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COMIX 208**

NOTE

from:	Presidency
to:	Strategic Committee on Immigration, Frontiers and Asylum
No. Cion prop.:	12125/05 MIGR 41 CODEC 750 COMIX 579
Subject:	Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals

I

The Commission submitted the above proposal on 1 September 2005 (12125/05 MIGR 41 CODEC 750 COMIX 579). A first round of discussions in the Working Party on Migration and Expulsion was completed during the Finnish Presidency. Those discussions showed delegations to have many reservations on the Commission proposal and extensive requests for amendments or additions on points of detail. Overall, most Member States thought that the Commission was going too far in the level of Community-wide harmonisation sought.

The Finnish Presidency recently submitted compromise proposals (13451/06 MIGR 146 CODEC 1051 COMIX 792 and 15165/1/06 MIGR 163 CODEC 1272 COMIX 945). It has become clear from initial consideration of them that Member States' reservations on issues of principle still stand. Further discussions on the basis of the proposals now on the table hold out very little prospect of success.

The Presidency sees more promise in a different approach.

In some areas (re-entry and residence bans, legal remedies and temporary custody), the Presidency can see scope for phased Community-wide harmonisation. As a first stage, in the Presidency's view, Community rules should cover only some aspects of return and removal and must make allowance for Member States' established arrangements and procedures. More extensive harmonisation of return, including all the procedural rules, should be attempted only in the long term. In any event, it needs to be ensured that return and removal are not prevented or delayed by Community provisions.

Procedurally, too, a phased approach is called for. The Presidency would suggest that Member States first reach agreement on policy guidelines for selected aspects of the devising of common standards and procedures for return. A revised draft can then be produced on that basis, for discussion in the Council and with the European Parliament under the codecision procedure.

II

In the light of the Commission initiative and discussions so far, the Presidency would suggest the following policy guidelines (NB: these are not drafting proposals; not all points are in dispute between Member States and the Commission):

Return decision:

Return decisions should be issued by the competent body (administrative authority, police, magistrate or judicial authority), in accordance with Member States' own national law.

Return decisions may establish a requirement to leave the country, or have declaratory force if such a requirement has already arisen by law in a Member State.

It should be left to Member States' competent authorities to set any time limits for departure in each individual return decision.

Removal order:

A removal order may be combined with a return decision.

Issue of a return order should not be contingent upon any particular grounds, such as a risk of absconding. A removal order may be issued where the time limit for departure has expired or voluntary compliance with the requirement to leave cannot be guaranteed.

Member States should not need to set any further time limit for enforcement of a removal order, in addition to a time limit for departure under a return decision.

Postponement of removal:

Enforcement of a removal order should be postponable only in the light of special circumstances in an individual case. The Directive should not establish any legal entitlement to postponement.

Those concerned should be given confirmation in writing if removal is postponed or the removal order is for the time being not to be enforced, save where they are in temporary custody. This cannot entail any right of residence.

Re-entry and residence ban:

Issue of a return decision or removal order may be accompanied by a re-entry and residence ban.

Enforcement of a removal order must be accompanied by such a ban. Re-entry and residence bans should have binding force for all Member States.

(Member States may impose a re-entry and residence ban for a limited period, in the light of the circumstances of the individual case. **Alternative:** Member States may impose an indefinite re-entry and residence ban. In that event, it may be commuted to a limited ban, at the request of the person concerned, in the light of the circumstances of the individual case.)

Exceptions may be allowed for a short stay in special cases.

Before the Directive comes into force, the Commission should produce a blueprint for information sharing between all EU Member States and associated states applying the Schengen *acquis* and for an information technology facility for enquiries by those countries.

Form:

Whether a return decision or removal order has to be issued in writing and what exceptions to this are allowed, what information on legal remedies is supplied to those concerned and in what language decisions are conveyed to them should be governed by Member States' own national law.

Legal remedies:

There should be legal remedies available against return decisions and removal orders. Procedures and requirements should be governed by Member States' own national law. The Directive should not specify any avenue; it should be left to Member States to decide on the appropriate bodies.

Legal aid should be granted, under national law, in accordance with the principles laid down in Directive 2003/8/EC on legal aid.

The suspensive effect of a legal remedy and the option of applying for suspensive effect should be governed by Member States' own national law, where available under it.

Temporary custody:

Temporary custody should be possible for the proper carrying out of removal orders in cases involving a risk of absconding or in other cases where enforcement of a removal order is (temporarily) obstructed. The decision on temporary custody should be taken by Member States' own competent bodies.

(Temporary custody may be ordered for up to six months and extended by up to twelve months.) Length of custody, legal safeguards available and review should be governed by Member States' own national law. Legal aid should be granted, under national law, in accordance with the principles laid down in Directive 2003/8/EC on legal aid.

Conditions of temporary custody should be determined by Member States, as the Community has no powers in this respect.

Apprehension in another Member State:

The Directive should not include any intra-Community return clause, as the Community's powers in this respect are in dispute.

There is no need to include the subject matter dealt with in Directive 2001/40/EC.

Obstacles to removal:

For such time as there is any legal obstacle to removal, removal orders should not be enforced.

International standards for the treatment of those to be returned:

Such standards are already to be found in the relevant international agreements and conventions. There is no need to reiterate them. At most, a reference to them could be included in the recitals.

There is no need for the Directive to go any further in its provisions than the standards under international agreements and conventions.

Scope of the Directive:

The Directive should not affect Member States' residence permit issue, renewal or withdrawal procedures and requirements.

The Directive should apply to all cases of enforced return. Voluntary departure should be covered only following a return decision or removal order. Other cases of voluntary return should remain outside the scope.

The Directive should not apply to cases of non-admission at the border (refusal of entry) or to people present in a transit area, as these are covered by the Schengen Borders Code.

Member States may continue to apply existing national rules on procedures for return at the border.

The Directive should cover people who do not or who no longer fulfil entry and residence requirements or who are to be removed in connection with criminal proceedings. Special provisions might need to be laid down on removal as part of a criminal sentence.

