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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

TABLE OF CONTENTS

1.	Introduction	3
2.	Monitoring and state of transposition.....	3
3.	General provisions.....	3
3.1.	Definitions (Article 2)	3
3.2.	Scope (Article 3)	4
4.	Specific provisions	4
4.1.	Information given to the third-country nationals concerned (Article 5)	4
4.2.	Reflection period (Article 6 (1)).....	4
4.3.	Protection from enforcement of expulsion orders (Article 6 (2)).....	5
4.4.	Termination of the reflection period (Article 6 (4)).....	5
4.5.	Issue of the residence permit (Article 8)	5
4.6.	The period of validity and renewal of the residence permit (Article 8 (3))	6
4.7.	Treatment of victims (Article 7 and 9).....	6
4.7.1.	Standards of living capable of ensuring subsistence	6
4.7.2.	Attendance to the special needs of the most vulnerable (Articles 7(1) and 9(1-2))	6
4.7.3.	Safety and protection needs (Article 7(2) and 9 (1)).....	7
4.7.4.	Translation and interpreting services (Article 7(3) and 9(1)).....	7
4.7.5.	Free legal aid (Article 7(4) and 9(1))	7
4.7.6.	Medical care (Articles 7 (1) and 9(1)).....	7
4.8.	Minors (Article 10).....	8
4.8.1.	Best interest of the child (Article 10(a)).....	8
4.8.2.	Access to the educational system for minors (Article 10 (b)).....	8
4.8.3.	Legal representation and location of family (Article 10 (c)).....	8
4.9.	Work, vocational training and education (Article 11).....	8
4.10.	Programmes or schemes (Article 12)	9
4.11.	Non-renewal of the residence permit (Article 13).....	9
4.12.	Withdrawal (Article 14)	9
5.	Statistics and figures.....	9
6.	Conclusions	10
7.	Future developments	11

1. INTRODUCTION

On 29 April 2004 the Council adopted Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (hereinafter: ‘the Directive’). It applies to all Member States except DK, IE and the UK¹.

The report has been prepared in accordance with Article 16 of the Directive, which provides that the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and propose any necessary amendments.

It is based on a study on the implementation of the Directive². The Member States have been given the opportunity to revise and update the factual information.

2. MONITORING AND STATE OF TRANSPOSITION

Member States were required to complete transposition by 6 August 2006³. The Commission assisted in this process by organising meetings with national experts. Following the expiry of the transposition deadline, infringement procedures were initiated against 14 Member States. Subsequently, in accordance with Article 226 of the Treaty, the Commission sent eight reasoned opinions. Decisions to bring cases before the European Court of Justice were taken for two Member States: one was withdrawn and a judgment was given for one⁴.

All Member States bound by the Directive have communicated their transposition measures.

3. GENERAL PROVISIONS

3.1. Definitions (Article 2)

For the purposes of this Directive, trafficking in human beings covers cases ‘such as’ those referred to in Articles 1, 2 and 3 of Framework Decision 2002/629/JHA. This means that even if the domestic definition does not need to be identical, any substantially altered or narrower one may impact negatively on the transposition of Directive 2004/81/EC. Certain deficiencies in this respect have already been identified in the Commission report on the implementation of that Framework Decision and the accompanying staff working paper⁵. At the time of its adoption, the Commission invited the Member States concerned to correct this situation as soon as possible.

¹ In this report ‘Member States’ means the Member States bound by the Directive.

² Study supported by the Commission and conducted by the Academic Network for Legal Studies on Immigration and Asylum in Europe ‘Odysseus’ (2007).

³ RO and BG had to transpose the Directive as from their accession to the EU.

⁴ C-2008/266, judgment of 14.5.2009, *Commission v Spain*.

⁵ COM (2006) 187 final and SEC (2006) 525.

3.2. Scope (Article 3)

All Member States shall apply the Directive to third-country nationals who are, or have been victims of offences related to trafficking in human beings, even if they have illegally entered their territory.

In addition to victims of trafficking, Member States may apply this Directive to third-country nationals who have been the subject of an action to facilitate illegal immigration. Nine Member States (AT, BE, CZ, ES, LU, MT, PT, RO, SE) have used this opportunity.

A large majority of Member States apply the transposition norms to both adults and minors, though two Member States (LT, SK) apply it only to adults. In EE the application to minors is subject to a restriction that it is within the interests of and for the benefit of the rights of the minor.

4. SPECIFIC PROVISIONS

4.1. Information given to the third-country nationals concerned (Article 5)

When the competent authorities take the view that a third-country national may fall within the scope of this Directive, they shall inform the person concerned of the possibilities offered under this Directive.

AT, ES and LT have not shown that they have fulfilled this obligation.

The legislation in RO may be problematic, since it does not specify to which authority this obligation refers, nor the content and form of the information.

Notwithstanding the formal transposition, there are indications that practical difficulties have arisen on certain occasions in some Member States (EE, EL, NL, PL), in particular where victims were not identified satisfactorily. In some cases this led to the alleged victim being taken into custody as an illegally staying alien, rather than being seen as an opportunity to grant a reflection period (NL).

4.2. Reflection period (Article 6 (1))

All Member States offer a reflection period for persons falling within the scope of the Directive. The Directive does not prescribe its duration, but it stipulates that it should be determined by national law.

Member States adopted varying solutions in this regard. Some of them (BE, CZ, EL, FR, LU, LV, SK) provide a single fixed duration (30 days or more). In a few other Member States, only a minimum length of reflection period is stipulated, while others (EE, FI, DE) provide for a lower and upper threshold (up to 6 months). Certain Member States (MT, PT, RO, SI) set out only a maximum length (2-3 months).

In LT there is no indication of the length of the reflection period, while the period is not specifically regulated by law in IT, though it is usually granted in practice.

In PL the residence permit of maximum three months, which may be granted to all victims of trafficking, is treated as equivalent to a reflection period. The optional character of this provision is not in line with the Directive, where the issue of a reflection period is mandatory.

4.3. Protection from enforcement of expulsion orders (Article 6 (2))

The Directive prohibits the enforcement of any expulsion order during the reflection period. A large majority of Member States complied with the requirement.

However, no protection of this kind is provided for in BG.

4.4. Termination of the reflection period (Article 6 (4))

The Directive allows the reflection period to be terminated if the person concerned has actively, voluntarily and on his/her initiative renewed contact with the perpetrators, or for reasons relating to public policy and to the protection of national security.

Less than half of the Member States (BE, DE, EE, FI, FR, EL, LU, LV, MT, PL, SE, SK) transposed this optional provision in accordance with the circumstances addressed by this Article.

In NL, the reflection period can be terminated where the victim has indicated during the period that he/she is not willing to cooperate with the competent authorities or where he/she left the country during the reflection period; this goes beyond the criteria laid down in the Directive.

The relevant provision in ES may be excessively broad since it allows the reflection period to be terminated on the general grounds that the authorities become aware that the victim's claim is not justified.

4.5. Issue of the residence permit (Article 8)

For the issue of the residence permit Member States should consider cumulatively the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, whether he/she has shown a clear intention to cooperate and whether he/she has severed all relations with the suspected perpetrators.

Most Member States have correctly transposed these criteria.

Some (BG, LT) additionally require that the victim present one or more documents, such as a passport or an entrance visa, as a pre-condition for the issue of the residence permit. This may impede the actual enjoyment of rights under this Directive, given that some victims may have been, under certain circumstances, left with no proof of identity.

The legislation in FR requires that the victim should file an official complaint to the competent authorities as a pre-requisite to the issue of the residence permit. Depending on practice on the ground, this may go beyond the conditions set out in the Directive.

The conditions for issuing a residence permit mentioned under Article 8(1) are without prejudice to the reasons relating to public policy and to the protection of national security.

A number of Member States (AT, BE, DE, EE, FI, FR, LU, SE, SI) provide a possibility to for the residence permit to be refused for such reasons. In certain cases this provision forms part of the general principles governing the issue of residence permits.

In EE the permit may be refused where the person may be likely to jeopardise public order, public safety, public morals or the rights or interests of other people; this exceeds the margin set out in the Directive.

In addition to residence permits granted in exchange for cooperation with the competent authorities, some Member States (e.g. AT, BE, ES, HU, IT, LU, NL, PL, SK) make provision for certain forms of residence permit, based on the vulnerable position of the victim. This possibility is sometimes limited to particular categories of persons (e.g. minors).

4.6. The period of validity and renewal of the residence permit (Article 8 (3))

The Directive requires the residence permit to be valid for at least six months. It shall be renewed if the conditions of issue continue to be satisfied.

In a majority of Member States the period of validity is at least six months (AT, CZ, FI, FR, DE, LT, LU, LV, MT, PL, RO, SE, SI) or one year (EL, ES, NL, PT).

In two Member States (BG, EE) there is either no minimum period of validity or it is shorter than six months.

All Member States have made provision for the residence permit to be renewed.

4.7. Treatment of victims (Articles 7 and 9)

4.7.1. Standards of living capable of ensuring subsistence

Member States are obliged to ensure that the persons concerned who do not have sufficient resources are granted a standard of living capable of ensuring their subsistence during the reflection period and at least the same treatment after the issue of the residence permit.

A large majority of Member States provide some sort of support in either cash or kind in this respect.

In AT the treatment is granted only after a residence permit has been issued, while there is no specific provision for assistance during the reflection period, unless the victim is an asylum seeker. This appears not to meet the requirements of the Directive.

Moreover, practical difficulties have been noted in some Member States, where the treatment offered may not be sufficient to provide beneficiaries with adequate means of subsistence. In BG, there is no evidence that shelters for victims have been established. In LT, the victims do not enjoy specific rights in this respect: they receive the same treatment as illegally staying third-country nationals.

4.7.2. Attendance to the special needs of the most vulnerable (Articles 7(1) and 9(1-2))

Member States shall attend to the special needs of the most vulnerable, including, where appropriate and if provided by national law, psychological assistance. This concerns both the reflection period and the time after the issue of the residence permit.

However, very few Member States have established a general clause to that effect.

Most Member States provide access to psychological assistance by way of explicit provisions.

No venues where assistance is given have been established in BG. In EE access to psychological assistance is provided only under aggravated circumstances, and reimbursement is granted to victims *post factum*, which may make it difficult for them to enjoy this right in practice. In AT, LT and SK there are no specific provisions guaranteeing psychological assistance to victims.

4.7.3. *Safety and protection needs (Article 7(2) and 9 (1))*

Only a few Member States have introduced explicit provisions on the safety and protection needs of the persons concerned (BG, EL, FI, FR, LV, MT, PT). A number of Member States rely on pre-existing victim protection measures (CZ, DE, ES, LT, NL, SE, SK).

No correlating national provisions have been demonstrated in AT, EE and RO.

4.7.4. *Translation and interpreting services (Article 7(3) and 9(1))*

A considerable number of Member States provide translation and interpreting services both before and after the issue of the residence permit (BE, CZ, FI, DE, EL, ES, LT, LU, MT, NL, PT, RO, SE, SK).

In PL these services are provided by NGOs authorised by the government.

In some cases, the benefits of interpretation may be insufficient because of practical deficiencies, such as a limited number of services (EL). AT provides translation only after the issue of the residence permit, SI only during the reflection period, and BG only during criminal proceedings. EE provides no more than an ‘emergency translation service’.

LV legislation may be problematic due to the lack of explicit entitlements for victims of trafficking after the issue of the residence permit.

4.7.5. *Free legal aid (Articles 7(4) and 9(1))*

The optional provision concerning free legal aid was transposed in a considerable number of Member States, covering the period both before and after the issue of the residence permit (BE, BG, CZ, DE, FI, FR, LV, LT, LU, MT, NL, PL, PT, RO, ES, SE, PT).

Provision has been made for the relevant entitlements in EL, but a lack of operational provisions may jeopardise their application in practice.

4.7.6. *Medical care (Articles 7 (1) and 9(1))*

Member States are obliged to ensure ‘emergency’ medical treatment during the reflection period and ‘necessary’ medical assistance after the issue of the residence permit.

All Member States have complied with this obligation. A few (BE, CZ, EL, FI, NL, SE) have gone further and provide general, rather than merely emergency, medical care both before and after the issue of the residence permit. General medical care is granted after the issue of the residence permit in PL and PT.

There are no indications of other Member States providing a broader range of services for holders of a residence permit, despite the Directive encouraging this by specifying that the treatment after the issue of the residence permit should be ‘at least’ the same as during the reflection period.

4.8. Minors (Article 10)

4.8.1. Best interest of the child (Article 10(a))

Those Member States which chose to apply this Directive to minors shall take due account of the best interests of the child when applying its provisions. Only a few Member States provide for this explicitly in their legislation (BE, EE, FI, MT, PT, RO, ES, SE). Some others consider that the principle is effectively in force due to the ratification of the UN Convention on the Rights of the Child or general laws. However, the actual application of this principle may raise concerns.

For example, only ES, FR and MT have introduced a specific provision ensuring that the procedure is appropriate to the age and maturity of the child.

Only BG, EL and PT have used the optional provision (Article 10 (a)) to extend the reflection period for minors.

4.8.2. Access to the educational system for minors (Article 10 (b))

All Member States provide access to the educational system for minors.

It remains to be seen whether the provisions in RO and EE, which make such access conditional on residence in the country, do not pose problems in practice.

4.8.3. Legal representation and location of family (Article 10 (c))

A large majority of Member States have complied with the requirement on legal representation for unaccompanied minors. However, no operational provisions, providing for the conditions of legal representation, have been established in EL.

The requirement for Member States to make every effort to locate the family members as quickly as possible has not been introduced in several Member States (AT, CZ, FI, MT, PL, SE, SI).

4.9. Work, vocational training and education (Article 11)

Member States shall define the rules under which holders of the residence permit shall be authorised to have access to the labour market, to vocational training and education.

All Member States except for RO provide access to the labour market for the persons concerned. MT imposes the condition of obtaining a licence from the Minister for Justice and Home Affairs, which may make it difficult for people to exercise this right.

All Member States except for RO allow victims access to vocational training and education.

4.10. Programmes or schemes (Article 12)

The victims shall be granted access to existing programmes or schemes aimed at the recovery of a normal social life, while an option is foreseen to provide specific arrangements for the persons concerned.

All Member States allow victims to participate in programmes which are normally targeted at victims of trafficking or, more generally, immigrants. However, only three Member States (CZ, FI, LV) have taken the opportunity to launch targeted programmes.

No Member State has made renewal of the residence permit conditional on participation in the relevant programmes or schemes.

4.11. Non-renewal of the residence permit (Article 13)

A large majority of Member States do not renew the residence permit if the conditions provided for in Article 8(2) cease to be satisfied, or if a decision adopted by the competent authorities has terminated the relevant proceedings.

Some Member States (BE, CZ, FI, LU, NL) make it possible to grant a permanent residence permit for the victims after proceedings have been terminated or once the victim has spent a specified period in the country.

4.12. Withdrawal (Article 14)

The residence permit may be withdrawn at any time if the conditions for the issue are no longer satisfied, in particular in the cases listed under Article 14 (a-e).

The criteria for withdrawal of the residence permit vary in the Member States' legislation.

Some of them (BE, DE, EL, LU, MT, RO) lay down conditions based on those set out in Article 14. Others (BG, CZ, ES, FR, EE, LV, NL, PT, SK) have introduced more restricted criteria for withdrawal.

In SE and LT, the residence permit may be withdrawn if the person concerned is on the list of persons banned from entering those countries. Other grounds for withdrawal of permit include a public health criterion (LT), misuse of the permit by the holder (PL), provision of false or forged information on identity (FI and SI), supply of incorrect information or suppression of circumstances that have been important for obtaining the permit (SE). The above-mentioned grounds appear to exceed the scope of Article 14.

5. STATISTICS AND FIGURES

Only a limited number of Member States were able to provide data on the number of residence permits granted as a result of transposition of this Directive, and even fewer of them informed the Commission about the number of reflection periods.

The available data⁶ on residence permits for victims of trafficking show that the impact of the Directive varies considerably. In certain Member States the number of permits was significant (BE, IT, NL, FR, DE), in some cases exceeding 100 per year. In others, the figures were considerably smaller, in most cases between 1-20 per year (CZ, FI, HU, PL, SE). In other Member States no residence permit was granted on this basis or no information was provided (BG, EE, ES, LV, LT, RO, SI, SK).

It must be noted that the available data may not be fully comparable, since some Member States are able to grant humanitarian residence permits whose issue is not restricted to victims of trafficking or is not dependent on their cooperation with the competent authorities.

With a view to obtaining more complete and reliable statistics on the application of this Directive, the Commission will examine technical options for the collection of data on residence permits granted under the norms transposing this Directive as part of the existing data collection organised within the framework of Article 6 of Regulation (EC) 862/2007.

6. CONCLUSIONS

Even though the available figures cannot in themselves allow for a full assessment of the effectiveness of this Directive, its impact does appear to be insufficient in the light of the overall data on victims of trafficking in the EU. While the identified victims in some Member States number several hundred or even upwards of two thousand per year⁷, the number of residence permits based on this Directive is rarely higher than twenty per year.

Even if a proportion of victims would not qualify under this Directive (e.g. because they are not third-country nationals), the difference between identified victims and those who made use of the specific residence permits is remarkable. This may indicate that the potential of the Directive in dismantling networks of traffickers while protecting the rights of victims is not being put to full use.

Although some of the deficiencies indicated in this report are not manifestly serious, there are some which may prevent the Directive being applied correctly. Moreover, as indicated by Member States, some victims may be reluctant to rely on the mechanisms. However, it may also be assumed that giving victims more effective access to information on the opportunities that are available would raise the Directive's profile and help it to work better. Improving the supply of information would need increased efforts by the competent authorities of the Member States and non-governmental organisations and associations, as set out in Article 5.

Another way of getting victims to take full advantage of the scheme would be if the provisions of the Directive relating to how victims are treated in the course of the reflection period or for the residence permit were fully complied with.

The statistics also show that making it possible to grant temporary residence permits to victims who for various reasons do not cooperate with the competent authorities may significantly increase the number of victims who benefit from the legal stay in the Member States.

⁶ The data were collected on the basis of ad-hoc requests made for the Odysseus report, Impact Assessment for the proposal of the Framework Decision on trafficking in human beings and, more recently, through national contact points of the Committee on Integration and Asylum.

⁷ Global Report on Trafficking in Persons, February 2009, UNODC.

7. FUTURE DEVELOPMENTS

The fight against trafficking in human beings is a top priority in the area of freedom, security and justice.

Several important initiatives, also affecting immigration policy, have been taken to step up the action against this type of crime. The Commission Communication of 10 June 2009,⁸ adopted with a view to the Stockholm Programme, stressed that there must be zero tolerance of trafficking in human beings and adequate resources should be invested in order, inter alia, to simplify the conditions for issuing residence permits to victims. The Stockholm Programme⁹ stressed that the fight against human trafficking must mobilise all means of action, bringing together prevention, law enforcement and victim protection. It was made clear that all competences of the Union should be used in the most optimal way in order to reach a well coordinated and consolidated EU policy. The Commission was called on to propose further steps to protect and assist victims through an array of measures¹⁰.

The rights of minors received particular attention in this context. It was indicated in the Stockholm Programme that children in particularly vulnerable situations will receive special attention, notably in the context of immigration policy (unaccompanied minors, victims of trafficking, etc.). According to the Action Plan on Unaccompanied Minors¹¹, the EU and Member States should reinforce action regarding child victims of trafficking in human beings by assistance which should at least include the measures provided for by Directive 2004/81.

The Commission has already taken action to respond to these calls. On 29 March 2010 it presented a legislative proposal which will strengthen protection of and support for victims¹². In addition, a new integrated strategy on fighting trafficking in human beings and on measures to protect and assist victims is scheduled for 2011¹³. Moreover, the 2008 and 2009 Commission proposals amending the Reception Conditions and the Qualification Directives specify that victims of trafficking must be considered as vulnerable persons whose special needs must be appropriately addressed. Furthermore, the Commission launched a public consultation and is carrying out an impact assessment with a view to presenting a package of measures in 2011 on victims of crime and violence in general.

Thought will now be given to additional measures increasing the potential of immigration law in combating trafficking and enhancement of the protection of victims. In this context the Commission may consider the need for amendments to the Directive, including the possibility of issuing a temporary residence permit based on the vulnerable situation of the victim and not necessarily in exchange for cooperation with competent authorities. Other amendments might include having a specified length of reflection periods for victims; strengthening the framework of treatment, in particular for minors, reinforcement of the obligation to inform victims of their rights.

⁸ COM (2009) 262 final.

⁹ Council document 17024/09.

¹⁰ Directive 2009/52/EC on employer sanctions was also partly inspired by the scheme provided under Directive 2004/81/EC. It foresees establishing comparable arrangements for the issue of residence permits for third-country nationals involved in criminal proceedings concerning particularly exploitative working conditions or illegally employed minors.

¹¹ COM (2010) 213 final.

¹² COM(2010) 95 final.

¹³ See Action Plan: COM(2010) 171 final.

The Commission will examine all cases where problems of application of this Directive have arisen. This may imply contacting Member States and/or launching the necessary procedural steps for non-compliance, where appropriate, in accordance with Article 258.