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of : Working Party on Migration and Expulsion/Mixed Committee
(EU-Iceland/Norway/Switzerland)

on : 4 and 29 November 2005

No. Cion prop. 12125/05 MIGR 41 CODEC 750 COMIX 579

Subject : **Proposal for an European Parliament and Council Directive on common standards and procedures in Member States for returning illegally staying third-country nationals**

At its meeting held on 4 November 2005, the Working Party started the first reading of the above proposal and continued it at its meeting on 29 November 2005.

The result of the discussions is set out in the Annex.

Chapter I^{1 2} GENERAL PROVISIONS

Article 1 Subject matter

This Directive sets out common standards and procedures³ to be applied in Member States for returning illegally staying third-country nationals, in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations⁴.

¹ A number of delegations entered general scrutiny reservations (**DE, FR, HU, IT, LT, MT, NL, PL, PT, SE** and **SK**), Parliamentary reservations (**CZ, DK, EE, FI, FR, HU, IT** and **LT**) and linguistic reservations (**CZ, IT, LT, NL** and **PT**) on this proposal.

IE said that its decision whether or not to opt-in is still under consideration.

² **NL**, supported by **EL, DK, IT** and **PL** took the view that this proposal grants to third-country nationals, who are the subject of return procedures, excessive rights and guarantees. In particular **this delegation** complained the fact that the proposal does not make any distinction between different categories of third-country nationals who may be the subject of return procedures.

The **Cion** said that, even if the proposal establishes general standards applicable to all the returnees, nevertheless its substantive provisions take into account the existence of different categories of persons concerned, to whom specific rules apply.

³ According to **FR**, in Article 1, as well as in its title and throughout the proposal, it should be added the word *minimum* before *common standards and procedures*.

The **Cion** noted that it considered the possibility of referring to *minimum common standards* and that it felt more appropriate to use the wording which appears in the title of the proposal.

⁴ **ES** suggested inserting the following new paragraph at the end of Article 1:

This Directive will be applied without prejudice to the alternative measures on infractions laid down by the national legislation of the Member States, in certain and specific cases.

Article 2
Scope¹

1. This Directive applies to third-country nationals² staying illegally in the territory of a Member State, i.e.
 - (a) who do not fulfil or who no longer fulfil the conditions of entry as set out in Article 5 of the Convention Implementing the Schengen Agreement, or

¹ In response to a question raised in particular by **CZ** and **SI**, the **Cion** stated that the Directive will also apply to the third-country nationals who have committed criminal offences, insofar as the persons concerned are in a situation of illegal stay in the territory of a Member State. **NL**, **PL** and **SE** raised the question if a third-country national who has applied for asylum and whose application has been rejected could be considered as *illegally staying* and fall within the scope of the Directive. While pointing out that the rules of the Directive would apply to these cases, the **Cion** drew attention to the fact it allows Member States to adopt simultaneously, in specific circumstances, the rejection of the application for asylum, the expulsion decision and the immediate removal of the person concerned, if there is a risk of absconding, in a single act. According to **IT**, this provision should state that the return of third-country nationals whose stay has been interrupted by an expulsion for reasons of public order and public security remain outside the scope of this Directive. It also pointed out that this Directive should not address ‘rejections’, namely the refusal to enter the territory of a Member State which takes place, even in a compulsory way, at the borders of the Member State concerned. **EL** supported the **IT** suggestions, which were opposed by **BE**. The question of the rejections at the borders was also raised by **PL**.

With respect to the first **IT** remark, while noting that this issue is regulated by other instruments, the **Cion** said that, should this suggestion be taken on board, it would be necessary to expressly exclude such cases in this provision. With respect to rejections, the **Cion** took the view that, under the current draft, the person concerned will not be deemed to be illegally staying if he/she has not entered the territory of a Member State and the Directive will then not apply. However, the Directive will apply if the person concerned has managed to enter its territory. In this context **EL** drew attention to the fact that in various agreements between Member States which establish facilitated procedures for returning third-country nationals intercepted at the borders, the Parties concerned accept to readmit the persons concerned even if they have been found close to their borders and have not entered their territory. Taking note of this remark, the **Cion** felt that, in order to cover such cases, the rejections at the borders should be expressly excluded from the scope of the Directive.

² In response to a query from **FR**, the **Cion** noted that the notion of third-country national covers also, under Community law, stateless persons.

(b) who are otherwise¹ illegally staying in the territory of a Member State.

2. Member States may decide not to apply this Directive to third-country nationals who have been refused entry in a transit zone² of a Member State³. However, they shall ensure that the treatment and the level of protection of such third-country nationals is not less favourable than set out in Articles 8, 10, 13 and 15⁴.

¹ **Various delegations** felt that the word *otherwise* is not clear enough, insofar as its use might imply some legal uncertainty. This issue was raised in particular by **FR**, which suggested replacing this word with a clause such as ...*whose stay is declared illegal*. The **FR** suggestion was supported by **BE** and **PL** (which made reference to a wording such as *other circumstances*), and opposed by **FI**. However **FR** said that the suggestion from **LT**, supported also by **PL**, of aligning Article 1 (a) with the definition of *illegal stay* contained in Article 3 (b) – which would result in introducing the words *and stay* after *entry* in Article 1 (a) – could meet the concerns it raised, and endorsed it. **SI** suggested introducing the words *entering and* before *illegally staying* in this provision. The **Cion** drew attention to the fact that this provision was elaborated by its Legal Service and that it deliberately maintained some differences vis-a-vis the text of Article 3 (b) for reasons due to the legal basis of the proposal. **FR** wondered why the reference to the Schengen acquis which is contained in Article 1 (a) would not more appropriately be inserted in a recital, in order to avoid any confusion between this provision and the definition set out in Article 3 (b).

² Pointing out that this provision does not clarify the notion of *transit zone*, thus leaving large discretion to Member States, **FI** suggested introducing a specific definition in the Directive. **CZ**, **EE** and **LT** entered scrutiny reservation on the first sentence of paragraph 2. The **Cion** noted that if Member States wish to define a transit zone, it would endorse such a suggestion.

In general terms, **EL** made reference to a ruling of the Court of Justice (C-170/96), according to which, if the person is in a transit zone, it has to be assumed that he/she has not crossed the borders of the Member State concerned. It also added that a further argument for considering a transit zone not to be the territory of a Member States is the existence of special transit visas.

In response to a remark from **FI**, the **Cion** took the view that this provision is not inconsistent with Article 26 of the Schengen Convention, which contains rules on carriers liability.

Taking the view that the entire paragraph 2 is rather unclear, **NL** invited the **Cion** to produce a non-paper on this issue.

³ Feeling that the current draft of the first sentence of paragraph 2 is quite inaccurate, **FR** suggested replacing the wording *third-country nationals who have been refused entry in a transit zone of a Member State* with a clause such as *third-country nationals who, being present in a transit zone of a Member State, were refused entry*. It said that it will submit a suggestion in this respect.

The **Cion** supported the **FR** suggestion of making the text of this provision more precise.

⁴ **Various delegations** (**CH**, **CZ**, **DE**, **FI**, **LT**, **NL**, **AT**, **PL**, **SE** and **SI**) expressed some concerns on the second sentence of paragraph 2, in particular for the level of protection that it grants it grants, which, on the basis of the current draft, should not be less favourable than that provided by Articles 8, 10, 13 and 15. **CZ**, **PL** and **SI** wanted this provision to be deleted. Pointing out that, in its view, the level of protection granted under paragraph 2 is relatively low, the **Cion** suggested re-examining this provision once the relevant provisions will have been considered. With respect to the suggestion of deleting this provision, it drew attention to the fact that its removal would have as a consequence the application of the entire Directive.

3. This Directive shall not apply to third-country nationals¹
- (a) who are family members of citizens of the Union who have exercised their right to free movement within the Community² or
 - (b) who, under agreements between the Community and its Member States, on the one hand, and the countries of which they are nationals, on the other, enjoy rights of free movement equivalent to those of citizens of the Union^{3 4}

¹ In response to a query from **AT**, which wondered why the Directive does not apply in the cases mentioned under paragraph 3 (a) and (b), the **Cion** said that the two categories of persons concerned are excluded insofar as their treatment is very similar to that of the EU citizens.

² Feeling that the scope of this exclusion is not clear, **EL** asked for a clarification with respect to the meaning of the expression *family members of citizens of the Union who have exercised their right to free movement within the Community*. Also **EE** felt that this provision needs to be clarified.

³ According to **AT**, this provision should be drafted in a more precise way. The **Cion** drew attention to the fact that the draft of paragraph 3 (2) is similar to a clause contained in the SIS, which might be used for revising this provision.

⁴ **AT** suggested introducing a further exception in this provision for third-country nationals who, within a certain deadline have entered a Member State and whose expulsion can be implemented without a specific return decision. Without this specific exception **AT** would no longer be able to implement expulsions on the basis of provisions which introduce facilitated procedures for the return of the persons concerned in the framework of the readmission agreements it has concluded with Hungary, the Czech Republic and Slovakia.

HU suggested introducing the following new paragraph:

Without prejudice to the guarantees specified in Articles 10 and 15, the provisions of the Directive do not apply to third-country nationals returned in accordance with the provisions of a bilateral or multilateral readmission agreements concluded by the European Community or one of more of its Member States.

Article 3

Definitions

For the purpose of this Directive the following definitions shall apply:

- (a) ‘third-country national’ means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty¹;
- (b) ‘illegal stay’ means the presence² on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions for stay or residence in that Member State³;
- (c) ‘return’ means the process of going back to one’s country of origin, transit or another third country, whether voluntary or enforced⁴;

¹ **IS** wondered why the family members of EEA citizens are not mentioned in this definition. The **Cion** said that it will consider this issue.

In more general terms **IS**, as well as **CH**, queried why the definitions of this proposal are not aligned with those of the Schengen Border Code. While noting that it prefers to keep the current definitions, the **Cion** said that it will consult its experts on Schengen issues.

² **EE** and **NL** entered scrutiny reservation on point b).

IT, supported by **EL**, suggested replacing *presence* with *stay*. In the framework of the examination of this provision **EL** raised the question of the rejections at the borders, which is extensively evoked in footnote 1 on page 3. **EE** and **PO** supported **EL**.

³ **BE**, which noted that other provisions of this Directive address the issue of the apprehension of illegally staying third-country nationals in other Member States, suggested either to replace in point b) the words *in that Member State* with *in the Member States*, or to delete the words *in that Member State*.

Pointing out that the Directive looks at the situation of the person who is found illegal in a Member State, the **Cion** preferred maintaining the current wording.

⁴ **DE** entered a scrutiny reservation on point c). It took the view that voluntary return should not be evoked in this proposal, since there is no need to provide protection to the persons concerned.

The **Cion** drew attention to the fact that voluntary return is a rather problematic category, insofar as it covers cases of legally residing persons who decide to return to their countries of origin, as well as cases of illegally staying third-country nationals, on a purely voluntary basis or following an order to leave.

ES, which entered a scrutiny reservation on point c), felt that this definition focuses too much on voluntary return. In its view, only reading point c) in conjunction with point d) it is possible to understand that the return can take place on a compulsory way.

The **Cion** drew attention to the fact that the Directive deliberately avoids to refer to the notion of *expulsion*, whose perception is different in the various Member States. It evoked again the two-step approach adopted by the Directive: if the person is under an order to leave, he/she has to leave the territory of the Member States, either voluntarily or, if not, on a compulsory basis.

Finally, the **Cion** did not support the **EE** suggestion to introduce a definition of *country of origin*.

- (d) ‘return decision’ means an administrative or judicial decision or act¹, stating or declaring the stay of a third-country national to be illegal and imposing² an obligation to return³;
- (e) ‘removal’ means the execution of the obligation to return⁴, namely the physical transportation out of the country;
- (f) ‘removal order’ means an administrative or judicial decision or act ordering the removal⁵;

¹ Noting that the word *act* does not appear either in its linguistic version, or in the German one, **SI** suggested deleting it. The **Cion** drew attention that this definition needs to refer both to *decision* and *act*, given the differences which exist in the administrative and judicial systems of the Member States.

² In response to a problem evoked by **DE**, and linked with its internal administrative and judicial system, the **Cion** that it may be solved by adding the word *or stating* after *imposing*.

³ **NL** suggested inserting a clause such as the following in point d), as well as in point f):
Member States may provide that a return decision/removal order is part of the decision on the application for a residence permit.

Noting that the Directive does not prevent Member States from doing what is evoked in the **NL** suggestion, the **Cion** did not oppose the introduction of such a clause, while preferring inserting it in the Preamble as a recital.

In the framework of the examination of this provision **NL** also raised the question of the need for introducing a differentiation in treatment between the third-country nationals who have entered and stay legally and have become illegal at a later stage and those who have entered and remained illegally. In its view it is justified to grant the level of protection provided by the Directive only to the persons belonging to the first category. **EE**, **IT**, **PL** and **SE** supported the **NL** suggestion (this issue was already raised in more general terms in the framework of the examination of Article 1: see footnote 2 on page 2).

The **Pres** invited **NL** to submit a suggestion in this respect.

⁴ Drawing attention to the fact that the person under an order to leave may decide to return not to its country of origin, but to a different country, **IT** suggested replacing the words *obligation to return* with the words *obligation to leave the territory of the Member State concerned*. The **Cion** observed that, irrespective from the fact that the person concerned returns to his/her country of origin or to a different country, once he/she has left the territory of a Member State, he/she will have complied with the obligation to return.

⁵ **DE** and **AT** entered scrutiny reservations on point f). Expressing doubts on the need for providing for a specific removal order, **PL** suggested maintaining the definition of removal contained in point e) and to delete point f).

- (g) “re-entry ban” means an administrative or judicial decision or act preventing re-entry¹ into the territory of the Member States for a specified period².
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¹ Noting that in its version the word *re-entry* was incorrectly translated with the word *readmission*, **FR** entered a linguistic reservation on point g).

² It was pointed out by **various delegations** that the re-entry ban may, in some cases, be unlimited. For this reason, **EE** and **SE** suggested deleting the words *for a specified period*. On the same line, **DE** preferred replacing the current text with a more general wording such as *for a period to be determined*.

The **Cion** observed that the relevant provision ((Article 9) provides for clear rules on the duration of the *re-entry ban*. In its view the question whether or not to keep the wording *for a specified period* is purely a matter of visibility.