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NOTE

from : Presidency
to : Working Party on Migration and Expulsion

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

Delegations will find attached the Presidency compromise suggestions concerning Articles 1-10 of the above proposal.

The changes vis-à-vis the original Commission proposal are underlined.

Chapter I

GENERAL PROVISIONS

Article 1

Subject matter

This Directive sets out common standards and procedures 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 obligations.

Article 2

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 Treaty;
- (aa) "presence on the territory of a Member State" means the physical presence in the territory of a Member State of a third-country national who has crossed an external border of a Member State as it is defined by Article 2 paragraph 2 of Regulation EC 562/2006 (Schengen Borders Code) or
- (b) 'illegal stay' means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of Regulation EC 562/2006 (Schengen Borders Code), or of the or other conditions for entry, stay or residence in that Member State;
- (c) 'return' means the process of going back to one's country of origin, transit or another third-country, whether voluntary or enforced;
- (d) 'return decision' means an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;

Clarifying recital to be added:

"The present Directive does not prevent Member States from adopting a decision on the ending of legal stay together with a return decision and/or a removal order within one administrative or judicial act as provided for in their national legislation".

- (e) 'removal' means the execution of the obligation to return, namely the physical transportation out of the country;
- (f) 'removal order' means an administrative or judicial decision or act ordering the removal;
- (g) "re-entry ban" means an administrative or judicial decision or act preventing re-entry into and stay in the territory of the Member States for a specified period.
- (h) "risk of absconding" means the existence of reasons to believe, the assessment of which is made by national authorities in accordance with objective criteria laid down by national law, that a third-country national who is subject to return procedures will abscond.
- (i) "voluntary departure" means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.

Article 3
Scope

1. This Directive applies to third-country nationals staying illegally in the territory of a Member State.
2. Without prejudice to paragraph 1, member States may continue to apply the existing national law regarding procedures on removal at the border.
3. Member States shall ensure that illegally staying third-country nationals who are physically present in the territory of a Member State but who are excluded from the scope of this Directive because they have not crossed the external borders of that Member State as it is defined by Article 2 paragraph 2 of Regulation EC 562/2006 shall be treated at least in accordance with the standards set out in Articles 8, 10 and 15 of this Directive and Article 7 paragraph 1 of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings.
4. This Directive shall not apply to third-country nationals
 - (a) who are family members of citizens of the Union who have exercised their right to free movement within the Community 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
 - (c) who are family members of third-country nationals covered by point (b).

Article 4

More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:

bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;

bilateral or multilateral agreements between one or more Member States and one or more third countries.
2. This Directive shall be without prejudice to any provision which may be more favourable for the third-country national laid down in the Community acquis relating to immigration and asylum.
3. This Directive shall be without prejudice to the right of the Member States to adopt or maintain provisions that are more favourable to persons to whom it applies provided that such provisions are compatible with this Directive.

Article 5

Non-refoulment, Family relationships and best interest of the child

A Member State considering the issuing of decisions or acts in accordance with this Directive shall especially take account of:

- 1) the principle of non-refoulment;
- 2) family relationship, as concerns the nature and solidity of the third-country national's family relationship and the existence of family ties with his/her country of origin and the duration of his/her stay in the Member State;
- 3) the best interest of a child.

Chapter II

TERMINATION OF ILLEGAL STAY

Article 6 **Return decision**

1. Without prejudice to the exceptions referred to in paragraphs 2, 4 and 5 of this Article, Member States shall issue a return decision to any third-country national staying illegally on their territory.
2. Third-country nationals staying illegally in the territory of a Member State and holding a valid residence permit or another authorisation offering a right to stay issued by another Member State, shall be required to go to the territory of that Member State immediately. In this case Member States may refrain from issuing a return decision.
3. The return decision shall provide for an appropriate period for voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period or if the person concerned poses a risk to public security, public order or national security.

Member States may extend the period for voluntary departure for an appropriate period, taking into account the specific circumstances of the individual case.

Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of that period.

4. Member States may, at any moment decide to grant an autonomous residence permit or another authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In this event no return decision shall be issued.
5. If a third-country national staying illegally in the territory of the Member State is the subject of a pending procedure for renewing his residence permit or any other permit offering the right to stay, that Member State may refrain from issuing a return decision, until the pending procedure is finished.

Article 7
Removal order

- (1) Member States shall issue a removal order concerning a third-country national who is subject of a return decision, if no period for voluntary departure has been granted in accordance with Article 6(3) or if the obligation to return has not been complied with within this period.
- ~~(2) A Member State may issue, together with the return decision, a removal order concerning a third-country national who is subject of a return decision. If the Member State has granted a period of voluntary departure in accordance with Article 6 (3) the removal order can be enforced only after the period has ended.~~
- ~~(3) A Member State which does not follow the procedure specified in paragraph 2 above shall issue a removal order as a separate act or decision.~~
- (4) The removal order shall as far as possible specify the delay within which the removal will be enforced and the country of return.

Article 8
Postponement of removal

(The previous Article 8(1) has been moved to Article 6(3))

1. Member States shall take into account in particular the following circumstances, for as long as those circumstances prevail, with a view to postponing the execution of a removal order:
 - inability of the third-country national to travel or to be transported to the country of return due to his or her physical state or mental capacity;
 - technical reasons, such as lack of transport capacity, []making it impossible in practice to enforce the removal in a humane manner and with full respect for the third-country national's fundamental rights and dignity;
 - lack of assurance that unaccompanied minors can be handed over at the point of departure or upon arrival to a family member, an equivalent representative, a guardian of the minor or a competent official of the country of return, following an assessment of the conditions to which the minor will be returned.
2. If execution of a removal order is postponed as provided for in paragraph 1, the obligations foreseen in Article 6(3) 3rd indent may be imposed on the third-country national concerned.

Article 9
Re-entry ban

1. Removal orders shall include a re-entry ban.

Clarifying recital to be added: In cases where a Member State issued the removal order in a single act together with the return decision, and the third-country national concerned complied with the obligation to return within the given period for voluntary departure, the re-entry ban automatically included in the removal order does not become applicable. [Explanation: In these case the removal order itself never became enforceable.]

2. (a) Return decisions shall include a re-entry ban if, based on an individual assessment of the case, there are concrete reasons to assume that the third-country national concerned may try to re-enter the EU illegally. This situation may arise in particular in cases where the third-country national concerned:

- has entered the Member State during a re-entry ban;
- has illegally entered the territory of a Member State;
- has absconded during a pending return procedure; or
- has already been subject of more than one return decision or removal order.

(b) Return decisions shall also include a re-entry ban if, based on an individual assessment of the case, a third-country national represents a threat to public order or public security or to national security. This situation may arise in particular in the case of:

- a third-country national who has been convicted of an offence by a Member State carrying a penalty involving deprivation of liberty of at least one year;
- a third-country national in respect of whom there are serious grounds for believing that he has committed serious criminal offences or in respect of whom there are clear indications of an intention to commit such offences in the territory of a Member State.

(c) In other cases, return decisions may include a re-entry ban.

3. The length of the re-entry ban shall be determined with due regard to all relevant circumstances of the individual case and should not exceed five years. It may exceed five years if the third-country national represents a serious threat to public order, public security or to national security.

4. The re-entry ban may be withdrawn or suspended in exceptional individual cases for compassionate, humanitarian or other reasons.

5. Where a Member State considers issuing a residence permit or another authorisation offering a right to stay to a third-country national who is subject of a re-entry ban issued by another Member State, it shall first consult the Member State issuing the re-entry ban and shall take account of its interests in accordance with Article 25 of the Convention Implementing the Schengen Agreement.

6. Paragraphs 1 to 5 apply without prejudice to the right to seek asylum in one of the Member States.

Article 10

Removal

1. Where Member States use coercive measures to carry out the removal of a third-country national who resists removal, such measures shall be proportional and shall not exceed reasonable force. They shall be implemented in accordance with fundamental rights and with due respect for the dignity of the third-country national concerned as provided for in national legislation.

2. In carrying out removals by air, Member States shall take into account the common Guidelines on security provisions for joint removal by air, attached to Decision 2004/573/EC.