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THE EUROPEAN UNION**

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**NOTE**

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from : Presidency  
to : Working Party on Migration and Expulsion

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

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Delegations will find attached the Presidency compromise suggestions concerning Articles 11-22 of the above proposal.

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

The attention of delegations is drawn to the amendments to Article 16, which have been inserted following the release of the first version of this document.

## **Chapter III**

### **PROCEDURAL SAFEGUARDS**

#### *Article 11*

##### **Form**

1. Return decisions and removal orders shall be issued in writing.  
The reasons in fact and in law shall be stated in the decision and order and the third-country national concerned shall be informed about the available legal remedies in writing.
2. Member States shall provide, a written or oral translation of the main elements of the return decision and/or removal order in a language the third-country national may reasonably be supposed to understand.

#### *Article 12*

##### **Judicial remedies**

1. The third-country national concerned shall have the right to an effective remedy before a court or other competent authority or body composed of members who are impartial and who enjoy safeguards of independence. The competent authority or body shall have the power to review the return decision or removal order, including the possibility of temporarily suspending its execution.
2. The remedy shall either have suspensive effect or comprise the right of the third country national to apply for the suspension of the enforcement of the return decision or removal order.
3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance. Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice. As regards legal aid, Member States may provide that the treatment of third country nationals shall not be more favourable than the treatment generally accorded to their own nationals.

*Clarifying recital to be added:*

*In cases where a Member State issues a decision on ending of legal stay together with a return decision and/or removal order within one administrative or judicial act these decisions may be reviewed in a single procedure as provided in the national legislation.*

*Article 13*  
**Safeguards pending return**

1. The conditions of stay of third-country nationals pending return or removal shall comply at least with the following standards:
  - Family unity with family members present in their territory is maintained as far as possible;
  - Standards of living capable of ensuring their basic subsistence are provided;
  - Necessary health care, including at least emergency care and essential treatment of illness is provided;
  - Subject to the length of their stay, minors are granted access to the education system;
  - Special needs of vulnerable persons are taken into account;
  
2. Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 6(3) or that the removal order will temporarily not be executed.

## Chapter IV

# TEMPORARY CUSTODY FOR THE PURPOSE OF REMOVAL

### *Article 14*

#### Temporary custody

1. Where there are serious grounds to believe that there is a risk of absconding or otherwise avoiding or hampering the removal process and where it would not be sufficient to apply less coercive measures, for example, regular reporting to the authorities, the deposit of a financial guarantee, the handing over of documents, an obligation to stay at a designated place or other measures to prevent that risk, Member States shall keep under temporary custody a third-country national, who is or will be subject of a removal order or a return decision,
2. Temporary custody orders shall be issued by administrative or judicial authorities. If they have been issued by administrative authorities temporary custody orders shall be subject to review by judicial authorities within 48 hours from the beginning of the temporary custody. The judicial authority shall hear the matter without delay.
3. Temporary custody orders shall be subject to review by judicial authorities at least once a month.
4. Member States shall foresee a maximum period of temporary custody of not less than four and not more than eight months.  
Member States may extend this period in cases where regardless of all their reasonable efforts the removal operation is likely to last longer due to a lack of co-operation by the third country national concerned or due to delays in obtaining necessary documentation from third countries.
5. Temporary custody shall be maintained for as long a period as the conditions laid down in paragraph 1 exist and as it is necessary to assure successful removal.
6. Temporary custody shall be justified only for as long as removal arrangements are in progress. When it appears that a reasonable prospect of removal no longer exists for legal or other considerations or the conditions laid down in paragraph 1 no longer exist, temporary custody ceases to be justified.

*Article 15*  
**Conditions of temporary custody**

*To be moved to Preamble:*

*Member States should ensure that third-country nationals under temporary custody are treated in a humane and dignified manner with respect for their basic human rights and in compliance with international and national law.*

1. Temporary custody shall be carried out in specialised temporary custody facilities. Where a Member State cannot provide accommodation in a specialised temporary custody facility and has to resort to prison accommodation, the third-country nationals under temporary custody should not normally be held together with ordinary prisoners.
2. Third-country nationals under temporary custody shall be allowed – upon request - to establish in due time contact with legal representatives, family members and competent consular authorities as well as with international and non-governmental organisations.
3. Particular attention shall be paid to the situation of vulnerable persons. If unaccompanied minors are kept in temporary custody, they shall be separated from adults unless it is considered in the child's best interest not to do so. Member States shall ensure that minors are not kept in temporary custody in prison accommodation.
4. Relevant international and non-governmental organisations shall have the possibility to visit temporary custody facilities in order to assess the adequacy of the temporary custody conditions. Such visits may be subject to authorisation.

## Chapter V

# APPREHENSION IN OTHER MEMBER STATES

### *Article 16* *Apprehension in other Member States<sup>1</sup>*

Where a third-country national who is the subject of a return decision or removal order issued in a Member State (“the first Member State”) is apprehended in the territory of another Member State (“the second Member State”), the second Member State may take one of the following steps:

- (a) recognise the return decision or removal order issued by the first Member State and carry out the removal, where applicable in accordance with Directive 2001/40/EC in which case Member States shall compensate each other for any financial imbalance which may be caused, applying Council Decision 2004/191/EC *mutatis mutandis*;
- (b) request the first Member State to take back the third-country national concerned without delay, in which case the first Member State shall be obliged to comply with the request, unless it can demonstrate that the person concerned has left the territory of the Member States following the issuing of the return decision or removal order by the first Member State;
- (c) launch the return procedure under its national legislation;
- (d) maintain or issue a residence permit or another authorisation offering a right to stay for protection-related, compassionate, humanitarian or other reasons, after consultation with the first Member State.

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<sup>1</sup> The whole Article 16 will be re-evaluated.  
In relation to Article 16 and paragraph (b) in particular, the Presidency considers that the following issues also need to be addressed:

1. Questions related to the legal basis.
2. Further details in regard to the provision to be fixed in implementing rules.
3. As an accompanying measure, appropriate tools for information exchange among Member States need to be created (or existing mechanisms extended).
4. The provisions of the Article will only become applicable once 1 and 2 are decided upon.

## **Chapter VI**

# **FINAL PROVISIONS**

### *Article 17*

#### **Reporting**

The Commission shall periodically report to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments. The Commission shall report for the first time four years after the date referred to in Article 18(1) at the latest.

### *Article 18*

#### **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by *(24 months from the date of publication in the Official Journal of the European Union)* at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

### *Article 19*

#### **Relationship with Schengen Convention**

This Directive replaces Articles 23 and 24 of the Convention implementing the Schengen Agreement.

### *Article 20*

#### **Repeal**

*[deleted]*

*Article 21*  
**Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

*Article 22*  
**Addressees**

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, [...]

*For the European Parliament*  
*The President*

*For the Council*  
*The President*