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

on : 8 December 2006

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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**

1. At its meetings on 8 December 2006 the Working Party on Migration and Expulsion continued the examination of the Presidency compromise suggestions on Articles 6-9 of the proposal.
2. The results of the discussions are set out in the Annex to this Note. The changes to the text of the compromise suggestions vis-à-vis the original Commission proposal are underlined.

Chapter II

TERMINATION OF ILLEGAL STAY

Article 6

Return decision¹

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 territory².
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 weeks³, 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 security⁴.

¹ **AT** and **DE** entered a linguistic reservation on Article 6, since the text of the German version does not correspond to that of the English version.

² **IT** suggested adding, after paragraph 1, the following wording:
Without prejudice to the Council Directive 2005/85/CE on minimum standards on procedures in Member States for granting and withdrawing refugee status, Member States may presume a risk of absconding in relation to any third-country national who has entered the national territory illegally.

Various delegations (ES, FR, MT and PL) supported the **IT** suggestion. With respect to the **IT** suggestion, **BE** underlined that the presumption of a risk of absconding in the cases where a third-country national enters illegally should be an option for the Member State concerned and should not apply automatically. In this context, **NL** felt that the situation needs to be assessed on a case-by-case basis.

Taking note of the **IT** suggestion, the **Cion** pointed out that, in its view, the best approach would be, rather than introducing the proposed addition, to further consider and elaborate the definition of *risk of absconding*, as set out in point (h) of Article 2.

³ With respect to the deadline, **EE** preferred not to set any maximum period, leaving this to the discretion of the Member States. **PL**, which entered a reservation on this provision, wanted the deadline for voluntary departure to be reduced to 14 days. **NL** favoured maintaining 4 weeks, with a view to promoting voluntary return. In this respect **BE** and **DE** drew attention to the fact that, according to the current wording, 4 weeks is the maximum period, allowing Member States to provide for a shorter deadline. Also the **Cion** underlined the flexibility (*appropriate period* and *up to 4 weeks*) of the current text.

⁴ With respect to a query from **AT** concerning the possibility of granting voluntary return to third-country nationals who have entered illegally and have no or few financial means, the **Cion** took the view that this is one element to be taken into account when assessing the existence of a risk of absconding.

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) ¹Member 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.²
- (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 return³.

¹ **AT** suggested introducing, at the beginning of paragraph 1, the words *Unless the national law provides for a removal order*.

The question of the one step or two step approach was again evoked in the context of the consideration of this provision and was the subject of extensive debates.

CH and **SE** entered scrutiny reservations on the entire Article 7, as well as **AT** and **DE**, which expressed, in particular, concerns on the fact that there might be legal remedies against both the return decision and the removal order.

BE expressed concerns on the suspensive nature of the legal remedies for the removal order. The **Cion** supported the current draft of Article 7.

² **ES** suggested deleting the second sentence of paragraph 2.

³ **Various delegations** entered reservations on paragraph 4. In particular **BE**, **DE**, **ES**, **FR** and **PT** opposed the obligation to specify a delay. Moreover, **ES** expressed concern on the obligation to specify the country of return. **PL**, supported by **CZ**, **EE** and **IT** suggested deleting paragraph 4.

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:¹
 - 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.

¹ **AT**, supported by **DE**, felt that rather than listing a series of situations which could give rise to the postponement of the removal, a shorter wording, simply referring to *legal or factual reasons*, could be more advisable. While noting that the list contained in paragraph 1 is probably not exhaustive, the **Pres** underlined that its intention was to provide some examples of cases where this provision could apply. Taking the view that the current draft is weaker than the text of its original proposal and stressing the need for achieving harmonisation, the **Cion** opposed the **AT** suggestion. In line with the **Cion**, **BE**, supported by **PL**, stressed that this provision should focus on humanitarian cases, such as those referred to in the current draft.

*Article 9*¹²
Re-entry³ **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.

¹ CZ, FR and LT maintained general scrutiny reservations on Article 9. Moreover, CZ and LT maintained all the reservations they entered on this provision, which were not included in the Presidency compromise suggestions (see 12125/06 MIGR 41 CODEC 750 COMIX 579).

² In the framework of its consideration, **various delegations**, while welcoming the improvements introduced by the Presidency with its compromise suggestions, underlined that this provision needs to be clarified. In particular, two issues were raised: the question of the exchange of information and of consultation among Member States in the implementation of Article 9 (including its relationship with Article 25 of the Schengen Convention) and the question of the articulation between the EU ban and national bans applicable by Member States, including the question of the discretionary power of the Member States in implementing the EU ban. Moreover, according in particular to **BE** and **NL**, the current text should clearly state that the ban is not applicable in cases where the third-country national concerned decides to leave voluntarily. **These delegations** recalled that one of the objectives of the Directive is to promote voluntary return: applying the EU ban could result in imposing a sort of punishment to the persons who have left voluntarily and have the effect of discouraging those who intend to use this option.

The **Pres**, as well as the **Cion**, agreed that the current draft of Article 9 needs to be further considered.

³ **FR** noted that its in its linguistic version the word *re-entry* is wrongly translated as *readmission*.

AT, **ES**, **LT** and **PT** preferred replacing the expression *re-entry ban* with the expression *entry ban*. While expressing its preference for the expression *re-entry ban*, **BE** said that it could also support this suggestion.

The **Cion**, while noting that it still needs to consider it, pointed out that it could go along with this suggestion.

(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 security¹.
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.

¹ PT maintained a reservation on the second sentence of paragraph 3.