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

1. The Permanent Representatives Committee at Senior Level examined certain outstanding issues of the above draft Directive at its meeting on 19 March 2008.
2. On the basis of the above discussion, the Presidency is submitting in the attached text further compromise suggestions with a view to examining them during the meeting of the JHA Counsellors to be held on 28 March 2008.
Changes to doc. 6965/08 MIGR 14 CODEC 266 COMIX 164 are highlighted in bold.

CURRENT STATE OF PLAY AT COUNCIL

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on common standards and procedures in Member States for returning illegally staying third-country nationals

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) thereof,

Having regard to the proposal from the Commission¹,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas²:

- (1) The Tampere European Council of 15 and 16 October 1999 established a coherent approach in the field of immigration and asylum, dealing together with the creation of a common asylum system, a legal immigration policy and the fight against illegal immigration.
- (1a) The Brussels European Council of 4 and 5 November 2004 called for the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity.

¹ OJ C [...], p. [...].

² **FI/SE** suggested adding the following recital to the Preamble: *A third country-national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of the Member State until a negative decision on the application has entered into force.*

- (1b) The Council of Europe Committee of Ministers adopted on 4 May 2005 "*20 guidelines on forced return*" (CM(2005)40).
- (2) Clear, transparent and fair rules need to be fixed to provide for an effective return policy as a necessary element of a well managed migration policy.
- (3) This Directive should establish a horizontal set of rules, applicable to all third-country nationals who do not or who no longer fulfil the conditions for entry, stay or residence in a Member State.
- (4) Member States should ensure that the ending of illegal stay of third-country nationals is carried out through a fair and transparent procedure. According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria.
- (5) The need for EC and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.³
- (5a) It is recognised that it is legitimate for Member States to return illegally staying third-country nationals. The pre-requisite for this assumption is that fair and efficient asylum systems are in place, which fully respect the principle of non-refoulement.

³ **FR** maintained a reservation on this recital.

- (6) Where there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted. In order to promote voluntary return, Member States should provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the European Return Fund.
- (7) A common minimum set of legal safeguards on decisions related to return should be established to guarantee effective protection of the interests of the individuals concerned
- (8) The situation of persons who are staying illegally but who cannot (yet) be removed should be addressed and standards of living capable of ensuring their basic subsistence should be provided.⁴
- (9) The use of coercive measures should be expressly bound to the principle of proportionality and minimum safeguards for the conduct of forced return should be established, taking into account Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subject of individual removal orders⁵ and the 20 guidelines on forced return adopted by the Council of Europe Committee of Ministers on 4 May 2005.
- (10) The effects of national return measures should be given a European dimension by establishing an entry ban preventing entry into and stay in the territory of all the Member States. The length of the entry ban should be determined with due regard to all relevant circumstances of an individual case and should not normally exceed 5 years. In cases of ("serious" deleted) threat to public policy or public security, Member States should be allowed to impose a longer-entry ban⁶.

⁴ **FR** maintained a reservation on this recital, suggesting its deletion or alternatively the following wording:

The situation of third-country nationals who are staying illegally but cannot yet be removed should be addressed regarding their basic conditions of subsistence according to national legislation.

⁵ OJ L 261, 6.8.2004. p. 28.

FR maintained a reservation to this recital.

⁶ **DE/NO** maintained reservations on this recital.

- (10a) It should be for the Member States to decide whether or not review decisions related to return imply the power for the reviewing authority or body to take its own decision related to the return, in substitution for the earlier decision.
- (11) The use of detention should be limited and bound to the principle of proportionality. Detention should only be used if necessary to prepare return or carry out the removal and if the application of less coercive measures would not be sufficient⁷.
- (11a) Third-country nationals under detention should be treated in a humane and dignified manner with respect for their fundamental rights and in compliance with international and national law.
- (15) Member States should have rapid access to information on entry bans issued by other Member States. This information sharing should take place in accordance with Regulation (EC) No 1987/2006 of the European Parliament and of the Council on the establishment, operation and use of the Second Generation Schengen Information System (SIS II)]⁸
- (15a) Cooperation between the institutions involved at all levels in the return process and the exchange and promotion of best practices should accompany the implementation of this Directive and provide European added value.
- (16) Since the objective of this Directive, namely to establish common rules concerning return, removal, use of coercive measures, detention and entry bans, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

⁷ **FR** maintained a reservation on this recital.

⁸ OJ L 381, 28.12.2006, p. 4.

- (17) Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinions, membership of a national minority, property, birth, disability, age or sexual orientation.
- (18) In line with the 1989 United Nations Convention on the Rights of the Child, the “best interests of the child” should be a primary consideration of Member States when implementing this Directive. In line with the European Convention on Human Rights, respect for family life should be a primary consideration of Member States when implementing this Directive.
- (19) Application of this Directive is without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967.
- (20) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (21) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application. Given that this Directive builds - to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code⁹ - upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark should, in accordance with Article 5 of the said Protocol, decide, within a period of six months after the adoption of this Directive, whether it will implement it in its national law.

⁹ OJ L 105, 13.4.2006, p. 1.

- (22) This Directive constitutes - to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Schengen Borders Code - a development of provisions of the Schengen *acquis* within the meaning of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*, which fall within the area referred to in Article 1, point C of Council Decision 1999/437/EC¹⁰ on certain arrangements for the application of that Agreement.
- (23) This Directive constitutes a development of the provisions of the Schengen *acquis* within the meaning of the Agreement signed by the European Union, the European Community and the Swiss Confederation on the latter's association with the implementation, application and development of the Schengen *acquis* which fall within the area referred to in Article 4(1) of Council Decision 2004/860/EC¹¹ on the provisional application of certain provisions of that Agreement.

This Directive constitutes - to the extent that it applies to third country nationals who do not fulfil or who no longer fulfil the conditions of entry in accordance with the Convention Implementing the Schengen Agreement - an act building on the Schengen *acquis* or otherwise related to it within the meaning of Article 3(2) of the Act of Accession,

HAVE ADOPTED THIS DIRECTIVE:

¹⁰ OJ L 176, 10.7.1999, p. 31.

¹¹ OJ L 370, 17.12.2004, p. 78.

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

Scope

1. This Directive applies to third-country nationals staying illegally in the territory of a Member State.
2. Member States may decide not to apply this Directive to third-country nationals who:
 - (a) are subject to a refusal of entry, in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State unless they have subsequently obtained an authorisation to stay in that Member State¹².
 - (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law or who are subject to extradition procedures.
3. This Directive shall not apply to persons enjoying the Community right of free movement as defined in Article 2(5) of the Schengen Borders Code.

¹² CZ/DE/NO asked for the deletion of the word *external* before *borders*. In order to deal with this concern, a new paragraph 2a has been added to Article 6.

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 Treaty and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code.
- (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 the Schengen Borders Code 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, in which the third-country national concerned will be accepted, whether in voluntary compliance with an obligation to return, 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;
- (e) ‘removal’ means the enforcement of the obligation to return, namely the physical transportation out of the country;

- (f) deleted
- (g) “entry ban” means an administrative or judicial decision or act prohibiting entry into and stay in the territory of the Member States for a specified period, accompanying a return decision.
- (h) "risk of absconding" means the existence of reasons in an individual case which are based on objective criteria defined in national law¹³ to believe that a third-country national who is subject to return procedures may abscond¹⁴.
- (i) "voluntary departure" means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision.
- (j) "vulnerable persons" means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.¹⁵

Article 4

More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:
 - (a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;
 - (b) 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.

¹³ AT suggested deleting the wording *based on objective criteria defined in national law*.

¹⁴ MT expressed concerns about the wording, especially in regard with the deletion of the examples of risk of absconding.

¹⁵ FR suggested maintaining in the end of this definition the wording *found to have special needs after an individual evaluation of their situation*.

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.

¹⁶4. With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2 paragraph 2(a) Member States shall:

- ensure that the treatment and the level of protection is not less favourable than set out in Article 7 paragraphs 4 and 5 (limitations on use of coercive measures), Article 8 paragraph 2, first indent (postponement of removal), Article 13 second and fourth indent (emergency health care and taking into account needs of vulnerable persons) and Articles 15 and 15a (detention conditions) and
- respect the principle of non-refoulement.

Article 5

Non-refoulement, family life and best interest of the child

When implementing this Directive, Member States shall take due account of

- (a) the best interest of the child,
- (b) family life
- (c) the state of health of the third country national concerned

and respect the principle of non refoulement.

¹⁶ **DE** maintained a reservation on this paragraph because although these third-country nationals are to be exempted from the scope of the Directive certain Articles would be explicitly applicable to them.

Chapter II

TERMINATION OF ILLEGAL STAY

Article 6

Return decision

1. Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2, **2a**, 3 and 4 of this Article.

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 case of non-compliance by the third-country national concerned with this requirement,¹⁷ or where the third country national's immediate departure is required for reasons of national security or public policy, paragraph 1 shall apply.

- 2a. Member States may refrain from issuing a return decision to a third-country national staying illegally on their territory, if the third-country national concerned is taken back by another Member State under bilateral agreements or arrangements existing at the date of entry into force of this Directive. In this case the Member State which has taken back the third-country national concerned shall apply paragraph 1 of this Article.

¹⁷ **DE/SK** suggested reinserting in the text the wording *or where it may be* (**SK** add: *reasonably*) *assumed that the third-country national will not comply with the requirement*

3. Member States may, at any moment decide to grant an autonomous residence permit or another authorization offering a right of 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. Where a return decision has already been issued, it shall be withdrawn or suspended for the duration of validity of the residence permit or other authorization offering a right of stay.
4. If a third-country national staying illegally in its territory is the subject of a pending procedure for renewing his residence permit or any other permit offering the right to stay, that Member State shall¹⁸ consider refraining from issuing a return decision, until the pending procedure is finished.
5. 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 decision on removal within one administrative or judicial act as provided for in their national legislation, without prejudice to the procedural safeguards available under Chapter III of this Directive and under other relevant provisions of Community and national law.

¹⁸ **AT** suggested replacing *shall consider* with *may*. **BE** opposed to this suggestion.

Article 6a¹⁹

Voluntary departure

1. The return decision shall²⁰ provide for an appropriate maximum period for voluntary departure ranging between seven [...] days²¹ and thirty days, without prejudice to the exceptions referred to in paragraphs 2 and 4. Member States may provide in their national legislation that such period shall only be granted following an application of the third-country national concerned. In this case, Member States shall inform the third-country nationals concerned about the possibility of submitting such an application.²²

The time period foreseen above does not exclude the possibility for the third-country nationals concerned to leave earlier.

2. Member States may extend the period for voluntary departure for an appropriate period, taking into account the specific circumstances of the individual case,²³ such as the length of stay, the existence of children attending school and the existence of other family and social links.
3. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of that period.

¹⁹ **MT** maintained its scrutiny reservation on the Article as a whole.

²⁰ **IS/MT** suggested replacing *shall* with *may*.

DK underlined that in certain cases Member States should have flexibility in regard with the relevant deadlines and suggested referring this issue to national legislation.

²¹ **CZ/DE/ES/HU** preferred the previous draft compromise without a minimum time period.

²² **NO** maintains a scrutiny reservation linked to Art. 6(2a).

²³ **DE** suggested deleting the rest of the paragraph, thus returning to the previous draft compromise.

ES also questioned the added value of setting these examples.

4. If there is a risk of absconding, as defined in Article 3 (h) or if an application for a legal stay has been found to be [...] ²⁴ unfounded or based on fraud [...] or if the person concerned poses a risk to public security, public order or national security Member States may ²⁵ refrain from granting a period of voluntary departure, or grant a period shorter than seven days.

Article 7

Removal

1. Member States shall enforce ²⁶ the return decision if no period for voluntary departure has been granted in accordance with Article 6a or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with Article 6a.
2. If the Member State has granted a period of voluntary departure in accordance with Article 6a the return decision can be enforced only after the period has ended, unless during this period, a risk, as defined in Article 6a, paragraph 4, arises.
3. Member States may adopt a separate administrative or judicial decision or act ordering the removal.
4. Where Member States use – as a last resort - 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 as provided for in national legislation in accordance with fundamental rights and with due respect for the dignity and physical integrity of the third-country national concerned.
5. 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.

²⁴ **FI/FR** supported adding the word *manifestly*.

²⁵ **BE/ES/AT** suggested replacing *may* with *shall*.

²⁶ **NL** suggested amending the phrase as follows: *Member States shall as a rule enforce...* in order to cover cases where return is not possible at a given time.

BE suggested replacing *shall* with *may*.

Article 8
Postponement of removal

1. Member States shall postpone removal
 - when this would violate the principle of non-refoulement or
 - as long as suspensive effect is granted in accordance with Article 12 paragraph 2.

2. Member States may postpone removal for an appropriate period taking into account the specific circumstances of the individual case. Member States shall in particular take into account:
 - the person's physical state or mental capacity;
 - technical reasons, such as lack of transport capacity or failure of the removal due to lack of identification.²⁷

3. If a removal is postponed as provided for in paragraphs 1 and 2, the obligations foreseen in Article 6a paragraph 3 may be imposed on the third country national concerned.

²⁷ **BE** suggested adding an additional ground related to special needs of vulnerable persons.

Article 8a

Return and removal of unaccompanied minors

1. Before deciding to issue a return decision in respect of an unaccompanied minor, appropriate assistance²⁸ shall be granted with due consideration given to the best interest of the child.
2. Before removing an unaccompanied minor from its territory, the authorities of the Member State shall be satisfied that he/she will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the state of return.²⁹

²⁸ **AT** maintained a scrutiny reservation.

²⁹ **DE** maintained a reservation due to the additional administrative burden this provision would create.

Article 9
Entry ban³⁰

1. Return decisions shall be accompanied by an entry ban.³¹
 - if no period for voluntary departure has been granted or,
 - if the obligation to return has not been complied with within [...] the period granted in accordance with Article 6a.³²

In other cases return decisions may be accompanied by an entry ban.³³

2. The length of the entry ban shall be determined with due regard to all relevant circumstances of the individual case and shall not in principle exceed five years³⁴. It may exceed five years if the third-country national represents a threat to public policy or public security or to national security.

³⁰ The following statement will be added to the Council Minutes: "*The Commission states that the review of the SIS II (envisaged under the review clause of Article 24(5) of Regulation (EC) No 1987/2006, will be an opportunity to propose an obligation to register in the SIS entry bans issued under this Directive.*"

³¹ **DE** maintained a reservation.
BE/CZ/ES/FI/IS/NL/NO/AT/SE maintained scrutiny reservations. **BE/FI/SE** expressed concerns about the lack of flexibility that this regime might have in certain cases (in particular where an entry ban *shall* be imposed for marginal infringement of the regime).

³² **SE** suggested deleting the second indent as without added value.
ES opposed this suggestion and underlined that an EU-wide obligation to impose entry bans in specific cases is of added value.

BE suggested reformulating the grounds for imposing an entry ban on a returned third-country national as follows: - *constitutes a threat to public policy or public security,- has already been the subject of more than one removal order, - or has already been the subject of forced return.*

³³ **IT** suggested accompanying compulsorily a return decision with an entry ban in all cases except for *assisted voluntary return*. It suggested the following wording: *Return decisions shall be accompanied by an entry ban, unless in the case of assisted voluntary return.*

³⁴ **DE**, supported by **IS**, maintained a reservation on the maximum limit of five years suggesting a lifelong ban as a principle, which could be shortened.

NO, which also has a lifelong entry ban suggested flexibility for special cases as regards imposition and duration of the entry ban.

CZ suggested replacing *five years* with *ten years*. Alternatively, **CZ** suggested adding at the end of the paragraph 2 the following wording ... *or repeatedly and intentionally infringes national legislation or does not respect decisions of competent national authorities.*

3. Third-country nationals who have been granted a residence permit pursuant to Council Directive 2004/81/EC [...] shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, second indent and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.³⁵

Member States may refrain from issuing, withdraw or suspend an entry ban in individual cases for humanitarian [...] reasons.

Member States shall consider³⁶ withdrawing or suspending an entry ban where a third-country national who is the subject of an entry ban issued in accordance with paragraph 1 second subparagraph can demonstrate that he/she has left the territory of a Member State in full compliance with a return decision.³⁷

4. 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 an entry ban issued by another Member State, it shall first consult the Member State having issued the entry ban and shall take account of its interests in accordance with the provisions of Article 25 of the Convention Implementing the Schengen Agreement.
5. Paragraphs 1 to 4 apply without prejudice to the right to international protection, as defined in Article 2 (a) of Directive 2004/83/EC, in the Member States.

Article 10

(Deleted)

³⁵ CZ suggested deleting the paragraph as redundant.

BE maintained scrutiny reservations.

³⁶ DE/ES/LV/AT suggested replacing *shall consider* with *may*.

³⁷ CZ suggested deleting this sub-paragraph.

Chapter III

PROCEDURAL SAFEGUARDS

Article 11

Form

1. Return decisions and – if issued - entry-ban decisions and decisions on removal, shall be issued in writing³⁸ and give reasons in fact and in law as well as information about available legal remedies.

The information on reasons in fact may be limited where national law allows for the right of information to be restricted, in particular in order to safeguard national security, defence, public security and the prevention, investigation, detention and prosecution of criminal offences.

2. Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return as defined in paragraph 1, including information on the available legal remedies in a language the third-country national understands or may reasonably be supposed to understand.

³⁸ CH maintained a reservation on the provision against the obligation to provide the return decision in writing.

NL suggested the following wording: *Return decisions and - if issued - decisions on removal, shall be issued in writing. Return decisions and - if issued - decisions on removal and entry-ban decisions give reasons in fact and in law as well as information about available legal remedies..*

- ³⁹3. With regard to persons who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation to stay in that Member State paragraph 2⁴⁰ does not apply.

In those cases decisions related to return, as defined in paragraph 1, shall be given by means of a standard form as set out in Annex I⁴¹.

Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five⁴² of those languages, which are most frequently used or understood by illegal migrants entering the Member State concerned.⁴³

Article 12

Remedies⁴⁴

1. The third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return, as defined in Article 11(1) before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence.
2. The above mentioned authority or body shall have the power to review decisions related to return, as defined in Article 11(1) including the possibility of temporarily suspending its execution, unless temporary suspension is already applicable under national legislation.

³⁹ CZ/AT maintained reservations on this paragraph as a whole, highlighting their preference to the deleted Article 13a for the accelerated procedure.

⁴⁰ NL suggested adding *paragraphs 1 and 2 do not apply*.

⁴¹ CZ maintained a reservation on this paragraph.

⁴² CZ questioned the added value of this obligation to provide this information in five languages.

⁴³ CH maintained a reservation on this point.

⁴⁴ SE maintained a scrutiny reservation on the text as a whole.

3. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.
4. If the third-country national concerned does not have sufficient means to pay for necessary legal assistance, he/she shall⁴⁵ be given it free of charge,⁴⁶ in accordance with the relevant national rules regarding legal aid.

Article 13

Safeguards pending return⁴⁷

1. Member States shall, with the exception of the situation covered in Articles 15 and 15a ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period of voluntary departure granted in accordance with Article 6a and during periods for which removal has been postponed in accordance with Article 8:
 - Family unity with family members present in their territory is maintained
 - Emergency health care and essential treatment of illness is provided;
 - Minors are granted access to the basic education system subject to the length of their stay;
 - Special needs of vulnerable persons are taken into account..
2. Member States shall provide the persons referred to in paragraph 1 with a written⁴⁸ confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 6a or that the return decision will temporarily not be enforced.

⁴⁵ LV: replace *shall* with *may*.

⁴⁶ EL maintained a reservations on the obligation to provide legal aid free of charge.
DE suggested providing in this Article for a pre-scrutiny to confirm if the case is justified, before granting the legal aid.

AT suggested adding *in accordance with national legislation*.

⁴⁷ CY/AT/SE suggested deleting the Article as redundant or moving its contents, (or a large part thereof, or a generally-worded relevant principle) to the Preamble.

⁴⁸ ES/NL/NO suggested deleting the word *written*. NL suggested alternatively to replace *shall* with *may*.

Chapter IV

DETENTION FOR THE PURPOSE OF REMOVAL

Article 14

Detention⁴⁹

1. Unless other sufficient but less coercive measures can be applied in the concrete case,⁵⁰ Member States **may** keep in detention a third-country national, who is subject to return procedures, in order to prepare return and/or carry out the removal process, in particular⁵¹ when
- there is a risk of absconding or
 - the third country national concerned avoids or hampers the preparation of return or the removal process.

Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.

⁴⁹ CZ/CH/MT/NO maintained their reservations on the Article as a whole.
MT suggested putting the contents of the Article *in accordance with national legislation*.

IT maintained general scrutiny reservations on the Article as a whole.

ES suggested to add a recital whereby the term *detention* would be clarified.

⁵⁰ IT suggested the following wording: *Unless other sufficient but less coercive measures can be applied **effectively** in the concrete case **according to national legislation**, ...*

⁵¹ BE/LU suggested deleting the words *in particular*.

2. Detention shall be ordered by administrative or judicial authorities.⁵²

When detention has been ordered by administrative authorities, Member States shall

- either provide for a judicial review of the lawfulness of detention to be decided on speedily from the beginning of detention,
- or grant the third-country national concerned the right to take proceedings by which the lawfulness of detention shall be subject to a speedy judicial review to be decided on speedily from the launch of the relevant proceedings; in this case Member States shall immediately inform the third-country national concerned about the possibility of submitting such an application.

The third country national concerned shall be released immediately if the detention is not lawful.

3. In every case, detention shall be reviewed at reasonable intervals of time⁵³. In the case of prolonged detention periods⁵⁴, reviews shall be subject to the supervision of a judicial authority.

⁵² **LT** suggested maintaining reference to the 48-hour limit (*within 48 hours*).

CZ/AT suggested referring to national legislation for this provision.

⁵³ **AT** suggested referring to national legislation.

SE supported by **PL**, suggested the following wording to replace the current paragraph 3: *In every case detention shall be reviewed at reasonable intervals of time. In the case of prolonged detention periods a third-country national shall be entitled to take proceedings by which the lawfulness of his/her detention shall be subject to the supervision of a judicial authority.*

FI suggested providing for a regular review of the detention once a month.

⁵⁴ **CZ** suggested amending the first part of this sentence along the following lines: *In the case of prolonged detention periods, exceeding the maximum of six months, reviews shall be subject to ...*

4. Detention shall be maintained for as long a period as the conditions laid down in paragraph 1 are fulfilled and it is necessary to ensure successful removal. **Without prejudice to** paragraph 5, the maximum period of detention as set out by national legislation, may not exceed a period of six months.⁵⁵

5. Member States may without prejudice to paragraph 6 extend this period up to eighteen months⁵⁶ 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, or
 - due to pending appeal procedures.

6. 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, detention ceases to be justified and the person concerned shall be released immediately.

⁵⁵ **CY** and **LT** suggested replacing *six* with *twelve* months or, alternatively, referring to no period of time but to national legislation on this issue.

MT maintained a reservation on this paragraph, because each Member State has its own specific concerns and suggested that the maximum period of detention should be determined in accordance with national legislation.

⁵⁶ **CH/DK/EE/NO** suggested opting for a detention without maximum period for exceptional cases. **DK** would not favour an absolute upper limit as counterproductive where the returnee tries to prolong the return procedure beyond that maximum time in order to be released. **LU** opposed an open-ended upper limit.

MT suggested that the maximum period of detention should be determined in accordance with national legislation.

Article 15
Conditions of detention⁵⁷

1. Detention shall be carried out as a rule in specialised detention facilities. Where a Member State cannot provide accommodation in a specialised detention facility and has to resort to prison accommodation, the third-country nationals under detention shall be separated from ordinary prisoners.⁵⁸
2. Third-country nationals under detention shall⁵⁹ be allowed – upon request - to establish in due time contact with legal representatives, family members and competent consular authorities.⁶⁰
3. Particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided.⁶¹
4. Relevant and competent national, international and non-governmental organisations and bodies shall⁶² have the possibility to visit detention facilities in order to assess the adequacy of the detention conditions. Such visits may be subject to authorisation.
5. Third-country nationals kept in detention shall be systematically provided with information which explains the rules applied in the facility and sets out their rights and obligations. This includes the information on their entitlement under national law to contact organizations and bodies referred to in paragraph 4.

⁵⁷ **ES** maintained a reservation on this Article.

⁵⁸ **SE**, supported by **BE** suggested the following wording for paragraph 1: *A third-country national being held in detention may also be placed in prison accommodation if the third-country national cannot for security reasons be kept in specialized detention facilities or there are some other exceptional circumstances.*

⁵⁹ **AT** suggested replacing *shall* with *may*.

⁶⁰ **CZ** suggested adding at the end of this paragraph the following wording: *with regard to available capacity and possibility of the Member States.*

⁶¹ **AT** maintained a scrutiny reservation.

⁶² **DE/EL/ES/FR/AT** suggested replacing *shall* with *may*.

Article 15a
Detention of minors and families⁶³

1. Unaccompanied minors and families with minors shall only be detained as a measure of last resort and for the shortest appropriate period of time.
2. Families detained pending removal shall be provided with separate accommodation guaranteeing adequate privacy.
3. Minors in detention shall have the possibility to engage in leisure-activities, including play- and recreational activities appropriate to their age, and shall have -depending on the length of their stay - access to education.⁶⁴
4. Unaccompanied minors shall as far as possible be provided with accommodation in institutions provided with personnel and facilities which take into account the needs of persons of their age.
5. The best interest of the child shall be a primary consideration in the context of the detention of minors pending removal.

⁶³ **DE/AT** maintained scrutiny reservations on the Article.

⁶⁴ **FR** suggested to depend the whole paragraph on the length of stay.
SK maintained a scrutiny reservation.

Article 15b
Emergency situations

1. In cases where an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities of a Member State or on its administrative or judicial staff, such a Member State may, as long as the exceptional situation persists, decide to allow for longer periods for judicial review than those set out in Article 14(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 15(1) and 15a(2).
2. When resorting to such exceptional measures, the Member State concerned shall inform the Commission. It shall also inform the Commission as soon as the reasons for applying these exceptional measures have ceased to exist.
3. Nothing in this Article shall be interpreted as allowing Member States to derogate from their general obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations arising out of this Directive.

Chapter V
APPREHENSION IN OTHER MEMBER STATES

Article 16
Deleted

Chapter VI

FINAL PROVISIONS

Article 17

Reporting

The Commission shall report every three years 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 three years after the date referred to in Article 18(1) at the latest and focus at this occasion in particular on the application of Articles 9 and 14 in Member States.

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.

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 the provisions of 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

**Standard form for return decision in cases of apprehension within
seven days after illegal entry**

(in accordance with Article 11 of Directive 2008/xxx/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals)

Name of State

LOGO OF STATE (Name of Office)

RETURN DECISION

On _____ at (time) _____ at (place) _____

**We, the undersigned, _____ have before
us:**

Surname _____

First name _____

Date of birth _____

Place of birth _____ Sex: _____

Nationality _____

Resident in _____

Type of identity document _____

number _____

Issued in _____

on _____

Apprehended following illegal entry coming from _____

on _____ *(a maximum period of 1 week may have elapsed between illegal entry and the issuing of this decision)*

by means of _____

(indicate circumstances of illegal entry).

⁶⁵ The content of the standard form has still to be discussed at technical level in order to align it to the final wording of the corresponding provisions.

He/she is hereby informed that he/she does not fulfil the conditions for entry, stay or residence in _____ pursuant to _____ (*indicate references to the national legislation in force*), for the following reasons:

- (A) Has no valid travel document(s)
- (B) Has a false/counterfeit/forged travel document
- (C) Has no valid visa
- (D) Has a false/counterfeit/forged visa
- (E) Has no appropriate documentation justifying the purpose and conditions of stay
- (F) Does not have sufficient means of subsistence in relation to the period and form of stay, or the means to return to the country of origin or transit
- (G) Is a person for whom an alert has been issued for the purposes of refusing entry
 - in the SIS
 - in the national register

and is therefore obliged to return.

Taking into account the fact the he/she entered illegally and did not subsequently obtain an authorisation to stay, this return decision is enforceable immediately and he/she is hereby placed under detention for the purpose of removal.

Entry-ban: In accordance with Article 9 of Directive 2008/xxx/EC he/she is not allowed to enter into and stay in the territory of the Member States for a period of _____ (*normally five years*).

Comments

The person concerned may appeal against the decision as provided for in national law. The person concerned receives a copy of this document (*each State must indicate the possibilities under national legislation to appeal*).

Person concerned

Officer responsible