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Limited

Proposal for a

COUNCIL RECOMMENDATION

on addressing the deficiencies identified in the 2015 evaluation of the application of the Schengen acquis in the field of Return by Austria

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Reasons for and objectives of the proposal

On 7 October 2013 the Council adopted Regulation (EU) No 1053/2013¹, establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*. In line with the Regulation, the Commission has established a multiannual evaluation programme 2014 - 2019² and an annual evaluation programme for 2015³, with detailed plans for on-site visits to the Member States to be evaluated, areas to be evaluated and sites to be visited.

The areas to be evaluated cover all aspects of the Schengen *acquis*; management of the external borders, visa policy, the Schengen Information System, data protection, police cooperation, judicial cooperation in criminal matters, as well as the absence of border control at internal borders. In addition, fundamental rights issues and the functioning of authorities that apply the relevant parts of the Schengen *acquis* are taken into account in all evaluations.

Based on the multiannual and annual programmes, a team of Member States and Commission experts carried out an evaluation of Austria's implementation of Return between 9 and 13 February 2015. Their evaluation report⁴ sets out their findings and assessments, including best practices and any deficiencies identified during the evaluation.

Alongside the report the team made recommendations for remedial action aimed at addressing the deficiencies.

This proposal reflects those recommendations, but not the recommendations included in the report that were aimed to achieve a 'best practice' and were not linked to a deficiency.

Against this background, the current proposal for a Council Recommendation seeks to ensure that Austria applies all Schengen rules related to Return correctly and effectively.

Consistency with existing provisions in the policy area

These recommendations serve to implement the existing provisions in the policy area.

Consistency with other Union policies

These recommendations are in consistency with other policy areas evaluated under the Schengen Evaluation Mechanism.

¹ OJ L 295, 6.11.2013, p. 27.

² Commission Implementing Decision C(2014)3683 of 18 June 2014 establishing the multi-annual evaluation programme 2014 - 2019 in accordance with Article 5 of the Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*

³ Commission Implementing Decision C(2014) 7881 of 30 October 2014 establishing the first section of the annual evaluation programme for 2015 in accordance with Article 6 of Council Regulation (EU) No1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*

⁴ [C(2015)6341]

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

Legal basis

Council Regulation (EU) no 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis.

Subsidiarity

Article 15(2) of Council Regulation (EU) No 1053/2013 specifically requests the Commission to submit a proposal to the Council to adopt recommendations for remedial action aimed at addressing any deficiencies identified in the course of the evaluation. Action at Union level is required to strengthen mutual trust between the Member States and to ensure better coordination at Union level in order to guarantee that all Schengen rules are applied effectively by the Member States.

Proportionality

Article 15(2) of Council Regulation (EU) No 1053/2013 mirrors the specific powers of the Council in the field of mutual evaluation of the implementation of Union policies within the area of freedom, security and justice.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

Ex-post evaluations/fitness checks of existing legislation

n.a.

Stakeholder consultations

In line with Article 14(5) and Article 21(2) of Council Regulation (EU) no 1053/2013 Member States gave their positive opinion on the evaluation report in the Schengen Committee of 12th June 2015.

Collections and use of expertise

n.a.

Impact assessments

n.a.

Regulatory fitness and simplification

n.a.

Fundamental rights

The protection of fundamental rights when applying the Schengen acquis was taken into account during the evaluation process.

4. BUDGETARY IMPLICATION

n.a.

5. OTHER ELEMENTS

n.a.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen⁵, and in particular Article 15 thereof

Having regard to the proposal from the European Commission,

Whereas:

- (1) The purpose of this Recommendation is to recommend to Austria remedial actions to address deficiencies identified during the Schengen evaluation in the field of return carried out in 2015. Following the evaluation, a report covering the findings and assessments, listing best practices and deficiencies identified during the evaluation was adopted by Commission Implementing Decision [C(2015)6341].
- (2) The limited average period of pre removal detention as well as the new detention centre of Vordenberg, with its open door regime and high standards of accommodation, can be seen as an example of good practice.
- (3) It is important to remedy each of the deficiencies identified immediately. Therefore no indication of priority for implementation of the recommendations should be given
- (4) This Recommendation should be transmitted to the European Parliament and to the parliaments of the Member States
- (5)

HEREBY RECOMMENDS:

Austria should:

- (1) improve the collection and provision of data and statistics in the field of return policy, in line with article 5 of the Regulation (EC) No 862/2007 on Community Statistics on migration and international protection.

⁵ OJ L 295, 6.11.2013, p. 27.

(2) amend the *Fremdenpolizeigesetz* (FPG) [Aliens' Police Act] and make it more explicit which cases are exempted from the application of the Return Directive (2008/115/EC; Article 2(2)(a) and (b)) and which parts of the Directive nevertheless apply to such cases (Article 4(4)).

(3) review the current law and practice as regards the procedural rights and treatment of unaccompanied minors belonging to various age-groups to make the rules clearer both for the minors and for staff dealing with them in the return procedure. The principle of the best interests of the child, and the procedural safeguards in the Return Directive, are valid for all minors under the age of 18. It should be ensured that unaccompanied minors are treated in their best interests in the light of their age, in line with the provisions of Article 17 of the Return Directive.

(4) bring the rules on the maximum period of detention fully in line with the return *acquis* (the maximum period should not exceed 18 months), although it is acknowledged that in practice the length of the detention period does not seem to exceed 18 months.

(5) consider for the sake of legal clarity to amend the FPG to include the possibility to reduce or revoke, on application or ex officio, a life-long entry ban. This possibility is currently foreseen only in the General Administrative Procedural Act (Article 68).

(6) ensure that unaccompanied minors are strictly separated from adults, in an environment appropriate for their age, as required by the FPG, and that they are no longer detained at the Rossauer Lände and Hernalser Gürtel PAZ centres.

(7) make the facilities and detention regime at Rossauer Lände and Hernalser Gürtel more suitable for detaining irregular migrants; ensure that the open regime is the general rule (and consider the amendment of the PAZ centres' in-house rules accordingly) and that detainees in solitary confinement are not denied the right to visits and outdoor exercise.

(8) find a more appropriate solution for holding returnees in pre-removal detention that have special medical needs either in ordinary hospitals or in suitably equipped specialised detention centres for returnees.

(9) review the monitoring system to allow for monitoring of the in-flight phase when commercial flights are used for forced returns. For the sake of transparency and the independence of the Verein Menschenrechte Österreich, its reports on return operations should be made public and submitted to Parliament.

(10) align the practice on issuing entry bans with Article 11(1) of the Return Directive and consider amending the wording of the corresponding Article 53 of the FPG accordingly. Issue an entry ban, as a rule, if no period of voluntary departure has been granted or the subject did not comply with the obligation to return within the provided timeframe, while always taking into account the circumstances of the individual case.

(11) provide the Commission and the Council with an action plan within three months of adoption of this Council Recommendation,

Done at Brussels,

*For the Council
The President*