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## **REPORT**

on the proposal for a Council decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals  
(COM(2003) 49 – C5-0050/2003 – 2003/0019(CNS))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Marcelino Oreja Arburúa

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases  
covered by Articles 105, 107, 161 and 300 of the EC Treaty and  
Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position  
majority of Parliament's component Members, to reject or amend  
the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). These suggested corrections are subject to the agreement of the departments concerned.

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## PROCEDURAL PAGE

By letter of 14 February 2003 the Council consulted Parliament, pursuant to Article 63(3) of the EC Treaty, on the proposal for a Council decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals (COM(2003) 49 – 2003/0019(CNS)).

At the sitting of 10 March 2003 the President of Parliament announced that he had referred the proposal to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible and the Committee on Legal Affairs and the Internal Market for its opinion (C5-0050/2003).

By letter of 14 March 2003 the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs requested the opinion of the Committee on Legal Affairs and the Internal Market on the proposal's legal basis pursuant to Rule 63(2).

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs had appointed Marcelino Oreja Arburúa rapporteur at its meeting of 18 February 2003.

The committee considered the Commission proposal and draft report at its meetings of 19 March, 23 April and 20 May 2003.

At the last meeting it adopted the draft legislative resolution by 33 votes to 1, with 1 abstention.

The following were present for the vote: Jorge Salvador Hernández Mollar (chairman), Robert J.E. Evans (vice-chairman), Johanna L.A. Boogerd-Quaak (vice-chairman), María Antonia Avilés Perea (for Marcelino Oreja Arburúa (rapporteur) pursuant to Rule 153(2)), Juan José Bayona de Perogordo (for Mary Elizabeth Banotti pursuant to Rule 153(2)), Mario Borghezio, Alima Boumediene-Thiery, Giuseppe Brienza, Marco Cappato (for Maurizio Turco), Michael Cashman, Charlotte Cederschiöld, Ozan Ceyhun, Carlos Coelho, Thierry Cornillet, Gérard M.J. Deprez, Francesco Fiori (for Marcello Dell'Utri pursuant to Rule 153(2)), Ewa Hedkvist Petersen (for Margot Keßler), Othmar Karas (for Christian Ulrik von Boetticher pursuant to Rule 153(2)), Eva Klant, Ole Krarup, Baroness Sarah Ludford, Lucio Manisco (for Giuseppe Di Lello Finuoli), Manuel Medina Ortega (for Carmen Cerdeira Morterero), Peter Michael Mombaur (for Bernd Posselt pursuant to Rule 153(2)), Bill Newton Dunn, Elena Ornella Paciotti, Hubert Pirker, Reinhard Rack (for Giacomo Santini (vice-chairman) pursuant to Rule 153(2)), José Ribeiro e Castro, Martine Roure, Heide Rühle, Ingo Schmitt (for The Lord Bethell), Joke Swiebel and Anna Terrón i Cusí.

The opinion of the Committee on Legal Affairs and the Internal Market on the proposal's legal basis is attached.

The report was tabled on 21 May 2003.

## EUROPEAN PARLIAMENT DRAFT LEGISLATIVE RESOLUTION

**on the proposal for a Council decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals  
(COM(2003) 49 – C5-0050/2003 – 2003/0019(CNS))**

**(Consultation procedure)**

*The European Parliament,*

- having regard to the Commission proposal to the Council (COM(2003) 49)<sup>1</sup>,
  - having regard to Article 63(3) of the EC Treaty,
  - having regard to Article 67 of the EC Treaty, pursuant to which the Council consulted Parliament (C5-0050/2003),
  - having regard to Rule 67 of its Rules of Procedure,
  - having regard to the opinion of the Committee on Legal Affairs and the Internal Market on the proposal's legal basis,
  - having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0166/2003),
1. Rejects the Commission proposal;
  2. Calls on the Commission to withdraw its proposal and submit a new one;
  3. Instructs its President to forward its position to the Council and Commission.

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<sup>1</sup> Not yet published in OJ.

## EXPLANATORY STATEMENT

### I. Purpose

The application of the directive on the mutual recognition of decisions on the expulsion of third-country nationals (Council Directive 2001/40/EC)<sup>1</sup> may result in financial imbalances where a Member State enforces expulsion decisions taken by the authorities of another Member State. Member States must therefore compensate each other for any such financial imbalances. Article 7 of the directive requests the Council to adopt appropriate criteria and practical arrangements. The purpose of this proposal for a decision is to lay down such criteria and practical arrangements.

### II. Substance of the proposal for a decision

The core principle of this proposal is that the Member State issuing the decision should reimburse the enforcing Member State on the basis of actual cost.

Article 2 of the proposal provides that recoverable actual costs will include transport costs for the returnee and up to two escorts, administrative costs such as fees for issuing visas and return travel documents, detention costs for up to three months and accommodation costs during the enforcement of the decision either in a transit area of a third country or in the country of origin.

Member States may also agree on a bilateral basis to reimburse costs exceeding the minimum costs or to reimburse other additional costs. Under this clause, charter flights (for example) which exceed the defined ceiling could be subject to reimbursement where the Member States concerned so agree.

Article 3 contains procedural provisions. Firstly, reimbursement is confined to enforcement measures carried out within three years of an expulsion decision being issued. To ensure that any reimbursement requests are made promptly, the decision allows for the rejection of any reimbursement requests submitted more than one year after enforcement.

The requests are channelled through national contact points in order to identify the competent authority or the body responsible for payment.

Lastly, Article 4 obliges the national contact points of each Member State to submit to the Commission an annual report on the total number of forced returns, the number of enforcement measures taken in accordance with Directive 2001/40/EC, the total number of decisions to reject reimbursement applications (duly motivated) and the number of expulsion decisions which could be recognised and enforced by other Member States.

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<sup>1</sup> OJ L 149, 2.6.2001, p. 34.

### III. Assessment of the substance of the proposal for a decision

The Commission proposal confines itself to satisfying the request contained in Article 7 of Directive 2001/40/EC. It sets out a clear and operable compensation system. The proposal is based on two principles, as set out below.

Firstly, recoverable costs are confined to those referred to above (transport, administrative and detention costs), on the basis of actual cost. The Commission also introduces criteria designed to limit costs (for example, no more than two persons may escort a returnee). There will, of course, be cases in which the authorities require more people to accompany flights (such as on long-haul flights or where the returnees are aggressive). Even in such cases, however, the issuing Member State is not obliged to pay costs for more than two persons. This system keeps costs to a level acceptable by the Member States. Member States may, however, agree on a bilateral basis to exceed the ceiling.

Secondly, the Commission provides for the setting up of contact points to handle the day-to-day running of the compensation system. For example, should the Brussels police enforce an expulsion decision issued by the Munich authorities, they would not need to find out which body to contact in Germany for reimbursement; they would simply get in touch with the contact point in Belgium, which would then approach the contact point in Germany.

Your rapporteur therefore fully endorses the substance of the Commission proposal.

### IV. Legal basis

On a proposal from the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, at its sitting of 13 March 2001 Parliament rejected the initiative of the French Republic with a view to adopting a Council directive on mutual recognition of decisions on the expulsion of third country nationals<sup>1</sup>. The committee rejected the initiative owing to the absence of a legal basis in the Treaty establishing the European Community. It did, however, endorse the aim of the policy.

In his report A5-0394/2000, tabled in plenary on 11 December 2000, Hartmut Nassauer argued as follows:

#### ‘IV. 1. The legal basis

**A.** The draft directive is based on Article 63 of the EC Treaty, and in particular paragraph 3 thereof. This provision, however, is out of the question as the legal basis for the proposed rules.

Article 63 of the EC Treaty is part of Title IV, which is concerned with visas, asylum, immigration and other policies related to free movement of persons. Article 63(3) of the EC Treaty provides the legal basis for measures on immigration policy in certain areas. Article 63(3)(a) refers to conditions of entry and residence and visa procedures. Article 63(3)(b)

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<sup>1</sup> Nassauer report, A5-0065/2001.

provides the legal basis for measures relating to illegal immigration and illegal residence, including the repatriation of illegal residents.

That provision thus basically empowers the Council to adopt measures to regulate illegal immigration and illegal residence. It is further empowered to determine rules on the repatriation of illegal residents.

The wording, legislative purport and context of the Treaty provision thus empower the Council to determine under what conditions a third country national's residence is illegal and under what other conditions, if any, illegal residence should result in expulsion or repatriation. We are dealing here with the power to determine substantive repatriation law, which will bindingly lay down for the European Union the substantive conditions under which a third country national may be expelled or returned to his state of origin against his will.

These issues, however, are not dealt with in this draft directive. The draft text is not fundamentally concerned with laying down substantively the conditions for repatriation. Instead, it is explicitly concerned only with the mutual recognition of expulsion decisions which have already been taken. It specifically does not cover repatriation decisions under Community law, which would have been enacted on the basis of legislation founded on Article 63 of the EC Treaty; the draft directive is apparently directed, instead, at expulsion decisions which have already been taken on the basis of national law.

The directive thus does not seek to lay down Community repatriation law, but merely to ensure that an expulsion decision taken in one Member State on the basis of national law can be enforced in another Member State. It lays down conditions for the enforcement of that decision. It is thus a directive which should be ascribed to the sphere of the law on enforcement processes, and not one which substantively regulates repatriation law. Article 63(3) of the EC Treaty only admits of the latter; it says nothing about the mutual recognition of decisions taken on the basis of national law. It cannot be assumed that the Treaty's authorisation of substantive legislation on repatriation includes the mutual recognition of expulsion decisions. For this reason, regardless of the legal objective, which is to be endorsed, Article 63(3)(b) of the EC Treaty, which is cited by the authors of the directive, is out of the question as a legal basis for the directive.

Article 63 of the EC Treaty does not provide a legal basis for the mutual recognition of expulsion decisions in other respects, either.

[...]

**E.** In the final analysis, it has to be stated that the legal basis cited by the French Republic, Article 63(3) of the EC Treaty, does not support the draft directive.'

At the time, Parliament could refer matters to the Court of Justice pursuant to Article 230 of the EC Treaty only with a view to protecting its prerogatives. Article 2(34) of the Treaty of Nice, which entered into force on 1 February 2003, amended Article 230 of the EC Treaty in such a way as to give Parliament a general right of appeal, as follows:

34. In Article 230, the second and third paragraphs shall be replaced by the following:



‘It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.

The Court of Justice shall have jurisdiction under the same conditions in actions brought by the Court of Auditors and by the ECB for the purpose of protecting their prerogatives.’

Given that what we have before us is a proposal for the application of Directive 2001/40/EC, which Parliament rejected owing to its lack of a legal basis, your rapporteur proposes that, in order to be consistent, this proposal should also be rejected.

## V. Recommendation

While endorsing its substance and political aims, Parliament rejects this proposal on the grounds of the initial directive's lack of an appropriate legal basis, calls accordingly on the Commission to withdraw its proposal and instructs its President to forward this opinion to the Council and Commission.

# OPINION OF THE COMMITTEE ON LEGAL AFFAIRS AND THE INTERNAL MARKET

## The Chairman

Mr Jorge Salvador Hernández Mollar  
Chairman  
Committee on Citizens' Freedoms and Rights, Justice and Home Affairs  
BRUSSELS

Subject: Checking the legal basis of the proposal for a Council decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals (COM(2003) 49 - C5-0050/2003 - 2003/0019(CNS))

Dear Mr Hernández Mollar,

By letter of 14 April 2003 the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs asked for the legal basis of the above proposal for a decision to be checked.

The proposal for a decision is based on Article 63(3) of the Treaty establishing the European Community. However, Marcelino Oreja Arburúa, rapporteur for the committee responsible, has questioned the appropriateness of Article 63(3) as the legal basis for this proposal for a decision; its appropriateness was also questioned in the opinion adopted by my committee (draftsman: Diana Wallis) for Hartmut Nassauer's report on the initiative of the French Republic with a view to adopting a Council Directive on mutual recognition of decisions on the expulsion of third-country nationals (A5-0394/2000).

### *Background*

In 2000 the Nassauer report (A5-0394/2000) rejected the initiative of the French Republic with a view to adopting a Council Directive on mutual recognition of decisions on the expulsion of third-country nationals, on the grounds that there was no legal basis for it in the EC Treaty. The proposal for a directive was based on Article 63(3) of the EC Treaty.

In 2001 a second report by Mr Nassauer (A5-0065/2001) rejected the initiative of the French Republic with a view to adopting a Council Directive on mutual recognition of decisions on the expulsion of third-country nationals, again on the grounds of the lack of a legal basis in the EC Treaty. The proposal for a directive was based on Article 63(3) of the EC Treaty.

The proposal was adopted in the form of Directive 2001/40/EC of 28 May 2001<sup>1</sup>, Article 7 of which provides for arrangements to compensate for financial imbalances resulting from the mutual recognition of expulsion decisions.

The proposal for a decision currently before us seeks to set out the criteria and practical arrangements for the compensation of such financial imbalances.

#### *Scope of Article 63(3) of the EC Treaty*

The article reads:

‘The Council (...) shall (...) adopt:

(3) measures on immigration policy within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,

(b) illegal immigration and illegal residence, including repatriation of illegal residents’.

According to one interpretation, Article 63(3) of the EC Treaty is the appropriate legal basis for both substantive law and procedural law measures relating to immigration policy.

According to a second interpretation, the article is the appropriate legal basis for matters coming within the sphere of substantive law alone, and not for procedural matters such as issues relating to mutual recognition. This interpretation takes account of the distinction between substantive law and procedure. Substantive law covers the conditions under which a third-country national may be expelled or returned to his country of origin, while procedures for the mutual recognition of expulsion decisions are confined to the procedural sphere.

#### *Aim and content of the proposal for a decision*

According to settled case-law, in the context of the organisation of the powers of the Community the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure<sup>2</sup>.

In terms of content, the proposal for a decision provides for the introduction of ‘appropriate criteria and practical arrangements for the compensation of any financial imbalances which may result from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals of 28 May 2001’<sup>3</sup>, with a view to ensuring ‘financial burden-sharing for cooperation between Member States on expulsion of third country nationals’ (third recital of the proposal for a decision).

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<sup>1</sup> OJ L 149, 2.6.2001, p. 34.

<sup>2</sup> See, in particular, the judgment of 23 February 1999 in Case C-42/97, *Parliament v Council*, point 36.

<sup>3</sup> Explanatory memorandum, p. 2.

The proposal establishes the ‘core principle (...) that the issuing Member State should reimburse the enforcing Member State on the basis of the actual costs’<sup>1</sup>. In this connection, Article 2 defines recoverable actual costs, of which there are three kinds, namely transport costs, administrative costs and accommodation costs. The list of recoverable costs is exhaustive. A ceiling is set for each category.

Reimbursement requests are submitted and processed through national contact points (Article 3).

Given that it lays down the conditions under which mutual recognition of expulsion decisions takes place, the proposal for a decision comes within the sphere of substantive law.

At its meeting of 12 May 2003 in Strasbourg the Committee on Legal Affairs and the Internal Market unanimously decided, in the light of the above factors and on a proposal from the rapporteur on legal bases, Mr Gil-Robles Gil-Delgado, that Article 63(3) of the EC Treaty was the appropriate legal basis for the adoption of this proposal for a decision<sup>2</sup>.

Yours sincerely,

(sgd) Giuseppe Gargani

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<sup>1</sup> Ibid.

<sup>2</sup> The following were present for the vote: Willi Rothley, acting chairman; Bill Miller, vice-chairman; Paolo Bartolozzi, Maria Berger, Janelly Fourtou, José María Gil-Robles Gil-Delgado, Malcolm Harbour, The Lord Inglewood, Kurt Lechner, Manuel Medina Ortega, Marcelino Oreja Arburúa (for Bert Doorn) and Stefano Zappalà.