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to: Working Party on Integration, Migration and Expulsion/Mixed Committee
(EU-Iceland/Norway/Switzerland/Liechtenstein)

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Subject: Defining of conditions where entry ban can be imposed and the means by which
Member States can have rapid access to information on entry ban

Delegations will find attached a draft report from the Presidency in relation to the aforementioned subject, which will be the focus of the relevant discussion at the above Working Party's meeting.

**DEFINING OF CONDITIONS WHERE ENTRY BAN CAN BE IMPOSED
AND THE MEANS BY WHICH MEMBER STATES
CAN HAVE RAPID ACCESS TO INFORMATION ON ENTRY BAN**

DRAFT REPORT

by the Polish Presidency

1. PRELIMINARY REMARKS

The *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*¹ (hereafter the Return Directive) underlines the fact that the effects of national return measures should be given a European dimension by establishing an entry ban prohibiting entry into, and stay in, the territory of all Member States.

The Return Directive states also that 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 of 20 December 2006 on the establishment, operation and use of the second-generation Schengen Information System (SIS II)*².

According to Regulation (EC) No 1987/2006, SIS II is to contain alerts for the purpose of refusing entry or stay. It also states that it is necessary to consider the further harmonisation of provisions for issuing alerts concerning third-country nationals for the purpose of refusing entry or stay, and to clarify their use within the framework of asylum, immigration and return policies. The Commission should therefore review, three years after the date from which this Regulation applies, the provisions on the objectives of, and conditions for, issuing alerts for the purpose of refusing entry or stay.

¹ OJ L 348, 24.12.2008, p. 98

² OJ L 381, 28.12.2006, p. 4

In accordance with actual Schengen *acquis* alerts for the purposes of refusing entry or stay are issued in SIS – according to art. 96 of the *Convention implementing the Schengen agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders*¹.

Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered [into SIS] on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law. Decisions may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose.

This situation may arise in particular in the case of:

- (a) an alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year;
- (b) an alien in respect of whom there are serious grounds for believing that he has committed serious criminal offences, including those referred to in Article 71, or in respect of whom there is clear evidence of an intention to commit such offences in the territory of a Contracting Party.

Decisions may also be based on the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens.

On 1 May 2011 there were 709.040 alerts for the purposes of refusing entry issued in SIS (in most cases introduced by Italy, Germany, Greece, Spain and France).

¹ OJ L 239, 22.9.2000, p. 19

Since 1997 there were 253.640 hits in SIS on alerts issued by other Member States on the basis of art. 96 of the Schengen convention which is 40,56% of all hits achieved by the Member States (on both their own alerts and those issued by other Member State)

Considering the mentioned above – particularly relations between return decisions issued by Member States bound by the Return Directive and European Union policy on refusals of entry and entry bans – the Polish Presidency invited the delegates to the Expulsion Component of the Working Group of the Council of the EU on Integration, Migration and Expulsion to present their national solutions and best practices concerning entry ban policy by replying to the questionnaire on defining the conditions under which an entry ban can be imposed and the means by which Member States can have rapid access to information on an entry ban.

23 delegations replied to the questionnaire – Austria, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Liechtenstein, Lithuania, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovenia, Slovakia, Sweden, Switzerland and the United Kingdom.

2. PRACTICES OF MEMBER STATES

2.1. RELATION BETWEEN A RETURN DECISION AND AN ENTRY BAN

Detailed examination of MSs replies given on the questionnaire points at various practices in field of implication of a return decision and an entry ban.

Nevertheless, four main mechanisms can be identified:

- an entry ban is issued independently of any kind of removal orders (return decisions),
- an entry ban is issued at the moment a return decision is issued or within specified time limit from that moment,

- an entry ban is issued immediately (from the date) after a third-country national departure is confirmed,
- an entry ban is issued when a return decision is final (and there is no possibility to appeal against it or an appeal has not a suspending effect).

Apart from the enumerated-above mechanisms Member States apply mixed or modified practices in their return and entry ban policies.

Alerts for the purposes of refusing entry are issued in the SIS on the basis of national alerts – generally through the SIRENE national office.

2.2. ISSUING A RETURN DECISION TO AN UNDOCUMENTED THIRD-COUNTRY NATIONAL

As a general rule there is no possibility to issue an undocumented third-country national a return decision and, consequently, an entry ban. At least the identity (a name and a surname) is required (nationality not necessarily).

In some Member States a “declared identity” (by a third-country national) is acceptable.

A “procedural (legal) identity” is sporadically issued by a relevant court in a few Member States and on the basis of which the data is entered into SIS for the purposes of refusing entry. When the real identity is established, the return decision and alert issued in SIS are revised.

2.3. ISSUING A RETURN DECISION ACCOMPANIED BY AN ENTRY BAN TO A THIRD-COUNTRY NATIONAL WHO ILLEGALLY CROSSED THE EXTERNAL BORDER

A third-country national who illegally entered the territory of the European Union through its external borders is issued a return decision accompanied by an entry ban in most cases.

It is necessary to point out that illegal entry does not affect the rights of a third-country national with regard to seeking protection in the territory of the European Union – in these circumstances a return decision is not issued until the final decision on granting protection is taken, or the execution of the return decision, if issued, is suspended.

2.4. ISSUING A RETURN DECISION ACCOMPANIED BY AN ENTRY BAN TO A THIRD-COUNTRY NATIONAL WHO ABUSE AN ASYLUM PROCEDURE

The legal solutions and practices concerning issuing a return decision accompanied by an entry ban in cases of misuse of an asylum procedure differ from one Member State to another.

The following solutions can be identified:

- a misuse of an asylum procedure doesn't cause issuing a return decision at all,
- a third-country national is issued a return decision obliging him/her to leave the territory of the Member State voluntarily – an alert for the purposes of refusing entry is not issued unless the obligation (in the determined period of time) is realized,
- a return decision is issued (separate or combined with the decision on refusal on granting the protection) and entry ban is introduced,
- an entry ban accompanies a return decision only when a removal order following an asylum procedure must be enforced.

2.5. PRACTICES IN PROCEEDINGS WITH A THIRD-COUNTRY NATIONAL TO WHOM A RETURN DECISION, ACCOMPANIED BY AN ENTRY BAN, HAS BEEN ISSUED BY ANOTHER MEMBER STATE

The most common practice in case of apprehension a third-country national to whom a return decision, accompanied by an entry ban, has been issued by another Member State, is the execution of a return decision issued in spite of an existing decision issued by another Member State in accordance with Article 6(1) of *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*. Most of the Member States take also opportunity given by bilateral agreements on readmission concluded between the particular Member States and readmit a third-country national concerned to the Member State that issued the return decision.

The *Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals* and *Council Decision of 23 February 2004 setting out the criteria and practical arrangements for compensation of the financial imbalances resulting from application of above mentioned directive* is not commonly used since it is found to be “inefficient and unfit”.

Moreover, several Member States haven't experienced the situation yet.

2.6. USE OF FINANCIAL SUPPORT INSTRUMENTS DERIVING FROM THE RETURN FUND

The Member States which return a third-country national instead of readmitting him/her to another Member State mostly don't use any financial support instruments deriving from the Return Fund which aims to support a direct return of a third-country national to the country of origin or to the country of residence.

2.7 SUSPENSION OF AN ENTRY BAN

Depending on what practice in field of implication of a return decision and entry ban is preferable the particular Member States adopt different solutions.

Mostly an alert for the purposes of refusing entry is not issued until the return decision is executed and any act of suspending the execution of the return decision automatically delays application of an entry ban.

However, in some Member States – particularly where an entry ban is issued independently of a return decision – such a mechanism doesn't exist (in result a third-country national is allowed to stay in the territory of the Member State concerned, in spite of a binding entry ban).

2.8. WITHDRAWAL OF AN ENTRY BAN

Considering the possibilities of withdrawal of an entry ban, in principle – according to the existing legislation and practice of the particular Member States – an entry ban cannot be lifted automatically when a third-country national returns to the country of return under the assisted voluntary return programme.

Only in a few Member States the above mentioned opportunity is possible – as a rule upon a third-country national's request.

In some Member States an entry ban may be shortened (i.e. to a half of the established period) upon request if the third-country national concerned left the territory of the Member State voluntarily.

It is necessary to point out that legislation and following practice of some Member States provide for other conditions for withdrawal of the issued entry ban (upon request or by virtue of law), like: humanitarian reasons (or other reasons if found appropriate), a change of circumstances, a marriage to the resident.

3. CONCLUSIONS

- 1) Existing *acquis communautaire* in the field of return of a third-country national and an entry ban policy through its general character is reflected in various legal solutions and practices based on it.
- 2) Efficient and quick establishing the identity of a third-country national who should be banned an entry is crucial for the issuing alerts in SIS for the purposes of refusing entry (via national data bases of undesirable persons).
- 3) The *Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals* and *Council Decisions of 23 February 2004 setting out the criteria and practical arrangements for compensation of the financial imbalances resulting from application of above mentioned directive* is not commonly used being found inefficient.
- 4) Further actions on the European Union and national level should be undertaken to promote a return instead of implementing readmission procedure among Member States, mainly through financial support from the European Union financial instruments.
- 5) Cases of third-country nationals whose execution of a return decision has been suspended and entry ban issued have been identified what may cause some misunderstandings and practical problems in possible future control measures undertaken within the territory of the European Union.
