



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 25 June 2008

10737/08

**Interinstitutional File:
2005/0167 (COD)**

**CODEC 778
MIGR 43
COMIX 500**

NOTE

from:	General Secretariat
to:	Permanent Representatives' Committee/Council
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 – Outcome of the European Parliament's first reading (Strasbourg, 16 to 19 June 2008)

I. INTRODUCTION

The Rapporteur, Mr Manfred WEBER (EPP/ED - DE), presented a report on behalf of the Committee on Civil Liberties, Justice and Home Affairs, consisting of 73 amendments

In accordance with the provisions of Article 251(2) of the EC Treaty and the joint declaration on practical arrangements for the co-decision procedure¹, a number of informal contacts took place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this dossier at first reading, thereby avoiding the need for a second reading and conciliation.

¹ OJ C 145, 30.6.2007, p. 5.

In this context, the Rapporteur tabled one compromise amendment (amendment 74) on behalf of the EPP/ED group. This amendment had been agreed during the informal contacts referred to above.

In addition, the Greens/EFA group tabled eleven amendments (amendments 75-85), the GUE/NGL group tabled eight amendments (amendments 86-93) and the PES group tabled ten amendments (amendments 95-104).

II. VOTE

The plenary adopted the compromise amendment (amendment 74) to the proposal for a Directive when it voted on 18 June 2008. The amendment adopted corresponds to what was agreed between the three institutions and ought therefore to be acceptable to the Council. Consequently, once the lawyer-linguists¹ have scrutinised the text, the Council should be in a position to adopt the legislative act.

The text of the amendment adopted and the European Parliament's legislative resolution are set out in the Annex hereto. The amendments are presented in the form of a consolidated text where added wordings are highlighted in *bold and italics*, the symbol "■" indicates deleted text and the symbol "||" indicates changes of a linguistic or clerical nature.

¹ Delegations with legal-linguistic observations can send them to the secretariat of the Council's Directorate for the Quality of Legislation (secretariat.jl-codecision@consilium.europa.eu) until 09.07.2008, in order better to prepare the lawyer-linguists' meeting with national experts.

Common standards and procedures in Member States for returning illegally staying third-country nationals *I**

European Parliament legislative resolution of 18 June 2008 on the 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 (COM(2005)0391 – C6-0266/2005 – 2005/0167(COD))

(Codecision procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to the European Parliament and the Council (COM(2005)0391),
 - having regard to Article 251(2) and Article 63(3)(b) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0266/2005),
 - having regard to Rule 51 of its Rules of Procedure,
 - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the opinions of the Committee on Foreign Affairs and the Committee on Development (A6-0339/2007),
1. Approves the Commission proposal as amended;
 2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
 3. Instructs its President to forward its position to the Council and Commission.

Position of the European Parliament adopted at first reading on 18 June 2008 with a view to the adoption of Directive 2008/.../EC 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 Commission **||**,

Acting in accordance with the procedure laid down in Article 251 of the Treaty¹,

Whereas:

- (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.***
- (2) 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.
- (3) ***The Council of Europe Committee of Ministers adopted on 4 May 2005 "Twenty guidelines on forced return" (CM(2005)40).***
- (4) 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.
- (5) 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.

¹ *Position of the European Parliament of 18 June 2008.*

- (6) 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 implying that consideration should go beyond the mere fact of illegal residence. When using standard forms for decisions related to return Member States should respect this principle and fully comply with all applicable provisions of this Directive.*
- (7) *The need for Community 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.*
- (8) *It is recognised that it is legitimate for Member States to return illegally staying third-country nationals. The prerequisite for this assumption is that fair and efficient asylum systems are in place, which fully respect the principle of non-refoulement.*
- (9) *In accordance with Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status¹, 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, or a decision ending his or her right of stay as asylum seeker has entered into force.*
- (10) 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. *An extension of the period for voluntary departure should be provided for when considered necessary because of the specific circumstances of an individual case. 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.*
- (11) 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. *Necessary legal aid should be made available to those who lack sufficient resources. Member States should lay down in their national legislation in which cases legal aid is to be considered necessary.*

¹ OJ L 326, 13.12.2005, p. 13.

- (12) The situation of *third-country nationals* who are staying illegally but who cannot **yet** be removed should be addressed. ***Their basic conditions of subsistence should be defined according to national legislation. In order to be able to demonstrate their specific situation in case of administrative controls or checks, these persons should be provided with a written confirmation. Member States should enjoy wide discretion concerning the form and the format of the written confirmation and may also include it in decisions related to return adopted under this Directive.***
- (13) The use of coercive measures should be expressly *subject* to the *principles* of proportionality ***and effectiveness with regard to means taken and objectives pursued.*** 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 orders¹. ***Member States should be able to rely on various possibilities to monitor forced return.***
- (14) 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 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 *five* years. ***In this context the fact that the third-country national concerned has already been subject of more than one return decision or removal order or entered the territory of a Member State during an entry ban should be particularly taken into account.***
- (15) ***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.***
- (16) The use of *detention for the purpose of removal* should be limited and *subject* to the principle of proportionality ***with regard to means taken and objectives pursued.*** ***Detention is justified only to prepare return or carry out the removal process*** and if the application of less coercive measures would not be sufficient.

¹ OJ L 261, 6.8.2004, p. 28.

(17) *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. Without prejudice to the initial apprehension by law-enforcement authorities, regulated by national legislation, detention should be as a rule carried out in specialised detention facilities.*

(18) 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)¹.

(19) *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.*

(20) 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.

(21) 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.

(22) 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.

(23) 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.

¹ *OJ L 381, 28.12.2006, p. 4.*

- (24) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (25) 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 Code*¹ - upon the Schengen acquis under the provisions of Title IV of Part Three of the Treaty establishing the European Community, Denmark *shall*, 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.
- (26) *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, this Directive constitutes a development of provisions of the Schengen acquis in which the United Kingdom does not take part, in accordance with Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis²; moreover, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.*
- (27) *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, this Directive constitutes a development of provisions of the Schengen acquis in which Ireland does not take part, in accordance with Council Decision 2002/192/EC of 28 February 2002 concerning the request of Ireland to take part in some of the provisions of the Schengen acquis³; moreover, in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, Ireland is not taking part in the adoption of this Directive and is therefore not bound by it in its entirety or subject to its application.*

¹ OJ L 105, 13.4.2006, p. 1.

² OJ L 131, 1.6.2000, p. 43.

³ OJ L 64, 7.3.2002, p. 20.

- (28) *As regards Iceland and Norway*, 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/EC¹ on certain arrangements for the application of that Agreement.
- (29) *As regards Switzerland*, 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 between* the European Union, the European Community and the Swiss Confederation *concerning* the association *of the Swiss Confederation* with the implementation, application and development of the Schengen acquis², which fall within the area referred to in *Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/146/EC*³.
- (30) *As regards Liechtenstein*, 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 Protocol signed between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis*⁴, which fall within the area referred to in *Article 1, point C, of Decision 1999/437/EC read in conjunction with Article 3 of Council Decision 2008/261/EC*⁵,

¹ OJ L 176, 10.7.1999, p. 31.

² OJ L 53, 27.2.2008, p. 52.

³ OJ L 53, 27.2.2008, p. 1.

⁴ *The text of this instrument is available on*
<http://www.consilium.europa.eu/docCenter.asp?lang=en&cmsid=245> under the
reference Doc. 16462/06.

⁵ OJ L 83, 26.3.2008, p. 3.

HAVE ADOPTED THIS DIRECTIVE:

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 and who have not subsequently obtained an authorisation or a right to stay in that Member State;*
 - (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.*

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 - whether **in voluntary compliance with an obligation to return**, or enforced - **to:**
- **one's country of origin, or**
 - **a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or**
 - **another third country, to which the third-country national concerned voluntarily decides to return and in which he/she will be accepted;**
- (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;
- I**
- (f) "**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;**
- (g) "**risk of absconding**" means the existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is subject to return procedures may abscond;

- (h) *"voluntary departure" means compliance with the obligation to return within the time-limit fixed for that purpose in the return decision;*
- (i) *"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.*

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.
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.
4. ***With regard to third-country nationals excluded from the scope of this Directive in accordance with Article 2(2)(a) Member States shall:***
 - ***ensure that their treatment and the level of protection is not less favourable than set out in Article 8 (4) and (5) (limitations on use of coercive measures), Article 9 (2), first indent (postponement of removal), Article 14(1) second and fourth indent (emergency health care and taking into account needs of vulnerable persons) and Articles 16 and 17 (detention conditions) and***
 - ***respect the principle of non-refoulement.***

Article 5

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

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.*

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, 3, 4 and 5.*
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, or where the third-country national's immediate departure is required for reasons of national security or public policy, paragraph 1 shall apply.*
3. *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.*

4. *Member States may, at any moment decide to grant an autonomous residence permit or another authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory. In this event no return decision shall be issued. 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 authorisation offering a right to stay.*
5. 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 shall *consider refraining* from issuing a return decision, until the pending procedure is finished, *without prejudice to paragraph 6.*
6. *This 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 and/or entry ban within one administrative or judicial decision or 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.*

Article 7

Voluntary departure

1. *The return decision shall provide for an appropriate period for voluntary departure ranging between seven days 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.*

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

2. *Member States shall, when this is necessary, extend the period for voluntary departure for an appropriate period, taking into account the specific circumstances of the individual case, 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.*
4. *If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent or if the person concerned poses a risk to public security, public order or national security Member States may refrain from granting a period for voluntary departure, or grant a period shorter than seven days.*

Article 8

Removal █

1. Member States shall *take all necessary measures to enforce the return decision if no period for voluntary departure has been granted in accordance with Article 7* or if the obligation to return has not been complied with within the period *for* voluntary departure granted in accordance with *Article 7*.
2. *If the Member State has granted a period for voluntary departure in accordance with Article 7 the return decision may be enforced only after the period has ended, unless during this period, a risk, as referred to in Article 7(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.*
6. *Member States shall provide for an effective forced return monitoring system.*

Article 9

Postponement *of removal*

1. Member States *shall* postpone *removal*:
 - *when it would violate the principle of non-refoulement, or*
 - *as long as suspensive effect is granted in accordance with Article 13(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.*■
3. If ■ a removal ■ is postponed as provided for in paragraphs 1 and 2, *the obligations foreseen in Article 7(3)* may be imposed on the third-country national concerned ■ .

Article 10

Return and removal of unaccompanied minors

1. *Before deciding to issue a return decision in respect of an unaccompanied minor, assistance by appropriate bodies other than the authorities enforcing return 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.*

Article 11

Entry ban

1. **Return decisions shall be accompanied by an entry ban:**
 - **if no period for voluntary departure has been granted, or**
 - **if the obligation to return has not been complied with.**

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

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 years. It may exceed five years** if the third-country national **represents** a serious threat to public policy, public security **or to national security.**
3. **Member States shall consider 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.**

Victims of trafficking in human beings who have been granted a residence permit pursuant to Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities¹ 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.

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

Member States may withdraw or suspend an entry ban in individual cases or certain categories of cases for other reasons.

¹ **OJ L 261, 6.8.2004, p. 19.**

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.*



Chapter III

PROCEDURAL SAFEGUARDS

Article 12

Form

1. Return decisions and - *if issued - entry-ban decisions and decisions on removal* , shall be issued in writing *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, detection 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 referred to 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.
3. *Member States may not apply paragraph 2 with regard to persons who have illegally entered the territory of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.*

In this case decisions related to return, as referred to in paragraph 1, shall be given by means of a standard form as set out under national legislation.

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

Article 13

■ Remedies

1. ■ The third-country national concerned *shall be afforded* an effective ■ remedy ■ to appeal against or ■ seek review of *decisions related to return, as referred to in Article 12(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 referred to in Article 12(1), including the possibility of temporarily suspending its enforcement, unless temporary suspension is already applicable under national legislation.*
3. ■ The third-country national concerned *shall have* the possibility to obtain legal advice, representation and, where necessary, linguistic assistance. ■
4. *Member States shall ensure that necessary legal assistance and/or representation be granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid and may provide that free legal assistance and/or representation is subject to conditions as set out in Article 15 (3) - (6) of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.*

Article 14

Safeguards pending return

1. Member States shall, ***with the exception of the situation covered in Articles 16 and 17, ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:***
 - ***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 written confirmation ***in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that*** ■ the return decision ■ will temporarily not be ***enforced.***

Chapter IV

DETENTION FOR THE PURPOSE OF REMOVAL

Article 15

Detention

1. ***Unless other sufficient but less coercive measures can be applied effectively in the concrete case, Member States may only 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 particular 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.

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

Detention shall be ordered in writing with reasons in fact and in law.

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

- *either provide for a speedy judicial review of the lawfulness of detention to be decided on as speedily as possible 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 as speedily as possible 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 time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.*
4. *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.*
5. *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. Each Member State shall set a limited period of detention, which may not exceed six months.*
6. *Member States may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months in accordance with national law 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.*

Article 16

Conditions of *detention*

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.*
2. *Third-country nationals under detention shall be allowed - upon request - to establish in due time contact with legal representatives, family members and competent consular authorities.*
3. Particular attention shall be paid to the situation of vulnerable persons. *Emergency health care and essential treatment of illness shall be provided.*
4. *Relevant and competent national, international and non-governmental organisations and bodies shall have the possibility to visit detention facilities, as referred to in paragraph 1, to the extent that they are being used for detaining third-country nationals in accordance with this Chapter.* 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 organisations and bodies referred to in paragraph 4.*

Article 17

Detention of minors and families

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.*
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.*

Article 18

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 15(2) and to take urgent measures in respect of the conditions of detention derogating from those set out in Articles 16(1) and 17(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

FINAL PROVISIONS

Article 19

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 20(1)* at the latest *and focus at this occasion in particular on the application of Articles 11, 13(4) and 15 in Member States. In relation to Article 13(4) the Commission shall assess in particular the additional financial and administrative impact in Member States.*

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...^{*} at the latest. **Concerning Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...^{**} 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 21

Relationship with *the* Schengen Convention

This Directive replaces *the provisions of* Articles 23 and 24 of the Convention implementing the Schengen Agreement.



Article 22

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.

^{*} *24 months from the date of publication in the Official Journal of the European Union.*

^{**} *36 months from the date of publication in the Official Journal of the European Union.*

Article 23

Addressees

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at ||

For the European Parliament

The President

For the Council

The President

Statements to the Minutes of the Council at the moment of the adoption of the Act

1. *The Council states that the implementation of this Directive should not be used in itself as a reason to justify the adoption of provisions less favorable to persons to whom it applies.*
2. *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.*
3. *The Commission commits itself to assist Member States in finding possibilities for mitigating the financial burden resulting from the implementation of Article 13(4) (free legal aid) in Member States in a spirit of solidarity.*

The Commission underlines that possibilities exist under the European Return Fund (Decision No 575/2007/EC) to co-finance national action promoting the application of Article 13(4) (free legal aid) in Member States:

- Actions related to the specific objective of "promoting an effective and uniform application of common standards on return" (Article 3 (c)) may include support for the "enhancement of the capacity of competent authorities to take high quality return decisions" (Article 4(3)(a)). The presence of appropriate legal safeguards, including the principle of equality of arms, enhances the potential for high quality decisions.

- In accordance with Priority 4 of the strategic guidelines for the Return Fund (Decision 2007/837/EC), the Community contribution may be increased up to 75% for actions which ensure a "fair and effective implementation of common standards" on return in Member States. This means that measures related to the provision of Article 13(4) (free legal aid) may be co-financed up to 75 % under the European Return Fund.

The Commission encourages Member States to take this fact into account when choosing the priorities for their national programmes and when programming actions under priority 4 of the strategic guidelines.

4. *The Commission states that in its assessment under Article 19(2) it will consider additional impact on the administration of justice in the Member States.*