

Common standards and procedures for returning illegally staying third-country nationals. "Return Directive"

2005/0167(COD) - 01/09/2005 - Legislative proposal

PURPOSE: to provide common rules concerning return, removal, use of coercive measures, temporary custody and re-entry for illegally staying third-country nationals.

PROPOSED ACT: Directive of the European Parliament and of the Council.

CONTENT: An effective return policy is a necessary component of a well managed and credible policy on migration. Clear, transparent and fair rules have to be agreed which take into account this need, whilst respecting the human rights and fundamental freedoms of the person concerned.

This proposal seeks to achieve these aims as follows:

- establishing a rule that illegal stay should be ended through a fair and transparent procedure;
- promoting the principle of voluntary return by establishing a general rule that a "period for departure" should normally be granted;
- establishing – as a general principle – a harmonised two-step procedure: involving a return decision as a first step and – if necessary – the issuing of a removal order as a second step, thus aligning to a certain extent the currently divergent Member States systems.
- addressing the situation of persons who are staying illegally but who cannot (as yet) be removed;
- providing for a minimum set of procedural safeguards;
- limiting the use of coercive measures, binding it to the principle of proportionality and establishing minimum safeguards for the conduct of forced return;
- giving a European dimension to the effects of national return measures by establishing a re-entry ban valid throughout the EU;
- rewarding good compliance (including an option to withdraw any re-entry ban) and penalising non-compliance (including an option to extend any re-entry ban).
- protecting the interests of the state in cases of serious threat to national and public security (including an option to extend any re-entry ban);
- limiting the use of temporary custody and binding it to the principle of proportionality;
- establishing minimum safeguards for the conduct of temporary custody;
- addressing situations where a third-country national who is the subject of a removal order or return decision issued by a Member State is apprehended in the territory of another Member State.

The proposal does not contain an express provision on the issue of expulsion/removal for reasons of national and public security.

The most critical aspects are as follows:

Chapter I

The starting point for applying the Directive is "illegal stay". The proposal aims to establish a horizontal set of rules, applicable to any illegally staying third-country national, whatever the reason of the illegality of the stay (e.g. expiry of a visa, expiry of a residence permit, revocation or withdrawal of a residence permit, negative final decision on an asylum application, withdrawal of refugee status, illegal entrance). This proposal for a Directive does not address the reasons or procedures for ending legal residence.

Chapter II

The proposal provides for a two-step procedure, leading to the ending of illegal stay. A return decision must be issued to any third-country national staying illegally. Priority must be given to voluntary return. If the third-country national concerned does not return voluntarily, Member States shall execute the obligation to return by means of a removal order. In consultations, many Member States expressed concern that the two-step procedure could lead to procedural delays. In response to this concern, the proposal expressly clarifies that Member States are free to issue both the return decision and the removal order within one act or decision. The substantive provisions of this chapter, in particular concerning protection against removal and the possibility for voluntary return will have to be respected by Member States, notwithstanding their choice of whether to issue the return decision and removal order as two separate or one joint act or decision. The proposal provides for the introduction of a "re-entry ban", preventing re-entry into the territory of all the Member States, to accompany removal orders. The length of the re-entry ban will be determined with due consideration of all relevant circumstances of the individual case. Normally, the ban should not exceed 5 years. Only in cases of serious threat to public policy or public security, may the re-entry ban be issued for a longer period.

Chapter III

The proposal provides for a right to an effective judicial remedy against return decisions and removal orders. The judicial remedy shall either have suspensive effect or comprise the right of the third country national to apply for the suspension of the enforcement of the return decision or removal order in which case the return decision or removal order shall be postponed until it is confirmed or is no longer subject to a remedy which has suspensive effects.

Chapter IV

This chapter seeks to limit the use of temporary custody and to bind it to the principle of proportionality. Temporary custody shall only be used if this is necessary to prevent the risk of absconding and if the application of less coercive measures is not sufficient. The reasons for maintaining a person in temporary custody must be regularly reviewed by a judicial authority. Maximum time limits shall ensure that temporary custody cannot be unduly extended. This harmonisation of national rules on temporary custody is also aimed at preventing secondary movements between Member States of illegally staying persons subject to measures under this Directive.

Chapter V

This chapter provides for a flexible set of rules, applicable if a third-country national who is the subject of a removal order or return decision issued in a Member State ("the first Member State") is apprehended in the territory of another Member State ("the second Member State"). Member States may select different

options, depending on the circumstances of the particular case. On the one hand, the second Member State may recognise the return decision or removal order issued by the first Member State. The financial compensation mechanism agreed upon in Decision 2004/191/EC is made applicable to these cases. Alternatively, a second Member State may ask the first Member State to take back an illegally staying third-country national or decide to launch a new/autonomous return procedure under its national legislation.

Finally, information sharing between Member states will take place in accordance with the rules concerning the establishment, operation and use of the Second Generation Schengen Information System (SIS II).