

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

2005/0167(COD) - 01/09/2005 - Document attached to the procedure

COMMISSION'S IMPACT ASSESSMENT

For further information regarding the context of this issue, please refer to the summary of the Commission's initial proposal for a European Parliament and Council Directive on common standards on procedures in Member States for returning illegally staying third country nationals COM(2005)0391.

1- POLICY OPTIONS AND IMPACTS

The Commission has defined and assessed four policy options.

1.1- Option 1 - No policy change: The first option is to maintain the status quo and not seek to develop common standards on return procedures. Member States may oblige third country nationals staying illegally on their territories to leave and enforce their return – including temporary custody measures – according to their national legislation and practice. Third country nationals subject to a return decision may potentially comply with their obligation to leave by moving to another Member State. The existing community legal framework provides only for a limited and optional possibility of mutual recognition of administrative expulsion (return) decisions issued by the competent administrative bodies of another Member States for certain reasons, meanwhile return decisions quite often are issued by judicial authorities for other reasons (i.e. as a criminal sanction).

1.2- Option 2 - Adoption of a non-binding legal instrument: This second option is for common standards on return procedures to be laid down in a non-binding legal instrument, namely in an EC Recommendation of the Council and of the European Parliament. Laying down common standards on return procedures by adopting a Recommendation would mean that Member States are called on, but not placed under any legal obligation, to reach the desired and necessary level of harmonisation in this field. In spite of the undoubted common interest to tackle illegal immigration and to develop an effective return policy, due to the complexity of this issue – different roles played by Member States, and different level of exposure to the consequences of illegal migratory movements as well as the above mentioned variety of legal and administrative framework of return procedures at national level, the outcome of this option would be difficult to anticipate and/or schedule in time.

1.3- Option 3 - Gradual harmonisation by adoption of a directive on common standards of return procedures: The third option is that common standards on return procedures are laid down in a European Parliament and Council Directive with a comprehensive approach covering all relevant key aspects of return, including the ending of illegal stay, the enforcement of the obligation to return, cases of temporary custody of third country nationals subject to a return decision, access to legal remedies, prevention of re-entry of third country nationals subject to return decisions or removal orders as well as the procedures to be followed in case of apprehension of those persons in another Member State. This Directive by definition would be binding on the Member States as regards the objectives to be achieved, but they could take into account their national legal and institutional circumstances when translating those common standards into their national legal and administrative system.

1.4- Option 4 - Full harmonisation by adoption of a regulation on return procedures: This option would provide for full harmonisation of return procedures by laying down detailed procedural rules for all the elements listed under Option 3 and by establishing a single forum for legal remedies in relation to return decisions, removal and temporary custody orders. This would take the legal form of a European Parliament and Council Regulation adopted by the co-decision procedure. As the Regulation would set out all provisions in a detailed manner, it would not be possible to take into account the given circumstances of national legal and administrative systems of the Member States and it would be very difficult to ensure consistency with other kinds of legislation and procedures.

CONCLUSION: Option 3 is the Commission's chosen option. This option would set out fair and transparent rules for return procedures. It would put special emphasis on those measures (including the temporary custody of third country nationals subject to a return procedure and the enforced return of the persons concerned) which, in the absence of binding legal standards, might pose a threat to fundamental rights. Furthermore, it would set out procedural safeguards regarding rights and obligations of third country nationals subject to return.

IMPACT

Laying down binding common standards on return procedures - including the procedure to be followed in the event of apprehending illegally present third country nationals subject to a return decision or a removal order - should reduce the possibility of absconding.

Impact on human rights, in particular the protection of privacy and personal data and the right to liberty: The adoption and the transposition of the directive by the Member States would necessarily lead to systematic sharing of data among Member States who fully apply the Schengen-acquis on return decisions and removal orders via the common database providing for such functionality - that is likely to be the second generation of the Schengen Information System (SIS II) – but it would be based on the agreed binding common standards in spite of the previous options. Administrative costs: Member States will probably have to modify their existing legal and administrative system and the distribution of competencies (i.e. to ensure regular judicial review of temporary custody measures) in order to provide for the requested level of harmonisation with the common standards set out in the directive within the given transposition deadline.

There would be a significant improvement regarding the efficiency of the implementation of a Common Return policy as well as for the further gradual development of that policy. Member States would be placed under a legal obligation to comply with the common standards laid down in the directive, being able to take into account any particularities of their national legal and administrative environment.

Reduced illegal immigration: The likely impact of the adoption of a binding legal instrument can be expected to be at medium level. Laying down binding common standards and firm application of them at both the national and community level accompanied by other measures such as enhanced administrative cooperation of the competent national authorities of the Member States would result in a credible likelihood of return and of its subsequent enforcement, if the circumstances of a given case so require. Consequently, the clear message to illegal residents in the Member States and to potential illegal migrants outside the EU will be that illegal entry and residence do not lead to the stable form of residence they hope to achieve.

This option would develop binding common, fair and transparent rules on return procedures, to be transposed by Member States into their national law within a given deadline. Even if this option envisages gradual harmonisation, it sets out common standards regarding the most important aspects of return procedures.

An improvement on the present state of information exchange among Member States on return decisions could only be expected if the planned developments regarding IT tools in the field of migration permit storage and exchange of such data. However, the Commission's proposals to be tabled on this subject, notably the draft regulation on the establishment, operation and use of the Second Generation Schengen Information System (SIS II) in synergy with this policy option will lead to enhanced information exchange among Member States who fully apply the Schengen-acquis.

For achieving stable and mutual trust of Member States in each others' national systems responsible for issuing return decisions and removal orders as well as for dealing with legal remedies, it is vital that those systems operate according to common standards, ensuring an adequate and similar treatment of illegally staying third country nationals subject to return. The only way to provide for such mutual trust is that each national system is developed according to binding common standards.

2- FOLLOW UP

The effective monitoring of the chosen policy option would require regular evaluation of the implementation and of the state of play regarding the situation in the field of returning third country nationals. In order to facilitate the identification of possible problems and questions of interpretation at an early stage and to offer an opportunity for discussion between MS and the Commission with the establishment of an informal Contact Committee. This Contact Committee would offer a platform for the exchange of views on the interpretation of the provisions of the legal instrument as adopted according to the policy option chosen. In addition, in depth evaluation would not be possible without reliable statistical data on return procedures. Such data collection already takes place in the framework of the CIREFI and Member States also supply data for Eurostat.