Bundesrat **Printed matter 705/05 (Decision)**

25 November 2005

Decision
of the Bundesrat

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) 391 final; Council Document 12125/05

At its 817th meeting on 25 November 2005, pursuant to Sections 3 and 5 of EUZBLG (Act on Cooperation between the Federation and the Federal States in European Union Affairs), the Bundesrat adopted the following Opinion:

1. In principle, the Bundesrat welcomes the efforts of the EU to harmonise the return of illegal third-country nationals. The present challenges in the area of illegal immigration, which affects all Member States of the Community, can only be adequately met through a common and consistent return policy in a European context.

2. The Bundesrat welcomes the statement by the Commission that an effective return policy is a necessary component of a well managed and credible policy on migration. It considers, however, that the content of the directive does not correspond in large measure to this action, but rather is more likely to hamper, delay, complicate or even preclude return procedures. It places a one-sided overemphasis on the interests of illegally staying third-country nationals and also generously accommodates those in the EU who have already demonstrated a lack of observance of the law.

3. The Bundesrat reaffirms its position that common standards are not the primary approach to optimising the return policy, but rather the efforts in this connection

Distribution: Bundesanzeiger Verlagsgesellschaft mbH, Amsterdamer Straße 192, 50735 Cologne
Phone: 0221/97668-0, Fax: 0221/97668-338
ISSN 0720-2946

must continue to be directed at strengthening the operational cooperation among Member States and with the regions of origin and transit (Bundesrat Decisions of 14 March 2003 and 26 September 2003 (Bundesrat printed papers 139/03 (Decision) and 139/03 (Decision) (2)). Also, there is no evidence of a pressing need for action to safeguard the rights of returnees, since existing national laws sufficiently protect such rights. Member States naturally respect the rights of illegally staying third-country nationals under the ECHR. The same is true for fundamental rights as contained in numerous other international agreements. Beyond this, there is no necessity for additional laws or for the "establishment" of a minimum set of procedural safeguards for the benefit of illegally staying persons.

4. The Bundesrat supports the critical evaluation of the proposed Directive by the Federal Government in the treatment at Community level so far and requests that, in particular and subject to any future resolutions, it encourage the implementation of the following positions in the further handling of the proposed Directive:

Subsidiarity

5. The Bundesrat notes that not all regulatory areas of the proposed Directive conform to the subsidiarity principle of Community action.

   The Bundesrat believes that the proposed Directive does not make it clear to what extent an effective return policy absolutely requires the proposed provisions at Community level. For example, while it is rightly noted that the proposed "harmonised two-step procedure" is not currently being realised, a reason explaining the necessity of aligning the currently divergent procedures is not given in the proposal. Here and in the wider context, the Commission obviously incorrectly assumes that it is the Commission's task to ensure uniform, equal treatment of third-country nationals in all Member States.

   In particular, it is not necessary to harmonise the procedure of detention pending removal (Articles 14 and 15 of the proposed Directive) within the Community. The legal systems of Member States already take into specific account the custody requirements under international treaties. There is no evidence that harmonisation of detention pending removal will produce a positive European added value. In this connection, the explanation provided for

Chapter IV states, unconvincingly, that the harmonisation of national rules on temporary custody (detention pending removal) is aimed at preventing secondary movements of illegally staying persons. Yet, it seems unrealistic to suggest that illegal third-country nationals choose their place of residence in Member States according to the conditions of detention pending removal.

6. Only Articles 9 and 16 of the proposed Directive conform, on the whole, to the subsidiarity principle, since an EU-wide re-entry ban and the mutual recognition of return decisions require Community-level provisions, which are welcomed by the Bundesrat.

7. As regards subsidiarity, the Bundesrat refers additionally to its Decisions of 14 March 2003 (Bundesrat printed paper 139/03 (Decision), cf. paragraph 3, fourth indent) and of 26 September 2003 (Bundesrat printed paper 139/03 (Decision) (2), cf. paragraph 1) concerning the Communication from the Commission of the European Communities to the Council and the European Parliament on a common policy on illegal immigration (COM(2001) 672 final).

Family relationships and best interest of the child (Article 5)

8. The Bundesrat believes that the provisions contained in Article 5 do not require inclusion in the proposed Directive, since they are not so much a consideration in the return and removal of illegally staying persons, as they are in the decision on ending the permitted stay or issuing a residence permit. The reasons and procedures for ending legal residence, however, are expressly not addressed in the proposed Directive. Irrespective of this, Article 5 creates the impression that Member States would disregard the best interest of the child in violation of international treaties. There is no basis for this assumption.

Return decision (Article 6)

9. The obligation of Member States to issue a return decision to each illegally staying third-country national in addition to a removal order (paragraphs 1 and 3) is counterproductive. The proposal defines ‘return decision’ as an administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing an obligation to return (Article 3(d)). However, as a rule, such a statement is not required, since the fact of

illegal stay and the obligation to leave the country already follow directly from the law, namely when the foreign national does not, or no longer, holds the required permit (cf. Section 50 subsection (1) of the Residence Act (Aufenthaltsgesetz, 'AufenthG')). The loss of permit, on the other hand, is the legal consequence of a certain event such as expiry of the period of validity, occurrence of a condition subsequent or, in particular, cancellation of the permit and expulsion (cf. Section 51 subsection (1) of the Residence Act). The reiterative statement of legal consequences is unnecessary, complicates the procedure, provokes further legal proceedings and, as a result, leads to procedural delays.

Also, the obligation to provide for an appropriate period for voluntary departure (paragraph 2) raises considerable doubts. As a matter of principle, an illegally staying foreign national is required to leave the country without delay (cf. Section 50 subsection (2), first sentence, of the Residence Act). For appropriate treatment of the individual case, it is sufficient if the possibility of setting the period exists.

In this connection, it is also not understandable that the proposed Directive only disregards the setting of a period if there is the "risk of absconding" and only in this case provides for supervision measures: steps can also be taken to institute supervision measures in situations constituting a threat to public policy, security or health. Furthermore, it is inconsistent when, on the one hand, departure should occur without the setting of a period – that is, evidently immediately – if there is the "risk of absconding", while, on the other hand, supervision measures may be imposed which, in turn, presuppose a continuous stay. Moreover, it is to be doubted whether, in the case of a continuous stay, the supervision measures named here can, for example, effectively prevent the foreign national from going into hiding.

Under paragraph 4, no return decision shall be issued or, if one has already been issued, it shall be withdrawn in cases where Member States are subject to obligations derived from fundamental rights as resulting, in particular, from the ECHR, such as the right to non-refoulement, the right to education and the right to family unity. In future cases, this would impede return in an unacceptable manner, especially since these fundamental rights are already regularly taken into account in the decision on ending the stay or issuing a permit.

In a directive on return, there is no necessity for the possibility stated in paragraph 5 to grant residence permits to illegally staying third-country nationals at any time. Since, however, such "legalisation" can also have a considerable effect on other Member States in view of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, obligations to provide information should at least be demanded for such purpose; for example, in the mutual information procedure concerning Member States' measures in the areas of asylum and immigration (see Commission proposal of 10 October 2005 on the relevant Council decision, COM(2005) 480 final, Council Document 13215/05 (Bundesrat printed paper 765/05)).

Paragraph 7 contradicts the principle according to which appeals against the rejection of an application for renewal of the residence permit do not have any suspensive effect (cf. Section 84 subsection (1) number 1 of the Residence Act). There is no compelling reason to refrain from pursuing return measures for illegally staying third-country nationals simply in view of the fact that they have submitted applications for a residence permit.

Removal order (Article 7)

10. The issue of a removal order within the meaning of a "decision or act ordering the removal" (paragraph 3(f)) is superfluous; a deportation warning is always sufficient (cf. Section 59 subsection (1) of the Residence Act). The power of removal is essentially a legal consequence of an enforceable deportation order that has not been voluntarily fulfilled. Removal measures must not be made more difficult and complicated by further accompanying administrative acts justifying an appeal. For the rest, the reasons for removal ("risk of absconding" or no voluntarily departure within the set period) contained in the proposed Directive are far too limited. Instead, the catalogue of reasons for removal laid

down in Section 58 subsection (3) of the Residence Act should be preserved.

In addition, it is unacceptable that another period – here for the enforcement of removal – absolutely must be specified again under paragraph 2 of the removal order after the removal order is issued only in the case where there is a risk of absconding or voluntary departure has not occurred within the period granted in accordance with Article 6(2).

As for the rest, the term "removal order" is already used nationally in Section 58a of the Residence Act and Section 34a of the Asylum Procedure Act (Asylverfahrensgesetz, ' AsylVfG').

As a result, Article 3(f) is also superfluous.

Postponement (Article 8)

11. The "reasons for postponement" enumerated under paragraph 2 do not, on the one hand, take into account the multifarious aspects of life circumstances and only cover a small spectrum of the legal or actual impossibility of removing a foreign national (cf. Section 60a subsection 2 of the Residence Act). On the other hand, some of the reasons for postponement named are far too indeterminate and too broadly formulated. Therefore, the wording of paragraph 1 should be left at that, since it is always a matter of assessments within the context of the individual case.

    Paragraph 3 should not be geared to the risk of absconding, since the supervision measures named therein should be applicable to permitted foreign nationals more generally.

Re-entry ban (Article 9)

12. There is no reason to privilege foreign nationals who have had to be removed as a result of the violation of legal obligations, thus demonstrating a lack of observance of the law, and to limit the period of the re-entry ban right from the beginning to a maximum of five years. It is more appropriate to start by always prohibiting the re-entry and stay of removed foreign nationals for an unlimited period and to limit these consequences upon application, taking into account the circumstances of the individual case (cf. Section 11 subsection 1, first and second sentences, of the Residence Act). Otherwise, the specific and general

preventive effect that expulsion and removal are intended to achieve would be considerably diminished. As a result, the reference to a specified period in Article 3(g) is superfluous.

Moreover, there is no reason for a provision under paragraph 3 for the withdrawal of the re-entry ban. Within the context of the decision to set the period, the interests of the parties concerned can be sufficiently taken into account.

Removal (Article 10)

13. Paragraph 1 is superfluous, since it states what is self-evident, namely the obligation to respect fundamental rights when implementing removal measures, and simultaneously creates the impression that Member States would violate this standard and so must be specifically obliged to comply with it.

Form and judicial remedies (Articles 11 and 12)

14. These articles make clear the procedural delays to be expected from the proposed Directive: the superfluous return decisions and removal orders must be explained thoroughly in writing and translated if needed and, in addition, still enable legal remedies with suspensive effect until conclusion of the procedure, even in urgent proceedings.

The alternative provided for in Article 12(1) of the proposed Directive of an "effective judicial remedy before a court or tribunal", on the one hand, and the right to "seek review", on the other, does not make any sense from a German legal perspective. According to the German legal understanding, every judicial remedy before a court or tribunal also leads to a judicial review. This paragraph requires linguistic clarification, since both the French and English language versions of the Directive differ from one another and from the German version.

Article 12(2) of the proposed Directive is worded in a way that is misleading. In the second case, mere submission of the application to the court for suspension of the return decision or removal order should not already in itself lead to the ordering/restoration of suspensive effect. On the contrary, a court decision is required for this (cf. Section 80 subsection 5 of the Code of Administrative Procedure (Verwaltungsgerichtsordnung, 'VwGO')).

Regarding the right to legal aid laid down in Article 12(3), second sentence, of the proposed Directive, it is appropriate to clarify that the granting of legal aid can be made subject to whether the remedy is likely to succeed; in particular, abusive use of the courts must permit the exclusion of legal aid. The criteria should agree with the provisions of Council Directive 2003/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes (OJ L 26 of 31 January 2003).

These measures and options delaying return are not suitable for strengthening the credibility of the EU in return policy.

Temporary custody and conditions of temporary custody (Articles 14 and 15)

15. The possibility of temporary custody provided for in paragraph 14(1) must not be made subject to the condition that other measures such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents, the obligation to stay at a certain place or other measures to prevent risks are not sufficient. These measures are only analysis and decision criteria within the context of examining proportionality. Furthermore, the proposed Directive is too restrictive insofar as the necessary prerequisite for temporary custody is the risk of absconding, and, thus, other grounds can never justify ordering custody. These restrictions would decisively weaken the instrument of detention pending removal. Instead, the catalogue of reasons for detention pending removal contained in Section 62 subsection (2) of the Residence Act should also be embedded in European law.

    Article 14(2) and (4) of the proposed Directive should be changed to the effect that the ordering, confirmation and extension of temporary custody are done by means of a "judicial order" rather than "by judicial authorities".

    The monthly review provided for in Article 14(3) seems unreasonably frequent and will unnecessarily burden the courts. The preferable German rule limits the period of detention pending removal to six months, which can be extended only if additional grounds are raised, and grants the person held in custody a right to ask for review of the grounds for detention at any time.

    An express six-month time limit on detention pending removal (Article 14(4)) is too short given the known difficulties of return. The duration ultimately

follows from the proportionality principle. In practice, detention pending removal is a last resort to guarantee departure of the person required to leave the country. It is limited to a few days or weeks in the vast majority of cases. Insofar as these times are exceeded, the persons held in detention pending removal are themselves regularly accountable for this (for example, on account of false information about identity or citizenship). For these cases, Section 62 subsection (3) of the Residence Act, for example, provides for a detention duration of up to 18 months.

16. As a whole, Article 15 of the proposed Directive is misconceived, irrespective of the absence of Community power to impose rules. On the one hand, it regulates things that are self-evident such as respect for international and national law as well as respect for fundamental rights; on the other hand, the provision is imprecisely worded. In the present form, it leads to a considerable increase in the cost of executing deportation pending removal in Member States, without the promise of engendering an adequate European added value.

    Article 15(2) of the proposed Directive distinguishes between temporary custody facilities and prison accommodation, without specifying the difference. The permanent physical separation from other inmates seems excessive and cost intensive and should be replaced in favour of a provision according to which persons held in detention pending removal may not be accommodated in the same detention space as prisoners or persons awaiting trial. The shared use of activity facilities, prison yards or resident doctors, however, should be possible.

    The separation of unaccompanied minors from adults provided for in Article 15(3), second sentence, of the proposed Directive should also apply only to accommodation in the detention space.

    In Article 15(4) of the proposed Directive, visitation rights should be limited to "relevant international and non-governmental organisations". The wording in paragraphs 1 and 4 should match.

    Instead of the authorisation requirement in Article 15(4), second sentence, of the proposed Directive, it should be clarified that this provision does not give the organisations named any further legal right to visitation beyond those resulting from national or international agreements.

<u>Apprehension in other Member States (Article 16)</u>

17. The mutual recognition of return decisions among Member States enabled in the proposed Directive is basically sound. For effective actual implementation, however, sufficient exchange of information between Member States about the existence, contents and binding force of such return decisions is crucial (see also Recital 15).

Shortcomings of the proposed Directive

18. In contrast to the other efforts of the EU in combating terrorism, the proposed Directive contains no special provisions at all for return and removal of members and supporters of international terrorism (for example, removal order under Section 58a of the Residence Act, custody to secure deportation). In this area, however, the creation of less stringent conditions for removal is urgently required. Insofar as the Commission points out by way of explanation that the residence permits of foreign nationals constituting a threat to public policy or public security may be withdrawn, this is irrelevant, because the proposed Directive expressly does not address the reasons and procedures for ending legal residence. The reference to the fact that it may be opportune in individual cases not to expel a suspected terrorist merely states the obvious and is not an argument against special harmonised removal procedures.