COUNCIL OF THE EUROPEAN UNION

Brussels, 6 December 2006

15871/06

Interinstitutional Files: 2005/0167 (COD)

LIMITE

MIGR 167
CODEC 1411
COMIX 998

OUTCOME OF PROCEEDINGS

of :	Working Party on Migration and Expulsion/Mixed Committee (EU-Iceland/Norway/Switzerland)
on :	24 November 2006
No. prev. doc. :	14743/06 MIGR 158 CODEC 1221 COMIX 903
Subject:	**Proposal for a European Parliament and Council Directive on common standards and procedures in Member States for returning illegally staying third-country nationals**

1. At its meetings on 24 November 2006 the Working Party on Migration and Expulsion continued the examination of the Presidency compromise suggestions on Articles 1-10 of the proposal, covering in particular, Articles 4 to 6 of the compromise.

2. The results of the discussions are set out in the Annex to this Note. The changes in the text of the compromise suggestions vis-à-vis the original Commission proposal are underlined.

PRESIDENCY COMPROMISE SUGGESTIONS[1]

Chapter I
GENERAL PROVISIONS

Article 1
Subject matter[2]

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. [3]

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1 **DE, PT** and **SE** entered scrutiny reservations on the compromise suggestions as a whole. **PT** introduced a linguistic reservation on the whole text.

2 **HU** entered a scrutiny reservation on Article 1.
CZ suggested adding either a recital to the Preamble or a new wording to Article 1, whereby it would be clarified that national legislation and not this draft Directive would apply for removal sentences issued by a criminal Court to third-country nationals who have committed criminal offences (irrespective of their legal status concerning their stay in the Member State). This suggestion was supported by **BE, DK, ES**, **HU** (preferring a provision to this effect in Article 3 instead of a recital), **AT, PT, SE** (under a scrutiny reservation), **SI** and **SK.**
The wording tabled by **CZ** would read as follows:
"This Directive is without prejudice to the criminal proceedings taken against a third-country national in a Member State, if these proceedings have no link to the illegal stay or residence of the above person and the criminal procedure has been followed on grounds of violation of national criminal law. The outcome of this criminal procedure could be a sentence that includes also expulsion for a certain period from the territory of the Member State. In this case the Member State concerned will act in compliance with its national legislation".
The **Cion** underlined that the return procedure of all third-country nationals whose stay is illegal (notwithstanding the reason of illegality) in a Member State should be compatible with this draft Directive. **FR,** supporting the **Cion,** pointed out that it could not follow the suggestion of **CZ** because the (offender) third-country national would be expelled due to the fact that he/she would not fulfil any longer the criteria of legal residence (in accordance with the Court's sentence) and therefore, the draft Directive would apply.

3 **ES** stressed that in certain cases the third-country nationals illegally staying in its territory should not be returned, for humanitarian or other similar reasons, (instead, for example, a fine might be imposed to them). On these grounds, **ES** suggested adding a wording at the end of the Article whereby this flexibility to provide (without prejudice to the provisions of the Directive) for alternative, more favourable, measures in specific cases would be maintained. The suggested wording would read as follows:
"This Directive shall be applied without prejudice to other provisions laid down by national law that allow for applying alternative measures to the expulsion".
In relation to its request, **ES** entered a reservation to the current text of the **Pres.** compromise. The **Pres.** wondered if applying Article 6(4) of the draft Directive could cover the concerns of **ES.** In this context, **AT** recalled that Article 4(3) concerning the application of more favourable provisions could also be applied.

Article 2

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;[1]

(aa)[2] "presence on the territory of a Member State" means the physical presence in the territory of a Member State of a third-country national who has crossed an external border of a Member State as it is defined by Article 2 paragraph 2 of Regulation EC 562/2006 (Schengen Borders Code) or

(b) 'illegal stay' means the [3]presence on the territory of a Member State[4], of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of Regulation EC 562/2006 (Schengen Borders Code), or of other conditions for entry, stay or residence in that Member State[5];

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1 **IS** underlined that its citizens (as well as those from **CH** and **NO**) should not be considered as third-country nationals in a Schengen-related legal instrument. To this effect, **IS** suggested adding at the end of (a) the following wording: *"... and who is not a citizen of CH, IS or NO."* Alternatively, **IS** suggested taking inspiration from Article 2(6) of the Schengen Borders Code which excludes from its scope persons who enjoy the Community-related right of free movement (i.e. apart from Union citizens, third country nationals and family members who enjoy this right on the basis of agreements between the Community and the relevant third countries). The **Cion** felt that the issue needs further consideration.

2 **BE, DE, ES, FR, AT** and **NL** pointed out that this definition should be clarified. **FR** wondered if it concerns Member States which do not fully apply the Schengen Acquis as yet. **BE, ES, PL** and **PT** expressed their doubts on the added value of the definition, taking into account its limited relevance with the text of the Presidency compromise [only with Article 3(3)]. **BE** suggested adding a definition on the notion of *"transit zone"* for the purposes of this Directive.

3 **ES** and **PT** suggested adding before *"presence"* the word *"physical"* in which case the definition under (aa) would become redundant (see footnote above).

4 **NL** suggested adding a definition on the concept of *"territory of a Member State"*.

5 **LT** suggested deleting the wording: *"or of other conditions for entry, stay or residence in that Member State."*

(c)[1] 'return' means the process of going back to one's country of origin, transit or another third-country, whether voluntary or enforced[2];

(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;[3]

Clarifying recital to be added:

"The present Directive does not prevent Member States from adopting a decision on the ending of legal stay together with a return decision and/or a removal order within one administrative or judicial act as provided for in their national legislation".

(e) 'removal' means the execution of the obligation to return, namely the [4]physical transportation out of the country;

(f) 'removal order' means an administrative or judicial decision or act ordering the removal[5];

(g) "re-entry ban" means an administrative or judicial decision or act preventing re-entry into and stay in[6] the territory of the Member States for a specified period[7].

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1 In order to better illustrate the difference between the Member States (and Associated States) which fully apply the Schengen Acquis and those which do not, the **Cion** suggested creating two different indents in the provision i.e. one for the Schengen-related conditions of entry and the other referring to *"the other conditions of entry, stay or residence in a Member State"*.

2 **DE** wanting to clarify that this proposal does not refer to voluntary return per se, suggested amending point (c) as follows: *"return means the process of enforced going back to one's country of origin, transit or another third-country."* The **Cion** stressed that the proposal essentially addresses cases of enforced and voluntary *compliance* with an obligation to return, and recalled that in point (i) of the Article, where the notion of *"voluntary return"* is defined, this approach is endorsed. It also suggested clarifying point (c) by referring to *"voluntary compliance with an existing obligation to return"*. Aiming at clarifying point (c), **EE** suggested adding at the end of the current wording the word *"departure"*. In support of **DE** remarks, **NL** stressed that the scope of the draft Directive should be clearly delineated in Article 1 excluding any cases where the return is carried out voluntarily by the third-country national concerned.

3 **LT** entered a reservation to this point, suggesting merging it with point (i) of Article 2.

4 **LT** suggested modifying the wording of the definition as follows: *'removal' means the execution of the obligation to return, namely the compulsory physical transportation out of the country;*

5 **DE** and **AT** expressed their concerns about the two-step procedure (return decision/removal act) given as alternatives in this provision, **ES** requested a definition of each of these two steps.

6 **NL** expressed its preference to the original **Cion** proposal (i.e. to delete the wording "and stay in" for legal basis reasons). **DE** opposed this suggestion.

7 **DE,** supported by **EE** and **HU,** suggested deleting point (g), or, alternatively, deleting the last part of the definition, *i.e: "... for a specified period"*. The **Cion** underlined that even a lifelong re-entry ban is for a specified time (the lifetime of the person concerned). Besides that, the **Cion** considers that, maintaining it could help negotiations with the **EP**.
EE, FR, ES, LT and **PT** entered linguistic/substantial reservations on the term *"re-entry ban"* preferring the clearer – according to them – *"entry ban"*. The **Cion** pointed out that essentially the terms have the same scope and that the issue could be further examined for clearer drafting.

(h) "risk of absconding[1]" means the existence of reasons to believe, the assessment of which is made by national authorities in accordance with objective criteria laid down by national law, that a third-country national who is subject to return procedures will abscond[2].[3]

(i) "voluntary departure" means compliance[4] with the obligation to return[5] within the time-limit fixed for that purpose in the return decision[6].

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1 **DE** suggested adding *"and frustrating removal"*. **AT** suggested considering those third-country nationals who enter illegally the territory of a Member State to fall in the scope of this definition. The **Cion** underlined that this definition is important as being referred to in several provisions of the proposal.

2 **DE** suggested adding *"or frustrate the removal"*.

3 **LT** suggested deleting point (h). **DE, ES, FR, LV** and **AT** suggested deleting the wording *"... in accordance with objective criteria laid down by national law,..."*. The **Cion** pointed out that the *"objective criteria"* will be decided by the Member States' legislation.

4 **NL** suggested inserting after *"compliance"* the wording *"by the third-country national concerned"*.

5 **NL** suggested deleting the last part of the sentence: *"within the time-limit fixed for that purpose in the return decision"*.

6 **DE** reiterated its concerns about the inclusion of the voluntary returns in the scope of the draft Directive (see footnote 7 at page 3 about point c of Article 2).

Article 3

Scope

1. This Directive applies to third-country nationals staying illegally in the territory of a Member State.[1][2]

2[3]. Without prejudice to paragraph 1, member States may continue to apply the existing national law[4] regarding procedures on removal at the border[5].

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[1] Aiming at the same result as **CZ** and other **delegations** (see footnote 2 at page 2), **EE** supported by **DK, SK,** proposed the following alternative wording for paragraph 1:
"This Directive shall not apply to removals of third-country nationals, where these removals are sanctions imposed as an additional punishment, or part of a sanction, in accordance with the criminal law of the Member State concerned, irrespective of whether the third-country nationals are staying legally or illegally at the Member State." The **Cion** recalled its remarks under footnote 2 at page 2.
In the same spirit, **EE, ES, IT** and **PT** underlined that this Directive should not regulate the committal of a crime and the ensuing sentence for the return of the third-country national concerned (pointing out that the re-entry ban under criminal law would be more severe). These delegations also doubted the choice of the legal basis for the proposal in case where these cases remained under the scope of the proposal.
CZ wondered about the correct treatment of those third-country nationals who would be convicted for a crime and sentenced to return and who under Article 15(2) of the draft Directive should not be put in prison but in specialized facilities.
The **Cion** stressed that no harmonization of the national criminal laws is attempted through this proposal, which becomes relevant only once the third country national becomes illegal. In support to the **Cion**, **DE, FR** and **SI**, pointed out that all cases of illegal stay should be covered by the scope of this proposal.

[2] **NL** expressed its concerns in regard to the decision-making process and the visa overstayers, illegal entrants for whom this delegation does not wish to give a period up to four weeks for voluntary departure.

[3] **ES a**nd **NL** entered scrutiny reservations to the paragraph.

[4] **PL** suggested inserting the following wording: *"... or all their bilateral/multilateral international agreements..."*
In the same sense, **EE,** supported by **CZ, HU, AT** and **SK,** suggested excluding from the scope of the Directive the bilateral/multilateral readmission agreements with third countries, because as these delegations maintained, otherwise the application of these agreements (for deadlines, etc) would in certain cases be unfeasible.
ES HU and **AT,** suggested inserting a new paragraph 5 in the Article whereby bilateral/multilateral and Community readmission agreements with third countries would be explicitly excluded from the scope of the Directive.
DE and **PL** underlined that readmission agreements are international law instruments and should be dealt with separately from this draft Directive which would be part of national law of the Member States.
The **Cion** pointed out that the draft Directive is horizontally applicable to all third-country nationals and that it is not incompatible with the readmission agreements which have a different scope. Furthermore, nothing in the provisions of the draft Directive prevents Member States from keeping up with tight deadlines or other obligations emanating from the above readmission agreements.

[5] **AT** suggested the following wording as amendment to paragraph 2:
"Without prejudice to paragraph 1, Member States may continue to apply the existing national law regarding procedures on refusal at the border and on removal within 7 days after the illegal entry." **DE s**uggested clarifying the wording by adding *"refusal of entry"* This delegation also expressed its wish replace *"7 days"* with *"6 months"*. The **Cion,** supported by **BE,** expressed its concerns against the suggested *"standstill clause*" considering it as undermining the efforts for harmonisation and running contrary to the objectives of the proposal and suggested instead the following clarifying distinction of cases:
1) third-country nationals who have not yet crossed the external borders of the Member State (e.g. being in airport transit zones). This category would be anyhow excluded from the scope of the draft Directive under Article 3(3).
2) third-country nationals who have been rejected at the border. For this category, the provisions of the Schengen Borders Code shall be applied.
3) third-country nationals who have been apprehended in the territory of a Member State after having crossed illegally the external borders irrespective of the time passed from that crossing. For this category, the draft Directive shall fully apply.

3[1]. Member States shall ensure that illegally staying third-country nationals who are physically present in the territory of a Member State but who are excluded from the scope of this Directive because they have not crossed the external borders of that Member State as it is defined by Article 2 paragraph 2 of Regulation EC 562/2006 shall be treated at least in accordance with the standards set out in Articles 8, 10 and 15 of this Directive and Article 7 paragraph 1 of 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.

4[2]. This Directive shall not apply to third-country nationals

(a) who are family members of citizens of the Union who have exercised their right to free movement within the Community or

(b) who, under agreements between the Community and its Member States, on the one hand, and the countries of which they are nationals, on the other, enjoy rights of free movement equivalent to those of citizens of the Union

(c) who are family members of third-country nationals covered by point (b).

[3]

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[1] **CZ, DE, FR, AT, PL** and **SI** suggested deleting this paragraph, as they considered it likely to create inconsistency with Article 2. Following a query by the **Pres.,** it was confirmed that **no delegation** opposed the deletion of the paragraph. The **Cion** opposed the deletion, underlining that in practice Member States have already been providing some minimum safeguards, like emergency medical care to third-country nationals in transit zones). Moreover, the **Cion** recalled that the **EP** attaches particular importance to the contents of this provision. **DE** pointed out that certain minimum safeguards for persons in transit zones can be found in other existing legislative frameworks such as the ICAO rules.

[2] **EE** and **NO** entered reservations to the provision. The **Cion** suggested considering that the – already agreed – wording of Article 2(1)(5) of the Schengen Borders Code should be taken on board:
"5. persons enjoying the Community right of free movement means:
(a) nationals who are members of the family of a Union citizen exercising his or her right to free movement to whom Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [15] applies;
(b) third-country nationals and their family members, whatever their nationality, who, under agreements between the Community and its Member States, on the one hand, and those third countries, on the other hand, enjoy rights of free movement equivalent to those of Union citizens;"
NO considered positively the above suggestion.

[3] **ES** suggested (see also footnote 2 at page 2 and footnote 1 at page 5) adding a new paragraph (d) which would read as follows:
"who have been condemned according to provisions laid down by national law".

Article 4

More favourable provisions

1. This Directive shall be without prejudice to more favourable provisions of:
bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries;
bilateral or multilateral agreements between one or more Member States and one or more third countries[1].

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[2].

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.

[1] **Delegations** expressed their concens over the feasibility of applying the accelerated return procedures included in bilateral readmission agreements. For Article 4(1) see also the relevant comments under footnote 4 at page 6.

[2] The **Pres.** pointed out that the suggestion to convert this provision into a recital will be examined in the course of the consideration of the Preamble of this proposal.

Article 5[1]

Non-refoulment, Family relationships and best interest of the child

A Member State considering the issuing of decisions or acts in accordance with this Directive shall especially take account of:

1) the principle of non-refoulment[2];

2) family relationship[3], as concerns the nature and solidity of the third-country national's family relationship and the existence of family ties with his/her country of origin and the duration of his/her stay in the Member State;

3) the best interest of a child.

[1] **DE, EL, IT, LT** and **NL** suggested converting the whole Article 5 into a recital, due to difficulties in its implementation. The **Cion,** supported by **ES** and **PL,** stressed that the contents of Article 5 need to remain in the text.

[2] **FR** suggested stressing the importance of this principle (e.g. by reference to Article 3 ECHR, or alternatively by referring generally to the relevant international obligations of the Member States).

[3] **PL** suggested deleting the rest of the paragraph after *"family relationship"*.

Chapter II

TERMINATION OF ILLEGAL STAY

Article 6[1]

Return decision

1[2]. Without prejudice to the exceptions referred to in paragraphs 2, 4 and 5 of this Article, Member States shall[3] issue a return decision to any third-country national staying illegally on their territory[4].

2[5]. 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 this case Member States may refrain from issuing a return decision.

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1 **CH** (in conjunction with Article 7), **LT, NL, SE** (in conjunction with Article 7) and **SI** entered reservations on Article 6 as a whole. **CH** pointed out that any subsequent formal act following the issue of the return decision would be redundant.
LT suggested adding a new paragraph to this Article whereby the criteria (it suggested inserting cancellation of visa, revocation of residence permit, overstay/lack of temporary or permanent residence permit of the third-country national, or alternatively it suggested referring to the national legislation) on which the return of a third-country national may be required would be set out. (This suggestion applies to Article 7 as well).
PL, supported by **EL,** suggested adding a new paragraph to this Article whereby it would be provided that if a third-country national (whose return can be effected subject to a bilateral/multilateral readmission agreement) is apprehended directly after the illegal crossing of a Member State's borders, no return decision would be required by the Member State in question.

2 **DE** pointed out that if a Member State's legislation provides specifically for the obligation to return, no return decision as such would be necessary. The **Cion** underlined that there is always the need to state in written (even in a pre-printed form) the illegality of entrance and the obligation to leave. **NL** recalled that the definition of "return decision" in Article 2 does not require any written form.

3 **EL, ES, MT** and **PT** entered reservations suggesting replacing *"shall"* with *"may"*.

4 **BE** suggested adding at the end of the sentence: *"... if the Member States become aware of their illegal stay"*. In this sense, **PT** suggested amending the sentence as: *"...to any third-county national detected staying illegally on their territory."*

5 **EL**, entered a reservation to this paragraph and wondered if Member States have to conclude bilateral agreements between themselves for the implementation of this provision (as it was the case under the Schengen Convention).
The **Cion** clarified that this provision refers also to Member States which have not fully implemented the Schengen Acquis.

3. The return decision shall provide for an appropriate period for voluntary departure of up to four weeks[1], unless there are reasons to believe that the person concerned might abscond[2] during such a period or if the person concerned poses a risk to public security, public order or national security.[3]

Member States may extend the period for voluntary departure for an appropriate period, taking into account the specific circumstances of the individual case.

Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of that period.

4[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 [5]be issued.

5. If a third-country national staying illegally in the territory of the Member State is the subject of a pending procedure for renewing his residence permit or any other permit offering the right to stay, that Member State may[6] refrain from issuing a return decision, until the pending procedure is finished.

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1 **FR** suggested excluding the illegal entrants from the third-country nationals who may be granted the four-week period.
ES suggested replacing the *"four-week"* with the term *"appropriate"*.

2 The **Cion** clarified that, in principle, the authorities which issue the return decision are to decide on the risk of absconding.

3 **LT** suggested referring to public security, public order and national security e.g. along the lines of recital 8 of Council Directive 2003/109/EC concerning the long-term residence status.
The **Pres** suggested adding at the end of the sentence: *"... or in those cases where readmission agreements could be applied"* **NL** entered a scrutiny reservation to this suggestion. **HU** and **PL** suggested exempting the readmission agreements from the scope of this provision.

4 **LT** suggested deleting paragraph 4.

5 **HU** suggested replacing *"shall"* with *"may"*.

6 **BE** suggested replacing *"may"* with *"shall"*.

Article 7

Removal order

(1) Member States shall issue a removal order concerning a third-country national who is subject of a return decision, if no period for voluntary departure has been granted in accordance with Article 6(3) or if the obligation to return has not been complied with within this period.

(2) A Member State may issue, together with the return decision, a removal order concerning a third-country national who is subject of a return decision. If the Member State has granted a period of voluntary departure in accordance with Article 6 (3) the removal order can be enforced only after the period has ended.

(3) A Member State which does not follow the procedure specified in paragraph 2 above shall issue a removal order as a separate act or decision.

(4) The removal order shall as far as possible specify the delay within which the removal will be enforced and the country of return.

Article 8

Postponement of removal

(The previous Article 8(1) has been moved to Article 6(3))

1. Member States shall take into account in particular the following circumstances, for as long as those circumstances prevail, with a view to postponing the execution of a removal order:

   - inability of the third-country national to travel or to be transported to the country of return due to his or her physical state or mental capacity;

   - technical reasons, such as lack of transport capacity,[ ]making it impossible in practice to enforce the removal in a humane manner and with full respect for the third-country national's fundamental rights and dignity;

   - lack of assurance that unaccompanied minors can be handed over at the point of departure or upon arrival to a family member, an equivalent representative, a guardian of the minor or a competent official of the country of return, following an assessment of the conditions to which the minor will be returned.

2. If execution of a removal order is postponed as provided for in paragraph 1, the obligations foreseen in Article 6(3) 3rd indent may be imposed on the third-country national concerned.

Article 9

Re-entry ban

1. Removal orders shall include a re-entry ban.

Clarifying recital to be added: In cases where a Member State issued the removal order in a single act together with the return decision, and the third-country national concerned complied with the obligation to return within the given period for voluntary departure, the re-entry ban automatically included in the removal order does not become applicable. [Explanation: In these case the removal order itself never became enforceable.]

2. (a) Return decisions shall include a re-entry ban if, based on an individual assessment of the case, there are concrete reasons to assume that the third-country national concerned may try to re-enter the EU illegally. This situation may arise in particular in cases where the third-country national concerned:

- has entered the Member State during a re-entry ban;
- has illegally entered the territory of a Member State;
- has absconded during a pending return procedure; or
- has already been subject of more than one return decision or removal order.

(b) Return decisions shall also include a re-entry ban if, based on an individual assessment of the case, a third-country national represents a threat to public order or public security or to national security. This situation may arise in particular in the case of:

- a third-country national who has been convicted of an offence by a Member State carrying a penalty involving deprivation of liberty of at least one year;
- a third-country national in respect of whom there are serious grounds for believing that he has committed serious criminal offences or in respect of whom there are clear indications of an intention to commit such offences in the territory of a Member State.

(c) In other cases, return decisions may include a re-entry ban.

3. The length of the re-entry ban shall be determined with due regard to all relevant circumstances of the individual case and should not exceed five years. It may exceed five years if the third-country national represents a serious threat to public order, public security or to national security.

4. The re-entry ban may be withdrawn or suspended in exceptional individual cases for compassionate, humanitarian or other reasons.

5. 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 a re-entry ban issued by another Member State, it shall first consult the Member State issuing the re-entry ban and shall take account of its interests in accordance with Article 25 of the Convention Implementing the Schengen Agreement.

6. Paragraphs 1 to 5 apply without prejudice to the right to seek asylum in one of the Member States.

Article 10

Removal

1. Where Member States use 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 in accordance with fundamental rights and with due respect for the dignity of the third-country national concerned as provided for in national legislation.

2. 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.