



COMMISSION OF THE EUROPEAN COMMUNITIES

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Proposal for a

COUNCIL DECISION

setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals

(presented by the Commission)

EXPLANATORY MEMORANDUM

1. INTRODUCTION

The Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals was adopted on 28 May 2001¹ to make possible the recognition of an expulsion decision issued by a competent authority of another Member State. It stressed the need to ensure greater effectiveness in enforcing expulsion decisions and better co-operation between Member States, including the mutual recognition of expulsion decisions.

The application of Council Directive 2001/40/EC may result in financial imbalances where expulsion decisions cannot be effected at the expense of the third country national concerned. Member States shall, therefore, compensate each other for any financial imbalances, which may result from such mutual recognition.

To that end Article 7 of the Directive requests the Council to adopt appropriate criteria and practical arrangements. This Council Decision will introduce the required mechanism for the bilateral compensation of financial imbalances due to the application of Council Directive 2001/40/EC.

In addition, Article 7 of the Directive requests that these criteria and practical arrangements shall also apply to the implementation of Article 24 of the Schengen Convention. Due to the fact, that this complex issue could significantly delay the full application of Council Directive 2001/40/EC to which Member States have to comply with on 2 December 2002 at the latest, this Council Decision will not introduce a multilateral burden sharing mechanism as requested in Article 24 of the Schengen Convention on the financial imbalances which may result from the obligation as set down in Article 23 of the Convention. Nevertheless, the criteria and practical arrangements on the calculation of the individual costs of a removal operation per returnee as defined in this Decision should be the basis for the similar calculation of the enforcing State in the framework of a future instrument for Article 24 of the Convention.

2. OBJECTIVE

The purpose of this Decision is to introduce appropriate criteria and practical arrangements for the compensation of any financial imbalances which may result from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals of 28 May 2001.

The core principle of this Decision is that the issuing Member State should reimburse the enforcing Member State on the basis of the actual costs. Preliminary discussions in the Council highlighted the need for a set of guiding principles both in relation to expenditure during the enforcement as well as in relation to the actual procedure of reimbursement.

Reimbursements would be necessary in relation to three types of costs incurred: transport costs, administrative costs and accommodation costs. It also became clear that a ceiling would need to be established for each category to ensure that any costs are at all times kept reasonable, comparable and balanced.

¹ OJ L 149 of 2 June 2001, p. 35.

3. SUBSIDIARITY

In accordance with the principle of subsidiarity, the objective of the proposed action, namely financial burden-sharing for co-operation between Member States on the expulsion of third country nationals, cannot be sufficiently achieved by the Member States and can therefore, by reason of the effects of the envisaged action, be better achieved by the Community. This Decision does not go beyond what is necessary to achieve that objective.

4. COMMENTARY ON ARTICLES

Article 1

This article defines the purpose of this decision.

Article 2

This article requires the issuing Member State to compensate the enforcing Member State for any financial imbalances which may result from the application of Directive 2001/40/EC and defines the concept of recoverable actual costs.

Recoverable actual costs under this Decision will include transport costs for the returnee and up to two escorts, administrative costs such as fees for issuing visas and return travel documents, detention costs for up to three months and accommodation costs during the enforcement either in a transit area of a third country or in the country of origin. In principle, these elements represent an exhaustive list of recoverable costs in order to define a clear ceiling for reimbursement in order to keep costs reasonable, comparable and balanced.

However, paragraph 4 allows that Member States agree on a bilateral basis to reimburse costs exceeding the minimum costs or to reimburse other additional costs. This clause permits that e.g. charter flights, which exceed the defined ceiling, can be subject for reimbursement, when the Member States concerned agree.

Article 3

This article describes the procedure that must be followed by Member States when submitting and processing claims for reimbursement. It establishes a transparent procedure for legal certainty and clarity.

It limits reimbursement to enforcement measures carried out within three years of an expulsion decision being issued in order to define the time of the responsibility of the issuing Member State. To ensure that any reimbursement requests are made promptly, this Decision allows for the rejection of any reimbursement requests submitted more than one year after the enforcement.

The requests are channelled through national contact points in order to identify the competent authority or responsible body for payment. The national contact points ensure the orderly delivery of the request and inform the enforcing authority about the responsible body for payment.

Notifications of payment and motivations for refusals shall also be forwarded to the national contact points in order to enable national contact points to comply with the reporting obligations as set out in Article 4.

Article 4

This article obliges the national contact points of Member States to register and report annually to the Commission the total number of forced returns, the number of enforcement measures made under the articles of Directive 2001/40/EC and the number of expulsion decisions which could be recognised and enforced by other Member States.

Article 5

This article limits the reimbursement to expulsion decisions, which have been issued after the entry into force of this Decision. Moreover, it describes how and when this Decision will enter into force.

Article 6

This article defines who is addressed by this decision.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63 (3) thereof,

Having regard to the proposal from the Commission²,

Having regard to the opinion of the European Parliament³,

Whereas:

- (1) The Tampere European Council on 15 and 16 October 1999 reaffirmed its resolve to create an area of freedom, security and justice. For that purpose, a common European policy on asylum and migration should aim both at fair treatment of third country nationals and better management of migration flows. These objectives were confirmed by the Laeken European Council on 14 and 15 December 2001 and the Seville European Council on 21 and 22 June 2002. The need to fight against illegal immigration, including taking appropriate measures to promote the return of illegal residents, was particularly emphasised.
- (2) The application of Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals may result in financial imbalances where expulsion decisions cannot be effected at the expense of the third country national concerned. Appropriate criteria and practical arrangements for the bilateral compensation of Member States should therefore be adopted.
- (3) In accordance with the principle of subsidiarity, the objective of the proposed action, namely financial burden-sharing for co-operation between Member States on expulsion of third country nationals in case of mutual recognition of expulsion decisions, cannot be sufficiently achieved by the Member States and can therefore, by reason of the effects of the envisaged action, be better achieved by the Community. This Decision does not go beyond what is necessary to achieve that objective.
- (4) 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

² OJ C , , p. .

³ OJ C , , p. .

Community, Denmark is not participating in the adoption of this Decision, and is therefore not bound by it or subject to its application. Given that this Decision aims to build upon the Schengen acquis under the provisions of Title IV of the Treaty establishing the European Community, in accordance with Article 5 of the above-mentioned Protocol, Denmark will decide within a period of six months after the Council has adopted this Decision whether it will apply this Decision.

- (5) As regards the Republic of Iceland and the Kingdom of Norway, this Decision constitutes a development of the Schengen acquis within the meaning of the agreement concluded on 18 May 1999 between the Council of the European Union and those two States. As a result of the procedures laid down in the agreement, the rights and obligations arising from this Decision should also apply to those two States and in relations between those two States and the Member States of the European Community to which this Decision is addressed.
- (6) This Decision respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union as general principles of Community law. In particular this Decision seeks to ensure full respect for human dignity and the protection in the event of expulsion and removal, promoting the application of Articles 1, 18 and 19 of the Charter.

HAS ADOPTED THIS DECISION:

Article 1

This Decision sets out appropriate criteria and practical arrangements for the compensation of any financial imbalances which may result from the application of Council Directive 2001/40/EC where expulsion cannot be effected at the expense of the national(s) of the third country concerned.

Article 2

- (1) The issuing Member State shall compensate the enforcing Member State for any financial imbalances, which may result from the application of the above-mentioned Directive where expulsion cannot be effected at the expense of the national(s) of the third country concerned.
- (2) The reimbursement shall take place at the request of the enforcing Member State on the basis of actual costs.
- (3) The following shall be regarded as minimum recoverable costs in respect of the returnee and up to two escorts per returnee:
 - Transport costs; this includes the actual costs for flight tickets up to the amount of the official IATA tariff for the respective flight at the time of enforcement. The actual costs for land transport by car or train can be claimed on the basis of a second class train ticket for the respective distance at the time of enforcement.
 - Administrative costs; this includes the actual costs for visa fees and the fees for the issuing of return travel documents (*laissez-passer*).

- Accommodation costs; this includes the actual costs for the returnee's stay in a detention facility for a duration of no more than three months. During the enforcement, accommodation costs for the returnee and the escorts are covered in a transit area of a third country and for the unavoidable short stay of the escorts in the country of origin.
- (4) Paragraph 3 shall not prevent Member States from agreeing on a bilateral basis to reimburse costs exceeding the minimum costs or to reimburse other additional costs.

Article 3

- (1) Reimbursement requests shall be made in writing and shall be accompanied by documentary proof of the recoverable costs
- (2) Reimbursement cannot be claimed for the enforcement of expulsion decisions, issued more than three years prior to their enforcement.
- (3) Requests for reimbursement submitted more than one year after the enforcement has taken place may be rejected.
- (4) National contact points shall be established for the implementation of this Decision. The national contact points are listed in the annex of this Decision.
- (5) The request for reimbursement shall be sent by the competent authority of the enforcing Member State via the national contact point in that Member State. The national contact point in the enforcing Member State shall send the request to the national contact point of the issuing Member State who shall forward the request to the competent authority of that Member State. The national contact point of the issuing Member State shall inform the national contact point of the enforcing Member State as to the responsible authority for reimbursement.
- (6) Payments shall be made to the competent authority of the enforcing Member State within three months of the receipt of the request by the national contact point of the issuing Member State. Member States may establish bilateral arrangements as to modes of payment.
- (7) A refusal to reimburse shall be made in writing, stating reasons for the refusal, and shall be sent to the competent authority of the enforcing Member State within three months of the receipt of the request.
- (8) The national contact points of the enforcing Member State and of the issuing Member State shall be informed of payments and of refusals to reimburse.

Article 4

Each national contact point shall submit an annual report to the Commission specifying the following:

- a) the total number of forced returns made by the relevant Member State;
- b) the total number of enforcement measures taken under Directive 2001/40/EC;

- c) the total number of refusals to reimburse together with the reasons for such refusals;
- d) the total number of expulsion decisions taken by the competent administrative authority of the relevant Member State, which could be recognised and enforced by other Member States.

The annual report shall also include statements on the implementation of this Decision and recommendations for improvements of the criteria and practical arrangements of this Decision.

Article 5

- (1) Requests for reimbursement can only be made for expulsion decisions, which are issued after the entry into force of this Decision.
- (2) This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Communities*.

Article 6

This Decision is addressed to the Member States.

Done at Brussels,

For the Council
The President

ANNEX

List of national contact points

(to be completed)