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From: General Secretariat of the Council

On: 20 September 2016

To: Delegations

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Subject: Council Implementing Decision setting out a Recommendation on addressing the deficiencies identified in the 2015 evaluation on the application of the Schengen acquis in the field of return by Germany

Delegations will find in the annex the Council Implementing Decision setting out a Recommendation on addressing the deficiencies identified in the 2015 evaluation on the application of the Schengen acquis in the field of return by Germany, adopted by the Council at its 3484th meeting held on 20 September 2016.

In line with Article 15(3) of Council Regulation (EU) No 1053/2013 of 7 October 2013, this Recommendation will be forwarded to the European Parliament and national Parliaments.

Council Implementing Decision setting out a

RECOMMENDATION

on addressing the deficiencies identified in the 2015 evaluation on the application of the Schengen acquis in the field of return by Germany

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen¹, and in particular Article 15 thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The purpose of this decision setting out a recommendation is to recommend to Germany remedial actions to address deficiencies identified during the Schengen evaluation in the field of return carried out in 2015. Following the evaluation, a report covering the findings and assessments, listing best practices and deficiencies identified during the evaluation was adopted by Commission Implementing Decision (C(2016) 5097).
- (2) The timely assistance provided to unaccompanied minors by the youth welfare authorities and the information provided to detainees about the exact date of removal can be seen as examples of good practice.

¹ OJ L 295, 6.11.2013, p. 27.

- (3) To develop an effective strategy involving the Federal Police and the Länder police forces to apprehend and detect illegally staying third-country nationals, while taking into consideration, for example, the 2012 Fundamental Rights Agency recommendations on apprehension of migrants in an irregular situation, can be seen as a preliminary condition for an effective return policy.
- (4) In light of the importance to comply with the Schengen *acquis*, in particular the return *acquis*, priority should be given to implementing recommendations related to criminalisation of illegal stay, issuance of entry bans, definition of return, *ex officio* review of detention decisions, common guidelines on security provisions for joint return operations and effective forced-return monitoring system.
- (5) This Recommendation should be transmitted to the European Parliament and to the parliaments of the Member States. Within three months of its adoption, Germany shall, pursuant to Article 16 of Regulation (EU) No 1053/2013, establish an action plan to remedy the deficiencies identified in the evaluation report and provide this to the Commission and the Council,

HEREBY RECOMMENDS

That the Federal Republic of Germany should:

1. take all necessary measures, according to Article 8(1) of Directive 2008/115/EC², to enforce return decisions, in an effective and proportionate manner;
2. provide reliable data and statistics in the field of return, in a manner that facilitates an adequate assessment of the effective implementation of the return *acquis* in Germany;

² Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008, p. 98.

3. amend Section 95 of the Residence Act, setting the penal provisions for illegal entry and stay in Germany, in line with the jurisprudence of the Court of Justice of the European Union (*El Dridi, C-61/11*), in order not to hamper one of the main objectives of the Directive 2008/115/EC, notably the swift return of third-country nationals to the country of origin or transit ³;
4. issue return decisions systematically as soon as it has been determined that a third-country national is staying illegally within German territory, in line with Article 6(1) of Directive 2008/115/EC;
5. amend Section 11(1) of the Residence Act to allow the issuing of entry bans to third-country nationals who leave the country after the expiry of a period of voluntary return; also issue, as a rule, an entry ban, in accordance with Article 11(1)(b) of Directive 2008/115/EC, in cases of returnees who did not comply with an obligation to return within the period of voluntary return at the moment of departure;
6. amend the Residence Act in order to comply fully with the definition of return provided by Article 3(3) of Directive 2008/115/EC, and bring the content of the return decisions into line with this definition, so as to prevent third-country nationals from being forcibly removed to third countries that are not the countries of origin or transit, or to a third country where they could be admitted, against their will ⁴;
7. appoint a guardian to unaccompanied minors in all cases where the parents are not physically present and, at the same time, cannot ensure the protection of the best interests of the child and adequate legal representation, taking due account of the fundamental rights of parents to represent their children as well as the duty of the state to protect minors, as enshrined in the Basic Law of the Federal Republic of Germany;

³ The transposition of the relevant article of Directive 2008/115/EC into German legislation is the object of a pending infringement procedure (DE 2014/2192). The present Council Decision is without prejudice to any ruling of the European Court of Justice in the mentioned infringement procedure.

⁴ See footnote 3.

8. consider setting up a procedure allowing for the possibility to issue a return decision and to impose an entry ban in cases where illegal stay is discovered during an exit check, following an individual assessment and where such measures are duly justified;
9. amend national legislation to ensure that detention decisions are reviewed *ex officio* at reasonable intervals so as to verify whether the conditions for detention still exist ⁵;
10. take specific measures to ensure that unaccompanied minors held in pre-removal detention are strictly separated from adults and in an environment appropriate for their age;
11. take action to ensure that all detention facilities are suitable for the detention of irregular migrants in all detention centres; consider shortening the period during which detainees are locked in their rooms in detention centres (for instance, from 7 pm to 7 am in the detention centre at Muhldorf am Inn), and consider harmonising the regimes of all detention centres to ensure an adequate and uniform level of protection of detainees' rights, respecting the detainees' right to privacy and the specific nature of their detention;
12. amend the Residence Act to ensure that the relevant and competent national, international and non-governmental organisations and bodies are able to visit detention facilities, regardless of the request of detainees;
13. transpose into national legislation the reference to the Common guidelines on security provisions for joint removals by air annexed to Decision 2004/573/EC as provided for in Article 8(5) of Directive 2008/115/EC, in order to ensure that this applies to any forced removal by air conducted by German police forces;
14. consider setting up an emergency mechanism between the relevant authorities (police, Foreigners Offices, Federal Office for Migration and Refugees (BAMF)) enabling the swift verification of legitimacy and response to last-minute asylum claims, in full respect of the returnees' rights;

⁵ See footnote 3.

15. set up an effective monitoring system carried out by a third party that actively observes the execution of forced return, in compliance with Article 8(6) of Directive 2008/115/EC; in order to achieve this, German authorities enjoy a wide margin of discretion, concerning the entity in charge, the scope and the frequency of the monitoring ⁶.

Done at Brussels,

*For the Council
The President*

⁶ See footnote 3.