Guide to Selected EU Legal and Policy Instruments on Migration

(Update 2008)

This is an extract of the publication that was produced in the framework of the European Commission funded project for the ”Establishment of EU compatible legal, regulatory and institutional frameworks in the fields of Asylum, Migration and Visa matters” (CARDS AMV). The project was managed by the Swedish Migration Board, which in turn subcontracted the Migration Module to the International Organization for Migration (IOM) in Vienna, Austria. The publication has partly been updated by its original author in March 2007 for the project Technical Cooperation Turkey, implemented by the IOM mission in Ankara.

Publisher: International Organization for Migration
Persons involved:
Pier Rossi-Longhi, IOM Vienna, Migration Module Coordinator
Angela Sanchez Cerdá, IOM Vienna

IOM is committed to the principle that humane and orderly migration benefits migrants and society. As an intergovernmental body, IOM acts with its partners in the international community to: assist in meeting the operational challenges of migration, advance understanding of migration issues, encourage social and economic development through migration, and uphold the human dignity and well-being of migrants.

International Organization for Migration
Nibelungengasse 13/4
1010 Vienna
Austria
Tel: +43.1.585 33 22
Fax: +43.1.585 33 22 30
Email: iomvienna@iom.int
Internet: http://www.iomvienna.at

ISBN 978 92 9068 268 4

INDEX

Introduction

One of the objectives of the European Union is to develop and maintain itself as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime[1].

Immigration policy became a full Community responsibility with the entry into force of the Amsterdam Treaty on 1 May 1999. Article 63(3) of the Treaty establishing the European Community now provides that the Council, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt measures on immigration policy within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion, and
(b) illegal immigration and illegal residence, including repatriation of illegal residents.

Furthermore, Article 63(4) requires the Council to adopt measures defining rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

This compilation summarises the most relevant EU acquis documents relating to migration. Where a binding legal framework has not yet been developed, descriptions of applicable EU policies and developments in this field are referenced. In order to ensure a harmonised and coherent approach to migration management and border control, appropriate, non-binding recommendations and resolutions as well as policy documents and proposed legislation should be taken into account during the development of immigration legislation and practice.

To clarify the hierarchy of Council documents:

Regulations: are directly applicable and binding in all EU Member States without the need for any national implementing legislation.

Directives: bind Member States as to the objectives to be achieved within a certain time limit while leaving national authorities the choice of form and means to be used. Directives have to be implemented in national legislation in accordance with the procedures of the individual Member State.

Decisions: are binding in all their aspects for those to whom they are addressed. Decisions do not require national implementing legislation.

Framework Decisions: are binding on the Member States as to the result to be achieved but leave the choice of form and methods to the national authorities.

Recommendations and Opinions: are not binding[2] but provide input into the policies of Member States.

Conclusions and Resolutions: determine EU policy but are not binding.

The purpose of this compilation is to provide an overview of the relevant legislation and policy developments in the area of entry and admission. It is intended to serve as a useful tool, in particular for policy makers and legislators, in the area of migration.

The EU acquis concerning the short-term entry and admission and departure of third-country nationals[3] is determined to a large extent by the Schengen acquis, which was incorporated into the European Union framework by a protocol attached to the Treaty of Amsterdam. The Schengen area is

[1] Article 2 of the Treaty on European Union.
[2] Source: Article 249 EC as amended.
[3] Third-country nationals in this context are to be understood as persons who are not a citizen of the European Union within the meaning of Article 17(1) of the Treaty establishing the European Union.

now within the legal and institutional framework of the EU. In order to make this integration possible, the Council of the European Union took a number of decisions and, as set out in the Treaty of Amsterdam, the Council took the place of the Executive Committee created under the Schengen agreement. One of the Council's most important tasks in incorporating the Schengen area was to choose from among the provisions and measures taken by the signatory states those which formed a genuine *acquis*, i.e. a body of law which could serve as a basis for further cooperation. A list of the elements which make up the *acquis*, setting out the corresponding legal basis for each in the treaties, was adopted on 20 May 1999.[4] In its new multi-annual 'Hague Programme; strengthening freedom, security and justice in the European Union'; the Council acknowledges that legal migration will play an important role in enhancing the knowledge-based economy in Europe and in advancing economic development. According to the Council, *"it could also play a role in partnerships with third countries, notably in cases of temporary labour migration"*.[5]

Building on the existing EU policy framework, the **Policy Plan on Legal Migration**[6] now defines a **road-map for the remaining period of the Hague Programme** (2006-2009) and lists the **actions and legislative initiatives** that the Commission intends to take to pursue the development of a coherent EU legal immigration policy.

[4] OJ L176/1, 10.7.1999 and OJ L176/17, 10.7.1999.
[5] Council Document No 13302/1/04, 15.10.2004.
[6] Communication from the Commission, Brussels, 21.12.2005, COM(2005) 669 final.

A. Entry & Admission

I. General Entry Conditions

I.1. Convention Implementing the Schengen Agreement of 14 June 1985[7]

Article 5 of the Schengen Convention provides that, **for stays not exceeding three months**, third-country nationals fulfilling the following conditions may be granted entry into the territory of the Contracting Parties:

(a) possession of a **valid document or documents**, as defined by the Executive Committee, authorising the person to cross the border,
(b) possession of a **valid visa** if required, and
(c) production, if necessary, of **documents justifying the purpose and conditions of the intended stay** and **evidence of sufficient means of subsistence**, both for the period of intended stay and for the return to the person's country of origin or transit to a third State into he or she is certain of being admitted, or evidence that the person is in a position to acquire such means lawfully.

Excluded are:

(d) persons for whom an **alert** has been issued **for the purpose of refusing entry** and
(e) persons who are considered to be a **threat to public policy**, **national security** or the **international relations** of any of the Contracting Parties.

Furthermore, third-country nationals who hold residence permits or re-entry visas issued by one of the Contracting Parties or, where required, both documents, shall be authorised entry for transit purposes, unless their names are on the national list of alerts of the Contracting Party whose external borders they are seeking to cross.

I.2. Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)[8]

This Regulation **amends Regulation (EC) No 562/2006** of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) as regards the implementing powers conferred on the Commission. It **repeals the Common Manual** and all its annexes[9] and applies to any person crossing the internal or external borders of an EU Member State. On entry and exit, third-country nationals are subject to thorough checks which comprise a verification of the conditions governing entry and, if applicable, of documents authorising residence and the pursuit of a professional activity.

[7] OJ L239/19, 22.9.2000.
[8] O J L 105/1 of 14.4.2006.
[9] With effect from 13 October 2006, the following were repealed: **Articles 2 to 8** of the **Convention implementing the Schengen Agreement** of 14 June 1985; the **Common Manual**, including its annexes, the following **Decisions of the Schengen Executive Committee:** - 26 April 1994 (SCH/Com-ex (94) 1, rev 2) - 22 December 1994 (SCH/Com-ex (94)17, rev. 4) - 20 December 1995 (SCH/Com-ex (95) 20, rev. 2); **Annex 7** to the **Common Consular Instructions; Council Regulation (EC) No 790/2001 of 24 April 2001** reserving to the Council implementing powers with regard to certain **detailed provisions and practical procedures for carrying out border checks and surveillance**; **Council Decision 2004/581/EC of 29 April 2004** determining the **minimum indications to be used on signs at external border crossing points; Council Decision 2004/574/EC of 29 April 2004** amending the Common Manual; and **Council Regulation (EC) No 2133/2004 of 13 December 2004** on the requirement for the competent authorities of the Member States to **stamp systematically the travel documents of third country nationals** when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen agreement and the Common Manual to this end.

This Regulation shall **apply to any person crossing the internal or external borders** of Member States, **without prejudice to**:

(a) the rights of persons enjoying the Community right of free movement;

(b) **the rights of refugees and persons requesting international protection**, in particular as regards non-refoulement (**article 3(b)**).

Article 4(1) of Regulation (EC) No 562/2006 as amended by Regulation (EC) No 296/2008 provides that **external borders may be crossed only at border crossing points** and **during the fixed opening hours**. The opening hours shall be clearly indicated at border crossing points which are not open 24 hours a day.

However, checks at external borders may be relaxed as a result of exceptional circumstances such as unforeseeable events that might create a build-up of traffic, so that excessive waiting times at the crossing-point may be avoided (**article 8**).

Article 5 of Regulation rules the entry **conditions for third-country nationals for stays not exceeding three months per six-month period**. Third-country nationals must:

- be in possession of a **valid travel document** or documents authorising them to cross the border (article 5(1)(a));
- be in possession of a **valid visa**, if required[10] (article 5(1)(b));
- justify the **purpose and conditions of their intended stay** (article 5(1)(c));
- have **sufficient means of subsistence**, both for the duration of their intended stay and for the return to their country of origin or the transit to a third country into which they are certain to be admitted, or be in a position to acquire such means lawfully (article 5(1)(c));
- not be a person for whom an alert has been issued in the **Schengen Information System (SIS)** for the purposes of refusing entry (article 5(1)(d));
- not be considered to be a **threat to public policy**, **internal security**, **public health**[11] or the **international relations** of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds (article 5(1)(e)).

Article 5(2) provides that a non-exhaustive **list of supporting documents which the border guard may request** from the third-country national in order to verify the fulfilment of the above conditions is included in *Annex I of the Regulation*:

For **business trips** these may include:

- an invitation from a firm or an authority to attend meetings, conferences or events connected with trade, industry or work
- other documents which show the existence of trade relations or relations for work purposes
- entry tickets for fairs and congresses if attending one.

For **journeys undertaken for the purposes of study or other types of training** these may include:

- a certificate of enrolment at a teaching institute for the purposes of attending vocational or theoretical courses in the framework of basic and further training
- student cards or certificates for the courses attended.

For **journeys undertaken for the purposes of tourism or for private reasons** these may include:

- supporting documents as regards lodging (e.g. an invitation from the host if staying with one, a supporting document from the establishment providing lodging or any other appropriate document indicating the accommodation envisaged)
- supporting documents as regards the itinerary (e.g. confirmation of the booking of an organised trip or any other appropriate document indicating the envisaged travel plans)
- supporting documents as regards return (e.g. a return or round-trip ticket).

[10] Council Regulation (EC) No 539/2001 of 15 March 2001, OJ L 81/1 of 21.3.2001.

[11] 'Threat to public health' means any disease with epidemic potential as defined by the International Health Regulations of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the Member States.

For **journeys undertaken for political, scientific, cultural, sports or religious events or other reasons** these may include:

- invitations, entry tickets, enrolments or programmes stating wherever possible the name of the host organisation and the length of stay or
- any other appropriate document indicating the purpose of the visit.

Article 5(3) states that **means of subsistence** shall be assessed in accordance with the duration and the purpose of the stay and by reference to average prices in the Member State(s) concerned for board and lodging in budget accommodation, multiplied by the number of days stayed. The assessment of sufficient means of subsistence may be based on the cash, travellers' cheques and credit cards in the third-country national's possession. Declarations of sponsorship, where such declarations are provided for by national law and letters of guarantee from hosts, as defined by national law, where the third-country national is staying with a host, may also constitute evidence of sufficient means of subsistence.

However, **article 5(4)(c)** establishes that third-country nationals who do not fulfil one or more of the entry conditions set out above may be authorised by a Member State to enter its territory on **humanitarian grounds**, on **grounds of national interest** or because of **international obligations**.

I. 3 Policy Plan on Legal Migration[12]

Unlike the 2001 proposal for a directive on economic migration – which intended to regulate the entry and residence conditions for all third-country nationals exercising paid and self-employed activities – the Policy Plan only addresses the **conditions and the procedures of admission for few selected categories of economic immigrants**. In addition, it intends to establish which **rights a third-country national in employment shall enjoy** once he/she has been admitted to the territory of a Member State.

The consideration of the contents of this Policy Plan, in particular the **Directive proposals** contained therein will support the **development of immigration legislation and policies** that is **inclusive of future developments at EU level**.

The Policy Plan foresees the introduction of a **Framework Directive** which will not address the admission conditions and procedures of economic migrants - with the exception of the single application for a joint permit – and will not affect the application of the Community preference principle[13].

In the area of Entry & Admission, the following Directive proposals foreseen by the Policy Plan will be of relevance:

- *Proposal for a directive on the conditions of entry and residence of highly skilled Workers*
- *Proposal for a directive on the conditions of entry and residence of seasonal workers*
- *Proposal for a directive on the procedures regulating the entry into, the temporary stay and residence of Intra-Corporate Transferees (ICT)*
- *Proposal for a directive on the conditions of entry and residence of remunerated trainees*

When considering the future Proposals, however, the following **general principles**, contained in the Proposals, should be noted:

[12] Communication from the Commission, Brussels, 21.12.2005, COM(2005) 669 final.

[13] Member States will consider requests for admission to their territories for the purpose of employment only where vacancies in a Member State cannot be filled by national and Community manpower or by non Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market *(Council Resolution of 20 June 1994, in connection with Council Regulation (EEC) n°1612/1968).*

Admission should be conditional on the existence of a work contract and on the "economic needs test". Exceptions may be necessary for declared structural/temporary needs in certain sectors/occupations/regions. International commitments entered into by the EC, or by the EC and its Member States, notably under the Common Commercial Policy, will need to be respected.

Ethical recruitment should be considered for sectors particularly vulnerable to brain drain: for example, the global crisis in human resources for health, with severe health worker shortages in parts of Africa in particular, which are compounded by the brain drain, requires a comprehensive and coherent approach to ethical recruitment of health workers.

II. Travel Documents

II.1. Convention Implementing the Schengen Agreement of 14 June 1985[14]

In addition to the provisions regarding travel documents contained in **Article 5(1)(a)**, **Article 13(1)** of the **Schengen Convention** stipulates that **no visa shall be affixed to a travel document that has expired**. **Article 13(2)** goes on to provide that **the period of validity of a travel document must exceed that of the visa, taking account of the period of use of the visa. It must enable third-country nationals to return to their country of origin or to enter a third country**.

Article 14 of the Convention provides that **visas shall not be affixed to any travel document if it is not valid for any of the Contracting Parties**. If a document is only valid for one or several of the Contracting Parties, the visa to be affixed shall be limited to the Contracting Party or Parties in question. Further, **Article 14(2)** provides that if a travel document is not considered valid, it is possible to issue an 'authorisation valid as a visa' in place of a visa.

II.2. Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

This Regulation **amends Regulation (EC) No 562/2006** of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) as regards the implementing powers conferred on the Commission. It **repeals**, *inter alia*, **Council Regulation (EC) No 2133/2004 of 13 December 2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third country nationals when they cross the external borders of the Member States**.

In accordance with **article 7(2)** of Regulation (EC) No 562/2006 as amended by Regulation (EC) No 296/2008, all persons shall undergo a **minimum check** in order to establish their identities on the basis of the production or presentation of their **travel documents**. Such a minimum check shall consist of a **rapid and straightforward verification**, where appropriate by using **technical devices** and by consulting, in the relevant databases, **information exclusively on stolen, misappropriated, lost and invalidated documents**, of the validity of the document authorising the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting.

Article 10 of the Regulation regulates the **stamping of the travel documents of third-country nationals**. Accordingly, **the travel documents of third-country nationals shall be systematically stamped on entry and exit**[15]. In particular an entry or exit stamp shall be affixed to:

[14] OJ L239/19, 22.9.2000.

[15] In accordance with article 10(3), no entry or exit stamp shall be affixed to:
(a) travel documents of Heads of State and dignitaries whose arrival has been officially announced in advance through diplomatic channels;
(b) pilots' licences or the certificates of aircraft crew members;
(c) travel documents of seamen who are present within the territory of a Member State only when their ship puts in and in the area of the port of call;
(d) travel documents of crew and passengers of cruise ships who are not subject to border checks in accordance with point 3.2.3 of Annex VI;
(e) documents enabling nationals of Andorra, Monaco and San Marino to cross the border.

a) the documents, bearing a valid visa, enabling third-country nationals to cross the border (article 10(1)(a));
b) the documents enabling third-country nationals to whom a visa is issued at the border by a Member State to cross the border (article 10(1)(b));
c) the documents enabling third-country nationals not subject to a visa requirement to cross the border (article 10(1)(c)).

The **practical arrangements for stamping** are set out in *Annex IV of the Regulation*.

Article 11 of the Regulation further provides that if the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that the holder does not fulfil, or no longer fulfils, the conditions of duration of stay applicable within the Member State concerned.

This presumption may be rebutted where the third-country national provides credible evidence, such as transport tickets or proof of his or her presence outside the territory of the Member States, that he or she has respected the conditions relating to the duration of a short stay.

II.3. Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States[16]

The **harmonisation of security features** and the **integration of biometric identifiers** envisaged in this Regulation are seen as an important step towards the use of new elements in view of future developments at European level. These features and identifiers render the travel document more secure and establish a **more reliable link between the holder and the passport / travel document** and are regarded as an important contribution to ensuring that it is protected against fraudulent use.[17]

However, this Regulation is limited to the harmonisation of the security features including biometric identifiers for the passports and travel documents of the Member States. The designation of the authorities and bodies authorised to have access to the data contained in the storage medium of documents is a matter of national legislation, subject to any relevant provisions of Community law, European Union law or international agreements.

In accordance with **Article 1** of the Regulation:

1. Passports and travel documents issued by Member States shall comply with the **minimum security standards set out in the Annex to the Regulation**, which specifies the minimum level of security for the specific material that is used.

2. Passports and travel documents shall include a **storage medium**, which shall contain a **facial image**. Member States shall also include **fingerprints** in interoperable formats. The data shall be secured and the storage medium shall have **sufficient capacity and capability** to guarantee the **integrity**, the **authenticity** and the **confidentiality** of the data.

3. This Regulation applies to passports and travel documents issued by Member States. It **does <u>not</u> apply to identity cards issued by Member States** to their nationals **or to temporary passports and travel documents** having a validity of 12 months or less.

Additionally, **technical specifications for passports and travel documents** relating to the following shall be established:

(a) additional security features and requirements including **enhanced anti-forgery**, **counterfeiting** and **falsification standards**,
(b) **technical specifications for the storage medium** of the biometric features and their security, including prevention of unauthorised access, and
(c) requirements for **quality and common standards** for the facial image and the fingerprints.[18]

[16] OJ L385/1, 29.12.2004.
[17] The specifications of the International Civil Aviation Organisation (ICAO), and in particular those set out in Document 9303 on machine readable travel documents, should be taken into account.
[18] Article 2 of the Resolution.

II.4. Council Decision of 27 March 2000 on the improved exchange of information to combat counterfeit travel documents[19]

The Council Decision aims at an **improved exchange of information on counterfeit travel documents**. This is designed to limit the counterfeiting of documents and thus make an effective contribution to combating crime and the smuggling of human beings.

In its **Annexes I and II**, the Decision introduces a **standardised data collection form** and **questionnaire**.

The Decision further provides that **data required for criminal proceedings** shall be communicated to other Member States in accordance with national law and international conventions.

However, the Decision does not affect the competence of the Member States relating to the recognition of passports, travel documents, visas, or other identity documents.

II.5. Council Regulation (EC) No 856/2008 of 24 July 2008 laying down a uniform format for visas as regards the numbering of visas

This Council Regulation amends the current legal framework provided for in Council Regulation (EC) No 1683/95[20].

The Council Regulation provides as essential that the **uniform format for visas** should **containt all the necesary information** and **meet very high technical standards**, notably as regards safeguards against counterfeiting and falsification. It must also be suited to use by all the Members States and bear **universally recognizable security** wich are clearly visible to the naked eye.

So in accordance with **Article 1**, visas issued by the Member States in conformity with **Article 5**[21] shall be produced in the form of a **uniform format (sticker)**. They shall conform to the specifications set out in the *Annex*.

Article 2(3) provides that, in accordance with the procedure referred to in Article 6(2), it may be decided that the technical specifications for the uniform format for visas shall be **secret** and not be published. In that case they shall be made available only to the bodies designated by the Member States as responsible for the printing and to persons duly authorised by a Member States or the Commission.

However, **article 4(1)** specifies that, without prejudice to the relevant more extensive provisions concerning data protection, **an individual to whom a visa is issued shall have the right to verify the personal particulars entered on the visa** and, where appropiate, to ask for any corrections or deletions to be made.

III. Refusal of Entry

III.1. Convention Implementing the Schengen Agreement of 14 June 1985[22]

A third-country national who does not fulfil the following conditions set out in **Article 5(1)** of the Convention must be refused entry[23]:

[19] OJ L81/1, 1.4.2000.
[20] OJ L164, 14.7.1995, p.1.
[21] Article 5: For the purposes of this Regulation a 'visa' shall mean an authorisation given by or a decision taken by a Member State which is required for entry into its territory with a view to:
-an intended stay in that Member State or in several Member States of no more than three months in all,
-transit through the territory or airport zone of that Member State or several Member States
[22] OJ L239/19, 22.9.2000.
[23] See Part A.I.1. above.

a) possession of a **valid document or documents**, as defined by the Executive Committee, **authorising the person to cross the border**,
b) **possession of a valid visa** if required, and
c) production, if necessary, of **documents justifying the purpose and conditions of the intended stay** and evidence of **sufficient means of subsistence**, both for the period of intended stay and for the return to the person's country of origin or transit to a third State into he or she is certain of being admitted, or evidence that the person is in a position to acquire such means lawfully.

Excluded from entry in all cases are:

d) **persons for whom an alert has been issued for the purpose of refusing entry** and
e) **persons who are considered to be a threat to public policy, national security or the international relations** of any of the Contracting Parties.

The only exception to this rule, set out in **Article 5(2)** of the Convention, is where a Contracting Party considers it necessary to derogate from that principle on **humanitarian grounds**, on **grounds of national interest** or because of **international obligations**. In such cases authorisation to enter will be restricted to the territory of the Contracting Party concerned, which must inform the other Contracting Parties accordingly.

III.2. Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

This Regulation **amends Regulation (EC) No 562/2006** of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) as regards the implementing powers conferred on the Commission.

Article 13 of Regulation (EC) No 562/2006 as amended by Regulation (EC) No 296/2008 rules the **refusal of entry**. Accordingly, a third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) **shall be refused entry** to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

However, **article 13(2)** stipulates that entry may only be refused by a **substantiated decision stating the precise reasons for the refusal**. The decision shall be given by means of a standard form, filled in by the authority empowered by national law to refuse entry. The form shall be handed to the third-country national concerned, who shall acknowledge receipt of the decision. The decision shall take effect immediately.

Detailed rules governing refusal of entry are given in *Part A of Annex V of the Regulation*. Accordingly, when refusing entry, **the competent border guard shall**:

a) fill in the **standard form for refusing entry**, as shown in *Part B of Annex V of the Regulation*. The third-country national concerned shall sign the form and shall be given a copy of the signed form. Where the third-country national refuses to sign, the border guard shall indicate this refusal in the form under the section 'comments';
b) affix an **entry stamp** on the passport, **cancelled by a cross in indelible black ink**, and write opposite it on the right-hand side, also in indelible ink, the **letter(s) corresponding to the reason(s) for refusing entry**, the list of which is given on the abovementioned standard form for refusing entry;
c) in the cases referred to below, **cancel the visa** by applying a **stamp stating 'CANCELLED'**. In such a case the optically variable feature of the visa sticker, the security feature 'latent image effect' as well as the term 'visa' shall be destroyed by crossing it out so as to prevent any later misuse. The border guard shall **inform** his/her **central authorities** of this decision forthwith;

d) **record every refusal of entry in a register or on a list** stating the identity and nationality of the third-country national concerned, the references of the document authorising the third-country national to cross the border and the reason for, and date of, refusal of entry.

Still according to *Part A of Annex V of the Regulation (article 2)*, **the visa shall be cancelled in the following cases:**

a) if the **holder of the visa is the subject of an alert in the SIS** for the purposes of being refused entry unless he or she holds a visa or re-entry visa issued by one of the Member States and wishes to enter for transit purposes in order to reach the territory of the Member State which issued the document, and
b) if there are **serious grounds to believe that the visa was obtained in a fraudulent way**.

Additionally, and still according to *Part A of Annex V of the Regulation (article 3)*, **if a third-country national who has been refused entry is brought to the border by a carrier**, the authority responsible locally shall:

a) **order the carrier to take charge of the third-country national** and transport him or her without delay to the third country from which he or she was brought, to the third country which issued the document authorising him or her to cross the border, or to any other third country where he or she is guaranteed admittance, or to find means of onward transportation in accordance with Article 26 of the Schengen Convention and Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, and
b) pending onward transportation, take **appropriate measures,** in compliance with national law and having regard to local circumstances, **to prevent third-country nationals who have been refused entry from entering illegally**.

Finally, and still according to *Part A of Annex V of the Regulation (article 4)*, if there are grounds **both for refusing entry to a third-country national and arresting him or her**, the border guard shall contact the authorities responsible to decide on the action to be taken in accordance with national law.

Article 13(3) of the Regulation stipulates that persons refused entry shall have the **right to appeal**. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide **information on representatives competent to act** on behalf of the third-country national in accordance with national law shall also be given to the third-country national.

Lodging such an appeal shall **not have suspensive effect** on a decision to refuse entry.

The third-country national concerned shall, **where the appeal concludes that the decision to refuse entry was ill-founded**, be entitled to **correction of the cancelled entry-stamp**, and any other cancellations or additions which have been made, by the Member State which refused entry.

IV. Entry of Minors

IV.1. Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

This Regulation **amends Regulation (EC) No 562/2006** of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) as regards the implementing powers conferred on the Commission.

Article 19 of Regulation (EC) No 562/2006 as amended by Regulation (EC) No 296/2008 provides **specific rules for checks on certain categories of persons**, including minors. **Specific rules regarding the entry of minors** are set out in *article 6 of Annex VII of the Regulation*.

Minors crossing an external border shall be subject to the same checks on entry and exit as adults. But according to *article 6(6.1.) of Annex VII of the Regulation*, **border guards shall pay particular attention to minors, whether travelling accompanied or unaccompanied**.

In the case of **accompanied minors**, the border guard shall check that the persons accompanying minors have parental care over them, especially where minors are accompanied by only one adult and there are serious grounds for suspecting that they may have been unlawfully removed from the custody of the person(s) legally exercising parental care over them. In the latter case, the border guard shall carry out a further investigation in order to detect any inconsistencies or contradictions in the information given (**article 6(6.2.)**).

In the case of **unaccompanied minors**, border guards shall ensure, by means of thorough checks on travel documents and supporting documents, that the minors do not leave the territory against the wishes of the person(s) having parental care over them (**article 6(6.3.)**).

IV.2. Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries[24]

Article 2 of this non-binding Resolution deals with the issue of admission and provides that:

1. Member States may, in accordance with their national legislation and practice, refuse admission at the frontier to **unaccompanied minors** in particular if they are **without the required documentation and authorisations**. However, in case of **unaccompanied minors who apply for asylum**, the Resolution on Minimum Guarantees for Asylum Procedures is applicable.[25]

2. In this connection, Member States should take appropriate measures, in accordance with their national legislation, to **prevent the unauthorised entry of unaccompanied minors** and should **cooperate to prevent illegal entry and illegal residence of unaccompanied minors** on their territory.

Unaccompanied minors who, pursuant to national provisions, must remain at the border until a decision has been taken on their admission to the territory or on their return, should receive all **necessary material support and care** to satisfy their basic needs, such as food, accommodation suitable for their age, sanitary facilities and medical care.

V. Entry for Specific Purposes

V.1. Council Directive on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service[26]

The Directive distinguishes **four categories of third-country nationals**: **students**, **school pupils**, **unremunerated trainees** and **people doing voluntary service**. Apart from the **general conditions for admission**, the Directive lays down the **specific conditions** for the admission of each of these four categories to the territory of the Member States for a period exceeding three months as well as **rules concerning the procedures for admitting third-country nationals** for the purposes listed. The Member States are obliged to apply the Directive to the admission of third-country nationals for the purpose of studies, whereas the application of the Directive to pupils, trainees and volunteers is optional for the Member States.

[24] OJ C221/23, 19.7.1997.
[25] See in particular Paragraphs 23 and 25 of the Resolution on Minimum Guarantees for Asylum Procedures (OJ C362/270, 2.12.1996).
[26] OJ L375/12, 23.12.2004.

General conditions for admission applicable to all four categories of persons are set out in **Article 5** of the Directive. Accordingly, a third-country national who applies to be admitted for the purposes set out in subsequent parts of the Directive shall:

(a) present a **valid travel document**, as determined by national law,
(b) if he or she is a minor under the national law of the host Member State, present a **parental authorisation** for the planned stay,
(c) have **sickness insurance** in respect of all risks normally covered for its own nationals in the Member State concerned,
(d) **not be regarded as a threat to public policy**, **public security** or **public health**, and
(e) provide proof, if the Member State so requests, that he or she has **paid the fee for processing the application**.[27]

Additional specific conditions for the **admission of students** are set out in **Article 6** of the Directive. Accordingly, a third-country national who applies to be admitted for study purposes shall:

(a) have been **accepted by an establishment of higher education** to follow a course of study,[28]
(b) provide the evidence requested by a Member State that during his/her stay, s/he will have **sufficient resources** to cover his/her subsistence, study and return travel costs,[29]
(c) provide evidence, if the Member State so requires, of **sufficient knowledge of the language of the course** followed by the student, and
(d) provide evidence, if the Member State so requires, that s/he has **paid the fees charged by the establishment**.

Further specific conditions for the **admission of school pupils** participating in an exchange scheme are set out in **Article 9** of the Directive. A third-country national who applies to be admitted in a pupil exchange scheme shall:

(a) not be below the **minimum age** nor above the **maximum age** set by the Member State concerned,
(b) provide **evidence of acceptance to a secondary education establishment**,
(c) provide **evidence of participation in a recognised pupil exchange scheme programme** operated by an organisation recognised for that purpose by the Member State concerned (…),
(d) provide **evidence that the pupil exchange organisation accepts responsibility for him/ her** throughout his/her period of presence in the territory of the Member State concerned, in particular as regards **subsistence, study**, **healthcare** and **return travel costs**, and
(e) be **accommodated throughout his/her stay by a family** meeting the conditions set by the Member State concerned and selected in accordance with the rules of the pupil exchange scheme in which he/she is participating.

Specific conditions for the **admission of unremunerated trainees** are provided in **Article 10** of the Directive. Accordingly, a third-country national who applies for admission as an unremunerated trainee, shall, in addition to the general conditions stipulated in **Article 5**:

(a) have signed a **training agreement**, approved if need be by the relevant authority in the Member State concerned (…) for an unremunerated placement with a public or private-sector enterprise or vocational training establishment recognised by the Member State (…),
(b) provide evidence requested by a Member State that during his/her stay s/he will have **sufficient resources** to cover his/her subsistence, training and return travel costs,[30] and
(c) receive, if the Member State so requires, **basic language training** so as to acquire the knowledge needed for the purposes of the placement.

Specific additional conditions to be met by a third-country national applying for **admission as a volunteer** are set out in **Article 11** of the Directive. The person shall:

[24] Pursuant to Article 20 of the Directive, Member States may request applicants to pay fees for the processing of applications.
[25] Evidence of acceptance of a student by an establishment of higher education could include, among other possibilities, a letter or certificate confirming his/her enrolment (Recital 12 to the Preamble of Council Directive 2004/114/EC).
[26] Member States shall make public the minimum monthly resources required for the purpose of this provision, without prejudice to individual examination of each case.
[30] The Member States shall make public the minimum monthly resources required for the purpose of this provision, without prejudice to the individual examination of each case.

(a) not be below the **minimum age** nor above the **maximum age** set by the Member State concerned,
(b) produce an **agreement with the organisation responsible in the Member State concerned for the voluntary service scheme** in which he/she is participating, given a description of the tasks, the conditions in which he/she is supervised in the performance of those tasks, his/her working hours, the resources available to cover his/her travel, subsistence, accommodation costs and pocket money throughout his/her stay and, if appropriate, the training he/she will receive to help him/her perform his/her service,
(c) provide evidence that the organisation responsible for the voluntary service scheme in which he/she is participating has subscribed to a **third-party insurance policy** and accepts **full responsibility** for him/her throughout his/her stay, in particular as regards his/her **subsistence**, **healthcare** and **return travel costs**, and
(d) if the host Member State specifically requires it, receive a **basic introduction to the language, history** and **political and social structures** of that Member State.

Furthermore, **mobility of students between Member States must be facilitated** so that the European Union can reflect the reality of the growing internationalisation of education. **Article 8** of the Directive applies to **students admitted in one Member State who apply to follow part of the studies already commenced in another Member State**, or to **complement them with a related course of study in another Member State**. Applications shall be processed within a period that does not hamper the pursuit of the relevant studies, whilst leaving the competent authorities sufficient time to process the application.

V.2. Council Resolution of 20 June 1994 on limitation on admission of third-country nationals to the territory of the Member States for employment[31]

This Resolution sets out principles governing Member States' policies in relation to the **admission of third-country nationals to their territories as employed persons**. The purpose of the Resolution is the harmonisation of these policies in recognition of the fact that in light of unemployment in the Member States these policies will need to be restrictive. However, the principles of the Resolution are not legally binding.

General criteria introduced by the Resolution are:

- **Member States will refuse entry to their territories of third-country nationals for the purpose of employment** and
- **Member States will consider requests for admission to their territories for the purpose employment only where vacancies in a Member State cannot be filled by national and Community manpower or by non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State's regular labour market**.[32]

Without prejudice to the application of the above two criteria, **third-country nationals may**, if necessary, **be admitted on a temporary basis** and **for a specific duration** to the territory of a Member State for the purpose of employment where:

1. such an **offer is made to a named worker** or **named employee of a service provider** and is of a **special nature** in view of the requirement of **specialist qualifications** (professional qualifications, experience etc.);
2. an **employer offers named workers vacancies only where the competent authorities consider**, if appropriate, **that the grounds adduced by the employer**, including the nature of the qualifications required, **are justified in view of a temporary manpower shortage** on the national or Community labour market which significantly affects the operation of the undertaking or the employer himself or herself; and
3. **where vacancies are offered to**:

[31] OJ C274/3, 19.9.1996.
[32] In this context they will apply the procedure laid down in Part II of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, in the light of Commission Decision 93/569/EEC on implementing of the Regulation, in particular with regard to Article 15.

- **seasonal workers**, whose numbers are strictly controlled on admission to the territory of the Member States and who undertake well-defined jobs, normally fulfilling a traditional need in the Member State in question. Member States will restrict the admission of these workers to cases where there is no reason to believe that the persons concerned will seek to stay within their territory on a permanent basis;
- **trainees**;
- **frontier workers**; or where
- the persons concerned are **intra-corporate transferees** being transferred temporarily by the company as key personnel.

According to the Resolution, a third-country national will not be admitted for employment unless **prior authorisation** has been given for him or her to take up employment in the Member State. Such authorisation in the form of a **work permit may be issued to either the employer or the employee**.[33] Furthermore, initial authorisation for employment will normally be restricted to employment in a specific job with a specified employer.

Restrictions as to the period of admission for employment set by the Resolution are as follows:

- **seasonal workers** are to be admitted for a maximum of 6 months in any 12-month period, and must remain outside the territories of the Member States for a period of at least six months before being readmitted for employment;
- **trainees** will be admitted for a maximum period of one year in the first instance; this period may be fixed at more than a year and extended exclusively for the time needed to obtain a professional qualification recognised by the Member State concerned in the sphere of their activity; and
- **other third-country nationals** admitted to the territories of the Member States for employment will only be admitted for a period not exceeding four years in the first instance.

A person already present in the territory of a Member State as a visitor or student will not be permitted to extend his or her stay for the purpose of taking or seeking employment; they will normally be required to return to their own countries on conclusion of their visit or studies. The same principle applies to those admitted as a trainee or a service provider or an employee of a service provider, and seasonal workers.

Additionally, a draft Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities was tabled in 2001.[34] This draft Directive sought to define a common legal framework on admission of economic migrants by laying down common definitions, criteria and procedures regarding the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, based on concepts, which have already been successfully applied in the Member States. However, **political agreement was not reached** on this draft Directive

The Commission has been invited to present a **policy plan on legal migration**, including **admission procedures capable of responding promptly to fluctuating demands for migrant labour** in the labour market before the end of 2005. The Council stresses that such a policy plan should take into account the outcome of discussions on the **Green Paper on an EU approach to managing economic migration**[35] and on the **Commission Communication on legal and illegal migration**[36] while respecting that the determination of volumes of admission of labour migrants falls within the sphere of competence of Member States.[37]

[33] In addition, the employee must also be in possession of the necessary visa, and/or, if the Member State concerned so requires, of a residence permit.
[34] COM(2001) 386 final, 11.7.2001.
[35] COM(2004) 811 final, 11.1.2005.
[36] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Study on the links between legal and illegal migration, COM(2004) 412 final, 4.6.2004.
[37] Hague Programme; strengthening freedom, security and justice in the European Union, Council Document 13302/1/04, 15.10.2004.

V.3. Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons[38]

This Council Resolution is based on the premise that the admission for purposes of pursuing a salaried activity and that of the admission of self-employed persons can be treated distinctly. In the view of the Council, the **admission of persons for the purpose of an independent economic activity who add value** (investment, innovation, transfer of technology, job creation) **to the economy of the host country is of benefit**.

Furthermore, **artists** exercising an independent activity of significance may also be admitted.

This Resolution concerns only individuals and does not affect the setting up of firms[39]. Its principles are not legally binding.

According to **Paragraph C.2.1.** of the Resolution, Member States may allow third-country nationals wishing to pursue activities as self-employed persons to enter their territory where it has been duly established that that activity will **produce economic benefits** or where it is **independent activity of an artist**.

Requests for admission must be submitted to the authorities of the host Member State and must be accompanied by information which can be used to assess whether the planned activity meets the preconditions, and also by documentary evidence that the activity will be carried out in accordance with the relevant national legislation.[40]

Paragraph C.6. of the Resolution also covers **service providers**[41] and stipulates that, under the conditions laid down by national law, Member States may grant third-country nationals wishing to provide a service, leave to enter their territory with authorisation to carry out the relevant work for the performance of a service.

In principle, a person already present in the territory of a Member State as a student, trainee, seasonal worker, service provider, contract worker or for other reasons will not be permitted to extend his or her stay for the purpose of establishing himself or herself as a self-employed person. They will normally be required to return to their own countries on conclusion of the purpose of their stay.

As outlined above, political agreement was not reached on the draft Directive, introduced by the Commission in 2001, on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed activities, which was designed to lay down a **clear** and **transparent legal framework** on the conditions of **entry and residence** of **third-country nationals** for the purpose of **paid employment and self-employed activities**.[42]

V.4. Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for purposes of scientific research[43]

This Directive, which has to be transposed by 12 October 2007, recognises that the number of researchers which will be needed by the EU Member States by 2010 to meet the target set by the Barcelona European Council in March 2002 is estimated at 700 000. This target is to be met, *inter alia*, through opening up the Community to third-country nationals who might be admitted for the purposes of research.

Article 7 of the Directive lays down the **conditions for the admission of third-country researchers** to the Member States **for more than three months** for the purposes of carrying out a research project under hosting agreements with research organisations.

[38] OJ C274/7, 19.9.1996.
[39] Only those associates actively involved and whose presence is necessary in pursuing the company's or firm's aims and in its management may be authorised to establish themselves in the host Member State (see Point C.1.3. of the Resolution).
[40] Paragraph C. 3.1. to C.3.4.
[41] According to Paragraph C.6.2., 'service provider' means a self-employed person (residing abroad) whose services are sought by a person residing in a Member State in order to carry out, against remuneration, a specific task over a specific period.
[42] COM (2001) 386 final, 11.7.2001.
[43] OJ L289/15, 3.11.2005.

Accordingly, a third-country national who applies to be admitted for the purposes set out in this Directive shall:

a) present a **valid travel document**, as determined by national law[44]
b) present a **hosting agreement** signed with a **research organisation**
c) where appropriate, present a **statement of financial responsibility** issued by the research organization and
d) not be considered to pose a **threat to public policy, public security or public health**.

Member States are obliged to check that all the conditions referred to in points a), b), c) and d) are met. They may also check the terms upon which the hosting agreement has been based and concluded.

Once the checks referred to in paragraphs 1 and 2 have been positively concluded, researchers shall be admitted on the territory of the Member States to carry out the hosting agreement.

Hosting agreements are regulated in **Article 6** of the Directive. Pursuant to Article 6(1), a research organisation wishing to host a researcher shall sign a hosting agreement with the researcher whereby the researcher undertakes to complete the research project and the organisation undertakes to host the researcher for that purpose.

However, **research organisations may sign hosting agreements only if the following conditions are met**:

a) the research project has been **accepted by the relevant authorities in the organisation**, after examination of:

- the **purpose and duration of the research**, and the **availability of the necessary financial resources** for it to be carried out;
- the **researcher's qualifications** in the light of the research objectives, as evidenced by a certified copy of his/her qualification

b) during his/her stay the researcher has **sufficient monthly resources** to meet his/her **expenses and return travel costs**[45], without having recourse to the Member State's social assistance system;

c) during his/her stay the researcher has **sickness insurance** for all the risks normally covered for nationals of the Member State concerned;

d) the **hosting agreement specifies the legal relationship and working conditions of the researchers**.

The Directive foresees the **automatic lapse of the hosting agreement in a situation where the researcher is not admitted** to the Member State or when the legal relationship between the researcher and the research organisation is terminated.

Article 5 of the Directive outlines the **procedures for the approval of research organisations**. The approval of the research organisations shall be in accordance with procedures set out in the national law or administrative practice of the Member States and shall be for a **minimum period of five years**[46].

Furthermore, Member States may require, in accordance with national legislation, a **written undertaking** of the research organisation **that in cases where a researcher remains illegally in the territory of the Member State concerned, the said organisation is responsible for reimbursing the costs related to his/her stay and return** incurred by public funds. The financial responsibility of the research organisation shall end at the latest **six months after the termination of the hosting agreement**.

[44] Member States may require the period of the validity of the travel document to cover at least the duration of the residence permit.
[45] In accordance with the minimum amount published for these purposes by the Member State.
[46] In exceptional cases, Member States may grant approval for a shorter period.

V.5. Council Recommendation 2005/762/EC of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community

Council Directive 2005/71/EC was introduced together with **Council Recommendation 2005/762/EC of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community** and **Recommendation 2005/761/EC of the European Parliament and of the Council of 28 September 2005 to facilitate the issue by the Member States of uniform short-stay visas for researchers from third countries travelling within the Community for thepurpose of carrying out scientific research**.

In the area of admission, the Council Recommendation of 12 October 2005 provides in particular that EU Member States should **encourage the admission of researchers** into the Community, by providing them with favourable conditions for carrying out research, preferably by **exempting them from work permit requirements**, or alternatively by providing for work permits to be issued automatically or under fast-track procedures. It is further recommended that EU Member States **refrain from using quotas** to restrict the admission of third-country nationals for research posts and that they **guarantee third-country nationals the possibility of working as a researcher**, including the possibility of extension or renewal of work permits where appropriate.

VI. Border Checks

V.1. Regulation (EC) No 296/2008 of the European Parliament and of the Council of 11 March 2008 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

This Regulation **amends Regulation (EC) No 562/2006** of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) as regards the implementing powers conferred on the Commission.

Border checks are carried out by border guards. According to **article 6** of Regulation (EC) No 562/2006 as amended by Regulation (EC) No 296/2008, and when performing their duties, **border guards must fully respect human dignity, and shall not discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation**. Any measures taken in the performance of their duties shall be **proportionate to the objectives pursued** by such measures.

According to **article 7**, the checks may also cover the **means of transport** and **objects in the possession of the persons crossing the border**. But only the law of the Member State concerned shall apply to any searches which are carried out.

In accordance with **Article 7(2)**, **all persons shall undergo a minimum check in order to establish their identities** on the basis of the production or presentation of their travel documents. Such a minimum check shall consist of a **rapid and straightforward verification**, where appropriate by using **technical devices** and by consulting, in the relevant databases, **information exclusively on stolen, misappropriated, lost and invalidated documents**, of the validity of the document authorising the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting.

However, **article 7(3)** further provides that, **on entry and exit**, **third-country nationals shall be subject to thorough checks**.

Thorough checks on entry shall comprise verification of the entry conditions and, where applicable, of documents authorising residence and the pursuit of a professional activity, including:

- verification that the third-country national is in possession of a **document which is valid for crossing the border** and which has not expired, and that the document is accompanied, where applicable, by the requisite visa or residence permit;

- **thorough scrutiny of the travel document** for signs of falsification or counterfeiting;
- **examination of the entry and exit stamps** on the travel document of the third-country national concerned;
- verification regarding the **point of departure and the destination** of the third-country national concerned and the purpose of the intended stay, checking if necessary, the corresponding supporting documents;
- verification that the third-country national concerned has **sufficient means of subsistence** for the duration and purpose of the intended stay, for his or her return to the country of origin or transit to a third country into which he or she is certain to be admitted, or that he or she is in a position to acquire such means lawfully;
- verification that the third-country national concerned, his or her means of transport and the objects he or she is transporting are not likely to jeopardise the **public policy**, **internal security**, **public health** or **international relations** of any of the Member States.

Thorough checks on exit shall comprise:

- verification that the third-country national is in possession of a **document valid for crossing the border**;
- **verification of the travel document** for signs of falsification or counterfeiting;
- whenever possible, verification that the third-country national is not considered to be a threat to **public policy**, **internal security** or the **international relations** of any of the Member States.

Thorough checks on exit may also comprise:

- verification that the person is in possession of a valid visa, if required pursuant to Regulation (EC) No 539/2001, except where he or she holds a valid residence permit;
- verification that the person did not exceed the maximum duration of authorised stay in the territory of the Member States;
- consultation of alerts on persons and objects included in the SIS and reports in national data files.

Where facilities exist and if requested by the third-country national, such **thorough checks shall be carried out in a private area** (**article 7(4)**).

In some cases, third-country nationals may be subject to a **thorough second line check**. In these cases, **article 7(5)** provides that third-country nationals shall be given **information on the purpose of**, and **procedure for**, **such a check**. This information shall be available in all the **official languages of the Union and in the language(s) of the country or countries bordering the Member State concerned** and shall indicate that the third-country national may request the name or service identification number of the border guards carrying out the thorough second line check, the name of the border crossing point and the date on which the border was crossed.

According to **article 8**, **border checks at external borders may be relaxed as a result of exceptional and unforeseen circumstances**. Such exceptional and unforeseen circumstances shall be deemed to be those where unforeseeable events lead to traffic of such intensity that the waiting time at the border crossing point becomes excessive, and all resources have been exhausted as regards staff, facilities and organisation.

Regulation (EC) No 562/2006 as amended by Regulation (EC) No 296/2008 creates positive obligations for the Member States. Indeed, and according to **articles 14 and 15**, Member States must deploy **appropriate staff and resources** in sufficient numbers to ensure a high and uniform level of control at their external borders and ensure that border guards are **specialised and properly trained professionals**.

Moreover, **article 16(2)** rules that the operational cooperation between Member States in the field of management of external borders is coordinated by the **European Agency for the Management of Operational Cooperation at the External Borders of the Member States (FRONTEX)**. Member States shall refrain from any activity which could jeopardise the functioning of the Agency or the attainment of its objectives.

B. Stay & Residence

I. Residence Permits and Residence Status

I.1. Council Regulation (EC) No 380/2008 of 18 April 2008 laying down a uniform format for residence permits for third-country nationals[47]

This Regulation amends Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals.

Before any other consideration, and according to **article 5** of Council Regulation (EC) No 1030/2002 as amended by Council Regulation (EC) No 380/2008, **this Regulation shall not apply to third-country nationals who are**:

-members of the families of citizens of the Union exercising their right to free movement;
-nationals of Member States of the European Free Trade Association party to the Agreement on the European Economic Area and members of their families exercising their right to free movement in accordance with that Agreement;
-nationals of third countries who are exempt from the requirement to hold a visa and who are authorised to stay in a Member State for a period of less than three months.

Article 1(1) provides that **residence permits**[48] issued by Member States to third-country nationals shall be drawn up in a **uniform format** and provide sufficient space for the information set out in the *Annex as amended by Annex I of Council Regulation (EC) No 380/2008*, including: **title of the document**, **document number**, **names of the holder**, **period of validity**, **place and date of issue**, **type of permit**[49], any **remarks** necessary for national use, **signature and seal of the issuing authority** and/or **signature of the holder**, **national emblem** of the Member State, a **machine-readable area**, a **metallised latent image effect**, an **optically variable device**, an **identity photograph**, **date and place of birth** of the holder, **nationality** of the holder, **gender** of the holder, and **remarks**. The **address of the permit holder** may also be indicated.

Additionally, residence permits for third-country nationals shall be issued as stand-alone documents in **ID 1 or ID 2 format**. Each Member State may add in the relevant space of the uniform format information of importance regarding the nature of the permit and the legal status of the person concerned, in particular information as to whether or not the person is permitted to work.

According to **articles 4a and 4b**, the uniform format for residence permits shall **also include biometric identifiers**, namely a storage medium containing the facial image (**a photograph provided by the applicant or taken at the time of application**) and two fingerprint images of the holder (**two fingerprints taken flat and digitally captured**), both in **interoperable formats**.

The **technical specifications for the capture of biometric identifiers** shall be set out in accordance with the procedure described in **article 7(2)** and with **ICAO standards** and the technical specifications for passports issued by Member States to their nationals pursuant to Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States[50].

[47] OJ L157/1, 15.6.2002.
[48] Article 1(2): For the purpose of this Regulation, 'residence permit' shall mean any authorisation issued by the authorities of a Member State allowing a third-country national to stay legally on its territory, with the exception of:
(i) visas;
(ii) permits issued pending examination of a request for asylum, an application for a residence permit or an application for its extension;
(iia) permits issued in exceptional circumstances with a view to an extension of the authorised stay with a maximum duration of one month;
(iii) authorisations issued for a stay of a duration not exceeding six months by Member States not applying the provisions of Article 21 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders.
[49] For example, 'family member' in the permit held by a family member of an EU national who has not exercised the right of free movement.
[50] OJ L385, 29.12.2004, p.1.

The capture of fingerprints is compulsory as of six years of age, but persons for whom fingerprinting is physically impossible shall be exempt from the requirement to give fingerprints.

According to **Article 2(1)**, **additional technical specifications** for the uniform format for residence permits relating to the following shall be established:

> (a) **additional security features and requirements** including enhanced anti-forgery, counterfeiting and falsification standards;
> (b) **technical processes and rules** for the filling in of the uniform residence permit;
> (c) **other rules** to be observed for the filling in of the uniform residence permit;
> (d) **technical specifications for the storage medium of the biometric features** and the security thereof, including prevention of unauthorised access;
> (e) requirements for the quality of and **common standards for the facial image** and the fingerprint images;
> (f) an exhaustive list of additional national security features which could be added by Member States.

Article 3 rules that **these specifications shall be secret** and **shall not be published**. They shall be made available only to the bodies designated by the Member States as responsible for the printing of the uniform residence permits and to persons duly authorised by a Member State or the Commission[51].

However, article 4 of Council Regulation (EC) No 1030/2002 as amended by Council Regulation (EC) No 380/2008 does provide **guarantees and safeguards** to the holder of a residence permit.

Accordingly, and without prejudice to data protection, the holder of a residence permit has the **right to verify the personal particulars contained in the residence permit** and, where appropriate, to have them corrected or deleted.

Moreover, **no information in machine-readable form shall be included on the resident permit** or on the storage medium of the residence permit referred to in article 4a, unless provided for in this Regulation, or its *Annex* or unless it is mentioned in the related travel document by the issuing State in accordance with its national legislation. And even if Member States may store data for e-services such as e-government and e-business as well as additional provisions relating to the residence permit on a chip referred to in point 16 of the *Annex*, **all national data must be logically separated from the biometric data**.

And finally, the **biometric features in residence permits shall only be used for verifying**:

> (a) the authenticity of the document;
> (b) the identity of the holder by means of directly available comparable features when the residence permit is required to be produced by national legislation.

Article 4b further provides that the **procedure according to which Member States take biometric identifiers**, comprising the facial image and two fingerprints, shall be determined in accordance with the national practice of the Member State concerned and **with the safeguards laid down in the Convention for the Protection of Human Rights and Fundamental Freedoms and in the United Nations Convention on the Rights of the Child**.

Article 9 of Council Regulation (EC) No 1030/2002 as amended by Council Regulation (EC) No 380/2008 introduces a **timeframe within which the Regulation is to be implemented**. Accordingly, Member States shall issue the uniform format for residence permits defined in Article 1 no later than one year after the adoption of the additional security features and requirements referred to in Article 2(1)(a).

[51] The technical specifications were adopted by the Commission on 14 August 2002 and have to be implemented by 14 August 2007 (see Commission decision C (2002) 3069 – unpublished).

The storage of the facial image as primary biometric identifier shall be implemented at the latest two years, and the storage of the two fingerprint images at the latest three years, after the adoption of the respective technical measures provided for in article 2(1)(d) and (e).

However, the validity of residence permits already issued shall not be affected by the implementation of this Regulation, unless the Member State concerned decides otherwise.

For a transitional period of two years after the adoption of the technical specifications for the facial image referred to in the third paragraph of article 9, the residence permit may continue to be issued in sticker form.

It is important to note that **this Regulation does not affect the powers of the Member States regarding the recognition of States and territorial entities and passports, identity documents and travel documents issued by their authorities**[52].

NB.
In September **2003** the Commission had **proposed an amendment to Regulation (EC) 1030/2002** laying down a uniform format for residence permits for third-country nationals in order to **further enhance the security standards of the uniform format for visas and of travel documents** in general. In its proposal the Commission made it clear that it was in favour of **including biometric identifiers in visas and residence permits issued to third-country nationals** in order to establish a more reliable link between holder, passport and visa. With its proposal, the Commission intended to bring forward the final date for the **implementation of the photograph requirement** from 2007 to 2005 and, at the same time, to require Member States to **integrate biometric identifiers** into the visa and the residence permit for third-country nationals in a harmonised way, thus ensuring interoperability[53].

However, as it was technically **not feasible** to integrate biometrics into the visa sticker and the sticker version of the residence permit for third country nationals, as stated in the original draft, especially due to problems of durability of the chip and interference between several chips in one passport, a **modified proposal for a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals**[54] **was presented** by the Commission in March **2006**. The new proposal took into account the consensus reached by the Council on **incorporating biometric identifiers into residence permits in the form of a separate card within a period of 24 months** as well as the Council's desire to discontinue the use of residence permits in the form of stickers.

I.2. Council Decision of 3 December 1998 on common standards relating to filling in the uniform format for residence permits [54].

This Council Decision defines in detail the procedures for the completion of the **common reference area** of the **sticker** in the uniform format of the residence permit[55] as well as the procedures for the completion of the common reference area of the **stand-alone document** in the uniform format of the residence permit.[56]

There are eight spaces to be completed in both documents in accordance with the technical specifications, where appropriate: the permit number, the name of the holder, 'valid until' space, place/date of issue, type of permit, remarks, date/ signature/authorisation and a machine-readable area. Additionally, the stand-alone document must also contain information on the date and place of birth of the holder, the nationality of the holder and on the sex of the holder.

[52] See Article 8 of the Regulation.
[53] Proposal for a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals (COM (2003) 558 final, 24.9.2003).
[54] COM(2006) 110 final, 10.3.2006
[55] Annex, Paragraph I.
[56] Annex, Paragraph II.

The Decision further lists the codes for entering the nationality or status of the holder of the residence permit in the machine-readable area.

I.3. Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [55].

I.3.1. Residence permit issued to students

A residence permit shall be issued to a student for a period of at least one year and be renewable if the holder continues to meet the conditions of **Articles 6** and **7**. Where the duration of the course of study is less than one year, the permit shall be valid for the duration of the course.

However, without prejudice to **Article 16**, renewal of a residence permit may be refused or the permit may be withdrawn if the holder:

(a) does not respect the limits imposed on access to economic activities under **Article 17,** or
(b) does not make acceptable progress in his/her studies in accordance with national legislation or administrative practice.

I.3.2. Residence permit issued to school pupils

Article 13 of the Directive provides that a residence permit issued to school pupils shall be issued for a period of no more than one year.

I.3.3. Residence permit issued to unremunerated trainees

In accordance with **Article 14** of the Directive, the period of validity of a residence permit issued to unremunerated trainees shall correspond to the duration of the placement or shall be for a maximum of one year. In exceptional cases, it may be renewed, once only and exclusively for such time as is needed to acquire a vocational qualification recognised by a Member State in accordance with its national legislation or administrative practice, provided the holder still meets the conditions laid down in **Articles 6** and **10**.

I.3.4. Residence permit issued to volunteers

A residence permit issued to volunteers shall be issued for a period of no more than one year. In exceptional cases, if the duration of the relevant programme is longer than one year, the duration of the validity of the residence permit may correspond to the period concerned.[57]

I.3.5. Withdrawal or non-renewal of residence permits

In accordance with **Article 16** of the Directive, Member States may withdraw or refuse to renew a residence permit issued on the basis of this Directive when it has been fraudulently acquired or wherever it appears that the holder did not meet or no longer meets the conditions for entry and residence laid down in **Article 6** and in whichever of **Articles 7 to 11** applies to the relevant category.

Additionally, Member States may withdraw or refuse to renew a residence permit on grounds of **public policy**, **public security** or **public health**.

[57] See Article 15 of the Directive.

I.3.6. Procedural guarantees and transparency

Article 18 of the Directive provides certain **procedural guarantees**. Accordingly, a decision on an application to obtain or renew a residence permit shall be adopted, and the applicant shall be notified of it, within a period that does not hamper the pursuit of the relevant studies, whilst leaving the competent authorities sufficient time to process the application. In this regard, Article 18(2) further specifies that if the information supplied in support of the application is inadequate, processing of the application may be suspended and the competent authorities shall inform the applicant of any further information they need.

Additionally, any **decision rejecting an application** for a residence permit shall be notified to the third-country national concerned in accordance with the notification procedures provided for under the relevant national legislation. The notification shall specify the possible redress procedures available and the time limit for taking action.

Where an application is rejected or a residence permit issued in accordance with this Directive is withdrawn, the person concerned shall have the **right to mount a legal challenge** before the authorities of the Member State concerned.

I.3.7. Economic activities by students

Outside their study time and subject to the rules and conditions applicable to the relevant activity in the host Member State, **students shall be entitled to be employed** and **may be entitled to exercise self-employed economic activity**. The situation of the labour market in the host Member State may be taken into account. Where necessary, Member States shall grant students and/or employers prior authorisation in accordance with national legislation.[58]

For this purpose, each Member State shall determine the **maximum number of hours per week or days or months per year** allowed for such an activity, which shall **not be less than 10 hours per week**, or the equivalent in days or months per year.[59]

Notwithstanding the above, **Article 17(3)** of the Directive allows host Member States to **restrict access to economic activities** for the first year of residence.

Additionally, Member States may require students to report, in advance or otherwise, to an authority designated by the Member State concerned, that they are engaging in an economic activity. Their employers may also be subject to a **reporting obligation**, in advance or otherwise.

I.4. Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purpose of scientific research [58].

Article 8 of this Directive foresees that Member States shall issue residence permits to researchers for a period of **at least one year** and **shall renew it if the conditions for his/her admission**, including a valid hosting agreement, **are still met**. If the research project is scheduled to last less than one year, the residence permit shall be issued for the duration of the project.

Pursuant to **Article 10**, Member States may **withdraw or refuse to renew** a residence permit issued on the basis of this Directive when it has been **fraudulently acquired** or wherever it appears that **the holder did not meet or no longer meets the conditions for entry and residence** provided by Articles 6 and 7 of the Directive or if he/she is residing for purposes other that that for which he/she was authorized to reside.

Member States may also withdraw or refuse to renew a residence permit for **reasons of public policy, public security or public health**.

[58] See Article 17(1) of the Directive.
[59] See Article 17(2) of the Directive.

The Directive for the admission of researchers provides certain **procedural safeguards** regarding the granting and the rejection of residence permits. **Article 15** provides the following:

1. The competent authorities of the Member States shall adopt a **decision on the complete application as soon as possible** and, where appropriate, provide for accelerated procedures.

2. If the information supplied in support of the application is inadequate, the consideration of the application may be suspended and the competent **authorities shall inform the applicant of any further information they need**.

3. Any decision rejecting an application for a residence permit shall be notified to the third-country national concerned in accordance with the notification procedures under the relevant national legislation. The **notification shall specify the possible redress procedures available and the time limit for taking action**.

4. Where an application is rejected, or a residence permit, issued in accordance with this Directive, is withdrawn, the person concerned shall have the **right to mount a legal challenge** before the authorities of the Member State concerned.

I.5. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [58].

This Directive, which came into force on 23 January 2004, sets out the **terms for conferring and withdrawing long-term resident status** for third-country nationals legally residing in the territory of a Member State and the **rights pertaining to that status**. It further determines the **terms of residence** in Member States for third-country nationals enjoying long-term resident status. The Directive is to be transposed by the Member States by 23 January 2006.

The **main criterion** for acquiring the status of long-term resident is the **duration of residence** in the territory of a Member State. Pursuant to **Article 4(1)** of the Directive, Member States shall grant long-term resident status to third country nationals who have resided legally and continuously within its territory for **five years** immediately prior to the submission of the relevant application.

Additionally, according to **Article 5(1)** of the Directive, Member States shall require third-country nationals to provide evidence that they have, for themselves and for dependent family members:

(a) **stable and regular resources** which are sufficient to maintain himself/herself and the members of his/her family without recourse to the social assistance system of the Member State concerned, and
(b) **sickness insurance** in respect of all risks normally covered for its own nationals.

Furthermore, Member States may require third-country nationals to comply with **integration conditions**, in accordance with national law.[60] In this regard, the European Parliament suggested in its November 2001 Report on the proposal for this Council Directive that Member States should be permitted to make the award of long-term resident status contingent on other evidence of integration, in particular adequate knowledge of a national language of the Member State concerned. The reasoning behind this suggestion was that, in the words of the Parliament, "*the award of long-term resident status is no substitute for successful integration; instead, an advanced degree of integration into the life of the Member State concerned is a precondition for the award of that status. Whilst the host society must offer immigrants the prospect of long-term resident status and equal access in many areas, for their part immigrants must learn the language of the host country. The acquisition of the soundest possible language knowledge as quickly as possible is in the interests of both individual immigrants and the host society*".

Third-country nationals who wish to acquire and maintain long-term resident status should not constitute a threat to public policy[61] or public security. Accordingly, **Article 6** provides that Member States may refuse to grant long-term resident status on grounds of public policy or public security[62].

[60] Article 5(2).
[61] The notion of public policy may cover a conviction for committing a serious crime.

The **procedure for acquiring long-term resident status** is set out in **Article 7(1)** of the Directive: To acquire long-term resident status, the third-country national concerned shall loge an application with the competent authorities of the Member State in which he or she resides. The application shall be accompanied by **documentary evidence**, (…), **that he or she meets the conditions set out in Articles 4** and **5** as well as, if required, by a **valid travel document** or its certified copy. It is important to note in this context that the evidence referred to in **Article 7(1)** may also include documentation with regard to **appropriate accommodation**.

According to **Article 8(2)** of the Directive, the permit shall be **valid at least for five years** and it shall, upon application if required, be **automatically renewable on expiry**.

Article 8(3) further provides that a 'long-term resident's EC residence permit' may be issued in the form of a **sticker** or of a **separate document**. It shall be issued in accordance with the rules and standard model as set out in Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals.[63]

Article 9 provides for the **withdrawal or loss of status** in circumstances of:

(a) detection of fraudulent acquisition of long-term resident status,
(b) adoption of an expulsion measure,[64]and
(c) in the event of absence from the territory of the Community for a period of 12 consecutive months.

The Directive gives **procedural guarantees** in that reasons shall be provided for any decision rejecting an application for long-term resident status or withdrawing that status[65] as well as in the situation where the expulsion of a long-term resident is being considered.[66]

Long-term residents have the **right to equal treatment** with nationals[67] as regards:

(a) **access to employment and self-employed activity**, (…),
(b) **educational and vocational training**, (…),
(c) **recognition of professional diplomas, certificates and other qualifications**, (…),
(d) **social security, social assistance and social protection** (…),
(e) **tax benefits**,
(f) **access to goods and services** and the **supply of goods and services** made available to the public and to **procedures for obtaining housing**,
(g) **freedom of association and affiliation** and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, (…), and
(h) **free access to the entire territory of the Member State concerned**, (…).

Furthermore, **Chapter III** of the Directive provides for the **right to reside in the territory of Member States other than the one which granted the long-term residence status**, for a period exceeding 3 months, provided that certain conditions are met.

According to **Article 14**, a **long-term resident may reside in a second Member State** on the following grounds:

(a) **exercise of an economic activity** in an employed or self-employed capacity,
(b) **pursuit of studies or vocational training**, and for
(c) **other purposes**.

The Directive **applies to third-country nationals residing legally in the territory of a Member State**, with the **exception** of those who:

---

[62] This condition is further specified in Article 17 in relation to applications for residence from long-term residents who wish to acquire the right to reside in a second Member State.
[63] See above.
[64] The conditions for this are provided for in Article 12 and Member States may take a decision to expel a long-term resident solely where he or she constitutes an actual and sufficiently serious threat to public policy or public security.
[65] Article 10.
[66] Article 12(3), (4) and (5).
[67] Certain derogations are permitted and are outlined in Article 11 (2) to (4).

(a) reside in order to pursue studies or vocational training,
(b) are authorised to reside in a Member State on the basis of temporary protection or have applied for authorisation to reside on that basis and are awaiting a decision on their status,
(c) are authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or have applied for authorisation to reside on that basis and are awaiting a decision on their status,
(d) are refugees or have applied for recognition as refugees and whose application has not yet given rise to a final decision,
(e) reside solely on temporary grounds such as au pair or seasonal worker, or as workers posted by a service provider for the purposes of cross-border provision of services, or as cross-border providers of services or in cases where their residence permit has been formally limited, or
(f) enjoy a legal status governed by the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, the Convention of 1969 on Special Missions or the Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character of 1975.[68]

I.6. 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 or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities [67].

This Directive, the contents of which will be described in more detail below,[69] introduces a residence permit intended for victims of trafficking in human beings or, if a Member State decides to extend the scope of this Directive, to third-country nationals who have been the subject of an action to facilitate illegal immigration, to whom the residence permit offers a sufficient incentive to cooperate with the competent authorities while including certain conditions to safeguard against abuse.

[68] Article 3(2)(a) to (f).
[69] See Part E.II.1. below.

II. Family Reunification

II.1 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[70]

The purpose of this Directive is to determine the **conditions for the exercise of the right to family reunification** by third-country nationals residing lawfully in the territory of the Member States.[71] It recognises that family reunification is a necessary way of making family life possible, that it helps to create socio-cultural stability and facilitates the integration of third-country nationals in the Member States.

'**Family Reunification**' is defined in **Article 2** of the Directive as "*the **entry into and residence in a Member State by family members of a third-country national residing lawfully in that Member State in order to preserve the family unit**, whether the family relationship arose before or after the resident's entry*".

According to its **Article 3(1)**, the **Directive shall apply where the sponsor**[72] **is holding a residence permit**[73] **issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence**, if the members of his or her family are third country nationals of whatever status.

Article 3(2) of the Directive provides that it shall not apply where the sponsor is:

(a) applying for recognition of refugee status whose application has not yet given rise to a final decision,
(b) authorised to reside in a Member State on the basis of temporary protection or applying for authorisation to reside on that basis and awaiting a decision on his status, or
(c) authorised to reside in a Member State on the basis of a subsidiary form of protection in accordance with international obligations, national legislation or the practice of the Member States or applying for authorisation to reside on that basis and awaiting a decision on his status.

Furthermore, the Directive shall not apply to members of the family of a Union citizen.[74]

According to **Article 4(1)** of the Directive, the Member States **shall authorise the entry and residence (…) of the following family members**:

(a) the sponsor's **spouse**,
(b) the **minor children of the sponsor and his/her spouse**, including children adopted in accordance with a decision taken by the competent authority in the Member State concerned or a decision which is automatically enforceable due to international obligations of that Member State, or must be recognised in accordance with international obligations,
(c) the **minor children** including adopted children **of the sponsor** where the sponsor has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement, and
(d) the **minor children** including adopted children **of the spouse** where the spouse has custody and the children are dependent on him or her. Member States may authorise the reunification of children of whom custody is shared, provided the other party sharing custody has given his or her agreement.

The minor children referred to in **Article 4(1)** must be **below the age of majority** set by the law of the Member State concerned and must **not be married**. Additionally, Member States may request that

[70] OJ L251/12, 3.10.2003.
[71] Article 1 Council Directive 2003/86/EC.
[72] 'sponsor' is defined in Article 2 of the Directive as "a third-country national residing lawfully in a Member State and applying or whose family members apply for family reunification to be joined with him/her".
[73] 'residence permit' is defined in Article 2 of the Directive as "any authorisation issued by the authorities of a Member State allowing a third-country national to stay legally in its territory, in accordance with the provisions of Article 1(2)(a) of Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals".
[74] Article 3(3) Council Directive 2003/86/EC.

applications concerning family reunification of minor children have to be submitted before the age of 15.[75] However, if the application is submitted after the age of 15, Member States, which decide to apply this derogation, have the obligation to authorise the entry and residence of such children on grounds other than family reunification.[76]

Furthermore, by way of derogation, where a child is aged over 12 years and arrives independently from the rest of his or her family, the Member State concerned may, before authorising entry and residence under this Directive, verify whether the child meets a condition for integration provided for by its existing legislation.

This provision was challenged by the European Parliament in an action brought to the European Court of Justice on the basis that the Article enforcing tests on children aged 12 or over is contrary to Article 8 of the 1950 European Convention on Human Rights and Fundamental Freedoms. On 27 June 2006 the Court held that the Directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interest of children or to the principle of non-discrimination on grounds of age, either in itself or in that it expressly or impliedly authorises Member States to act in such a way.

Article 4(2) and **(3)** widen the scope of application of the Directive by allowing for the authorisation of the entry and residence of:

- **first degree relatives** in the direct ascending line of the sponsor or his or her spouse, where they are dependent on them and do not enjoy proper family support in the country of origin;
- **adult unmarried children** of the sponsor or his or her spouse, where they are objectively unable to provide for their own needs on account of their state of health; and
- the **unmarried partner**, being a third-country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third-country national who is bound to the sponsor by a registered partnership,[77] and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons

Furthermore, Member States may decide that **registered partners** are to be treated equally with spouses with regard to family reunification.

The Directive limits family reunification rights in the event of **polygamous marriages**. Where the sponsor already has a spouse living with him in the territory of a Member State, the Member State concerned shall not authorise the family reunification of a further spouse. In that context, Member States may also limit the family reunification of minor children of a further spouse and the sponsor.[78]

In order to ensure better integration and to prevent **forced marriages**, Member States may require the sponsor and his or her spouse to be of minimum age (and at maximum 21 years), before the spouse is able to join him or her.[79]

In relation to the **submission and examination of the application**, **Article 5(1)** leaves it to the Member States to determine whether an application for entry and residence shall be submitted to the competent authorities of the Member State concerned by the sponsor or by the family member or members.

In any case, the application shall be accompanied by **documentary evidence** of the **family relationship** and of **compliance with the conditions** laid down in **Article 4**,[80] as regards age, dependency etc., and Article 6, as regards public policy, public security and public health.

Furthermore, **Article 7** provides that when an application for family reunification is submitted, the Member State concerned may require the person who submitted the application to provide evidence that the sponsor has:

[75] As provided for in its existing legislation on the date of the implementation of the Directive.
[76] Article 4(6) Council Directive 2003/86/EC.
[77] Article 5(2) Council Directive 2003/86/EC provides that "when examining an application concerning the unmarried partner of the sponsor, Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof".
[78] Article 4(4) Council Directive 2003/86/EC.
[79] Article 4(5) Council Directive 2003/86/EC.
[80] See above.

(a) **accommodation** regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned,
(b) **sickness insurance** in respect of all risks normally covered for its own nationals in the Member State concerned for himself or herself and the members of his or her family, and
(c) **stable and regular resources** which are sufficient to maintain himself or herself and the members of his or her family, without recourse to the social assistance system of the Member State concerned.[81]

Member States may also require third-country nationals to comply with **integration measures**, in accordance with national law.[82]

According to **Article 8**, **Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years**, before having his or her family member join him or her.[83]

The **family reunification of refugees** recognised in the Member States is regulated in **Chapter IV** of the Directive, which provides for more preferential treatment.

Upon granting of family reunification, the host Member State shall **authorise the entry of the family member or members** and shall grant such persons every **facility for obtaining the requisite visas**.

The sponsors' family members shall be entitled, in the same way as the sponsor, to:

(a) **access to education**,
(b) **access to employment and self-employed activity**, and
(c) **access to vocational guidance, initial and further training and retraining**.

With regard to **access to employment or self-employed activities**, it is open to the Member States to introduce **time limits** not exceeding 12 months during which they may examine the situation of their labour market before authorising a family member to exercise an employed or self-employed activity.[84] Member States may also **restrict access** to employment or self-employed activity for first-degree relatives in the direct ascending line or adult unmarried children who were granted family reunification on the basis that they did not enjoy proper family support in the country of origin (in the case of the former) or because the were objectively unable to provide for their own needs on account of their state of health (in the case of the latter).[85]

An **autonomous residence permit**, independent of that of the sponsor, shall be issued upon application, no later than **after five years** of residence to the spouse or unmarried partner and a child who has reached majority. However, the granting of an autonomous residence permit to a spouse or unmarried partner may be limited to cases of breakdown of the family relationship.[86]

In the event of widowhood, divorce, separation, or death of first-degree relatives in the direct ascending or descending line, an autonomous residence permit may be issued, upon application, if required, to persons who have entered on the basis of family reunification. Member States are required to lay down provisions ensuring the **granting of an autonomous residence permit in particularly difficult circumstances**.[87]

The granting of an **autonomous residence permit** to **adult children** and to **relatives in the direct ascending line** who were granted family reunification on the basis that they did not enjoy proper family support in the country of origin (in the case of the former) or because the were objectively

[81] Article 7(1)(c) Council Directive 2003/86/EC provides that "Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum national wages and pensions as well as the number of family members".
[82] With regard to refugees and/or family members of refugees, the integration measures referred to in the first subparagraph of Article 7(2) may only be applied once the persons concerned have been granted family reunification.
[83] Where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.
[84] Article 14(2) Council Directive 2003/86/EC.
[85] Article 14(3) Council Directive 2003/86/EC.
[86] Article 15(1) and (4) Council Directive 2003/86/EC.
[87] Article 15(3) and (4) Council Directive 2003/86/EC.

unable to provide for their own needs on account of their state of health (in the case of the latter) is discretionary.[88]

In accordance with **Article 16(1)** Member States may **reject an application for entry and residence** for the purpose of family reunification, or, if appropriate, **withdraw or refuse to renew a family member's residence permit**, in the following circumstances:

(a) where the conditions laid down by this Directive are not or are no longer satisfied,[89]
(b) where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship, or
(c) where it is found that the sponsor or the unmarried partner is married or is in a stable long-term relationship with another person.

Article 16(2) further provides that Member States may **reject an application for entry and residence** for the purpose of family reunification, or **withdraw** or **refuse to renew a family member's residence permit**, where it is shown that:

(a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used, or
(b) the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or to reside in a Member State.[90]

Finally, Member States may withdraw or refuse to renew the residence permit of a family member also where the **sponsor's residence comes to an end** and the family member concerned does not yet enjoy an autonomous right of residence under Article 15.[91]

Additionally, Member States may conduct **specific checks and inspections, where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience** as defined by **Article 16(2)**. Specific checks may also be undertaken on the occasion of the renewal of family members' residence permits.[92]

Member States shall take due account of the **nature and solidity of the person's family relationships** and the **duration of his or her residence in the Member State** and of the **existence of family, cultural and social ties with his or her country of origin** where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his or her family.[93]

Article 18 of the Directive provides that the Member States shall ensure that the sponsor and/or the members of his or her family have the **right to mount a legal challenge** where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered.

II.2. Council Directive 2003/109/EC of 25 November 2003 concerning the status third-country nationals who are long-term residents [92]

Article 16 of this Directive[94] provides that when **a long-term resident exercises his or her right of residence in a second Member State** and **when his or her family was already constituted in the first Member State**, the members of the family, who fulfil the conditions referred to in Article 4(1) of

[88] Article 15(2) and (4) Council Directive 2003/86/EC.
[89] When renewing the residence permit, where the sponsor has not sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income.
[90] When making an assessment with respect to this point, Member States may have regard in particular to the fact that the marriage, partnership or adoption was contracted after the sponsor had been issued his or her residence permit.
[91] Article 16(3) Council Directive 2003/86/EC.
[92] Article 16(4) Council Directive 2003/86/EC.
[93] Article 17 Council Directive 2003/86/EC.
[94] Described in more detail at B.I.4. above.

the Family Reunification Directive 2003/86/EC,[95] i.e. **spouses and minor unmarried children**, shall be authorised to accompany or to join the long-term resident.

When the long-term resident exercises his or her right of residence in a second Member State and when the family was already constituted in the first Member State, family members of his or her family, **other** than those referred to in **Article 4(1)** of the **Family Reunification Directive 2003/86/EC may** be authorised to accompany or to join the long-term resident.

The second Member State may require the family members concerned to present together with their application for a residence permit:

(a) their **long-term resident's EC residence permit** or **residence permit and a valid travel document** or their certified copies,
(b) **evidence that they have resided as members of the family of the long-term resident** in the first Member State, and
(c) evidence that they have **stable and regular resources** which are sufficient to maintain themselves without recourse to the social assistance of the Member State concerned or that the long-term resident has such resources and insurance for them, as well as sickness insurance covering all risks in the second Member State.[96]

Where the family was not already constituted in the first Member State, the **Family Reunification Directive 2003/86/EC** shall apply.

II.3. Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research[97]

The Council Directive on the admission of researchers provides that **sspecial attention should be paid to the facilitation and support of the preservation of the unity of family members of the researchers**. Additionally, in order to preserve family unity and to enable mobility, family members should be able to join the researcher in another Member State under the conditions determined by the national law of such Member State, including its obligations arising from bilateral or multilateral agreements.

The Directive was introduced together with **Council Recommendation of 12 October 2005 to facilitate the admission of third-country nationals to carry out scientific research in the European Community**[98].

In its Recommendation the Council of the European Union recognizes that matters relating to family reunification are a crucial factor in researchers' decisions to choose the Community as the location for their research and therefore urges Member States to facilitate the reunification of the researchers' family members, for example with respect to access to the labor market and the possibility for family members to apply when they are legally present on the territory of the Member State concerned.

Furthermore, the Recommendation provides that in determining the duration of the residence permit to be issued to the family members, Member States should take into account whether the person concerned should complete his/her schooling needs or not.

The Council recommends specifically that Member States **facilitate and support the reunification of family members**, by providing them with **favorable and attractive conditions and procedures**.

[95] See Part B.II.1. above.
[96] Member States shall evaluate these resources by reference to their nature and regularity and may take into account the level of minimum wages and pensions.
[97] OJ L289/15, 3.11.2005.
[98] OJ L289/26, 3.11.2005.

III. Non-Discrimination and Integration

III.1 Treaty Establishing the European Community [98]

The protection of the fundamental rights of European citizens and third-country nationals resident in the European Union has been a key feature of European integration from the start. In the area of non-discrimination, **Article 12** of the **EC Treaty**, in particular, **prohibits any discrimination on grounds of nationality**, regardless of whether citizens are nationals of a Member State or not. However, this article alone was not an effective weapon in the fight against discrimination. The new **Article 13** of the **EC Treaty**, introduced by the **Treaty of Amsterdam**, expanded upon this principle by stipulating that *"without prejudice to the other provisions of this Treaty and within the limits of the powers conferred upon it by the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."*

Additionally**, Article 3(2)** of the Treaty seeks not only to eliminate inequalities but also to promote **equality between men and women**, **Articles 136 and 137** promote **measures to combat exclusion**, **Article 141** deals with the principle of **equal pay for equal work** and **Declaration No 22 to the Final Act of the Amsterdam Treaty**, which refers to Article 95 of the EC Treaty, concerns **equal opportunities for persons with disabilities**.[99]

III.2 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[100]

The purpose of this Directive is to lay down a **framework for combating discrimination on the grounds of 'racial'**[101] or **ethnic origin**, with a view to putting into effect, in the Member States, the principle of equal treatment.[102]

According to its **Article 3**, the Directive **applies to all persons resident in the Member States, including third-country nationals**. However, it does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment that arises from the legal status of the third country nationals and stateless persons concerned.[103]

The Directive goes far beyond the area of **employment** and includes, *inter alia*, access to all types and levels of **vocational guidance and training**, **social protection** (including social security and healthcare), education and **access to, and supply of, goods and services** which are available to the public, including housing.[104]

In **Article 2(2)** of the Directive **'direct discrimination'** is defined as a situation in which *"one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of 'racial' or ethnic origin"*.

According to the same article **'indirect discrimination'** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a 'racial' or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary.

---

[99] Article 13 takes a subordinate role if a more specific legal basis applies.
[100] OJ L180/22, 19.7.2000.
[101] The European Union rejects theories, which attempt to determine the existence of separate human races. The use of the term 'racial origin' in this Directive does not imply an acceptance of such theories (Recital (6)).
[102] For the purpose of the Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin (Article 2(1)).
[103] See Article 3(2).
[104] See Article 3(1)(a) to (h).

According to **Article 2(3)** '**harassment**' shall also be deemed discrimination when an unwanted conduct related to 'racial' or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Furthermore, an **instruction to discriminate** against persons on grounds of 'racial' or ethnic origin shall be deemed to be discrimination.

With a view to ensuring full equality in practice, the Directive allows for **positive action** by Member States maintaining or adopting specific measures to prevent or compensate for disadvantages linked to 'racial' or ethnic origin.

Article 7(1) obliges Member States to ensure that **judicial, administrative and conciliation procedures** are available to all persons who consider themselves victims of ethnic or 'racial' discrimination, even after the relationship in which the discrimination is alleged to have occurred has ended. According to **Article 7(2)**, legal entities, for example associations, which have a legitimate interest in ensuring the enforcement of the Directive, may engage in any such procedure.

Article 8 the Directive provides for a shift back of the **burden of proof** to the respondent.

Additionally, Member States are bound to **inform the public** of all provisions adopted pursuant to the Directive by all appropriate means throughout their territory[105] and to designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of 'racial' or ethnic origin.[106] The competence of these authorities have to include at least: providing **independent assistance** to victims of discrimination in pursuing their complaints, conducting **independent surveys**, publishing **independent reports** and making **recommendations**.

III.3. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [106].

The **Employment Equality Directive** implements the principle of equal treatment in employment and training irrespective of **religion** or **belief**, **disability**, **age** or **sexual orientation** in employment and training.

It includes identical provisions to the **'Racial' Equality Directive**[107] on definitions of discrimination, rights of legal redress and the sharing of the burden of proof. Additionally, it requires employers to make **reasonable accommodation** to cater for the needs of a person with a disability who is qualified to do the job in question.

Furthermore, the Directive allows for **limited exceptions** to the principle of equal treatment, for example to preserve the ethos of religious organisations or to allow special schemes to promote the integration of older or younger workers into the labour market.

III.4. Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [107].

The Directive itself provides that **Member States should give effect to its provisions without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation**.[108]

Specifically, **Article 11** of the Directive prescribes the **equal treatment of long-term residents** with nationals of the Member State concerned as regards:

[105] See Article 10.
[106] See Article 13.
[107] Council Directive 2000/43/EC described above.
[108] Recital No 5 to Council Directive 2003/109/EC.

a. **access to employment and self-employed activity**, provided such activities do not entail even occasional involvement in the exercise of public authority, and conditions of employment and working conditions, including conditions regarding dismissal and remuneration;
b. **education and vocational training**, including study grants in accordance with national law;
c. **recognition of professional diplomas, certificates and other qualifications**, in accordance with the relevant national procedures;
d. **social security, social assistance and social protection** as defined by national law;
e. **tax benefits**;
f. **access to goods and services** and the **supply of goods and services made available to the public** and to **procedures for obtaining housing**;
g. **freedom of association and affiliation** and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security; and
h. **free access to the entire territory of the Member State** concerned, within the limits provided for by the national legislation for reasons of security.

However, pursuant to **Article 11(2)**, the Member State concerned **may restrict equal treatment** with respect to the provisions of Paragraph 1, points (b), (d), (e), (f) and (g) to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he or she claims benefits, lies within the territory of the Member State concerned.

Additionally, Member States **may restrict equal treatment** with nationals in the following cases, pursuant to **Article 11(3)**:

a. Member States may retain restrictions to **access to employment or self-employed activities** in cases where, in accordance with existing national or Community legislation, these activities are reserved to nationals, EU or EEA citizens; and
b. Member States may require **proof of appropriate language proficiency for access to education and training**. Access to university may be subject to the fulfilment of specific educational prerequisites.

Article 11(4) further provides that Member States may limit equal treatment in respect of social assistance and social protection to core benefits.

However, in accordance with **Article 11(5)** Member States may decide to grant **access to additional benefits** in the areas referred to in paragraph 1. Member States may also decide to grant **equal treatment with regard to areas not covered in paragraph 1**.

III.5. Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research [107].

Holders of a residence permit issued pursuant to this Directive shall be entitled to **equal treatment with nationals** as regards:

(a) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;

(b) working conditions, including pay and dismissal;

(c) branches of social security as defined in Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (1).

(d) tax benefits;

(e) access to goods and services and the supply of goods and services made available to the public.

III.6. Council Regulation (EC) 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC)No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality [107]

The purpose of this Council Regulation is the **fair treatment of third-country nationals legally resident in the Member States** and the definition of their legal status, including uniform rights as close as possible to those enjoyed by the citizens of the European Union.

To this end, the **extension of Regulation (EEC) 1408/71 on the application of social security schemes to employed persons and their families moving within the Community** was necessary to remedy a situation in which the number and diversity of legal instruments used in an effort to resolve problems in connection with the coordination of the Member States' social security schemes encountered by nationals of third countries, who are in the same situation as Community nationals, gave rise to legal and administrative complexities. These created major difficulties for the individuals concerned, their employers, and the competent national social security bodies[109].

According to the **Regulation (EEC) 1408/71**, persons entitled to benefits for **invalidity, old age and death (pensions)** must be able to enjoy all the benefits, which have accrued to them in the various Member States. In order to secure mobility of labour under improved conditions, it is necessary to ensure closer co-ordination between the unemployment insurance schemes and the unemployment assistance schemes of all the Member States. In order to facilitate search for employment in the various Member States, it is appropriate to grant to an unemployed worker, for a limited period, the unemployment benefits provided for by the legislation of the Member State to which he or she was last subject.

The provisions of **Regulation (EEC) 1408/71** and the **implementing Regulation (EEC) 574/72**[110] are, by virtue of this Regulation, **applicable only in so far as the person concerned is already legally resident in the territory of a Member State**.[111]

The provisions of **Regulation (EEC) 1408/71** and **Regulation (EEC) 574/72 are not applicable in a situation, which is confined in all respects within a single Member State**. This concerns, *inter alia*, the situation of a third-country national who has links only with a third country and a single Member State[112].

The continued right to **unemployment benefit**, as laid down in **Article 69** of **Regulation (EEC) 1408/71**, is subject to the condition of registering as a job-seeker with the employment services of each Member State entered. Those provisions may therefore apply to a third-country national only provided that he or she has the right, where appropriate pursuant to his or her residence permit, to register as a job-seeker with the employment services of the Member State entered and the right to work there legally[113].

According to **Article 2(2)** of the **Regulation**, any period of insurance and, where appropriate, any period of employment, self-employment or residence completed under the legislation of a Member State before 1 June 2003 shall be taken into account for the determination of rights acquired in accordance with the provisions of this Regulation.

Furthermore, any benefit that has not been awarded or that has been suspended on account of the nationality or the residence of the person concerned shall, at the latter's request, be awarded or resumed from 1 June 2003, provided that the rights for which benefits were previously awarded did not give rise to a lump-sum payment.[114]

---

[109] Recital 8 Council Regulation (EC) 859/2003.
[110] This Regulation specifies the competent institutions of each Member State, the documents to be furnished and the formalities to be completed by persons concerned in order to obtain benefits, the procedures for administrative checks and medical examinations and the conditions for the reimbursement of benefits provided by the institution of one Member State on behalf of the institution of another Member State.
[111] Recital 11 Council Regulation (EC) 859/2003.
[112] Recital 12 Council Regulation (EC) 859/2003.
[113] Recital 13 Council Regulation (EC) 859/2003.
[114] Article 2(4) Council Regulation (EC) 859/2003.

The rights of persons who, prior to 1 June 2003, obtained the award of a pension may be reviewed at their request, account being taken of the provisions of this Regulation.[115]

III.7. Common Agenda for Integration-Framework for the Integration of Third-Country Nationals in the European Union [114]

Following the **Council Conclusions of 19 November 2004 on Immigrant Integration Policy in the EU**[116], the **Hague Programme** invited the Commission to present a policy plan on legal migration before the end of 2005. As a first step, the Commission published a Green Paper on an EU approach to managing economic migration[117], underlining that admission measure must be accompanied by strong integration policies.

While integration continues to be high on the political agenda of the EU, binding provisions on this issue do not exist. Instructive in this regard is the **Common Agenda for Integration – Framework for the Integration of Third-Country Nationals in the European Union**. This Communication is the Commission's first response to the invitation of the European Council to establish a coherent European framework for integration. The cornerstones of such a framework are proposals for concrete measures to but the **Common Basic Principles** adopted in November 2004[118] into practice, together with a series of supportive EU mechanisms. Taking into account the existing EU policy frameworks, the Communication provides new suggestions for action both at EU and national level.

- **Integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of Member States.**
- **Integration implies respect for the basic values of the European Union**
- **Employment is a key part of the integration process and is central to the participation of immigrants, to the contributions immigrants make to the host society and to making such contributions visible.**
- **Basic knowledge of the host society's language, history, and institutions is indispensable to integration; enabling immigrants to acquire this basic knowledge is essential to successful integration.**
- **Efforts in education are critical to preparing immigrants, and particularly their descendants, to be more successful and more active participants in society**
- **Access for immigrants to institutions, as well as to public and private goods and services, on a basis equal to national citizens and in a non-discriminatory way is a critical foundation for better integration.**
- **Frequent interaction between immigrants and Member State citizens is a fundamental mechanism for integration. Shared forums, intercultural dialogue, education about immigrants and immigrant cultures, and stimulating living conditions in urban environments enhance the interactions between immigrants and Member State citizens.**
- **The practice of diverse cultures and religions is guaranteed under the Charter of Fundamental Rights and must be safeguarded, unless practices conflict with other inviolable European rights or with national law.**
- **The participation of immigrants in the democratic process and in the formulation of integration policies and measures, especially at the local level, supports their integration.**

[115] Article 2(5) Council Regulation (EC) 859/2003.
[116] Council Doc. No 14776/04 MIGR 105.
[117] COM(2004) 811 final.
[118] Council Doc. No 14615/04 of 19 November 2004.

C. Expulsion, Voluntary Return & Readmission

Introduction

At legislative level, no further EU binding legal instruments have been introduced since August 2005. The proposed **Directive on common standards and procedures in member States for returning illegally staying third country nationals**[119], under Article 63(3)(b) TEC, is the latest attempt by the EU to deal with the problems caused by the ability of irregular migrants to move between member States to avoid expulsion to their countries of origin, and to impose common standards in relation to expulsion decisions, legal safeguards, detention and the process of removal.

So far however, agreement between the Member States has not been reached and at Member States' insistence, safeguards in the proposed Directive relating to persons in transit zones, human rights grounds for refraining from expulsion, restrictions on forced removal and suspended enforcement of expulsion decisions, re-entry bans, procedural safeguards and detention conditions were watered down.

In February 2007, the German Presidency of the EU Council suggested a new approach to the text, which would remove many of the provisions of the Directive altogether and simply refer to national law as regards most of the remainder[120]. The German Presidency proposed that **extensive harmonization of all aspects of expulsion be ruled out**. In the words of the Presidency: *"in some areas (re-entry and residence bans, legal remedies and temporary custody), the Presidency can see scope for phased Community-wide harmonization. As a first stage, in the Presidency's view, Community rules should cover only some aspects of return and removal and must make allowance for Member States' established arrangements and procedures. More extensive harmonization of return, including all the procedural rules, should be attempted only in the long term. In any event, it needs to be ensured that return and removal are not prevented or delayed by Community provisions"*.

The proposed Return Directive should be seen in the context of the Commission's framework programme for managing future migration to the EU. According to the **Communication from the Commission to the Council and the European Parliament establishing a framework programme on solidarity and management of migration flows for the period 2007-2013**[121] half a million irregular migrants are apprehended annually in the EU, and 300,000 are removed. The programme proposes financial solidarity mechanisms covering four areas:

- **controls and surveillance of external borders**
- **return of third-country nationals residing illegally in the EU**
- **integration of legally resident third-country nationals**
- **asylum**

The programme foresees an **External Borders Fund**, a **European Refugee Fund**, and a **European Integration Fund**. A '**European Return Fund**', as proposed by the Council in the Hague Programme, is to be set up in 2008 to pay Member States for expulsions on a basis taking into account both the numbers being expelled and the number of returns carried out satisfactorily by the member State in the past.

[119] COM (2005) 391 final, 1.9.2005.
[120] Council doc. 6624/07, 28.2.2007.
[121] COM (2005) 123 final, 6.4.2005.

I. Expulsion

I.1. Convention Implementing the Schengen Agreement of 14 June 1985[122]

The underlying principles of the EU acquis concerning expulsion relate to the **speed**, **efficiency**, **effectiveness**, and **economy** of facilitating expulsion.[123] However, at the same time, expulsion procedures are required to be fully consistent with the obligations of the expelling country under the relevant international instruments in the fields of **asylum** and **human rights**.

According to **Article 23** of the Convention Implementing the Schengen Agreement:

1. **Third-country nationals who do not fulfil or who no longer fulfil the short-stay conditions** applicable within the territory of a Contracting Party shall normally be **required to leave the territories of the Contracting Parties** immediately.

2. **Third-country nationals who hold valid residence permits or provisional residence permits issued by another Contracting Party** shall be **required to go to the territory of that Contracting Party** immediately.

3. Where such third-country nationals have **not left voluntarily** or where it **may be assumed that they will not do so** or where their **immediate departure is required for reasons of national security or public policy**, they **must be expelled** from the territory of the Contracting Party in which they were apprehended, in accordance with the national law of that Contracting Party. If under that law expulsion is not authorised, the Contracting Party concerned may allow the persons concerned to remain within its territory.

4. Such third-country nationals may be expelled from the territory of that Party to their countries of origin or any other State to which they may be admitted, in particular under the relevant provisions of the **readmission agreements** concluded by the Contracting Parties.

5. Paragraph 4 **shall not preclude the application of national provisions on the right of asylum**, the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, paragraph 2 of this Article or Article 33(1) of this Convention.

Additionally, **Article 24** of the Convention provides that subject to the Executive Committee's definition of the appropriate criteria and practical arrangements, the **Contracting Parties shall compensate each other for any financial imbalances**, which may result from the obligation to expel as provided for in Article 23 where such expulsion cannot be effected at the third-country national's expense.

On 21 April 1998 the **Schengen Executive Committee** approved Document SCH/II-read (97)5 rev. 5 on **cooperation between the Contracting Parties in connection with the expulsion of foreign nationals by air**. This issue has now been addressed in the Council Decision on the organisation of joint flights for removals, from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders.[124]

On 23 June 1998 the **Schengen Executive Committee** further decided that the **measures to be taken vis-à-vis countries posing problems with regard to the issue of documents required for expulsion from the Schengen territory** shall be adopted.[125] This specifically concerns difficulties encountered in the area of repatriation, due to a lack of cooperation from foreign consulates in the Schengen capitals in issuing a laissez-passer. Although initial steps to find solutions were being contemplated at national level, it was thought that a joint Schengen approach to this problem might result in more effective solutions.

[122] OJ L239/19, 22.9.2000 – Schengen Acquis as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999, OJ L176/1, 10.7.1999.
[123] See Paragraph III of the Recommendation of 30 November 1992 concerning transit for the purpose of expulsion (WG1110).
[124] See Part C.I.6. below.
[125] SCH/Com-ex (98)18 rev.

I.2. Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals[126]

This Directive was adopted to ensure **greater effectiveness** in **enforcing expulsion decisions** and **better cooperation between Member States**, recognising that decisions on the expulsion of third-country nationals have to be adopted in accordance with fundamental rights, as safeguarded, *inter alia*, by the European Convention for the Protection of **Human Rights and Fundamental Freedoms**.[127]

According to its **Article 1(1)**, the purpose of the Directive is to make possible the **recognition of an expulsion decision issued by a competent authority in one Member State**[128] **against a third-country national present within the territory of another Member State**.[129] Any decision taken pursuant to Article 1(1) shall be implemented according to the applicable legislation of the enforcing Member State.

An expulsion pursuant to **Article 1(1)** shall apply to:

(a) a third-country national who is the subject of an expulsion order based on a **serious and present threat to public order** or to **national security** and **safety**, taken in the following cases:
   - conviction of a third-country national by the issuing Member State for an offence punishable by a penalty involving deprivation of liberty of at least one year
   - the existence of serious grounds for believing that a third-country national has committed serious criminal offences or the existence of solid evidence of his intention to commit such offences within the territory of a Member State, and

(b) a third-country national who is the subject of an expulsion decision based on **failure to comply with national rules on the entry and residence of third-country nationals**.[130]

According to **Article 4** of the Directive, Member States have the duty to ensure that a third-country national in respect of whom an expulsion decision pursuant to **Article 1(1)** has been issued may bring **remedial proceedings**.

Furthermore, the protection of personal data and data security shall be ensured.[131]

The Directive further provides that the authorities of the issuing Member State and of the enforcing Member State shall make use of all appropriate means of cooperation and exchanging information[132] and that they shall compensate each other for any financial imbalances, which may result from the application of this Directive.[133]

[126] OJ L149/34, 2.6.2001.
[127] See Recital 4 of the Preamble to Directive 2001/40/EC as well as Article 3(2) thereof.
[128] 'issuing Member State'
[129] 'enforcing Member State'
[130] See Article 3(1) of Directive 2001/40/EC.
[131] In accordance with Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L281/31, 23.11.1995).
[132] Article 6(1) of Directive 2001/40/EC.
[133] Article 7(1) of Directive 2001/40/EC; this matter is now being addressed in the Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals (OJ L060/55, 27.2.2004) (see below).

I.3. Council Decision of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals[134]

This Decision acknowledges that the application of Directive 2001/40/EC[135] may result in **financial imbalances** where expulsion decisions, despite efforts made by the enforcing Member State, cannot be effected at the expense of the third-country national concerned or of a third party, and that appropriate criteria and practical arrangements for **bilateral compensation** of Member States should be adopted.

The Decision constitutes the basis for establishing the **criteria and practical arrangements** required for the implementation of the provisions of Article 24 of the Schengen Convention.[136] It sets out appropriate criteria and practical arrangements for the **compensation of any financial imbalances**, resulting from the application of Directive 2001/40/EC.

The enforcing Member State shall provide the issuing Member State with **general information** about the **indicative costs** of the removal operations and the reimbursement shall take place at the request of the enforcing Member State on the basis of the minimum actual costs covering transport costs, administrative costs, mission allowances per diem for the escorts, accommodation costs for the escorts, accommodation costs for the returnee and any medical costs. Where necessary, the enforcing Member State shall consult the issuing Member State and agree on costs set out in **Article 2(2)** of the Decision or on additional costs.

Reimbursement requests shall be made **in writing** and shall be accompanied by **documentary proof** of the recoverable costs and may be rejected if they are submitted more than one year after the enforcement has taken place.

I.4. Council Directive 2003/110/EC of 25 November 2003 on assistance in case of transit for the purposes of removal by air[137]

The purpose of this Directive is to define **measures on assistance** between the competent authorities at Member State airports of transit with regard to **unescorted** and **escorted removals by air**.

According to **Article 3** of the Directive, a Member State wishing to return a third-country national by air shall examine whether it is possible to **use a direct flight to the country of destination**. Provided that a Member State wishing to return a third-country national cannot, for reasonable practical circumstances, use a direct flight to the country of destination, it can request transit by air via another Member State. An application for transit by air shall in principle not be made if the removal measure requires a change of airport on the territory of the requested Member State.

Without prejudice to the obligations of **Article 8**,[138] the **requested Member State may refuse transit** by air if:

(a) the third-country national under national legislation in the requested Member State is charged with criminal offences or is wanted for the carrying out of a sentence,
(b) transit through other States or admission by the country of destination is not feasible,
(c) the removal measure requires a change of airport on the territory of the requested Member State,
(d) the requested assistance is impossible at a particular moment for practical reasons, or
(e) the third-country national will be a threat to public policy, public security, public health or to the international relations of the requested Member State.

[134] OJ L60/55, 27.2.2004.
[135] See Part C.III.2. above.
[136] See C.I.1. above.
[137] OJ L321/26, 6.12.2003.
[138] Article 8 provides that this Directive shall be without prejudice to the obligations arising from the Geneva Convention relating to the status of refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, from international conventions on human rights and fundamental freedoms and from international conventions on the extradition of persons.

The **request** for escorted or unescorted transit by air and the associated assistance measures shall be made **in writing** by the requesting Member State **no later than two days before the transit**.[139]

Pursuant to **Article 5(2)** of the Directive, the requested State shall provide the **assistance measures necessary from landing and the opening of the aircraft doors until it is ensured that the third-country national has left**. This relates to the following assistance measures in particular:

(a) meeting the third-country national at the aircraft and escorting him or her within the confines of the transit airport, in particular to his or her connecting flight,
(b) providing emergency medical care to the third-country national and, if necessary, his or her escort,
(c) providing sustenance for the third-country national and, if necessary, his or her escort,
(d) receiving, keeping and forwarding travel documents, particularly in the case of unescorted removals,
(e) in cases of unescorted transit, informing the requesting Member State of the place and time of departure of the third-country national from the territory of the Member State concerned, and
(f) informing the requesting Member State if any serious incidents took place during the transit of the third-country national.

The requested Member State may, in accordance with its national law,

(a) place and accommodate the third-country nationals in a **secure facility**, and
(b) use **legitimate means** to prevent or end any attempt by the third-country national to resist the transit.

When carrying out the transit operation, the **powers of the escorts shall be limited to self-defence**. Only **in the absence of law-enforcement officers** from the transit Member State or **for the purpose of supporting the law-enforcement officers**, the escorts may use **reasonable and proportionate action** in response to an immediate and serious risk to prevent the third-country national concerned from escaping, causing injury to himself or herself or to a third party, or damage to property.

Under all circumstances, escorts must comply with the legislation of the requested Member State. **Escorts shall not carry weapons during transit by air and shall wear civilian clothes**. They shall provide means of appropriate **identification**, including the **transit authorisation** delivered by the transit Member State, or where applicable, the notification referred to in **Article 4(2)**, at the request of the requested Member State.

Member States are to implement this Directive with **respect for human rights and fundamental freedoms.** In accordance with the applicable international obligations, **transit by air should be neither requested nor granted if the third-country national faces the threat of inhumane or humiliating treatment, torture or the death penalty, or if his or her life or liberty would be at risk by reason of his or her 'race', religion, nationality, membership of a particular social group or political conviction in the third country of destination or in the country of transit**.[140]

[139] This time limit may be waived in particularly urgent and duly justified cases.
[140] Recital 7 to Council Directive 2003/110/EC.

I.5. Council Conclusions on assistance in cases of short-term transit by land or sea through the territory of another Member State in the course of effecting a removal order adopted by a Member State against a third-country national in the framework of the operational cooperation among Member States[141]

With these non-binding Conclusions, the Council is seeking to encourage Member States to make **arrangements to facilitate short-term transit** through their territory also by land or sea.

In particular, where a Member State decides to have recourse to transit through the territory of another Member State, which should in all cases be with an **escort by staff of the implementing Member State**, the transit operations **cannot be implemented without prior consent** from the Member State through which the transit would take place.

Furthermore, the Member State, which is implementing the transit operation,[142] should make and **maintain appropriate contacts** with the competent authorities of the Member State through which the transit is planned to take place[143] during the organisation phase of the transit operations as well as during its implementation and after its completion.

The requesting Member State should be **responsible for the completion of the transit operation**, until the arrival of the person concerned in the country of destination. Its escorts should, under all circumstances, comply with the legislation of the requested Member State.

The **cost of transit operations should be compensated** among Member States on the basis of appropriate financial arrangements.

Any transit operation should be implemented in **full compliance with international obligations** and in particular those arising from the **Geneva Convention relating to the status of refugees**, **from international conventions on human rights and fundamental freedoms** and from **international conventions on the extradition of persons**.

With a view to facilitating transit operations, the Council encourages the requested Member States to consider providing the following **assistance measures**:

(a) **escorts to assist the transit operations**, in accordance with national legislation, and
(b) **accommodation and sustenance**, where necessary, to the third-country nationals concerned and to the escorts, as well as **emergency medical assistance** and **assistance in the event of incidents**.

[141] Council Doc. No 15998/1/03 (adopted on 22.12.2003).
[142] 'requesting Member State'
[143] 'requested Member State'

I.6. Council Decision 2004/57/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States of third-country nationals who are subjects of individual removal orders[144]

The purpose of this Decision is to **coordinate joint removals by air**, from one or two Member States, of third-country nationals who are subjects of individual removal orders.

Where a Member State[145] decides to organise a joint flight for the removal of third-country nationals, which is open to the participation of the other Member States,[146] it shall inform the national authorities[147] of those Member States accordingly.

According to **Article 4** of the Decision, the **tasks of the organising Member State** are to take the necessary measures to ensure that the joint flight is conducted properly. In particular, it shall:

(a) select the **air carrier** and determine with the selected air carrier all the relevant costs of the joint flight, assume the relevant **contractual obligations** and ensure that it takes all the **measures necessary** for carrying out the joint flight, including providing the **appropriate assistance** to the third-country nationals and to the escorts
(b) request and receive, from third countries of transit and destination, the **authorisations** which are required for the implementation of the joint flight
(c) make use of **contacts** and make the appropriate **arrangements** for the organisation of the joint flight with the participating Member States
(d) define the **operational details** and **procedures** and determine, in agreement with the participating Member States, the **number of escorts** which is appropriate in relation to the number of third-country nationals to be removed
(e) conclude all the appropriate **financial arrangements** with the participating Member States

Article 5 of the Decision provides that the tasks of the participating Member States are to:

(a) **inform** the organising Member State of its **intention to participate** in the joint flight, specifying the number of third-country nationals to be removed, and
(b) **provide** a sufficient number of **escorts** for each third-country national to be removed.

Pursuant to **Article 6** of the Decision, the organising Member State and each participating Member State shall:

(a) **ensure** that each third-country national and the escorts hold valid **travel documents** and any other necessary **additional documents**, such as entry and/or transit visas, certificates or records, and
(b) **inform**, as soon as possible, their **diplomatic and consular representations** in the third-countries of transit and destination of the arrangements concerning the joint flight, in order to obtain the necessary assistance.

This Decision is being introduced together with **Common Guidelines on security provisions for joint removals by air**.[148] The Guidelines cover the **pre-return phase**, the **pre-departure phase** in departure or stopover airports, the **in-flight procedure**, the **transit phase**, the **arrival phase** and the case of a **failure of the removal operation**.

The Guidelines introduce, *inter alia*, **specific requirements for returnees**: **Section 1.1.1.** of the Guidelines stresses that joint flights are organised for persons residing without authorisation, who are persons who do not, or no longer, fulfil the conditions for entry to, presence in, or residence on the territory of a Member State. Most importantly, the Member States shall **ensure that the legal situation of each of the returnees for which they are responsible allows for removal**.

[144] OJ L261/28, 6.8.2004.
[145] 'organising Member State'
[146] 'participating Member States'
[147] Each Member State shall appoint the national authority responsible for organising and/or participating in joint flights and communicate the relevant information to the other Member States.
[148] Article 7 of Decision No 6379/04 provides that Member States shall take into account the Common Guidelines on security provisions for joint removals by air attached to it.

Section 1.1.2. of the Guidelines requires the Member States to ensure that the returnees for whom they are responsible are in an **appropriate state of health**, which allows legally and factually for a safe removal by air.

Pursuant to **Section 1.1.3.** of the Guidelines, the Member States shall ensure that for each returnee **valid travel documents and other necessary additional documents, certificates or records** are available.

According to **Section 3.2.(b)** of the Guidelines, **coercion** may only be used on individuals who refuse or resist removal. However, all such measures **shall be proportionate** and **shall not exceed reasonable force**. The dignity and physical integrity of the returnee shall be maintained. Member States are asked to adopt the **principle of 'no removal at all costs'**.

I.7. Council Conclusions on giving practical effect to the Council Decision on the organisation of joint flights for removals, from the territory of two or more Member States, of third-country nationals who are the subject of individual removal orders[149]

In its recent Conclusions, the Council urges an increase in the **use of joint flights** as a means of demonstrating the commitment of the EU to joint action on returns, an increase in the **rate of returns** from the EU and the more effective **use of resources**. In particular, recognising the practical difficulties of organising common removal operations, the Council encourages Member States in close geographic proximity to organise and share return flights where such collaboration would bring about economies of scale or otherwise confer mutual benefits on participants.

In the Conclusions, the Council further advises those Member States currently organising joint flights or planning to organise joint removal operations to consider **inviting participation** of other Member States in line with the procedures set out in the Council Decision. The Council encourages Member States with existing expertise in this area, in particular, to **share** this **experience** with the new Member States and those with little previous experience in the area of joint return operations;

The Council also calls on the Commission to develop the new **ICONET system**[150] to make it available as a secure **facility for Member States to communicate with each other** and **share information** about the organisation of joint removal operations; and to consider the possibility of **Community funding** for joint flights and the further **development of best practices** in this area. The Commission encourages the exploration with Member States of ways for the **Border Management Agency** to **provide the necessary assistance** for organising joint flights and advises that the **support of the immigration liaison officers (ILO) network**, where appropriate and in accordance with Member States' national functions for ILOs, might also be explored.

The Member States are called upon to **report regularly** to the Council and to the Commission on joint flights carried out by them and to **share** the **information and experience**.

1.8. Commission Communication on Policy priorities in the fight against illegal immigration of third-country nationals[151]

In this non-binding Communication the Commission recognises that **return, in full respect of fundamental rights, remains a cornerstone of EU migration policy**. Accordingly, an effective return policy is key in ensuring public support for elements such as legal migration and asylum. According to the Commission, the **conclusion of readmission agreements** will remain a priority. Ongoing negotiations should be completed and new negotiating mandates be adopted.

[149] Council Doc. No 8540/04 (adopted on 12.7.2004).
[150] Web-based information and coordination network.
[151] COM(2006) 402 final, 19.7.2006.

The Commission further refers to the future **Return Fund**, which it sees as an instrument to support and encourage the efforts made by Member States to improve the management of return in all its dimensions, including enhanced cooperation, which will further increase solidarity between them.

The Commission sees the **organisation of joint return flights** as supported through three elements:

- **Council Decision 2004/573/EC** which sets out a legal basis for such flights
- return preparatory actions and the future return fund which provide support in financial terms
- communication support provided by the ICONet web-based network which allows for necessary information exchange between Member States

Common standards for the training of officers responsible for return should also be established, for instance through the elaboration of a common training manual and EU-wide standardised and specialised seminars.

I.9. Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries[152]

With regard to the expulsion of minors, this non-binding Council Resolution can be seen as instructive. **Article 5** of the Resolution deals specifically with the **return of unaccompanied minors and provides that**:

1. Where a minor is not allowed to prolong his or her stay in a Member State, the Member State concerned may only return the minor to his or her country of origin or a third country prepared to accept him or her, if on arrival therein - depending on his or her needs in the light of age and degree of independence - **adequate reception and care** are available. This can be provided by parents or other adults who take care of the child, or by governmental or non-governmental bodies.

2. As long as return under these conditions is not possible, **Member States should** in principle **make it possible for the minor to remain in their territory**.

3. The competent authorities of the Member States should, with a view to a minor's return, **cooperate** in **reuniting unaccompanied minors with other members of their family**, either in the minor's country of origin or in the country where those family members are staying;

(a) with the **authorities** of the minor's country of origin or with those of another country, with a view to finding an **appropriate durable solution**,
(b) with **international organisations** such as UNHCR or UNICEF, which already take an active part in advising governments on guidelines for dealing with unaccompanied minors, in particular asylum-seekers, and
(c) where appropriate, with **non-governmental organisations** in order to ascertain the availability of reception and care facilities in the country to which the minor will be returned.

4. In any case, a minor may not be returned to a third country where his or her return would be contrary to the Convention relating to the status of refugees, the **European Convention on Human Rights and Fundamental Freedoms** or the **Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment** or the **Convention on the Rights of the Child**, without prejudice to any reservations which Member States may have tabled when ratifying it, or the Protocols to these Conventions.

Additionally, it should be emphasised that, according to the United Nations Convention on the Rights of the Child of 1989, in all actions related to children, **the child's interest must be a primary consideration**.

[152] OJ C221/23, 19.7.1997.

I.10. 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

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.

Like for all directives Member States have a certain amount of leeway as to the exact rules to be adopted. However, and according to **article 4**, this Directive shall be **without prejudice to more favourable provisions**:

1. of **bilateral or multilateral agreements** (article 4(1));
2. laid down in the **Community acquis relating to immigration and asylum** and which may be more favourable for the third-country national (article 4(2));
3. 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 (article 4(3)).

Additionally, and in accordance with **article 5**, when implementing this Directive, Member States shall take due **account** of:

(a) the **best interests of the child**;
(b) **family life**;
(c) the **state of health** of the third-country national concerned,
and respect the **principle of non-refoulement**.

Article 6 of the Directive provides that Member States shall issue a **return decision to any third-country national staying illegally on their territory**, but without prejudice to the exceptions referred to in paragraphs 2 to 5:

Article 6(2): When the illegally staying third-country national holds a valid residence permit or other authorisation offering a right to stay issued by another Member State;
Article 6(3): When the illegally staying third-country national is taken back by another Member State under bilateral agreements or arrangements existing on the date of entry into force of this Directive;
Article 6(4): When the Member States grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to the third-country national staying illegally on their territory;
Article 6(5): When the illegally staying third-country national is the subject of a pending procedure for renewing his or her residence permit or other authorisation offering a right to stay.

Article 7(1) specifies that a return decision shall provide for an **appropriate period for voluntary departure** of **between seven and thirty days**, without prejudice to the exceptions referred to in paragraphs 2 and 4:

Article 7(2): Where necessary, the period for voluntary departure shall be extended by an appropriate period, taking into account the specific circumstances of the individual case;
Article 7(3): Certain obligations aimed at avoiding the risk of absconding may be imposed for the duration of the period for voluntary departure;
Article 7(4): If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure, or may grant a period shorter than seven days.

Furthermore, Member States may provide in their national legislation that such a period shall be granted only following an application by the third-country national concerned. In such a case, Member States shall **inform the third-country nationals concerned of the possibility of submitting such an application**.

If no period for voluntary departure has been granted in accordance with article 7(4) or if the obligation to return has not been complied with within the period for voluntary departure granted in accordance with article 7, **article 8** provides that Member States shall take **all necessary measures to enforce the return decision**. However, and according to **article 8(4)**, where Member States use – as a last resort – coercive measures to carry out the removal of a third-country national who resists removal,

such **measures shall be proportionate** and **shall not exceed reasonable force**. They shall be implemented as provided for in national legislation **in accordance with fundamental rights** and **with due respect for the dignity and physical integrity of the third-country national concerned**.

According to **article 9(1)**, Member States shall **postpone removal**:

(a) when it would violate the principle of non-refoulement, or

(b) for as long as a suspensory effect is granted in accordance with article 13(2).

In the case of **unaccompanied minors**, **article 10(2)** provides that before removing an unaccompanied minor from the territory of a Member State the authorities of that Member State shall be satisfied that he or she will be returned to a member of his or her family, a nominated guardian or adequate reception facilities in the State of return.

Return decisions shall be accompanied by an **entry ban** (**article 11(1)**):

(a) if no period for voluntary departure has been granted, or

(b) if the obligation to return has not been complied with.

In other cases return decisions may be accompanied by an entry ban. However, victims of trafficking in human beings who have been granted a residence permit pursuant to 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 or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities[153] shall not be subject of an entry ban without prejudice to paragraph 1, first subparagraph, point (b), and provided that the third-country national concerned does not represent a threat to public policy, public security or national security.

Article 11(2) provides that **the length of the entry ban** shall be determined with due regard to all relevant circumstances of the individual case and **shall not in principle exceed five years**. It may however exceed five years if the third-country national represents a serious threat to public policy, public security or national security.

However, **article 12(1)** provides that return **decisions** and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and **give reasons in fact and in law** as well as **information about available legal remedies**. Member States shall make available generalised information sheets explaining the main elements of the standard form in at least five of those languages which are most frequently used or understood by illegal migrants entering the Member State concerned (article 12(3)).

The third-country national concerned, according to **article 13(1)**, shall be **afforded an effective remedy to appeal against or seek review of decisions related to return** [return decisions, entry-ban decisions and decisions on removal] before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence. According to **article 13(4)**, Member States shall ensure that the **necessary legal assistance and/or representation is granted on request free of charge** in accordance with relevant national legislation or rules regarding legal aid, and may provide that such free legal assistance and/or representation is subject to conditions as set out in articles 15(3) to 15(6) of Directive 2005/85/EC.

Finally, and unless other sufficient but less coercive measures can be applied effectively in a specific case, **article 15(1)** provides that Member States may only keep in **detention** a third-country national who is the subject of return procedures in order **to prepare the return and/or carry out the removal process**, in particular when:

(a) there is a risk of absconding or

(b) the third-country national concerned avoids or hampers the preparation of return or the removal process.

More generally, **article 15** determines the **timeframe limit of the detention**:

- Article 15(1): Any detention shall be for **as short a period as possible** and only maintained **as long as removal arrangements are in progress** and **executed with due diligence**.
- Article 15(3): In every case, detention shall be **reviewed at reasonable intervals of time** either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority.
- Article 15(5): Each Member State shall set a **limited period of detention**, which **may not exceed six months**.
- Article 15(6): Member States **may not extend the period referred to in paragraph 5 except for a limited period not exceeding a further twelve months** in accordance with national law

153 OJ L 261, 6.8.2004, p. 19.

in cases where regardless of all their reasonable efforts the removal operation is likely to last longer owing to:

(a) a lack of cooperation by the third-country national concerned, or

(b) delays in obtaining the necessary documentation from third countries.

In case of minors**, article 17(1)** specifies that **unaccompanied minors** and **families with minors** shall only be **detained as a measure of last resort** and **for the shortest appropriate period of time**.

General conditions of detention are described in **article 16**, with a particular focus on vulnerable persons.

According to **article 19**, the Commission shall report every three years to the European Parliament and the Council on the application of this Directive in the Member States and, if appropriate, propose amendments.

The Commission shall report for the first time by 24 December 2013 and focus on that occasion in particular on the application of Article 11, Article 13(4) and Article 15 in Member States. In relation to Article 13(4) the Commission shall assess in particular the additional financial and administrative impact in Member States.

Concerning the **transposition of the Directive**, **article 20(1)** rules that Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2010. In relation to Article 13(4), Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 24 December 2011. They shall forthwith communicate to the Commission the text of those measures.

II. Travel Documents for the Purpose of Expulsion

II.1. Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of third-country nationals[154]

To date, the major obstacle for effective return is uncertainty concerning the identity of the person concerned and/or his or her lack of necessary travel documents. Binding legislation has not yet been developed with regard to the issuing of travel documents to third-country nationals for the purpose of their return; and it is questionable how useful such legislation would be, as the recognition of such documents will always depend on the receiving states.

In its Recommendation of 30 November 1994 concerning the adoption of a standard travel document for the expulsion of **third-country nationals**, the Council acknowledges that the great majority of Mmeber States experience difficulties in cases of third-country nationals **possessing no travel documents who are supposed to be expelled from their territory**.

For the purpose of **improving** the **efficiency** with which expulsion measures are executed, the Council recommended that with effect from 1 January 1995 a **standard travel document** valid for a single journey should be used as appropriate by all Member States in the case of third-country nationals being expelled from the territory of the Union. The document should be established in the language of the Member State executing the expulsion order and, where appropriate, should be translated into both French and English.

The **standard travel document** shall contain the following information: **Member State**, **registration number**, **document number**, **valid for one journey from**, **name**, **forename**, **date of birth**, **height**, **distinguishing marks**, **nationality**, **photograph**, **address in home country** (if known), **seal/stamp** of the issuing authority, **issued at**, **issued on**, **signature** and **remarks/observations**.

II.2. Council Recommendation of 22 December 1995 on concerted action and cooperation in carrying out expulsion measures[155]

This later **Council Recommendation** calls on the Member States to apply the following **principles** with a view to cooperation in the **procurement of the necessary documentation:**

1. To implement **specific mechanisms to improve the procurement of the necessary documentation from the consular authorities** of the third State to which third-country nationals are to be expelled when they lack travel or identity documents.

2. Where Member States experience repeated difficulties with certain third States in the matter of procuring documentation:

a) to make a **particular effort to arrange for persons to be expelled to be identified by the consular authorities**,
b) to **issue repeated invitations to consular authorities to visit centres in which third-country nationals are being held**, where appropriate, in order to identify them for the purpose of providing documentation, and
c) to **urge the same authorities to issue travel documents** with a period of validity sufficient for expulsion to be carried out.

3. In the first instance to **make use of the provisions on presumption of nationality of the standard readmission agreement** adopted by the Council on 30 November 1994.[156]

[154] OJ C274/18, 19.9.1996.
[155] OJ C5/3, 10.1.1996.
[156] Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country (covered at C.III.1. below).

4. To issue, where it is not possible to obtain the necessary travel documents by using the above means, the **standard travel document** adopted by the Council on 30 November 1994.

II.3. Commission Communication on Policy priorities in the fight against illegal immigration of third-country nationals[157]

The European Commission in its recent Communication recognises that **lack of documentation remains an obstacle to the effective return of illegal migrants**, in particular as the EU travel document is still not accepted by a large number of third countries.

The current EU travel document is based on the 1994 Council Recommendation[158], and the Council adopted conclusions in June 2004 on its re-examination. FRONTEX is to undertake work on the identification of best practice on the acquisition of travel documents and the return of third country nationals.

[157] COM (2006) 402 final, 19.7.2006.
[158] See II.1 above.

III. Voluntary Return

III.1 Return Action Programme[159]

So far, the basis for voluntary return has usually been based on **national law** or on a memorandum of understanding between the lead ministry and an international organisation – with IOM for example. However, EU policies have a strong focus on voluntary return, giving it preference over forced return for obvious **humane reasons**, but also due to **cost**, **efficiency** and **sustainability**.

The Return Action Programme, which covers both **forced and voluntary return** of third-country nationals, contains the following indicative definition of voluntary return: ***'the assisted or independent departure to the country of origin, transit or another third country based on the will of the returnee'***.

The Programme is made up of the following four components:

- immediate **enhanced practical cooperation**, including exchange of information and best practices, common training, mutual assistance by immigration officers and joint return operations
- **common minimum standards** for return to be envisaged in the short, medium or long-term;
- **country specific programmes**
- **intensified cooperation with third countries** on return

With the aim of **encouraging returnees to choose to return voluntarily**, the Programme suggests that consideration be given to the question of **proof of exit** and to the **legal consequences of the voluntary or forced return on an application for subsequent re-entry**.

III.2. Communication on a Community Return Policy on Illegal Residents[160]

This Communication also deals with both aspects of the return of persons residing without authorisation: **voluntary and forced**. As **priority should be given to voluntary return**, the Commission is looking for the development and implementation of more efficient **ways to promote voluntary return**.

In general, according to the Communication, experience has shown that successful return projects require all or most of the following elements:

- **pre-return advice and counselling**
- **training/employment assistance**
- **assistance for travelling to and/or re-establishment in the country of origin**
- **assistance for housing**
- **follow-up assistance and counselling post-return**

Moreover, the implementing agency must have **sufficient links to the authorities and non-governmental community in the country of origin** as well as **adequate facilities in the field** (e.g. locally based staff, at least on a temporary basis, with knowledge of local languages) and the skills necessary to select, where it is appropriate, returnees with the potential to succeed once returned.

Information should be made available – as early as possible – for potential returnees **on the possibilities for voluntary return** to the country of origin. In general, incentives should be assessed, which would **encourage potential returnees to return voluntarily**.

The general conclusion to be drawn from past experience in managing return programmes is that they must be **flexible regarding their timing and administration** in order to respond to circumstances on the ground. This requires a more **cohesive use of Community based programmes** and **national programmes** backed by **clear policy guidelines** to that end.

[159] Council Doc. No 14673/02 (adopted on 28.11.2002).
[160] COM(2002) 564 final, 14.10.2002.

A satisfactory **proof of exit** is important, in particular in cases of voluntary return, to ensure sustainable return and to allow **preferential treatment to voluntary returnees**; namely to avoid that persons are banned from a later legal re-entry due to a lack of proof of their previous voluntary exit. According to the Communication, one possibility would be to develop incentives for returnees to personally report back to a consular post of a Member State in the country of origin. Where applicable, the proof of exit could also be issued by a reliable organisation which has been involved in the return process.

Applying the principle of the priority of voluntary return, the **legal consequences of the voluntary or forced return on an application for a subsequent re-entry** should be assessed. A refusal of a future visa application in order to re-enter the EU should not be based only on the fact that the person concerned has previously stayed in a Member State illegally, if he or she has returned voluntarily. However, it is the Commission's view that restrictions to re-entry should be imposed in cases of forced return.

III.3. Council Decision of 26 May 1997 on the exchange of information concerning assistance for the voluntary repatriation of third country nationals[161]

The first binding Community instrument to be adopted in the context of voluntary return is the Council Decision on the exchange of information concerning assistance for the voluntary repatriation of third-country nationals. According to this Decision, the Member States that have taken steps to develop **programmes to support the voluntary return** of third-country nationals to their country of origin shall **report annually** on them to the General Secretariat of the Council.

The following **information** is **to be provided**:

- the **authorities responsible for carrying out the programme** (i.e. non-governmental and/or international organisations)
- the **scope of the programme** in terms of the persons covered
- any further **requirements to be met by individual returnees** in order to be considered for assistance under the programme
- any **requirements to be met by the country of origin** under the programme;
- the **type and level of assistance granted** (i.e. travel expenses for the returnee and his/her family, removal costs, repatriation allowance)
- estimate of the **effects of the programme**, including the number of beneficiaries and the occurrence of any incentive effects

The General Secretariat **shall circulate** such information to all Member States and the Commission and make available a draft **report on the information received** on an annual basis.

On the basis of the report drafted by the General Secretariat, Member States and the Commission shall, within the Council, **exchange** their **views** on the programmes and compare the their **scope, conditions and effects** with a view to their **possible approximation**.

Furthermore, Member States, which have not introduced these programmes, shall examine the results and usefulness thereof.

[161] OJ L147/3, 5.6.1997.

IV. Readmission

IV.1. Council Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country[162]

Following the establishment of principles that must appear in bilateral and multilateral readmission agreements in the Action Plan in the field of justice and home affairs, approved in May 1994, it was agreed to devise a **specimen readmission agreement** on the basis of these principles.

The specimen readmission agreement is **to be used flexibly** by the Member States and may be **adapted to the particular needs of the Contracting Parties**. Since January 1995, the specimen agreement should be used by the Member States as a **basis for negotiations with third countries** on the conclusion of readmission agreements for the purpose of facilitating the readmission of persons staying illegally on the territory of the other Contracting Party, i.e. persons who do not, or who no longer, fulfil the conditions in force for entry or residence, and for the purpose of facilitating the transit of persons in a spirit of cooperation and on the basis of reciprocity.

The readmission agreement covers matters of **readmission of own nationals**, obliging the Contracting Parties to readmit, at the request of the other Contracting Party and without any formality, irregular migrants provided that it is proved or may be validly assumed that they possess the nationality of the requested Contracting Party. The same shall apply to persons who have been deprived of the nationality of the requested Contracting Party since entering the territory of the requesting Contracting Party without at least having been promised naturalisation by the requesting Contracting Party.

Furthermore, in the case of **third country nationals** who entered via the external frontier, the Contracting Party via whose external border the person can be proved, or validly assumed to have entered illegally, shall readmit the person at the request of that Contracting Party and without any formality.

Third-country nationals who have arrived in the territory of the requesting Contracting Party illegally but are in possession of a **valid visa** or of a valid **residence permit**[163] issued by the other Contracting Party shall be readmitted by that other Contracting Party without any formality upon application by the requesting Contracting Party.

The specimen agreement further covers **time limits**, **transit**, **data protection**, **costs** and **mutual assistance** between the Contracting Parties, including the setting up of a **Committee of Experts**.

Additionally, the specimen seeks to ensure that readmission agreements do not affect the Contracting Parties' obligations arising from the **Convention on the Status of Refugees**, **international conventions on extradition and transit**, the **Convention for the Protection of Human Rights and Fundamental Freedoms**, **international conventions on asylum**[164], and **international conventions and agreements on the readmission of foreign nationals**.

IV.2. Council Recommendation of 24 July 1995 on the principles to be followed in drawing up protocols on the implementation of readmission agreements[165]

In 1995, the Council recommended that from 1 July 1995, the Member States should use the following **guiding principles** as a basis for negotiations with third countries when drawing up **protocols on implementing readmission agreements**:

[162] OJ C274/20, 19.9.1996.
[163] A 'residence permit' pursuant to this specimen agreement means an authorisation of any type issued by one Contracting Party, entitling the holder to reside on the territory of that Contracting Party. This shall not include temporary admission to reside on the territory of one of the Contracting Parties in connection with the processing of an asylum application.
[164] In particular under the Dublin Convention determining the State responsible for examining applications for asylum lodged in a Member State of the European Community.
[165] OJ C274/25, 19.9.1996.

1. For the return/readmission of persons residing without authorisation, it is recommended that provision be made for the Contracting Parties to use **common forms**, whereby the need for simplicity and speed should be the prime concern.

2. Persons apprehended in a border area are to be returned/readmitted under a **simplified procedure** to be provided for in the protocols drawn up by the Parties. The Contracting Parties will determine the total time taken by the simplified readmission procedure, which should be very short and not exceed 48 hours.

3. The **normal procedure** is to be applicable where a person cannot be returned or readmitted under the simplified procedure. In accordance with the specimen draft bilateral agreement,[166] the time in question must not exceed 15 days.

4. The Recommendation also provides **means of identifying persons** to be readmitted and provides that in general, **proof produced of nationality**[167] and entry should have to be accepted by the Parties without further investigation. A **presumption of nationality**[168] and entry should be deemed accepted by the Parties unless the requested party proves otherwise; whereby the protocols to be drawn up by the Parties should clearly lay down the means of proving or establishing a presumption of nationality as well as the establishment of a presumption of nationality.

5. Protocols on the implementation of readmission agreements should also clearly lay down the means of **proving** or establishing a **presumption of entry** via an external frontier, under Article 2 of the specimen readmission agreement.

6. The protocols should further stipulate that Ministers with responsibility for border controls are to **designate the border posts, which may be used for aliens' readmission and entry in transit and the central or local authorities competent to deal with readmission and transit requests**. The choice should be geared to efficiency and speed.

7. In their relations with third-country Contracting Parties, Member States could make provision for the use of a **readmission/transit form** for requests for transit under escort in accordance with **Article 7** of the **specimen readmission agreement**.

8. An article on **data protection** could be inserted into the protocols to be drawn up by the Parties; its contents will largely depend on the legislation in force within Member States. It should in any event be stipulated that information must be supplied only for the purposes for which the agreement has been concluded.

IV.3. Council Decision of 2 December 1999 on the inclusion of model readmission clauses in community agreements and in agreements between the EC, its member states and third countries[169]

At its meeting on 2 December 1999, the Council agreed to adapt **standard readmission clauses** - concerning the repatriation of persons illegally resident in a Member State – to be used in Community and mixed agreements. The adaptation of the clauses defined in 1995 is due to the entering into force of the **Amsterdam Treaty** under which readmission matters have become a Community competence and which empowers the Community as a whole to conclude readmission agreements.

The standard clauses, which should be included in all future Community agreements and in agreements between the EC, its Member States and third countries (mixed agreements), read as follows:

---

[166] See Part C.III.1. above.

[167] Nationality may be proved by means of nationality papers which can be definitely ascribed to a particular person, any type of passport (national, diplomatic or official duty passport or officially issued passport substitutes with a photograph) or any other travel document indicating nationality, consular registration cards, identity cards (even if provisional or temporary), a minor's travel document in lieu of passport, provisional identity papers, service record books and military passes.

[168] A presumption of nationality may be established in particular by means of specific information from the official authorities, an official service pass, a company pass, a driving licence, an extract from register office records, a seaman's book, a bargeman's identity document, photocopies of any of the above documents, statements by witnesses, particulars supplied by the person concerned and the language of the person concerned.

[169] Council Doc. No 13461/99, 2.12.1999.

Article A: The European Community and State X agree to cooperate in order to prevent and control illegal immigration. To this end:

- State X agrees to readmit any of its nationals illegally present on the territory of a Member State of the European Union, upon request by the latter and without further formalities, and
- each Member State of the European Union agrees to readmit any of its nationals, as defined for Community purposes, illegally present on the territory of State X, upon request by the latter and without further formalities.

The Member States of the European Union and State X will also provide their nationals with appropriate identity documents for such purposes.

Article B: The Parties agree to conclude upon request an agreement between State X and the European Community regulating the specific obligations for State X and the Member States of the European Community for readmission, including an obligation for the readmission of nationals of other countries and stateless persons.

Article C: Pending the conclusion of the agreement with the Community referred to in Article B, State X agrees to conclude, upon request of a Member State, bilateral agreements with individual Member States of the European Community regulating the specific obligations for readmission between State X and the Member State concerned, including an obligation for the readmission of nationals of other countries and stateless persons.

Article D: The Cooperation Council shall examine what other joint efforts can be made to prevent and control illegal immigration.

IV.4. Decision of the Schengen Executive Committee of 15 December 1997 on the guiding principles for means of proof and indicative evidence within the framework of readmission agreements between Schengen States[170]

Due to problems arising in practice, when applying readmission agreements, notably with regard to **means of proof establishing** the **illegal residence in** or **transit through** the territory of the requested Member State by third-country nationals, the Member States have adopted the following **guiding principles**:

1. The following documents, *inter alia*, may be deemed to provide **proof of residence or transit**:

- an entry stamp affixed to the travel document by the requested Member State
- an exit stamp of a State adjacent to a Member State, taking into account the travel route and date of the frontier crossing
- an entry stamp affixed to a false or falsified travel document by the requested Member State
- travel tickets issued by name which can formally establish entry
- fingerprints
- a valid residence permit
- a valid visa issued by the requested Member State
- an embarkation/disembarkation card showing the date of entry into the territory of the requested Member State

2. A **presumption of residence or transit** may be established, *inter alia*, by the following indicative evidence:

- statements by officials
- statements by third parties

[170] SCH/Com-ex (97) 39 rev. - *Article 2* of the Protocol to the Amsterdam Treaty integrating the Schengen *acquis* into the framework of the European Union provides that from the date of entry into force of the Treaty of Amsterdam, the Schengen *acquis,* including the decisions of the Executive Committee established by the Schengen agreements which have been adopted before this date, shall immediately apply to the thirteen Member States referred to in Article 1, without prejudice to the provisions of paragraph 2 of this Article. From the same date, the Council will substitute itself for the said Executive Committee.

- statements by the person to be transferred
- an expired residence permit issued by the requested Member State, whatever the type
- an expired visa issued by the requested Member State
- documents issued by name in the territory of the requested Member State
- travel tickets
- hotel bills
- cards for access to public or private amenities in the Member States
- appointment cards for doctors, dentists, etc.
- data showing that the person to be transferred has used the services of a facilitator or travel agency

3. In so far as the Member States take into account the means of proof listed under point 1 when concluding future readmission agreements, these shall provide conclusive proof of residence or transit. In principle, no further investigation shall be carried out. Evidence to the contrary shall, however, be admissible (e.g. showing a document to be falsified or forged).

4. In so far as the Member States take into account the evidence listed under point 2 when concluding future readmission agreements, such evidence shall establish a presumption of residence or transit. It is by nature rebuttable by evidence to the contrary.

D. Irregular Migration

I. Measures to Combat Irregular Migration

I.1. Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals[171]

This Communication forms an integral part of the EU´s comprehensive and structural approach towards effective migration management and complements recent policy initiatives in this area, such as the Policy Plan on Legal Migration[172], the Communication on Migration and Development[173], and the Communication proposing a Common Agenda for Integration[174].

The comprehensive EU approach to combat illegal immigration[175] is guided by a set of fundamental principles which aim to reconcile the need for solidarity within the Union, fundamental rights, expectations of third countries, and public perception in Member States.

The Communication sets out the following **nine policy priorities** for the EU in the fight against irregular immigration:

- **Cooperation with third countries**
- **Secure borders – integrated management of external borders**
- **Fight against human trafficking**
- **Secure travel and identity documents**
- **Addressing regularisations**
- **Tackling illegal employment – a key pull factor**
- **Return policy**
- **Improving exchange of information through existing instruments**
- **Carriers liability**

I.2. Comprehensive Plan to combat illegal immigration and trafficking of human beings in the European Union[176]

The measures and actions in this Plan are based on the **Commission Communication on a common policy on illegal immigration**[177] in which the Council of the European Union was invited to approve, at the earliest opportunity, an **Action Plan to prevent and combat illegal immigration**, indicating which actions must be given priority.

The Plan, which was adopted at the meeting of the Council held on 14-15 October 2002, lists actions in the fields of **visa policy**, **information exchange and analysis**, **pre-frontier measures**, **measures relating to border management**, **readmission and return policy**, **measures enhancing the role of Europol** and **penalties**.

In the field of **visa policy**, the Plan provides that given the constant changes in migratory flows, the lists of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempted from that requirement should be re-examined annually.

[171] COM(2006) 402 final, 19.7.2006
[172] COM (2005) 669, 21.12.2005
[173] COM (2005) 390, 1.9.2005
[174] COM (2005) 389, 1.9.2005
[175] The term 'illegal immigration' is used to describe a variety of phenomena. This includes third-country nationals who enter the territory of a Member State illegally by land, sea and air, including airport transit zones. This is often done by using false or forged documents, or with the help of organised criminal networks of smugglers and traffickers. In addition, there is a considerable number of persons who enter legally with a valid visa or under a visa-free regime, but "overstay" or change the purpose of stay without the approval of the authorities; lastly there are unsuccessful asylum seekers who do not leave after a final negative decision.
[176] OJ C142/23, 14.6.2002 – also referred to as the 'Santiago Action Plan'.
[177] COM(2001) 672 final, 15.11.2001.

Furthermore, the following measures should be adopted in the field of **visa policy**:

1. **uniform visa and security standards**: in the short-term, **document security** should be improved on the basis of new technologies; in the medium term, **biometric data** should possibly be included on documents
2. **the creation of common administrative structures**: in the short-term, a pilot project should be run **using joint infrastructures** and **consular cooperation** should be strengthened; in the medium-term, **integrated consular offices** should be brought into operation
3. the development of a **European Visa Identification System**: in the short-term, a feasibility study should be conducted; in the medium-term, the common visa identification system should be brought into operation

In the area of **information exchange and analysis** the following measures should be adopted:

1. **statistics**: in the short-term, an **annual report** consisting of a **statistical overview** and **data analysis** should be published; in the medium-term, the system should be reviewed
2. **gathering information, intelligence and analysis**: in the short-term, a **feasibility study** should be conducted with a view to developing a **European system for exchanging information**, taking into account possible improvement of existing instruments; in the medium-term, a European system for exchanging information should be adopted
3. **development of the Early Warning System**: in the short-term, the existing Early Warning System should be implemented and appraised[178]

Pre-frontier measures to be adopted include:

1. **advice and support by liaison officers**: in the short-term, **cooperation** should be stepped up via the **liaison officers' network**
2. **financial and technical support for actions in third countries**: in the short term, **Action Plans** prepared by the High Level Working Group on Asylum and Migration should be implemented
3. **awareness-raising campaigns**: in the medium-term, campaigns should be prepared in **countries of origin and transit**

The following measures are to be adopted in the area of **border management**:

1. **border management in a common area**: in the short-term, a **risk assessment system** should be put into practice
2. **controls at sea borders**: in the short-term, a **feasibility study on improving sea border controls** should be conducted; in the medium-term, **measures to improve sea border controls** should be carried out
3. **common curriculum and training**: in the short-term, the possible **contribution from CEPOL**[179] towards improving training should be analysed; in the medium-term, a **network of national training organisations** should be created
4. **border management cooperation and performance by joint teams**: in the short-term, **cooperation** with the operational services in the Member States should be **stepped up** and the feasibility of a **joint external borders service** should be analysed; in the medium-term, actions and measures based on the feasibility study should be taken

[178] With a Council Regulation of May 1999 an early warning system for the transmission of information on illegal immigration and facilitator networks has been introduced. The aim was to set up a standardised, permanent communication framework enabling a Member State to report illegal migration phenomena instantly. However, the Early Warning System is still in a rudimentary phase. The main problems are insufficient use, a lack of information distribution within the Member States' services involved and poor technical infrastructure.

[179] At its meeting in Tampere on 15 and 16 October 1999, the European Council agreed to establish a network of national police training institutes, which could ultimately lead to the creation of a permanent institution. The Council Decision of 22 December 2000 establishing the European Police College (CEPOL) (OJ L336, 30.12.2000) follows on from that decision. Its objective is to step up cooperation between national police schools, in order to promote a joint approach to the major problems encountered in fighting crime, preventing delinquency and maintaining law and order. CEPOL takes the form of a network bringing together national training institutes for senior police officers.

I.3. Communication on the Development of a Common Policy on Illegal Immigration, Smuggling and Trafficking of Human Beings, External Borders and the Return of Illegal Residents[180]

With this Communication the Commission seeks to contribute to **a preliminary assessment of the work carried out so far in the area of migration management**. Based on this preliminary stock-taking exercise, the Commission feels that the following guidelines should be considered as priorities for guiding the actions of the Union's institutions in implementing the action plans adopted in 2002:

- the **principle of solidarity**
- **reflection of the principle of solidarity in the budgets** within the new post-2007 financial perspective
- examination of the possibility of using part of the budgetary margin available for internal policies to support a **solidarity drive** over the period 2004-2006
- examination of the elements to be taken into consideration in developing a separate instrument designed to assist a **common return policy** by financing specific programmes
- adaptation of the Commission's **financial programming** in the light of the political guidelines set by the Thessaloniki European Council or, as an alternative option, the deferring of certain parties of the initiative
- guarantee of the **consistency and long-term nature of Community action** by setting priorities and creating a stable framework and methods
- attention paid to **risk analysis, staff training and greater standardisation of verification equipment and procedures**
- establishment of a **Community operational structure**
- development of a **common visa information system**[181]
- coherent approach on **biometric identifiers** or **biometric data**
- increasing cooperation and introduction of the necessary legislative framework, as well as the possible adoption of a specific financial instrument for the **implementation of a common return policy**
- implementation of the political guidelines for the **integration of immigration policy into the Union's relations with third countries**
- development of a **common policy on readmission**
- combination of a set of measures which correspond to the different aspects of **illegal immigration** by strengthening the Union's ability to **gather, exchange and process information** on this phenomenon and by working towards greater **consistency of action in the field of combating trafficking in human beings**
- greater cohesion by the merger of the three action plans to ensure **effectiveness of the joint action**

[180] COM(2003) 323 final, 3.6.2003.
[181] Council Decision 2004/512/EC of 8 June 2004 establishing a Visa Information System (VIS), OJ L213/5, 15.6.2004.

II. Penal Framework for the Combating of Irregular Migration

II.1. Facilitation of unauthorised entry, transit and residence

II.1.1. Convention implementing the Schengen Agreement of 14 June 1985[182]

The Schengen States undertook to impose **appropriate penalties** on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party's laws on the entry and residence of third country nationals.

However, **Article 27(1)** of the 1990 Schengen Convention, which originally covered this matter, has now been **repealed** by **Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence**.[183] As outlined above, this Directive obliges the Member States to adopt **appropriate sanctions on persons facilitating the unauthorised entry, transit and residence of third-country nationals**.

Furthermore, **Article 27(2)**, of the **Schengen Convention**, which has also been **repealed**, provided that if a Contracting Party is informed of actions as referred to in Article 27(1), which are in breach of the law of another Contracting Party, it was **obliged to inform** the latter accordingly. Pursuant to **Article 27(3)**, any Contracting Party which requests another Contracting Party to prosecute, on the grounds of a breach of its own laws, actions as referred to in Article 27(1), had the duty to **specify**, by means of an official report or a certificate from the competent authorities, the **provisions of law that have been breached**.

Since 5 December 2004, these matters are regulated in **Article 7** of the **Council Framework Decision** of 28 November 2002 **on the strengthening of the penal framework to prevent the facilitation of the unauthorised entry, transit and residence**.[184]

II.1.2. Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence[185]

The purpose of this **Council Directive** is to provide a **definition of the facilitation of illegal immigration** and consequently to render more effective the implementation of **Framework Decision 2002/946/JHA of 28 November 2002** on the **strengthening of the penal framework to prevent the facilitation of unauthorised entry**, **transit** and **residence**[186] in order to prevent these offences.

Accordingly, pursuant to **Article 1** of the Directive, each Member State shall adopt **appropriate sanctions** on:

(a) any **person who intentionally assists** a person who is not a national of a Member State to **enter**, or **transit across**, the territory of a Member State **in breach of the laws of the State concerned** on the entry or transit of third-country nationals, and

(b) any **person who, <u>for financial gain</u>, intentionally assists** a person who is not a national of a Member State to **reside** within the territory of a Member State **in breach of the laws of the State concerned** on the residence of third-country nationals.

[182] OJ L239/19, 22.9.2000.
[183] See below.
[184] See D.II.1.3. below.
[185] OJ L328/17, 5.12.2002.
[186] See below.

However, it should be borne in mind that in accordance with the Directive, Member States **may decide not to impose sanctions** with regard to the facilitation of entry or transit for cases **where the aim of the behaviour is to provide humanitarian assistance** to the person concerned.

In **Article 2**, the Directive further provides, in the same way as the 'Smuggling Protocol',[187] that each Member State shall take the **measures necessary** to ensure that the **sanctions** referred to in Article 1 of the Directive are **also applicable to any person who**:

(a) is the **instigator** of,
(b) is an **accomplice** in, or
(c) **attempts to commit**

an infringement as referred to in **Article 1(1)(a)** or **(b)**.

In accordance with **Article 3** of the Directive, each Member State **shall take the measures necessary** to ensure that the infringements referred to in Article 1 and 2 are subject to **effective**, **proportionate** and **dissuasive sanctions**.

II.1.3. Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of the unauthorised entry, transit and residence (2002/946/JHA)[188]

The subjects of the **Council Framework Decision** are **minimum rules for penalties**, **liability of legal persons** and **jurisdiction**. The Decision applies, of course, without prejudice to the protection afforded to refugees and asylum seekers in accordance with **international law on refugees** or other **international instruments relating to human rights**.[189]

The Framework Decision provides in **Article 1(1)** that each Member State shall take the measures necessary to ensure that the infringements defined in **Articles 1** and **2** of **Directive 2002/90/EC**[190] are punishable by **effective**, **proportionate** and **dissuasive criminal penalties**, which **may entail extradition**.

In accordance with **Article 1(2)** of the Framework Decision, such **criminal penalties may be accompanied by the following measures**:

- **confiscation of the means of transport** used to commit the offence;
- **prohibition on practising** directly or through an intermediary **the occupational activity in the exercise of which the offence was committed**; and/or
- **deportation.**

Each Member State shall take the measures necessary to ensure that, **when committed for financial gain**, the facilitation of illegal immigration is punishable by **custodial sentences** with a **maximum sentence of not less than eight years** where they are **committed as an activity of a criminal organisation**[191] or **while endangering the lives of the persons who are the subject of the offence**.

Furthermore, pursuant to **Article 2** of the Decision, each Member State shall take the **measures necessary to ensure that legal persons**, for example companies and other legal entities, **can be held liable** for the infringements referred to in Article 1(1), if they are committed to their benefit, by any person, acting either individually or as a part of an organ of the legal person, who has a **leading**

[187] Covered at D.II.1.4. below.
[188] OJ L328/1, 5.12.2002.
[189] Article 6 of the Framework Decision.
[190] See above.
[191] Joint Action 98/733/JHA of 21 December 1998 (OJ L351/1, 29.12.1998) defines a criminal organisation as a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.

position within the legal person, based on a **power of representation** of the legal person, an **authority to take decisions** on behalf of the legal person, or an **authority to exercise control** within the legal person.

Measures shall also be taken to ensure that a legal person can be held liable where the **lack of supervision** or control by a person who has a leading position within it has made possible the commission of the facilitation of illegal immigration **for the benefit of that legal person** by a **person under its authority**.

In accordance with **Article 3** of the Decision, **sanctions for legal persons** shall include **criminal or non-criminal fines** and may include **other sanctions** such as:

- **exclusion from entitlement to public benefits,**
- **temporary or permanent disqualification** from the practice of commercial activities,
- placing under **judicial supervision, and**
- a judicial **winding-up order.**

Article 4(1) of the Decision further provides that each Member State shall take the measures necessary to establish its **jurisdiction** with regard to the **facilitation of illegal immigration** that has been **committed**

(a) **in whole or in part within its territory**,
(b) **by one of its nationals**, or
(c) **for the benefit of legal persons established in the territory of that Member State**.

Exceptions to this rule are set out in **Article 4(2)** with regard to infringements committed by one of the nationals of the relevant Member State or for the benefit of legal persons established in the territory of that Member State, where the relevant offence has been committed outside that Member State. However, **Article 5(1)** provides in this context that any Member State which under its law does not extradite its own nationals **shall take the necessary measures to establish its jurisdiction over any infringements committed by its own nationals** outside its territory.

II.1.4. Proposal for a COUNCIL DECISION on the conclusion, on behalf of the European Community, of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime[192]

In August 2003, the Commission tabled a proposal on the conclusion, on behalf of the European Community, of the UN Convention Against Transnational Organized Crime as well as of its two supplementing Protocols. However, while in April 2004, the Council, on behalf of the European Community, decided to adopt a Decision on the conclusion of the Convention itself, a similar decision has not yet been taken with regard to the Protocols. So far, the '**Smuggling Protocol**' has been signed by all EU Member States and ratified by 12 of them, with one additional acceptance by the Netherlands.[193]

The purpose of this Protocol, in force since 28 January 2004, is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

For the purpose of this Protocol, **'smuggling of migrants'** is defined in **Article 3(a)** as *"the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident"*.

The scope of the Protocol is limited to the prevention, investigation and prosecution of offences established in accordance with **Article 6** of the Protocol, where these offences are transnational in

[192] COM(2003) 512 final, 22.8.2003.
[193] Information compiled on 12 August 2005.

nature and involve an organised criminal group, as well as to the protection of the rights of person who have been the object of such offences. Migrants themselves shall not become liable to criminal prosecution under this Protocol by reason of having been the object of conduct defined in **Article 6**.

According to **Article 6** of the Protocol, each State shall adopt such **legislative and other measures** as may be necessary **to establish as criminal offences**, when committed internationally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) the **smuggling of migrants**,
(b) when committed for the purpose of enabling the smuggling of migrants:
- **producing a fraudulent travel or identity document**,
- **procuring, providing or possessing such a document**, and
(c) **enabling a person who is not a national or a permanent resident to remain** in the State concerned without complying with the necessary requirements for legally remaining in the State by **means mentioned in Article 6(1)(b) or any other illegal means**.

Additionally, each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences:

(a) subject to the basic concepts of its legal system, **attempting** to commit an offence established in accordance with **Article 6(1)**,
(b) **participating** as an accomplice in an offence established in accordance with **Article 6(1)(a),(b)(i)** or **(c)** and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with Article 6(1)(b)(ii), and
(c) **organising** or **directing other persons to commit an offence** established in accordance with **Article 6(1)**.

The Protocol contains further specific provisions regarding the **smuggling of migrants by sea** (Articles 7-9) as well as on the **prevention**, **cooperation** and **other measures**, including **information exchange**, **border measures**, **security and control of documents**, **training and technical cooperation**, as well as **awareness raising** and **public information** (Articles 10-15).

Article 16 of the Protocol obliges State Parties to take appropriate **protection** and **assistance measures** to **preserve and protect the rights of persons who have been the object of conduct described in Article 6**, (…), in particular the **right to life** and the **right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment**. Furthermore, each State Party shall take appropriate measures to afford migrants appropriate **protection against violence** that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct described in **Article 6**. In applying the provisions of this Article, States Parties shall take into account the **special needs of women and children**.

State Parties shall consider the **conclusion of bilateral or regional agreements** or **operational arrangements** aimed at:

(a) establishing the most appropriate and effective measures to prevent and combat offences set out in Article 6, and
(b) enhancing the provisions of this Protocol among themselves.

In accordance with **Article 18(1)**, each State Party agrees to **facilitate** and **accept**, without undue or unreasonable delay, the **return** of a person who has been the object of an offence set out in Article 6 and who is its national or who has the right of permanent residence in its territory at the time of return.

II.2. Obligations of Transport Carriers and Sanctions

II.2.1. Convention implementing the Schengen Agreement of 14 June 1985[194]

The **Convention implementing the Schengen Agreement of 14 June 1985** contains the first attempt to regulate the issue of carriers' liability at a multilateral level among the Schengen States.

[194] OJ L239/19, 22.9.2000.

The Convention provides in its **Article 26 that in the case of refusal of entry** to a third country national into the territory of one of the Contracting Parties, **the carrier, which brought them to the external border by air, sea or land, shall be obliged immediately to assume responsibility for them again**.

Furthermore, the **carriers are be obliged to take all the necessary measures to ensure that a third-country national carried by air or sea is in possession of the travel documents required for entry** into the territories of the Contracting Parties.

II.2.2. Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985[195]

In the Council Directive supplementing the **provisions of Article 26 of the Schengen Convention** certain conditions of the Convention are more clearly defined with respect to their **implementation**.

Pursuant to **Article 2** of the Directive, Member States are obliged to take the necessary steps to ensure that the obligation of carriers to return third country nationals provided for in Article 26 of the Schengen Convention shall also apply when entry is refused to a **third-country national in transit** if:

(a) the carrier which was to take him to his country of destination refuses to take him on board, or
(b) the authorities of the State of destination have refused him entry and have sent him back to the Member State through which he transited.

Furthermore, Member States are required to oblige **carriers which are unable to effect the return of a third-country national** themselves, to find **other means of onward transportation** immediately and to bear the **cost thereof**. Alternatively, if immediate onward transportation is not possible, carriers shall be obliged to **assume responsibility for the costs of the stay and return** of the third-country national in question.

In accordance with **Article 4(1)** of the Directive, Member States shall take the necessary measures to ensure that the **penalties applicable to carriers** under the provisions of **Article 26(2) and (3)** of the Schengen Convention are **dissuasive, effective and proportionate** and that:

(a) either the maximum amount of the applicable financial penalties is not less than EUR 5,000.00 or equivalent national currency[196] for each person carried,
(b) the minimum amount of these penalties is not less than EUR 3,000.00 or equivalent national currency for each person carried, or
(c) the maximum amount of the penalty imposed as a lump sum for each infringement is not less that EUR 500,000.00 or equivalent national currency irrespective of the number of persons carried.

Article 4(2) further specifies that the above provisions are **without prejudice to Member States' obligations in cases where a third-country national seeks international protection**.

The Directive allows the Member States to adopt or retain, for carriers which do not comply with the obligations arising from the provisions of **Articles 26(2)** and **26(3)** of the Schengen Convention and **Article 2** of this Directive, **other measures involving penalties of another kind**, e.g. **immobilisation, seizure and confiscation of means of transport**, or **temporary suspension or withdrawal of the operating licence**.

Finally, Member States shall ensure that their laws, regulations and administrative provisions stipulate that carriers against which proceedings are brought with a view to imposing penalties have **effective rights of defence and appeal**.

[195] OJ L187/45, 10.7.2001.
[196] At the rate of exchange published in the Official Journal of the European Communities on 10 August 2001.

II.2.3. Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data[197]

This Directive aims at **improving border controls** and **combating illegal immigration** by the transmission of advance passenger data to the competent national authorities.

Member States shall take the necessary steps to **establish an obligation for carriers**[198] **to transmit**, **at the request of the authorities responsible for carrying out checks on persons at external borders, by the end of check-in, information concerning the passengers they will carry to an authorised border crossing point** through which these persons will enter the territory of a Member State.

The information referred to above shall comprise:

- the number and type of travel document used
- nationality
- full names
- the date of birth
- the border crossing point of entry into the territory of the Member States
- code of transport
- departure and arrival time of the transportation
- total number of passengers carried on that transport
- the initial point of embarkation

Member States shall take the necessary measures to **impose sanctions** on carriers, which, as a result of fault, have not transmitted data or have transmitted incomplete or false data. Member States shall take the necessary measures to ensure that sanctions are dissuasive, effective and proportionate and that either:

(a) the maximum amount of such sanctions is not less than EUR 5,000.00[199] for each journey for which passenger data were not communicated or were communicated incorrectly or
(b) the minimum amount of such sanctions is not less than EUR 3,000.00[200] for each journey for which passenger data were not communicated or were communicated incorrectly.

Other punitive measures that may be taken by Member States against carriers, which seriously infringe the obligations arising from the provisions of this Directive, include **immobilisation**, **seizure** and **confiscation** of the **means of transport**, or **temporary suspension** or **withdrawal** of the **operating licence**.

The personal data referred to above shall be communicated to the **authorities responsible for carrying out checks on persons at external borders** through which the passenger will enter the territory of a Member State, for the purpose of facilitating the performance of such checks with the objective of combating illegal immigration more effectively.

In accordance with **Article 6** of the Directive, Member States shall ensure that this data is **collected** by the carriers **and transmitted electronically** or, in case of failure, by any **other appropriate means**, to the authorities responsible for carrying out border checks at the authorised border crossing point through which the passenger will enter the territory of a Member State. The authorities responsible for carrying out checks on persons at external borders shall save the data in a **temporary file**.

After passengers have entered, these authorities shall **delete the data, within 24 hours after transmission**, unless the data are needed later for the purposes of exercising the statutory functions

[197] OJ L261/24, 6.8.2004.
[198] For the purpose of this Directive 'carrier' means any natural or legal person whose occupation it is to provide passenger transport by air.
[199] Or than the equivalent national currency at the rate of exchange published in the Official Journal of the European Union on the day on which this Directive enters into force.
[200] Or than the equivalent national currency at the rate of exchange published in the Official Journal of the European Union on the day on which this Directive enters into force.

of the authorities responsible for carrying out checks on persons at external borders in accordance with national law and subject to **data protection** provisions under **Directive 95/46/EC**[201].

[201] See F.III.4. below.

III. Illegal Employment

III.1. Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals

This proposal forms **part of the EU's efforts to develop a comprehensive migration policy**. In September 2007, the Commission plans to present a first proposal on legal migration in accordance with its December 2005 Policy Plan on legal migration[202].

It recognises that **one of the factors encouraging illegal immigration into the EU is the possibility of finding work** and **aims to reduce that pull factor by targeting the employment of third-country nationals who are illegally staying in the EU**.

Under this proposal, it is the employer who will be sanctioned, not the illegally employed third-country nationals. However, the 2005 proposal for a Return Directive would, as a general rule, require Member States to issue a return decision to third-country nationals staying illegally.

The proposal contains a **general prohibition on the employment of third-country nationals who are illegally staying**. Infringements would be sanctioned by **penalties (which may be administrative in nature)** consisting of fines and, in the case of businesses, the possibility of other measures, including exclusion from and recovery of public subsidies. **Criminal penalties would be available in serious cases**.

To ensure the effectiveness of the prohibition, **employers would be required to undertake certain checks before recruiting a third-country national**, the **procedure for making complaints** would be facilitated and **Member States would be required to undertake a certain number of inspections**.

In the proposed Directive **'employers'** are defined as not only **natural or legal persons employing others in the course of business activities**, but also **private individuals in their capacity as employers of for example house cleaners**.

Article 3 of the proposed Directive provides **a general prohibition on the employment of third-country nationals who do not have the right to be resident in the EU**.

In line with Article 4 of the Proposal, Member States will have to oblige employers to:

(a) require the production by third-country nationals of a **residence permit or another authorisation for stay** valid for the period of the employment in question;
(b) **copy or record the content of the residence permit or other authorisation** for stay before employment begins; and to
(c) keep for at least the duration of the employment the copies or records available for inspection by the competent authorities of the Member States.

Furthermore, Member States will have to oblige employers acting in the course of business activities or who are legal persons to **notify the competent authorities** of both the start and the termination of employment of third-country nationals at the latest within one week.

The Proposal recognises that it would be clearly **unreasonable to require employers to detect forged documents**. However, employers should not escape liability when documents are manifestly incorrect (for example, a document with a photograph that is manifestly not that of the prospective employee or a document that has clearly been tampered with).

[202] COM(2005) 669 final, 21.12.2005.

Article 6 of the Proposal seeks to ensure that infringements by employers would be punishable by **effective, proportionate and dissuasive sanctions**, which may be administrative sanctions. In respect of each infringement, these sanctions should include:

- fines and
- the costs of returning the third-country national.

Furthermore, in line with Article 7, employers would be required to **pay any outstanding remuneration to illegally employed third-country nationals** and Member States to put in place mechanisms to ensure that third-country nationals, even if they have left the Member State, receive any back payment of wages.

In line with Article 8 other measures would be available for business employers, including **disqualification from public benefits, subsidies and public procurement procedures**. It would also be possible to recover public subsidies, including EU funding managed by Member States, granted to the employer during the preceding 12 months.

Member States would be required to provide for **criminal penalties for four types of serious cases**:

- **repeated infringements,**
- **the employment of a significant number of third-country nationals,**
- **particularly exploitative working conditions, and**
- **where the employer knows that the worker is a victim of human trafficking.**

To ensure in particular that individual employers are liable to criminal sanctions only in serious cases, a repeated infringement is to be criminalised only where it is the third infringement within a two-year period.

In this regard, Member States should ensure that **legal persons can be held liable for criminal offences**.

Article 14 of the proposed Directive seeks to make enforcement more effective, by requiring mechanisms to be in place through which third-country nationals can lodge **complaints directly or through designated third parties**. Such third parties should be protected against possible sanctions under rules prohibiting the facilitation of unauthorised entry and residence.

Additional measures are proposed to protect the third-country nationals in cases of particularly **exploitative working conditions** leading to criminal liability. First, those who cooperate in proceedings should benefit from the same possibility of being granted a **temporary residence permit** as already exists under EC law for victims of human trafficking who cooperate with the authorities. Secondly, their return should be postponed until they have actually received back payment of their remuneration.

In line with Article 15 of the Proposal Member States would be required to ensure that at least 10% of companies established on their territory per year are subject to **inspections to control employment of illegally staying third-country nationals** on the basis of a risk assessment.

III.2. Council Recommendation of 22 December 1995 on harmonizing means of combating illegal immigration and illegal employment and improving the relevant means of control[203]

On the basis of this Recommendation, Member States of the EU should further **harmonise the means of checking on foreign nationals** to verify that they fulfil the conditions laid down by the rules applicable to **entry**, **residence** and **employment**. In the context of illegal employment, this should be done on the basis of the following guidelines:

1. Where national law regards the **residence** or **employment situation** as a **prerequisite for foreign nationals to qualify for benefits provided by a public service** of a Member State

[203] OJ C5/1, 10.1.1996.

in particular in the area of **health**, **retirement**, **family** or **work**, that condition cannot be met until it has been **verified that the residence and employment situation of the person concerned and his or her family does not disqualify them from the benefit**.

2. Verification of residence or employment status is not required where intervention by a public authority is necessary on **overriding humanitarian grounds**. Such verifications should be carried out by the services providing the benefits, with the assistance, if necessary, of the authorities responsible in particular for issuing residence or work permits, in accordance with national law relating, in particular, to data protection.

3. **Employers wishing to recruit foreign nationals** should be **encouraged to verify that their residence or employment situations are in order by requiring them to present the document(s) by virtue of which they are authorised to reside and work in the Member State concerned**. Member States could stipulate that employers may, if necessary, under the conditions laid down by national law relating in particular to data protection, check with the authorities responsible for issuing residence and work permits. The said authorities may communicate the relevant information under procedures that **guarantee confidentiality** in the transmission of individual data.

4. This Recommendation further advises that **any person who is considered, under the national law of the Member State concerned, to be employing a foreign national who does not have authorisation should be made subject to appropriate penalties**.

III.3. Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals[204]

This Recommendation on combating the illegal employment of third-country nationals is aimed at **strengthening cooperation between Member States** on immigration policies in relation to third countries. It sets out certain principles that the Member States should apply with a view to **combating the illegal employment of third-country nationals**.

Firstly, third-country nationals wishing to work in the territory of a Member State must be in possession of the **authorisations to reside and to work** required by the law of the Member State concerned. Secondly, the **activity carried out, the post, its location and its duration must**, in accordance with the law in force, **effectively correspond to the content of the authorisation granted** by the Member State concerned.

Part III. of the Recommendation sets out **guidelines regarding the introduction of penalties for employing persons without authorisation**. Accordingly,

1. The **employment of third-country nationals who do not possess the necessary authorisation is prohibited** and **should give rise to the imposition of criminal and/or administrative penalties** in accordance with the provisions of the law of the Member State concerned.

2. The penalties referred to in Paragraph 1 should be imposed in accordance with the provisions of the law of the Member State concerned **upon those who employ workers illegally and those who encourage, facilitate or promote illegal employment**.

3. **Illegal trafficking in labour organised by persons acting on their own or in networks should constitute a criminal offence** and **incur criminal and/or administrative penalties** in accordance with the law of the Member State concerned.

4. The **procedures for punishing the employment of workers who do not possess the necessary authorisation** could:

- allow the **application of penalties** which are **effective**, **dissuasive**, **appropriate** and **proportionate** to the seriousness of the offences committed, and

[204] OJ C304/1, 14.10.1996.

- permit the **elimination of added profits** or **other advantages obtained by employers as a result of the offences committed** in particular as regards the wages and charges imposed by the relevant provisions in each Member State.

The said procedures must provide for appropriate mechanisms and procedures for judicial control.

Part IV. of the Recommendation encourages **coordination and collaboration between enforcement agencies**. Accordingly, Member States should adopt the measures necessary to **coordinate the activities of the competent services or authorities** with the aim of combating the illegal employment and the exploitation of third-country nationals, given that the **specialisation in separate areas of control** should be supplemented by the necessary coordination and collaboration in the activities of the services concerned.

The **coordination** could be put into practice through the preparation of **joint operations** to be defined by sectors of productive activity, geographical areas and periods of time in which non-compliance with the rules on the employment of third-country nationals appears to be concentrated. The **collaboration** might take the form of:

- **support, at the request of one of the competent services**, for **preventive action**, such as **inspection visits** to places of work where there is hard evidence that the activities of those services could be obstructed or nullified or could involve any type of risk
- **support during inspections** where the work of the competent services is seriously impeded in their investigations into the hidden economy
- **prompt support where assistance is requested by the competent services in emergency situations**

Furthermore, the **exchange of information** between Member States on a **bilateral basis** and **within the Council** regarding the **fight against the illegal employment of third-country nationals** and **organised networks trafficking in labour** is recommended.

III.4. Council Decision 96/749/JHA of 16 December 1996 on monitoring the implementation of instruments adopted by the Council concerning illegal immigration, readmission, the unlawful employment of third-country nationals and cooperation in the implementation of expulsion orders[205]

In 1996 the Council of the European Union decided that each year, the Presidency shall forward to the Member States a **questionnaire designed to show how they have implemented the instruments adopted by the Council concerning illegal immigration, readmission, the unlawful employment of third-country nationals** and **cooperation in the implementation of expulsion orders**.

The questionnaire shall refer to the following matters:

- **provisions adopted** during the preceding year by the Member States in any of the relevant areas
- any **difficulties encountered** in adopting such provisions
- the **likelihood of provisions in the relevant areas being adopted** in the future
- **practical application** of any such instruments and provisions

A report shall be drawn up by the General Secretariat of the Council on the basis of the replies received from the Member States and shall be submitted to the Council.

The Directorate General for Justice and Home Affairs has made the **first annual report on migration and asylum statistics** covering all Member States, Candidate Countries and Iceland and Norway available on its website.[206] The report consists of 20 tables of statistical data collected from Ministries and National Statistical Institutes in 29 countries. These data are supplemented by statistical data from Eurostat's databases. These tables do not replace the usual publication of official statistics by national

[205] OJ L342/5, 31.12.1996.
[206] http://europa.eu.int/comm/justice_home/doc_centre/asylum/statistical/printer/doc_annual_report_2001_en.htm.

authorities and Eurostat, but they do provide a unique mix of data, some of which have not previously been publicly available.

The report is the first of its kind to be produced by the European Commission. It represents the results of a lengthy and extensive exercise carried out with the co-operation of the reporting countries. During the exercise data has been collected and combined from a wide range of administrative and statistical sources. The content and structure of future reports will be revised and developed and future reports will include EU/non-EU sub-totals in all tables wherever possible.

IV. Marriages and Adoptions of Convenience

IV.1. Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[207]

In accordance with **Article 16(1)** of the Directive on the right to family reunification, Member States may **reject an application for entry and residence** for the purpose of family reunification, or, if appropriate, **withdraw or refuse to renew a family member's residence permit**, in the following circumstances:

(a) where the conditions laid down by this Directive are not or are no longer satisfied,[208]
(b) where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship, or
(c) where it is found that the sponsor or the unmarried partner is married or is in a stable long-term relationship with another person.

Article 16(2) further provides that Member States may also **reject an application for entry and residence** for the purpose of family reunification, or **withdraw** or **refuse to renew a family member's residence permit**, where it is shown that:

(a) false or misleading information, false or falsified documents were used, fraud was otherwise committed or other unlawful means were used, or
(b) the marriage, partnership or adoption was contracted for the sole purpose of enabling the person concerned to enter or to reside in a Member State.[209]

Furthermore, the Member States may withdraw or refuse to renew the residence permit of a family member where the **sponsor's residence comes to an end** and the family member does not yet enjoy an autonomous right of residence under **Article 15**.[210] Member States may conduct **specific checks and inspections, where there is reason to suspect that there is fraud or a marriage, partnership or adoption of convenience**, as defined by **Article 16(2)**. Specific checks may also be undertaken on the occasion of the renewal of family members' residence permit.[211]

Member States shall take due account of the **nature and solidity of the person's family relationships**, the **duration of his residence in the Member State** and of the **existence of family, cultural and social ties with his or her country of origin** where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.[212]

Article 18 of the Directive provides that the Member States shall ensure that the sponsor and/or the members of his or her family have the **right to mount a legal challenge** where an application for family reunification is rejected or a residence permit is either not renewed or is withdrawn or removal is ordered.

[207] OJ L251/12, 3.10.2003.
[208] When renewing the residence permit, where the sponsor has not sufficient resources without recourse to the social assistance system of the Member State, as referred to in Article 7(1)(c), the Member State shall take into account the contributions of the family members to the household income.
[209] When making an assessment with respect to this point, Member States may have regard in particular to the fact that the marriage, partnership or adoption was contracted after the sponsor had been issued his or her residence permit.
[210] Article 16(3) Council Directive 2003/86/EC.
[211] Article 16(4) Council Directive 2003/86/EC.
[212] Article 17 Council Directive 2003/86/EC.

IV.2. Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience[213]

Should the authorities competent under national law find a **marriage** to be one **of convenience**,[214] the residence permit or authority to reside granted on the basis of the third-country national's marriage shall as a general rule be withdrawn, revoked or not renewed.

Factors that may provide grounds for believing that a marriage is one of convenience include:

- the fact that **matrimonial cohabitation** is not maintained
- the lack of an appropriate **contribution to the responsibilities arising from the marriage**
- the spouses have **never met before** their marriage
- the spouses are **inconsistent about their respective personal details** (name, address, nationality and job), about the circumstances of their first meeting, or about other important personal information concerning them
- the spouses **do not speak a language understood by both**
- a sum of **money has been handed over in order for the marriage to be contracted** (with the exception of money given in the form of a dowry in the case of nationals of countries where the provision of a dowry is common practice)
- the **past history of one or both of the spouses** contains evidence of previous marriages of convenience or residence anomalies

In this context, such **information may result from**: statements by those concerned or by third parties, information from written documentation, or information obtained from inquiries carried out.

Where there are factors which support suspicions for believing that a marriage is one of convenience, Member States shall issue a residence permit or an authority to reside to the third-country national on the basis of the marriage only after the authorities competent under national law have checked that the marriage is not one of convenience, and that the other conditions relating to entry and residence have been fulfilled. Such checking may involve a separate interview with each of the two spouses.

The third-country national concerned shall have an **opportunity to contest or to have reviewed**, as provided for by national law, either before a court or before a competent administrative authority, a **decision to refuse, withdraw, revoke or not renew a residence permit or authority to reside**.

Member States shall have regard to this Resolution in any proposals to amend their national legislation. They were urged to bring their national legislation into line with this Resolution by 1 January 1999.

[213] OJ C382/1, 16.12.1997.

[214] For the purposes of this resolution, a 'marriage of convenience` means a marriage concluded between a national of a Member State or a third-country national legally resident in a Member State and a third-country national, with the sole aim of circumventing the rules on entry and residence of third-country nationals and obtaining for the third-country national a residence permit or authority to reside in a Member State.

E. Trafficking

I. Penal Framework for the Combating and Prevention of Trafficking in Human Beings

I.1. Council Framework Decision 19 July 2002 on combating trafficking in human beings[215]

The purpose of this Framework Decision is to contribute to the **fight against** and the **prevention of trafficking in human beings** by complementing the instruments adopted in this area.[216] It recognises that the **UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children**, also referred to as the **'Palermo Protocol'**, represents a **decisive step towards international cooperation** in this field. It recognises that trafficking in human beings comprises **serious violations of fundamental human rights and human dignity** and that it involves **ruthless practices** such as the **abuse** and **deception** of vulnerable persons, as well as the **use of violence**, **threats**, **debt bondage** and **coercion**.

The Framework Decision aims for a **more comprehensive EU approach** to trafficking in human beings by addressing the problem of the divergent legal approaches in the Member States through the **provision of common standards and sanctions, liability and jurisdiction.**

In accordance with **Article 1(1)** of the Decision, each Member State shall take the necessary measures to ensure that **the following acts are punishable**:

the **recruitment**, **transportation**, **transfer**, **harbouring**, **subsequent reception of a person**, **including exchange or transfer of control over that person**, where:

(a) use is made of **coercion**, **force** or **threat**, **including abduction**,
(b) use is made of **deceit** or **fraud**,
(c) there is an **abuse of authority** or of a **position of vulnerability**, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or
(d) **payments** or **benefits** are **given** or **received** to achieve the consent of a person having control over another person for the purpose of exploitation of that person's labour or services, including at least **forced or compulsory labour or services**, **slavery or practices similar to slavery or servitude**, or for the purpose of the **exploitation of the prostitution of others** or **other forms of sexual exploitation**, including in **pornography**.

Article 1(2) of the Decision further provides that the **consent of a victim of trafficking** in human beings to the exploitation, intended or actual, **shall be irrelevant where any of the means set forth in paragraph 1 have been used**.

When the conduct referred to in paragraph 1 involves a **child**[217], it **shall be a punishable trafficking offence even if none of the means set forth in paragraph 1 have been used**.[218]

[215] OJ L203/1, 1.8.2002.
[216] The documents listed are Council Joint Action 96/700/JHA of 29 November 1996 establishing an incentive and exchange programme for persons responsible for combating trade in human beings and sexual exploitation of children (STOP), Council Joint Action 96/748/JHA of 16 December 1996 extending the mandate given to the Europol Drugs Unit, Decision No 293/2000/EC of 24 January 2000 adopting a programme of Community action (the Daphne Programme) 2000 – 2003 on preventive measures to fight violence against children, young persons and women, Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network, Council Joint Action 96/277/JHA of 22 April 1996 concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the EU, and Council Joint Action 98/427/JHA of 29 June 1998 on good practice in mutual legal assistance in criminal matters.
[217] For the purpose of this Framework Decision, 'child' shall mean any person below 18 years of age.
[218] Article 1(3) of the Decision.

Article 2 of the Decision specifies that each Member State shall take the necessary measures to ensure that the **instigation of, aiding, abetting or attempt to commit an offence** referred to in Article 1 is punishable.

In its **Article 3**, the Decision sets out rules regarding the **penalties** to be imposed on persons convicted of trafficking offences. Accordingly:

1. Each Member State shall take the necessary measures to ensure that an **offence referred to in Articles 1** and **2** is punishable by **effective**, **proportionate** and **dissuasive criminal penalties**, which **may entail extradition**.

2. Each Member State shall take the necessary measures to ensure that an **offence referred to in Article 1** is punishable by **terms of imprisonment with a maximum penalty that is not less than eight years** where it has been committed in any of the **following circumstances**:

(a) the offence has deliberately or by gross negligence **endangered the life of the victim**;
(b) the offence has been **committed against a victim who was particularly vulnerable**. A victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography;
(c) the offence has been committed by use of **serious violence** or has caused particularly **serious harm** to the victim; or
(d) the offence has been **committed within the framework of a criminal organisation** as defined in **Joint Action 98/733/JHA**, apart from the penalty level referred to therein.

In its Decision, the Council also emphasises the need for taking the necessary measures to **ensure that legal persons**, in other words companies and other legal entities, **can be held liable for offences concerning trafficking in human beings** as well as for the **instigation**, **aiding**, **abetting** and **attempting** of such offences. Furthermore, Member states also have to ensure the introduction of **effective**, **proportionate** and **dissuasive sanctions**, including criminal and non-criminal fines **to be imposed on legal persons**. According to **Article 5** of the **Framework Decision**, these sanctions may include other sanctions such as:

a.) **exclusion from entitlement to public benefits** or **aid**,
b.) temporary or permanent **disqualification from the practice of commercial activities**,
c.) placing under **judicial supervision**,
d.) a **judicial winding-up order**, or
e.) temporary or permanent **closure of establishments**, which have been used for committing the offence.

In accordance with its **Article 6**, the Decision requires the Member States to **establish their jurisdiction** over an offence concerning trafficking in human beings where:

a.) the **offence is committed** in whole or in part **within its territory**,
b.) the **offender is one of its nationals**, or
c.) the **offence is committed for the benefits of a legal person established in the territory of that Member State**

Additionally, the **Framework Decision** recognises the need to provide **protection and assistance to victims of trafficking**. In this regard, **Article 7** provides that **investigations shall not depend on the report or accusation made by a person subjected to the offence**. Furthermore, **children who are victims of an offence should be considered as particularly vulnerable** and consequently, Member States shall take the measures possible to **ensure appropriate assistance for the family members of such children**.

I.2. EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings[219]

The Hague Programme required the Commission and the Council to develop in 2005 a plan with a view to the development of common standards, best practices and mechanisms to prevent and combat trafficking in human beings.

This Plan now seeks to ensure that the EU recognises the importance of taking forward a **human rights and victim-centred approach** in the context of trafficking in human beings. In particular, EU Member States should:

- ensure that the **human rights of victims of trafficking** are protected fully at all stages in the process;
- ensure that **appropriate referral mechanisms** are in place, as necessary and in line with national practice and law, to enable the early identification and referral of trafficked persons;
- work to develop, in line with national traditions, circumstances and practice, an appropriate **governmental coordination structure** to coordinate and evaluate national policies and ensure appropriate handling of individuals;
- actively pursue **policies reinforcing the criminalisation of human trafficking** including the protection of potential victims at national, regional, EU and at a wider international level – this should include, as appropriate and where relevant, prevention strategies specific to vulnerable groups such as women and children;
- strengthen **political dialogue with third countries** bilaterally and multilaterally on the human rights dimensions of anti-trafficking policies and continue to raise the issue in relevant regional and multi-lateral for a;
- ensure that EU anti-trafficking policy reflects a **child rights approach** based on globally recognised principles, respecting in particular the principles; such approach must consequently apply to any person below the age of 18;
- promote **gender specific prevention strategies** as a key element to combat trafficking in women and girls. This includes implementing gender equality principles and eliminating the demand for all forms of exploitation, including sexual exploitation and domestic labour exploitation;and
- where necessary, speed up the transposition of **Directive 2004/81/EC** and take into consideration legally binding instruments, political commitments and other relevant documents, in particular the recently concluded Council of Europe Convention on Action Against Trafficking in Human Beings when developing national strategies.

Enhancing operational cooperation should be a priority in strengthening EU activities in combating trafficking in human beings. Member States should provide for necessary **organisational structures, specialised personnel and adequate financial resources** to their law enforcement authorities to effectively combat human trafficking.

The Council recognises that **human trafficking for labour exploitation requires new types of specialisation and cooperation with partners**, e.g. agencies responsible for the control of working conditions and financial investigations related to irregular labour.

Member States' law enforcement strategies should, as appropriate, include **measures to confiscate the proceeds of crime**. Measures should continue to be taken to facilitate the **more rapid identification of potential victims of trafficking at the EU's borders**. In particular, Member States should consider reviewing policies on **unaccompanied minors** to protect this particularly vulnerable group.

Member States should,

- as appropriate and in line with national conditions and practice, provide **protection and assistance to victims** as a part of a balanced, effective prosecution.
- further develop **pro-active intelligence led investigations**, which do not necessarily depend on the testimony of the victims.

[219] OJ C311/1, 9.12.2005.

- ensure that national law enforcement agencies regularly involve Europol in the **exchange of information, in joint operations and joint investigative teams** and use the potential of Eurojust to facilitate the prosecution of traffickers.
- promote combating human trafficking as a priority in their law enforcement relations with third countries.

Anti-corruption and anti-poverty strategies should be an integral part of anti-trafficking strategies and Member States should find more and more intensive ways of taking forward **cooperation**.

I.3. Proposal for a COUNCIL DECISION on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organised Crime[220]

In August 2003, the Commission tabled a proposal on behalf of the European Community on the conclusion of the **UN Convention Against Transnational Organized Crime** as well as of its two supplementing Protocols. However, while in April 2004, the Council decided to adopt a Decision on the conclusion, on behalf of the European Community, of the Convention itself, a similar decision has not yet been taken with regard to the Protocols. Currently, the **'Trafficking Protocol'** (Palermo Protocol) has been signed by all EU Member States, ratified by 14 of them and accepted by the Netherlands.[221]

The Protocol, in force since 25 December 2003, is not a stand-alone instrument. It **must be read and applied together with the parent Convention**, and each country is required to become a party to the Convention in order to become party to the Protocol. **Protocol offences are deemed to be Convention offences** for the purposes of **extradition** and **other forms of cooperation**, and most of the provisions must be read together. The combination of the Convention and one or more Protocols makes it possible for countries to **attack trafficking in the broader context of organised criminal groups** and not just as one distinct area of criminal activity.

The **purpose and scope of the Protocol**, as well as **criminal sanctions** contained therein, are covered in **Articles 1 - 5**. The basic purpose of the Protocol, as defined in its **Article 2**, is to **prevent and combat trafficking**, to **protect and assist victims** and to **promote international cooperation**. Victims and witnesses are also dealt with in the parent Convention, but the protection of, and assistance to, victims is specified as a core purpose of the Protocol in recognition of the acute needs of trafficking victims and the importance of victim assistance, both as an end in itself and as a means to support the investigation and prosecution of trafficking crimes.

Article 3(a) of the Protocol defines trafficking as follows: **'trafficking in persons'** shall mean the **recruitment**, **transportation**, **transfer**, **harbouring** or **receipt of persons**, by means of the **threat or use of force** or **other forms of coercion**, of **abduction**, of **fraud**, of **deception**, of the **abuse of power or of a position of vulnerability** or of the **giving or receiving of payments or benefits** to achieve the consent of a person having control over another person, **for the purpose of exploitation**.

'Exploitation' shall include, at a minimum, the **exploitation of the prostitution of others** or **other forms of sexual exploitation**, **forced labour or services**, **slavery or practices similar to slavery**, **servitude** or the **removal of organs**.

With regard to the matter of **'consent of the victim'** the Protocol specifies that, while consent may initially be raised by accused traffickers in their defence, **consent to initial recruitment is not the same as consent to the entire course of trafficking** and **any alleged consent to exploitation must be deemed irrelevant if any of the means of trafficking listed in the definition have occurred** (i.e. the threat or use of force, coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person such as a parent).

[220] COM(2003) 512 final, 22.8.2003.
[221] Information compiled on 12 August 2005.

Furthermore, the **recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons'** even if this does not involve any of the means described in **Article 3(a)**; in other words, the **'consent' of a person under the age of 18 years of age is not to be considered relevant**.

In **Article 5**, the Protocol provides that each State Party shall adopt such legislative and other measures as may be necessary to **establish 'trafficking in persons'** as defined in **Article 3** of the Protocol **as a criminal offence**.

In Part II, **Articles 6 – 8**, the Protocol specifically deals with the p**rotection of trafficked persons.** In addition to taking action against traffickers, the Protocol requires States to take some steps to **protect and assist victims of trafficking**. These requirements supplement the more general provisions of the parent Convention for the protection of victims and witnesses, recognising that **victims of trafficking are often in greater danger and in greater need of assistance and support**, particularly if repatriated to their countries of origin. Under the Protocol, trafficking victims are entitled to some degree of **confidentiality**, **information about legal proceedings involving traffickers** and **assistance in making representations in such proceedings** at an appropriate stage.

Countries must also endeavour to provide for the **basic safety and security of victims**, and the Protocol requires that victims be afforded the **possibility of obtaining compensation for damage suffered**.

Additionally, the Protocol calls for further **social assistance** to victims in areas such as **counselling**, **housing**, **education** and **health care needs**, although the provision of such assistance is not obligatory.

Article 8 of the Protocol requires countries to **facilitate and accept the return of victims** who are their nationals or who had legal residency rights when they were trafficked into the destination country. It also incorporates a series of **safeguards to protect victims** in the context of return. **Repatriation should be voluntary**, if possible, and **must take into consideration the safety of the victim** and **the status of any ongoing legal proceedings**.

A further safeguard provision, **Article 14**, protects other fundamental interests, including those of trafficking victims who are also asylum seekers, and the principle of non-discrimination.

II. Assistance and Protection of Victims of Trafficking

II.1. Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are the victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities[222]

The purpose of this Directive is to define the **conditions for granting residence permits** of limited duration, linked to the length of the relevant national proceedings against the perpetrators of the offence, **to third-country nationals who cooperate in the fight against trafficking in human beings** or **against action to facilitate illegal immigration**.

According its **Article 3**, Member States shall apply this Directive to **third-country nationals who are, or have been victims of offences related to the trafficking in human beings**, even if they have illegally entered the territory of the Member States. Member States may also apply this Directive to **third-country nationals who have been the subject of an action to facilitate illegal migration**.

When the competent authorities of the Member States take the view that a third-country national may fall into the scope of this Directive, they **shall inform** the person concerned **of the possibilities offered under this Directive**.[223]

Article 6 of the Directive provides that Member States shall ensure that the third-country nationals concerned are granted a **reflection period** allowing them to recover and escape the influence of the perpetrators of the offence so that they can take an **informed decision** as to whether to cooperate with the competent authorities. The **duration and starting point** of the reflection period shall be determined according to national law.

During the reflection period and while awaiting the decision of the competent authorities, the third-country nationals concerned shall have **access to the treatment referred to in Article 7** and it shall not be possible to enforce any expulsion order against them.

Article 7 of the Directive obliges Member States to

1) ensure that the third-country nationals concerned who do not have **sufficient resources** are granted standards of living capable of ensuring their subsistence and access to **emergency medical treatment**. States shall attend to the **needs of the most vulnerable**, including, where appropriate and if provided by national law, **psychological assistance**,
2) take due account of the **safety and protection needs** of the third-country nationals concerned when applying this Directive, and
3) provide the third-country nationals concerned, where appropriate, with **translation and interpreting services**.

Additionally, Member States may provide the third-country nationals concerned with **free legal aid**, if established under the conditions set by national law.

Article 8 of the Directive regulates the **issue and renewal of the residence permit**. According to **Article 8(1)**, if after the expiry of the reflection period, or earlier if the competent authorities are of the view that the third-country national concerned has already fulfilled the criterion set out in subparagraph (b), Member States shall consider:

(a) the **opportunity** presented by prolonging his/her stay on its territory **for the investigations or the judicial proceedings**,
(b) whether he/she has shown a **clear intention to cooperate**, and
(c) whether he/she has **severed all relations with those suspected of acts that might be included among the offences** referred to in **Article 2(b)** and **(c)**.[224]

[222] OJ L261/19, 6.8.2004.
[223] Member States may decide that such information may also be provided by a non-governmental organisation or an association specifically appointed by the Member State concerned.

Article 8(2) further provides that for the issue of the residence permit, and without prejudice to the reasons relating to **public policy** and to the **protection of national security**, the fulfilment of the conditions referred to in Paragraph 1 shall be required.

According to **Article 8(3)**, and without prejudice to the provisions on withdrawal referred to in **Article 14**, the **residence permit shall be valid for at least six months**. It **shall be renewed** if the conditions set out in **Article 8(2)** continue to be satisfied.

Article 9 sets out the treatment to be afforded to those granted a residence permit pursuant to the Directive.

By way of derogation, **Member States may decide to apply this Directive to minors** under the conditions laid down in their national law. If they do so, they shall:

(a) take due account of **the best interests of the child** and ensure that the **procedure** is **appropriate** to the age and maturity of the child,
(b) ensure that minors have **access to the educational system** under the same conditions as nationals, and
(c) in the case of **unaccompanied minors**,
   - take the necessary steps to **establish their identity, nationality and the fact that they are unaccompanied**,
   - make every effort to **locate the families** as quickly as possible, and
   - take the necessary steps immediately to **ensure legal representation**.

To enable the third-country nationals concerned to (re-)gain their independence and not return to the criminal network, Member States shall define the rules under which the holder of the residence permit shall be authorised to have **access to the labour market**, **vocational training** and **education**.[225]

Furthermore, the third-country nationals concerned shall be granted **access to existing programmes or schemes**, provided by the Member States or non-governmental organisations or associations which have specific agreements with the Member State, **aimed at the recovery of a normal social life**, including, where appropriate, courses designed to improve their professional skills, or preparation of their assisted return to their country of origin.[226]

The residence permit issued on the basis of this Directive shall not be renewed if the conditions of **Article 8(2)** cease to be satisfied or if a decision adopted by the competent authorities has terminated the relevant proceedings. Additionally, **Article 14** provides that the **residence permit may be withdrawn** at any **time if the conditions for the issue are no longer satisfied**. In particular, the residence permit may be withdrawn in the following cases:

(a) if the holder has actively, voluntarily and in his/her own initiative **renewed contacts with those suspected of committing the offences** referred to in **Article 2(b)** and **(c)**,
(b) if the competent authority believes that the **victim's cooperation is fraudulent** or that his/her **complaint is fraudulent or wrongful**,
(c) for **reasons relating to public policy** and to the **protection of national security**,
(d) when the **victim ceases to cooperate**, or
(e) when the **competent authorities decide to discontinue the proceedings**.

II.2. Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims[227]

[224] Articles 2(b) and (c) define 'action to facilitate illegal immigration' and 'trafficking in human beings' as cases such as those referred to in Articles 1 and 2 of Directive 2002/90/EC (covered at 4.1.d.) above) and such as those referred to in Articles 1, 2 and 3 of Framework Decision 2002/629/JHA (covered at 4.1.e.) above) respectively.
[225] Article 11 of the Directive.
[226] Where a Member State decides to introduce and implement such programmes or schemes, it may make the issue of the residence permit or its renewal conditional upon the participation in the said programmes or schemes.
[227] OJ L261/15, 6.8.2004.

In accordance with this Directive, each EU Member State has to have a **national scheme** in place, which **guarantees fair and appropriate compensation to victims of crime**.[228]

Secondly, the Directive **seeks to ensure that compensation is easily accessible in practice**, regardless of where in the EU a person becomes the victim of a crime, by creating a **system for cooperation between national authorities**. This is expected to be operational by 1 January 2006.

With the introduction of the Directive, the Council recognised that a **vital part of support to crime victims** is the possibility to get **compensation for the physical and psychological injuries** they have suffered. Crime victims may often find it impossible to be awarded damages from the perpetrator of the crime, since she/he may lack the means to satisfy any judgement to pay damages, or since the perpetrator may remain unknown. When the crime has been committed outside the victim's country of residence, which will often be the case in the context of trafficking, the victim may find it difficult to apply for compensation because of practical and linguistic difficulties.

[228] The deadline for the introduction of such schemes was 1.7.2005.

I. Data Collection and Exchange

I.1. Convention implementing Schengen Agreement of 14 June 1985 [226]

In **Chapter 2** of its **Title IV**, the **Schengen Convention** introduces the **Schengen Information System (SIS)**.[229] **Article 94** describes in detail the categories of **data, which are supplied by each of the Contracting Parties**, as required for the purposes laid down in **Articles 95 – 100**, including the **purpose of refusing entry** set out in **Article 96** of the Convention.

These categories of data shall be: **Persons for whom an alert has been issued as well as objects referred to in Article 100**[230] **and vehicles referred to in Article 99**.[231]

For **persons**, the information shall be no more than the following:

(a) surname and forenames, any aliases possibly entered separately
(b) any specific objective physical characteristics not subject to change
(c) first letter of second forename
(d) date and place of birth
(e) gender
(f) nationality
(g) whether the persons concerned are armed
(h) whether the persons concerned are violent
(i) reason for the alert
(j) action to be taken

Additionally, **data on persons wanted for arrest for extradition purposes** shall be entered at the request of the judicial authority of the requesting Contracting Party.

Data on third-country nationals for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law.

Article 97 provides that **data on missing persons or persons who, for their own protection or in order to prevent threats, need temporarily to be placed under police protection**[232] shall be entered so that the police authorities may communicate their whereabouts to the Contracting Party issuing the alert or may move the persons to a safe place in order to prevent them from continuing their journey.

Data on witnesses, persons summoned to appear before the judicial authorities in connection with criminal proceedings in order to account for acts for which they are being prosecuted, or persons who are to be served with a criminal judgment or summons to report in order to serve a penalty involving deprivation of liberty, shall be entered, at the request of the competent judicial authorities, for the purposes of communicating their place of residence or domicile.

[229] The Schengen III Treaty was signed on 27 May 2005. It will have to be ratified by the national parliaments of the seven participating states - Germany, Spain, France, Luxembourg, Netherlands, Austria and Belgium. It is not part of the Schengen treaty and is not intended to be a part of the Schengen acquis. However, it follows a model of cooperation, which is similar to the 'Schengen Cooperation' before its integration into the first and third pillar of the EU under the Amsterdam Treaty.
[230] Article 100 refers to objects sought for the purposes of seizure or use as evidence in criminal proceedings such as certain motor vehicles, trailers and caravans, firearms, blank official documents, issued identity papers and banknotes.
[231] Article 99 refers to data on persons and vehicles.
[232] At the request of the competent authority or the competent judicial authority of the Party issuing the alert.

I.2. Council Regulation (EC) No 377/2004 of 19 February 2004 on the creation of an inmigartion liaison officers network [230]

The main purpose of this Council Regulation is the setting up of a **network of immigration liaison officers** posted in third countries. The need for such a network was envisaged in the 2002 Plan for the Management of the External Borders of the EU. It was recognised in 2002, that most Member States had a network of immigration liaison officers but it was also noted that there was a need to further strengthen these networks.

The Regulation is a legally binding act, setting out the obligation to establish **forms of cooperation** among immigration liaison officers of the Member States, the **objectives of such cooperation**, the **functions and appropriate qualifications** of such liaison officers, as well as their **responsibilities** vis-à-vis the host country and the sending Member State.[233]

One of the duties of the immigration liaison officers laid down in **Article 2** of the Regulation, is the facilitation and expedition of the collection and exchange of information. In this regard, immigration liaison officers are obliged to **collect information** for use at the **operational level**, at a **strategic level**, or at both levels. Such information shall concern issues such as:

- **irregular migration flows** originating from or transiting through the host country
- **routes followed by those irregular migration flows** in order to reach the territories of the Member States
- their **modus operandi**, including the means of transport used, the involvement of intermediaries, etc.
- the **existence and activities of criminal organisations** involved in the **smuggling of immigrants**
- **incidents and events** that may be or become the cause for new developments with respect to irregular migration flows
- **methods used** for **counterfeiting or falsifying identity documents and travel documents**
- **ways and means to assist the authorities** in host countries in preventing irregular migration flows originating from or transiting through their territories
- **ways and means to facilitate the return and repatriation** of irregular migrants to their countries of origin
- **legislation and legal practices** relevant to the issues referred to above
- **information transmitted** via the **early warning system**

Additionally, immigration liaison officers are entitled to **render assistance in establishing the identity of third country nationals** and in **facilitating their return to their respective countries of origin**.

In this context, Member States shall ensure that their immigration liaison officers carry out their tasks within the framework of their responsibilities and in compliance with the provisions, including those on the **protection of personal data** laid down in their national laws and in any agreements or arrangements concluded with host countries or international organisations.

Furthermore, in accordance with **Article 4** of the Regulation, immigration liaison officers shall:

- meet regularly and whenever necessary
- **exchange information** and **practical experience**
- coordinate positions to be adopted in contacts with commercial carriers, when appropriate
- attend joint specialised training courses, when appropriate
- organise information sessions and training courses for members of the diplomatic and consular staff of the missions of the Member States in the host country, when appropriate
- adopt common approaches as to **methods of collecting and reporting strategically relevant information**, including risk analyses, to the competent authorities of the sending Member States,
- **contribute to the biannual reports** of their common activities

[233] See Recital No 6 to the Preamble of the Regulation.

- set up **regular contacts with similar networks** in the host country and in neighbouring third countries, as appropriate

I.3. Council Decision of 5 October 2006 on the establishment of a mutual information mecahnism concerning Member States' measures in the areas of asylum and immigartion [231]

This Decision establishes a mechanism for the **mutual exchange of information** concerning **national measures in the areas of asylum and immigration**. Accordingly, the Member States have an obligation to communicate to the Commission and the other Member States information on the measures which they intend to take, or have recently taken, in the areas of asylum and immigration, where these measures are **publicly available** and are likely to have a **significant impact on several Member States or on the European Union as a whole**.

Such **information shall be transmitted as soon as possible** and **at the latest when it becomes publicly available**, **subject to any confidentiality and data protection requirements that may apply** to a particular measure. The information is to be communicated on a **standard reporting form** which is annexed to the Decision.

The Commission or a Member State may request **additional information** concerning the information communicated by another Member State through the network. In such a case, the Member State concerned shall provide additional information within one month. However, information on final decisions of the highest Courts which apply or interpret measures of national law shall not be the subject of such a request for additional information.

Additionally, the **possibility for providing additional information may also be used by the Member States to provide information on measures not covered by the obligation to transmit information** on their own initiative or upon request of the Commission or another Member State.

The network for the exchange of information in accordance with this Decision shall be **web-based**. And the Commission shall be responsible for the development and management of the network, including the structure and content of the network and access to it. The network shall include appropriate measures to guarantee the confidentiality of all or part of the information in the network.

The Decision provides that for the **practical set up of the network**, the Commission shall make use of the existing technical platform within the Community framework of the **trans-European telematic network for the interchange of information between the Member States authorities**[234].

With regard to the **exchange of views, the general report and discussions at ministerial level** the Decision provides that the Commission shall, once a year, prepare a **general report summarising the most relevant information transmitted**. This report shall constitute the basis for a debate on national asylum and immigration policies at ministerial level.

I.4. Council Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network[232]

In its conclusions the Laeken European Council of December 2001 invited the Commission **'to establish a system for exchange of information on asylum, migration and countries of origin'**. The project, which eventually took the name 'European Migration Network' (EMN), continued from 2003 as a preparatory action, until 2006.

In order to consult relevant stakeholders about the future of the EMN, the Commission adopted on 28 November 2005 a '**Green Paper on the future of the European Migration Network**[235]' which, in addition to an assessment of the functioning of the EMN during the preparatory period, dealt with

[234] TESTA is the European Community's own private, IP-based network. TESTA offers a telecommunications interconnection platform that responds to the growing need for secure information exchange between European public administrations. It is a European IP network, similar to the Internet in its universal reach, but dedicated to inter-administrative requirements and providing guaranteed performance levels.
[235] OJ L131 of 12 May 2008, p. 7.

issues such as the mandate and future structure of the EMN. There was broad agreement on the need to continue the activities of the EMN, building on its current mandate and structure, and Member States supported the Commission's intentions for the formalisation of the EMN.

This Council Decision was adopted on 14 May 2008.

Article 1(2) of the Decision provides that the objective of the EMN shall be to **meet the information needs of Community institutions, Member States' authorities and institutions on migration and asylum**, by providing **up-to-date, objective, reliable and comparable information on migration and asylum**, with a view to supporting **policymaking in the European Union** in these areas. Article 1(3) further rules that the EMN shall also serve to provide the general public with information on these subjects.

To achieve its objectives, and in accordance with **article 2**, the EMN shall:

- **collect and exchange up-to-date data and information** from a wide range of sources;
- undertake **analysis of the data and information** and provide it in a readily accessible format;
- **develop indicators and criteria to improve the consistency of information** and help in the development of Community activities related to migratory statistics;
- **publish periodic reports on the migration and asylum situation** in the Community and its Member States;
- create and maintain an **Internet-based information exchange system** which provides access to relevant documents and publications in the area of migration and asylum;
- **raise awareness of the EMN**, by providing access to the information it gathers and disseminating the output of the EMN;
- **co-ordinate information and co-operate with other relevant European and international bodies**.

According to **article 3**, the EMN shall be composed of the Commission and of **National Contact Points** (NCP) designated by the Member States. The NCP shall be composed of at least three experts (article 5(2)) and the experts of each NCP shall collectively have expertise in the area of asylum and migration, covering aspects of policymaking, law, research and statistics (article 5(3)).

Furthermore, **article 4** establishes a **Steering Board**. Indeed, article 4(1) provides that the EMN shall be guided by a Steering Board composed of one representative from each Member State and one representative of the Commission, assisted by two scientific experts. The missions of the Steering Board are described in article 4(5). Each member of the Steering Board shall have one vote, including the Chair, who, according to article 4(2), shall be the representative of the Commission, and decisions shall be taken by a two-thirds majority of the votes cast (article 4(3)).

A particular focus is made in **article 8** on the establishment of an **Internet-based information exchange system**, accessible through a dedicated website. The content of the information exchange system shall **normally be public** and shall comprise at least the following elements:

- **access to Community and national legislation**, case law and policy in the areas of migration and asylum, including specific migration regimes for particular categories of migrants;
- a functionality for **ad hoc requests**;
- a **migration and asylum glossary and thesaurus**;
- direct **access to all EMN's publications**, including reports and studies, as well as a regular newsletter;
- a **directory of researchers and research institutions** in the area of migration and asylum.

According to **article 13**, and no later than three years after the entry into force of this Decision, and every three years thereafter, the Commission shall present to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, **a report, based on an external and independent evaluation, on the development of the EMN**. The report shall be **accompanied, if necessary, by proposals for amendments**.

II. Migration Statistics

II.1 Council Regulation (EC) No 322/97 of 17 February 1997 on Community Statistics [233]

The purpose of this Regulation, as set out in **Article 1**, is to establish a **legislative framework for the systematic and programmed production of Community statistics** with a view to the formulation, application, monitoring and assessment of the policies of the Community.

Article 1 further provides that the **national authorities** at **national level** and the Community authority at Community level shall be **responsible for the production of Community statistics**. To guarantee **comparability of results**, Community statistics shall be produced on the basis of **uniform standards** and, in specific, duly justified cases, of **harmonised methods**.

In accordance with this Regulation, the Community must have **timely access to statistical information, comparable between the Member States,** which is **up to date**, **reliable**, **pertinent** and **produced as efficiently as possible** for the **formulation**, **application**, **monitoring** and **assessment of its policies**.

In **Article 10**, the Regulation sets out that, in order to ensure the **best possible quality** in both **deontological and professional aspects**, Community statistics shall be governed by the **principles of impartiality**, **reliability**, **relevance**, **cost-effectiveness**, **statistical confidentiality** and **transparency**.

With regard to **relevance**, data collection should be **limited to what is necessary** for attaining the desired results.

II.2. Decision No 2367/2002/EC of the European Parliament and of the Council of 16 December 2002 on the Community statistical programme 2003 to 2007 [233]

The **Community statistical programme** was established in accordance with **Council Regulation (EC) No 322/97 on Community Statistics**[236] in order to ensure the **consistency and comparability of statistical information** in the Community.

Annex I of the Decision defines the approaches, the main fields and the objectives of the actions envisaged during the period 2003 to 2007 and also provides a summary of statistical requirements viewed from the perspective of the policy needs of the European Union. In its **Title IV**, the Decision covers the area of visas, asylum, **immigration and other policies related to free movement of persons**.

In this regard, it recognises that Community competence in the field of immigration and asylum was established by the entry into force of the **Treaty of Amsterdam** on 1 May 1999. At the request of the European Council, the Commission submitted in November 2000 two Communications to launch a debate in the Community on the long-term aspects of a common EU policy. Both Communications address the issue of statistics in this perspective.

The **Communication on a Community immigration policy**[237] emphasises that **more information is needed about migration flows and patterns of migration into and out of the EU**. The **Communication on asylum**[238] states that establishing and implementing the common European asylum system requires an **in-depth analysis on the scale of migratory flows**, **their origins**, as well

[236] See F.II.1. above.
[237] Communication from the Commission to the Council and the European Parliament on a community immigration policy (COM(2000) 757 final, 22.11.2000).
[238] Communication from the Commission to the Council and the European Parliament 'Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum', (COM(2000) 755 final, 22.11.2000).

as **analysis of the characteristics of applications for protection and the response to them**. The Union's enlargement and the development of cooperation with the countries of the Mediterranean Basin is seen to reinforce the **need for statistical information** in these fields.

In accordance with the Decision the Commission will, during the five-year programme period;

- develop a **more standardised nomenclature** in the areas of migration and asylum in liaison with the national authorities, and
- **enhance the range and quality of statistics** in this field to meet the initial requirements contained in the Commission communications on the subject.

II.3. Communication from the Commission to the Council and the European Parliament to present an Action Plan for the collection and analysis of Community Statistics in the field of migration[239]

The purpose of this Communication is twofold:

1. to present an **Action Plan** aimed at the **development and improvement of Community statistics** and their **analysis** in the field of asylum and migration, and
2. to facilitate a **discussion** about the **form and main principles of possible future legislation** to underpin all **statistical work** in this field.

The Communication recognises that there is a **need to reinforce the exchange of statistical information on asylum and migration** and to **improve the quality of Community statistical collections and outputs**. Furthermore, the Commission is of the view that a coordinated action plan and future legislation will enable the Community effectively to formulate, apply, monitor and assess the policies of the Community, as required in Article 1 of Regulation on Community Statistics.[240]

The Commission's **Action Plan** envisages the adoption of **new practices**, **common statistical methods** and **new forms of cooperation**,[241] including activities to **enhance information exchange** and **promote decision-making**, **changes in the current data collection or database**, production of **user-friendly statistical outputs** by the Commission, and action relating to the **legal and political framework**.

More specifically, the Action Plan is divided into **actions in light of the objectives and principles of the Council Conclusions,** such as transparency, confidentiality and sensitivity, rapid electronic dissemination of all reports, an EU annual report on asylum and migration, ways and means of regular consultation and improving cooperation with other actors and providers.

The Plan further includes other actions to improve the data collection and dissemination including the modification of the collection and its definitions, introduction of a legal entry data collection and adapting the collection to the needs of non-governmental users.

In relation to **legislation**, the Commission envisaged at the time proposing legislation relating to the supply of monthly, quarterly and annual asylum and migration statistics, from national administrative and statistical sources. This would offer legal certainty and predictability for all parties involved. Given the sensitivity of the subject area and the complicated methodological questions involved, it was the intention that a draft Framework Regulation[242] would be prepared to provide the legal basis for the general activities associated with the production, supply, collection, processing and dissemination of Community statistics in the field of asylum and migration.

Future legislative instruments introduced under this framework would set out the **precise definitions and variables in the data collections** according to existing, new and forthcoming legislation on asylum and migration. The **terms and definitions used in the data collection would reflect those used in the relevant legislation**.

[239] COM(2003) 179 final, 15.4.2003.
[240] See F.II.1. above.
[241] This will lay the ground for future work, which will have a legal basis.
[242] See draft proposal for a Regulation of the European Parliament and of the Council on Community statistics on migration, citizenship and asylum described below.

II.4. Regulation (EC9 No 862/2007 of 11 July 2007 on Community statistics on migartion and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers [240]

Council Regulation (EC) No 322/97 of 17 February 1997 on Community Statistics[243] constitutes the reference framework for the provisions of this Regulation. In particular, it requires conformity to **standards of impartiality, reliability, objectivity, scientific independence, cost effectiveness and statistical confidentiality**.

Enlargement of the EU has brought an added geographical and political dimension to the scale of the phenomena associated with migration. It has also brought a further impetus to the **demand for accurate, timely and harmonised statistical information**. There is also an **increasing need for statistical information regarding the profession, education, qualifications and type of activity of migrants**. Harmonised and comparable Community statistics on migration and asylum are considered essential for the development and monitoring of Community legislation and policies relating to immigration and asylum, and to the free movement of persons.

In the view of the Parliament and the Council there is a **need to reinforce the exchange of statistical information on asylum and migration and to improve the quality of Community statistical collections and outputs** which have, hitherto, taken place on the basis of a series of 'gentlemen's agreements'. It is therefore essential that information be available, throughout the EU, for the purposes of **monitoring the development and implementation of Community legislation and policy**.

In its Article 2 the Regulation provides detailed definitions of migration and protection related terms to ensure consistency and comparability of the information supplied by Member States. Accordingly,

- **'usual residence'** means the place at which a person normally spends the daily period of rest, regardless of temporary absences for purposes of recreation, holiday, visits to friends and relatives, business, medical treatment or religious pilgrimage or, in default, the place of legal or registered residence;
- **'immigration'** means the action by which a person establishes his or her usual residence in the territory of a Member State for a period that is, or is expected to be, of at least 12 months, having previously been usually resident in another Member State or a third country;
- **'emigration'** means the action by which a person, having previously been usually resident in the territory of a Member State, ceases to have his or her usual residence in that Member State for a period that is, or is expected to be, of at least 12 months;
- **'citizenship'** means the particular legal bond between an individual and his or her State, acquired by birth or naturalisation, whether by declaration, choice, marriage or other means according to national legislation;
- **'country of birth'** means the country of residence (in its current borders, if the information is available) of the mother at the time of the birth or, in default, the country (in its current borders, if the information is available) in which the birth took place;
- **'immigrant'** means a person undertaking an immigration;
- **'emigrant'** means a person undertaking an emigration;
- **'long-term resident'** means long-term resident as defined in Article 2(b) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents
- **'third-country national'** means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty, including stateless persons;
- **'application for international protection'** means application for international protection as defined in Article 2(g) of Council Directive 2004/83/EC of 29 April 2004 on minimum standards

[243] Community Statistics shall mean quantitative, aggregated and representative information taken from the collection and systematic processing of data, produced by the national authorities and the Community authority in the framework of implementation of the Community statistical programme (see also Part F.II.1. above).

for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted;

- **'refugee status'** means refugee status as defined in Article 2(d) of Directive 2004/83/EC;
- **'subsidiary protection status'** means subsidiary protection status as defined in Article 2(f) of Directive 2004/83/EC;
- **'family members'** means family members as defined in Article 2(i) of Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national;
- **'temporary protection'** means temporary protection as defined in Article 2(a) of Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof;
- **'unaccompanied minor'** means an unaccompanied minor as defined in Article 2(i) of Directive 2004/83/EC;
- **'external borders'** means external borders as defined in Article 2(2) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code);
- **'third-country nationals refused entry'** means third-country nationals who are refused entry at the external border because they do not fulfil all the entry conditions laid down in Article 5(1) of Regulation (EC) No 562/2006 and do not belong to the categories of persons referred to in Article 5(4) of that Regulation;
- **'third-country nationals found to be illegally present'** means third-country nationals who are officially found to be on the territory of a Member State and who do not fulfil, or no longer fulfil, the conditions for stay or residence in that Member State;
- **'resettlement'** means the transfer of third-country nationals or stateless persons on the basis of an assessment of their need for international protection and a durable solution, to a Member State, where they are permitted to reside with a secure legal status.

In accordance with the Regulation, **Member States shall supply to the European Commission (Eurostat):**

- **Statistics on international migration, usually resident population and acquisition of citizenship**

(a) **immigrants moving to the territory** of the Member State;
(b) **emigrants moving from the territory** of the Member State;
(c) persons having their **usual residence** in the Member State at the end of the reference period;
(d) persons having their usual residence in the territory of the Member State and having acquired during the reference year the **citizenship** of the Member State and having formerly held the citizenship of another Member State or a third country or having formerly been stateless.

- **Statistics on international protection**

(a) **persons having submitted an application for international protection** or having been included in such an application as a family member during the reference period;
(b) persons who are the subject of **applications for international protection under consideration** by the responsible national authority at the end of the reference period;
(c) **applications for international protection having been withdrawn** during the reference period;
(d) persons covered by **first-instance decisions rejecting applications for international protection**, such as decisions considering applications as inadmissible or as unfounded and decisions under priority and accelerated procedures, taken by administrative or judicial bodies during the reference period;
(e) persons covered by **first-instance decisions granting or withdrawing refugee status**, taken by administrative or judicial bodies during the reference period;
(f) persons covered by **first-instance decisions granting or withdrawing subsidiary protection status**, taken by administrative or judicial bodies during the reference period;
(g) persons covered by **first-instance decisions granting or withdrawing temporary protection**, taken by administrative or judicial bodies during the reference period;

(h) persons covered by other **first-instance decisions granting or withdrawing authorisation to stay for humanitarian reasons** under national law concerning international protection, taken by administrative or judicial bodies during the reference period.

(i) applicants for international protection who are considered by the responsible national authority to be **unaccompanied minors** during the reference period;
(j) persons covered by **final decisions rejecting applications for international protection**, such as decisions considering applications as inadmissible or as unfounded and decisions under priority and accelerated procedures, taken by administrative or judicial bodies in appeal or review during the reference period;
(k) persons covered by **final decisions granting or withdrawing refugee status** taken by administrative or judicial bodies in appeal or review during the reference period;
(l) persons covered by **final decisions granting or withdrawing subsidiary protection status** taken by administrative or judicial bodies in appeal or review during the reference period;
(m) persons covered by **final decisions granting or withdrawing temporary protection** taken by administrative or judicial bodies in appeal or review during the reference period;
(n) persons covered by **other final decisions**, taken by administrative or judicial bodies in appeal or review, **granting or withdrawing authorisations to stay for humanitarian reasons** under national law concerning international protection during the reference period;
(o) persons who have been **granted an authorisation to reside in a Member State within the framework of a national or Community resettlement scheme** during the reference period, where such a scheme is implemented in that Member State.

Furthermore, Member States shall supply to the Commission (Eurostat) the following statistics on the application of Regulation (EC) No 343/2003[244] and Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003[245]:

(a) the numbers of requests for taking back or taking charge of an asylum seeker;
(b) the provisions on which the requests referred to in point (a) are based;
(c) the decisions taken in response to the requests referred to in point (a);
(d) the numbers of transfers to which the decisions referred to in point (c) lead;
(e) the number of requests for information.

- **Statistics on the prevention of illegal entry and stay**

(a) third-country nationals refused entry to the Member State's territory at the external border;
(b) third-country nationals found to be illegally present in the Member State's territory under national laws relating to immigration.

- **Statistics on residence permits and residence of third-country nationals**

(a) the number of residence permits issued to persons who are third-country nationals
(b) the number of long-term residents at the end of the reference period

- **Statistics on returns**

(a) the number of **third-country nationals found to be illegally present in the territory** of the Member State who are **subject to an administrative or judicial decision or act stating or declaring that their stay is illegal and imposing an obligation to leave the territory** of the Member State
(b) the number of **third-country nationals who have in fact left the territory** of the Member State, following an administrative or judicial decision or act, as referred to in point (a).

The **Regulation further specifies in detail how the data collected for each of the above categories shall be disaggregated**, e.g. age, sex, citizenship, and particulars regarding administrative decisions.

[244] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L50/1, 25.2.2003.
[245] Commission Regulation (EC) No 1560/2003 of 2 September 2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L222/3, 5.9.2003.

III. Data Protection

III.1. Convention implementing the Schengen Agreement of 14 June 1985 [243]

The **protection of personal data** and **security of data** in the **Schengen Information System (SIS)** is regulated in **Title IV**, **Chapter III** of the **Schengen Convention** (Articles 102 – 125). Additional rules regarding the **protection of personal data** are contained in **Title VI** (Article 126 – 130) of the Convention.

Article 102 limits the use of any data collected in the SIS to the purposes laid down in Articles 95 – 100 of the Convention, for example for the purpose of **refusing entry** (Article 96).

It further provides that **data may only be copied for technical purposes in order for the relevant authorities** that are responsible for border checks, other police and customs checks carried out within the country and the coordination of such checks **to carry out a direct search**. Alerts issued by other Contracting Parties may not be copied from the national section of the SIS into other national data files.

Data contained in the SIS may not be used for administrative purposes. Any use of data, which does not comply with **Article 102**, will be considered as **misuse** under the national law of each Contracting Party.

According to **Article 105**, the Contracting Party issuing an alert shall be responsible for ensuring that the data entered into the SIS is accurate, up to date and lawful.

Only the Contracting Party issuing an alert shall be authorised to modify, add to, correct or delete data, which it has entered (Article 106).

However, **any person may have factually inaccurate data relating to them corrected or unlawfully stored data relating to them deleted** (Article 110) and **may bring** before the courts or the authority competent under national law an **action to correct, delete or obtain information or to obtain compensation** in connection with an alert involving them (Article 111).

Personal data entered into the SIS for the purposes of tracing persons shall be kept only for the time required to meet the purposes for which they were supplied. Accordingly, the Contracting Party, which issued the alert, **must review the need for continued storage of such data not later than three years after they were entered** (Article 112).[246] Other data shall be kept for a maximum of 10 years, data on issued identity papers and suspect bank notes for a maximum of five years and data on motor vehicles, trailers and caravans for a maximum of three years.

Each Contracting Party shall designate a **supervisory authority** responsible in accordance with national law for carrying out independent supervision of the data file of the national section of the SIS and for checking that the processing and use of data entered in the SIS does not violate the rights of the data subject.

For this purpose, the **supervisory authority shall have access to the data file of the national section of the SIS** and **any person shall have the right to ask the supervisory authorities to check data entered in the SIS, which concerns them, and the use made of such data**.

In its **Title VI**, the Convention provides further detailed rules regarding the protection of personal data. In this regard, **Article 126** specifies that:

As regards the automatic processing of personal data communicated pursuant to the Schengen Convention, **each Contracting Party shall**, no later than the date of the entry into force of the Convention, **adopt the necessary national provisions in order to achieve a level of protection of personal data at least equal to that resulting from the Council of Europe Convention for the**

[246] The period shall be one year in case of alerts for the purposes of discreet surveillance or of specific checks in accordance with Article 99(5).

Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.

The **communication of personal data** provided for in the Schengen Convention **may not take place until the provisions for the protection of personal data have entered into force** in the territories of the Contracting Parties involved in such communication.

Further specific rules regarding the processing of personal data communicated pursuant to the Schengen Convention are outlined in **Article 126(3)(a) to (f)**.

III.2. Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protecction of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movements of such data [244]

The introduction of this Regulation was necessary

- to provide the individual with **legally enforceable rights**,
- to **specify the data processing obligations** of the controllers within the Community institutions and bodies, and
- to **create an independent supervisory authority** responsible for monitoring the processing of personal data by the Community institutions and bodies.

The **persons to be protected by this Regulation** are **those whose personal data are processed by Community institutions or bodies in any context whatsoever**, for example because they are employed by those institutions or bodies.[247]

The **principles of data protection** should apply to **any information concerning an identified or identifiable person**[248]. To determine whether a person is identifiable, account should be taken of all the means likely to be reasonably used, either by the controller or by any other person, to identify the said person. However, the principles of protection should not apply to data rendered anonymous in such a way that the data subject is no longer identifiable.[249]

Chapter II of the Regulation contains general rules on the lawfulness of the processing of personal data. **Article 4** specifies that personal data must be:

(a) **processed fairly and lawfully**,
(b) **collected for specified, explicit and legitimate purposes** and **not further processed in a way incompatible with those purposes**,[250]
(c) **adequate, relevant and not excessive** in relation to the purposes for which they are collected and/or further processed,
(d) **accurate and**, where necessary, **kept up to date**,[251] and
(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data was collected or for which it is further processed.[252]

However, in accordance with **Article 5**, personal data may be processed only if:

[247] Recital 7 to the Preamble of the Regulation.
[248] An 'identifiable person' is one who can be identified, directly or indirectly, in particular by reference to and identification number or to one or more factors specific to his or her physical, physiological, mental, economic, cultural or social identity.
[249] Recital 8 to the Preamble of the Regulation
[250] Further processing of personal data for historical, statistical or scientific purposes shall not be considered incompatible provided that the controller provides appropriate safeguards, in particular to ensure that the data are not processed for any other purposes or used in support of measures or decisions regarding any particular individual.
[251] Every reasonable step must be taken to ensure that data, which is inaccurate or incomplete, having regard to the purposes for which it was collected or for which it is further processed, is erased or rectified.
[252] The Community institution or body shall lay down that personal data which are to be stored for longer periods for historical, statistical or scientific use should be kept either in anonymous form only or, if that is not possible, only with the identity of the data subjects encrypted. In any event, the data shall not be used for any purpose other than for historical, statistical or scientific purposes.

(a) **processing is necessary** for the performance of a task carried out in **the public interest** or in the **legitimate exercise of official authority**,
(b) processing is **necessary for compliance with a legal obligation** to which the controller is subject,
(c) processing is **necessary for the performance of a contract to which the data subject is party** or in order to take steps at the request of the data subject prior to entering into a contract,
(d) the **data subject has unambiguously given his or her consent**, or
(e) processing is **necessary in order to protect the vital interests of the data subject**.

Article 10 of the Regulation provides that the **processing of certain sensitive data** revealing **racial or ethnic origin**, **political opinions**, **religious or philosophical beliefs**, **trade-union membership**, and of **data concerning health and sex life is prohibited**.

However, certain **exceptions to this rule** apply where:

(a) the data subject has given his or her express consent to the processing of those data[253],
(b) processing is necessary for the purposes of complying with the specific rights and obligations of the controller in the field of employment law,
(c) processing is necessary to protect the vital interests of the data subject or of another person where the data subject is physically or legally incapable of giving his or her consent,
(d) processing relates to data which are manifestly made public by the data subject or is necessary for the establishment, exercise or defence of legal claims, or
(e) processing is carried out in the course of its legitimate activities with appropriate safeguards by certain non-profit-seeking bodies with a political, philosophical, religious or trade-union aim and on condition that the processing relates solely to the members of this body or to persons who have regular contact with it in connection with its purposes and that the data are not disclosed to a third party without the consent of the data subjects.

Articles 11 and 12 of the Regulation specify the **information that has to be supplied to the data subject**, depending on whether the data has been obtained from him/her or from another source.

Additionally, all data subjects have the right to **access the information stored** on them. They have the right to obtain, without constraint, at any time within three months from the receipt of the request and free of charge from the controller:

(a) confirmation as to **whether or not data related to him or her are being processed**,
(b) information at least as to the **purposes of the processing operation**, the **categories of data concerned**, and the **recipients or categories of recipients to whom the data are disclosed**,
(c) communication in an intelligible form of the **data undergoing processing** and of any available **information as to their source**, and
(d) knowledge of the **logic involved in any automated decision process** concerning him or her.

Furthermore, data subjects shall have the **right to obtain** from the controller the **rectification** without delay **of inaccurate or incomplete personal data**[254] as well as the **erasure of data the processing of which is unlawful**.[255]

Section 7 of the Regulation contains specific rules on the **confidentiality and security of data processing**.

In **Section 8**, the Regulation obliges each Community institution and Community body to appoint at least one person as a **data protection officer**. The data protection officers are tasked with **ensuring that the rights and freedoms of the data subjects are unlikely to be adversely affected** by data processing operations.

Chapter III of the Regulation contains rules regarding **remedies**, with Article 32 giving the **Court of Justice of the European Communities** jurisdiction to hear all disputes, which relate to the provisions of this Regulation.

[253] Except where the internal rules of the Community institution or body provide that the prohibition may not be lifted by the data subject's giving his or her consent.
[254] Article 14 of the Regulation.
[255] Article 17 of the Regulation.

Additionally, complaints may be lodged with the **independent European Data Protection Supervisor**, established under **Article 41** of this Regulation.

III.3. Council Decision of 13 September 2004 adopting implementing rules concerning Regulation 45/2001 of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of suh data [253]

With its September 2004 Decision, the Council adopted further implementing rules concerning **Regulation EC No 45/2001** on the **protection of individuals** with regard to the **processing of personal data by the Community institutions and bodies and on the free movement of such data**.[256]

With this decision, the Deputy Secretary General of the Council appoints a **Data Protection Officer** who in turn is directly attached to the Deputy Secretary General.

The tasks of the Data Protection Officer (DPO) are set out in **Article 4** of the Decision:

(a) ensure that controllers and data subjects are informed of their rights and obligations pursuant to the Regulation. In the discharge of this task, he/she shall in particular: **establish information and notification forms, consult interested parties and raise the general awareness of data protection issues**,
(b) **respond to requests** from the European Data Protection Supervisor (EDPS) and, within the sphere of his/her competence, **cooperate with the EDPS** at the latter's request or on his/her own initiative,
(c) ensure, in an **independent** manner, the **internal application of the provisions** of the Regulation in the General Secretariat of the Council (GSC),
(d) keep a **register of the processing operations** carried out by the controllers and **grant access** to it to any person directly or indirectly through the EDPS,
(e) notify the EDPS of the processing operations likely to present **specific risks**, and
(f) **ensure that the rights and freedoms of the data subjects are unlikely to be adversely affected** by the processing operations.

In **Articles 5, 6 and 7** the Decision further specifies duties, powers and resources of the Data Protection Officer.

In regard to the rights of the data subject, **Article 12** of the Decision specifies:

Further to the **data subjects' right** to be **appropriately informed** about any processing of personal data relating to themselves, the data subjects **may approach the controller** concerned to exercise their rights. Additionally, and without prejudice to any judicial remedy, **every data subject may lodge a complaint with the EDPS** if he/she considers that his/her rights under the Regulation have been infringed as a result of the processing of his/her personal data by the Council. The Council stresses in its decision that "***No one shall suffer prejudice on account of a complaint lodged with the EDPS or of a matter brought to the attention of the DPO alleging a breach of the provisions of the Regulation***".[257]

In **Articles 16 to 24**, the Decision outlines in detail the **Procedure for Data Subjects to Exercise their Rights**.

[256] See above.
[257] Article 12 of the Regulation.

III.4 Directive 95/46/EC of the European Parliament and on theCouncil of 24 October 1995 on the protecction of individuals with regard to the processing of personal data and on the free movement of such data[255]

With the introduction of this Directive in November 1995, it was recognised that the difference in levels of protection of the rights and freedoms of individuals, notably the **right to privacy**,[258] with regard to the processing of personal data then afforded in the Member States may have prevented the transmission of such data from the territory of one Member State to that of another Member State. In order to remove any obstacles to the flow of personal data, the **level of protection of the rights and freedoms of individuals** with regard to the processing of such data has to be **equivalent in all Member States**.

The Directive was designed to give substance to and amplify the principles of protection of the rights and freedoms of individuals contained in the **Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data**.

According to **Recital 25** of the Preamble to the Directive, the **principles of protection** must be reflected, on the one hand, in the **obligations imposed on persons, public authorities, enterprises, agencies or other bodies responsible for processing**, in particular regarding data quality, technical security, notification to the supervisory authority, and the circumstances under which processing can be carried out, and, on the other hand, in the **right conferred on individuals**, the data on whom are the subject of processing, **to be informed that processing is taking place, to consult the data, to request corrections and even to object to processing** in certain circumstances.

In **Article 6**, the Directive lays down a number of principles that contain the **fundamental requirements to be met by any processing of personal data**. Accordingly, personal data must be:

(a) processed fairly and lawfully,
(b) collected for specified, explicit and legitimate purposes and not further processed in any way incompatible with those purposes,[259]
(c) adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed,
(d) accurate and, where necessary, kept up to date,[260] and
(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purpose for which the data was collected or for which it is further processed.[261]

A list of further criteria is contained in **Article 7** of the Directive. These criteria determine that the **processing of data is legitimate only if**:

(a) the data subject has unambiguously given his/her consent,
(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract,
(c) processing is necessary for compliance with a legal obligation to which the controller[262] is subject,
(d) processing is necessary in order to protect the vital interests of the data subject,
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to who the data are disclosed, or
(f) processing is necessary for the purposes of the legitimate interest pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interest are overridden by the interests for fundamental rights and freedoms of the data subject.

[258] The right to privacy is recognised in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as well as in the general principles of Community law.
[259] Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States introduce appropriate safeguards.
[260] Every reasonable step must be taken to ensure that data, which is inaccurate or incomplete, having regard to the purposes for which it was collected or for which it is further processed, is erased or rectified.
[261] Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.
[262] 'Controller' shall mean the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.

Article 8 of the Directive sets out **categories of data that are to be regarded as sensitive**. Accordingly, Member States shall prohibit the processing of personal data revealing

- **racial or ethnic origin,**
- **political opinions,**
- **religious or philosophical belief,**
- **trade union membership,**

and the processing of data concerning **health or sex life**.

However, **exceptions to these rules** are to be introduced by the Member States in certain circumstances in accordance with **Article 8(2) to (7)** and **Article 9**.

Informing data subjects of various details of the processing of their data is a crucial measure to ensure transparency in data processing and the exercise of the data subjects' rights. The Directive therefore sets out the **basic information that must be provided**, and in this regard distinguishes between the situation in which data are obtained directly from the data subject and situations in which data are obtained from other sources.

In accordance with **Article 12** of the Directive, Member States shall guarantee every data subject the **right to obtain from the controller**:

(a) without constraint at reasonable intervals and without excessive delay or expense,
   - **confirmation** as to whether or not data relating to him/her are being processed and confirmation at least as to the purpose of the processing, the categories of data concerned, and the recipients or categories of recipients to whom that data are disclosed,
   - **communication** to him/her in an intelligible form of the data undergoing processing and of any available information as to their source, and
   - **knowledge** of the logic involved in any automatic processing of data concerning him/her at least in the case of the automated decisions;

(b) as appropriate the **rectification, erasure or blocking of data** the processing of which does not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data; and

(c) **notification to third parties** to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with the above, unless this proves impossible or involves a disproportionate effort.

However, Member States may adopt legislative measures to restrict the scope of obligations and rights when such a restriction constitutes a necessary measure to safeguard:

(a) national security
(b) defence
(c) public security
(d) the prevention, investigation, detection and prosecution of criminal offences, or of breaches of ethics for regulated professions
(e) an important economic or financial interest of a Member State or of the EU, including monetary, budgetary and taxation matters
(f) a monitoring, inspection or regulatory function connected, even occasionally, with the exercise of official authority in cases referred to in (c), (d) and (e)
(g) the protection of the data subject or of the rights and freedoms of others

Articles 16 and 17 of the Directive contain further provisions on the **confidentiality and security of the processing of data**.

The **system of notification and prior checks,** as set out in **Articles 18–21** of the Directive, responds to the essential principle of transparency and efficiency of control in that notification is theoretically required. Following the Directive, the Member States in principle require notification of all wholly or partly automated processing. In most Member States, notifications must be submitted to the national data protection authority.

The existence and ready availability of **effective remedies** against unlawful or improper processing of data is essential to ensure compliance with the law in general as well as enjoyment of the rights and

remedies of data subjects in particular. Provisions regarding judicial remedies, liability and sanctions are contained in **Articles 22-24** of the Directive.

The Directive was one of the first international instruments to contain **rules on transfers of data to third countries**. Such rules were deemed necessary to avoid a circumvention of the protection offered by the Directive when exporting data and possibly re-importing it to the Community. The Directive, in **Articles 25 and 26**, thus establishes that transfers to third countries may take place only if the third country in question ensures an adequate level of protection.

Article 27 of the Directive further provides for the **possibility of drawing up self-regulatory codes of conduct**, which are seen as a useful means to clarify the application of data protection law in a particular sector. The bottom-up approach ensured by self-regulatory mechanisms should increase the awareness among data controllers of the existing rules as well as their willingness to comply with them.

The **establishment of independent supervisory authorities**, exercising their functions with complete independence, is an essential component of the protection of individuals with regard to the processing of personal data.[263] Consequently, **Articles 28-30** of the Directive introduce obligations to set up national supervisory authorities as well as an EU Working Party on the protection of Individuals with regard to the processing of personal data.

Each Member State shall provide that **one or more public authorities are responsible for monitoring the application of the provisions adopted pursuant to this Directive**. These authorities shall act with **complete independence** in exercising the functions entrusted to them.

In this regard, each Member State shall provide that the supervisory authorities are **consulted when drawing up administrative measures or regulations relating to the protection of individuals' rights and freedoms with regard to the processing of personal data**.

Each authority shall in particular be endowed with:

- **investigative powers**, such as powers of access to data forming the subject-matter of processing operations and powers to collect all the information necessary for the performance of its supervisory duties
- **effective powers of intervention**, for example, that of delivering opinions before processing operations are carried out, in accordance with Article 20, and ensuring appropriate publication of such opinions, of ordering the blocking, erasure or destruction of data, of imposing a temporary or definitive ban on processing, of warning or admonishing the controller, or that of referring the matter to national parliaments or other political institutions,
- **the power to engage in legal proceedings** where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities.

Additionally, each **supervisory authority shall hear claims** lodged by any person, or by an association representing that person, concerning the protection of his/her rights and freedoms in regard to the processing of personal data. The person concerned shall be informed of the outcome of the claim.

[263] See Recital 62 to the Preamble of the Directive.