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From: General Secretariat of the Council

On: 14 May 2019

To: Delegations

No. prev. doc.: 8830/19

Subject: Council Implementing Decision setting out a Recommendation on addressing the deficiencies identified in the 2018 evaluation of **Switzerland** on the application of the Schengen *acquis* in the field of **return**

Delegations will find in the annex the Council Implementing Decision setting out a Recommendation on addressing the deficiencies identified in the 2018 evaluation of Switzerland on the application of the Schengen *acquis* in the field of return, adopted by the Council at its meeting held on 14 May 2019.

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

Council Implementing Decision setting out a

RECOMMENDATION

on addressing the deficiencies identified in the 2018 evaluation of Switzerland on the application of the Schengen acquis in the field of return

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

Whereas:

- (1) The purpose of this Decision setting out a recommendation is to recommend to Switzerland remedial actions to address deficiencies identified during the Schengen evaluation in the field of return carried out in 2018. Following the evaluation, a report covering the findings and assessments, listing best practices and deficiencies was adopted by Commission implementing Decision C(2019) 430.
- (2) The use of modern, tailor-made and portable technical equipment by the police forces of the canton of Zurich, which runs software facilitating the rapid identification of third-country nationals by comparing biometric data and consulting databases on the ground, should be regarded as a good practice, provided that full compliance with personal data security requirements is ensured.

¹ OJ L 295, 6.11.2013, p. 27.

- (3) To ensure compliance with the Schengen *acquis* on return, notably with the standards and procedures set by Directive 2008/115/EC², priority should be given to implement recommendations 1, 2, 4, 5, 6, 11, 12, 14, 15, 18 and 20.
- (4) All necessary measures should be taken to return illegally staying third-country nationals in an effective and proportionate manner.
- (5) This Decision setting out a recommendation should be transmitted to the European Parliament and to the parliaments of the Member States. Within three months of its adoption, the evaluated Member State shall establish, pursuant to Article 16(1) of Regulation (EU) No 1053/2013, an action plan listing all recommendations to remedy any deficiencies identified in the evaluation report and provide this to the Commission and the Council,

HEREBY RECOMMENDS

that the Swiss Confederation should:

1. adapt the content of return decisions issued by the competent authorities, including cantonal authorities, in order to systematically and clearly state or declare the stay of a third-country national to be illegal and impose or state the obligation to return, in accordance with the requirements of Article 6(1) of Directive 2008/115/EC read in conjunction with Article 3(4) of that Directive;
2. amend relevant provisions of Swiss law to ensure that return decisions issued to illegally staying third-country nationals, including those who received such a decision following a negative decision on their application for international protection, impose a clear obligation to leave Switzerland in order to return to a third country within the meaning of the definition of ‘return’ set out in Article 3(3) of Directive 2008/115/EC; take immediate measures to align the practice accordingly;

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

3. take measures ensuring that, in accordance with the case law of the Court of Justice of the European Union³, the enforcement of return decisions issued to third-country nationals who, while already subject to a return decision, lodges an application for international protection that is rejected by the competent authorities, is resumed at the stage at which it was interrupted as soon as the application for international protection is rejected at first instance; for this purpose, discontinue the practice of issuing new return decisions in such cases;
4. take immediate measures to ensure that decisions on the return of minors who are members of families of third-country nationals subject to an obligation to return provide reasons in fact and in law in relation to the minor(s) concerned, in accordance with Article 12(1) of Directive 2008/115/EC; such conditions shall be met both if the minor is subject to an individual return decision and if the minor is included in the return decision addressed to the parents;
5. carry out a comprehensive assessment of the specific circumstances of each individual case to determine the actual duration of the period for voluntary departure granted to illegally staying third-country nationals subject to an obligation to return; for this purpose, discontinue the practice of systematically granting a period for voluntary departure of thirty days, irrespective of the individual circumstances;
6. take measures to ensure that, following a comprehensive assessment of the specific circumstances of each individual case, competent authorities do not systematically grant a period for voluntary departure to illegally staying third-country nationals, or grant a period shorter than seven days, when the conditions set by Article 7(4) of Directive 2008/115/EC are met, notably when the third-country nationals concerned pose a risk to public policy, public security or national security;

³ Case C-601/15 PPU, *J.N.*, ECLI:EU:C:2016:84.

7. ensure that a decision on the legality of the stay of third-country nationals is taken without undue delay by the competent authorities in all cases in which third-country nationals are apprehended, in accordance with Article 6 of Directive 2008/115/EC as interpreted by the Court of Justice of the European Union⁴. In particular, take measures to ensure that the time granted by the relevant authorities to third-country nationals in order to submit possible observations concerning the legality of their stay does not lead to unjustified delays in the issuing of return or other decisions, in particular where such information is already gathered or is directly available from other sources and/or procedures;
8. amend relevant provisions of Swiss law to bring it in line with the case law of the Court of Justice of the European Union related to the criminalisation of illegal stay in the context of procedures launched in accordance with Directive 2008/15/EC; take measures to align the practice accordingly;
9. as regards unaccompanied minors, take measures to ensure that competent authorities either issue a return decision or grant a right to stay, taking due account of the best interests of the child in accordance with Article 5 of Directive 2008/115/EC; ensure that, before deciding to issue a return decision in such cases, assistance by an appropriate body is always provided, in line with Article 10(1) of the same Directive;
10. take measures to ensure that, once a return decision is issued in relation to an unaccompanied minor after having taken due account of the factors set out in Article 5 of Directive 2008/115/EC and fulfilled the conditions of Article 10 of that Directive, the responsible authorities take all necessary and proportionate measures to enforce such a decision, including when the unaccompanied minors concerned are not willing to depart voluntarily;

⁴ Case C-329/11, *Achughbabian*, ECLI:EU:C:2011:807.

11. amend relevant provisions of Swiss law or implementing directives to establish objective and binding criteria defining the existence of the risk that a third-country national may abscond, notably for the purpose of determining whether to grant a period for voluntary departure; take measures to align the practice accordingly;
12. establish effective assisted voluntary return programmes to provide support also to third-country nationals who did not lodge an application for international protection, subject to rules on access and eligibility established by national law;
13. define clear rules for ensuring that return decisions and, if appropriate, entry bans can be issued to illegally staying third-country nationals apprehended during exit checks at the external border, following a case-by-case assessment and respecting the principle of proportionality;
14. amend provisions of national law, and take immediate measures to ensure that detention for the purpose of removal takes place in practice and as a rule in specialised detention facilities, and that prison accommodation is used only as an exceptional measure, as prescribed by Article 16(1) of Directive 2008/115/EC; when obliged to have recourse to prison accommodation, ensure that separation from ordinary prisoners is guaranteed through appropriate means that fully reflect the administrative nature of detention, for instance by means other than confining third-country nationals in their cells;
15. increase the availability of places for the detention of illegally staying third-country nationals in specialised facilities, in particular of male third-country nationals, bringing detention capacity in line with actual needs, in view of supporting and reinforcing the effective and proportionate enforcement of return decisions in application of Article 8(1) of Directive 2008/115/EC;

16. ensure that, in the Thun regional prison, the detention regime for illegally staying third-country nationals subject to return procedures allows detainees to spend more time outside their cells, that sufficient daylight enters the cells and that an adequate outdoor area is available; use less intrusive methods than strip search during the intake procedures at the Thun regional prisons;
17. provide for sufficient and well-trained staff equipped to cater for the needs of illegally staying third-country nationals in detention as well as of families, women and minors, is regularly present at the Thun regional prison, to guarantee both the security of the premises and daily assistance to detainees;
18. ensure that families without children detained at the airport prison in Zurich are provided with separate accommodation guaranteeing adequate privacy, in accordance with Article 17(2) of Directive 2008/115/EC, and that the two members of the family are not systematically separated;
19. modify the regime applicable to illegally staying third-country nationals detained in the dedicated facility at the Zurich airport to ensure that cells are locked for the shortest appropriate period of time during the day, notably that detainees are not locked in their cells during more than an entire day during the week; ensure that detainees have more indoor living space at their disposal;
20. modify the regime applicable to illegally staying third-country nationals detained in the Bern regional prison to ensure that the cells are locked for the shortest appropriate period of time during the day; ensure that detainees have more indoor living space at their disposal.

Done at Brussels,

*For the Council
The President*