



European Economic and Social Committee

SOC/134

**Mutual recognition of
decisions on the expulsion of
third country nationals**

Brussels, 18 June 2003

OPINION

of the European Economic and Social Committee
on the

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

COM(2003) 49 final – 2003/0019 (CNS)

Own-initiative opinion

On 17 June 2003 the European Economic and Social Committee decided, in accordance with Rule 29(2) of its Rules of Procedures, to draw up an own-initiative opinion on the

Proposal for a Council Decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals
(COM(2003) 49 final – 2003/0019 (CNS)).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 28 May 2003. The rapporteur was **Mr Pariza Castaños**.

At its 400th plenary session of 18/19 June 2003 (meeting of 18 June), the European Economic and Social Committee adopted the following opinion by 82 votes to five with six abstentions.

1. Introduction

1.1. For various reasons the EESC believes that this opinion should assess *Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals*.

1.2. When the French Presidency decided to propose this Directive to the Council, the EESC was not consulted and did not therefore have the opportunity to issue the mandatory opinion.

1.3. In its opinions, the EESC has always encouraged the EU to adopt a common policy on immigration and asylum, in accordance with the Treaty's mandate and the political approach followed by the Tampere Council; as a result, it has contributed to progress in harmonising Community legislation in this area.

1.4. It is not possible to issue an opinion on the *Proposal for a Council Decision setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Council Directive 2001/40/EC* without first expressing a view on the Directive itself, which provides the basis for the recognition of expulsion decisions between the Member States.

1.5. The technical and procedural rules for compensating financial imbalances cannot be analysed without a political and legal assessment of Directive 2001/40/EC, bearing in mind the need to respect all the safeguards that are provided in Community law, as laid down in the EU Charter of Fundamental Rights and the European Convention on Human Rights, for people who may be affected by this Directive.

1.6. The EESC therefore intends in this opinion first to consider Directive 2001/40/EC and then analyse the proposed Council Decision on the compensation of financial imbalances in accordance with Article 7 of this Directive.

2. **Summary of Council Directive 2001/40/EC**

2.1. Council Directive 2001/40/EC of 28 May 2001, which followed on from the Tampere European Council of 15/16 October 1999, approved the mutual recognition of decisions on the expulsion of third country nationals.

2.2. The aim of the Directive is to make possible the recognition of an expulsion decision issued by the competent authority in one Member State against a third country national present within the territory of another Member State.

2.3. The expulsions covered by the Directive concern the following cases:

- a) A third country national is the subject of an expulsion decision 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 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.
- b) A third country national is the subject of an expulsion decision based on failure to comply with national rules on the entry or residence of aliens.

2.4. If the person concerned holds a residence permit issued by the enforcing Member State or by another Member State, the enforcing State must consult the issuing State and the State which issued the permit.

2.5. The existence of an expulsion decision taken in accordance with Article 3.1a) of the Directive must allow for the residence permit to be withdrawn if this is authorised by the national legislation of the State which issued the permit, without prejudice to Article 25(2) of the Schengen Convention.

2.6. The expulsion decisions covered by the Directive must not have been rescinded or suspended by the issuing Member State.

2.7. The Member States must ensure that the third country national concerned may bring proceedings for a remedy against any such expulsion measure.

2.8. Protection of personal data and data security and the free movement of such data must be ensured. Personal data files may be used only for the purposes laid down in the Schengen Convention.

2.9. The authorities of the Member States must make use of all appropriate means of cooperation and of exchanging information. As part of this cooperation, the issuing Member State must provide the enforcing Member State with all documents needed to certify the continued enforceability of the decision by the fastest appropriate means.

2.10. The enforcing Member State must first examine the situation of the person concerned to ensure that neither the relevant international instruments nor the applicable national rules conflict with the enforcement of the expulsion decision.

2.11. Member States must compensate each other for any financial imbalances which may result from application of this Directive where expulsion cannot be effected at the expense of the national(s) of the third country concerned.

2.12. Member States must bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than 2 December 2002, along with the criteria and practical arrangements for compensating the financial imbalances resulting from the Directive's application.

3. Summary of the proposed Council Decision

3.1. The proposed Council Decision introduces appropriate criteria and practical arrangements for the compensation of any financial imbalances which may result from the application of Council Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals.

3.2. The application of the aforementioned Council Directive may result in financial imbalances where expulsion decisions cannot be effected at the expense of the third country national concerned. Hence appropriate criteria and practical arrangements must be adopted for the bilateral compensation of the Member States.

3.3. The financial burden-sharing for cooperation between Member States on the expulsion of third country nationals cannot be sufficiently achieved by the Member States alone and may therefore require action by the Community.

3.4. The Member State issuing the expulsion decision must compensate the enforcing Member State for any financial imbalances which may result from the application of the Directive. Reimbursement is at the request of the enforcing Member State and on the basis of actual costs.

3.5. Minimum recoverable costs under the Decision will include :

- transport costs for the returnee and up to two escorts,
- administrative costs,
- accommodation costs.

3.6. Member States may agree on a bilateral basis to reimburse costs exceeding the minimum costs or to reimburse other additional costs.

3.7. Reimbursement requests must be made in writing and be accompanied by documentary proof of the recoverable costs. Reimbursement cannot be claimed for the enforcement of expulsion decisions issued more than three years prior to their enforcement. Requests for reimbursement submitted more than one year after the enforcement has taken place may be rejected.

3.8. Payments must be made to the competent authority of the enforcing Member State within three months of the receipt of the request by the national contact point of the issuing Member State. Member States may establish bilateral arrangements as to modes of payment. Any refusal to reimburse must be made in writing, stating reasons for the refusal, and be sent to the competent authority of the enforcing Member State within three months.

3.9. Each national contact point has to submit an annual report to the Commission including statements on the implementation of the Decision and recommendations for improvements to the criteria and practical arrangements.

4. Comments on Directive 2001/40/EC

4.1. This Directive starts on the wrong footing, as it provides for the mutual recognition of decisions on the expulsion of third country nationals when there is still no common legislation on immigration and asylum. As stated by the EESC in several opinions, the Council needs to speed up its work on drafting a proper common policy on immigration and asylum based on the conclusions of the Tampere Council so that migration flows can be managed more effectively. However, until now this legislation has been "delayed" at the Council which, somewhat contradictorily, is stepping up the pace of legislative work on compulsory return and the mutual recognition of expulsion orders. The Council is thereby hindering the creation of an area of freedom, safety and justice where the rights and duties of third country nationals are properly safeguarded.

4.2. This Directive does, however, contribute to harmonising Community legislation on the mutual recognition of decisions on the expulsion of third country nationals.

4.3. With this Directive, the Council continues to "put the cart before the horse", as pointed out by the EESC in previous opinions. It would be premature to apply this measure without harmonised standards and criteria on, for example, the subsidiary protection that is given to people granted asylum (and asylum seekers) under the Geneva Convention of 1951. This was stated in the

EESC's opinion¹ on the *Communication from the Commission to the Council and the European Parliament on a Community return policy on illegal residents*.

4.4. Any mechanism for the mutual recognition of expulsion decisions should therefore be part of a framework of common legislation on immigration and asylum. Without common legislation, any enforcing Member State will be obliged to cooperate in enforcing an expulsion decision for reasons that are not covered, or indeed explicitly excluded, in its own legislation. This Directive repeats the mistakes and lack of safeguards found in many aspects of the Schengen Convention.

4.5. The Committee welcomes the fact that the Directive does not apply to family members of EU citizens who have exercised their right of free movement. However, such protection should be extended to all relatives regardless of their nationality (i.e. they may be nationals of non-EU countries).

4.6. Regarding the implementation of this Directive, the EESC believes that some of the safeguards laid down in the Charter of Fundamental Rights and the European Convention on Human Rights are not properly respected. It therefore calls on the Member States to respect all the aforementioned safeguards, as well as those enshrined in the constitutional traditions of the Member States.

4.7. The EESC believes that expulsion or forced return decisions cannot merely be administrative decisions, and the courts may intervene. All people affected by such expulsion or forced return procedures must be guaranteed the protection of the courts, with the due safeguards provided by rule of law and in accordance with the legislation of each Member State. The expulsion cannot be enforced if protective measures to suspend and/or rescind the expulsion have been issued by a legal or administrative authority.

4.8. The enforcing Member State must not merely formally "ensure", but must tangibly guarantee legal protection, so that a third country national may, in accordance with the enforcing Member State's legislation, bring proceedings for a remedy against any expulsion measure². The right to appeal against any expulsion measure or forced return must always have suspensive effect, since this is the only means of guaranteeing the fundamental rights of the person concerned.³

¹ EESC opinion on the *Communication from the Commission to the Council and the European Parliament on a Community return policy on illegal residents*, CES 1362/2002

² According to the Court of Justice of the European Communities, "There may not be inferred from Article 8 [of the Directive] an obligation for the Member States to permit an alien to remain in their territory for the duration of the proceedings, so long as he is able nevertheless to obtain a fair hearing and to present his defence in full." (Judgment of 5 March 1980, Pecastaing, Case 98/79.)

³ EESC opinion on the *Green Paper on a Community return policy on illegal residents*, CES 1019/2002

4.9. Without questioning the nature of a "permanent resolution", the enforcing Member State that examines the situation of the person concerned must take account of legal factors, such as the statute of limitations; humanitarian factors, such as the situation in the country of origin⁴ (e.g. civil wars⁵, persecutions, disasters); personal factors, such as serious illness⁶, etc.⁷; roots, such as ties with family members in the enforcing Member State or other EU countries; and the loss of personal ties with the country of origin owing to a long period of absence from the country that may render an expulsion order ineffective.

4.10. The EESC believes that Member States that enforce expulsion decisions must also ensure that the people affected by such procedures are granted effective legal protection in accordance with the legislation of each Member State.

4.11. The EESC⁸ supports the Commission in proposing voluntary return policies. Consequently expulsions and forced returns must be regarded as very harsh procedures that should only be applied in exceptional circumstances. The authorities must therefore make decisions on a case-by-case basis and consider other alternatives depending on the person's employment ties, family situation and integration into the host society⁹.

4.12. Expulsion decisions should not apply to those third country nationals who:

- legally reside within an EU state and
- have integrated through employment and family ties and
- have lost links with the third country of origin due to their long period of absence.

⁴ EESC opinion on the *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration*, OJ C 149 of 21.06.2002

EESC opinion on the *Green Paper on a Community return policy on illegal residents*, CES 1019/2002

⁵ See European Court of Human Rights case law, in particular the case of ECHR Judgment Ahmed v. Austria, of 17 December 1996, expulsion order concerning a Somali national, not enforced due to his being in clear danger in his country of origin (Somalia) and because if Austria did expel him it would be in contravention of the Convention; and Hatami v. Sweden, of 9 October 1998, decision to expel Iranian national to Iran, not enforced and subsequently repealed.

⁶ ECHR Judgment B.B. v. France, of 7 October 1998, risk of Congolese (former Zaïrean) national suffering from Aids being deported to his country of origin where he would not receive appropriate medical treatment. And, Andric v. Sweden, Majic v. Sweden and others, of 23 February 1999, which established that the expulsion order cannot be enforced while the alien is receiving obligatory psychiatric treatment.

⁷ EESC opinion on the *Green Paper on a Community return policy on illegal residents*, CES 1019/2002

⁸ EESC opinion on the *Communication from the Commission to the Council and the European Parliament on a Community return policy on illegal residents*, CES 1362/2002

EESC opinion on the *Green Paper on a Community return policy on illegal residents*, CES 1019/2002

⁹ Any administrative procedure for expulsion takes time (despite mechanisms that many States have incorporated into their legislation to speed up procedures). During this time, there may be factors or circumstances that change the alien's legal status (e.g. marriage, birth of a child that has the nationality of an EU Member State, etc.) or circumstances that render the expulsion decision ineffective from a humanitarian point of view.

These third country nationals should face the full weight of the law as would any EU national.

4.13. Expulsion decisions must be based on a serious and present threat to public order or to national security and safety that has been established by a legal ruling. The administrative consequences must be proportionate to the legal ruling¹⁰. The concept of "existence of serious grounds" found in the Directive could result in the violation of some of the rights protected by Article 1 of the European Convention on Human Rights¹¹ and the Charter of Fundamental Rights. Indeed, the European Convention on Human Rights sets out various rights for aliens who are to be expelled. EU legislation must also take account of the extensive European Court of Human Rights case law.

5. **Comments on the Proposal for a Council Decision**

5.1. This Proposal aims to ensure that the actual costs of enforcing an expulsion, where expulsion cannot be effected at the expense of the third party national, are covered by the Member State issuing the expulsion decision, in order to prevent any financial imbalances that may result from the application of Directive 2001/40/EC.

5.2. In the EESC's view, the procedure proposed in the Council Decision for compensating financial imbalances cannot be implemented until there is common legislation on immigration and asylum.

5.3. In exceptional circumstances, e.g. when many people move to Member States following humanitarian crises, a Community budget could be established to ensure proper treatment for people affected by return procedures.

5.4. The Member States will only have to reimburse the costs of applying the Directive when expulsions are accompanied by effective legal protection and due respect for human rights.

5.5. The EESC believes it is unacceptable for EU Member States to have to meet the costs of expelling people if investigations reveal there is a threat to their human rights. It points out that

¹⁰ The legislation of the Member States prohibits double jeopardy. The Greek Presidency recently drew up an initiative for a framework decision of the Council concerning the application of the *ne bis in idem* principle.

¹¹ ECHR Judgment, of 13 February 2001, case of Ezzouhdi v. France. The applicant arrived in France at the age of five and has lived there ever since. He followed his studies in France and worked there for several years. His mother and brothers also live in France, and the Court therefore ruled that the exclusion order affects his right to family life. Moreover, the order was based on a conviction for personal use of narcotics in accordance with the Criminal Code. The Court considers that the crimes for which the applicant was convicted (two years in prison for crimes against the legislation on narcotics linked primarily to the personal use of drugs) do not reasonably indicate that the applicant is a serious threat to public order, as demonstrated by his light sentence despite the fact that he had re-offended. The crimes committed by the applicant could not be considered, either separately or together, to justify the severity of the measure, owing to the fact that he has ties with France but does not seem to have any links with Morocco other than nationality, or the permanent nature of the exclusion order.

Articles 3, 5, 6, 8 and 13 of the European Convention on Human Rights and Articles 3, 4, 19, 24 and 47 of the Charter of Fundamental Rights are all applicable to expulsion procedures.

5.6. It is difficult for Member States to conclude readmission agreements with some third countries. The EU must therefore endeavour to sign readmission agreements as part of its foreign policy. The EU may sign readmission agreements with third countries. These agreements must include clauses safeguarding the human rights of returnees, and ensuring that returnees will not be punished for leaving the country. These agreements must be complemented by other political, economic or social instruments that are in the interests of third countries, in the context of EU foreign policy, as proposed in the EESC's opinion¹² on the *Green Paper on a Community return policy on illegal residents*.

5.7. It is very important for the EU to establish a proper relationship between immigration policy and development policy in the future. In this context, some well-managed returns may be positive both for the economic and social development of third countries, and for the integration of the people concerned.

5.8. The EESC believes that programmes need to be set up to foster voluntary return through international organisations and NGOs. These programmes could be financed by the EU, as recommended by the EESC's opinion¹³ on the *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration*. It will often be more effective to enforce expulsion decisions under readmission agreements, using the budget earmarked for administering expulsion decisions.

5.9. Article 2(4) allows Member States to conclude bilateral agreements to reimburse costs exceeding the minimum costs established. This will encourage returnees to be transported to their country of origin by charter flight in order to reduce transport costs. Transport conditions must respect the dignity of the person and their right to life, and physical and psychological integrity.

5.10. Although this collective method of managing expulsions does not correspond legally to the model of "collective expulsions", the EESC recommends that it should only be used in exceptional circumstances. It should be remembered that Article 19 of the EU Charter of Fundamental Rights prohibits collective expulsions.

5.11. The EESC welcomes the stipulation that reimbursement is only valid for expulsion decisions enforced within three years of being issued. It also agrees that requests for reimbursement submitted more than one year after enforcement may be rejected. Adequate reasons will have to be given for any refusal to pay.

¹² EESC opinion on the *Green Paper on a Community return policy on illegal residents*, CES 1019/2002

¹³ EESC opinion on the *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration*, OJ C 149 of 21.06.2002

5.12. Establishing national contact points will ensure proper and transparent management on the basis of common rules and a legally established procedure.

5.13. The Council Decision stipulates that accommodation costs can be reimbursed for a period not exceeding three months. The EESC's opinion¹⁴ on the *Green Paper on a Community return policy on illegal residents* stated that detention pending removal must not exceed thirty days, and the persons concerned must be held in specific detention centres and not in ordinary prisons. Prisons may only be used as a detention centre if the expulsion is the result of crimes having been committed.

5.14. The annual reports to be submitted by each contact point to the Commission must specify the motives for the expulsion order on the basis of Article 3 of the Directive, and the financial cost of the forced repatriations actually carried out.

6. Final comments

6.1. The compensation mechanisms relating to the management of expulsion decisions will be faster and more effective when there is a common policy on immigration and asylum. The open coordination method must be complementary to the common legislation and not a pretext for avoiding developing it.

6.2. Budgetary constraints must never adversely affect the level of protection or proper treatment of people who are the subject of expulsion decisions. Moreover, under no circumstances must such constraints result in unlawful extensions of the period of detention, poor treatment of persons, or restrictions on their fundamental rights (with the exception of freedom of movement).

6.3. As laid down in Article 19 of the Charter of Fundamental Rights, consideration must be given to certain groups in specific situations who should not be subject to expulsion decisions. As recommended in the aforementioned EESC opinion on the *Green Paper on a Community return policy on illegal residents*¹⁵, it must be possible to extend this consideration to particularly vulnerable people who find themselves in one of the following situations:

- return implies family separation, either from children or parents;
- return implies serious harm for minors in their charge;

¹⁴ EESC opinion on the *Green Paper on a Community return policy on illegal residents*, CES 1019/2002

¹⁵ The Commission itself recommends that "A European return policy should be fully respectful of human rights and fundamental freedoms and as such be seen in the context of the European Union's human rights policies both within the European Union and in its external relations. Article 6 of the Treaty on European Union, reaffirms that the European Union "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States"." *Green Paper on a Community return policy on illegal residents*, point 2(4). COM(2002) 175 final.

- the person suffers from a serious physical or psychological injury;
- the safety, life and freedom of the person may be at considerable risk, in the country of origin or transit.

Brussels, 18 June 2003.

The President
of the
European Economic and Social Committee

The Secretary-General
of the
European Economic and Social Committee

Roger Briesch

Patrick Venturini
