



COMMISSION OF THE EUROPEAN COMMUNITIES

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2002/0043 (CNS)

Proposal for a

**COUNCIL DIRECTIVE**

**on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities**

(presented by the Commission)

## EXPLANATORY MEMORANDUM

### **1. BACKGROUND**

This Directive is a response to a problem that is causing mounting concern: the increase in illegal immigration, particularly in its two most odious forms, namely the growth of networks of smugglers acting for non-humanitarian reasons and the exploitation of foreign nationals in the form of trafficking in human beings.

#### **1.1. Nature of the phenomenon**

Although accurate figures are hard to come by, given that this is by definition a clandestine activity, research and field reports<sup>1</sup> suggest that illegal immigration is growing at international and European level. EU Member States are increasingly affected. The most common form involves transnational criminal networks operating for profit, displaying complete disregard for human dignity and endangering the lives of their victims.

Facilitating illegal immigration and trafficking in human beings are two separate offences in law, but experience suggests that in practice they often overlap. There are cases of migrants exploited on their journey to pay the price demanded by the smuggler, of others condemned to servitude to repay their debt once they arrive in their country of destination and others who believe they have found a way of earning a better living in a more developed country only to find themselves the victims of sexual or other forms of exploitation.

There are a number of other distinctive characteristics which justify the measures proposed to combat this phenomenon. Because this sort of immigration is illegal the victims do not have the right papers and their situation is to say the least insecure. Even though they are victims of the crimes referred to above, they will not usually dare to report the matter to the authorities in the country where they find themselves, for fear of being immediately returned to their country of origin because of their illegal status. This means going back to square one, with the added misfortune of having failed in their attempt to leave. They will usually keep the details of their experience to themselves, thus failing to prevent other victims from falling into the same trap. Added to this is the fear of retaliation by the criminals, either directly against the victims or against their families and relations in the country of origin.

While this situation is unsatisfactory for the victims it is equally so for the authorities of the Member States trying to combat illegal immigration and expose and disband the networks involved. Victims may remain underground or be swiftly deported, but either way they do not disclose the invaluable information they have gained from their situation and what they have seen and heard. Yet this is precisely the sort of information the authorities responsible for investigating and prosecuting such crimes need to obtain in order to be able to combat them effectively. If the victims can be persuaded to cooperate with the authorities it may be possible to extract the different pieces of information in their possession (names, addresses, organisations, etc.). The

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<sup>1</sup> IOM, UNHCR and OSCE conducted several studies on this subject. The French Presidency has also organised a seminar on illegal immigration networks on 20-21 July 2000.

more this cooperation serves the interests of the victim, the better they will be as a source of information. It is therefore necessary to offer incentives to victims to cooperate, and the incentives must be tailored to their concerns.

## **1.2. Provisions adopted by the Member States**

These considerations have prompted several Member States to try in recent years to step up the fight against the perpetrators of these crimes by turning to their victims. Belgium in 1994, Italy and the Netherlands in 1998 and Spain in 2000 amended their domestic legislation or regulations to promote the recovery and reintegration of victims, to enable victims to cooperate with the authorities pursuing the investigation or prosecution by supplying information, or to lay charges against the people suspected of these crimes, respectively. In the meantime, victims are given a residence permit, possibly after a reflection period if the permit is issued in exchange for actual cooperation with the authorities. Victims also receive help with housing, daily subsistence, medical care, etc. Where necessary they will be covered by the ordinary legislation on witness protection.

One point to note is that the first three Member States to adopt such provisions targeted trafficking in human beings, whereas Spain, the most recent country to introduce such measures, also included illegal immigration, illegal trafficking in labour and exploitation through prostitution. Most of the other Member States will issue residence permits on humanitarian grounds where such circumstances require it.

## **1.3. The United Nations Convention and Protocols**

While the Member States were upgrading their legal arsenal to reflect their desire to tackle this issue, the United Nations opened its Convention Against Transnational Organised Crime for signature in Palermo in December 2000, together with the additional Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and the Protocol Against the Smuggling of Migrants by Land, Sea and Air. The Convention was adopted by the UN General Assembly and signed by 135 countries. The Protocols were signed by 93 and 89 countries respectively. The Convention and Protocols define the offences in question, but the limitations of an international framework covering the countries of departure, transit and destination are clearly apparent in the restricted legal scope of the articles dealing with the protection of victims of trafficking.

## **1.4. The Community response**

This matter has also been dealt with by different Community institutions on several occasions since the late 1980s.

In 1989, the European Parliament adopted a Resolution on the exploitation of prostitution and the traffic in human beings, calling on the Member States to ensure that victims could lodge a complaint without fear of immediate deportation.<sup>2</sup> This was followed in 1993 by a Resolution on trade in women, which called for the formulation of a policy to combat illegal immigration and a legal right to residence and protection for migrant women when they are witnesses before, during and after

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<sup>2</sup> Resolution A2-52/89, 14 April 1989, OJ C 120, 16 May 1989, p. 352 ff., in particular point 8.2.

legal proceedings against trade in human beings, as well as permission for victims of this international trade to remain in the Member States' territory, especially when their repatriation might pose a threat to their personal safety or expose them to renewed exploitation.<sup>3</sup> The adoption of measures to ensure the safety and dignity of victims in cases where they report their exploiters to the police, by guaranteeing them the right to bring civil proceedings, a temporary residence permit for humanitarian reasons and protection as witnesses, during and after the trial, all featured in a 1996 Resolution on trafficking in human beings.<sup>4</sup>

In the same year, the Commission referred explicitly to a temporary residence permit in its Communication on trafficking in women for the purpose of sexual exploitation. It specifically mentioned "the issue of a temporary permit of stay for victims prepared to act as witnesses in judicial proceedings and ... proper coordination between judicial and police authorities to avoid expulsion without consultation."<sup>5</sup> The European Parliament Resolution on the matter listed specific measures to be taken: temporary residence status, social, health and psychological care, work permit and training opportunities during the period of stay, etc.<sup>6</sup>

Continuing the approach outlined in its 1996 Communication, the Commission presented another Communication two years later on further actions in the fight against trafficking in women.<sup>7</sup> It stressed the close interaction between the need for an immigration policy that catered for the situation of the victims of trafficking and the question of increasing the powers of the courts to sentence traffickers, reiterating the connection between improving prosecutions of traffickers and the possibility of allowing victims to remain in the host country and receive help there. Citing experience in Belgium, Italy and the Netherlands, the Commission expressed its belief that more should be done in this area by all Member States and announced that a proposal would be presented for legislation on temporary residence permits for victims prepared to give evidence, drawing on recent experience of national provisions in order to avoid the risk of any future measures being abused.

There has also been increased involvement by the Council. Under the Dutch Presidency, a Ministerial Declaration was adopted in The Hague on 26 April 1997, which included the idea of temporary residence status among the measures aimed at encouraging victims to go to the police and give evidence. Temporary residence status also featured in the Joint Action of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat trafficking in human beings and sexual exploitation of children.<sup>8</sup>

The Community has not only issued formal documents; it has launched Stop, an incentive and exchange programme for people responsible for combating trade in human beings and the sexual exploitation of children. It was set up in 1996 for a

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<sup>3</sup> Resolution B3-1264, 1283 and 1309/93, 16 September 1993, OJ C 268, 4 October 1993, p. 141 ff., in particular points 2 and 10.

<sup>4</sup> Resolution A4-0326/95, 18 January 1996, OJ C 032, 5 February 1996, p. 88 ff., in particular point 25.

<sup>5</sup> Commission Communication to the Council and the European Parliament on trafficking in women for the purpose of sexual exploitation, 20 November 1996, COM(96) 567 final.

<sup>6</sup> Resolution A4-0372/1997 on the Commission Communication to the Council and the European Parliament on trafficking in women for the purpose of sexual exploitation, 16 December 1997.

<sup>7</sup> COM(1998) 726, 9 December 1998.

<sup>8</sup> OJ L 63, 4 March 1997, p. 2 ff.

period of five years, which was then extended for a further two years. It complements the Daphne programme of Community action (2000-2003) on preventive measures to fight violence against children, young persons and women.

With the Treaty of Amsterdam having conferred powers in immigration matters on the Community, the Tampere European Council on 15 and 16 October 1999 set out the measures intended to facilitate the creation of an area of freedom, security and justice. Point 3 of the Conclusions of the Tampere European Council refers to the need "to stop illegal immigration and to combat those who organise it and commit related international crimes", while point 23 expresses the determination "to tackle at its source illegal immigration, especially by combating those who engage in trafficking in human beings and economic exploitation of migrants".

Finally, this legislative proposal was announced in the recent Communication from the Commission on a common policy on illegal immigration.<sup>9</sup> Among the measures aimed at preventing and combating illegal immigration, set out here, the Commission indicated that it would present a legislative proposal on short-term residence permits for victims of trafficking who are prepared to cooperate in investigations and criminal proceedings against their exploiters.

## **2. AIM: TO STEP UP THE FIGHT AGAINST ILLEGAL IMMIGRATION**

The aim of the present proposal for a Directive is to strengthen the instruments for combating illegal immigration by introducing a residence permit for the victims of action facilitating illegal immigration and trafficking in human beings, subject to conditions designed to encourage them to cooperate with the competent authorities against those suspected of committing the crimes in question. The proposal has been prepared on the basis of a thorough examination of the legislation and practice of the Member States, the replies to the questionnaire which the Commission sent to the Member States in Spring 2000 and the consultations in the European crime prevention forum of 30 October 2001.

### **2.1. A residence permit subject to conditions designed to encourage cooperation with the authorities**

The permit would be issued to victims, defined as adults (or possibly minors who fulfil certain conditions laid down by domestic law) who are third-country nationals and have suffered harm directly caused by action to facilitate illegal immigration or trafficking in human beings. When the police come into contact with people who might reasonably be regarded as victims, they will inform them of the existence of the temporary residence permit. Victims who effectively break off all relations with the suspected criminals will be granted a 30-day reflection period in which to decide, on the basis of all the facts, whether or not to take their cooperation with the police and judicial authorities any further.

During this reflection period the Member State will allow victims to receive aid according to their needs (housing, medical and psychological care, social assistance if necessary), which should help them to regain the material and psychological autonomy needed to take the decision to cooperate. At the same time, the authority

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<sup>9</sup> COM(2001)672 final, in particular point 4.7.2.

responsible for the investigation and prosecution (the judicial authorities or the police, depending on the Member State in question) will determine whether the presence of the victims is useful for the investigation or for prosecuting the suspects. This authority will also have to decide whether victims are really prepared to cooperate and whether they have genuinely severed their links with the suspects. Cooperation may take various forms, from simply providing information or lodging a complaint to giving evidence in a trial.

If these three conditions are met and the victim does not pose a threat to public order or national security, the short-term residence permit will be issued for six months. This permit gives access to the labour market, education and vocational training. It also gives victims greater access to medical care. The Member States may arrange for victims to follow an integration programme with a view to settling there or returning to their country of origin.

The residence permit may be renewed under the same conditions as it was issued. It will not be renewed if a judicial decision has been reached terminating the proceedings. At this point, the normal aliens legislation will apply. If victims apply for a residence permit on other grounds the Member State will take their cooperation in the criminal proceedings into account when considering the application.

Conversely, the short-term residence permit may be withdrawn from victims who are found to have renewed contacts with the suspects or who have not genuinely cooperated.

## **2.2. Victims of action facilitating illegal immigration and trafficking in human beings**

### *2.2.1. From trafficking in women and children to trafficking in human beings*

This proposal for a Directive is aimed at the victims of the offences of facilitating illegal immigration and trafficking in human beings. As we have seen from the various measures and different ways of looking at the issue prior to this proposal, the target group first consisted predominantly of women who were the victims of trafficking in human beings. This was because at that time they accounted for the majority of victims. Children were soon added to the target group, as it became clear that they, too, were affected by this phenomenon in large numbers. Then the definition was widened to trafficking in human beings, to include all those who might be affected. From victims of trafficking to victims of action to facilitate illegal immigration.

### *2.2.2. From victims of trafficking to victims of action to facilitate illegal immigration*

To put in the same text victims of action to facilitate illegal immigration and victims of trafficking in human beings reflects the fact that these two crimes are two particularly odious forms of a more general problem: the increase in illegal immigration. An instrument that applies to both types of offence is likely to be more effective than one that targets only one of them. Hence the scope of this proposed Directive. Moreover, the two offences have certain factors in common, and victims often experience both in turn.

However, it should be clear that the notion of victim is to be understood in the precise and specific sense of Article 1. Although the notion of victim of trafficking in human beings does not present any difficulties (featuring as it does in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children), the concept of "victim of action to facilitate illegal immigration" has a very specific meaning, in that it does not cover all those who seek assistance in illegal immigration, only those who might be reasonably regarded as victims, who have suffered harm (which is why it does not feature in the UN Protocol Against the Smuggling of Migrants by Land, Sea and Air). The concept, as mentioned in Article 1, covers persons who have suffered harm, for example having their lives endangered or physical injury.

### **2.3. Not a victim protection or witness protection measure**

This proposal for a Directive is concerned with a residence permit and defines the conditions for its issue. In this sense, and to the extent that certain provisions on the conditions of residence constitute protective measures (starting with the residence permit itself, which offers *de facto* "protection" against deportation), the proposal may appear to serve to protect victims. This is not, however, the case: the proposed Directive introduces a residence permit and is not concerned with protection of either witnesses or victims. This is neither its aim nor its legal basis. Victim protection and witness protection are matters of ordinary national or European law.

At the European level, the framework decision of 15 March 2001 on the status of victims in criminal proceedings<sup>10</sup> sets out the rules concerning the right to receive information and the specific assistance to be given to victims, as well as the right to compensation. It foresees that each Member State shall ensure that victims who are particularly vulnerable can benefit from specific treatment. Each Member State shall also guarantee a suitable level of protection to the victims and, if necessary, to their family or to persons treated as members of their family where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to interfere with their privacy.

The Council in its Resolution of 23 November 1995 on the protection of witnesses in the framework of the fight against international organised crime<sup>11</sup> calls on the Member States to ensure proper and effective protection of witnesses before, during and after trials. Such protection must also be extended if necessary to the parents, children and other close relatives of witnesses.

## **3. THE CHOICE OF LEGAL BASIS**

The choice of legal basis is consistent with the changes made to the Treaty establishing the European Community by the Treaty of Amsterdam, which came into force on 1 May 1999. Article 63(3) of the EC Treaty states that the Council is to adopt "measures on immigration policy within the following areas: (a) conditions of entry and residence... ; (b) illegal immigration and illegal residence". This Article is the legal basis for a proposal for a Directive which would define the conditions of issue, the terms of residence and the grounds for withdrawal or non-renewal of a

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<sup>10</sup> OJ L 82, 22 March 2001, p. 1.

<sup>11</sup> OJ C 327, 7 December 1995, p. 5.

residence permit issued to people whose administrative situation is irregular or precarious.

The purpose of the proposed Directive is to introduce a residence permit, with the aim of enhancing measures to combat illegal immigration. The text is not intended to incriminate networks of organised crime or to arrange protection for victims or witnesses. The proposal does not regulate these aspects, even though they are to some extent related to the subject matter of the text.

The proposed Directive must be adopted by the procedure provided for in Article 67 of the Treaty: the Council must act unanimously on a proposal from the Commission or on the initiative of a Member State, after consulting the European Parliament. Title IV of the EC Treaty does not apply to the United Kingdom or Ireland, unless these States decide otherwise, under the arrangements set out in the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaties. Nor does Title IV apply to Denmark, in accordance with the Protocol on the position of Denmark, annexed to the Treaties.

#### **4. SUBSIDIARITY AND PROPORTIONALITY: JUSTIFICATION AND ADDED VALUE**

The inclusion in the Treaty establishing the European Community of the new Title IV on visas, asylum, immigration and other policies related to free movement of persons attributed certain powers in these fields to the European Community. These must be exercised in accordance with Article 5 of the EC Treaty, that is if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. The proposal for a Directive satisfies these criteria.

##### Subsidiarity

The prime objective of the proposed Directive is to tighten up measures against illegal immigration by introducing a short-term residence permit for victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the authorities. Certain Member States already have such measures, although they differ enormously from one State to the next. Others make no such provision in their legislation. These disparities have the undesirable effect of diverting the activity of criminal organisations to those countries where the risks are lowest. This suggests the need for harmonised rules, which can only be agreed at Community level.

##### Proportionality

The form of Community action must be the simplest that will enable the objective of the proposal to be attained and effectively implemented. In this spirit, the legal instrument chosen is a Directive, laying down general principles but leaving the Member States to which it is addressed the choice of the most appropriate form and methods for giving effect to these principles in their national legal system and general context. The proposed Directive sets out common definitions and confines itself to defining the criteria for issuing the short-term residence permit, laying down the terms of residence granted to the holders and the grounds for non-renewal or



withdrawal. Member States remain free to enact more favourable conditions for victims.

## **ARTICLE-BY-ARTICLE COMMENTARY**

### **Chapter I: General provisions**

#### Article 1

The purpose of the Directive is to introduce a residence permit and define the various aspects relating to it, i.e. the procedure and criteria for issue (these provisions constitute Chapter II), the conditions of residence for holders (dealt with in Chapter III) and finally the grounds for non-renewal and withdrawal (defined in Chapter IV). The residence permit is intended for the victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the police and judicial authorities against the smugglers and traffickers.

#### Article 2

This Article defines the various concepts used in the proposal's provisions.

a) "Third-country national" is defined by default, by excluding citizens of the Union as specified in the Treaty establishing the European Community. It covers both persons having the nationality of a third country and stateless person within the meaning of the New York Convention of 28 September 1954.

b) "Facilitating illegal immigration" means the offences defined in Articles 1 and 2 of Council Directive .../.../EC [on defining the facilitation of unauthorised entry, transit and stay].

c) "Trafficking in human beings" means the offences defined in Articles 1, 2 and 3 of the Council Framework Decision of [...] [on combating trafficking in human beings].

d) The concept of "measure to enforce an expulsion decision" is inspired by Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals. However, it is not confined to decisions taken by the administrative authorities but also includes those taken by the judicial authorities.

e) "Short-term residence permit" is defined precisely by this proposal for a Directive in terms of the criteria for its issue, the conditions of residence and the grounds for withdrawal or non-renewal.

#### Article 3

1. Article 3 defines the scope of the Directive. It applies to victims of the offences referred to in Article 2, points (b) and (c). In view of the risks which victims run when they cooperate - risks to themselves or threats by members of the criminal organisation against victims' families - the proposed Directive is in the first instance concerned with adults.

2. This choice is not in any way intended to deny or ignore the fact that many victims are minors. In these cases Member States may issue residence permits on humanitarian (or other) grounds to victims who are minors. In so far as certain Member States make provision in their national legislation for minors to act to a greater or lesser extent in these circumstances, they may also decide, using the possibility created by Article 3(2), to extend the application of the provisions of this Directive to minors who fulfil the conditions laid down in their national law. It is for the Member States to decide at what age victims who are minors are sufficiently

mature on the one hand properly to understand the risks they run in cooperating and on the other hand actually to cooperate.

#### Article 4

This Article states that the proposed Directive is without prejudice to the protection extended to refugees, beneficiaries of subsidiary protection and persons seeking international protection and alludes here to the Geneva Convention of 28 July 1951 on the Status of Refugees and the supplementary Protocol signed in New York on 21 January 1967. This provision is directed in particular at persons seeking international protection who cross frontiers with the help of networks of traffickers or smugglers. It also covers situations where victims want to apply for international protection in view of the dangers of reprisals which they run after having cooperated with the authorities against traffickers or smugglers. Similarly, the provisions of the proposed Directive are without prejudice to the application of all of the articles of the European Convention on Human Rights and its protocols, particularly as regards conditions of residence and expulsion.

#### Article 5

The beneficiaries of this Directive include, by definition, people of different race, colour, sex, ethnic origin and religion. This provision requires the Member States to apply the principle of non-discrimination in the implementation of all the obligations contained in the Directive. In this respect it complies with Article 21 of the Charter of Fundamental Rights of the European Union.

#### Article 6

The proposed Directive provides for a minimum regime open to victims of the offences referred to who cooperate with the police and judicial authorities. These measures form a common basis and are without prejudice to other national or Community provisions which could be invoked, for example in matters of victims' rights, witness protection and the protection of minors. This Article thus allows the Member States to provide more favourable conditions for victims in so far as they are compatible with the provisions laid down in the proposed Directive. These more favourable conditions may already exist in national law or be introduced at a later date.

### **Chapter II: Procedure for issuing the short-term residence permit**

#### Article 7

1. This Article describes the first stage of the process: the authorities of a Member State have come into contact with a victim of action to facilitate illegal immigration or trafficking in human beings, perhaps because the person was discovered by the authorities themselves or referred to them by an association or non-governmental organisation, or has contacted them on his or her own initiative. Persons whom the authorities believe to be victims of one of the offences referred to will be informed of the provisions of this Directive, i.e. the possibility of benefiting from its residence regime in exchange for cooperation.

The Member States may delegate this power to a local authority, association or non-governmental organisation working in the field and thus qualified to perform this task. The role played by associations and non-governmental organisations in this area justifies allowing their services to be used. Indeed, the Member State may take the view that victims would prefer to deal with members of associations or NGOs rather than representatives of the State.

## Article 8

1. Once informed of the existence of the short-term residence permit and about the conditions under which it is granted, victims may decide to proceed. Therefore, they must first of all sever all links with the smugglers or traffickers. They then benefit from a 30-day reflection period, during which they have access to a range of assistance and care measures defined in Article 9.

The reason for this is that victims are in a vulnerable and dependent position. Having survived often traumatic experiences, particularly in the case of victims of human trafficking, they may not be in a state to decide immediately whether to cooperate with the authorities, particularly given the risks they run. In practice many victims will be cared for by associations or non-governmental organisations at this point.

2. Their condition may necessitate certain forms of assistance and care at this stage of the procedure. Access to such assistance is not dependent on legalising their administrative situation or their cooperation with the authorities (unlike the more favourable regime - see Chapter III - which may be available to them at a later stage, subject to certain guarantees, such as the victims' cooperation). These forms of assistance and care are described in Article 9. Given this breathing space, assistance, care and the support of an association, victims will then be better able to make an informed decision as to whether or not they wish to cooperate.

This waiting period allows victims enough time to recover physically and psychologically, without providing an incentive likely to encourage abuse.

The authorities may not expel victims during the waiting period. They may, however, take an expulsion decision which is not immediately enforceable. This measure could be enforced if the victim decides not to cooperate or lifted if the person is granted a short-term residence permit.

3. Unlike the regime which becomes available on issue of a short-term residence permit, the waiting period is merely a temporary respite, during which victims' residence in the territory of a Member State is tolerated, until such time as the competent authority can rule on their future status. This waiting period does not, therefore, create any subsequent entitlement to residence in the context of the present Directive.

4. As activation of the reflection period is conditional on severance of all links with smugglers or traffickers, any renewal of contact with them could put an end to the reflection period. Similarly, throughout the procedure the Member State retains the option of invoking grounds of public order or national security to terminate the waiting period.

## Article 9

1. This Article provides for a package of measures to assist victims in a vulnerable state. It begins by stating that it is without prejudice to national or European provisions on the protection of victims or witnesses (such as the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings<sup>12</sup> and the Council

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<sup>12</sup> OJ L 82, 22 March 2001, p. 1 ff.

Resolution of 23 November 1995 on the protection of witnesses in the fight against international organised crime<sup>13</sup>).

This article is intended to enable victims to reach an informed decision at the end of the waiting period and to prevent advantage being taken of their vulnerability. Victims will receive the medical and psychological care and material assistance their condition requires. Medical care that cannot wait is care, which must be provided to forestall an emergency.

The measures should enable victims to come out of hiding and not run the risk of re-establishing ties with the smugglers or traffickers. They arise from similar proposals made in the ministerial declaration of The Hague on 26 April 1997, the Commission Communication of 9 December 1998<sup>14</sup> and reports by the European Parliament (Sörensen Report<sup>15</sup> and Klamt Report<sup>16</sup>).

2. In the interests of the procedure and of securing optimum cooperation from the victims, the Member States will also provide them with free legal aid and translation and interpreting services.

#### Article 10

1. The authority responsible for the investigation or prosecution shall come to a decision on three elements, and has therefore a deadline of ten days more than the one given to the victims.

The authority must decide:

- first, whether the presence of the victim is useful. The usefulness of victims' presence will be assessed, depending on the circumstances, according to the nature of their cooperation or the need for them to attend the different stages of the proceedings;

- second, whether the victim has shown a clear intention to cooperate: this will be judged according to the content of the victim's statements. Lodging a complaint is regarded as a clear indication of an intention to cooperate;

- third, the victim must have actually severed all links with the smugglers or traffickers.

2. If the authority responsible for the investigation or prosecution rules favourably, the authorities responsible for issuing residence permits will issue the victim with a short-term residence permit, provided that person presents no threat to public order or national security.

3. The short-term residence permit will be valid for six months. It will be renewed as long as the conditions continue to be met as regards the usefulness of the victim's presence, the clear intention to cooperate, the severing of all links with the perpetrators and the absence of any threat to public order or national security.

4. Paragraph 4 deals precisely with the concrete situation where a person was victim, together with family members, of one of the offences mentioned, but where only this person could be granted a short term residence permit. This could be the case if the authority responsible for

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<sup>13</sup> OJ C 327, 7 December 1995, p. 5 ff.

<sup>14</sup> COM(1998) 726.

<sup>15</sup> A5-0127-2000, 2 May 2000.

<sup>16</sup> A5-0183/2001, 30 May 2001.

the investigation or prosecution considers that only the presence of this person is useful. The evidence of the spouse, or if necessary the children, would not be retained because they could not bring to light additional elements. In these circumstances, account shall be taken of the vulnerability of the victims. For this reason, if Member States grant a short-term permit to the victim, they take into account this element when examining the possibility of granting a humanitarian permit to the member(s) of his/her family. In accordance with the framework decision of 15 March 2001 on the statute of victims in criminal proceedings<sup>17</sup>, those concerned are the members of their family or persons treated as members of their family.

#### Article 11

This Article specifies the format which the residence permit must take, referring for this purpose to Council Regulation (EC) No .../... [laying down a uniform format for residence permits for third-country nationals].<sup>18</sup>

### **Chapter III: Conditions of residence**

#### Article 12

In view of the purpose it is intended to serve, the short-term residence permit allows holders to have access to the labour market, engage in studies or follow vocational training courses, in order to put their illegal past behind them and gain independence from the network of traffickers or smugglers. Access to the labour market should enable them to earn a living; access to education and vocational training should enable them to acquire the means to earn a living later. This is an essential measure in the medium and long term to enable victims to reinsert themselves in a legal occupation. It should also ensure that victims do not re-establish contacts with their old network in the host country, or even, on their return, in their country of origin, because they see no way out of their situation.

#### Article 13

1. Article 13 extends the range of healthcare available to victims. While the start of the waiting period allows victims to benefit from emergency medical and psychological care and medical attention that cannot be postponed, the issue of a short-term residence permit gives victims greater access to healthcare, by adding primary care (i.e. care dispensed by general practitioners) to the list of services available. The list excludes specialist care, which will be provided only if it cannot be postponed (e.g. certain types of dental care).

2. Paragraph 2 requires the Member States to meet the special health needs of certain categories of victims and gives examples. This is an important addition, because a significant number of the victims involved will belong to the categories mentioned.

#### Article 14

Article 14 lays down the provisions to be applied if Member States take advantage of the option provided in Article 3(2) of extending the scope of this Directive to minors.

Point (a) reaffirms the commitment made in Article 3(1) of the international Convention on the Rights of the Child of 20 November 1989 and Article 24 of the Charter of Fundamental

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<sup>17</sup> OJ L 82, 22 March 2001, p. 1.

<sup>18</sup> OJ L ... [COM(2001)157].

Rights of the European Union. The best interest of the child may imply, within this directive, specific adaptations in terms of procedure, and especially concerning the period of reflection.

Point (b) states that minors will have access to education under the same conditions as nationals of the host country.

Point (c) reproduces the relevant provisions of the Council Resolution of 26 June 1997 on unaccompanied minors who are nationals of third countries,<sup>19</sup> with particular reference to the establishment of their identity and their representation. The provisions concerning unaccompanied minors are supplementary to the preceding provisions.

#### Article 15

In view of the favourable regime guaranteed to victims under the terms of the short-term residence permit, Member States may in return require victims to participate in a rehabilitation programme. In the short term such programmes would help victims to reintegrate and in the long term they would prevent them falling back into the activities of the network. Depending on the opportunities and needs of the victims, these programmes will be geared either to their integration in the host country (for example, study or additional vocational training), or to their assisted return to their country of origin or another state willing to accept them (for example, developing an economically viable project).

### **Chapter IV: Non-renewal and withdrawal**

#### Article 16

1. The short-term residence permit will be renewed according to the needs of the proceedings. It will not be renewed if the proceedings have been concluded (for example with a decision to dismiss the case or the conviction of the perpetrators) or if the conditions that led to its issue are no longer satisfied (for example the presence of the victim is no longer regarded as necessary, the victim no longer wishes to cooperate or, in the case where the Member State decides to link the short-term permit to a rehabilitation programme as foreseen in Article 15, the victim did not follow this programme).

2. Non-renewal does not prejudice the issue of another type of residence permit if the victim applies for it. Ordinary immigration law will apply and the Member State may, depending on its national legislation, issue a humanitarian residence permit if the victim's situation warrants it, or a residence permit for the purpose of employment or study if the individual fulfils the necessary conditions. The prior issue of a short-term residence permit does not create an entitlement to residence once the proceedings have finished, but the Member State must take the victim's cooperation into account, either because it was decisive in bringing the proceedings to a successful conclusion or because the victim will run special risks in the event of expulsion as a result of such cooperation. This is an additional incentive aimed at encouraging victims to give evidence and disclose all the information they have.

#### Article 17

Unlike non-renewal, which by definition occurs at the end of the six months for which a permit was initially issued or subsequently renewed, withdrawal can occur at any time. It penalises the victim's failure to comply with one of the initial conditions, for example by

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<sup>19</sup> OJ C 221, 19 July 1997, p. 23.

resuming contacts with smugglers or traffickers, wrongly or fraudulently exploiting the possibility created by the residence permit (for example by fictitious or manifestly false accounts), or engaging in personal behaviour incompatible with the public order and national security clause.

## **Chapter V: Final provisions**

### Article 18

This article is a standard clause in Community law, providing for effective, proportional and deterrent penalties. It leaves the Member States the discretion to determine the penalties applicable in the event of violation of the national provisions enacted to implement the Directive.

### Article 19

The exchange of information is important for evaluating the effectiveness of the short-term residence permit in achieving its objective. In order to facilitate proper monitoring the Member States will collect and forward information on residence permits and the judicial procedures associated with them. With a view to evaluation, in the short term, and in the longer term to the exchange of good practice, they will do the same in the case of the rehabilitation programmes provided for in Article 15. Even though these programmes are optional, monitoring will provide a basis for any future assessment of their value in the light of their positive contribution.

### Article 20

The Commission is given the task of preparing a report on application of the Directive by the Member States, in keeping with its role of monitoring implementation of the provisions enacted by the institutions under the Treaty. It is also responsible for proposing any amendments.

### Article 21

The Member States are required to transpose the Directive by 30 June 2003 and to inform the Commission of amendments to their law, regulations and administrative provisions. When adopting these provisions they must include a reference to the Directive.

### Article 22

This article specifies the date on which the Directive will enter into force.

### Article 23

The Directive is addressed to the Member States only.



Proposal for a

**COUNCIL DIRECTIVE**

**on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities**

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission,<sup>20</sup>

Having regard to the Opinion of the European Parliament,<sup>21</sup>

Having regard to the Opinion of the Economic and Social Committee,<sup>22</sup>

Having regard to the Opinion of the Committee of the Regions,<sup>23</sup>

Whereas:

- (1) The framing of a common immigration policy, including the definition of the conditions of entry and residence for foreigners and measures to combat illegal immigration, is a constituent element of the European Union's objective of creating an area of freedom, security and justice.
- (2) At its special meeting in Tampere on 15 and 16 October 1999, the European Council expressed its determination to tackle illegal immigration at source, for example by targeting those who engage in trafficking of human beings and the economic exploitation of migrants. It called on the Member States to concentrate their efforts on detecting and dismantling criminal networks while protecting the rights of victims.
- (3) An indication of the growing concern about this phenomenon at international level was the adoption by the United Nations General Assembly of a Convention against Transnational Organised Crime, supplemented by a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and a Protocol Against the Smuggling of Migrants by Land, Sea and Air. These were signed by the Community and the fifteen Member States in December 2000.

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<sup>20</sup> OJ C , , p. .

<sup>21</sup> OJ C , , p. .

<sup>22</sup> OJ C , , p. .

<sup>23</sup> OJ C , , p. .

- (4) At European Community level, several instruments are in the process of being adopted to define the offences of facilitating illegal immigration and trafficking in human beings.<sup>24</sup>
- (5) This Directive introduces a residence permit intended for the victims of these offences, which offers a sufficient incentive to them to cooperate with the competent authorities while including certain conditions to safeguard against abuse.
- (6) To this end, it is necessary to define the short-term residence permit, to lay down the criteria for issuing it, the conditions of residence and the grounds for non-renewal and withdrawal.
- (7) Victims must be informed of the possibility of obtaining this residence permit and be given a period in which to reflect on their position. This should help put them in a position to reach a well-informed decision as to whether or not to cooperate with the police and judicial authorities (in view of the risks this may entail), so that they cooperate freely and hence more effectively. Given the extreme vulnerability of victims' situation they must have access to the assistance and care they require.
- (8) Confronted with a victim who clearly intends to cooperate and whose presence the judicial authority regards as useful to the proceedings, the competent administrative authority will issue a short-term residence permit for six months, renewable for six-month periods.
- (9) To enable victims to gain their independence and not return to the criminal network, the residence permit shall allow the holder to have access to the labour market and pursue vocational training and education. For the same reasons, the Member States may make the issue of the permit conditional on victims' participation in programmes aimed at integrating them or preparing them for assisted return.
- (10) This Directive is without prejudice to other provisions on the protection of victims, witnesses or persons who are particularly vulnerable. Nor does it detract from the prerogatives of the Member States as regards the right of residence granted on humanitarian or other grounds.
- (11) This Directive respects fundamental rights and complies with the principles recognised for example by the Charter of Fundamental Rights of the European Union.
- (12) The objective of introducing a short-term residence permit for victims who lodge a complaint or cooperate in the fight against traffickers or smugglers cannot be achieved adequately by Member States. Indeed, the criminal organisations operate by definition on an international scale. In order to fight against this phenomenon, an increasing number of Member States have introduced residence permits for those cooperating with the judicial authorities, with positive results. It would, however, be wrong if disparities between measures in different states were to lead to a shift in the activities of international networks to those Member States where they faced fewer difficulties and risks. As the objectives pursued, in view of the extent of the action, can be better achieved at the Community level, the Community can take measures in accordance

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<sup>24</sup> Council Directive .../.../EC [on defining the facilitation of unauthorised entry, transit and stay], OJ L , , p. [JHA(2000)22]; Council Framework Decision of [...] [on combating trafficking in human beings], OJ L , , p. [COM(2000)854, 22 January 2000].

with the subsidiarity principle as laid down in Article 5 of the Treaty. In accordance with the proportionality principle, as laid down in the same Article, the directive does not go beyond what is necessary to achieve these goals.

HAS ADOPTED THIS DIRECTIVE:

## **Chapter I: General provisions**

### *Article 1 Purpose*

The purpose of this Directive is to introduce a short-term residence permit for third-country nationals who are victims of offences constituted by the action to facilitate illegal immigration or by trafficking in human beings (hereafter referred to as “victims”) who cooperate in the fight against the perpetrators of these offences.

### *Article 2 Definitions*

For the purposes of this Directive:

- (a) "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;
- (b) "action to facilitate illegal immigration" means the offences defined in Articles 1 and 2 of the Council Directive .../.../CE [on defining the facilitation of unauthorised entry, transit and stay];
- (c) "trafficking in human beings" means the offences defined in Articles 1, 2 and 3 of the Council Framework Decision of [...] [on combating trafficking in human beings];
- (d) "measure to enforce an expulsion order" means any measure taken by a Member State to enforce the decision of an administrative authority ordering the expulsion of a third-country national;
- (e) "short-term residence permit" means any permit or authorisation issued by a Member State in accordance with its legislation, allowing a victim to reside in its territory in order to cooperate with the competent authorities.

### *Article 3 Scope*

1. This Directive shall apply to victims, as referred to in Article 1, having reached the age of majority.
2. Member States may decide to apply the provisions of this Directive to minors who fulfil certain conditions laid down in their national law.

*Article 4*  
*Safeguard*

This Directive shall be without prejudice to the protection extended to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments.

*Article 5*  
*Non-discrimination*

Member States shall apply this Directive without discrimination on the grounds of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinion, membership of a national minority, wealth, birth, disability, age or sexual orientation.

*Article 6*  
*More favourable provisions*

The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.

## **Chapter II: Procedure for issuing the short-term residence permit**

*Article 7*  
*Information given to the victims*

Persons who are identified by the competent authorities as victims within the meaning of Article 1 shall immediately be informed of the possibility of obtaining the short-term residence permit provided for by this Directive.

The information shall be provided by the authorities responsible for the investigation or prosecution, an association or a non-governmental organisation.

*Article 8*  
*Reflection period*

1. Victims shall be granted a reflection period of 30 days to take the decision to cooperate with the competent authorities. This period starts from the moment they sever relations with those suspected of committing the offences referred to in Article 2(b) and (c).
2. During this period and while awaiting the decision of the authority responsible for the investigation or prosecution in accordance with article 10(1), they shall have access to the assistance and care referred to in Article 9 and it shall not be possible to enforce any expulsion order against them.

3. The reflection period shall not create any entitlement to residence under this Directive.
4. The State may at any time terminate the reflection period if the person has renewed contact with the authors of the offences referred to in Article 2 points b) and c) or for reasons relating to the protection of public order and national security.

*Article 9*  
*Assistance and care*

1. Without prejudice to the application of measures relating to the protection of victims and witnesses, Member States shall ensure that victims have access to suitable accommodation, emergency medical and psychological treatment and medical care that cannot be postponed, and to the necessary support in the form of social welfare and means of subsistence if they do not have sufficient resources. They shall attend to the special needs of the most vulnerable.
2. Member States shall provide victims with free legal aid and translation and interpreting services.

*Article 10*  
*Issue and renewal of the residence permit*

1. The authority responsible for the investigation or prosecution shall decide on the following matters, at the latest ten days after the expiry of the 30-day reflection period:
  - (a) whether the presence of the victim is useful;
  - (b) whether the victim has shown a clear intention to cooperate substantiated, for example, by an initial, material declaration to the authorities responsible for the investigation or prosecution, or the lodging of a complaint, or any other act provided for by the Member State's legislation;
  - (c) whether the victim has severed all relations with those suspected of acts that might be included among the offences referred to in Article 2.
2. The short-term residence permit shall be issued if:
  - (a) the authority responsible for the investigation or prosecution rules favourably on the criteria listed in paragraph 1;
  - (b) there are no objections on the grounds of the protection of public order and national security.
3. The short-term residence permit shall be valid for six months. It shall be renewed for periods of six months if the conditions set out in paragraph 2 continue to be satisfied.
4. When Member States grant a short term permit to a person identified as a victim of one of the offences referred to under article 2 (b) and (c) with member of his/her family or persons treated as members of his/her family, they shall take this element into account when examining the possibility of granting them a residence permit on humanitarian grounds.

*Article 11*  
*Format of the residence permit*

The short-term residence permit may be issued in the form of a sticker or a separate document. It shall be issued according to the rules and standard format laid down in Council Regulation No .../... [laying down a uniform format for residence permits for third-country nationals].<sup>25</sup> Under the heading "Type of permit" Member States shall enter the words "Short-term residence permit".

### **Chapter III: Conditions of residence**

*Article 12*  
*Work, training and education*

The Member States shall authorise the holders of a short-term residence permit to have access to the labour market, vocational training and education.

*Article 13*  
*Medical and psychological care*

1. Member States shall ensure that holders of a short-term residence permit have access to primary medical care, in addition to the assistance and care referred to in Article 9.
2. Member States shall meet to the special needs of victims, such as pregnant women, the disabled or victims of rape or other forms of sexual violence and, if Member States take advantage of the option provided in Article 3(2) , minors.

*Article 14*  
*Victims who are minors*

If Member States take advantage of the option provided in Article 3(2), the following provisions shall apply:

- a) Member States shall take due account of the best interests of the child when applying the provisions of this Directive. They shall ensure that the procedure is appropriate to the age and maturity of the child. In particular, if they consider that it is in the best interest of the child, they may extend the reflection period.
- b) Member States shall ensure that minors have access to the educational system under the same conditions as nationals. Member States may stipulate that such access must be limited to the public education system.
- c) Besides, in the case of victims who are unaccompanied minors, Member States shall take the necessary steps to establish their identity and the fact that they are unaccompanied. They shall make every effort to locate their families as quickly as possible and take the necessary

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<sup>25</sup> OJ L [COM(2001)157].

steps immediately to ensure legal representation, including representation in criminal proceedings, if necessary.

*Article 15*  
*Rehabilitation programmes for victims*

Member States may make the issue of short-term residence permits conditional upon the victims' participation in a programme aimed either at their integration in the host country and, where appropriate, vocational training, or their assisted return to the country of origin or another country willing to accept them.

## **Chapter IV: Non-renewal and withdrawal**

*Article 16*  
*Non-renewal*

1. The short-term residence permit shall not be renewed if the conditions of Article 10(2) cease to be satisfied, if a judicial decision has terminated the proceedings or, if relevant, the beneficiary does not take part in the rehabilitation programme referred to in Article 15.
2. When the short-term residence permit expires ordinary aliens law shall apply. If victims submit an application for another type of residence permit, Member States shall take account of their cooperation when considering their applications.

*Article 17*  
*Withdrawal*

The short-term residence permit may be withdrawn at any time:

- (a) if the holder has renewed contacts with those suspected of committing the offences in question, or
- (b) if the judicial authority considering the case believes that the victim's cooperation or complaint is fraudulent or wrongful, or
- (c) for reasons relating to the protection of public order and national security.

## **Chapter V: Final provisions**

*Article 18*  
*Penalties*

Member States shall determine the system of penalties applying to violations of the national provisions enacted pursuant to this Directive and shall take all necessary measures to ensure the implementation of these provisions. The penalties envisaged must be effective, proportionate and deterrent. Member States shall communicate these provisions to the

Commission at the latest by the date specified in Article 21. Any later amendment affecting these provisions shall be communicated without delay.

*Article 19*  
*Exchange of information*

Every year the Member States shall communicate up-to-date information to the Commission on the following:

- (a) the number of short-term residence permits issued, the proceedings initiated and their outcome;
- (b) the rehabilitation programmes referred to in Article 15, together with an assessment of their effectiveness in rehabilitating victims.

*Article 20*  
*Report*

1. No later than 30 June 2007, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and propose any amendments that are necessary. The Member States shall send the Commission any information relevant to the preparation of this report.

2. After presenting the report referred to in paragraph 1, the Commission shall report to the European Parliament and the Council at least every three years on the application of this Directive in the Member States.

*Article 21*  
*Transposal*

The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive no later than 30 June 2003. They shall immediately inform the Commission accordingly.

When the Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference when they are officially published. The precise nature of such a reference shall be decided by the Member States.

*Article 22*  
*Entry into force*

This Directive shall enter into force on the twentieth day following its publication in the *Official Journal of the European Communities*.



*Article 23*  
*Addressees*

This Directive is addressed to the Member States.

Done at Brussels,

*For the Council*  
*The President*