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Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals COM (2005) 391

I. General remarks

1. Our organisations represent Churches throughout Europe - Anglican, Orthodox, Protestant and Roman Catholic - as well as Christian agencies particularly concerned with migrants and refugees. As Christian organisations, we are deeply committed to the dignity of the human individual, the concept of global solidarity and the promotion of a society that welcomes strangers. Churches and church-related agencies in Europe are active partners in providing services for migrants in both regular and irregular situations as well as refugees, in order to improve their living conditions. In particular they accompany them when facing removal and put into detention.

For a common human rights based approach in EU return policy

2. On the basis of our experience we acknowledge the objective of the Commission's Draft Directive on Return to establish clear, transparent and fair norms and procedures concerning the return and removal of third country nationals. The European Union must set high standards for a common return policy in order to assure the protection of the fundamental rights of migrants and refugees all over the European Union. We have also taken note of bilateral and multilateral European initiatives to remove third country nationals jointly (so called Euro-charter). We are deeply concerned by the infringements of human rights which have been committed in the course of removals e.g. the deaths in Austria, Belgium, France, Germany and the United Kingdom; and the risk of collective

expulsion[1]. The readmission agreements negotiated or concluded by the EU or by member states bilaterally, particularly with countries across the Mediterranean Sea, are of considerable concern as well: they have an impact on forced removals and there are cases which have to be seen as collective expulsions. An illustration of this trend is the detention center in Libya financed by Italy, which is not guaranteeing even minimum standards for the respect of human rights and human dignity. Therefore we call upon the EU Institutions to adopt common legislation on return and removal which will assure due respect for the human dignity and human rights of removed people.

The Return Directive – one element of EU migration and asylum policy

3. Given that a common EU Asylum System and a common migration policy have not yet been realised, we underline that an EU Return Directive can only represent one element of an overall approach to an EU Migration and Asylum Policy, which includes high standards for the qualification of refugees and the admission of migrants in the EU. The vast differences in the treatment of refugees from Chechnya may serve as an example: The probability of recognition depends on whether they have reached a Member State with a high recognition rate (e.g. Austria) or another with a low recognition rate (e.g. Poland or Slovakia). In view of the variety of approaches in EU Member States to deal with irregular migrants we are concerned that the directive in its current form might render it impossible for Member States to carry out regularisation campaigns, which have proved to be an important instrument for tackling the complex issue of irregular migration.

4. The directive on return is linked to the proposed budget line for removal operations. In our view, financial instruments at an EU level require of necessity a common policy approach. Therefore we urge that member states and the European Parliament agree on a directive for a common European policy on removal based on international rights standards and providing for the protection of human rights and human dignity.

Common Principles of an EU return policy

5. On 1 September 2005 NGOs and some of the Christian organisations which have signed this comment published common principles for removal procedures.[2] These principles are based on international rights standards, such as those developed by the Council of Europe, as well as on practical experience in some EU Member States. They serve as a reference point for this comment and should also be respected by the EU Return Directive.
6. We explicitly acknowledge that the draft directive contains some positive elements. We particularly welcome the general reference to respect for the fundamental rights of third country nationals as set out in Article 1, and the protection of family relationships and the interests of the child through the guiding principles of Article 5. We also recognise the introduction of obligations derived from the fundamental rights in Article 6-4, the guarantee of an autonomous residence permit by Article 6-5 and the renunciation of a return decision pending request for renewal of residence permit Article 6-7. Furthermore

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[1] Collective arrests on targeted population are taking place in several European countries with not always a guarantee of individual procedures.

[2] "Common principles on removal of irregular migrants and rejected asylum seekers"; Amnesty International, Caritas Europa, ECRE, Human Rights Watch, JRS-Europe, CCME, PICUM, Quaker Council for European Affairs, Save the Children, Cimade, Iglesia Evangelica Espanola, Federazione delle Chiese Evangeliche in Italia, SENSOA; 1st September 2005.

we should like to stress the importance of granting respect for migrants' human rights when it comes to coercive measures (Article 10-1) or detention (Article 15-1).

A preference for volutary return

7. Throughout the consultation process on return policies over the last three years, our organisations have emphasised the need to work out practical proposals and instruments for voluntary return. This concern had partly been echoed in the Green Book of 2002. Even though voluntary return is mentioned in Article 6-2, the draft directive lacks ambition in our view. We remain convinced that more effort on truly voluntary return measures, including reintegration projects, would help to reduce the strenuous removal operations for the benefit of migrants as well as enforcement officials, and could enhance the sustainability of the return.

Monitoring of removal procedures

8. Independent monitoring mechanisms for the removal procedures have proven to be an important instrument in the procedures of removals. NGOs and churches are involved in such monitoring at national levels. As more and more joint operations will be carried out at EU level, we see an urgent need to provide for a framework for monitoring removals at the various stages also at EU level.

II. Concerns regarding the concrete provisions of the Draft Return Directive

Application of the Return Directive in transit zones (Article 2-2)

The proposed directive foresees: "Member States may decide not to apply this Directive to third-country nationals who have been refused entry in a transit zone of a Member State. However, they shall ensure that the treatment and the level of protection of such third-country nationals is not less favourable than set out in Articles 8, 10, 13 and 15."

9. We regret that the proposal allows Member States not to apply to transit zones all the guarantees that it normally foresees. It is worth recalling that the ECtHR stated in the *Amuur v. France* Judgment[3] that transit zones are places of detention in the same way as closed centres for immigrants (called "*temporary custody facilities*" in the proposed Directive). Consequently, all human rights guarantees provided by the Directive proposal as well as by European and international standards must also apply to transit zones.

Voluntary return (Article 6-2)

"The return decision shall provide for an appropriate period for voluntary departure of up to four weeks, unless there are reasons to believe that the person concerned might abscond during such a period. Certain obligations aimed at avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place may be imposed for the duration of that period."

10. We believe that a delay of four weeks is not sufficient to organise a voluntary return in a fair and proper way. The term "voluntary" may be replaced by "mandatory" as far as if the persons are under a removal order anyway, the return will never be completely voluntary. To be truly voluntary, the return requires that migrants be sufficiently informed about the situation and the living conditions in the country of return and also

[3] See ECtHR, *Amuur v. France*, Judgment of 25 June 1996

that they can start to organise their reintegration in the society of the country of return. These are important conditions for an effective return, meaning that migrants will not try to immigrate again once returned. We do not see any reason why the time limits for organising a voluntary return for a migrant should be any less than the time limits given to Member States' authorities to organise a removal. E.g. if obtaining papers is difficult for the authorities within four weeks, how should a migrant be able to obtain them in that timeframe? We wish to urge that the same time limits are applied for authorities and individuals.

11. We express also doubt about any voluntary character of return when the freedom of migrants may be restricted when there is a *"risk of absconding"*. We regret the use of the term "absconding", which refers to a criminal law status, which is not the case when treating third country nationals staying without permit in the territory of a State. We strongly recommend to use a more appropriate term, such as "if the person concerned may not be found". Furthermore, the obligations "aimed at avoiding the risk of absconding" do not seem proportional to the risk nor compatible with human rights law.

12. The interpretation of the risk of absconding is left to the discretion of Member States. In practice, this may lead to systematic restrictions on the liberty of migrants even though they have expressed the will to be returned voluntarily. The possibility to oblige migrants to "*stay at a certain place*" is likely to lead to far-reaching restrictions and even detention. Detention centres or *"temporary custody facilities"* – whatever they are called – are certainly not the proper places to consider voluntary return.

Two-Step procedure (Article 6-3)

"The return decision shall be issued as a separate act or decision or together with a removal order."

13. This provision substantially limits the voluntary principle of return as well as the *"two-step procedure"* as promoted by the directive proposal[4]. Concerning the "*two-step procedure*" principle, it is paradoxical to promote this principle on one hand and, on the other hand, to leave its application to the entire discretion of Member States which can decide to issue the return decision together with the removal order. In practice, this is likely to lead to the non-application of the principle and consequently to its disappearance.

14. Moreover, the possibility to issue the return decision together with the removal order will put such pressure on migrants that they will not be able to properly consider voluntary return. In this case, migrants will be left without any real capacity to choose so that the voluntary character of return will no longer have any meaning.

Obligations to avoid the risk of absconding (Article 8-3)

"If enforcement of a return decision or execution of a removal order is postponed as provided for in paragraphs 1 and 2, certain obligations may be imposed on the third country national concerned, with a view to avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents or the obligation to stay at a certain place."

15. This provision does not provide any sustainable solution for migrants that are not or cannot be removed because of their vulnerability (migrants with physical or mental disabilities or unaccompanied minors who cannot be handed over by a family member or

[4] Third consideration of the preamble: *"As a general principle, a harmonized two-step procedure should be applied, involving a return decision as a first step, and where necessary, the issuing of a removal order as second step (…)"*

a representative) or for technical reasons. On the contrary, if Member States consider that there is a *"risk of absconding"*, they may impose "*certain obligations*" on these persons, among them "*to stay at a certain place*" which means to be detained.

16. Again, the evaluation of the risk to abscond is left to the entire discretion of Member States, which will lead in practice to a systematic use of detention. Detention "aimed at avoiding the risk of absconding" is in our view neither proportional to the risk nor in accordance with human rights law. In the case of people who cannot be removed, this may lead to long and unjustified detention[5]. Regarding minors, this is contrary to the 1989 UN Convention on the Rights of the Child, especially the principle of the "*best interest of the child*" as recalled in Article 5 of the Directive proposal. Therefore, minors must not be placed in detention. Furthermore, any custodial measure needs to be defined in its aim. Only when custody within a strict time limit is the only option to remove a person, custody may be considered an option.

Re-entry ban (Article 9)

"1. Removal orders shall include a re-entry ban of a maximum of 5 years.
Return decisions may include such a re-entry ban.
2. The length of the re-entry ban shall be determined with due regard to all relevant circumstances of the individual case, and in particular if the third-country national concerned:
(a) is the subject of a removal order for the first time;
(b) has already been the subject of more than one removal order;
(c) entered the Member State during a re-entry ban;
(d) constitutes a threat to public policy or public security.
The re-entry ban may be issued for a period exceeding 5 years where the third country national concerned constitutes a serious threat to public policy or public security.
3. The re-entry ban may be withdrawn, in particular in cases in which the third-country national concerned:
(a) is the subject of a return decision or a removal order for the first time;
(b) has reported back to a consular post of a Member State;
(c) has reimbursed all costs of his previous return procedure.
4. The re-entry ban may be suspended on an exceptional and temporary basis in appropriate individual cases.
5. Paragraphs 1 to 4 apply without prejudice to the right to seek asylum in one of the Member States."

17. We regret that the proposal provides the institution of a re-entry ban of five years following the execution of the removal. Besides the fact that a 5 year ban is too long, the re-entry ban could amount to a double penalty. It may also have far-reaching consequences for the principle of *non-refoulement* as guaranteed by the 1951 Refugee Convention[6]. The situation of returnees may indeed change after they have been removed. They may become eligible for the status of refugee. In this case, the re-entry ban may be contrary to the principle of *non-refoulement.* A general re-entry ban for 25 and potentially more EU member states for such a long time, not considering that the person may be returning into an unstable condition which might turn worse, excludes any possibility to find refuge. Some persons would probably feel obliged to turn to smugglers if they are desperate and are excluded from legal entry. Thus the instrument of a re-entry

[5] In the *Amuur v. France* Judgment, the ECtHR has judged that an excessive prolongation of detention may lead to a "*deprivation of liberty*" contrary to Article 5 of the ECHR.

[6] Article 33 of the 1951 Refugee Convention: "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

ban is likely to increase irregular migration and may cause deterioration in relations with third countries.

18. Also family relations in EU member states have to be considered. Certainly for dependent family members and minors, a re-entry ban is inappropriate. A 15 or 16-year-old migrant who had been removed with the family would be stripped of training and scholarship opportunities he or she might have due to language competence acquired previously, or in another EU Member State.

19. In our view, re-entry bans should be deleted from the directive. If included at all, this should be the exception rather than a rule, as the removal is sufficiently punitive. Particularly for return decisions followed by voluntary return no re-entry ban ought to be attached. If at all applied, we would strongly advocate that the maximum time for a re-entry ban be reduced to one year and for adults only.

20. The fact that the re-entry ban may be issued for a period exceeding 5 years when the returnee constitutes a "*serious threat to public policy or public security*" is also a matter of concern (Article 9-2). Firstly, the appreciation of the threat is left to the discretion of Member States and the Directive proposal does not provide any mechanism to challenge such an determination. This may be a source of abuse. Secondly, the notion of "*public policy*" seems too vague and covers so many domains that in practice every migrant with no permit may be considered as a threat to public policy. For example, every migrant facing removal may be considered as a threat of Member States' policy to fight against irregular immigration and consequently be systematically removed. We would also argue that this clause is unnecessary, as the granting of a visa in the future would have to assess whether the person is posing a threat at that time.

21. We are worried that the withdrawal of the re-entry ban may be conditional on the reimbursement by returnees of the cost of the removal procedure (Article 9-3 c.). This measure will add a supplementary burden on people who are already facing financial difficulties and, to this extent the measure may turn out as inhumane.

22. If a re-entry ban remains an option, we see a need to include possibilities for migrants to be fully informed about this and to include legal challenges in the directive. As the re-entry ban is used as a penalty, there must be legal remedies against such a penalty. This may also require clear provisions in the Schengen Information System and the Visa Information System e.g. that the reasons for a visa denial are communicated to the applicant.

23. In addition, the European Commission would need to monitor the application of such stipulations to ensure that there will be coherence in Member States' practice.

Translation of return decisions and removal orders (Article 11-2)

"Member States shall provide, upon request, a written or oral translation of the main elements of the return decision and/or removal order in a language the third-country national may reasonably be supposed to understand."

24. The right of migrants facing removal to be informed in a language which they understand is guaranteed by Article 5 (2) of the ECHR[7]. It is essential that, in the process of return, migrants are fully informed about their rights; procedures; and, most of all, about possibilities to challenge the return decision as well as the removal order.

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[7] *" Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons of his arrest and the charge against him."*

25. In this respect, we regret that only the *"main elements of the return and/or removal order"* shall be translated. This leaves too much discretion to the authorities in charge of the translation to determine what needs to be translated. Moreover, the translation, according to the ECHR, shall be made in a language that migrants understand and not that they *"may reasonably be supposed to understand"*. Finally, the translation of the return and the removal order must be systematic and not *"upon request"* to respect the obligation laid down in the ECHR.

Judicial remedy (Article 12- 1 and 2)

"1. Member States shall ensure that the third-country national concerned has the right to an effective judicial remedy before a court or tribunal to appeal against or to seek review of a return decision and/or removal order.

2. The judicial remedy shall either have suspensive effect or comprise the right of the third country national to apply for the suspension of the enforcement of the return decision or removal order in which case the return decision or removal order shall be postponed until it is confirmed or is no longer subject to a remedy which has suspensive effects."

26. We are worried about the wording of the first paragraph which provides that the *"return decision and/or [the] removal order"* shall be subject to a judicial remedy. Both the return decision and the removal order must be challengeable before a Court.

27. Paragraph 2 of the Article does not impose upon Member States the obligation to guarantee an automatic suspensive effect of appeals against return and removal orders. Migrants facing removal may have to *"apply for the suspension of the enforcement of the return decision or removal order"*. In practice, the lack of information or the short delay between the issuing of the removal order and its application may lead to a situation in which migrants are removed before reaching the end of the appeal procedure. The suspensive effect of appeal against return or removal order should be automatic in order to allow migrants to stay in the territory of Member States before a final decision about their removal is taken.

Reference to the Directive on Minimum Standards for the Reception of Asylum Seekers (Article 13-1)

"Member States shall ensure that the conditions of stay of third-country nationals for whom the enforcement of a return decision has been postponed or who cannot be removed for the reasons referred to in Article 8 of this Directive are not less favourable than those set out in Articles 7 to 10, Article 15 and Articles 17 to 20 of Directive 2003/9/EC."

28. The Directive referred to in the Article is the EU Directive "laying down the minimum standards for the reception of asylum seekers". We welcome the reference to Article 8 (right to family unity), 9 (right to medical screening), 10 (schooling and education of minors), 15 (right to health care), and 17 to 20 (protection of vulnerable persons: minors, unaccompanied minors and victims of torture and violence) of this Directive when dealing with migrants who cannot be removed or for whom the enforcement of a return decision has been postponed.

29. However, we regret the reference made to Article 7 of the same Directive. Paragraph 3 of this Article states: *"When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law."* This may in practice lead to widespread detention. In the case of people who cannot be removed, detention is not a solution. It may moreover create a risk of indefinite

detention contrary to human rights standards. We repeat our concern that, in practice, such provision may lead to the systematic use of detention against migrants by Member States.

Temporary Custody (Article 14)

"1. Where there are serious grounds to believe that there is a risk of absconding and where it would not be sufficient to apply less coercive measures, such as regular reporting to the authorities, the deposit of a financial guarantee, the handing over of documents, an obligation to stay at a certain place or other measures, Member States shall keep under temporary custody a third country national, who is or will be subject of a removal order.
2. Temporary custody orders shall be issued by judicial authorities. In urgent case they may be issued by administrative authorities, in which case the temporary custody order shall be confirmed by judicial authorities within 72 hours from the beginning of the temporary custody.
3. Temporary custody orders shall be subject to review by judicial authorities at least once a month.
4. Temporary custody may be extended by judicial authorities for a maximum of 6 months."

30. We welcome the reference to alternative measures to detention in the first paragraph. However, we regret that the evaluation of the *"risk of absconding*" is left to the discretion of Member States. It may lead in practice to a free and automatic use of detention by national authorities. It is important to re-iterate that detention should be a measure of last resort that can only be used when it is proved to be necessary and the objective of detention is clearly defined to be necessary for the removal procedure.

31. We also welcome the pre-eminence given to judicial authorities which represent better guarantees of impartiality than administrative authorities. However, when the detention order is taken by a judicial body, it is important that the judicial body in charge of the review is different from the one which has issued the order, in order to ensure fair and transparent decision making.

32. Paragraph 4 is for us a deep matter of concern. Six months as a maximum duration of detention is too long for an administrative measure which applies to persons who are not criminals. Because of its gravity, detention should be as short as possible and should be limited to the time necessary to organise return with due diligence of the administration. We would like to recall that the provisions of the proposal are only minimum standards so that Member States which provide a shorter maximum duration for detention than 6 months should not change their legislation if the proposed EU directive passes[8].

Treatment under temporary custody (Article 15)

"1. Member States shall ensure that third country nationals under temporary custody are treated in human and dignified manner with respect for their fundamental rights and in compliance with international and national law. Upon request, they shall be allowed without delay to establish contact with legal representatives, family members and competent consular authorities as well as with relevant international and non-governmental organisations.
2. Temporary custody shall be carried out in specialised temporary custody facilities. Where a Member State cannot provide accommodation in a specialised detention facility and has to resort to prison accommodation, it shall ensure that third country nationals under temporary custody are permanently physically separated from ordinary prisoners.

[8] See Article 4 (3) of the EU Commission proposal: "*This Directive shall be without prejudice to the right of Member States to adopt or maintain provisions that are more favourable to the persons to whom it applies, insofar as these provisions are compatible with this directive."*

3. Particular attention shall be paid to the situation of vulnerable persons. Member States shall ensure that minors are not kept in temporary custody in common prison accommodation. Unaccompanied minors shall be separated from adults unless it is considered in the child's best interest not to do so
4. Member States shall ensure that international and non-governmental organisations have the possibility to visit temporary custody facilities in order to assess the adequacy of the temporary conditions. Such visits may be subjected to authorisation."

33. We welcome the first paragraph, especially the right to access without delay to legal assistance, family members, competent consular authorities and NGOs. However, these rights are only some among others and the reference to international law means that detention in EU Member States should also be in accordance with international human rights standards which guarantee the right of the detainee to be informed of the grounds of their detention[9], as well as their right to health care[10]. It is also worth recalling again that the provisions of the EU Commission proposal are minimum standards. EU Member States which provide better conditions of detention should not change their legislation when the directive is adopted[11].

34. Our deepest worry concerns the third paragraph. The proposal does not forbid the detention of minors. This is contrary to international human rights standards[12]. We also regret that the directive proposal does not exclude vulnerable persons from its scope.

35. If persons are detained, whether in special centres or otherwise, their conditions of detention should, at least, never be worse than those of ordinary criminals. Thus, freedom of communication, use of telephone, leisure activities and possibly participation in work activities need to be provided, particularly if the duration is more than 7 days.

36. Concerning the right to be visited in general (by NGOs, lawyers, family members, etc.), we ask that EU Member States provide legal grounds for the refusal or the withdrawal of permission to receive visits, and make sure that the person concerned is entitled to take proceedings by which the legality of the decision shall be decided by a court.

37. We welcome the emphasis laid on the necessity to detain irregular migrants in specialised facilities, even though we regret that the proposal does not make the carrying out of detention in specialized facilities an obligation to Member States. The possibility to accommodate migrants facing removal in normal prisons is left to the discretion of national authorities.

38. We welcome the role attributed to international organisations and NGOs. However, we once again ask the EU to set up a EU body which would monitor and periodically report on the development of national legislation on detention practices in the EU Member States[13].

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[9] See in particular Article 5 (2) of the European Convention on Human Rights (ECHR): *"Everyone who is arrested shall be informed promptly, in a language which he understands of the reasons of his arrest and the charge against him".*

[10] See in particular Article 3 of the ECHR, which prohibits "torture" and "inhuman and degrading treatment or punishment". In the *Cyprus v. Turkey* case (Commission report of 10 July 1976), the European Commission for Human Rights ruled that not providing medical assistance in detention centres constitutes inhuman treatment contrary to Article 3 of the ECHR.

[11] See Article 4 (2) of the EU Commission proposal.

[12] See in particular Article 5 (1) d of the ECHR, which only allows *"the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent authority."*

[13] See "Common principles on removal of irregular migrants and rejected asylum seekers"; Amnesty International, Caritas Europa, ECRE, Human Rights Watch, JRS-Europe, CCME, PICUM, Quaker Council for European Affairs, Save the Children, Cimade, Iglesia Evangelica Espanola, Federazione delle Chiese Evangeliche in Italia, SENSOA; 1st September 2005.

III. Conclusions

39. As Churches and Church-linked organisations we acknowledge the efforts to establish clear, transparent and fair legislation for the return and removal of third country nationals. We believe that this legislation can only be one element of an overall approach to EU migration and asylum policy. We urge that the human rights of migrants and refugees be duly respected in the Return Directive and be in line with international law.

40. In particular we call for the Return Directive to be: applicable in transit zones; to establish a clear preference for voluntary return; to promote the two-step procedure; to assure better protection for vulnerable people and prevention of detention of minors in accordance with international obligations; to abandon or at least restrict re-entry bans; to provide for the proper translation of documents and effective judicial remedy; to apply the same minimum standards to return and removal as to the reception of asylum seekers; to avoid detention and to guarantee fair treatment in detention.

41. We are convinced that the Return Directive should not only contribute to the fair management of migration in the EU but must also take the needs of refugees and migrants into account. Migrants and refugees are human beings who need clear perspectives for their life and the life of their families. Therefore we denounce the forced return of migrants and refugees who have lived in the EU for more than 5 years. Even if return does take place, the perspectives of the migrants and refugees should always be taken into account. As the EU Commissions green paper of 2002 outlined, any return needs to be accompanied by follow-up measures after return, as there is "little point in returning people to villages with no housing and employment prospects[14]" If EU legislation on return and removal does not consider the consequences of return and removal for the migrants directly affected, as well as the indirect consequences for the communities of migrants in the EU, it will engender considerably negative results for the integration of migrants and refugees into European society.

March 2006

[14] COM (2002) 175 final, p. 21.