

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT** **C**  
**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**



Constitutional Affairs

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# Readmission Policy in the European Union

STUDY





**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND**  
**CONSTITUTIONAL AFFAIRS**

**CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS**

# **Readmission Policy in the European Union**

## **STUDY**

### **Abstract**

This study sets out to explain the drivers shaping cooperative patterns on the readmission of unauthorised third-country nationals, whether at bilateral or EU level. It lays emphasis on the existence of a predominant bilateral readmission system in which EU agreements are inextricably embedded. As a result of the entry into force of the Treaty of Lisbon, the reinforced political control of the European Parliament calls for an analysis of this system and of its implications for human rights observance.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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## LIST OF ABBREVIATIONS

<b>ADS</b>	Approved Destination Status
<b>AVR</b>	Assisted Voluntary Return
<b>CIREFI</b>	Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration
<b>Coreper</b>	Permanent Representatives Committee
<b>ECRE</b>	European Council on Refugees and Exiles
<b>EP</b>	European Parliament
<b>EU</b>	European Union
<b>FRA</b>	European Agency for Fundamental Rights
<b>FRAN</b>	Frontex Risk Analysis Network
<b>Frontex</b>	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
<b>FSJ</b>	Freedom Security and Justice
<b>FYROM</b>	Former Yugoslav Republic of Macedonia
<b>GAM</b>	Global Approach to Migration
<b>IOM</b>	International Organization for Migration
<b>JRC</b>	Joint Readmission Committee
<b>NGO</b>	Non-Governmental Organization
<b>OJ</b>	Official Journal
<b>PACE</b>	Parliamentary Assembly of the Council of Europe
<b>RAU</b>	Risk Analysis Unit
<b>RCP</b>	Regional Consultative Process
<b>TC</b>	Third Country
<b>TCN</b>	Third-Country National

**TEC** Treaty establishing the European Community

**TEU** Treaty establishing the European Union

**TFEU** Treaty on the Functioning of the European Union

**TL** Treaty of Lisbon

**ToA** Treaty of Amsterdam

**UN** United Nations

**UNHCR** UN High Commissioner for Refugees



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## EXECUTIVE SUMMARY

### BACKGROUND

Readmission agreements have been used for a long time as a key means of combating illegal immigration, whether at bilateral, intergovernmental or EU level.

Since the entry into force of the Treaty of Lisbon, the European Parliament has acquired the power to give its own consent to the EU readmission agreement (Art 218 TFEU).

There can be no question that the independent exercise of this function depends on the Parliament's ability to be kept informed during the negotiation process to acquire accurate data and knowledge about the actual rationale for readmission agreements, their configuration, their utility, and their implications for human rights observance.

Moreover, it is the argument of this study that EU readmission agreements cannot be isolated from a predominantly bilateral system of cooperation on readmission in which most Member States are currently involved. Paying attention to this bilateral system is key to understanding the real challenges facing the development of a common readmission policy based on the fundamental rights principles that the Union seeks to advance in its external action.

### AIM

This study sets out to explain the drivers shaping cooperative patterns on the readmission of unauthorised third-country nationals, whether at bilateral or EU level. It lays emphasis on the existence of a predominant bilateral readmission system in which EU agreements are inextricably embedded. As a result of the entry into force of the Treaty of Lisbon, the reinforced political control of the European Parliament calls for an analysis of this system and of its implications on human rights observance.

### KEY FINDINGS

- The TFEU reaffirmed, in a more explicit and unquestionable manner, the **shared competence** between the Union and the Member States in the field of readmission.
- The shared competence between the Union and the Member States should be driven by the principle of **sincere cooperation**. The respect of this principle presupposes, however, three conditions: 1) **effective procedures of notification**, 2) **monitoring capacities**, and 3) an optimal **convergence of priorities and contingencies** between the Member States and the Union.
- An optimal degree of convergence of priorities and contingencies between the Union and the Member States has not been reached so far.
- The mandate of the Commission consists in **brokering an agreement**, based on standard reciprocal obligations, procedures and protection rules. The EU readmission agreement is subsequently implemented **at a bilateral level** between each Member State and the third country concerned.

- EU readmission agreements constitute a tiny share of the overall number of bilateral agreements linked to readmission. EU readmission agreements cannot be isolated from a broader **readmission system** based on resilient patterns of bilateral cooperation in the field of readmission.
- Member States continue to retain their right to conclude bilateral agreements with third countries. Patterns of cooperation have changed dramatically since the entry into force of the ToA.
- Readmission agreements **are rarely an end in itself** but rather one of the many ways to consolidate a broader bilateral cooperative framework, including other strategic (and perhaps more crucial) policy areas such as security, energy, trade, and counter-terrorism.
- France, Greece, Italy, Spain and the United Kingdom have been at the forefront of a new wave of **agreements linked to readmission**.
- **Flexibility** and the **drive for operability** have acquired mounting importance in the practice of readmission over the last fifteen years or so. Non-standard agreements are gaining momentum. Among others, they stem from the perceptible **empowerment of some source countries** as a result of their proactive involvement in the reinforced police control of the EU external borders.
- The **prioritisation of operable means** of implementation might **dilute** international norms and standards that had been viewed as being sound and secure. The drive for operability rests on a subtle denial whereby the enforceability of universal norms and standards on human rights is weakened without necessarily ignoring or denying their existence.
- **Mobility partnerships** are not EU readmission agreements, neither in their rationale nor in their form. However, they are no less arrangements aimed at addressing an array of issues, including readmission.
- There is **no harmonized approach to voluntary return** at an EU level. Some EU Member States have established in the framework of their cooperation on readmission a link with Assisted Voluntary Return (AVR) programmes.
- Available statistical data allow operability to be calculated, not its **implications** in terms of human rights observance. They address law-enforcement decisions as applied to the readmission of unauthorised aliens but not their **concrete effects on the fate of readmitted persons**.
- Private business concerns and large security corporations have been increasingly mobilized, arguably to minimize the costs (and visibility) of removals and to **maximize their operability**

## RECOMMENDATIONS

- Recommendation 1: The European Parliament should request the Commission to carry out a thorough and regularly updated inventory of all the bilateral agreements linked to readmission (whether standard or not) concluded by each EU Member State, at global level.
- Recommendation 2: The European Parliament should ask the Commission to report precisely on the monitoring of EU readmission agreements, during the implementing phase. Monitoring mechanisms should be reinforced in order to check whether readmission procedures comply with the terms of an EU readmission agreement, particularly in situations when no implementing protocol has been signed between a given Member State and a third country.
- Recommendation 3: The full and independent exercise of the EP's power to give its consent to readmission agreements will necessarily depend on the extent to which the European Parliament will have access to information relating to the negotiation phase as well as the implementation phase of EU readmission agreements. This might lend support to the argument that representatives of the European Parliament should be involved in Joint Readmission Committees (JRCs).
- Recommendation 4: In accordance with the principle of sincere cooperation, and with due respect to the Treaties, Member States should inform the Commission, the Council and the European Parliament about the extent to which grafting readmission on to other strategic policy areas is consistent with the "fulfilment of their obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" (Art. 4 (3), TEU).
- Recommendation 5: The European Parliament should ask the European Agency for Fundamental Rights (FRA) to carry out a thorough study on the practice of "premature returns" and on its impact on the respect for fundamental rights and refugee protection standards. The study will apply to all the third countries with which the EU is intensifying its dialogue in the field of migration management, including those with which EU readmission agreements are being negotiated or have been concluded.
- Recommendation 6: The European Parliament should request the Commission to report clearly on the type of dialogue on migration management that is to be intensified. The Commission should report on how the respect for fundamental rights and refugee standards is concretely translated in the geographical priorities of the EU external action.
- Recommendation 7: Given the full incorporation of the Charter in the Treaties, the European Parliament should call for an updated list of binding criteria that have to be respected to identify third countries with which new EU readmission agreements can be negotiated. The need for an effective asylum system in the third country, based on the obligations under the 1951 Refugee Convention, constitutes one key criterion that monitors the consequences of the drive for operability.
- Recommendation 8: A comprehensive assessment of AVR programmes on the safety and conditions of all "voluntary returnees" in third countries of return should be undertaken by the European Commission. This assessment is of paramount

importance to lay emphasis on the extent to which AVR programmes may or may not have external human rights implications, after return to a third country.

- Recommendation 9: The European Parliament should call on the Commission to adopt an evaluation process of EU readmission agreements that fully reflects their manifold implications, not only in terms of operability, but also in terms of respect for the Union's fundamental values. The FRA should be mobilised to identify robust and measurable indicators allowing the fate of readmitted persons to be evaluated.
- Recommendation 10: The European Parliament should call on the Commission to foresee the possibility of assessing a sample of bilateral readmission agreements. Given the predominance of a bilateral readmission system in which most EU Member States are involved, this initiative would shed light on the rationales, configuration and implications for human rights observance of bilateral patterns of cooperation on readmission.
- Recommendation 11: The European Parliament should undertake a thorough examination of the outsourcing of migration control functions to private contractors in all the EU Member States. This monitoring is of paramount importance to assess the actual magnitude and rationale for outsourcing to private security companies as well as its implications for public accountability and for the observance of unauthorised aliens' fundamental rights, particularly those who are offered an order to leave.

## 1. INTRODUCTION

Readmission agreements have been used for a long time as a key means of combating illegal immigration, whether at bilateral, intergovernmental or EU level.

Since the entry into force of the Treaty of Lisbon, the European Parliament has acquired enhanced power to give its consent to the EU readmission agreements (Art. 218 TFUE).

There can be no question that the independent exercise of these functions, depends on the Parliament ability to be kept better informed during the negotiation process, to acquire accurate data and knowledge about the actual rationale for readmission agreements, their configuration, their utility and their implications for human rights observance.

Among many other priorities, the Stockholm programme foresees the need for an evaluation process of EU readmission agreements that are being implemented and negotiated, with a view to ensuring that "the objectives of the EU's efforts on readmission should add value and increase the efficiency of return policies, including existing bilateral agreements and practices" (European Council 2009: 67).

It is the argument of this study that EU readmission agreements cannot be isolated from a predominantly bilateral system of cooperation on readmission in which most Member States are currently involved. Paying attention to this dominant bilateral system is key to understanding the real challenges facing the development of a common EU readmission policy based on the fundamental rights principles<sup>1</sup> that the Union seeks to advance in its external action.

This study sets out to explore the domain where the cooperation on readmission is located while focusing on the existence of broader patterns of interaction that may impact on the ways in which the EU has (re)configured its cooperation. It also highlights the gaps that may exist, under some circumstances, between reciprocal obligations and effectiveness, as well as between the drive for operability and the respect for fundamental rights.

In sum, the effective and independent exercise of a reinforced political control on decision-making calls for an analysis of how and why the "European readmission system" has materialized so far and which major forces have driven policy options, at bilateral and EU levels.

### 1.1. Premises

Just like deportation, readmission is a form of expulsion if we assume that "the word 'expulsion' is commonly used to describe that exercise of state power which secures the removal, either 'voluntarily,' under threat of forcible removal, or forcibly, of an alien from the territory of a state" (Goodwin-Gill 1978, p. 201, cited in Walters 2002). Readmission has become part and parcel of the immigration control systems consolidated by countries of origin, transit, and destination. Technically, readmission as an administrative procedure requires cooperation at the bilateral level with the country to which the readmitted or removed persons are to be relocated. In substance, readmission permeates both domestic

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\* The author wishes to express his gratitude to the anonymous respondents for their time and availability during interviews. Also, special thanks go to Sergio Carrera, Michele Cavinato, Alejandro Eggenchwiler, Nicola Hargreaves, Mercedes Jimenez, Neva Ozturk, Adriano Silvestri, Piyasiri Wickramasekara and Tamar Zurabishvili.

<sup>1</sup> See Art. 21(1) TEU.

and foreign affairs. Practically, it is aimed at the swift removal of aliens who are viewed as being unauthorized. These include not only the nationals of the contracting parties to an agreement, but also third-country nationals who transited through the territory of the contracting parties.

The practice of readmission, viewed as a form of expulsion is, in its various forms, perhaps as old as the exercise, whether soft or violent, of state sovereignty and interventionism designed to regulate the entry and exit of aliens. In the early 20<sup>th</sup> century, the principle of readmission, based on the obligation under customary international law to take back one's own nationals who are found in unlawful conditions, was expressed in various bilateral agreements in Western Europe, even if, as Kay Hailbronner has stressed, "representatives of some states voiced reservations about an absolute duty to reaccept [their nationals]" (Hailbronner, 1997, p. 7). Additionally, Aristide Zolberg shows that, as early as the 19<sup>th</sup> century, in the United States, "[readmission] did not constitute a punishment but was merely an administrative device for returning unwelcome and undesirable aliens to their own countries".<sup>2</sup> This assumption holds true when it comes to explaining readmission as a form of control exerted by national law-enforcement agencies or administrations to categorize aliens and citizens alike.

However, as shown in this study addressed to the European Parliament, today's cooperation on readmission involves more than an "absolute duty" under customary international law or a mere "administrative device".

## 2. RECIPROCAL OBLIGATIONS, PRINCIPLES AND COMPETENCE

Readmission agreements are concluded to facilitate the removal of "persons who do not or no longer fulfil the conditions of entry to, presence in or residence in the requesting state". (European Commission, 2002, p. 26). As mentioned before, there exists under customary international law an obligation to readmit one's own nationals. Bilateral agreements aimed at the readmission of the nationals of the contracting parties are concluded to *facilitate* this obligation.<sup>3</sup> In other words, they should not be a *sine qua non* when it comes to dealing specifically with the nationals of the contracting parties. In practice, however, various European Union Member States have concluded bilateral agreements addressing exclusively the readmission of the nationals of the contracting parties. These include, for instance, the agreements concluded between Germany and Vietnam in 1995, Italy and Algeria in 2000, or more recently between the United Kingdom and Algeria in 2006. Arguably, such agreements reaffirm an obligation which is recognised under customary international law.

By contrast, the readmission of third-country nationals, i.e., nationals other than those of the contracting parties, does not constitute an obligation under customary international law (Roig and Huddleston 2007; Charles 2007; Noll 2005). The explicit reference to the readmission of both national and third-country nationals broadens the cooperative scope of bilateral readmission agreements while arguably justifying their rationale and reciprocal

<sup>2</sup> Aristide Zolberg (2006, pp. 225-226) refers to "deportation", which is mainly used in the parlance of the US administration.

<sup>3</sup> " The obligation for states to readmit their citizens is clear in international law. Article 13 of the 1948 UN Universal Declaration of Human Rights enshrines the right to return to one's own country, the corollary of which must be the obligation of the state to allow one to do so. Readmission agreements do not establish the state's obligation to readmit its citizens, but merely facilitate this process" (Roig and Huddleston 2007, p. 364), see also Noll (2005).

obligations. All the EU readmission agreements that have been concluded so far apply to both nationals and third-country nationals.

## 2.1. EU readmission agreements

Since the adoption of the Treaty of Amsterdam (ToA), which empowered the European Commission to negotiate and conclude EU readmission agreements with third countries, eighteen negotiating mandates were granted by the Council. Today, negotiations at EU level have led to the entry into force of eleven readmission agreements (Albania, Bosnia and Herzegovina, FYROM, Hong Kong, Macao, Moldova, Montenegro, Russia, Serbia, Sri Lanka, and Ukraine) and to the signature of an agreement with Pakistan.<sup>4</sup>

To orient its own strategy, the European Commission has adopted “a standard approach in negotiating readmission with third countries [by seeking] to achieve final texts that have as many common features as possible” (Trauner and Kruse, 2008, p. 24). This means that a kind of model has been used and readapted to each bargaining process specifying the reciprocal obligations that each contracting party commits to respecting.

**Table 1. List of EU readmission agreements**

Third country	Mandate	Date of signature	Entry into force
Albania	November 2002	14 April 2005	1 May 2006
Algeria	November 2002		
Bosnia and Herzegovina	November 2006	18 September 2007	1 January 2008
Cape Verde	June 2009		
China*	November 2002		
FYROM	November 2006	18 September 2007	1 January 2008
Georgia	September 2008		
Hong Kong	April 2001	27 November 2002	1 March 2004
Macao	April 2001	13 October 2003	1 June 2004
Moldova	December 2006	10 October 2007	1 January 2008
Montenegro	November 2006	18 September 2007	1 January 2008
Morocco	September 2000		
Pakistan	September 2000	26 October 2009	
Russia	September 2000	25 May 2006	1 June 2007
Serbia	November 2006	18 September 2007	1 January 2008
Sri Lanka	September 2000	4 June 2004	1 May 2005
Turkey	November 2002		
Ukraine	June 2002	18 June 2007	1 January 2008

\* China signed an Approved Destination Status (ADS) Agreement in 2004. This accord is not an EU readmission agreement. Rather, it is a memorandum of understanding facilitating the entry of Chinese

<sup>4</sup> Decisions concerning the conclusion of European readmission agreements with some listed third countries are available online. For third countries in the Western Balkans see: [http://europa.eu/legislation\\_summaries/enlargement/western\\_balkans/l14562\\_en.htm](http://europa.eu/legislation_summaries/enlargement/western_balkans/l14562_en.htm). For third countries in Eastern Europe (except Russia), see: [http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l14163\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l14163_en.htm). For Hong Kong and Macao, see [http://ec.europa.eu/home-affairs/doc\\_centre/immigration/immigration\\_illegal\\_en.htm](http://ec.europa.eu/home-affairs/doc_centre/immigration/immigration_illegal_en.htm)



tourists into EU Member States. Article 5 of the memorandum includes a series of provisions requiring China to take back its nationals who overstay and to cooperate on their readmission. Formal negotiations on an EU readmission agreement have not started yet.

This model or specimen was recommended in November 1994 by the Council of the European Union to the Member States in their bilateral and multilateral negotiations with third countries on the conclusion of readmission agreements<sup>5</sup>. Among others, the thirteen articles of the document mentioned:

- The obligation of the requested contracting party, upon application by the requesting party, to issue, without delay, the travel documents needed to expel their own nationals;
- The obligation to readmit third-country nationals, without any formality, who do not or no longer meet the conditions for entry or residence on the territory of the contracting parties;
- The time limits for replying to a readmission request. These were fixed to a maximum of 15 days;
- The time limits for taking charge of persons whose readmission has been agreed. These were fixed to a maximum of one month;
- The time limits for submitting an application for readmission. A readmission obligation might lapse if the application is submitted more than a year after a contracting party has noted the illegal entry or stay of a third-country national on its territory;
- The fact that the costs of transportation up to the border of the requested party will be borne by the requesting party;
- The creation of a committee of experts (i.e., a joint readmission committee);
- The provisions of the agreement will comply with the obligations of the contracting parties arising, among others, from the 1951 refugee convention and its 1967 protocol, international conventions on extradition and transit, the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms;
- The possibility for the contracting parties of suspending or terminating the agreement on such "important grounds" as public health, state security or public order.

Having recommended a model of agreement on readmission, the next step for the Council of the European Union consisted of recommending the "guiding principles"<sup>6</sup> for the drafting of protocols aimed at implementing the readmission agreements. These principles were proposed in July 1995. They included procedures of readmission at the entry ports (so-called simplified or accelerated procedures) and the maximum time limit (two days) for expelling an unauthorised person apprehended in a border area. Beyond that time limit, the so-called normal procedure applies and a formal readmission application must be sent in writing to the requested party. "Answers [to readmission requests] should be compulsory" and replied to within 15 days. The guiding principles also listed an array of means for identifying and presuming the nationality of persons to be readmitted. An exhaustive list of

<sup>5</sup> OJ C 274, 19 September 1996, pp. 20-24.

<sup>6</sup> OJ C 274, 19 September 1996, pp. 25-33.

means of proofs or presumptions of identity was presented; it ranged from identity cards (even if provisional or temporary), consular registration cards, to statements by witnesses and the language of the person to be readmitted.

The reference to the abovementioned recommended model of readmission agreement and their related implementing protocols is important because these documents clearly reflected the attempt of the EU to consolidate a Common asylum and migration policy which was later enshrined in the conclusions of the 1999 Tampere special meeting of the European Council. At the same time, they implicitly translated the awareness of the EU institutions that Member States' bilateral patterns of cooperation on readmission with third countries differed noticeably. Finally, they foretold the reinforced powers of the Community in the field of readmission which materialised through Art. 63(3)(b) of the Treaty establishing the European Community (TEC):

"The Council [...] shall [...] adopt [...] measures on immigration policy within the following areas: [...] illegal immigration and illegal residence, including repatriation of illegal residents".

## **2.2. A reaffirmed shared competence**

Art. 63(3)(b) of the TEC marked a watershed in the recognition of a Community competence regarding measures aimed at addressing illegal migration and illegal residence; readmission (though not explicitly mentioned in the TEC) was considered as being part and parcel of these measures. Nils Coleman (2009), in his comprehensive study on Community readmission agreements, clearly explained that, following the adoption of the Treaty of Amsterdam (ToA), the issue of competence was subjected to controversy between the Member States and the European Commission. The Commission "claimed exclusive Community competence to negotiate and conclude readmission agreements" (Coleman, 2009, p. 75) whereas the Member States and the Council viewed Art. 63(3)(b) of the TEC as the expression of a shared competence. In May 1999, the Justice and Home Affairs Council meeting set out to solve the controversy, as Coleman clarified:

"The Council made sure to link Community readmission agreements to the Community objective of repatriation, sufficiently to safeguard a legal basis in Article 63(3)(b), but not to the degree of resulting in exclusive competence. In the political assessment of the Council, the link between Community readmission agreements and the objectives of repatriation of unauthorised immigrants was in general not considered 'indissoluble', and the competence to conclude readmission agreements therefore shared. The Member States hereby retained the right to conclude agreements with third countries on a bilateral basis, implicitly accepting [...] the risk of distortions within the internal market in light of the free movement of persons" (Coleman, 2009, pp. 78-79).

Today, there can be no question that Member States have continued to retain their right to conclude bilateral agreements with third countries, given the expanding cobweb of bilateral agreements linked to readmission in which most Member States are currently involved. However, as analysed in the next chapters, the patterns of cooperation have changed dramatically since the entry into force of the ToA, rendering the drive for europeanization much complicated (Roots, 2009).

Admittedly, the need for Community competence in the field of illegal migration and illegal residence, including readmission, constitutes a logical step given the overriding objective to consolidate a Common asylum and migration policy. Concomitantly, Member States

presumably expected that the EU could exert, through this (shared) competence, a stronger leverage on third countries “to cope with their readmission obligations towards the Union *and* the Member States” [italics added].<sup>7</sup>

Whereas the ToA established the Community competence, the entry into force of the Treaty of Lisbon (TL) in December 2009 introduced several amendments that, to some extent, reaffirmed in a more explicit and unquestionable manner the shared competence of the Union in the field of readmission. Art. 3 and 4 of the Treaty on the Functioning of the European Union (TFEU) respectively list the areas of exclusive and shared competences. ‘Freedom, security and justice’ (FSJ) constitutes an area of shared competence in Art. 4 (TFEU) and readmission logically belongs to this area. Art. 79, which amended Art. 63(3) of the TEC, clarifies in points 2(c) and 3 the competence of the Union in the field of readmission:

- [...] The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
- [...] illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
- [...]The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

### 2.3. Sincere cooperation

Admittedly, the clear existence of a Union competence in the above areas is congruent with the reinforced integration of migration issues in the EU external relations with third countries. It also reflects the commitment to consolidating the Global Approach to Migration (GAM) where the cooperation on readmission constitutes a key element. The attainment of this major objective continues to be based on the principle of “sincere cooperation” between the Union and the Member States. Art. 4(3) of the Treaty establishing the European Union (TEU) – which replaced Art. 10 of the TEC – stipulates that the Member States shall “refrain from any measure which could jeopardise the attainment of the Union’s objectives”. Just like former Art. 10 of the TEC, Art. 4(3) of the TEU allows Member States to share their competence in the field of readmission “only regarding third countries with which the Commission is not or not yet in the process of establishing readmission relations on behalf of the [Union]”, to rephrase Nils Coleman (2009, p. 83).

Art. 2(2) of the TFEU seems to confirm this interpretation when stating that:

The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

In other words, Member States will not exercise their competence on readmission when the Union is negotiating or has concluded an EU readmission agreement with a *given* third country. This does not mean, however, that Member States will not exercise their competence on readmission as a whole. It is often mistakenly understood that the mandate

<sup>7</sup> As stated in the conclusions of the special meeting of the European Council held in Tampere on

granted to the European Commission by the Council to negotiate and conclude an EU readmission agreement would also cover the implementation phase of the agreement. To be clear, the mandate of the Commission consists in *brokering* an agreement, based on standard reciprocal obligations, procedures and protection rules. The EU readmission agreement is subsequently implemented at a bilateral level between each Member State and the concerned third country.<sup>8</sup> Protocol 25 annexed to the TEU and the TFEU clearly stipulates that the Union's competence is limited in its scope:

When the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.

In theory, the existence of a shared competence between the Union and the Member States in the field of readmission should not be problematic, as long as it is driven by the principle of sincere cooperation, as mentioned before, and that effective mechanisms allow the infringement of this principle to be first detected and then corrected. It is worth recalling that, in the scope of an EU readmission agreement concluded with a third country, Member States have to comply with the general principles of EU law (legal certainty, legitimate expectations, effective remedies, proportionality and fundamental rights). In practice, however, this presupposes three preconditions.

#### 2.3.1. Procedures of notifications

The first one refers to notification procedures. The Member States would need to notify, on a regular basis, the Commission, the Council and the European Parliament their planned negotiations or talks on readmission with third countries. They would also have to notify their current bilateral agreements linked to readmission. As explained in the subsequent chapters, this notification procedure would necessarily address the variety of cooperative patterns linked to readmission (e.g., standard readmission agreements, exchanges of letters, pacts, memoranda of understanding, framework agreements) that several Member States have concluded, over the last fifteen years or so, to ensure the operability of their cooperation with third countries.

- Recommendation 1: The European Parliament should request the Commission to carry out a thorough and regularly updated inventory of all the bilateral agreements linked to readmission (whether standard or not) concluded by each EU Member State, at global level.

#### 2.3.2. Monitoring capacities

The second pertains to monitoring capacities. Monitoring mechanisms should be strengthened to understand how EU readmission agreements are bilaterally translated by each Member State during the implementation process. To be sure, each EU readmission agreement foresees the creation of a Joint Readmission Committee (JRC) comprising

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<sup>8</sup> 15-16 October 1999 (see Point 26) [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm). This point was made clear in April 2006 by Karel Kovanda, Special Representative for Readmission Policies at DG Relex, during an interview made by Euroasylum: "EC readmission policies and agreements fall under the external dimension. They set out reciprocal obligations binding the Community on the one hand and the partner country on the other hand. But once an agreement is negotiated, the Community responsibility is over. Its day-to-day implementation, the actual decision about sending a person back and the actual operation it involves – all this is entirely within the competence of our Member States." <http://www.eurasylum.org/Portal/April2006.htm>

representatives of the European Commission (EC), assisted by experts from the Member States, and representatives of the third country. Actually, the JRC is in charge of promoting regular exchanges among the individual Member States and the third country on issues regarding the application and interpretation of the EU agreement. Member States may conclude bilateral implementing protocols stating, among others, the competent authorities that receive and process readmission applications in accordance with the time limits set out in the agreement, the border crossing points, the role of escorting officers, the means of identification, the need to notify the JRC of the bilateral implementing protocols and any ensuing amendments for their entry into force. This would mean that the JRC possesses, to some extent, the tools to monitor whether the Member States and the third country abide by the terms of the EU readmission agreement.

However, experience has shown that Member States may implement the EU readmission agreements concluded with some third countries without necessarily having a bilateral implementing protocol. For instance, at the time of writing (August 2010), most readmission applications addressed to Moldova in 2008 and 2009, in the framework of its EU readmission agreement, originated in France and the Czech Republic, which do not have any implementing protocol with Moldova.<sup>9</sup> Similarly, most of the readmission applications addressed to Serbia in 2009 came from Germany and Sweden, which have no implementing protocol.<sup>10</sup> The same applies to the Republic of Macedonia which has no implementing protocol with Germany whereas most of the readmission applications addressed to Moldova in 2008 and 2009 came from this EU Member State.<sup>11</sup> Arguably, the main factor explaining the absence of bilateral implementing protocols may lie in the existence of the bilateral readmission agreements that all the EU Member States cited above had concluded before the European Commission was mandated to negotiate an EU readmission agreement with Moldova, the Republic of Macedonia and Serbia respectively. The existence of such bilateral agreements on readmission may have been viewed by the contracting parties as a kind of established *modus operandi* on which they could capitalise to implement the EU readmission agreement, even without an implementing protocol or the prospect of signing one.

A standard provision mentioned in almost all the EU readmission agreements states that they take precedence over any bilateral treaties or arrangements on readmission "in so far as the provisions of the latter are incompatible with those of this Agreement [i.e., the EU readmission agreement]." It has to be said that the issue of compatibility of existing bilateral arrangements or agreements on readmission (whether standard or not) has not been dealt with consistently in all EU readmission agreements (Coleman, 2009). Moreover, it is argued that "according to this provision [on compatibility], the Member States may continue to apply earlier concluded agreements or arrangements with the same [third] country insofar as these are compatible with the Community [or EU] agreement" (Coleman, 2009, p. 108).

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<sup>9</sup> At the time of writing (August 2010), Moldova has signed implementing protocols with Estonia, Romania, and Slovakia. It is currently negotiating implementing protocols with all the other EU Member States.

<sup>10</sup> So far, Serbia has signed implementing protocols with Slovenia, Italy, France, Hungary and more recently with Austria, the Benelux and Malta. Negotiations with Estonia, Slovakia, Poland and Latvia are underway.

<sup>11</sup> To date, the Republic of Macedonia has signed bilateral implementing protocols with Estonia and Austria. Negotiations with Germany and The Netherlands are being finalized at the time of writing (August 2010). Negotiations with Slovakia, Italy and Hungary are still underway. Draft protocols have been sent to all the EU Member States on the initiative of Macedonia.

Arguably, this assumption continues to arouse controversy. EU officials would certainly argue against it whereas representatives from some EU Member States would probably interpret the wording of the compatibility provision as being respectful of pre-existing bilateral efforts to cooperate on readmission with third countries and that implementation is and remains bilateral.<sup>12</sup> Beyond this controversy, the capacity to assess the abovementioned compatibility of bilateral treaties would necessarily imply that the JRC and the European Commission, by the same token, should be informed about the scope and provisions of all the existing bilateral arrangements or agreements on readmission that a given Member State has concluded with a third country involved in an EU readmission agreement. Adding value to the action of the Member States would logically require the knowledge and understanding of existing bilateral patterns of cooperation on readmission. Additionally, this would also imply that the Commission has the capacity to monitor, in the framework of JRCs, Member States' modalities of implementation. In this respect, when asked whether the Commission has the effective capacity to monitor the concrete implementation of EU readmission agreements, an official from the European Commission replied:

We do have already the tools. The problem is how you strike a balance between on-going negotiations, for which you are in need to have the support of your Member States, and how [EU readmission] agreements are [actually] implemented [...] What you don't want to do is to make people's life more difficult than anything else. We are not doing policy in order to make policy. We are doing it because we are convinced we can bring added value and help the Member States. Now, we don't want to render the whole process more difficult. Now, having said this, there are some rules that need to be respected and those rules will be reminded if they are not respected.<sup>13</sup>

There can be no question that monitoring mechanisms are key to understanding how the terms of an EU readmission agreement have been concretely translated, if not reconfigured, in the course of the implementation. This refers not only to procedures *per se*, but also to the respect of the fundamental rights of the persons to be readmitted with which each Member State must comply, since the Charter of Fundamental Rights of the European Union (henceforth the Charter) has become part of the core legislation of the EU. Since the entry into force of the Treaty of Lisbon (TL), such mechanisms may be reinforced, at least before the implementing phase of the EU readmission agreement.

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<sup>12</sup> With reference to interpretation, an interviewed Spanish official made clear that EU readmission agreements supersede bilateral agreements. However, "there is a clause in the EU readmission agreements RA, which states that established bilateral practices can be kept if they work properly." Anonymous interview made on 16 July 2010.

<sup>13</sup> Anonymous interview conducted with a member of the European Commission, 19 July 2010.

- Recommendation 2: The European Parliament should ask the Commission to report precisely on the monitoring of EU readmission agreements, during the implementing phase. Monitoring mechanisms should be reinforced in order to check whether readmission procedures comply with the terms of an EU readmission agreement, particularly in situations when no implementing protocol has been signed between a given Member State and a third country.

In Title V of the TFEU (“International Agreements”), Art. 218(10) reads that “the European Parliament shall be immediately and fully informed *at all stages* of the procedure [i.e., from the opening of negotiations to the conclusion of an international agreement] [italics added]”. Furthermore, Art. 218(11) of the TFEU stipulates that the European Parliament may “obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties”. Hence, the right for full information *at all stages* of the procedure, plus the application of the consent procedure (or co-decision procedure), added to the possibility of resorting to the Court of Justice of the European Union to assess compatibility with the Treaties (including the Charter) reflect the EP’s upgraded role in the decisions and talks on readmission agreements before their final conclusion.

Additionally, in accordance with Art. 14(1) of the TEU, the European Parliament will, “jointly with the Council, exercise legislative and budgetary functions”. Among others, these functions include a political control on the spending stemming from international agreements. Consequently, with the assistance of the Court of Auditors (Art. 287(4) of the TFEU), the European Parliament will perform this joint responsibility which plausibly requires the collection of data and information about the ways in which EU funds, allocated to support the implementation by the Member States of the removals carried out in the framework of an EU readmission agreement, have been spent to understand whether they precisely comply with the terms of the agreement and with the Treaties.

- Recommendation 3: The full and independent exercise of the EP’s power to give its consent to readmission agreements will necessarily depend on the extent to which the European Parliament will have access to information relating to the negotiation phase, as well as the implementing phase of EU readmission agreements. This might lend support to the argument that representatives of the European Parliament should be involved in Joint Readmission Committees (JRCs).

### 2.3.3. Convergence of contingencies and priorities

In the above, we have seen that the principle of sincere cooperation requires and justifies at the same time the need for regular notification procedures and monitoring mechanisms at various stages. There exists, however, a third precondition which needs to be considered. It refers to convergence of contingencies and priorities between the Member States and the Union. Contingencies pertain to the factors and conditions shaping the cooperation on readmission, whereas priorities refer to the drivers of cooperation. When convergence is optimal, Member States would entrust or be fully supportive of the Union in the field of readmission while recognising the added value and effectiveness of its action.

However, in practice, this optimal degree of convergence has not been reached so far, despite the gradual consolidation of a Common immigration and asylum policy. It is

important to recall that, whereas EU readmission agreements, once negotiated and concluded, take precedence over any bilateral agreement or arrangement with a given third country, they continue to constitute a tiny share of the overall number of bilateral agreements linked to readmission that have been concluded, at a bilateral level, by the Member States with third countries.

Given the objective predominance of bilateral patterns of cooperation on readmission, one is entitled to understand whether the drive for europeanization will change this statement of fact and, above all, the extent to which Member States' contingencies and priorities in the field of readmission have impacted on those of the Union.

Admittedly, EU readmission agreements cannot be isolated from this broader and resilient framework of bilateral cooperation in the field of readmission. The next chapter sets out to explain how cooperation at bilateral level has been configured while focusing on the main drivers and factors that have shaped bilateral patterns of cooperation on readmission. It also investigates whether the rationale for bilateral patterns of cooperation linked to readmission has shaped the EU approach to readmission enshrined in the Global Approach to Migration (GAM).

### **3. A PREDOMINANT BILATERAL DIMENSION**

Member States differ markedly in terms of cooperation on readmission, probably owing to the types of flows affecting their respective national territories. At the same time, however, the ways in which states codify their interaction over time play a crucial role in shaping their patterns of cooperation on readmission<sup>14</sup>.

This assumption implies that state-to-state interaction, in its broadest sense, impacts on the nature of cooperative patterns and on states' responsiveness to uncertainties. Sometimes, they may reciprocally commit themselves to cooperating on readmission by concluding a standard readmission agreement because both contracting parties view the formalisation as being valuable to each other's interests. Such agreements are standard in the sense that they substantially reflect the provisions and structure of the specimen recommended in 1994 by the Council of the European Union. This specimen is mentioned in Chapter 2.

These standard readmission agreements have been subject to various studies (Hailbronner, 1997; Nascimbene, 2001; Noll, 2005; Arnarsson, 2007) which, for example, stressed the reciprocal obligations contained in a readmission agreement as well as the procedures that need to be respected to identify undocumented persons (unauthorized migrants, rejected asylum seekers, stateless persons, and unaccompanied minors) to subsequently remove them out of the territory of a destination country.

When concluding a standard readmission agreement, the contracting parties agree to carry out removal procedures without unnecessary formalities and within reasonable time limits, with due respect of their duties under their national legislation and the international agreements on human rights and the protection of the status of refugees, in accordance with the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 protocol, the 1966 International Covenant on Civil and Political Rights, the 1984 UN Convention against torture, and more recently the 2000 European Charter on Fundamental Rights. All of these internationally recognized instruments oblige states not to expel persons (whether

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<sup>14</sup> Parts of the text draw on the introduction of a recent volume: Cassarino (2010).



migrants or not) to countries and territories where their safety, lives or freedom would be threatened in any manner whatsoever.

Despite the letter of these agreements, various human rights organizations and associations in Europe and abroad have repeatedly denounced the lack of transparency that surrounds the implementation of readmission agreements and removal operations. Such public denunciations have not only questioned the compliance with the obligations and principles contained in bilateral readmission agreements, but also have led to growing public concerns regarding respect for the rights and safety of the expelled persons.

In fact, it has to be said that the willingness of a country of origin to conclude a readmission agreement does not mean that it has the legal institutional and structural capacity to deal with the removal of its nationals, let alone the removal of foreign nationals and the protection of their rights. Nor does it mean that the agreement will be effectively or fully implemented in the long run, for it involves two contracting parties that do not necessarily share the same interest in the bilateral cooperation on readmission. Nor do they face the same implications, as previously stated. These considerations are important to show that the conclusion of a readmission agreement is motivated by expected benefits which are unequally perceived by the contracting parties, on the one hand, and that the agreement's implementation is based on a fragile balance between the concrete benefits and costs attached to it, on the other.

### **3.1. The fragile balance between costs and benefits**

Whereas a destination country has a vested interest in concluding readmission agreements to facilitate the removal of unauthorised migrants, the interest of a country of origin may be less evident, above all if its economy remains dependent on the revenues of its (legal and unauthorised) expatriates living abroad, or when migration continues to be viewed as a safety valve to relieve pressure on domestic unemployment. This statement is particularly true regarding the bilateral negotiations on readmission between some EU Member States and countries in the South Mediterranean and Africa where economic and political differentials are significant. Special trade concessions, preferential entry quotas for economic migrants, technical cooperation and assistance, increased development aid and short-term visa exemption have been the most common incentives used by the EU-27 Member States to induce countries in the South Mediterranean and Africa to cooperate on readmission.

At EU level, the entry visa facilitations played a major role in the negotiations of some of the agreements concluded so far.

However, experience has shown on various occasions that compensatory measures — which constitute the most commonly used form of incentive — may not always induce a third country to conclude a standard readmission agreement. Moreover, even when a standard agreement is concluded, the high costs stemming from the concrete implementation of the agreement make the extent of the actual cooperation highly uncertain. For a country of origin, such costs are not just financial. Nor do the costs stem only from the structural institutional and legal reforms needed to implement the cooperation. They also lie in the unpopularity of the standard readmission agreement and in the fact that its full implementation might have a negative impact on the relationship between the state and society in a country of origin.

### 3.2. Grafting readmission on to other policy areas

If we follow the conventional wisdom, we may believe that states negotiate and conclude readmission agreements as an end in itself. However, readmission agreements are rarely an end in itself but rather one of the many ways to consolidate a broader bilateral cooperative framework, including other strategic (and perhaps more crucial) policy areas such as security, energy, trade, and counter-terrorism. Often, the decision to cooperate on readmission results from a form of rapprochement that shapes the intensity of the *quid pro quo*.

There are various examples which support this argument. In February 1992, Morocco and Spain signed a readmission agreement in the wake of a reconciliation process which materialised following the signing of the Treaty of Good-neighbourliness and Friendly Cooperation on 4 July 1991. Morocco's acceptance to conclude this agreement was motivated by its ambition to acquire a special status in its political and economic relationships with the European Union (Mrabet, 2003). Likewise, in January 2007 Italy and Egypt concluded a readmission agreement as a result of reinforced bilateral exchanges between the two countries. Such reinforced exchanges have allowed Egypt to benefit from a bilateral debt swap agreement, as well as from trade concessions for its agricultural produce and, additionally, temporary entry quotas for Egyptian nationals in Italy. Importantly, the rapprochement between Italy and Egypt was key to integrating the latter into the G14<sup>15</sup> while acquiring enhanced regime legitimacy at the international level. Similarly, the bilateral agreement on the circulation of persons and readmission concluded in July 2006 between the United Kingdom and Algeria, while still not in force, is not an exception to the rule. This agreement, limited to the removal of the nationals of the contracting parties, took place in the context of a whole round of negotiations, including such strategic issues as energy security, the fight against terrorism, and police cooperation. These strategic issues have become top priorities in the bilateral relations between the United Kingdom and Algeria; particularly following the July 2005 London bombings and the ensuing G8 meeting in Gleneagles that Algeria also attended (Cassarino, 2007).

These few examples are important to show that the issue of readmission weaves its way through various policy areas. It has been, as it were, grafted on to other issues of 'high politics', such as the fight against international terrorism, energy security, the reconciliation process, reinforced border controls, special trade concessions, and, last but not least, the search for regime legitimacy and strategic alliances. It is this whole bilateral cooperative framework that secures a minimum operability in the cooperation on readmission more than the 'reciprocal' and binding obligations contained in a standard readmission agreement. EU policy-makers know that the reciprocal obligations contained in a standard readmission agreement are too asymmetrical to secure its concrete implementation in the long run. They also know that grafting the cooperation on readmission on to other policy areas may compensate for the unbalanced reciprocal obligations characterising the cooperation on readmission or removal. It is because of this awareness, which arguably resulted from a learning process, that the cobweb of readmission agreements has acquired formidable dimensions over the last fifteen years or so. However, this tells us just a part of the story.

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<sup>15</sup> The first G14 meeting took place in L'Aquila (Italy) in July 2009. The G14 comprises the world's most wealthy and industrialised countries (G8) plus the G5, i.e., the group of emerging economies (Brazil, China, India, Mexico, and South Africa), and Egypt.

- Recommendation 4: In accordance with the principle of sincere cooperation, and with due respect to the Treaties, Member States should inform the Commission, the Council and the European Parliament about the extent to which grafting readmission on to other strategic policy areas is consistent with the “fulfilment of their obligations arising out of the Treaties or resulting from the acts of the institutions of the Union” (Art. 4 (3), TEU).

## 4. THE DRIVE FOR FLEXIBILITY

We have seen that cooperative mechanisms may be formalised, as is often the case, through the conclusion of standard readmission agreements if both contracting parties view this as being valuable to each other’s interests. However, making an inventory of bilateral standard readmission agreements, as described above, would never suffice to illustrate the proliferation of cooperative patterns on readmission, for these have become highly diversified as a result of various concomitant factors. In other words, we need to look beyond standard readmission agreements to provide a more complete picture of the various mechanisms and cooperative instruments that have emerged recently, at bilateral level.

Under some circumstances, both contracting parties may decide to readjust their cooperation in order to “reduce the chance that either state will want to incur the costs of renegeing or be forced to endure an unsatisfactory division of gains for long periods” (Koremenos, 2005, p. 551). Circumstances and uncertainties alike change over time, making flexible arrangements preferable over rigid ones. They may agree to cooperate on readmission without necessarily basing their cooperation on a standard agreement, as recommended by the Council of the European Union in 1994. They may opt for different ways of dealing with readmission through exchanges of letters and memoranda of understanding or by choosing to frame their cooperation via other types of deals (e.g., police cooperation agreements, arrangements, and pacts).

The main rationale for the adoption of non-standard agreements is to secure bilateral cooperation on migration management, including readmission, and to respond flexibly to new situations fraught with uncertainties. Because of the uncertainty surrounding the concrete implementation of the cooperative agreement over time, states may want to secure their credibility through agreements “that include the proper amount of flexibility and thereby create for themselves a kind of international insurance” (Koremenos, 2005, p. 562). With reference to the cooperation on readmission, this argument does not imply that states do not make any credible commitments when signing agreements. On the contrary, it is because of their search for credibility that they may opt for flexible patterns of cooperation when it comes to dealing with highly sensitive matters such as readmission or removal.

Credibility is a core issue in the cooperation on readmission (Phuong, 2007, p. 356), for it symbolically buttresses the centrality of the state and its law enforcement agencies in the management of international migration. The cooperation on readmission has often been presented by European leaders to their constituencies and the international community as an integral part of the fight against illegal migration and as instruments protecting their immigration and asylum systems.

This cause-and-effect relationship, predicated by political leaders, shows to constituencies that governments have the *credible ability* to respond to and even anticipate shocks (e.g.,

mass arrivals of unauthorised migrants), because of the existence of specific mechanisms. However, shocks generate uncertainty which might, in turn, jeopardize the effective cooperation on readmission, particularly when it comes to addressing the pressing issue of re-documentation within agreed time limits, that is, the delivery of travel documents or *laissez-passers* by the consular authorities of the third country needed to remove undocumented migrants. It is a well-known fact that the above-mentioned readmission agreement concluded in 1992 between Spain and Morocco has never been fully implemented. This agreement foresees the readmission of the nationals of the contracting parties as well as the third-country nationals. Diplomatic tensions between the two countries hampered the bilateral cooperation on readmission, particularly under the José María Aznar government (1996–2004). Thus far, Morocco's cooperation on the delivery of travel documents at the request of the Spanish authorities has been erratic.

Changing circumstances may upset the balance of perceived costs and benefits and be conducive to defection. Because of the uncertainties surrounding the concrete implementation of a readmission agreement, various EU Member States have been prone to show some flexibility in readjusting their patterns of cooperation with some third countries in order to address re-documentation and the swift delivery of travel documents or *laissez-passers*. The faster the delivery of travel documents, the shorter the duration of detention, and the cheaper its costs.

#### **4.1. The non-standard approach**

Over the last few decades, France, Greece, Italy, Spain and the United Kingdom have been at the forefront of a new wave of agreements linked to readmission. They are *linked* to readmission in that they cannot be properly dubbed readmission agreements, in the technical sense or with reference to the model of readmission agreement recommended by the Council of the European Union to the EU Member States in 1994. These agreements (e.g., memoranda of understanding, arrangements, pacts, and police cooperation agreements including a clause on readmission) are often based on a three-pronged approach covering: 1) the fight against unauthorized migration, including the issue of readmission, 2) the reinforced control of borders, including *ad hoc* technical assistance, and 3) the joint management of labour migration with third countries of origin, including enhanced development aid. For example, this approach is enshrined in Spain's *Plan Africa* as well as in France's pacts on the joint management of international migration and co-development.

As mentioned earlier, circumstances change over time, and uncertainty might upset the fragile balance of costs and benefits linked to the bilateral cooperation on readmission. These non-standard agreements have been responsive to various factors. First, they tend to lower the cost of defection or reneging on the agreement, for they can be renegotiated easily in order to respond to new contingencies. In contrast to standard readmission agreements, they do not require a lengthy ratification process when renegotiation takes place. Second, they lower the public visibility of the cooperation on readmission by placing it in a broader framework of interaction. This element is particularly relevant for emigration countries located in the South Mediterranean and in Africa, where the cooperation on readmission is politically unpopular and where governments are reluctant to publicise it. Under these circumstances, governments in emigration countries would become more acquiescent in cooperating in the framework of agreements *linked* to readmission while being, at the same time, in a position to publicly abhor the use of standard readmission agreements. Third, they allow for flexible and operable solutions aimed at addressing the need for cooperation on readmission. The agenda remains unchanged, but the operability

of the cooperation on readmission has been prioritized over its formalisation. Fourth, non-standard agreements linked to readmission are by their nature difficult to detect and monitor, for they are not necessarily published in official bulletins. Nor are they always recorded in official documents or correspondence. The characteristics of such hybrid patterns of cooperation *linked* to readmission might be critical when it comes to evaluating the extent to which national practices comply with the principles of EU law.

There is no question that flexibility has acquired increased importance in the practice of readmission over the last fifteen years or so. Indeed, the number of non-standard agreements linked to readmission concluded between the EU Member States and third countries has risen over the last decade, together with the increase in standard readmission agreements. When the former European Community comprised 15 Member States (1995-2003), non-standard agreements linked to readmission numbered 38 against 118 standard readmission agreements. In August 2010, at the level of the 27 EU Member States, non-standard agreements linked to readmission numbered 63 against 190 standard readmission agreements<sup>16</sup>.

The sharp increase in standard readmission agreements stems from the gradual enlargement of the European Union and from the fact that some third countries regarded the conclusion of such readmission agreements as a way of consolidating their relations with the European bloc. Third countries in Eastern Europe and the Western Balkans have had a concrete incentive to cooperate on readmission. Their option to cooperate could also be justified to their constituencies while referring to their planned accession to the EU (e.g., the Eastern European countries which acceded the EU in 2004) or to expected benefits from a *rapprochement* with the EU (e.g., Croatia, Ukraine, Moldova, Georgia, Serbia, Bosnia Herzegovina, and, more recently, Kosovo). Moreover, additional incentives included the possibility to benefit from preferential visa facilitation agreements (Trauner and Kruse, 2008).

In contrast to countries located in Eastern Europe and the Western Balkans, third countries in the Mediterranean and in Africa have, from a general point of view, been involved in a mix of standard agreements and flexible arrangements aimed at cooperating on readmission. As previously mentioned, incentives to conclude (visible and unpopular) standard readmission agreements do not fully explain the proliferation of cooperative agreements linked to readmission, for they may not always offset the unbalanced obligations and asymmetric costs and benefits that characterize the cooperation.

The growing number of non-standard agreements has had a certain bearing on the proliferation of agreements linked to readmission. Today, the cobweb of bilateral agreements linked to readmission has grown considerably, involving more than one hundred countries throughout the world. Figure 1 (next page) schematically illustrates the cobweb of bilateral agreements linked to readmission concluded between the 27 EU Member States plus the Schengen associated countries (depicted in blue), on the one hand, and third countries (in light green), on the other<sup>17</sup>.

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<sup>16</sup> There is no official inventory of all the agreements linked to readmission concluded by the 27 Member States of the European Union, at a bilateral level. The data reported here are based on research conducted at the Migration Policy Centre in the framework of the Mirem project ([www.mirem.eu](http://www.mirem.eu)). The last initiative at EU level aimed at collecting such information dates back to 1999.

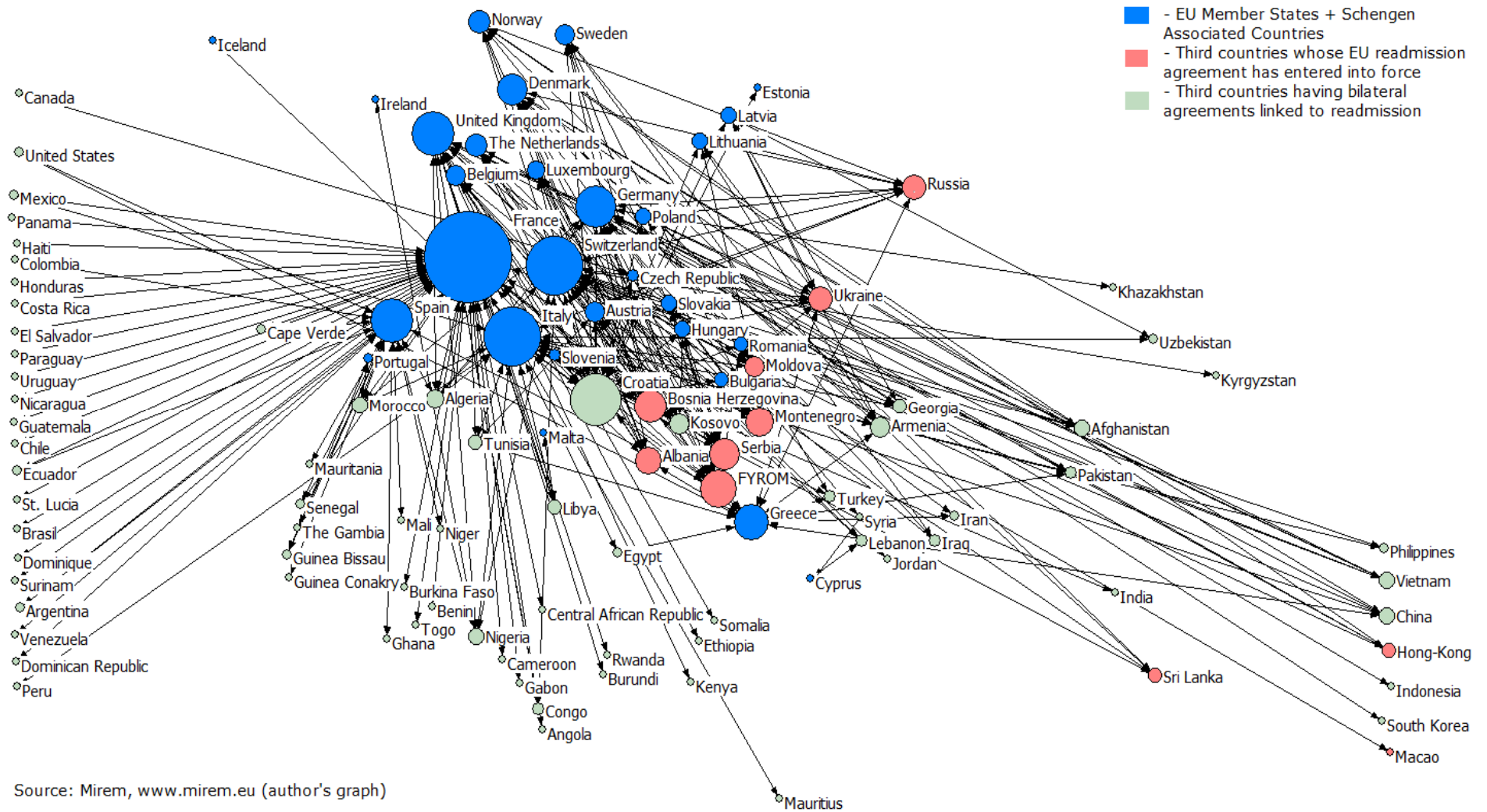
<sup>17</sup> For the sake of clarity, Figure 1 does not plot the numerous readmission agreements that have been concluded over the last decades, at a bilateral level, between the 27 EU Member States, Switzerland, Iceland, and Norway. Nor does it plot the growing number of agreements linked to

The size of each circle (or node) has been weighted with regard to the total number of bilateral agreements linked to readmission (whether standard or not) concluded between the two groups of countries. In other words, the bigger the circle, the denser the web of agreements linked to readmission in which each country is involved. This weighting is necessary to show that the cooperation on readmission is far from being a concern equally shared by the Member States and Schengen associated countries. Denmark, France, Germany, Greece, Italy, Spain, and Switzerland and the United Kingdom have been the most involved in bilateral cooperation on readmission. Clearly, their respective patterns of cooperation vary with the type of flows affecting their national territories, geographical proximity, the nature and intensity of their interaction (in terms of power relations) and, finally, with the third country's responsiveness to the need for enhanced cooperation on readmission. Moreover, another interesting aspect of Graph 1 is that it clearly reflects the predominance of bilateralism in the field of readmission and that all the third countries in Eastern Europe and the Western Balkans, which are currently involved in an EU readmission agreement, were already involved in the pre-existing bilateral patterns of cooperation on readmission with a large number of Member States. In other words, the conclusion and entry into force of EU readmission agreements with these specific third countries followed hard on the heels of an established framework of bilateral cooperation which arguably contributed, among many others factors (see Section 4.2.), to the success of the negotiations at an EU level.

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readmission that third countries have concluded among themselves. Finally, Finland is not reported on Figure 1, for it has no known agreement linked to readmission with any third country.

**Figure 1. Known bilateral agreements linked to readmission concluded between the Member States and Schengen associated countries, on the one hand, and the world, on the other, August 2010**



Incidentally, Denmark and Germany — like Switzerland — tend, from a general point of view, to cooperate on readmission through the conclusion of standard agreements. This inclination may stem from the fact that their negotiations have been mainly (though not exclusively) concluded with third countries in Eastern Europe, the Western Balkans, and the Caucasus (e.g., Serbia, Croatia, Bosnia Herzegovina, Macedonia, Albania, Moldova, Ukraine, and Kosovo) which, as explained earlier, have had a concrete incentive to cooperate on readmission and to formalize their cooperation while grafting it onto other strategic policy areas.

Conversely, Italy, Greece, France, Spain and the United Kingdom have been confronted with the need to adapt their respective cooperative patterns, above all when it comes to interacting on the issue of readmission with some Mediterranean and African countries. Past experience has already shown that these third countries have been less inclined to conclude standard readmission agreements, or even to fully implement them when such agreements were concluded, owing to the potentially disruptive impact of their (visible) commitments on the domestic economy and social stability, and on their external relations with their African neighbours. At the same time, however, other factors have justified such *ad hoc* readjustments.

#### **4.2. Factors shaping the cooperation on readmission**

More than an obligation under international customary law, the practice of readmission is, as it were, yoked to complex contingencies. Practice means that two states may decide to implement readmission without necessarily tying their hands with an agreement, whether standard or not. Under these circumstances, the practice may be viewed as being sporadic. What really matters is the assurance that the requested state (i.e., a country of transit or of origin) will be responsive to the expectations of the requesting state (i.e., a destination country). For example, a country of origin may agree to issue travel documents, at the request of a destination country, that are needed to expel or readmit undocumented migrants without necessarily having an agreement. The issuance of travel documents will be based on a form of tacit assurance that the requested country will be responsive.

The transition from *practice* to *cooperation* on readmission occurs, however, when the responsiveness to perceived exigencies has to be ensured on a more regular basis, not sporadically. A country of destination may seek to secure the regular responsiveness of its counterpart by concluding a treaty or a standard agreement based on reciprocal commitments and obligations to cooperate on readmission. At the outset, three interrelated factors may lead to the conclusion of readmission agreements at the request of a destination country.

The first factor pertains to *geographical proximity*. Countries sharing a common land or maritime border may have a higher propensity to cooperate on readmission. This assumption holds true in the case of Spain and Morocco which concluded a standard readmission agreement in 1992. Conversely, it is not explanatory in the case of neighbouring Portugal and Morocco which, despite their common maritime border, have no bilateral standard readmission agreement. To account for this contrast we need to combine geographical proximity with other factors.

The second factor refers to *migration salience*. This reflects the extent to which migration and mobility have become a salient component of the development of the bilateral relations between two countries. Migration, or the movement of people, has become over time a key feature of their historical relations. Migration salience may be observed in post-colonial regimes, where the mobility of people is part and parcel of the interaction between former colonial powers and their former colonies. It may also apply to two countries characterized by repeated exchanges of people and the presence of large émigré communities. If viewed as being significant in the negotiation process, migration salience might hinder the conclusion of a standard readmission agreement, for the unpopular conclusion of such an



agreement would jeopardise the diplomatic relations between the two countries. In other words, migration salience may turn out to be detrimental to the conclusion of standard readmission agreements, let alone their concrete implementation.

The third factor pertains to *incentives*. Expected absolute and relative gains allow the unbalanced reciprocities characterizing the cooperation on readmission to be overcome. This has often explained the reasons for which various countries of origin and of transit in the Western Balkans and in Eastern Europe have had a vested interest to conclude readmission agreements at the request of EU Member States. Their responsiveness was conditionally linked to an array of incentives including, among others, short-term visa exemption, trade concessions, preferential entry quotas for given commodities, technical assistance, and increased development aid. However, incentives do not always explain or secure cooperation on readmission in the long term. Under some circumstances, expected benefits might not always offset the costs of the cooperation on readmission. Costs are not only linked to the concrete implementation of the agreement and its consequences, but also to its unpopularity at the social level. Moreover, even when incentives were viewed, at a certain point in time, as being significant enough to cooperate on readmission, the (unintended) costs of the cooperation incurred by a country of origin or transit might eventually jeopardize the cooperative relationship and be conducive to renegeing. Incentives do not always offset the fragile balance of costs and benefits; above all, when migration salience might hinder the cooperation on readmission.

Arguably, none of the three factors described above could *individually* account for states' intervention in the field of readmission. Cooperation on readmission lies at the intersection of these three factors. Combined together, these factors delimit the boundaries of a *triangular domain* where the cooperation, based on a standard readmission agreement, is practicable and where the significance of each of the three factors will be weighted against each other, over time and in an *ad hoc* manner.

However, this triangular domain provides an incomplete explanation when it comes to analyzing the emergence of non-standard agreements linked to readmission (e.g., memoranda of understanding, pacts, exchanges of letters, police cooperation agreement including a clause on readmission).

The gradual importance that such agreements are acquiring at the bilateral level results from the consideration of a fourth factor that has emerged over the last few years prompting some EU Member States to adjust or even readjust their cooperative framework with some non-EU source countries. This readjustment was not only motivated by the need for flexibility with a view to securing the operability of the cooperation on readmission. It also stemmed from the perceptible *empowerment* of some source countries as a result of their proactive involvement in the reinforced police control of the EU external borders (Paoletti, 2010). As a matter of fact, with reference to the South Mediterranean, countries like Morocco, Algeria, Libya, Tunisia, Turkey, and Egypt have become gradually aware of their empowerment. Their cooperation on border controls has not only allowed these Mediterranean countries to play the efficiency card in the field of migration and border management, while gaining further international credibility and regime legitimacy; it has also allowed them to acquire a strategic position in migration and border management talks on which they tend to capitalize. There can be no question that this perceptible empowerment has had serious implications on the ways in which the cooperation on readmission has been adaptively addressed, reconfigured and codified, leading to the conclusion of (flexible and less visible) patterns of cooperation on readmission.

The combination of the four factors allows the conclusion of agreements linked to readmission (whether standard or not) to be better explained.

### 4.3. Case studies

Various case studies support the analytical relevance of the abovementioned four factors. To give just a few examples, France had to adjust its cooperative patterns on readmission with most North and West African countries as a result of this combination: first, because the management of labour migration has been part and parcel of France's diplomatic relations with these third countries. The (visible) negotiation of an unpopular standard readmission agreement would have jeopardized France's relations with these countries (i.e., *migration salience*). Second, because the aforementioned third countries have acquired a strategic position through their participation in the reinforced control of the EU external borders and in the fight against illegal migration and international terrorism (i.e., *empowerment*). Bringing pressure to bear on these neighbouring (and strategic) third countries to conclude a standard readmission agreement would have been difficult, if not counterproductive.

Conversely, France was in a position to negotiate standard readmission agreements with numerous Latin American countries, for their visible conclusion would not have significantly impaired bilateral relations, and because migration management does not constitute, for now, an issue of high politics in the relations between these geographically remote countries and France (*migration salience* is not a significant factor). Under these circumstances, France reinforced its cooperation on the exemption of short-term visas to the nationals of cooperative Latin American countries (i.e., *incentives*) by means of bilateral exchanges of letters. Conversely, Spain has few readmission agreements with Latin American countries, probably owing to the fact that migration management constitutes an issue of high politics (i.e., *migration salience*) in the history of its bilateral relations with Latin American countries.

It is the combination of these four factors that seems to account for the increase in the number of bilateral agreements linked to readmission while at the same time explaining their diversity. Their diversity results from a form of selective readjustment that soon became more a necessity than an option given the empowered position that some third countries acquired through their proactive involvement in the reinforced control of the EU external borders. The next section explores whether and how the combination of these four factors has shaped the EU approach to readmission.

### 4.4. EU Mobility partnerships: Drawing on Member States' experience

Just like various EU Member States, the European Commission has also become aware that it is no longer the moment to exert indiscriminate pressure on third countries to induce them to cooperate effectively on readmission. In a communication dated 30 November 2006, the European Commission expressed its intention to "broker a deal"<sup>18</sup> with a view to facilitating the conclusion of EU readmission agreements with third countries while learning from the bilateral experiences of the EU Member States.

This statement did mark a watershed in the EU approach to negotiations on readmission, for it revealed the growing awareness on the part of the European Commission of the need to strike a new compromise with selected third countries, particularly with those located in the EU neighbourhood, in order to speed up the negotiation process of EU readmission agreements.

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<sup>18</sup> "Experiences have demonstrated that to broker a deal the EU needs to offer something in return. In their bilateral readmission negotiations Member States are increasingly offering also other forms of support and assistance to third countries to facilitate the conclusion of such agreements, and the possibilities of applying this wider approach at EU level [i.e., the Global Approach to Migration] should be explored" (European Commission 2006, p. 9).

This readjustment could be viewed as a response to changed circumstances. On the one hand, as explained above, it also results from altered power relations with neighbouring third countries located in Africa and the Mediterranean, following their proactive involvement in the control of the external borders of the EU (i.e., *empowerment*). It also results from the awareness that incentives proposed would not alone induce third countries to become more cooperative on the thorny question of readmission, given its visibility and costs (see section 3.1).

On the other hand, it results from the need to respond proactively to EU internal challenges. As a matter of fact, a number of Member States, particularly France, Belgium, Spain, Italy, and Greece, started to express growing concerns about the progress made by the European Commission in the fight against unauthorised migration while implicitly questioning the EC mandate to negotiate Community readmission agreements with some third countries, owing to the slow process of negotiation.

Member States have demonstrated their concern in numerous ways regarding the capacity of the EU institutions to deal effectively with unauthorized migration, including readmission: 1) The founding of the G5 (today's G6) in 2003, which brings together the interior ministers of France, Spain, the U.K., Italy, Germany, and Poland (since 2006); 2) The signing of the Prüm Treaty<sup>19</sup> on May 27, 2005. The treaty is aimed at stepping up cross-border police cooperation and exchanges between Member States' law enforcement agencies to combat organized crime, terrorism, and illegal migration. Austria, Belgium, France, Germany, Luxembourg, the Netherlands, and Spain are signatories; 3) The writing of an open letter in September 2006 to the then Finnish Presidency of the Council of the European Union, calling for reinforced common concrete actions to counter mass arrivals in Southern Europe. The letter came from the heads of state of Cyprus, France, Greece, Italy, Malta, Portugal, Slovenia, and Spain; 4) The delivery of a document<sup>20</sup> to the then Czech Presidency of the Council of the European Union, pressing for the conclusion and effective implementation of Community readmission agreements. The document, dated 13 January 2009, came from Cyprus, Greece, Italy and Malta. These four countries formed the *Quadro Group* during the French EU Presidency (July-December 2008) to keep illegal immigration on the EU agenda.

A new EU compromise in the field of readmission was needed as a result of internal and external pressures. It found its expression in the Global Approach to Migration (GAM) which was described as "a comprehensive approach [combining] measures aimed at facilitating legal migration opportunities with those reducing illegal migration" (European Council, 2007, p. 3). Key mechanisms for strategic cooperation with selected third countries were introduced in the framework of the GAM.

Mobility partnerships and their rationale form an integral part of the GAM. They are tailor-made and encompass a broad range of issues ranging from development aid to temporary entry visa facilitation, circular migration schemes and the fight against illegal migration,

<sup>19</sup> The Prüm Treaty or Convention was signed by seven EU member states: Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain. Bulgaria, Finland, Italy, Portugal, Romania, Slovakia, Slovenia and Sweden are waiting to join. The Convention aims at stepping up cross-border police cooperation and exchanges between members' law enforcement agencies with a view to combating organised crime, terrorism and illegal migration more effectively. Provisions of the Prüm Treaty dealing with police co-operation and information exchange on DNA-profiles, and fingerprints were transposed in the legal framework of the European Union following a Council Decision dated 23<sup>rd</sup> June 2008 (Council Decision 2008/606/JHA).

<sup>20</sup> "Cyprus, Greece, Italy and Malta Paper", Ministers of the Interior and (for Malta) Minister of Justice and Internal Affairs, 13 January 2009. [http://www.cittadinitalia.it/mininterno/export/sites/default/it/assets/files/16/0970\\_Final\\_paper\\_Versione\\_firmata.pdf](http://www.cittadinitalia.it/mininterno/export/sites/default/it/assets/files/16/0970_Final_paper_Versione_firmata.pdf). This document was mentioned in European Council (2009), 2927<sup>th</sup> Council meeting Justice and Home Affairs Brussels, 26 and 27 February 2009, p. 9.

including the cooperation on readmission. They are selective in that they are addressed to those third countries once certain conditions are met, such as cooperation on illegal migration and the existence of "effective mechanisms for readmission"<sup>21</sup>.

The EU's attempt to link mobility partnerships with cooperation on readmission reflects how this issue has become a central component of its immigration policy. This conditional link is also stressed in the European Pact on Immigration and Asylum that was sponsored by France and endorsed by the 27 EU Member States in October 2008.

Additional factors explain this conditionality. First, readmission is all the more central for the EU and its Member States as the control of the European external borders and border restrictions affect the fluid and repeated back and forth movements inherent in the mobility of people. The EU and its Member States are aware of the fact that, because of border restrictions and the difficult access to labour markets in destination countries, migrants might be tempted to extend their stay abroad<sup>22</sup> or to overstay and become irregular. Second, the resilient differentials in standards of living, economic development, working conditions, welfare and political governance between origin and destination countries cannot be overlooked. Third, countries of origin might be tempted not to respect their commitment, above all when it comes to dealing with the readmission and redocumentation of their nationals. This explains why mobility partnerships are assessed on a regular basis by the parties involved (European Commission, 2007a, p. 4).

Mobility partnerships stem from the consolidation of a new compromise encompassing a large array of issues ranging from development aid, to temporary entry visa facilitation, circular migration schemes and the fight against illegal migration including readmission. They are presented as a paradigmatic "shift from a primarily security-centred approach focused on reducing migratory pressures to a more transparent and balanced approach" (European Commission, 2008, p. 3) based on the formulation of commitments expressed in the framework of exploratory talks where dialogue and mutual understanding are favoured.

Since late 2007, the Commission has been invited by the Council to launch pilot mobility partnerships with few countries. In June 2008, Cape Verde<sup>23</sup> and Moldova<sup>24</sup> signed partnerships with the EU, Georgia<sup>25</sup> in November 2009, whereas Senegal is still negotiating its accord at the time of writing. It is interesting to note that negotiations on mobility partnerships have been successful so far with third countries having, as it were, a weak leverage on European affairs. Conversely, given its strategic role in the control of the EU external borders and its perceptible empowered position in migration talks, it is likely that negotiations with Senegal on a mobility partnership might turn out to be lengthier, if not tricky.

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<sup>21</sup> Mobility partnerships "would be agreed with those third countries committed to fighting illegal immigration and that have effective mechanisms for readmission" (European Commission 2007, p. 19).

<sup>22</sup> This point draws on Heaven Crawley's statement reported in House of Commons International Development Committee, *Migration and Development: How to make migration work for poverty reduction*, Sixth report of Session 2003-2004, vol. 1, 8 July 2004. "When people come to a country [...] through a managed migration programme often they have had quite a difficult time getting onto that programme in the first place, and when they get to the [destination country] their first thought is not to think about how to return, because they found it difficult trying to get here in the first place, it is more about how to stay". (see §71, pp. 40-41).

<sup>23</sup> European Council (2008), Joint Declaration on a Mobility Partnership between the European Union and Cape Verde, 9460/08 Add 2, Brussels, 21 May 2008.

<sup>24</sup> European Council (2008), Joint Declaration on a Mobility Partnership between the European Union and Moldova, 9460/08, Brussels, 21 May 2008.

<sup>25</sup> European Council (2009), Joint Declaration on a Mobility Partnership between the European Union and Georgia, 16396/09, Brussels, November 2009.

**Table 2. List of Mobility Partnerships**

Third country	Mandate	Date of signature
Cape Verde	December 2007	5 June 2008
Georgia	June 2008	30 November 2009
Moldova	December 2007	5 June 2008
Senegal	June 2008	

Clearly, it is too early to assess the impact of mobility partnerships and to argue whether their broader policy framework (i.e., the GAM) will foster any progress in the consolidation of an EU readmission policy or otherwise. Admittedly, mobility partnerships are not EU readmission agreements, neither in their rationale nor in their form. However, they are no less arrangements aimed at addressing an array of issues prioritised in the GAM, including readmission.

They show that the European Commission is intent on adaptively revamping its cooperative framework on readmission in an *ad hoc* and more flexible manner while “taking into account the current state of the EU’s relations with the third country concerned as well as the general approach towards it in EU external relations” (European Commission, 2007a: 3). Also, mobility partnerships represent a trust-building platform addressed not only to third countries (whether these have been empowered or not), but also to interested Member States. In other words, the latter are free to take part in mobility partnerships if they consider that the partnership adds value to their current bilateral relations with a given partner country or not. Moreover, they may conclude bilateral agreements in various areas. Implementation remains a bilateral prerogative of the Member States. Monitoring bodies (i.e., the *Groupe Local de Suivi* in Cape Verde and the *National Monitoring Committee on the Mobility Partnership* in Moldova) comprise representatives of third Member States’ diplomatic missions and the EC Delegation. They are aimed at assessing the *progress* of implementation of the partnership.

It is important to stress that mobility partnerships are not only designed to foster cooperation on various migration-related areas, while proposing incentives in terms of legal migration and visa facilitation to cooperative third countries. When viewed as a platform for dialogue and consultations, such partnerships are also deemed to consolidate, through repeated exchanges among officials, the GAM agenda by identifying shared problems and perceived (new) priorities. In their attempt to “build mutual understanding and trust”, as a prerequisite to entering into negotiations, mobility partnerships are reflective of the EU attempt to place readmission in a broader framework of interaction. The main issue at stake is not only about proposing incentives to cooperate on readmission, even if, as stated in various communications from the Commission, this issue constitutes a key element of mobility partnerships. Rather, through repetition and regular exchanges among stakeholders, it is about consolidating a system whereby the cooperation on readmission would become more predictable. This system and its implications are analysed in the next chapter.

## 5. THE READMISSION SYSTEM

There can be no question that relative-gains-seeking and incentives can help explain the reasons for which two state actors cooperate on readmission. Such relative gains do motivate state actors to cooperate or not. However, this assumption does not necessarily mean that “relative gains pervade international politics nearly enough to make the strong realist position hold in general” (Snidal, 1991, p. 703). There also exist “particular systems” (Dryzek *et al* 1989, p. 502) shaped by beliefs, values, and dominant schemes of

understanding that can have an impact on the conditions conducive to cooperation, as well as on states' perceptions and behaviour.

The recognition of such systems is important in the framework of this study insofar as it lays emphasis on the need to consider the existence of a causal link between beliefs and (perceived) interests, subjectivities and priorities, as well as between values and policy agendas. The point is not so much to analyze the costs and benefits linked with the cooperation on readmission. The main question lies in exploring the system whereby the cooperation on readmission has become more predictable over the last ten years or so.

## 5.1. Repeated orientations and understandings

The international agenda for the management of migration is perhaps the most emblematic expression of this belief system assuming that it "is the product of individual subjects and, once created, provides a context for the further development of their subjectivity" Dryzek *et al* 1989, p. 502). The reference to the management of international migration is today part and parcel of state officials' language and discourses. In a document of the International Organization for Migration (IOM), it is described as being based on a series of "common understandings outlining fundamental shared assumptions and principles [among state actors] underlying migration management" (IOM, 2004). The agenda is also aimed at creating state-led mechanisms designed to "influence migration flows" (Salt, 2000, p. 11). However, its repeated reference implies much more than the capacity to influence migration flows.

Beyond their conflicting sovereign interests, countries of origin, transit, and destination share a common objective in the migration management agenda: introducing regulatory mechanisms buttressing their position as legitimate managers of the mobility of their nationals and foreigners. The dramatic increase in the number of agreements linked to readmission, and the adoption of mobility partnerships, cannot be isolated from the consolidation of this agenda, at the regional and international levels.

The international agenda for the management of migration has gained momentum through the organization of state-led international consultations in various regions of the world. Such regular consultations, or regional consultative processes (RCPs),<sup>26</sup> were critical in opening regular channels of communication among the representatives of countries of destination, of transit, and of origin. Scholars have already analyzed the ways in which RCPs can be referred to as networks of socialization (Thouez and Channac, 2008, p. 384; Carrera and Guild, 2008, p. 3) or "informal policy networks" (Lavenex, 2008, p. 940) between state representatives, establishing connections and relationships and defining roles and behaviours.

At the same time, RCPs have contributed to defining common orientations and understandings (Klekowski von Koppenfels, 2001, p. 24) as to how the movement of all persons should be influenced and controlled. Through their repetition, they have instilled guiding principles which in turn have been erected as normative values shaping how international migration should best be administered, regulated, and understood.

In addition to their recurrence, such intergovernmental consultations have gradually introduced a new lexicon including such words and notions as *predictability*, *sustainability*,

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<sup>26</sup> "While the first RCP was established in 1985, the majority of RCPs have emerged since 1995, often as a result of specific events or developments — for example, the fall of the Soviet Union, sudden major influxes of irregular migrants, and concerns over security linked to the events of 9/11" (IOM, source: <http://www.iom.int/jahia/Jahia/regional-consultative-processes>, accessed 30 August 2010). Major RCPs on migration include, among many others, the 2001 Berne Initiative, the 1991 Budapest Process, the 1996 Puebla Process, the 2002 5+5 dialogue on migration in the Mediterranean, the 2003 Mediterranean transit migration dialogue, the 2000 Migration Dialogue for West Africa, and the Global Forum on Migration and Development.

*orderliness, interoperability, harmonization, root causes, comprehensiveness, illegal migration, prevention, shared responsibility, joint ownership, balanced approach, and temporariness.* There is no question that this lexicon, endorsed and used by governmental and intergovernmental agencies, among others, has achieved a terminological hegemony in today's official discourses and rhetoric as applied to international migration. It has also been critical in manufacturing a top-down framework of understanding while reinforcing, at the same time, the managerial centrality of the state and of its law-enforcement bureaucracy.

## 5.2. Shared perceived priorities

This has had various implications. Perhaps the most important of which lies in having built a hierarchy of priorities aimed at best achieving the objectives set out in the migration management agenda. The above lexicon was of course a prerequisite to giving sense to this hierarchy of priorities, for its main function is to delineate the contours of the issues which should be tackled first and foremost. This hierarchy of priorities has gradually been conducive to a process of consensus formation based on the identification of "perceived exigencies" (Cox, 2006) while hiding others.

The cooperation on readmission is perhaps the most symptomatic feature of this process of consensus formation and "shared problem perceptions" as analysed by Sandra Lavenex and Nicole Wichmann (2009, p. 98). Today, it stands high in the hierarchy of priorities set by countries of destination, transit, and origin, whether they are poor or rich, large or small, democratically organized or totalitarian.

Readmission has become a mundane technique to combat unauthorized migration and to address the removal of rejected asylum seekers. It is important to stress that cooperating on readmission does not only allow states to *show* they have the credible ability to prevent or respond to uncertainties, as mentioned earlier. It has also contributed, by the same token, to making their constituencies (more) aware of the presence of the sovereign within a specific territorial entity at a time when the role of the welfare state is under heavy strain all over the European Union. In other words, keeping out the undesirables is not *only* a question of immigration control and security agenda. It is also an issue closely linked with the expression of state authority and sanction, or rather with states' capacity of classifying aliens and citizens alike, as well as their rights, privileges and position in a territorialized society (Engbersen 2009, pp. 166-167). In this respect, William Walters asks whether "the gradual strengthening of the citizen-territory link [has] less to do with any positive right of the citizen to inhabit a particular land, and more to do with the acquisition by states of a technical capacity (border controls, and so on) to refuse entry to non-citizens and undesirables" (Walters, 2002 p. 267).

Actually, the role of the state in protecting its citizens and in defending their rights and privileges has been linked with its capacity to secure its borders and to regulate migration flows.

In a similar vein, the mass arrivals of unauthorized migrants, including potential asylum-seekers, has been interpreted as a threat to the integrity of the immigration and asylum systems in the European Union. Most importantly, the use of such notions as 'mixed flows', 'asylum shopping', 'bogus asylum-seekers', 'unwanted migrants', 'burden', and 'safe third countries' have started to shape public discourses, more intensively as well as the actions of governmental institutions, while implicitly depicting a negative perception of the claims of foreigners (migrants and asylum-seekers) in general. Michael Collyer aptly explains how the establishment of a 'security paradigm' (2008, p. 121) around migration has gradually consolidated a dominant discourse as applied to aliens, particularly undocumented migrants, who are referred to as invisible threats "who are to be found not in society but on the state's territory" (Collyer, 2008 p. 130).

There is no question that the consolidation of a security paradigm has contributed to favouring the adoption of measures prioritizing the superior need to respond to perceived threats. However, this prioritization process, as shown by George Joffé, might lead to the “implicit abandonment of the normative pressure for democratization and human rights observance among partner-states” (2008, p. 166).

Restrictive laws regarding the conditions of entry and residence of migrants, asylum-seekers, and refugees, the reinforced controls of the EU external borders, and the dramatic expansion of the web of detention centres in and out of the EU territory illustrate the community of interests shared by countries of destination, transit, and origin (Webber, 2008 p. 5).

### 5.3. Implications for human rights observance

This prioritization process might lead to the flexible and restrictive (re)interpretation of internationally recognized standards and norms as applied to refugee protection. To give an example, the UNHCR and the European Council on Refugees and Exiles (ECRE) have on various occasions denounced that the very notion of “persons in need of international protection” has subtly shifted from obligations to consider *individual* asylum claims with due respect to the standards enshrined in the 1951 Refugee Convention to considerations based on *general* contextual conditions in the third country to which asylum seekers are subsequently returned, once their claims have been rejected and viewed as being unfounded (e.g., following the application of the safe third-country concept). Obviously, this shift implies that the rejection of an asylum claim does not mean or prove that the asylum-seeker is not in need of international protection.

An additional concern lies in the development of “premature returns”. ECRE explains that returns are premature when governments in Europe tend to consider the “declared end of hostilities and in a given country/region” (Coelho, 2005 p. 14) as a sufficient ground to enforce the return of refugees or even to delay the examination of the claims of asylum-seekers. Examples of premature returns abound. The UNHCR, ECRE and human rights advocacy NGOs have repeatedly voiced their concerns regarding premature returns to Afghanistan, Iraq, Somalia, and Sri Lanka, to mention just a few cases.

More recently, in 2009, the Council of Europe Commissioner for Human Rights, Thomas Hammarberg called on governments in Europe “to avoid forced returns of minorities to Kosovo and to regulate the status of those in their host country until conditions in Kosovo permit their safe return”. He warned against the “negative effect” of enforced returns of Romas, Serbs and minority Albanians to Kosovo, given the resilient unsafe situation and ethnic tensions with which the latter would be faced.

In a similar vein, the way in which the Italian-Libyan cooperation on readmission has developed over the last five years arguably constitutes another emblematic case of how internationally recognised standards can be restrictively reinterpreted.

In April 2005, the European Parliament (EP) voted on a resolution stating that the “Italian authorities have failed to meet their international obligations by not ensuring that the lives of the people expelled by them [to Libya] are not threatened in their countries of origin.”<sup>27</sup> This resolution was adopted following the action of the UN High Commissioner for Refugees (UNHCR) and various human rights associations denouncing the collective expulsions of asylum-seekers to Libya that Italy organized between October 2004 and March 2005.

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<sup>27</sup> European Parliament, *European Parliament Resolution on Lampedusa*, April 14, 2005, <http://www.europarl.europa.eu/sides/getDoc.do?jsessionid=8B5BEAAD5A39468ECA77F272A4E6D528.node2?pubRef=-//EP//TEXT+TA+P6-TA-2005-0138+0+DOC+XML+V0//EN>.



A few years later, neither the April 2005 EP resolution, nor the intense advocacy work of migrant-aid associations, nor the action of the office of the UNHCR, have contributed to substantially reversing the trend. On the contrary, Italy has broadened and reinforced its bilateral cooperation with Libya in the field of readmission, raising serious concerns among human rights organizations and the UN institutions regarding the respect of the *non-refoulement* principle enshrined in international refugee standards, on the one hand, and the safety of the readmitted persons to Libya, on the other.

The reinforcement of the bilateral cooperation became perceptible in May 2009 when Italy set out to intercept migrants in international waters before they could reach the Italian coasts to subsequently force them back to Libya. Hundreds of would-be immigrants and asylum-seekers have been forcibly subjected to these operations. UNHCR vehemently reacted against these push-back operations in international waters, which engaged Italy's responsibility under the principle of *non-refoulement* enshrined in the 1951 Geneva Convention (Council of Europe, 2010).

In September 2009, Human Rights Watch published a detailed report (HRW, 2009) on the dreadful conditions and ill-treatment facing readmitted persons in Libya. Despite the ill-treatment evidenced in the HRW report, the European Council called on the then-Swedish Presidency of the European Union and "the European Commission to intensify the dialogue with Libya on managing migration and responding to illegal immigration, including cooperation at sea, border control and readmission [while underlining] the importance of readmission agreements as a tool for combating illegal immigration" (European Council, 2009b, p. 12). This intensified dialogue has become part of the geographical priorities of the EU external relations listed in the December 2009 Stockholm programme (European Council, 2009).

- Recommendation 5: The European Parliament should ask the European Agency for Fundamental Rights (FRA) to carry out a thorough study on the practice of "premature returns" and on its impact on the respect for fundamental rights and refugee protection standards. The study will apply to all the third countries with which the EU is intensifying its dialogue in the field of migration management, including those with which EU readmission agreements are being negotiated or have been concluded.
- Recommendation 6: The European Parliament should request the Commission to report clearly on the type of dialogue on migration management that is to be intensified. The Commission should report on how the respect for fundamental rights and refugee standards is concretely translated in the geographical priorities of the EU external action.

### 5.3.1. The search for operability

The above case study shows that the need to respond to perceived threats does not only rest on operable means of implementation that are often antonymous to transparency and to the respect of international commitments. It also rests on a subtle denial. Clearly, such a denial does not stem from the ignorance or failure to recognize the value of international norms relating to migrants' rights, asylum-seekers, and the status of refugees. Rather, it stems first and foremost from the *prioritization* of operable means of implementation. In this respect, the interview made by HRW with Frontex deputy executive director, Gil Arias Fernández, is telling:

Based on our statistics, we are able to say that the agreements [between Libya and Italy] have had a positive impact. On the humanitarian level, fewer lives have been put at risk, due to fewer departures. But our agency [i.e., Frontex]

does not have the ability to confirm if the right to request asylum as well as other human rights are being respected in Libya (Human Rights Watch 2009, p. 37).

The most eloquent aspect of Arias Fernández's statement lies perhaps in the subjective vision that reinforced border controls save the lives of those migrants seeking better living conditions in destination countries. The bilateral cooperation on readmission is viewed as the best solution to tackle the "humanitarian" crisis, regardless of whether the country where migrants are to be readmitted (i.e., Libya) already possesses the capacity to fully respect the fundamental human rights and the dignity of the removed persons. This declaratory statement induces us to understand that it is because of the right to protect life that power is exercised and rhetorically justified by the same token.

This subtle denial and its ensuing operable means of implementation have gradually contributed to diluting international norms and standards that had been viewed as being sound and secure (Weinzierl, 2007, Coelho, 2005). This denial is reflective of the conflicting relationships between national interests and international commitments in which the readmission of aliens is fully embedded.<sup>28</sup>

Perhaps, at a political level, one of the most decisive steps that has been taken so far to warn against the consequences of the predominant search for operability on human rights observance lies in the recent adoption by the Parliamentary Assembly of the Council of Europe (PACE) of Resolution 1741(2010).<sup>29</sup> Points 3 and 7.1 are noteworthy:

- [Point 3] "There is a risk that readmission agreements pose a threat, directly or indirectly, to the human rights of irregular migrants or asylum seekers. This concerns, in particular, the risk that the sending or the readmitting country fails to honour their obligations under the Geneva Convention Relating to the Status of Refugees (the 1951 Geneva Convention) and its 1967 Protocol and the European Convention on Human Rights and then uses a readmission agreement to enforce a flawed decision.
- [Point 7.1] The Assembly invites the European Union to "*properly* consider the human rights situation and the availability of a well-functioning asylum system in a country prior to entering into negotiations on readmission agreements with that country" [italics added].

At a time when the cooperation on readmission has taken on unprecedented importance in the external relations of the Member States and of the EU, the abovementioned PACE resolution on readmission may be interpreted as word of caution addressed to governments in Europe.

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<sup>28</sup> Lena Skoglund (2008, p. 363) observed the same tension with reference to *diplomatic assurances against torture* whereby a state (e.g., a country of origin) promises that it will not torture or mistreat a removed person viewed as a security threat by the law-enforcement authorities of another state (e.g., a host country). See also Noll (2006) and Hasselberg (2009).

<sup>29</sup> See Council of Europe (2010a), <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1741.htm>. This resolution followed the release of a PACE report on readmission agreements (Strik, 2010).

- Recommendation 7: Given the full incorporation of the Charter in the Treaties, the European Parliament should call for an updated list of binding criteria that have to be respected to identify third countries with which new EU readmission agreements can be negotiated.<sup>30</sup> The need for an effective asylum system in the third country, based on the obligations under the 1951 Refugee Convention, constitutes one key criterion that monitors the consequences of the drive for operability.

Furthermore, it is no accident that a concomitant resolution was adopted by the PACE on assisted voluntary return (AVR) programmes. Resolution 1742(2010)<sup>31</sup> supports the development of such programmes which are viewed in the resolution as a “much more humane type of return” (unlike enforced return) giving persons who are served a removal order (i.e., victims of human trafficking, rejected asylum seekers, protection seekers who withdrew their asylum application, unaccompanied minors and irregular migrants) “the possibility of returning home with dignity”.

Today, the reference to the humane and dignified nature of assisted voluntary returns is recurrent if not undisputed in official discourses. The humane dimension has been frequently repeated to make AVR programmes a preferable option over enforced removals.

However, there exist additional elements that have been considered by states to sustain the development and expansion of AVR programmes. First, experience has shown that third countries tend to be more cooperative on the delivery of travel documents when the request for *laissez-passeurs* or travel documents is formulated in the framework of AVR programmes.<sup>32</sup> Second, they decrease the duration of detention of unauthorised migrants and consequently reduce its costs. Third, AVR programmes apply to all stages of the asylum application process. In other words, those who applied for asylum and are pending a reply, as well as those whose application has been rejected by the authorities of the destination country (even after an appeal has been dismissed) can be eligible for voluntary return. In a similar vein, persons who were granted temporary protection are also eligible. The latter shall withdraw or discontinue the asylum application before returning to the third country.

The fact that AVR programmes address an array of potential beneficiaries (migrants, asylum-seekers) has drawn the attention of various EU member States. There is, however, no harmonized approach to voluntary return at an EU level, for each Member State has its own legislation supporting the implementation of such programmes with the assistance of various non-governmental organizations (NGOs), associations, and international organizations.

For instance, in Italy, since the adoption of Law 94 dated 15 July 2009, foreigners who do not have a residence permit (i.e., irregular migrants) are no longer eligible for AVR programmes. By contrast, in the United Kingdom, such programmes encompass both irregular migrants and asylum-seekers.<sup>33</sup> Poland’s AVR programme also applies to both

<sup>30</sup> The most recent list of criteria used to identify third countries with which readmission agreements can be negotiated date back to April 2002 (Council of the European Union, 2002).

<sup>31</sup> See Council of Europe (2010), <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1742.htm>

<sup>32</sup> For example, Indian consular authorities are known to be more cooperative on the delivery of travel documents to their nationals, when the latter are returned through an AVR programmes. Source: Interview made with an IOM officer, 12<sup>th</sup> August 2010.

<sup>33</sup> There exist two main AVR programmes in the UK. Both are operated by the International Organization for Migration (IOM): The Voluntary Assisted Return and Reintegration Programme

rejected asylum-seekers and unauthorised migrants, following the conclusion in 2005 of an agreement with IOM for the Cooperation on Assisted Voluntary Return of Foreign Nationals Leaving Polish Territory.<sup>34</sup>

It is important to refer to such programmes. Not only because they have gained momentum, but also because some EU Member States have established in the framework of their cooperation on readmission a link with AVR programmes. For instance, France has included clauses on assisted voluntary returns in its bilateral agreements on the joint management of migration flows, concluded with African countries. In a note dated March 2010, the French Office for Immigration and Integration stated that unauthorised third-country nationals in detention centres are entitled to benefit from AVR when they are nationals of a country which concluded this type of agreement with France. AVR programmes can be viewed as flexible instruments which, among others, address the swift removal of unauthorised aliens, whether these are irregular or rejected asylum-seekers.<sup>35</sup>

Admittedly, owing to the resilient paucity of information and data allowing AVR programmes to be assessed, this interrelationship cannot be proven with hard evidence. However, it remains plausible given the overriding drive for operability and flexibility.

The polyvalence of AVR programmes explains why they have raised serious concerns among associations and NGOs in Europe as well as among members of the Council of Europe who, in a motion for a recommendation dated 7 January 2008, called for an analysis of their human rights implications. (Council of Europe, 2008) This concern was echoed in Points 10.1 and 10.4 of the abovementioned Resolution 1742(2010). The Council of Europe encouraged Member States to:

- [Point 10.1] ensure that assisted voluntary programmes are indeed voluntary, that their consent is not obtained under pressure or blackmail and that returnees have access to independent and impartial actors in the return process to make free and informed decisions.
- [Point 10.4] ensure that assisted voluntary return should never put in jeopardy the right of an asylum seeker to claim asylum and protection.

Apart from the questionable voluntary dimension of assisted voluntary return programmes, there exist additional concerns regarding 1/the safety of “voluntary returnees” in their countries of origin, and 2/the sustainability of their return.

These have been evidenced over the last few years by academic institutions and research centres which carried out field surveys based on interviews with returned third-country nationals in their countries of return. The common objective of these surveys was to provide empirical evidence of the social economic and psychological conditions of the beneficiaries of AVR programmes and of readmitted persons too. Moreover, they set out to assess the impact of both readmission and AVR programmes on the patterns of

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(VARRP, since 1999) and the Assisted Voluntary Return for Irregular Migrants (AVRIM, since 2004) programme. See Poppleton and Rice, 2009.

<sup>34</sup> The European Migration Network (EMN) has produced a wealth of information about the rationale for AVR programmes in each EU Member State. These are accessible at: <http://emn.sarenet.es/html/index.html>

<sup>35</sup> In this respect, Jon Sward underlines that “the current upsurge in AVR has taken place in a era marked by the increasingly rigid migration guidelines in European countries. Indeed, the spread of AVR programmes to transit countries with support from European governments can be seen as one dimension of efforts by EU countries to combat ‘upstream’ migration flows, in order to stop migrants reaching Europe in the first place. Other approaches in this same policy vein include the strengthening of transit country border controls, information campaigns to warn potential migrants in countries of origin about the dangers of undocumented migration to Europe, and ‘co-development’ programmes” (Sward, 2009 p. 3).

reintegration of foreigners in their countries of return. In other words, they tried to fill in a knowledge gap which has characterised so far the implementation of policies aimed at removing, either coercively or on a voluntary basis, aliens who are subjected to a return decision by the authorities of a Member State.

For instance, June de Bree (2008) observed in the framework of a field survey carried out in Afghanistan that interviewees are faced with poor employment and housing conditions back to their country of origin. Her field survey showed that 93% of the sample declared that "they are restricted in their mobility within Afghanistan, either because they or their family had personal issues with the Taliban or Mujahedeen, or because of a general feeling of insecurity due to violence, crime and (terrorist) attacks" (Bree, 2008 p. 16). Insecurity, added to economic and social instability in Afghanistan, are the most frequent factors that interviewees mentioned to leave again for abroad as 89% of them expressed the desire to return to the West.<sup>36</sup> In a similar vein, in a comparative study based on a large number of interviews carried out in Bosnia and Herzegovina, Sierra Leone, Afghanistan and Togo, Marieke van Houte and Mireille de Koning (2008) showed that social and political tensions in the country of return, added to the lack of safety, account for the interviewees' desire to re-emigrate, even when obstacles to do so exist (van Houte and Koning, 2008 p. 34). These factors strongly jeopardise the interviewees' possibility of reintegrating socially and professionally in the country of return. Such investigations are important to understand how the voluntary dimension and the "sustainability of return", which constitute key elements supporting the adoption and implementation of AVR programmes, have been addressed in concrete terms in the above case studies. They are also useful to show that, in most cases, "the notion of return has shifted from being a voluntary decision made by individuals to a policy option which is exercised by governments" (Blitz *et al* 2005, p. 196).

Arguably, it is the aforementioned drive for operability that has supported this shift, just like it has so far exempted AVR programmes from any comprehensive and *independent* assessment of their impact on the conditions of persons in their countries of return. To be sure, this independent assessment would certainly respond to the call for evidence-based policy-making that is underlined in the Global Approach to Migration.<sup>37</sup> Admittedly, field data collected in countries of return lend support to the argument that such programmes have to undergo a thorough assessment given their potential impact on returnees' individual welfare and safety.

- Recommendation 8: A comprehensive assessment of AVR programmes on the safety and conditions of all "voluntary returnees" in third countries of return should be undertaken by the European Parliament with the assistance of *independent* research institutions. This assessment is of paramount importance to lay emphasis on the extent to which AVR programmes may or may not have external human rights implications, after return to a third country.

#### 5.4. The issue of effectiveness

Many would argue that effectiveness is about *implementation* or operability. Quantitative data on approved and refused readmission requests, number of applications submitted under the normal and accelerated procedures, number of travel documents issued to the authorities of a requesting state, and financial considerations would certainly constitute the

<sup>36</sup> An evaluation report directed by Arne Strand, based on interviews with Afghan "voluntary returnees", confirms their desire to re-emigrate for abroad owing to harsh insecure conditions and poor economic prospects in Afghanistan. See Strand *et al.* (2008 pp. 46-47).

<sup>37</sup> "Policies on migration need to be based on reliable evidence and be coherent with other related policies. Promoting the links between policy and research can contribute to a better understanding of migration realities and policy development." See European Commission (2006, p. 6).

most obvious indicators to assess the effectiveness of readmission agreements, whether these are bilateral or European. Such indicators are useful to calculate the extent to which two contracting parties commit to respecting their reciprocal obligations. Arguably, these indicators may be taken into consideration to evaluate EU readmission agreements concluded with third countries as well as those that are being negotiated by the Commission. This evaluation process was requested in the Stockholm programme and requested in the European Pact on Migration and Asylum.

Data on the number of removals exist. These were produced initially by the Centre for Information, Discussion and Exchange on the Crossing of Frontiers and Immigration (CIREFI)<sup>38</sup> which, after the entry into force of the Treaty of Lisbon, was abolished by Coreper. Its functions were transferred to Frontex Risk Analysis Unit (RAU). Data are reported by Member States in the framework of the Frontex Risk Analysis Network (FRAN).

Member States also report their statistical data to Eurostat following the adoption of Regulation 862/2007<sup>39</sup> aimed at establishing common rules for the collection and compilation of community statistics. In the field of return, available Eurostat data for the years 2008 and 2009 address:

- "the number of third-country nationals who have in fact left the territory of the Member State, following an administrative or judicial decision or act" (henceforth "third-country nationals who left");
- "the number of third-country nationals found to be illegally present in the territory of the Member State who are subject to an administrative or judicial decision or act stating or declaring that their stay is illegal and imposing an obligation to leave the territory of the Member State" (henceforth "third-country nationals ordered to leave");
- the number of "third-country nationals who are refused entry at the external border because they do not fulfil all the entry conditions" (henceforth "third-country nationals refused entry").

The table below provides an overview of the number of third-country nationals who are served an order to leave the territory of each Member State, and of those who effectively left. A ratio would normally reflect a form of effectiveness rate as applied to removal orders. However, the reported data on the table must be taken with caution, for not all third-country nationals who left in 2008 and 2009 were served an order to leave making the calculation of effectiveness rates highly unrealistic.<sup>40</sup> Nor are third-country nationals consistently counted, by each Member State, as persons who left as a result of "an administrative or judicial decision or act".

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<sup>38</sup> See Table 4 in Annex.

<sup>39</sup> Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community Statistics on migration and international protection and repealing Council Regulation (EEC) N. 311/76 on the compilation of statistics on foreign workers, OJ L199, 31 July 2007, pp. 23-29.

<sup>40</sup> For instance, in a correspondence with the UK Border Agency (UKBA), dated 26<sup>th</sup> July 2010, the Agency explained that persons refused entry on arrival at port leave the territory without an order to leave.

**Table 3. Number of third-country nationals (TCNs) ordered to leave and third-country nationals who left the territory of each Member State, 2008-2009.**

	2008		2009	
	TCNs ordered to leave	TCNs who left	TCNs ordered to leave	TCNs who left
Austria	8870	5855	10625	6410
Belgium	32680	3965	23900	4060
Bulgaria	1405	275	1465	285
Cyprus	3355	3480	3205	4520
Czech Republic	3770	585	3805	850
Denmark	:	825	:	800
Estonia	185	95	150	115
Finland	1775	910	3125	1720
France	97515	19470	88565	18400
Germany	11985	14295	14595	11900
Greece	146335	68565	126140	62850
Hungary	4205	1190	4850	2245
Ireland	3510	770	1615	830
Italy	68175	7140	53440	5315
Latvia	265	270	70	200
Lithuania	910	855	1210	925
Luxembourg	:	:	185	105
Malta	3015	305	1690	530
Netherlands	31700	9350	43360	8980
Poland	8145	8595	8520	6945
Portugal	8185	1345	10295	1220
Romania	3695	3820	5125	4670
Slovakia	1655	1295	1180	900
Slovenia	1555	1995	1065	2220
Spain	82940	29785	103010	28865
Sweden	12555	9015	17820	11980
United Kingdom	69840	47455	69745	62535
<b>EU 27</b>	<b>608225</b>	<b>241505</b>	<b>598755</b>	<b>250375</b>

Source: Eurostat

For instance, the number of those who left Germany and the United Kingdom included not only those who were expelled as a result of a removal order, but also those who returned on a voluntary basis. Conversely, those who left France included only those who were served a removal order but not those who returned on a voluntary basis.

Moreover, the reported data do not provide any information regarding the impact of EU readmission agreements on the overall number of third-country nationals who left the EU. The only way of assessing their impact consists in collecting data from the authorities of the third countries concerned. This is what the Commission is doing, at the time of writing, by sending a questionnaire allowing the contribution of EU and bilateral readmission agreements to be comparatively assessed with reference to the difference between approved and refused readmission requests, the number of applications submitted under the normal and accelerated procedures, the number of travel documents issued to the authorities of a requesting Member State under an EU readmission and under a bilateral agreement (if any).

As stated before, quantitative data are key to understanding how parts of the reciprocal obligations contained in a readmission agreement have been addressed.

However, reciprocal obligations are not limited to such quantitative considerations. Reciprocal obligations also include the respect for fundamental rights of the unauthorised aliens enshrined, among others, in the 1951 Refugee Convention and in the Charter of Fundamental Rights of the European Union.

In this respect, Point 6, in the aforementioned PACE Resolution 1741(2010), states that:

It is essential to negotiate and apply readmission agreements which take fully into account the human rights of the irregular migrants concerned. Furthermore, it is crucial, in order to better understand and evaluate these instruments, to collect data on their *effects* and *implementation* [italics added].

To date, there are no accurate data allowing such a comprehensive evaluation to be performed with specific reference to the cooperation on readmission and its implications.

The first reason lies in that available statistical data allow the operability to be calculated, not its implications in terms of human rights observance. The second reason is that available data address law-enforcement decisions as applied to the readmission of unauthorised aliens but not their concrete effects. Effects, in the parlance of the PACE, refer to the *fate of unauthorised aliens* and to the extent to which readmission agreements, once implemented, impact on their safety and rights before and after their removal to a third country.

Measurable indicators could be taken into consideration to respond to the PACE resolution, particularly regarding the ways in which effective right for remedy and the fair treatment of asylum claims has been addressed, number and conditions of asylum-seekers in detention centres, number and types of complaints filed by aliens against immigration and border officers, medical records on aliens' physical and mental health, conditions after readmission in the third country. The list is far from being exhaustive.

- Recommendation 9: The European Parliament should call on the Commission to adopt an evaluation process of EU readmission agreements that fully reflects their manifold implications, not only in terms of operability, but also in terms of respect for the Union's fundamental values. The FRA should be mobilised to identify robust and measurable indicators allowing the fate of readmitted persons to be evaluated.
- Recommendation 10: The European Parliament should foresee the possibility of assessing a sample of bilateral readmission agreements. Given the predominance of a bilateral readmission system in which most EU Member States are involved, this initiative would shed light on the rationales, configuration and implications for human rights observance of bilateral patterns of cooperation on readmission.

## 5.5. A public/private regulatory system

There can be no question that the production of knowledge about readmission, as well as access to data, has become strategic, if not crucial, in political terms. The drive for operability, added to the consolidation of a security paradigm and its ensuing hierarchy of priorities, have obviously had a bearing on how knowledge has been produced and delivered. The state has been but one actor in the consolidation process of the hierarchy of priorities.

Actually, in the fields of the fight against unauthorized migration, detention, and readmission, private business concerns and large security corporations have been increasingly mobilized to arguably minimize the costs (and visibility) of removal and to



maximize its operability. In this respect, Thomas Gammeltoft-Hansen explains in his comprehensive study on the outsourcing of migration controls that:

Today, the privatisation of migration control is far from limited to airlines or other transport companies. From the use of private contractors to run immigration detention facilities and enforce returns and the use of private search officers both at the border and at offshore control zones, to increasing market for short-term visa exemption agents, privatised migration control is both expanding and taking new forms (Gammeltoft-Hansen, 2009, p. 233).

In the European Union, the outsourcing of migration controls to private contractors in the security and surveillance sectors (e.g., the GEO Group, European Homecare, Group 4 Securicor, International Trading Agency Overseas Escorts Ltd., RSI Immigration Services Ltd., Global Solutions Ltd., to mention just a few) has gained momentum over the last ten years or so as a result of an amazingly lucrative business (Hayes, 2009 p. 12). Such EU Member States as the United Kingdom, the Czech Republic, and the Netherlands, have outsourced parts of the management of their detention facilities and of their escorting for removal operations.

Reasons accounting for the delegation of some regulatory functions of the state are diverse. In a recent study, Michael Flynn and Cecilia Cannon (2009) show that large security companies have penetrated national migration control and surveillance systems in a number of countries around the globe, whether these are countries of destination or of origin, not only because they are purportedly responsive to cost-effectiveness, but also because their involvement might incur less visibility and accountability.

The action of human rights organisations, associations and also the media, have allowed alleged assaults and ill-treatment against asylum-seekers in detention centres and against readmitted aliens, escorted by private security agents, to be publicly exposed, leading to numerous inquiries (Independent Asylum Commission 2010; Arnold *et al* 2008). There can be no question that outsourced migration controls “have important consequences not only for the effective enforcement of refugee and human rights law, but also for the possibilities of establishing legal clarity” (Gammeltoft-Hansen, 2009, p. 271).

The actual magnitude of outsourcing in the field of readmission is still unknown. However, it is reasonable to argue that a readmission system is emerging whereby the interests of the private remain intertwined with those of the public to respond and legitimize operable means of implementation. Incidentally, private security companies do not only *deliver* a service which, being private, often remains beyond public purview, they are also proactive in developing “extremely close ties” (Flynn and Cannon, 2009, p. 16) with decision-makers and government officials and in expanding strategic alliances with other key private actors or subcontractors. Clearly, further evidence is needed to understand the actual impact of these interconnections on policy options and priorities. There are forms of interference that neither affect decision-making processes and policy options, nor are they meant to do so substantially.

Nonetheless, some may entail the provision of information that policy-makers value in their day-to-day tasks. Information provision which often takes place through special advisory committees also implies how policy issues and exigencies can be perceived and dealt with. It is reasonable to assume that the participation of private contractors’ staff in such committees, as evidenced by Ben Hayes (2009), may have contributed to consolidating the hierarchy of priorities mentioned above and its security paradigm, while making its means of implementation if not more practicable, at least more banal, thinkable, and acceptable.

- Recommendation 11: The European Parliament should undertake a thorough examination of the outsourcing of migration control functions to private contractors in all the EU Member States. This monitoring is of paramount importance to assess the actual magnitude and rationale for outsourcing to private security companies as well as its implications for public accountability and for the observance of unauthorised aliens' fundamental rights, particularly those who are offered an order to leave.

## 6. CONCLUSION

To be sure, the cooperation on readmission as it stands now in the external relations of the EU involves more than an absolute duty to re-accept one's own nationals. Since the mid 1990s, when the Council of the European Union recommended guiding principles to the Member States in their bilateral negotiations with third countries on readmission, cooperative patterns have become highly diverse.

This study explained how the drives for flexibility and operability have gradually led to the emergence of diverse cooperative patterns on readmission. It is precisely the combination of these factors that has been conducive to the dramatic expansion of the cobweb of bilateral agreements linked to readmission (whether standard or not).

EU readmission agreements have evolved in a dominant bilateral readmission system including all kinds of migration countries, whether they are rich or poor, democratically organised or totalitarian, stable or fragile. One is entitled to question the extent to which the prioritisation of readmission in EU external relations is compatible with the promotion of good governance, democracy and public accountability in partner countries, above all when, as shown in this study, some partner countries can effectively capitalise on their empowered position.

In a similar vein, when considering that the cooperation on readmission constitutes one of the many ways in which to consolidate a broader bilateral cooperative framework, including other strategic (and perhaps more crucial) policy areas such as security, energy, trade, and the fight against terrorism, one is entitled to question whether a cooperative third country has a vested interest in developing a genuine legal system aimed at the respect for the rights of migrants and the protection of asylum-seekers. Under these circumstances, it is reasonable to warn the European Parliament about future guarantees, aimed at ensuring the safety of persons readmitted to a country that has no effective asylum system. Such guarantee can hardly be taken seriously.

Consequently, the call of the Council of Europe to

conclude readmission agreements only with countries that comply with relevant human rights standards and with the 1951 Geneva Convention, that have functioning asylum systems in place and that protect their citizens' right to free movement, neither criminalising unauthorised entry into, nor departure from, the country in question<sup>41</sup>

cannot be dismissed offhand, above all following the incorporation of the Charter of Fundamental Rights of the European Union into the Treaties.

Additionally, this study set out to raise awareness of the existence of dominant frameworks of understanding that have branded readmission agreements as the only technical instruments able "to combat illegal migration." The need for enhanced cooperation has been presented as a *sine qua non* to tackle shared problems or perceived threats. Of course, this cause-and-effect relationship results from and fosters consensus formation. It subtly justifies, by the same token, the use of operable means that might weaken the enforceability of universal norms and standards on human rights without necessarily ignoring or denying their existence. The Italian-Libyan pattern of cooperation on readmission is perhaps the most emblematic case. Without the existence of an unquestioned scheme of understanding, based on the use of hegemonic language and sustained by the repetition of regional consultative processes (mobilizing state actors from

<sup>41</sup> See Point 6.1 in Resolution 1741 (2010), see Council of Europe (2010a).

countries of origin, of transit, and of destination), neither the asymmetric costs inherent in the cooperation on readmission would have become less critical in the bargaining process, nor would the cobweb of agreements have developed simultaneously at the global level.

This study is an attempt to shed light on how and why the readmission system has materialized so far and which major forces have driven its expansion and policy options, at bilateral and EU levels. Since the entry into force of the Treaty of Lisbon, the European Parliament has acquired the legislative and political powers to have a say on the hierarchy of priorities that has so far sustained the expansion of the readmission system, before it consolidates for good. The various recommendations contained in this study constitute concrete steps to move forward in accordance with the fundamental rights principles that the Union seeks to advance in its external action.

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**Table 5: Number of returned third-country nationals from each Member State, top-10 nationalities, 2009**

	Albania	Morocco	Brazil	Ukraine	India	Iraq	China (including Hong Kong)	Afghanistan	Turkey	Algeria	Other	Total
Austria	90	125	15	130	235	240	190	165	250	55	4895	<b>6390</b>
Belgium	135	265	1265	345	75	30	75	20	85	55	1685	<b>4035</b>
Bulgaria	10	10	0	0	0	30	5	20	70	5	100	<b>250</b>
Cyprus	0	10	0	50	310	10	165	5	95	0	3855	<b>4500</b>
Czech Republic	0	0	0	415	0	0	10	0	10	0	405	<b>840</b>
Denmark	10	10	20	20	15	125	20	25	35	10	490	<b>780</b>
Estonia	0	0	0	10	0	0	5	15	0	0	70	<b>100</b>
Finland	10	20	5	20	30	250	50	35	30	10	1235	<b>1695</b>
France	275	2890	670	275	805	430	810	365	910	2930	8015	<b>18375</b>
Germany	180	300	75	170	460	585	270	155	1040	440	8185	<b>11860</b>
Greece	60040	20	5	70	35	320	15	470	375	15	1430	<b>62795</b>
Hungary	70	5	0	40	5	10	25	35	105	10	1945	<b>2250</b>
Ireland	5	0	200	10	5	10	20	0	5	0	565	<b>820</b>
Italy	1085	830	125	355	80	30	135	5	40	170	2440	<b>5295</b>
Latvia	0	0	0	20	0	0	5	5	5	0	160	<b>195</b>
Lithuania	0	0	0	110	5	0	5	0	45	0	740	<b>905</b>
Luxembourg	5	0	10	0	0	0	0	0	0	0	65	<b>80</b>
Malta	0	10	0	10	20	0	10	0	5	10	465	<b>530</b>
Netherlands	115	380	535	270	135	685	475	75	935	50	5340	<b>8995</b>
Poland	5	10	0	4300	20	15	75	5	35	10	2445	<b>6920</b>
Portugal	0	30	715	80	30	0	20	0	0	15	315	<b>1205</b>
Romania	40	25	35	110	40	40	1375	0	1200	5	1785	<b>4655</b>
Slovakia	5	0	0	335	10	5	10	45	10	0	470	<b>890</b>
Slovenia	95	25	10	140	5	10	105	25	55	5	1715	<b>2190</b>
Spain	70	10130	2225	295	165	20	245	15	245	2195	13230	<b>28835</b>
Sweden	80	65	10	60	60	3180	160	135	175	85	7955	<b>11965</b>
United Kingdom	845	215	5735	670	5715	2010	3350	5095	900	525	37460	<b>62520</b>
<b>EU 27</b>	<b>63170</b>	<b>15375</b>	<b>11655</b>	<b>8310</b>	<b>8260</b>	<b>8035</b>	<b>7630</b>	<b>6715</b>	<b>6660</b>	<b>6600</b>	107460	<b>249870</b>

Source: Eurostat. Returned persons refer to "third-country nationals who have in fact left the territory of the Member State, following an administrative or judicial decision or act".

**Table 6: Number of third-country nationals ordered to leave from each Member State, top-10 nationalities, 2009**

	Albania	Morocco	Afghanistan	Iraq	Algeria	Brazil	China (including Hong Kong)	Bolivia	India	Pakistan	Other	Total
Austria	80	220	210	150	225	25	390	0	580	140	8595	<b>10615</b>
Belgium	290	3490	1515	1170	3890	660	440	10	1415	360	10640	<b>23880</b>
Bulgaria	20	30	95	270	30	0	10	0	5	15	975	<b>1450</b>
Cyprus	0	10	10	10	0	0	125	0	0	315	2705	<b>3175</b>
Czech Republic	5	5	15	20	20	5	80	0	10	5	3605	<b>3770</b>
Estonia	0	0	15	0	0	0	5	0	0	0	110	<b>130</b>
Finland	15	35	125	465	25	5	70	0	45	10	2300	<b>3095</b>
France	790	8795	4860	2025	9770	865	3495	205	3795	1870	52045	<b>88515</b>
Germany	140	355	190	840	385	160	305	10	535	170	11500	<b>14590</b>
Greece	63565	220	17830	7660	330	10	440	0	350	4855	30885	<b>126145</b>
Hungary	65	15	160	35	10	10	300	0	20	30	4205	<b>4850</b>
Ireland	15	5	5	15	10	200	30	5	5	20	1295	<b>1605</b>
Italy	2875	9450	745	610	1335	890	3460	225	1480	800	31575	<b>53445</b>
Latvia	0	0	0	0	0	0	0	0	0	0	70	<b>70</b>
Lithuania	0	0	0	0	0	0	10	0	10	5	1185	<b>1210</b>
Luxembourg	10	5	0	0	15	15	5	0	0	0	115	<b>165</b>
Malta	0	15	0	0	15	0	15	0	50	5	1585	<b>1685</b>
Netherlands	210	3275	1710	4430	325	280	1630	25	520	415	30510	<b>43330</b>
Poland	5	15	5	15	5	0	140	0	30	15	8235	<b>8465</b>
Portugal	0	105	0	0	15	6070	285	0	455	175	3175	<b>10280</b>
Romania	45	25	0	50	5	35	1390	0	45	40	3460	<b>5095</b>
Slovakia	5	0	65	5	0	0	25	0	20	50	980	<b>1150</b>
Slovenia	45	0	5	5	0	5	5	0	0	0	980	<b>1045</b>
Spain	185	15625	95	125	5800	8400	2475	17120	1270	2815	49090	<b>103000</b>
Sweden	85	70	255	5720	85	10	205	110	95	85	11065	<b>17785</b>
United Kingdom	725	150	7320	2015	725	2955	3790	300	6105	4510	41150	<b>69745</b>
EU-27	69175	41915	35230	25635	23020	20600	19125	18010	16840	16705	312035	<b>598290</b>

Source: Eurostat. Third-country ordered to leave are persons "found to be illegally present in the territory of the Member State who are subject to an administrative or judicial decision or act stating or declaring that their stay is illegal and imposing an obligation to leave the territory of the Member State".

**Table 7: Third-country nationals refused entry at the external borders from each Member State, top-10 nationalities, 2009**

	Morocco	Ukraine	Brazil	Russian Federation	Georgia	Belarus	Croatia	Turkey	Serbia	China (including Hong Kong)	Other	Total
Austria	5	30	5	40	15	5	5	65	55	55	345	<b>625</b>
Belgium	190	15	20	45	0	0	10	205	20	35	1505	<b>2045</b>
Bulgaria	15	65	5	115	20	5	0	1525	280	40	925	<b>2995</b>
Cyprus	5	50	5	40	15	10	0	20	15	20	470	<b>650</b>
Czech Republic	0	40	0	85	5	10	5	15	5	5	195	<b>365</b>
Denmark	0	0	0	5	0	0	0	0	0	0	25	<b>30</b>
Estonia	0	35	0	370	0	5	0	40	0	5	435	<b>890</b>
Finland	0	15	0	1095	0	15	0	25	0	15	135	<b>1300</b>
France	650	45	1505	165	25	15	15	315	55	1570	9930	<b>14290</b>
Germany	25	75	110	265	20	15	25	420	100	260	1660	<b>2975</b>
Greece	15	75	5	110	125	5	20	230	90	100	2215	<b>2990</b>
Hungary	5	3710	10	150	5	15	840	260	1730	35	925	<b>7685</b>
Ireland	15	35	470	30	15	0	25	25	10	385	2515	<b>3525</b>
Italy	265	60	150	85	10	5	20	155	75	135	2730	<b>3690</b>
Latvia	0	30	0	290	10	75	0	25	5	5	200	<b>640</b>
Liechtenstein	0	0	0	5	0	0	0	0	0	0	15	<b>20</b>
Lithuania	0	105	0	835	75	530	0	5	0	0	190	<b>1740</b>
Luxembourg	0	0	0	0	0	0	0	0	0	0	0	<b>0</b>
Malta	0	5	0	5	0	0	0	5	0	0	105	<b>120</b>
Netherlands	20	40	180	75	20	10	5	140	5	155	1830	<b>2480</b>
Poland	0	12800	0	3350	5685	4205	0	35	5	10	765	<b>26855</b>
Portugal	5	5	1670	0	0	0	5	0	0	5	835	<b>2525</b>
Romania	45	935	0	140	5	20	5	725	260	115	2320	<b>4570</b>
Slovakia	0	750	0	25	5	5	0	5	0	0	60	<b>850</b>
Slovenia	0	200	20	265	0	0	3705	185	825	5	2665	<b>7870</b>
Spain	377080	5	1995	90	5	0	5	25	0	135	7640	<b>386980</b>
Sweden	0	0	0	5	0	0	0	5	0	0	10	<b>20</b>
United Kingdom	145	320	2310	245	35	50	145	290	90	520	16300	<b>20450</b>
<b>EU-27</b>	<b>378485</b>	<b>19445</b>	<b>8460</b>	<b>7930</b>	<b>6095</b>	<b>5000</b>	<b>4835</b>	<b>4745</b>	<b>3625</b>	<b>3610</b>	<b>56945</b>	<b>499175</b>

Source: Eurostat. "Third-country nationals are refused entry at the external border because they do not fulfil all the entry conditions".



DIRECTORATE-GENERAL FOR INTERNAL POLICIES

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