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From: Presidency  
On: 3 March 2014  
To: Council (Justice and Home Affairs)  
Subject: **"An effective EU return policy"**  
Presidency's food for thought paper for the lunch discussion

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Each year, authorities in the EU Member States apprehend more than 500,000 illegal migrants. About 40 % of them are sent back to their country of origin or transit.

Since 1999, and in particular since the entry into force of the Lisbon Treaty<sup>1</sup>, the EU has made significant progress in developing a comprehensive approach on migration and asylum. An effective and humane return policy is essential to the credibility of this comprehensive approach:

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<sup>1</sup> Article 78(1) of TFEU establishes that *'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.'*

- provided that fair and efficient asylum systems are in place that fully respect the principle of non-refoulement, it is indeed legitimate for a state to return illegally staying third-country nationals, in full respect for the fundamental rights and dignity of the persons concerned and in line with the EU Charter of Fundamental Rights, the European Convention on Human Rights and all other relevant international human rights conventions;
- the lack of effective return systems and procedures for those illegally residing and possibly working in the Union may erode the support that exists in society for welcoming refugees and all those in real need of protection.

A number of EU legislative and operational instruments have been adopted in the area of the return policy. The Return Directive<sup>2</sup>, adopted in 2008, has entered into force in 2010. It establishes for the first time in the EU a clear, transparent and fair set of common rules for the return and removal of third-country nationals who do not, or no longer, fulfil the conditions for entry, stay or residence in a Member State, and for the use of coercive measures, detention and re-entry ban, while fully respecting the human rights and fundamental freedoms of the persons concerned. The Return Directive extends the right to *non-refoulement* to any illegally staying person, where this right was only guaranteed previously for asylum seekers.

When discussing such issues, the following considerations should be borne in mind.

- Since the late 1990s, the EU has sought to develop the ‘external dimension’ of its policies on immigration and asylum, trying to manage migration through strengthened cooperation with origin and/or transit countries. This policy includes not only the externalization of the traditional tools of migration control but also the prevention of the causes of migration and refugee flows, through development assistance and foreign policy tools. In order to ensure the full credibility and the effectiveness of the EU return policy, international cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.

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<sup>2</sup> Directive 2008/115/EC of 16 December 2008, OJ L 348 of 24.12.2008

Readmission agreements are an essential part of this approach, setting out clear obligations and procedures for the third countries and EU Member States as to when and how to take back people who are illegally residing in the EU. They are technical instruments to improve cooperation between national administrations, which can be used after a return decision has been taken in full respect of procedural guarantees set by the Return Directive and the Asylum Procedures Directive<sup>3</sup>. So far, the EU has signed and concluded readmission agreements with fourteen third countries, while two other readmission agreements, with Turkey and Azerbaijan, have been signed but not yet concluded. The EU is also developing cooperation, including on return and readmission matters, with several third countries, regional and continental organisations. However, one of the issues that appear to deserve further consideration at European level is the somewhat low-level of cooperation of some third countries in the implementation of readmission and return procedures.

- One of the basic principles of the EU return policy is to give priority to the voluntary return of illegal immigrants. The term 'voluntary return' includes different types of programmes, from those that are genuinely voluntary to those that are options of last resort, meaning that illegally resident migrants facing the possibility of forced removal prefer the 'voluntary' return instead. A voluntary return is preferable to forced return, and it presents fewer risks with respect to human rights. In addition, forced returns are more expensive and require an agreement with the origin/transit country. Forced return should therefore only be used as a last resort option, in case no other suitable alternative is provided. International organisations like the International Organisation for Migration (IOM) and the Council of Europe<sup>4</sup> have strongly recommended that host states should promote voluntary return, Member States can also provide for enhanced return assistance and counselling and make best use of the relevant funding possibilities offered under the Return Fund.

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<sup>3</sup> Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ L 180 of 28.06.13.

<sup>4</sup> The Committee of Ministers of the Council of Europe adopted twenty guidelines on forced return on 4 May 2005.

However, only few third country nationals in an illegal situation accept to return voluntarily to their country of origin or transit. Voluntary return programmes, including the pay-to-go return programmes implemented since the 1970's, have persistently failed to attract a substantive number of participants. Furthermore, the 'sustainability' of those returns, i.e. the possibility of succeeding in the origin country and contributing to its economic and social development, has been at best questionable.

- The EU's return policy is also based on operational cooperation between Member States aimed at avoiding useless duplications. Such operational cooperation covers areas such as assistance in cases of transit for the purposes of removal by air, organisation of joint flights for removals, and the mutual recognition of decisions on expulsion.
- Putting in place improved controls and imposing more severe penalties, on a Europe-wide basis, on those employing illegal immigrants could significantly reduce the attractiveness of illegal work in the EU, thereby contributing, even if indirectly, to the effectiveness of the EU return policy.

The Commission has stated its intention to present in the coming weeks a communication on the return policy of the European Union, which is expected to provide an assessment of the current situation in Europe and to contain recommendations for the improvement of the EU policy and for future actions in this area. In this perspective, the Presidency would like to invite Ministers to express their views on the following questions:

- How can the joint actions of the Commission, Member States, the EEAS and EU Agencies contribute to a more effective and efficient cooperation with third countries in the area of return policy, in particular on the implementation of return and readmission procedures? What are the leverages that can be used in this framework? How can we use the principle “more for more” as an incentive in this respect? How can we involve more effectively the relevant international organizations? Should return clauses be further used in EU agreements with third countries?

How could existing clauses, such as the ones contained in the Cotonou agreement, become operational? How could cooperation in this area be taken into account when assessing perspectives for developing broader EU relations with individual third countries?

- What stimulating and/or repressive measures could be adopted to promote a wider recourse to voluntary return by third country nationals in illegal situations?

