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From: Presidency  
To: Integration, Migration and Expulsion (IMEX Expulsion) working party  
Subject: Presidency discussion paper on making the return systems more effective:  
a reflection towards the future of the EU return policy

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Delegations will find in annex a discussion paper on the above-mentioned topic for the Integration, Migration and Expulsion (IMEX Expulsion) working party meeting on 12 March 2024.

**PRESIDENCY DISCUSSION PAPER ON MAKING THE RETURN SYSTEMS MORE  
EFFECTIVE: A REFLECTION TOWARDS THE FUTURE OF THE EU RETURN  
POLICY (PART I)**

**Introduction: new context for the future of the EU return policy**

The EU returns system is a cornerstone of the EU asylum and migration management policies. A well-functioning EU returns system serves as a deterrent for irregular migration and helps to ensure the credibility of the overall asylum and migration management systems. As such, returns are an essential element of the comprehensive approach to migration as set out in the New Pact on Migration and Asylum, and will be decisive for the success of the operationalisation of the legislative reforms of the Pact that have been agreed recently. It is also an important component of the European Integrated Border Management and the last stage in the four tier access control model

The 2015 migratory crisis has created many challenges for Member States, also in the field of return of illegally staying third country nationals. Indeed, many applications for international protection were rejected and many third-country nationals with no right to stay in the European Union were then issued a decision to leave the EU and the Schengen area. While the European Commission took various initiatives to address this situation and ensure the effectiveness of returns (action plan, recommendations, etc.), there is still room for improvement. In September 2018, the European Commission published a proposal for a recast of the Return Directive (2008/115/EC).<sup>1</sup> At that time, the objective of the Commission was to propose targeted revisions of the Directive, rather than an in-depth reform.

The Commission's proposal was discussed within the Council between September 2018 and May 2019. Following intensive negotiations, the Council adopted its partial general approach in June 2019.<sup>2</sup> It should be recalled that this approach was considered as partial, as discussions regarding the Asylum Procedures Regulation (APR) were still ongoing and Member States could not commit on defining the return border procedure without knowing how the asylum border procedure would look like as a result of negotiations.

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<sup>1</sup> ST 12099/18+ADD1

<sup>2</sup> ST 10144/19

On the side of the European Parliament, the previous and the current Parliament have been unable to establish a common position on the proposal. This is in part due to the focus on the other files of the Pact. The rapporteur, Tineke Strik, published a draft report that was presented to the LIBE Committee in September 2020. It mainly points out the lack of an impact assessment from the Commission and questions the necessity and proportionality of the reform.

The two major changes introduced by the Commission proposal for the recast Return Directive were the establishment of criteria for the determination of the existence of the risk of absconding and an (expedited) return border procedure. Among other elements were the systematic issuance of return decisions in connection with the termination of a legal stay; clearer rules regarding remedies; streamlined rules on the granting of a period for voluntary departure; the obligation to have national IT return management systems; and a more effective use of detention and alternatives to detention.

Nevertheless, since 2019, a number of important developments took place that have impacted the returns : a visa leverage has been established through the new Article 25a of the Visa code; the EU strategy on voluntary return and reintegration has been adopted; the mandate of the European Border and Coast Guard in the field of return has been extended to cover the whole return process and to include a comprehensive collective responsibility for Frontex and national authorities for border management and return; a EU Return Coordinator was appointed; and the obligation to introduce return alerts in the Schengen Information System (SIS) has been set. This latter development opens new possibilities for faster identification, facilitates determination of risk of absconding and mutual recognition of return decisions, and increases our situational awareness as regards returns.

Moreover, the case law of the Court of Justice of the European Union (CJEU) related to returns has also evolved since 2019. Member States exchange views on a regular basis on the consequences of the main judgments of the CJEU on matters related to return within the Contact Group on the “Return Directive”. For instance, Member States had to adapt their national practices following joined preliminary rulings establishing the obligation to indicate the country of destination in the return decision and to take a new return decision in the event of a change of destination (see joined case C-924/19 and C-925/19<sup>3</sup>).

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<sup>3</sup> Judgment in Joined case C-924/19 and C-925/19, 14 May 2020, (ECLI:EU:C:2020:367).

Finally, the New Pact on Migration and Asylum brings important changes that have a direct impact on the recast Return Directive. Thanks to the new Asylum Procedure Regulation (APR), the link between the asylum and return procedures will be reinforced. Indeed, the APR works towards the goal of the recast Return Directive to close the loopholes between the negative asylum decision and the return decision, both at the decision issuance stage and at the appeal stage.<sup>4</sup> The provisions on the return border procedure, which were originally in the recast Return Directive, are now set in a dedicated Regulation. The revised Schengen Border Code Regulation, which is expected to be adopted in the coming months, should establish a procedure for transferring irregular migrants who have crossed an internal border between two Member States apprehended in a border area.

In the light of these developments, at the Schengen Council of December 2023, a number of Member States called on assessing this new situation. Also, at the end of 2023, the Spanish Presidency started a discussion on a more effective EU return policy and a possibility to move towards the European return decision. In this context, in preparation for the implementation of the Pact, and looking ahead towards the next legislative cycle, the Presidency deems necessary to discuss the Member States' needs as regards the future of the EU return policy and, in particular, as regards its legal framework. At the end of this reflection exercise, we will take stock of the needs in order to draw the appropriate conclusions. The Presidency is not seeking to reopen or revise the Council mandate on the recast Return Directive, but rather to draw inspiration from it to define Member States' current needs as to the future legal framework in the area of return.

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<sup>4</sup> Rejection of an asylum application and issuance of a return decision: parts of Article 8 (6) RRD are now dealt with in Article 35a APR. Remedies: Parts of Article 16 RRD are now dealt with in Article 53 APR. Suspensive effect: Article 54 APR regulates, notably, abuses of the asylum procedure intended to delay or frustrate the enforcement of a return decision.

For this purpose, the Presidency intends to organise a number of discussions, at different fora, on various elements of the EU return legal framework.<sup>5</sup> The analysis on how to build a stronger and more effective return system can be carried out following three complementary angles:

- Harmonization: Identification of already regulated areas where improvements are sought, which could be solved by having more harmonization, where it has the potential to increase effectiveness of returns.
- Creative solutions: Identification of areas which are not yet regulated but whose development could bring more effectiveness to the EU return framework.
- Horizontal issues: Some issues are or have become central to the returns system so that they shape the whole legal framework and give it its own identity. Determining how the weight of each of those horizontal issues has evolved will define how the whole picture could potentially be adapted.

The first discussion is foreseen to take place at the Integration, Migration and Expulsion (IMEX Expulsion) working party meeting on 12 March. The debate will focus on the elements related to the ‘Harmonization’ theme and will be guided by the questions identified through the different parts of this paper.

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<sup>5</sup> IMEX of 12/03/24, SICFA of 10/04/24 and IMEX of 23/04/24.

## Some elements of the EU return legislation – Harmonization

### Issuance of return decisions

Given the lack of systematic issuance of return decisions in connection with the termination of legal stay, in Article 8 (6) of the recast Return Directive the Commission proposed to introduce the obligation for Member States to issue a return decision immediately after a decision rejecting or terminating the legal stay is taken.

Member States discussed extensively this provision, especially on the way (in one or in separate acts) and the timing (with or without a delay between the two decisions) that both decisions should be taken. The Council agreed to have the return decision issued in the same act with the decision ending or refusing a legal stay of a third country national or, together with or without undue delay after the adoption of a decision ending or refusing a legal stay. Similar discussions took place when later discussing Article 35a of the APR, which linked the issuance of the return decision with a negative asylum decision.

The issuance of return decisions in connection with the termination of a legal stay is sufficiently covered. On the one hand, the link with the asylum decision is appropriately dealt with in the APR. On the other hand the link with a decision ending a legal stay other than based on asylum is properly covered in Article 8 (6) of the recast Return Directive. The continuum between the end of legal stay and return is, *a priori*, adequately guaranteed by the two above mentioned legal acts.

However, beyond the above-mentioned issue, the Commission has identified other problems in its document titled “Key conclusions from the 2020-2023 Schengen evaluations as regards return”.<sup>6</sup> Return decisions are not consistently issued to all illegally staying third-country nationals and practices on timing, as well as on the content, differ. For example, some Member States wait for the end of a parallel ongoing procedure for legal stay or for the end of the criminal detention before issuing a return decision.

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<sup>6</sup> ST 5496/24, presented to the Council at the IMEX Expulsion meeting on 08/02/2024.

*Questions for discussion:*

- 1. What are the main legal challenges you face when it comes to issuance of return decisions? How can we legally ensure that return decisions are issued to all illegally staying third country nationals?*
- 2. Do you think that more legal clarity is needed on the use of the SIS information in the framework of the issuance of return decisions?*

**Giving a more European dimension to return decisions**

Currently a person who has been ordered to leave the EU and the Schengen area by means of a return decision in one Member State can move to another Member State where the return process then will start all over again, thereby undermining the effectiveness and credibility of the return system. The Return Directive already foresees that the effects of national return measures should be given a European dimension by providing for EU-wide entry bans. Moving towards a more European dimension also when it comes to return decisions could further facilitate and accelerate the return process, increase convergence between Member States on managing migration and discourage secondary movements.

During the discussions on the recast Return Directive within the Council in 2018-2019, Member States addressed the possibility to include the principle of mutual recognition of return decisions in the text, which had not been done by the Commission in its proposal. The Council mandate contains a reference to the Directive 2001/40/EC on the mutual recognition of return decisions (Article 8 (7) recast Return Directive Council mandate). However, some Member States regretted the lack of substantial solution on the mutual recognition of return decisions in the recast.

Nevertheless, since 2019, several important developments brought the discussions on the mutual recognition back to the table. As from March 2023, Member States are required to insert return alerts on their return decisions issued into SIS, which opens the possibility to substantially facilitate the mutual recognition of return decisions, given that for the first time Member States are aware of return decisions issued by other Member States. To guide the Member States through the possibilities offered by the new return alerts feature of the SIS, the Commission published a recommendation on mutual recognition of return decisions and expediting return when implementing Directive 2008/115/CE.<sup>7</sup>

In 2023, the President of the Commission, Ursula von der Leyen, called upon the Member States multiple times in her letters published ahead of European Councils to recognize each other's return decisions. Member States are generally in favour of such a principle, as it represents a credible tool to make the returns system more effective. Nevertheless, they have repeatedly mentioned the legal and operational difficulties, in the current legislative framework, to achieve such an objective. Among such issues mentioned were the links with other procedures, especially asylum; different national regulation on the right to remain; the need to organise a new test of the respect of the principle of *non-refoulement*; the need to ensure the right to be heard before issuing the recognition decision; the need to make remedies available against the recognition decision; the need for the text of decision and the translation; the calculation of the maximum period of detention, etc.

Despite the different above-mentioned obstacles, if these are to be overcome, mutual recognition of return decisions could be an important tool to give a further boost to the EU return policy, or even pave the way towards a new concept of the EU return decision that would be applicable across the Union.

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<sup>7</sup> ST 7571/23



With a view to overcoming different current obstacles in mutual recognition, during the Spanish Presidency, Member States discussed the possibility to harmonize the EU return procedures even further, with the adoption of a common form, or even the possibility to attain a potential EU-wide return decision. While many Member States agreed to such a long term objective, it was also made clear that this would imply changes to the EU legal framework that go beyond the current recast exercise. During the Schengen Council in December 2023, several Member States expressed their readiness to take this reflection further.

*Questions for discussion:*

1. *Do Member States prefer working towards mutual recognition (with the EU return decision as a more long term perspective) or immediately towards the EU return decision?*
  - a) *Do Member States consider that in the case of mutual recognition, substantial changes to the current legal framework, going beyond the recast Return directive, are necessary? If so, what kind of changes would that be? Do you see an added-value to having common minimum quality standards on the content of the return decisions?*
  - b) *Do Member States agree that in the case of the EU return decision, substantial changes to the current legal framework, going beyond the recast Return directive, are necessary? What kind of changes would that be?*

### *Preventing the risk of absconding and detention*

Preventing absconding and unauthorised movements within the Union is essential to ensure the effectiveness of the common EU system for returns. The Commission introduced a new Article 6 in the proposal for a recast Return Directive to include the key tools for assessing and preventing the risk of absconding (objective criteria for assessing the existence of the risk of absconding in each individual case). This would help facilitate and streamline the assessment of this risk in individual cases, strengthen the use of efficient alternatives to detention (to match the different levels of risk of absconding and individual circumstances), and ensure sufficient detention capacity – when detention is used as a measure of last resort and for an as short as possible period in accordance with Article 18 of the recast Return Directive.

During the negotiations in the Council, Member States welcomed the principle of a list of common criteria. Discussions focused on the indicators to be used to assess the risk of absconding and on their presumed nature. The difficulty laid in finding the right balance between the necessity to cover the main cases of absconding while making sure that the criteria would be effective and proportionate.

Once the risk of absconding has been assessed, it should be prevented through adequate and proportionate measures. Article 15 of the Return Directive establishes the obligation for Member States to provide alternatives to detention but does not regulate it further. However, the proposal for a recast Return Directive did not suggest regulating this issue with greater details.

Nevertheless, the Commission made two changes on detention in the proposal for a recast Return Directive to bring a minimum level of harmonisation. In Article 18, it introduced an initial minimum period of detention of 3 months. It also added a new ground for detention based on the threat to public order or national security. While Member States widely supported the latter proposal, the minimum duration of detention was more difficult to accept for some Member States if minors were covered by the measure. In the end, the Council mandate provides for the possibility to foresee shorter periods of detention for minors.

Article 16 of the Return Directive regulates the conditions of detention in broad terms. The Commission did not propose to revise this provision in the framework of the recast. However, in the document “Key conclusions from the 2020-2023 Schengen evaluations as regards return”,<sup>8</sup> the Commission notes that the absence of a common detention framework leads to significant discrepancies in the EU. Additionally, the Commission highlights that the lack of detention capacity in Member States poses a significant obstacle for a majority of Member States.

*Questions for discussion:*

1. *What legal modifications do you think are necessary in order to build a stronger system of alternatives to detention?*
2. *Do you deem necessary to further regulate the issue of conditions for detention to bring detention regimes and material conditions closer?*
3. *Do you think that the legislation should establish minimal detention capacities at EU and national levels?*

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<sup>8</sup> ST 5496/24