

Brussels, 7 February 2025
(OR. en)

5681/25

LIMITE

**JAI 96
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NOTE

From:	Presidency
To:	Strategic Committee on Immigration, Frontiers and Asylum
Subject:	Returns – strategic discussion ahead of the expected new return framework - Discussion paper

Effective migration policy cannot exist without an effective system for returns. Unfortunately, as available data show, less than a quarter of third country nationals obliged to return actually leave the EU. While the number of irregular arrivals to the EU remains high, the number of migrants staying irregularly in Member States after their visa has expired or asylum claims have been rejected is growing steadily. This gradually undermines the credibility of the asylum and return system in the eyes of our citizens and their confidence that we can manage migration effectively. Most of the recent debates on improving the ratio of return decisions to returns actually carried out that have been held in the Council under previous presidencies identified deficiencies and challenges that could be addressed through additional legal and operational measures.

Insufficient cooperation by both the third country nationals and the countries of origin has been raised repeatedly as one of the key challenges. Delegations have also highlighted the fragmentation and deficiencies of the legislative framework as a hindrance to achieving higher overall effectiveness of returns. Expectations with regard to improving the return system were expressed in the non-paper ‘Objectives for a new legislative proposal for more effective returns’ and in the letter of 15 May 2024 from 15 Member States to the Commissioner for Home Affairs, requesting innovative solutions for managing migration.

To address the challenges identified, a number of noteworthy initiatives have already been taken at EU level. They include the appointment of the EU Return Coordinator and the establishment of the High-Level Network for Returns; the implementation of the operational strategy for more effective returns; the extension of the mandate of Frontex to cover also voluntary return and reintegration; the introduction of visa leverage in the assessment of third countries' cooperation on readmission (Article 25a of the Visa Code); the introduction of the return alert in the Schengen Information System (SIS), the Commission Recommendation on mutual recognition and expediting returns (March 2023) and finally the establishment of the border procedure for returns and other legislative changes in the Pact applicable as of June 2026. A number of tools to support Member States in managing returns have also been made available. They include the Return Case Management Model (RECAMAS), the Integrated Return Management Application (IRMA), the Frontex Application for Return (FAR), the Readmission Case Management System (RCMS) and the Reintegration Assistance Tool (RIAT). Other initiatives, such as the establishment of trade leverage through the new EU Generalised Scheme of Preferences (GSP) Regulation, are ongoing.

In an attempt to take stock of the ongoing discussion and to provide the Commission with further input for the forthcoming legal framework on returns, the first meeting of the Integration, Migration and Expulsion (IMEX) Working Party under the Polish Presidency held an exchange of views on the issues that had not been explored in depth before, namely: the harmonisation of procedures (common deadlines, common return decision/return form), rights and obligations of the returnee and incentives to cooperate in the return process as well as the consequences of non-cooperation.

The next IMEX Working Party meeting on 18 February will focus on identification, including the exchange of information and operational cooperation between Member States, mainly in cases where a third country national subject to a return procedure in one Member State absconds and then becomes subject to this procedure in another Member State. Areas for simplification, improvement and for reducing the administrative burden at this early stage of return may still be identified, in particular to allow the Member State concluding the return procedure to use the information on a third country national already gathered in another Member State.

Level of harmonisation

During the abovementioned first IMEX Working Party discussion under the Polish Presidency, delegations expressed divergent views on the need for a stronger harmonisation of the legal framework. Some concerns were expressed, *inter alia*, with regard to common deadlines within the return procedure. While delegations highlighted their commitment to closing the gaps, it also seems clear that the new provisions would have to allow for some degree of flexibility. This being said, the majority of delegations agreed that introducing a uniform return decision form attached to the Schengen Information System (SIS) could be a significant and desirable step in the right direction. To render tangible effects it would need to be accompanied by an enhanced use of the available information sharing tools, especially SIS, with the possibility to enter return alerts and add information such as security flags, fingerprints, photos and possibly copies of documents.

Obligations of third country nationals subject to a return procedure, incentives and sanctions

Delegations clearly expressed their support for the introduction of different incentives to improve cooperation by third country nationals with Member States' authorities and of consequences for those individuals who do not cooperate. The relevant measures set out in the Council's 2019 general approach on the recast Return Directive¹ should be expanded. Delegations referred to the possibility of developing an open-ended catalogue of such measures, which might be applied depending on national law. Shorter entry bans, access to reintegration assistance, additional financial incentives, and access to social support were mentioned as examples of such possible incentives.

The need to define the obligation of the third country national to cooperate with the return authority, applicable to persons who do not have the right to reside legally in the EU, received unanimous support. It was underlined that a third country national's failure to fulfil the imposed obligations must result in specific sanctions. In this respect delegations supported the catalogue of rights and obligations included in the Council's general approach on the recast Return Directive. In particular the duty to provide all the necessary elements for establishing or verifying identity was emphasised, as this is one of the key issues for ensuring effective returns. At the same time delegations indicated their openness to expanding the set of obligations established in Article 7 of the recast Return Directive, by adding, for example, an obligation to reside in a designated place for the duration of the return procedure, to cooperate with the embassy or consulate of the relevant third country, to obtain a replacement travel document or to cooperate during medical examinations.

¹ 10144/19

With regard to the possible sanctions in case of a lack of cooperation, delegations proposed gradual restrictions to the third country national's movement, detention, the extension of the entry ban, and the withdrawal of access to social support. A number of delegations indicated that access to incentives should depend on the stage of the return procedure and thought that we should introduce a degressive model in addressing the incentives and consequences of non-cooperation. It is also clear that sanctions must be unavoidable and should constitute a deterrent. On this aspect, in addition to administrative sanctions relating to restrictions on the right of movement, some delegations also proposed to include criminal sanctions.

When considering the consequences of non-cooperation, return hubs could also play a role. The idea behind this innovative new solution is, *inter alia*, to discourage people from choosing the path of irregular migration and to incentivise third country nationals to cooperate with return authorities. Thus non-cooperation by third country nationals with Member States during the return process may lead to the implementation of return through a return hub.

Return hubs

Return hubs are one the policy tools proposed within the basket of new solutions for countering irregular migration developed by a group of like-minded Member States. During the initial discussions some distinct aspects of the concept were elaborated, *inter alia*, the key preconditions and safeguards, and it was suggested that pilot projects should be developed as soon as possible. Delegations unanimously stressed the need to ensure the respect of fundamental rights in return hubs and the important role of international organisations, notably the UNHCR and IOM, in the hubs. However, the examination of these considerations has not been conclusive, and the concept needs a clear legal basis in order to be implemented.

The prevailing position is to have the legal basis framed in a flexible way that would also allow for more tailor-made applications in agreement with the potential host countries of the hubs and would prevent judicial scrutiny that could put the implementation of this innovative solution at risk. Member States generally supported the idea that those sent to return hubs should include people with a final return decision who do not cooperate in their return procedure and/or whose country of origin does not cooperate, therefore making return difficult. Using the hubs for returns of third country nationals posing a threat to security was considered but the idea raised concerns over its practical implementation.

In terms of challenges, the potentially considerable financial implications of establishing such hubs in third countries, the issue of guarantees and the division of responsibility between the EU and the third country remain among the most vital issues. Furthermore, the possible form of the return hubs (i.e. open, closed, hybrid) will also have its ramifications. The issue of those who could not be returned from a return hub for a long time will also have to be solved.

Finding third countries willing to host such return hubs will surely be a difficult endeavour. Therefore close engagement of the Member States, the Council, the Commission, the EEAS, agencies and other relevant actors in providing appropriate incentives, balancing out costs and benefits as well as envisaging further steps will be essential. As for the location, there seems to be an agreement that return hubs should not be located in the proximity of the EU's external borders, to avoid causing secondary irregular migration back to the EU.

As tabling and adopting the new return legislation remains a matter of urgency and the Commission has indicated mid-March as the possible date for the submission of its legislative proposal on returns, the Presidency would like to invite delegations to reflect upon the following questions:

1. *Given the change in the Member States' approach to future return policy, which should be fair but firm and assertive, do you support the possibility of exceeding or even re-applying the current maximum period of detention provided by the current Return Directive, in certain specific circumstances? If so, which are the specific situations to which this exception could apply?*
2. *While Member States' opinions on the obligation of third country nationals to cooperate with the relevant authorities and on sanctions in cases of non-cooperation largely converge, the level of harmonisation should take into account the diverging views on the need for harmonisation. Do you see other areas in which cooperation between Member States on returns could be bolstered beyond the upcoming proposal from the Commission, i.e. at the stage of identification and with the support of current or future IT / information exchange tools?*
3. *What kind of approach should the EU and Member States take to engage with third countries with a view to establishing cooperation on return hubs? What conditions or criteria should third countries meet in order to be considered for selection as sites for the establishment of return hubs?*