

NON PAPER

NOTE FROM THE PRESIDENCY ON THE UNION COMPETENCE FOR RETURNS FROM THIRD COUNTRIES BASED ON THE ARGUMENTS PUT FORWARD BY THE COUNCIL LEGAL SERVICE AT THE POLITICAL TRILOGUE ON 12 March 2019

The competence of the European Union to conclude international agreements may arise not only from an express conferment by the Treaties, but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions (Opinion 1/03 (New Lugano Convention) of 7 February 2006 (EU:C:2006:81, paragraph 114). In particular, whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the Union has the competence to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect. The last-mentioned possibility is now referred to in Article 216(1) TFEU (Opinion 1/13 (Accession of third States to the Hague Convention) of 14 October 2014, EU:C:2014:2303, paragraph 67 and the case-law cited).

Article 216(1) TFEU provides that ‘the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope’.

It follows from the very wording of that provision, that the Union possesses such a competence in four situations. The external Union competence that falls within the scope of the second situation laid down in Article 216(1) TFEU, corresponding to the scenario in which the conclusion of an agreement is ‘necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties’, reflects the case-law of the Court cited above.

It is therefore necessary to determine, whether the fact that the European Union is undertaking international commitments with respect to providing assistance to third countries in the area of return, including return from such third countries, is ‘necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties’, within the meaning of Article 216(1) TFEU. If that is so, the European Union would have the external competence required to undertake international commitments in that respect.

According to article 79 TFEU, EU return policy is part of a common immigration policy aimed among others at ensuring the efficient management of migration flows and the prevention of illegal immigration.

According to Article 77 TFEU, the Union shall develop a policy establishing an integrated management system for external borders. In accordance with Article 3 of the EBCG proposal, the European Integrated Border Management comprises return policy, as well as cooperation with third countries in all areas covered by the Regulation, including returns.

Both the Union common immigration policy including return policy and the integrated management of external borders contain an external dimension and there is a direct link between those policies inside and outside the Union. It has been recognized, as documented through various reports and communications of the European Commission¹ to the European Parliament and the Council, that the said Union policies cannot be achieved without the cooperation with third countries in those areas and that such cooperation with third countries is important element of the external action policy of the Union. In particular third countries sharing borders with the European Union or third countries of transit are the most concerned as they are first responsible for managing irregular migration flows into the Union. Since they are obliged to readmit irregular migrants that cross their territories, they may face acute pressure to provide humanitarian assistance to migrants and refugees.

The proposal for the EBCG Regulation in Article 75(4) would allow the Agency to provide assistance to return activities of a third country or ensure the coordination or the organization of return operations. Such external action would fall under the Union competence if returns from third country would be necessary to achieve the objectives of common Union immigration policy including return policy and border management. It can be reasonably argued that returns from third countries are necessary to achieve the objectives of common Union immigration policy including return policy and border management, if such returns are carried out from third countries to diminish the migratory pressure on the EU external borders and there is a clear link established between returns from third country and the Union immigration and border management policy.

A contrario, there is no Union competence for returns from a third country where there is no link to Union immigration and border management policy. To establish such a link, several safeguards

¹ Communication on establishing a new Partnership Framework with third countries under the European Agenda on Migration, COM(2016) 385 final of 7.6.2016; [Communication on a more effective return policy in the European Union - A renewed action plan](#), COM(2017) 200; Progress report on the Implementation of the European Agenda on Migration, 6.3.2019 COM(2019) 126 final.

could be added in the text of the current provision, including by specifying the objective of such returns and the necessity of conclusion of a status agreement with a third country.

Provided such safeguards are included in Article 75(4), returns from third countries shall be considered to contribute to the achievement of the objectives of the Union policies set out in articles 77 and 79 TFEU.