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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT AND THE COUNCIL**

**Evaluation of EU Readmission Agreements**

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# COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

## Evaluation of EU Readmission Agreements

### 1. INTRODUCTION

In the Stockholm Programme, the Council invited the Commission to present an evaluation ‘during 2010’ of EU readmission agreements and ongoing negotiations, and to propose a mechanism to monitor the implementation of the agreements.<sup>1</sup> Moreover, ‘(t)he Council should define a renewed, coherent strategy on readmission on that basis, taking into account the overall relations with the country concerned, including a common approach towards third countries that do not cooperate in readmitting their own nationals.’

This Communication<sup>2</sup> aims to (1) evaluate the implementation of the EU Readmission Agreements (EURAs) already in force, (2) assess the ongoing readmission negotiations and ‘open’ negotiating directives and (3) provide recommendations for a future EU readmission policy, including on monitoring mechanisms.

EURAs impose reciprocal obligations on the contracting parties to readmit their nationals and also, under certain conditions, third country nationals and stateless persons. They also set out in detail the operational and technical criteria for this process.

In policy terms, EURAs are considered a necessary tool for efficient management of migration flows into the EU Member States (MS). As they should facilitate the swift return of irregular migrants, they are supposed to be a major element in tackling irregular immigration. The agreements do not define criteria for the legality of a person’s presence in the EU or partner country — this must be assessed by the national authorities in accordance with national and, where applicable, EU law.

Since 1999, when competence in this area was conferred on the European Community, the Council has issued negotiating directives to the Commission for 18 third countries. The state of play of these is attached as Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament and the Council, Evaluation of the EU Readmission Agreements, EU Readmissions Agreements: Brief Overview of the State of Play February 2011. Since the entry into force of the Lisbon Treaty, the conclusion of EURAs has an explicit legal basis (Article 79(3) of TFEU). Moreover it is a principle of (customary) international law that each country should take back its own nationals.

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<sup>1</sup> OJ C 115 of 4.5.2010, p.31.

<sup>2</sup> In 2004 the Commission published a ‘Communication to the Council and European Parliament on the priorities for the successful development of a common readmission policy’, SEC(2004)946 final of 19.07.2004.

## 2. EVALUATION OF EU READMISSION AGREEMENTS IN FORCE

Under the 18 negotiation directives so far issued by the Council, 12 EURAs have entered into force<sup>3</sup>. Three EURAs have a transitional period on readmission of third country nationals (TCN) (see Sections 2.4 and 3.2).

Since MS are responsible for implementing EURAs, the Commission has asked them to provide detailed data and feedback on the application of the EURAs<sup>4</sup>. This information was supplemented by EUROSTAT data<sup>5</sup>.

### 2.1. Quality of data

The Commission received replies from 21 MS (France, Sweden, Belgium, Estonia, Portugal, Poland, Malta, Latvia, Romania, Finland, Bulgaria, Greece, Czech Republic, Slovenia, Slovakia, Spain, Hungary, the United Kingdom, the Netherlands, Ireland and Germany). The absence of replies from 5 MS (Denmark is not bound by any EURA), including some very much affected by irregular migration, significantly limits the conclusions that can be drawn on that basis.

While some MS gave detailed figures on specific aspects of readmissions, others could only estimate the number of readmission applications per third country per year. In general, the data are not harmonised and different MS include different cases under the same headings<sup>6</sup>. Few MS have comprehensive data from before 2008.

In this situation, the only available data on return covering all EU MS are EUROSTAT data, but they also have some deficiencies. For example they show how many citizens of a particular third country were removed from a particular MS, but do not specify whether the person was sent to the country of origin, transit or another MS. The data do not distinguish between voluntary and forced returns. EURAs are very rarely used for voluntary returns. For this reason, the aggregated figures gathered from MS by the Commission<sup>7</sup> do not even get close to the EUROSTAT figures for any third country. For example, for 2009 EUROSTAT reports about over 4300 returns of Russian citizens from the MS, whereas according to the data provided by MS only over 500 effective returns took place under the EURA with Russia.

**Recommendation 1:** *The Commission will examine options for the extension of the existing Eurostat data collection on returns to allow these statistics to provide a useful basis to assess the implementation of the EURAs. In the meanwhile, FRONTEX should gather comprehensive*

<sup>3</sup> Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament and the Council, Evaluation of the EU Readmission Agreements, EU Readmissions Agreements: Brief Overview of the State of Play February 2011

<sup>4</sup> Information was also gathered at Joint Readmission Committees. The Commission also requested data from the third countries, but due to a very limited response (only from BH, FYROM, HK, ALB SER, MO) the data were used only incidentally in the evaluation.

<sup>5</sup> See COMMISSION STAFF WORKING DOCUMENT accompanying the COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Evaluation of EU Readmission Agreements EUROSTAT data

<sup>6</sup> e.g. one MS includes several categories of requests under effective removals, which sometimes results in the number of removals greatly exceeding the number of readmission applications.

<sup>7</sup> See COMMISSION STAFF WORKING DOCUMENT accompanying the COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Evaluation of EU Readmission Agreements The aggregated data for the chosen categories gathered by the Commission from the MS on the basis of a questionnaire .

*statistical data on returns (not including any personal data) with a view to obtaining more reliable data on the actual numbers of readmissions executed under the EURAs.*

## 2.2. Use of EURAs

A majority of MS apply EURAs for all their returns, but others still use their bilateral arrangements which existed before the EURA entered into force. One MS stated that it had not submitted any readmission application under any EURA. The reasons given for non-application of EURAs are the absence of a bilateral implementing protocol and/or that EURAs are used only if they facilitate returns.

Whereas transition periods for third country nationals in certain EURAs as well as the need to adapt national administrative procedures may explain the continued use of bilateral agreements in certain cases, the absence of implementing protocols<sup>8</sup> is not an excuse. The Commission (with strong support from the MS) has always insisted that the EURAs are self-standing, directly operational instruments which do not necessarily require the conclusion of bilateral implementing protocols with the third country. In the longer term protocols are mere facilitators, even if they are sometimes mandatory, as in the EURA with Russia.

The inconsistent application of EURAs undermines greatly the credibility of the EU Readmission Policy towards the third countries, which are expected to apply the EURA correctly. More seriously, human rights and international protection guarantees in EURAs may be ineffective if MS do not return irregular migrants under EURAs.

**Recommendation 2:** *The MS need to apply EURAs for all their returns. The Commission will closely monitor the correct implementation of EURAs by MS and, if necessary, consider legal steps in case of incorrect or lack of implementation.*

## 2.3. Readmission of own nationals

Even with incomplete data, some conclusions are possible on the scale of readmissions under the EURAs. It is clear that for own nationals, EURAs are an important tool when tackling irregular migration. Based on the data provided by the MS<sup>9</sup>, there were substantial numbers of readmission applications to practically all relevant third countries. The recognition rate of those applications ranged from 50% to 80-90% and over (Ukraine, the Republic of Moldova, the former Yugoslav Republic of Macedonia), playing a major role in preventing irregular migration from those countries. This analysis is confirmed by EUROSTAT data showing that in 2009, 20.1% of third country nationals apprehended in the EU were from countries with which the EU had a readmission agreement. This is a marked reduction compared to 2007 when the share of those countries was 26.9%.

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<sup>8</sup> See COMMISSION STAFF WORKING DOCUMENT accompanying the COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Evaluation of EU Readmission Agreements Implementing protocols signed/concluded by the MS under the EU readmission agreements in force

<sup>9</sup> See COMMISSION STAFF WORKING DOCUMENT accompanying the COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Evaluation of EU Readmission Agreements The aggregated data for the chosen categories gathered by the Commission from the MS on the basis of a questionnaire

Unfortunately, the data do not allow reliable conclusions about actual returns. There is a great variety of data on effective returns; the rate is extremely high for some countries and very low for others. Yet in terms of actual returns, EUROSTAT data show that in 2009, although citizens of EURAs countries were implicated in only about 20% of return decisions, they constituted 40% of the third country nationals actually returned from the EU.

**Recommendation 3:** *The Commission should pursue the dialogues (in particular within the Joint Readmission Committees) to further improve the rate of approved readmission requests and of effective returns.*

#### **2.4. Readmission of third country nationals**

TCN clauses allow applications for readmission of persons who do not have the nationality of either of the Parties (including stateless persons) and who transited the territory of one of the Parties. The clause is included in all EURAs, although in some its applicability is deferred (2 years for Albania and Ukraine, 3 years for the Russian Federation).<sup>10</sup>

Clearly the TCN clause in the EURA with Ukraine has worked. In 2009 TCN applications to Ukraine were almost as numerous as in 2008 and constituted almost half compared to applications for own nationals. These data come solely from the MS which used their existing bilateral agreements, as they were expressly allowed to do under the EURA, during the transitional period (Slovakia, Hungary and Poland). There is, however, no indication that the trend has changed since 1 January 2010 for Ukraine.

In stark contrast to the frequent use of the TCN clause for returns to Ukraine, only 63 applications for TCN were formulated by all MS under all other EURAs. The clause was also used also by partner countries to send 32 TCNs back to the EU.

The TCN clause in the EURAs with countries not bordering the EU (i.e. Sri Lanka, Montenegro, Hong Kong and Macao<sup>11</sup>) was only used 28 times. Some MS stated that as a matter of policy they only send persons to the countries of origin.

**Recommendation 4:** *The concrete need for TCN clauses should be thoroughly evaluated for each country with which the EU enters into readmission negotiations (see also Section 3.2).*

#### **2.5. Transit and accelerated procedures**

MS' use of transit and accelerated procedures is extremely low. Apart from Serbia with 249 applications under the accelerated procedure in 2008, falling to 1 the following year, and Montenegro with 88 applications, falling to 3 the next year, all MS submitted altogether 31 accelerated procedure applications under all EURAs. Similarly, the total number of transit applications submitted by all MS under all EURAs was 37.

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<sup>10</sup> The clause has been operational since 1 May 2008 for Albania, since 1 January 2010 for Ukraine and since 1 June 2010 for Russia.

<sup>11</sup> While Hong Kong and Macao are strictly speaking not countries but rather Special Administrative Regions of the People's Republic of China, for the purpose of this evaluation they are considered countries.

Several MS have not used either clause at all, although they are always included in the negotiating directives given to the Commission and often prove to be serious obstacles in the negotiations.

**Recommendation 5:** *In cases where neither procedure is likely to be widely used in practice, it should be considered to exclude them from future negotiating directives but leave them for bilateral implementing protocols.*

### 3. EVALUATION OF ONGOING NEGOTIATIONS AND ‘OPEN’ NEGOTIATING DIRECTIVES

Looking at the evolution of the 18 negotiating directives issued to date<sup>12</sup> (ie. the time elapsed between the negotiating directives received by the Commission and first round of negotiations and/or between the first round of negotiations and the signature of the agreement), it is clear that in all but a few countries (notably the Western Balkan countries, Moldova and Georgia), the negotiation of EURAs takes a very long time. A case in point is Morocco, where the negotiating directives were received in 2000, the first negotiating round took place in 2003 and negotiations are currently in their 15<sup>th</sup> round with little prospect of a swift conclusion. In addition, in two cases (China and Algeria) the EU has not even managed to formally open negotiations.

The main reasons for these excessive delays and the difficulty of bringing partner countries to the negotiating table are: (1) lack of incentives and (2) a certain lack of flexibility from MS on some (technical) issues.

#### 3.1. Lack of incentives

The initial EU approach was to invite third countries to negotiate a readmission agreement, without the EU offering anything in return. As these agreements have few benefits for the third country concerned, they normally want to receive something in exchange for concluding a readmission agreement with the EU. The Russian Federation and Ukraine negotiations, for instance, only really accelerated once the EU had committed, at their demand, to negotiate visa facilitation agreements in parallel. The lack of an incentive is also precisely the reason why the EU has not so far been able to start negotiations with Algeria<sup>13</sup> or China: both countries have repeatedly asked for ‘visa measures’ but, for various reasons, the EU has not been willing to answer these calls. Both Morocco and Turkey have also asked for visa measures.

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<sup>12</sup> See Commission Staff Working Document accompanying the Communication from the Commission to the European Parliament and the Council, Evaluation of the EU Readmission Agreements, EU Readmissions Agreements: Brief Overview of the State of Play February 2011.

<sup>13</sup> In the case of Algeria it should be noted that Article 84(2) of the Association Agreement states that ‘Les parties, soucieuses de faciliter la circulation et le séjour de leurs ressortissants en situation régulière, conviennent de négocier à la demande d’une partie, en vue de conclure des accords bilatéraux de lutte contre l’immigration illégale ainsi que des accords de réadmission. Ces derniers accords couvriront, si cela est jugé nécessaire par l’une des parties, la réadmission de ressortissants d’autres pays en provenance directe du territoire de l’une des parties (...)’.

An evaluation of the EU visa facilitation agreements<sup>14</sup> clearly demonstrated that the implementation of these agreements does not lead to a rise in the irregular migration into the EU from those countries. The MS are still fully in control of who is and is not issued with a visa. This conclusion, together with general improvements brought by the Visa Code to visa issuance practices, strongly suggests that visa facilitation agreements can provide the necessary incentive for readmission negotiations without increasing irregular migration.

The other incentive with great potential is financial assistance for implementing the agreement. Readmission of own nationals and third country nationals involves a substantial financial burden for the reception countries. For own nationals, conditions should be created in order to better reintegrate those persons in the society, which would also prevent their illegal return to the EU. For third country nationals who have to await onward readmission to their country of origin, the EU should be ready to assist the partner country to create adequate reception facilities that comply with EU standards. The EU has already financed several projects to support reintegration policies and reception capacities of some third countries with which a EURA has been concluded.

Financial assistance has very often been requested by the partner countries (notably Morocco and Turkey, but also Ukraine and some of the Western Balkan countries). It could be quite efficient as leverage, provided the money offered is substantial and comes on top of what has already been programmed or promised under the relevant EU geographic programmes (e.g. the Instrument for Pre-Accession Assistance, the European Neighbourhood and Partnership Instrument). The only instrument that could in principle provide this additional funding to third countries is the Thematic Programme for cooperation in the areas of migration and asylum. But the Thematic Programme has a very limited budget (approximately 54 million EUR annually) and is designed to cover cooperation activities world-wide, meaning that the resources potentially available for a specific third country are very small. Furthermore, the Thematic Programme is meant only for developing countries and countries belonging to the European Neighbourhood region, so candidate countries are excluded. For this reason, the only financial offers from the EU in this regard have so far consisted of earmarking funds which were in fact already available under financial geographic programmes. These kinds of offers are, unsurprisingly, often considered insufficient by the negotiating partners.

Broader and more substantive incentives, both in the area of migration and other areas of cooperation with the partner country (the Global Approach to Migration ‘toolbox’), have so far hardly been used. Mobility Partnerships only involve a limited number of MS and are still at an early stage. Moreover, although they include some legal migration opportunities for the third country, given the limited interest among MS, there have so far only been small-scale offers which can hardly be regarded as incentives for making progress on readmission.

A fundamental shift has to be made in devising EURAs, in particular as concerns the incentives. The EU should embed the readmission obligation firmly into its framework agreements with third countries, for own nationals *d’office* and for TCNs linked with further incentives. Concretely, and after having assessed the appropriateness together with the EEAS, this could mean developing the standard migration clause used in EU framework (association or cooperation) agreements into more elaborate and directly operational readmission clauses. This would allow making better use of the leverage that such an agreement represents for the

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<sup>14</sup> Commission Staff Working Document SEC(2009) 1401final of 15.10.2009, ‘Evaluation of the implementation of the European Community’s visa facilitation agreements with third countries’.

partner country. This leverage could also be used by negotiating an EURA in parallel to a PCA or other kind of association or cooperation agreement.

Non respect of the readmission obligation should lead to adopting sanctions for partner countries which show insufficient cooperation when tackling irregular migration, without prejudice to legal obligations contained in framework agreements between the EU and third countries, notably as regards the criteria for suspension of cooperation.

**Recommendation 6:** *The EU should develop the four main incentives at its disposal ( various visa related policy tools, financial assistance, elements of the Global Approach to Migration ‘toolbox’ and legal migration) into a coherent package, which should be offered to the partner country at the outset of the negotiations. Stand-alone readmission negotiating directives should no longer be proposed. Where possible, readmission negotiations should be opened in parallel with framework agreement negotiations. Future readmission negotiating directives should include the incentives that the EU will offer, in particular in case the negotiating directives include a TCN clause, and at the same time indicate possible retaliation measures by the EU in cases of persistent and unjustified denial of cooperation by the partner country.*

### 3.2. Lack of flexibility

Many negotiations drag on endlessly because there is a fundamental problem between the two sides on some technical issues (including the procedures mentioned in Section 2.5).

In negotiations the Commission is always forced to insist on a time limit which is at best equal to the lowest maximum detention period in any MS as detention periods have not been fully harmonised within the EU. This lowest time limit, which is complemented by the principle that absence of reply within this time limit implies acceptance of the readmission by the partner country, is for many third countries impossible to implement due to their limited administrative capacities. The issue may become less pressing in the (near) future thanks to new technologies. Several MS are considering also prolongation of their detention periods. But for the time being it is one of the biggest obstacles to speedy conclusion of negotiations, both with the third country concerned and with the MS. Another trend is that the Commission often has to continue negotiations on draft agreements at the insistence of sometimes a single MS, or a very limited number of them, when the draft is already acceptable to the vast majority of MS. While it is true that in such cases the countries mainly concerned have most to gain or lose from the agreement, it is also true that the conclusion of an agreement only requires a qualified majority in the Council.

**Recommendation 7:** *On the issue of time limits, it is recommended to agree with all MS on one fixed time limit which is realistic and doable both for third countries and MS. In agreeing this time limit, it should be borne in mind that the period should not be excessively lengthy in view of the fact that the strict limitations provided for in Article 15 of the Return Directive (detention as the last resort, preference for non-coercive measures, regular judicial oversight of the detention decision and obligation on MS to carry out removal procedures with due diligence) must always be respected. MS should support the Commission’s readmission negotiating efforts more whole-heartedly and not lose sight of the overall interest that a concluded EURA represents for the entire EU.*

All EURAs concluded so far include an obligation to also readmit, under certain conditions, TCNs who have transited through the territory of a contracting Party.

All third countries hold a deep aversion to the TCN clause, arguing that they cannot be held responsible for citizens of third countries and that they therefore do not have an obligation to readmit such people. If a TCN clause was not demanded by the EU or was underpinned with appropriate incentives, some negotiations could have been concluded already (e.g. Morocco and Turkey) and many others could have been concluded much quicker. It is, however, clear that an EURA with a major transit country for irregular migration to the EU without a TCN clause holds little value for the EU.

It has been Commission's experience that by the time the third country finally accepts the principle of a TCN clause, a lot of time will already have been lost and further concessions are then necessary in order to agree on the precise language and preconditions of the clause, often to the detriment of its effectiveness. To maintain such effectiveness a use of appropriate leverage would have been useful in cases when it is particularly relevant for the EU to have a TCN clause included. Readmission of own nationals should typically not require important incentives. Interestingly, MS' bilateral readmission agreements seldom include a TCN clause (mainly where there is a common land border). Yet MS always demand a TCN clause at EU level. This situation raises some important questions since, as the collected data from MS show (see Section 2.4), the TCN clause is actually rarely used by MS, even with transit countries like the Western Balkans, with which the EU shares land borders.

In this light, if the TCN clause will not be so widely used the EU would have to focus its readmission policy much more towards important countries of origin, instead of transit, of irregular migration, e.g. in sub-Saharan Africa and Asia.

**Recommendation 8:** *The current approach should be revised. As a rule, future negotiating directives should not cover third country nationals, hence there would not be a need for important incentives. Only in cases where the country concerned, due to its geographical position relative to the EU (direct neighbours, some Mediterranean countries) and where exists a big potential risk of irregular migration transiting its territory to the EU, the TCN clause should be included and only when appropriate incentives are offered. In those cases the EU should also explicitly state that, as a matter of principle, it will always first try to readmit a person to his/her country of origin. The EU should also focus more its readmission strategy towards important countries of origin.*

#### **4. MONITORING THE IMPLEMENTATION OF EU READMISSION AGREEMENTS INCLUDING IMPROVEMENT OF HUMAN RIGHTS SAFEGUARDS**

##### **4.1. The monitoring mechanism**

So far the main tool for monitoring the implementation of EURAs have been the Joint Readmission Committees (JRCs). They have been formally established under each of the 11 EURAs, with the exception of Sri Lanka where the political situation and technical issues have so far prevented the organisation of a meeting. JRC meetings take place according to the needs, and at the request, of either Party. Apart from Hong Kong and Macao, JRCs meet at least once a year and with some countries even twice a year. The JRCs are in particular charged with monitoring the application of the respective EURAs and can take decisions which are binding on the Parties. In line with the existing EURAs, the JRCs are co-chaired by the Commission (on behalf of the EU, but in some cases assisted by experts from the MS) and the third country in question.

The overall MS evaluation of the JRCs' work is quite positive. The Commission shares the view of some MS that systematically including MS' experts could be very useful.

However, given the growing role of the EURAs in the return process and their possible interaction in practice with human rights and international protection standards, the possibility of inviting relevant NGOs and international organisations to JRC meetings should be considered. Obviously this would require the agreement of the co-chair<sup>15</sup>. In addition, and with a view to enhancing the role of both existing and future JRCs in monitoring the implementation of EURAs, JRCs should draw much more on relevant information of the situation 'on the ground' that can be gathered from NGOs and international organisations, MS' Embassies and EU Delegations.

**Recommendation 9:** *Systematic participation of MS experts in all JRCs should be considered. On a case-by-case basis, NGOs' and international organisations' participation in JRCs should also be envisaged. JRCs should work much more closely with relevant actors on the ground in the third countries including on the monitoring of the treatment of TCNs. Information on the implementation should be gathered more from sources such as EU Delegations, EU MS' Embassies, International Organisations or NGOs.*

#### **4.2. The current approach to the human rights safeguards under EURAs**

The EU considers EURAs as technical instruments bringing procedural improvements to cooperation between administrations. The situation of the person subject to readmission has not been regulated, leaving those issues to relevant international, EU and national applicable law.

The legal construction of the EURAs concluded so far (and the negotiating directives adopted so far) has been based on the fact that a readmission procedure applies only to persons illegally staying on the territory of the contracting Parties. Whether or not a person is illegally staying is determined by a return decision in application of the relevant (administrative) laws applicable on the territory of each Party and procedural guarantees enshrined therein (legal representation, judicial review, respect of *non-refoulement* etc). Certain procedural guarantees for third-country nationals subject to return (including the respect of the principle of *non-refoulement*) were recently set by the Return Directive<sup>16</sup>, which had to be transposed by MSs by 24 December 2010 and must be implemented by MSs in compliance with fundamental rights, particularly the EU Charter of Fundamental Rights.

If the person in question has asked for international protection, the relevant EU asylum *acquis* provides in that case that he/she is entitled to stay on the territory of a MS until a decision on the claim has been issued. Only after a claim has been refused can a return decision be pronounced or executed, i.e. a person who has a valid international protection claim can never be considered for readmission since he/she could not be considered as illegally staying.

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<sup>15</sup> In fact all Rules of Procedure of JRCs already offer the possibility of inviting external experts to JRC meetings.

<sup>16</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

The legally binding applicable international instruments ratified by all MS<sup>17</sup> apply generally to all persons subject to a readmission procedure, independently of the abovementioned EU return/asylum *acquis*. Those instruments guarantee that no person may be removed from any MS if it would be against the principle of *non-refoulement* if in the recipient country, the person could be subject to torture or to inhuman or degrading treatment or punishment. In such cases no readmission procedure can be initiated and this is acknowledged by EURAs in what is called a ‘non-affected clause’ confirming the applicability of and respect for instruments on human rights. Consequently, any return/readmission can only be carried out as a result of a return decision which may only be issued if the guarantees mentioned above are observed. Furthermore, MS must respect the EU Charter of Fundamental Rights when they are implementing EURAs.

#### **4.3. Some possible measures to enhance human rights guarantees in EURAs and the monitoring of the implementation of EURAs**

From the above, it is clear that the legal framework of EURAs already inhibits applying them to a person who could possibly be subject to persecution, torture or to inhuman or degrading treatment or punishment in the country to which he/she would be returned.

However, the actual administrative and judicial practice applied in the field is important. Given the substantial number of EURAs and their significant role in the EU’s policies against irregular migration, we should consider certain flanking measures, control mechanisms and/or guarantees in future EURAs, to ensure that the human rights of returnees are fully respected at all times. The existing JRCs should play, to the extent possible, an important role in this regard. When considering possible measures, the following factors should be borne in mind:

(i) The existing instruments (in particular the EU asylum/return *acquis*) must remain the principal pillars of the EU return and readmission system. Improvements incorporated into the EU’s readmission policy and agreements should not simply duplicate guarantees laid down by other instruments. This would have no added value for the real situation of the person. Improvements to the readmission policy/agreements must aim to complement existing instruments, focusing on practical deficiencies which could lead to violations of fundamental rights in the implementation of a readmission procedure.

(ii) The main aim of EURAs (or any readmission agreement for that matter) is to agree with the administration of the partner country on a swift and efficient readmission procedure. This principle must not be compromised by including measures which could give grounds to a revision of previous final return decisions or final refusals of asylum applications, unless the relevant EU *acquis* so allows.

(iii) The absence of an EURA with a particular third country does not prevent MS requesting those third countries to readmit persons on a bilateral basis. Consequently, whatever improvements are introduced at EU level, those improvements will in principle not affect readmissions carried out by MS bilaterally.

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<sup>17</sup> The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the 1984 Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment and the 1951 Geneva Convention related to the Status of Refugees as amended by 1967 New York Protocol.

(iv) Some proposed measures, in particular V below, imply not only an increased burden for the Commission and possibly EU Delegations in terms of financial and human resources, but also require the unequivocal cooperation of the MS and the third countries concerned. In particular the latter may not always be keen on cooperating in this respect.

## **I Enhancing the access of third country nationals to international protection and legal remedies in practice**

(1) Many agreements (in particular those with third countries neighbouring the EU) contain special arrangements for persons apprehended in the border region (including airports), allowing their readmission within much shorter deadlines — the so-called ‘accelerated procedure’. Although the safeguards under the EU *acquis* (such as access to asylum procedure and respect of *non-refoulement* principle) are by no means waived by the accelerated procedure, there is a potential for deficiencies in practice. Furthermore, MS may choose not to apply some of the safeguards of the Return Directive to persons apprehended in the border region because the Directive merely obliges the MS to observe a certain number of key provisions, including the *non-refoulement* principle.

**Recommendation 10:** *Provisions addressing this particular issue and also highlighting in general the importance for border guards to identify persons seeking international protection could be included in the Practical Handbook for Border Guards.<sup>18</sup> A clause making the accelerated procedure conditional on such information might be also introduced in the text of the agreements<sup>19</sup>.*

(2) The Return Directive contains detailed rules on the suspensive effect of appeals and the right to effective remedy. Also the Asylum Procedures Directive requires MS to ensure that applicants for asylum have access to appeal procedures. In practice, there might be some attempts to return a person despite the fact that an appeal with suspensive effect is still pending.

**Recommendation 11:** *State clearly in the EURAs that they may be applied only to persons whose return/removal has not been suspended<sup>20</sup>.*

## **II Providing for suspension clauses in each future readmission agreement**

Many doubts are raised about the conclusion of EURAs with countries with a weak human rights and international protection record. One remedy could be a suspension clause for persistent human rights violations in the third country concerned.

**Recommendation 12:** *Member States must always respect fundamental rights when they are implementing EURAs and must therefore suspend their application when it would lead to a violation of fundamental rights.*

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<sup>18</sup> Commission Recommendation of 6 November 2006 establishing a Practical Handbook for Border Guards (Schengen Handbook) to be used by Member States’ competent authorities when carrying out border control on persons 2006 (C(2006) 5186 final).

<sup>19</sup> The situation might be further improved by adoption of the recast proposal of the Asylum Procedures Directive reinforcing the right to be informed at border crossing points.

<sup>20</sup> The situation might be further improved by adoption of the recast proposal of the Asylum Procedures Directive providing for the general principle of automatic suspensive effect.

*This overarching principle might be further reinforced by including in the agreement a suspension clause which would have reciprocal effect. This clause would provide for temporary suspension of the agreement in the event of persistent and serious risk of violation of human rights of readmitted persons. The EU could in this case unilaterally stop the application of the agreement by notification to the other contracting Party (if necessary after consulting the Joint Readmission Committee).*

### **III Providing for specific clauses in each future readmission agreement regarding voluntary departure**

The express preference given by the Return Directive to voluntary departure may be hampered in practice by administrative difficulties in obtaining the necessary *laissez-passer* for travelling back and the fear of becoming subject to administrative or criminal sanctions (for non-compliance with migration rules) when arriving at home.

**Recommendation 13:** *Provide for an article in each EURA by which Parties commit themselves to give preference to voluntary departure, to provide papers and documents necessary for voluntary departure and not to impose sanctions for non-compliance with migration rules on persons who return voluntarily.*

### **IV Requiring compliance with human rights in the treatment of returnees**

TCNs who have been readmitted to a transit country may find themselves in a particularly precarious situation in particular in countries with a weak human rights' system, including international protection. There is e.g. a risk of disproportionate administrative measures that are not allowed under general human rights standards (e.g. prolonged or indefinite detention period pending onward expulsion to their country of origin) or of further readmission to their country of origin, despite legitimate fears of persecution in the latter. TCNs who are not detained may face difficulties with regard to the means of subsistence during their stay in the country of readmission.

#### **Recommendation 14:**

*Any EURA with a TCN clause should contain a clause whereby the parties explicitly confirm that they will treat TCNs in compliance with the key international human rights conventions to which they are a party. If the readmitting country has not ratified the key international human rights conventions, the EURA should explicitly oblige that country to comply with the standards set out in those international conventions.*

### **V Setting up a 'post-return' monitoring mechanism in the countries of return with a view of gathering information about the situation of persons readmitted under the EURAs, including the respect for human rights**

So far no mechanism is in place to monitor what happens to persons (notably TCNs) after their readmission is completed. It would be important to know if the third country has respected the human rights of persons after their readmission. Due attention needs to be paid to practical feasibility, respect for the sovereignty of third countries and ways of encouraging returnees to actively cooperate in post-return monitoring.

**Recommendation 15:** *The Commission should consider to launch, with the support of the External Action Service, a pilot project with one of the principal international organisations*

*active in the migration area in a particular third country with which an EURA is in force (e.g. Pakistan or Ukraine), tasking that organisation to monitor the situation of persons readmitted under the EURA and to report back to the respective JRC. On the basis of an evaluation of this pilot project, and with due regard to human and financial resources available, the Commission could decide to extend such a project to all third countries with which EURAs have been concluded. It could also be further analysed to what extent the monitoring system of forced return as required by the Return Directive may contribute to the "post-return" monitoring in question.*

## **5. CONCLUSIONS**

Overall, the picture that emerges from the evaluation is a mixed one. On the one hand, it is clear that, where used properly, EURAs do provide added value with regard to readmission of nationals, especially to the countries neighbouring the EU. As such they are an important tool in tackling irregular migration from third countries. On the other hand, the negotiation directives are rigid on some (technical) aspects and do not offer sufficient incentives, resulting in delayed conclusion of negotiations and/or additional concessions. With regard to the monitoring of the implementation of EURAs and human rights issues, there is clearly scope for improvements, in particular through enhancing the role of JRCs.

The Commission proposes to the Council and the European Parliament revising EU readmission policy as recommended in this Communication. In particular, the Commission recommends that the incentives at the EU's disposal be developed into a coherent mobility package which should be offered to the negotiating third country at the outset of negotiations. Stand-alone negotiating directives should no longer be proposed and future negotiating directives should include the incentives that the EU will offer, in particular in case the negotiating directives include a TCN clause, and at the same time state the retaliation measures that the EU will adopt in case of persistent denial of cooperation by the negotiating country. In addition, the EU's readmission policy should be much more firmly embedded in the overall external relations policies of the EU by *inter alia* seeking possible, synergies with framework agreement negotiations with third countries.