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From:	Presidency
To:	Strategic Committee on Immigration, Frontiers and Asylum
Subject:	Making the return system more effective: a reflection towards the future of the EU return policy - Discussion paper

The EU return system is a cornerstone of the EU asylum and migration management policies. The Belgian Presidency will keep return policy high on the agenda, and considers that a discussion in SCIFA is needed to take stock of progress towards a more effective return system, including on legislative reform. It would also be worthwhile to continue the discussion on how to enhance efforts, including through possible legislative changes, to increase the return of persons posing a security threat.

The Presidency intends to continue the discussions on these and other aspects of the adequacy of the recast Return Directive and of the broader legal framework during this semester at several levels, including at this SCIFA and a future IMEX meeting. At the end of this process, we will take stock of the needs in order to be able to draw appropriate conclusions in view of the next legislative cycle.

1. The need for a more effective return policy, including through legislative reform in light of the Pact

As has been reconfirmed several times at the highest level, there is a broad political consensus on the need to make the EU return system more effective, both in its internal and external dimensions, as an essential part of the comprehensive approach to migration. A well-functioning return system will also be decisive for the success of the operationalisation of the legislative reforms of the Pact on Migration and Asylum that have been agreed recently: it is no exaggeration to say that the effectiveness of the Pact will depend on the effectiveness of returns.

The Presidency is convinced that work should be continued and intensified on three strands: operational cooperation, external dimension and legislative framework.

On the **operational side**, many achievements have occurred in recent years, notably the implementation of the EU strategy on voluntary return and reintegration, the extension of the Frontex mandate to cover the whole return process and the appointment of the EU Return Coordinator who, together with the High-Level Network for Returns, has presented an operational strategy for more effective returns. The latest Schengen Barometer shows that these efforts start to bear fruit and that return figures start to improve. However, the general return rate – which remains a key indicator to measure performance on returns in the absence of more suitable indicators – remains below expectations and work should be further intensified.

The same goes for the **external dimension**. A lot has been done to improve readmission cooperation with third countries. The establishment of visa leverage through the new Article 25a of the Visa Code, continuous engagement and dialogues with third countries including through comprehensive partnerships of which readmission is a key element, count among the main developments. Cooperation is improving but efforts must be pursued.

On the **legislative side**, the new Regulation on the Schengen Information System (SIS) on return and the Pact on Migration and Asylum (return border procedure, closer link between negative asylum decisions and returns, *inter alia*) modify the legal framework within which returns are operated. The caselaw of the European Court of Justice also influences the rules to be applied to returns. However, despite those changes and a proposal for a recast Return Directive, the Return Directive remains one of the few legal instruments that has not evolved since 2008.

At the Schengen Council of December 2023, several Member States already called for an assessment of the legal framework considering that the partial general approach of the Council on the recast Return Directive dates back to 2019. Besides, the discussions indicated that the mutual recognition of return decisions, which could possibly pave the way for more harmonised EU return decisions, would necessitate a more far-reaching reform.

In this context, the Presidency has launched a reflection exercise to identify the Member States' needs as regards the future of the legal framework of the EU return policy. Indeed, Schengen evaluations point to a fragmented approach among Member States' return systems.[1] A first discussion took place at the Integration, Migration and Expulsion (IMEX Expulsion) Working Party meeting on 12 March 2024 in order to determine whether some specific areas should be further harmonised,[2] notably the issuance of return decisions, the scope of return decisions, and the prevention of the risk of absconding and the detention. While some Member States recognised the need for further harmonisation within the legal framework, others have stressed the importance of maintaining appropriate flexibility for the national return systems. In any case, several delegations recalled the need to adapt the return framework to the new Pact legislation.

The presidency considers that it is necessary to continue this reflexion regarding the future of the legal framework on a more strategic level as well.

1 ST 5496/24, presented at the IMEX (Expulsion) Working Party meeting on 08/02/2024.
2 ST 6936/24.

2. Further efforts regarding return of third country nationals posing a security threat

The return of third country nationals posing a security threat[3] has been an important public policy concern for several years. The regular security threats linked to persons who have received return decisions in one or more Member States without being returned is an issue that remains constantly high on the political agenda. At the December 2023 Schengen Council meeting, Member States unanimously agreed to prioritise the swift return of third country nationals posing a security threat.

To return such persons, it is essential to identify the risk and to be able to proceed as quickly as possible to the return, while safeguarding the fundamental rights of the person, especially through the assessment of the principle of non-refoulement at all stages at the procedure. In the past few months, several exchanges have taken place in various fora to contribute to this ongoing endeavour. Concrete initiatives have already been taken in this regard. For example, the Commission published a recommendation on cooperation between the Member States with regard to serious threats to internal security and public policy in the area without internal border controls.[4]

Following the letter sent by President von der Leyen ahead of the October European Council, the Return Coordinator and the High-Level Network for Returns have developed a Roadmap on targeted return actions, one of which concerns returns of illegally staying third-country nationals posing a security threat. An informal and non-binding High-Level Network guideline underlines the importance of the systematic security check upon issuing a return decision, 'flagging' such cases in the return alert in SIS, prioritisation as well as management of such cases separately from regular case-flow in cooperation with relevant law enforcement and/or security actors. The guideline is intended to support Member States and lists established Member States' good practices.

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3 In this paper, 'security threat' is used to cover a risk to public order, public security or national security, as referred to in the recast Return Directive.

4 C(2023) 8139 final

In parallel, discussions also continued in the the Terrorism Working Party, which initiated a reflection on ways to improve the exchange of administrative information with regards persons posing a security threat. Indeed, the communication channels between intra-EU homologous services should be privileged, i.e. the exchange of information should take place between immigration and asylum authorities, on the one hand, and between counter-terrorism authorities, on the other. Information from the latter should be transmitted in an agreed form to the migration services. The SIS Return is also being explored at various levels to ensure the full use of its new functionalities.

In terms of existing legislation, the Return Directive 2008/115/CE already sets out various provisions regarding third-country nationals posing a security threat: the possibility to restrict or refrain from granting a deadline for voluntary return (Article 7(4)); the issuance of a return decision even though the person holds a residence permit from another Member State (Article 6(2)); the possibility to issue an entry ban of more than 5 years (Articles 11 (2) and 11(3)).

The 2018 proposal for a recast Return Directive puts additional provisions on the table. First, the possibility to restrict or refrain from granting a deadline for voluntary return would become mandatory (Article 9). This measure is accompanied by the obligation to issue an entry ban (Article 13). Second, the recast adds the risk to public order, public security or national security as a ground for detention (Article 18). Third, it also sets out a common, non-exhaustive list of criteria for establishing the existence of a risk of absconding. During the discussions on the Council position, Member States further reinforced the possibility to have swift returns of those posing a security threat by adding the threat to public order and national security as a criterion to assess risk of absconding (Article 6). Finally, the recast would also allow the issuance of an entry ban, during "exit checks", without any return decision (Article 13).

Moreover, as part of the new Pact legislation, the border procedure will be mandatory for applicants constituting a danger to national security and public order and the 'security flag' in Eurodac will help quickly identify those persons (applicants and in irregular stay) who might represent a danger to security. This will be especially useful in case of absconding. The security flag in Eurodac is however a mere indication for the authorities who will need to undertake an individual assessment of each case to identify the proper applicable procedural and substantive rules.

The return of third country nationals who pose a security threat puts an important question of balance between the need to proceed swiftly to the return (simple procedure), the safeguards of fundamental rights (fair procedure) and the need to avoid secondary movements of those persons (harmonised procedure). Depending on the weight awarded to each element, different solutions may be proposed.

3. Questions for discussion

In light of the above, Member States are invited to reflect on the following questions:

1. *Considering the need to further intensify efforts on operational cooperation and the external dimension, the evolution of the EU legal framework on asylum and migration, and the challenges linked to the operationalisation of the Pact on Migration and Asylum, do Member States agree that it is necessary to continue a reflection on the future of the legislative framework governing our return policy, both within and beyond the framework of the proposal for a recast of the Return Directive?*

2. *Building also on the reinforced rules in the agreed Pact legislation, what legal changes and other elements should be considered in order to ensure that returns from the EU territory of persons posing a security threat are carried out efficiently and swiftly while respecting fundamental rights?*