

EUROPEAN CONFERENCE

# FROM TAMPERE 20 TO TAMPERE 2.0

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### Background Note: Return and Readmission

Prepared by the European Union Agency for Fundamental Rights

### Pre-Conference Version

#### DISCLAIMER

The draft of this note has been prepared by the European Union Agency for Fundamental Rights. This note does not necessarily reflect the opinion of the Agency. The present document is the result of a process during which some changes have been made following a preparatory workshop and in liaison with the author. This means that the author might not agree with all of the suggestions proposed in this note. Final versions of all the background notes, which will take account of the input provided by the conference, will be published and widely disseminated. References to authors quoted have been reduced to a strict minimum contrary to academic rules due to a lack of space. More details will be provided in the published version of this note.



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### **Tampere Conclusions:**

*26. The European Council calls for assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help the authorities of those countries to strengthen their ability to combat effectively trafficking in human beings and to cope with their readmission obligations towards the Union and the Member States.*

*27. The Amsterdam Treaty conferred powers on the Community in the field of readmission. The European Council invites the Council to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries. Consideration should also be given to rules on internal readmission.*

## **I. ASSESSMENT OF THE CURRENT SITUATION:**

### **A. Return:**

Returning those third country nationals who do not fulfil the conditions for entry, stay or residence in the EU is an element of crucial importance of the EU common migration and asylum policy. [Directive 2008/115/EC](#) (the Return Directive) was adopted to provide common standards and procedures to be applied by Member States (MSs) to return migrants in an irregular situation, including the issuing of return decisions and enforcement of removals, the use of pre-removal detention as well as procedural safeguards. It integrates into the EU return policy a set of principles stemming from international and EU law, including the case law of the European Court of Human Rights and the EU Charter of Fundamental Rights (the Charter).

In the initial [evaluation report](#) on the application of the Return Directive (March 2014), the Commission observed that the flexibility of the directive and the implementation of its provisions by MSs had positively influenced the situation regarding voluntary departure and effective forced return monitoring. It had also contributed to achieving more convergence on detention practices, including the overall reduction of pre-removal detention periods with a wider implementation of alternatives to detention across the EU.

As per [the effectiveness of returns](#), the number of implemented returns in 2017 decreased by almost 20% compared to the previous year: from 226,150 in 2016 to 188,920 in 2017. Throughout the EU, this translates into a drop from 45.8% in 2016 to merely 36.6% in 2017 as compared to the total number of return decisions issued per year. [According to the Commission](#), low return rates undermine the credibility of the EU return system for the public and increase incentives for irregular migration and secondary movements. Challenges to effective returns include difficulties in identification/obtaining travel documents, absconding of returnees, non-cooperation of the returnees and the countries of origin, improper national implementation of the EU return acquis, etc.

Since the adoption of the [European Agenda on Migration](#) in May 2015, the objective of increasing the EU return policy's effectiveness, measured primarily by the enforcement rate of return decisions, has been gradually gaining prominence. In March 2017, the European Commission adopted a [renewed Action Plan on returns](#), accompanied by a [Recommendation](#) including a set of measures for Member States to make returns more effective. A number of these recommendations are based on the findings of the [Schengen](#)

[evaluation mechanism](#) assessing the conformity of the return systems and practices of the MSs with the EU return acquis.

The [European Council Conclusions of 28 June 2018](#) highlighted the need to step up the effective returns and welcomed the Commission's intention to make legislative proposals for a more effective and coherent European return policy. In May 2018, the [European Parliament](#) called on EU Member States to ensure swift and effective return procedures. At the same time, it emphasised the requirement of full respect for fundamental rights, and humane and dignified conditions when carrying out returns. In September 2018, the Commission proposed [a targeted recast of the Return Directive](#). As of September 2019, negotiations were ongoing both in the Council and the Parliament; a [partial general agreement](#) was reached at the JHA Council of 7 June 2019, except for the border procedure).

The Court of Justice of the EU (CJEU) has delivered [27 rulings](#) interpreting the directive. This shows the need for a careful balance between competing interests, MS legitimate interests to return migrants in an irregular situation, on the one hand, and the fundamental rights of the persons concerned, on the other hand. In its rulings, the CJEU draws on a large body of European Court of Human Rights (ECtHR) jurisprudence relevant to the subject matter of the Return Directive, thereby reflecting Article 52 (3) of the Charter.

Other secondary EU legal instruments related to return, which are not discussed here due to length constraints, include:

- [Directive on mutual recognition of expulsion decisions](#);
- [Decision on the compensation of financial imbalances resulting from the mutual recognition of expulsion decisions](#);
- [Directive for transit operations in removals by air](#);
- [Decision on removals by joint flights](#);
- [Regulation creating a European network of immigration liaison officers \(ILO\) – recast](#);
- [Annex 39 of the Schengen handbook – “Standard form for recognising a return decision for the purposes of transit by land”](#);
- [Regulation establishing the European Border and Coast Guard](#);
- [Regulation establishing a European travel document for return](#);
- [Revised Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex](#);
- [Regulation on the use of SIS II for the return of irregular migrants](#).

An increasingly important EU actor in the area of return is the [European Border and Coast Guard Agency](#) (Frontex), which has been supporting Member States in the field of return from its creation. With the years, Frontex activities in [the field of return have expanded](#), leading to the creation of the European Centre for Returns (ECRET). The number of people removed with the support of Frontex surpassed [13,000 in 2017](#). The new 2019 regulation revamping and strengthening Frontex expands its return-related mandate and tools at its disposal. Frontex may provide technical and operational assistance to support Member States' return systems. This may include support on consular cooperation for the identification of third-country nationals, the acquisition of travel documents, providing return monitors, return escorts and return specialists, and organising joint and collecting return operations, etc.

Funds for EU return policy were first allocated within the [ARGO programme](#) (2002-2006), which was replaced by the [European Return Fund](#) (2008-2013), allocating € 676 million for this period. This EU fund, together with two other migration solidarity funds, were then merged into the [Asylum, Migration and Integration Fund – AMIF](#) (2014-2020). AMIF allocated € [3,137 billion](#) altogether, and one of its objectives is to enhance return strategies in the Member States with an emphasis on the sustainability of return and effective readmission in the countries of origin (€ [800 million](#) were devoted to return for national programmes until 2020).

Different projects of practical/operational cooperation between Member States and with third countries have been launched to make returns more effective. These include the AMIF-funded deployment of [EU return liaison officers](#) (EURLO), next to Member States' ILOs, in a number of strategically key third countries; the [European Integrated Return Management Initiative](#) (EURINT) aiming at developing and sharing best-practices in the field of forced return; and the [European Return and Reintegration Network](#) (ERRIN), established to facilitate return-related cooperation between migration authorities in the MSs and the countries of return.

IT tools have also been developed to enhance cooperation/coordination between national return-enforcing authorities, such as the Irregular Migration Management Application ([IRMA](#)) for return-related operational data collection; and an EU-wide return case management IT system, managed by Frontex ([RECAMAS](#)) – still in the making.

## **B. Readmission:**

Successfully carrying out returns is impossible without the close cooperation of countries of origin and transit. Key instruments of this external dimension are EU level readmission agreements (EURA) concluded with third countries, which provide for the readmission of own nationals and third-country nationals irregularly coming to the EU through their territory.

Between 1999 and 2019, EURAs have been concluded with 18 countries – [17 of those already entered into force](#), with Turkey and Cape Verde as the last countries. 'Readmission clauses' have also been incorporated in a series of broader agreements concluded by the EU with third countries (e.g. EU partnership, association and cooperation agreements). New types of agreements helping implement return policy goals are equally appearing on the horizon (e.g. with [Albania](#) and [Serbia](#)). In addition, informal arrangements on return and readmission are also in place with [five countries of origin](#) (Afghanistan, Ethiopia, Ghana, Niger and Nigeria), which become lately the Commission preferred option to achieve fast and operational returns when the swift conclusion of a EURA is not possible. These informal arrangements are not under the scrutiny of the European Parliament, with the Council being also less involved, hence tilting the EU institutional balance, as well as raising questions of accountability and transparency.

In 2011, the [Commission evaluated](#) the functioning of the common readmission policy. As a result, the Council adopted conclusions defining the [Union's renewed and coherent strategy on readmission](#). These, among others, defined guidelines for the future: 1) the EU readmission policy should be more embedded in the overall external relations policy of the EU; 2) MS should make measures necessary to further improve the rate of approved readmission requests and effective returns; 3) with regard to the future mandates on readmission, the migration pressure from a third country concerned on a particular Member State/the EU as a whole, the cooperation on return by the third country concerned, and the geographical position of the third country concerned situated at a migration route towards Europe should be considered

to be the most important criteria; as well as 4) clauses on the readmission of third-country nationals and rules on accelerated procedure and transit operations should be incorporated in future agreements.

Typically, the practical implementation of the agreements creates imbalances: the formal reciprocity covers an asymmetric distribution of responsibilities, since the rate of irregular migration from EU Member States to the partner countries is negligible, while the third country concerned is usually a significant source of irregular migration as a country of origin or transit. Hence, EURAs can place sizable political and economic burden on the countries of origin or of transit (e.g. due to the volume of remittances). A set of [administrative and practical obstacles](#) have also hindered the successful implementation of EURAs.

Negotiations for a EURA with Belarus have been recently finalised, whereas readmission negotiations are still ongoing – or stalled – with Morocco, Algeria, Tunisia, Nigeria and Jordan (talks have not been even started yet with China since the mandate given in 2002).

## **II. IDEAS AND SUGGESTIONS FOR THE FUTURE:**

### **A. Legislative Measures:**

According to the Commission, the [two major challenges](#) of the EU return policy are:

- Difficulties and obstacles encountered by the Member States within their own countries in successfully enforcing return decisions (internal dimension), and
- The cooperation with countries of origin to enable actual removals, e.g. in identifying, re-documenting and readmitting their own nationals (external dimension).

Internally, it is vital to carefully balance between ensuring swift and effective return procedures on the one hand and fully respecting fundamental rights, as well as humane and dignified conditions when carrying out returns, with adequate built-in safeguards on the other hand. Ensuring respect for fundamental rights in return procedures not only safeguards the rights of the returnees, but also serves the interests of national authorities, as well as the effectiveness and overall credibility of the EU return policy. It prevents situations where fundamental rights violations during the return procedure lead to challenges at a later stage, resulting in delays in removal operations, prolonged detention and interventions of national/international courts, as well as reputational damage to the MSs.

### **1. Strengthening Fundamental Rights Safeguards:**

A number of changes that the recast Return Directive proposal of 2018 seeks to introduce raise fundamental rights concerns. [FRA's opinion to the European Parliament](#) and the [Substitute Impact Assessment](#) prepared by the European Parliamentary Research Service highlighted a number of issues and problematic provisions.

#### **Initial suggestions and ideas include:**

- 1. Upholding the primacy of voluntary departure over forced returns, which is an underlying, horizontal principle under the Return Directive – the CJEU has also stressed the preference for voluntary departure numerous times. From a practical perspective, it is also easier to manage with third countries.***
- 2. Limiting undesirable consequences of combining end of legal stay and return decisions. This approach is per se not unlawful, but it requires clear safeguards to protect the right to asylum, the principle of***

*non-refoulement and the right to an effective remedy. Contrary to the principle of individual assessment of every case, there seems to be practices of delivering automatically a return decision after the rejection of an asylum claim while this can entail fundamental rights violations. A precise checklist should be established on the basis of a study done by experts in order to help the officials in charge of return to individualise the cases they have to deal with.*

*3. Allocating sufficient funds under the new Asylum and Migration Fund (2021-2027) to finance return-related actions that are essential to ensure the practical implementation of fundamental rights safeguards required by the Return Directive (e.g. effective alternatives to detention; measures targeting vulnerable persons with special needs; effective forced return monitoring; provision of legal aid and interpretation/translation).*

*4. Inserting adequate safeguards concerning returnees' duty to cooperate. For instance, the duty to request a travel document from the authorities of the country of origin, if implemented against persons who sought asylum and whose application is not yet decided in the final instance, creates a risk of violating the right to asylum and the principle of non-refoulement.*

*5. Avoiding entry bans without a return decision. The proposal indicates that issuing entry bans without a return decision would allow issuing entry bans in a more expedited manner. This could foreseeably lead to decisions on entry bans that are issued swiftly without adhering to procedural requirements stemming from the right to good administration. Any measure issued under the Return Directive which negatively affects individuals needs to comply with the formal requirements and procedural safeguards (Article. 12-13 of the directive) and the right to good administration.*

*6. Avoiding undue restriction of the suspensive effect of appeals. Limiting the availability of the suspensive effect of appeals is at odds with the right to an effective remedy and interferes with MSs' procedural autonomy.*

*7. Establishing reasonable time limits for seeking a remedy against a return decision in line with CJEU and ECtHR case law. The proposed deadline of maximum five days would be the lowest deadline in place in EU law for a comparable type of proceedings in the field of migration and asylum, and would undermine the right to an effective remedy which must be available and accessible in practice. It would also severely affect the effective access to legal assistance, as well as interpretation and translation, in particular when the individual is deprived of liberty for the purpose of removal.*

*8. Ensuring that pre-removal detention remains a measure of last resort. The proposal unduly broadens the scope of interpretation of what constitutes lawful, proportionate and necessary use of pre-removal detention. It thus moves away from the principle of detention as a measure of last resort (ultima ratio).*

*9. Dropping the open-ended list of criteria to establish the existence of a 'risk of absconding' while assessing all circumstances of the individual case, including counter-indicators; and getting away with the rebuttable presumption of a risk of absconding, in order not to shift the burden of proof to the third-country national and not to absolve the national authorities from conducting an individual assessment of the circumstances of the case.*

*10. Avoiding inappropriate use of public policy, public security or national security concepts as additional grounds for detention of third-country nationals in the return procedures. As a limitation to the right to liberty, detention on these grounds needs to meet the requirements of the Charter, including the principle of proportionality. The CJEU ruled that such concepts, constituting necessarily an exception from the general rule, had to be interpreted in EU immigration and asylum legislation restrictively, similarly to their narrow interpretation in EU free movement legislation.*

*11. Refraining from setting a bottom limit to maximum detention periods (three months). The length of the maximum period of detention included in national law does not seem to impact on the effectiveness of returns. Among the MSs with the lowest return rate, there are some that apply shorter detention periods, as well as those taking advantage of the maximum detention periods permitted under the Return Directive. Some of the MSs with the shortest maximum permitted detention periods actually show*

*an above-average return rate. To gather more evidence, a study based on statistics should be prepared to evaluate the success of removal in comparison with the length of detention in order to see if this minimum period is necessary. Also, setting such a bottom limit could be wrongly perceived in practice, suggesting that three months of detention is automatically allowed.*

*12. Framing national return management systems must be in full compliance with European data protection law and the EU asylum acquis. According to the proposal, the national return systems, which need to be linked and automatically communicate data to a central system operated by Frontex, would store personal data of returnees. The objective to increase synergies between the asylum and the return procedures should not result in undermining the confidentiality of asylum information, e.g. information collected during the personal interview under the Asylum Procedures Directive should under no circumstances be used for return purposes.*

*13. Better reflecting the duty to protect stateless persons in the context of returns (e.g. to avoid their arbitrary and prolonged immigration detention), especially by injecting such language into the Return Directive.*

*14. Postponing the discussion on the border return procedure, given the interdependence between the proposed border procedure and the asylum procedure, until a final agreement on the Asylum Procedures Regulation is reached.*

## **2. Further Strengthening the EU-Wide Dimension of Return-Related Measures:**

*15. Submitting a proposal for EU legislation on the EU-wide recognition of return decisions, accompanied by all the necessary safeguards to enable access to effective remedies in the implementing Member State as well.*

*16. Strengthening the EU and domestic legal frameworks applicable to non-removable returnees (those who fall under Article 14 of the Return Directive), e.g. by properly implementing and applying all safeguards set out in Article 14 of the directive, including the written confirmation on the postponement of removal. New policies should be also carefully assessed so as not to have the unintended effect of increasing the group of people who are non-removable and at the same time remain in legal limbo.*

### **B. Policy Actions:**

*17. Moving towards [assessing the effectiveness of the EU return policy in a broader way](#), not only through the lenses of return rates, but also considering the impact of returns on individuals, communities and the countries of return – in view of the longer-term sustainability of return policies.*

*18. Comprehensively addressing low [return rates](#), including changing some third countries unwillingness to cooperate by offering incentives (e.g. legal migration channels, trade, investment, energy etc.) and envisaging sanctions (“stick and carrot approach”). In this spirit, the existing [EU Partnership Framework](#) should be extended to further strategic third countries.*

*19. Harmonising the assisted voluntary return and reintegration (AVRR) packages across the EU (e.g. approximating the scope of beneficiaries, the amount of support, the preconditions to benefit from reintegration support etc.) while not making access to AVRR programmes conditional on the cooperation of returnees with authorities during the return process. More attractive and widely used AVRR schemes can provide an incentive to returnees and help overcome the reluctance of third countries to cooperate on return.*

*20. Better using EU visa policy to facilitate negotiations on readmission (e.g. adopt restrictive visa measures against non-cooperative third countries on readmission) and using the visa suspension mechanism to closely monitor readmission obligations.*

21. *Better enforcing, based on conditionality, the existing multilateral agreements with third countries which contain a 'readmission clause' (e.g. the Cotonou Agreement with ACP countries).*
22. *Developing new EU readmission agreements and arrangements with other third countries, with the mobilisation of a wider range of levers from all EU relevant policy areas (more-for-more principle) – except for development aid in close coordination with leverage at Member States' level.*

### C. Practical Measures:

23. *Standards developed by Frontex for joint and collecting return operations should also apply, as relevant, to national operations the Agency is financing.*
24. *Frontex should ensure adequate training for all members of the pool of forced return escorts, all staff to be deployed to antenna offices, for the cultural mediators and for all other participants in return operations such as medical staff, interpreters, etc. potentially involved in Frontex return activities.*
25. *Frontex should assess how to strengthen the effectiveness and independence of the pool of forced return monitors, e.g. by involving the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in the monitoring of Frontex coordinated joint return operations.*
26. *Processing personal data through the integrated return management platform (RECAMAS) to be set up and operated by Frontex when communicating with Member States' return management systems needs to adhere to strict data protection safeguards at all times, in line with Regulation (EU) 2018/1725 and the Charter. The European Data Protection Supervisor should also be consulted in the process of setting this new information exchange mechanism.*
27. *Better using existing EU large-scale IT systems (e.g. the revamped SIS which will contain return decisions in future, and the revised VIS and Eurodac that will be both used for return purposes), to create an enabling environment for returns, including better information gathering, sharing and coordination among MSs for return purposes.*
28. *Strengthening the fundamental rights component of the Schengen evaluation mechanism in the field of return and readmission by adjusting the Sch-Eval questionnaire and checklist accordingly; by performing more unannounced visits with FRA as an observer as well as monitoring more closely, by the Council and the Commission, the effective implementation of the National Action Plans concerning return/readmission.*
29. *All Member States should operate an independent and effective forced return monitoring system, which should regularly publish reports. The [Forced-Return Monitoring III project](#), coordinated by ICMPD with the participation of 22 Member States, can help exploit synergies and increase convergences between the forced return monitoring mechanisms via training and exchange of best practices. Similarly, a systematic and effective oversight of the implementation of EURAs should be put in place.*
30. *Wider use of the voluntary scheme under [Annex 39 of the Schengen Handbook](#) concerning the transit by land of returnees and the mutual recognition of return decisions in this scenario of voluntary departure through more than one Member States. A similar scheme could be developed for transit by air of returnees who leave the EU voluntarily.*
31. *Systematically collecting data on the duration of return procedures; the time spent in pre-removal detention; the number of non-removable returnees and on backlogs (including different stages of appeals) to facilitate policy-making and performance evaluation by amending the Commission's proposal revising the regulation on Community statistics on migration and international protection (COM (2018) 307 final).*
32. *Putting in place post-return monitoring mechanisms, which can significantly contribute to sustainable return and reintegration. To be effective, such mechanisms should cover both the conditions*



*and circumstances of the return process as well as the situation and individual circumstances after arrival.*

*33. Mapping and regular monitoring of national authorities' operational capacities and capabilities in the field of return, to better determine the operational support Frontex should deliver to Member States.*

*34. Providing sufficient funding to support cooperation on readmission and reintegration of returnees between Member States and third countries, notably under the [Emergency Trust Fund for Africa](#) and EU financial programmes.*

*35. Creating an "[EU Coordination Mechanism for Returns](#)", which would allow Member States facing difficulties in cooperating with third countries on readmission to channel their concerns to the Commission and EEAS via an EU-wide coordination platform.*