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EUROPEAN PARLIAMENT**

**ON A COMMUNITY RETURN POLICY ON ILLEGAL RESIDENTS**

# Table of Contents

## Foreword

<b>1. Return as an integral part of a comprehensive Community immigration and asylum Policy .....</b>	<b>6</b>
1.1. Introduction .....	6
1.2. Working premises following the Commission's Green Paper .....	7
1.2.1. Focussing on the return of illegal residents .....	7
1.2.2. Safeguarding the integrity of immigration and asylum systems by the return of illegal residents .....	8
1.2.3. Respecting international obligations and human rights .....	8
1.2.4. Co-operating with countries of origin and transit on return and readmission.....	9
<b>2. Return Action Programme .....</b>	<b>9</b>
2.1. Phased integrated approach for interdependent elements of a Community return policy .....	9
2.2. Operational co-operation among Member States.....	11
2.2.1. Definitions.....	11
2.2.2. Statistics and information exchange.....	11
2.2.3. Networking authorities.....	11
2.2.4. Best practices and guidelines .....	12
2.2.5. Joint training .....	12
2.2.6. Better identification and documentation .....	13
2.2.7. Readmission and transit rules among Member States.....	14
2.2.8. Mutual assistance by immigration liaison officers.....	15
2.2.9. Joint Return Operations .....	15
2.2.10. Better co-ordination .....	16
2.3. Common minimum standards to ensure efficient return policies .....	17
2.3.1. Mutual recognition of return decisions .....	17
2.3.2. Removal .....	17
2.3.3. Preconditions for expulsion decisions.....	18

2.3.4.	Ending of legal residence .....	19
2.3.5.	Detention pending removal .....	19
2.3.6.	Proof of exit and re-entry .....	21
2.4.	Elements for integrated return programmes .....	21
2.5.	Intensification of co-operation with third countries .....	23
2.5.1.	Enhanced administrative co-operation .....	23
2.5.2.	Community readmission agreements .....	24
2.5.3.	Transit and admission arrangements and agreements with other third countries .....	24
<b>3.</b>	<b>Conclusions .....</b>	<b>25</b>

**Annex**

## FOREWORD

The Commission stressed the need for a common return policy in its Communication of 15 November 2001 on a Common Policy on Illegal Immigration. As it had pledged, on 10 April 2002 it tabled a Green Paper on a Community Return Policy on Illegal Residents to serve as a basis for wide-ranging consultations on this sensitive issue. This process, which was concluded on 31 July, attracted many contributions from Member States, candidate countries, third countries, international, governmental and non-governmental organisations and other national and local authorities. It culminated in a public hearing on 16 July attended by over 200 people at which some thirty experts spoke.

The importance of the matter was restated in the conclusions of the Seville European Council, which called, as a matter of priority, for an action programme to be adopted in this field before the end of the year. Return policy was also discussed in detail at the informal ministerial meeting in Copenhagen on 13 and 14 September. Like the results of the consultation, the pointers provided by these discussions were an invaluable contribution for preparing this Communication.

The Commission would point out that a common approach on return would be inconceivable outside the general framework of the Community policy on immigration and asylum, the foundations of which were laid in the Treaty of Amsterdam and in the conclusions of the Tampere, Laeken and Seville European Councils. In this sense, the Communication is just one part of a much larger whole, the other components of which can be found in the many proposals and Communications, which the Commission has tabled in recent years.

As the title itself suggests, the only issue addressed is that of the return of illegal residents, i.e. those who do not, or no longer, fulfil the conditions for entry to, presence in or residence on the territories of the Member States. It does not tackle the wider topic of the return of legal residents and, for example, how such return could benefit the country of origin. These points will be addressed elsewhere, for instance in a forthcoming Communication on the relationship between migration and development.

The effectiveness of Community action for return of illegal residents is therefore an essential aspect for the credibility of any policy for fighting illegal immigration. But for it to be fully effective, it must fit smoothly into a genuine management of migration issues, requiring crystal-clear consolidation of legal immigration channels and of the situation of legal immigrants, an effective and generous asylum system based on rapid procedures offering access to true protection for those needing it and enhanced dialogue with third countries, which will increasingly be invited to be partners in dealing with migration.

Against this background, and given the specific purpose of this Communication, the Commission intends to highlight four items in particular:

- A rapid response is required to the need to step up operational cooperation. Member States are very keen on this. It is essential that contacts and the exchange of information be made easier on the basis of common terms of reference, practices and training be brought into line and common moves be encouraged so that obstacles can be removed and resources co-ordinated in areas such as the identification and documentation of the persons concerned, co-ordination of return operations and mobilisation of the necessary resources.

- This operational cooperation will, however, soon reveal its limitations if there is no suitable legal framework. A first target for the medium term will be the adoption of common standards to facilitate the work of the national authorities handling return operations and in particular to ensure full mutual recognition of removal decisions, moving on from the first step represented by the directive adopted in May 2001. Subsequently these arrangements will have to be spelled out in even more detail on points such as the situation of a person who may be the subject of a return decision.
- On the basis of the experience of Member States and international organisations, the basic elements of an integrated programme should be worked out to form a common framework which could be adjusted to the specific needs of the populations and countries concerned. Such a programme would have to cover not only return proper but also the different stages of its preparation and its follow-up in order to give it every chance of being sustainable. The Commission is prepared, if necessary, to consider the possibility of releasing Community financial resources to support the establishment of such programmes.
- Here, as elsewhere, closer co-operation with third countries is a *sine qua non* for the success of the policy. This co-operation will, of course, have to develop first at administrative and operational level, concerning the documentation and reception of the persons concerned and also as regards transit in some cases. In formal terms it may involve conclusion of readmission agreements, the importance of which has been regularly underlined by the European Council and the Council. Care will also have to be taken to ensure that the ground is prepared for profitable reintegration both for the returnee and for the place of origin. This will require both a firm commitment on the part of the third country and the readiness of the European Union and its Member States to provide the necessary assistance where required.

## 1. RETURN AS AN INTEGRAL PART OF A COMPREHENSIVE COMMUNITY IMMIGRATION AND ASYLUM POLICY

### 1.1. Introduction

The European Council of Seville on 21 and 22 June 2002 called for the speeding up of the implementation of all aspects of the programme adopted by the European Council of Tampere in October 1999 for the creation of an area of freedom, security and justice in the European Union, in particular the common policy on immigration and asylum. The need to fight effectively against illegal immigration was reaffirmed as an essential part of such a common and comprehensive policy. The European Council of Laeken on 14 and 15 December 2001 had already called for an action plan on illegal immigration<sup>1</sup>. On the basis of the Commission's Communication on a common policy on illegal immigration of 15 November 2001<sup>2</sup>, the JHA Council adopted on 28 February 2002 a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union<sup>3</sup>. Return and readmission policies are identified as integral and vital components of that plan.

To follow up those aspects of this plan the Commission on 10 April 2002 tabled a Green Paper on a Community Return Policy on Illegal Residents<sup>4</sup>. Its purpose was to invite reactions from interested parties and to launch a broad discussion among all relevant stakeholders. To that end the Commission hosted a public hearing on 16 July 2002, where on the basis of the ideas set out in the Green Paper, the present practices of return policies and options for a future common EU policy on the return of illegal residents were discussed. The hearing allowed an open exchange of views of representatives of the European institutions, Member States, candidate countries, countries of origin and transit, other countries of destination, international organisations, regional authorities, non-governmental organisations and academia<sup>5</sup>. In addition, as requested in the Green Paper, written contributions were submitted to the Commission<sup>6</sup>.

The informal JHA Council meeting of 13 and 14 September 2002 debated the elements of a future return action programme as requested in Seville Conclusion No 30, which, inter alia, stated:

*"(...) The European Council calls on the Council and the Commission, within their respective spheres of responsibility, to attach top priority to the following measures contained in the plan: (...)*

- *as regards expulsion and repatriation policies, adoption by the end of the year, of the components of a repatriation programme based on the Commission Green*

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<sup>1</sup> Cf. Conclusion No. 40.

<sup>2</sup> COM (2001) 672 final.

<sup>3</sup> Council Doc. 6621/1/02 rev.1, JAI 30.

<sup>4</sup> COM (2002) 175 final.

<sup>5</sup> For further information check: [http://europa.eu.int/comm/justice\\_home/unit/immigration\\_en.htm](http://europa.eu.int/comm/justice_home/unit/immigration_en.htm).

<sup>6</sup> See aforementioned web pages.

*Paper; those components should include the best possible facilities for early return to Afghanistan; (...)*”

The discussion at the JHA Council meeting stressed in particular the need to enhance operational co-operation among Member States in order to make return policies more efficient in practice. The purpose of this Communication is to respond to this call and to put forward an outline for a return action programme taking into account, inter alia, the contributions and discussions in response to the Green Paper. The Communication focuses on the first element of the Seville European Council’s requirement, namely the concrete measures deriving from the general policy on the return of illegal residents, valid for all regions or countries of origin or transit.

With respect to Seville’s more specific reference to the case of Afghanistan, this is being addressed in a separate framework. Nonetheless, it is clearly closely linked and must be coherent with the general policy line on return as set out in this Communication. The identification and implementation of such elements for early return to Afghanistan in particular will create a unique opportunity for the Member States and the Commission to test the effectiveness of the new Community return policy.

## **1.2. Working premises following the Commission’s Green Paper**

In its Green Paper on a Community Return Policy on Illegal Residents, the Commission set out a number of working premises for the purpose of incorporating return policy as an integral part of a comprehensive Community immigration and asylum policy<sup>7</sup>. This Communication is based on those same premises, the most important elements of which are briefly recalled below.

### *1.2.1. Focussing on the return of illegal residents*

Although return policy in principle also covers the return of persons legally residing in the EU but willing to return to their country of origin, this Communication concentrates mainly on the return of persons residing illegally in the EU. These persons do not or no longer fulfil the conditions for entry to, presence in, or residence on the territories of the Member States of the European Union either because they entered illegally or overstayed their visa or residence permit, or because their asylum claim has been finally rejected. The term “illegal resident” is used following the legal terminology of Article 63 (3) b) of the Treaty of the European Community. This term must not be perceived as qualifying the persons as being illegal, but as qualifying their status of not being in compliance with the law on entry and/or residence.

Nevertheless, it is useful to extend slightly the focus of this Communication, only as far as voluntary return is concerned, to certain groups of legal residents, who have a temporary status or whose removal has been temporarily suspended. This concerns in particular persons under any form of international protection and which is principally of a temporary nature. Experience shows that in the context of voluntary return programmes it makes sense not to limit the scope of such a programme too much.

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<sup>7</sup> Cf. Part I – Return as an Integral Part of a Comprehensive Community Immigration and Asylum Policy of COM (2002) 175 final.

### *1.2.2. Safeguarding the integrity of immigration and asylum systems by the return of illegal residents*

The Communication deals with both aspects of the return of illegal residents: voluntary or forced. To every extent possible, priority should be given to voluntary return for obvious humane reasons, but also due to costs, efficiency and sustainability. More efficient ways to promote voluntary returns should therefore be developed and implemented.

However, in cases where voluntary return fails, the forced return of illegal residents becomes a necessity. A credible threat of forced return and its subsequent enforcement send a clear message to illegal residents in the Member States and to potential illegal migrants outside the EU that illegal entry and residence do not lead to the stable form of residence they hope to achieve<sup>8</sup>. It must be made clear that, in principle, third-country nationals, without a legal status enabling them to stay, either on a permanent or a temporary basis, and for whom a Member State has no legal obligation to tolerate the residence, have to leave the EU.

The possibility of forced return is essential to ensure that admission policy is not undermined and to enforce the rule of law, which is a constituent element of an area of freedom, security and justice. A credible policy on forced returns helps to ensure public acceptance for more openness towards persons who are in real need of protection, and for new legal immigrants against the background of more open admission policies, particularly for labour-driven migration.

### *1.2.3. Respecting international obligations and human rights*

Article 6 of the Treaty on European Union affirms that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. In consequence, the full respect of human rights and fundamental freedoms is the natural and basic prerequisite for a European return policy.

As already set out in the Green Paper on a Community Return Policy on Illegal Residents, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the European Union proclaimed in Nice in December 2000<sup>9</sup> contain provisions which are applicable to a policy on return of illegal residents (Articles 3, 5, 6, 8, 13 and 14 of the ECHR and Articles 3, 4, 7, 19, 21, 24 and 47 of the Charter of Fundamental Rights). Specifically relevant to international protection are Article 18 of the Charter of Fundamental Rights and the provisions of the Geneva Convention of 28 July 1951 on the status of refugees and the Protocol of 31 January 1967, in particular Articles 32 and 33 thereof. Finally, it should be emphasised that, according to the United Nations Convention on the Rights of the Child of 1989; in all actions related to children, the child's best interest must be a primary consideration.

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<sup>8</sup> Cf. COM (2001) 672, p.6.

<sup>9</sup> OJ C 364 of 18 December 2000, p. 1.



#### *1.2.4. Co-operating with countries of origin and transit on return and readmission*

The European Council of Seville highlighted – once again – the importance of the co-operation with countries of origin and transit on migration management, in particular in the field of return and readmission. Third countries must readmit their own nationals unlawfully present in a Member State and, under the same conditions, nationals of other countries who can be shown to have passed through their territories before arriving in the EU<sup>10</sup>. Member States' Justice and Interior Ministers recently expressed their view that the main problem does not lie in strengthening the co-operation between Member States, but is rather attributable to the unwillingness of third countries to take back their nationals and to ensure sustainable return. They have, therefore, the clear expectation that the third countries concerned should be put under pressure to be more co-operative both by the Community and by the Member States.

Co-operation is needed at an administrative level to obtain return travel documents for illegal residents who are not in possession of valid travel documents. In addition, when arriving in the country of return, the readmission process at the points of entry, often at airports, requires support. In certain cases it might be helpful to negotiate a readmission agreement at political level, which goes further than establishing the principles of readmission and sets out the practical procedures and modes of transportation for return and readmission.

Co-operation with countries of origin and transit on return and readmission is vital and might be backed up – where appropriate and within the limits of the resources allocated in the framework of the financial ceilings – with technical or financial assistance from the EU side. Moreover, the refusal of constructive co-operation should trigger the phased mechanism as defined in the Seville Conclusion No 36, which could, in case of persistent and unjustified denial of such a co-operation, include the unanimous adoption of measures or positions under the Common Foreign and Security Policy and other European Union policies after full use has been made of existing Community mechanisms without success.

## **2. RETURN ACTION PROGRAMME**

### **2.1. Phased integrated approach for interdependent elements of a Community return policy**

All Member States face the same obstacles to a smooth and timely return of illegal residents to their country of origin: lack of willingness to return voluntarily, unknown residence or identity of the person, missing travel documents or difficulties in co-operation with some states in issuing identity or travel documents; resistance to return of the returnee; absence of adequate means of transportation. Member States have, therefore, developed a variety of practices in order to overcome these difficulties. Experience has been gained with different concepts or countries of return. The improvement of co-operation between the Member States based on the experience gained is vital to solve practical problems.

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<sup>10</sup> Cf. conclusions no. 33-36.

Information exchange on such experience is clearly the first step of any co-operation among Member States. The improvement of existing schemes to exchange know-how and best practices is, therefore, important and the best starting point for further successful co-operation. This includes the exchange of return statistics, the networking of authorities and the development of certain guidelines on best practices.

Such non-binding guidelines require to some extent mutual consent to the effect of a given best practice<sup>11</sup>. Moreover, when considering the question of whether joint training of return practitioners should be organised, a basic common understanding or certain minimum rules on return enforcement appear indispensable. Certain pre-defined training schemes or standards are needed to achieve common training results.

Concrete operational co-operation in terms of assistance in individual cases again requires that certain rules be developed and adhered to, in particular for cases of identification where the exchange of personal data is envisaged. Moreover, mutual assistance or even joint operations are destined to fail if the enforcement staff of one Member State cannot comply with the legal requirements of another Member State. Common standards could, therefore, at least facilitate, if not create the possibility of having joint operations. The legality of the enforcement act must be beyond doubt during all stages of the return operation. This is to be taken into account in particular in cases of returns in transit through another Member State.

A binding regime for the mutual recognition of return decisions must be seen as the key factor for an effective operational co-operation. The Commission believes that it is time that the EU takes a fresh look at this key factor, as co-operation between Member States would otherwise remain rudimentary. A return should be assumed as being successful only if the illegal resident concerned has left the territory of the EU rather than of a particular Member State, if no other Member State has granted legal residence. The preferred option is – as a matter of course – the sustainable return to the country of origin. The mere continuation of illegal residence in another Member State is anyway an unsatisfactory option, even if it at present occurs in practice.

Consequently, Member States must ensure that the effect of a return measure is not limited to their own territory. Only the binding mutual recognition of return decisions can lay the foundations so that in the medium-term enforcement activities, including mutual assistance and co-operation, finally lead to the desired results. To that end an approximation of the legal conditions for the ending of residence is a prerequisite.

A comprehensive Community return policy should be gradually developed by identifying short-term measures that can be implemented immediately. These short-term measures could focus on some practical steps for operational co-operation. Nevertheless, a fully-fledged return action programme must additionally contain medium-term legislative measures, which will smoothen the co-operation among Member States, such as the binding mutual recognition of return decisions.

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<sup>11</sup> Cf. the best practices found in the EU Schengen Catalogue, External borders control, Removal and readmission: Recommendations and best practices, Council of the European Union, 28 February 2002.

## 2.2. Operational co-operation among Member States

### 2.2.1. Definitions

Due to different concepts and legal systems, the terminology in the field of return differs and often causes confusion. Some common definitions would already facilitate the practical co-operation by improving mutual understanding. The discussion on the first set of definitions as proposed in the Green Paper has begun. These definitions are for now of preliminary and non-binding character. However, they may serve at a later stage as a starting point for legislative work in the field of return. An updated set of definitions is attached (see Annex I).

The common definitions should be used in future documents insofar as possible in order to streamline terminology and thereby to avoid linguistic confusion.

### 2.2.2. Statistics and information exchange

The Conclusions of the JHA Council of May 2001 regarding common analysis and the improved exchange of Statistics on Asylum and Migration<sup>12</sup> consider that there is a need for a comprehensive and coherent framework for improving statistics in the area of asylum and migration. The Commission will put forward an Action Plan to implement the Council Conclusions shortly. The Action Plan will cover a variety of measures, such as new statistical methods and the extension of existing data collections. It shall be applicable to existing Community statistics on return measures as well as to any future statistics the Council may decide to start collecting.

Work has already started on one particular objective of the Conclusions, namely the publication of a comprehensive annual report on statistics in the area of asylum and migration. It is envisaged that the first report, on 2001 data, will be published in early 2003. In the section on return, figures will include the total number in each Member State of rejected applicants for asylum returned and other persons removed. In addition, figures shall be broken down according to the type of return (voluntary or forced). Reliable and comparable figures will help to demonstrate more clearly the scale of the challenges faced by Member States in the area of return.

After the publication of the report an assessment should be made of what other figures may be collected and how the return figures on types of return can be made more comparable.

### 2.2.3. Networking authorities

Co-operation starts with using contacts and with an informal exchange among individuals. In recent years the information exchange on return among Member States has taken place mostly at ministerial expert level. Member States' practitioners tended to contact each other on an ad hoc basis, on the occasions of bilateral or multilateral talks, workshops, meetings, conferences or seminars, which did not necessarily take place in the EU context. A systematic overview of the organisation and responsibility of Member States' return enforcement services,

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<sup>12</sup> Cf. Council Doc. 7973/01 ASIM 10.

which would facilitate working contacts amongst different Member State officials, does not exist.

An up-to-date and easily accessible list of national contact points, including contact points in national return travel document units and other related enforcement services, would, therefore, assist in addressing other Member States' enforcement services.

The Commission has started to develop a web-based Information and Co-ordination Network (ICONet), which is designed as a secure Intranet website for Member States' migration management services provided by the Commission. This site could include a section for return services. This return section could provide lists of (central) return enforcement authorities, which could be updated in real time.

The Commission will include a return section in the web-based Information and Co-ordination Network (ICONet), which would provide contact details for Member States' return enforcement services.

#### 2.2.4. *Best practices and guidelines*

The exchange of best practices is another important tool of operational co-operation. Based on the experience in the Schengen context Member States have already developed a catalogue with recommendations and best practices on removal and readmission on 28 February 2002<sup>13</sup>. On the same date the Council adopted conclusions on the particular aspect of obtaining travel documents for the return of illegal residents. On the basis of Member States' contributions to a questionnaire, an overview will be established on the different experiences made in the practice with laissez-passer documents, e.g. if the EU standard travel document<sup>14</sup> is regularly accepted by a third country or not.

This overview - and in the future other summaries on return and readmission related matters - should be compiled, analysed and discussed. The creation of a handbook of best practices, focusing on both, their implementation and the resources for their implementation, could be envisaged. This would help operational services to profit from the experience of others and to ensure coherence from third countries in the processing of requests for the issuing and acceptance of return travel documents. Moreover, such a handbook could contain certain guidelines, which would also be the common basis for joint training.

A handbook of best practices on return and readmission should be developed, which contains guidelines for better performance based on best practices in Member States. The first edition should focus on obtaining return travel documents.

#### 2.2.5. *Joint training*

Return enforcement is a very difficult and demanding task and should be carried out by a specialised service, which calls for specific know-how. Any person responsible for carrying out such a high-profile task needs to have various skills such as proper

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<sup>13</sup> EU Schengen Catalogue, External borders control, Removal and readmission: Recommendations and best practices, Council of the European Union, 28 February 2002.

<sup>14</sup> Cf. OJ C 274 of 19 September 1996, p. 18.

knowledge of the legal competencies, adequate treatment of returnees, the management of incidents, intercultural understanding and negotiation techniques. Member States must provide special training, which enables staff to conduct removals in an appropriate manner.

The challenges of enforcing returns should be the subject of joint seminars or regular meetings of persons responsible for the development of training schemes used in the training facilities. For the sake of efficiency it seems advisable to use initially the network of national training facilities for border management, which was foreseen by the Council's action plan on illegal immigration of 28 February 2002<sup>15</sup>. In case of diverging responsibilities, consideration could be given to the establishment of a similar network of responsible return training facilities. In addition, Member States should offer training courses to officials from other Member States in their training facilities. This could start with subjects that are – without further adjustment - of common interest and that are not focussed on specific needs due to national legislation.

Nevertheless, joint training schemes could be developed, which would also cover subjects where national practices differ, such as in the case of the use of restraints. Such schemes could be worked out more easily on the basis of common standards laid down in guidelines as described before in 2.2.4. Common standards have already been requested in the Council's plan for the management of the external borders of the Member States of the European Union of 13 June 2002 as far as standard security measures are concerned, which should be set up with regard to return in aeroplanes, ships and other means of transportation<sup>16</sup>.

Intensive joint training should be made possible with the creation of common security standards, a network of return training facilities, the development of joint training schemes and the participation in training courses of other Member States.

#### 2.2.6. *Better identification and documentation*

It should be recalled that the main obstacle to return is unclear identity and the lack of proper travel documents. Potential returnees are mostly responsible for this lack of documentation since it is generally known that countries of origin often delay or deny the issuing of return travel documents because of missing information on nationality or identity. In order to avoid removal, illegal residents therefore may hide or destroy their travel documents and not infrequently claim a completely false identity and/or nationality. As a consequence, lengthy and expensive procedures have often to be carried out, which include presentation at several embassies of neighbouring third countries or a language or dialect analysis.

A key element in solving return-related problems is, therefore, the carrying out of suitable identification measures during administrative procedures, e.g. at visa posts, when the person concerned has an interest in providing correct data. Following the Commission's proposal the Council agreed on the establishment of an online European Visa Identification System<sup>17</sup> in its action plan on illegal immigration of 28

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<sup>15</sup> Council Doc. 6621/1/02 rev.1, JAI 30.

<sup>16</sup> Cf. Council Doc. 10019/02 FRONT 58.

<sup>17</sup> The present Commission's working title is "Visa Information System".

February 2002. The Commission is currently assessing the technical feasibility of such a Visa Information System.

The study should assess in particular an important return related component: the storage of an electronic photo or other biometric identifier combined with the scan of the travel document as shown by the visa applicant. The availability of this information in a central database would have a substantial added value, despite the fact that photos are already today mostly requested for visa applications and travel documents copied. The difficulty is that even existing information is only accessible under the condition that the corresponding travel document is available. This creates a dependence on the willingness of its holder to present it, which, in cases of illegal residence, is obviously low. The aim is, therefore, to overcome this obstacle and to identify persons without the need for their co-operation. With the help of the biometric identifiers in the Visa Information System apprehended undocumented illegal residents could be retrieved and, in cases of prior visa applications, identified. The scan of the travel documents could be used as a clear proof for the third country concerned, when return travel documents are requested.

It is expected that the system will reduce significantly the time and costs incurred as a result of illegal residence, including the detention time for the returnee pending removal. In addition, the visa issuing practice could be reconsidered due to an obvious change in the risk assessment. The return component in the Visa Information System could allow a quicker and smoother handling of the whole visa practice, because Member States would have a real chance to identify and remove mala fide travellers, independent from the paper documentation or irrespective of in which Member States' representation a visa has been issued. Consequently, bona fide travellers would profit from this system.

A central function of the future Visa Information System should be the return component so that undocumented persons can be identified after apprehension in the Member States with biometric means in order to retrieve the existing personal information, in particular a scan of the travel document as presented in the visa post.

#### 2.2.7. *Readmission and transit rules among Member States*

As mentioned in the Commission's Green Paper, readmission among Member States takes place mostly on the basis of bilateral readmission agreements or informal co-operation<sup>18</sup>. In 1999 Finland presented an initiative with a view to the adoption of a Council Regulation determining obligations as between the Member States for the readmission of third-country nationals<sup>19</sup>. The discussion was suspended due to the negotiations on the transfer of the mechanism for the determination of the responsibility for asylum claims into Community law, Dublin II<sup>20</sup>. Since the negotiations on this subject have progressed substantially, the general framework for readmission among Member States concerning all illegally resident third-country nationals should be put on the agenda again.

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<sup>18</sup> Apart from the framework of the Dublin Convention and the mechanism for the determination of the responsibility for asylum claims, and Art. 11 of the Council Directive 2001/55/EC on temporary protection. Cf. also COM (2001) 127 final., Art. 26 of the proposal on long-term residents.

<sup>19</sup> OJ C 353 of 7 December 1999, p.6.

<sup>20</sup> Cf. COM (2001) 447 final.

Moreover, a common framework could be set for questions relating to transit during the return process. Often it is necessary to use airports of other Member States due to a lack of connections to the country of return. In such cases it is important to establish a clear legal framework for the transit procedure, e.g. the use and competencies of escorts in transit and regulations on failure to return. To that end Germany has launched an initiative for a Council Directive on assistance in cases of transit for the purpose of return by air<sup>21</sup>. In this context, account should be taken of annex 9 of the Convention on International Civil Aviation<sup>22</sup>. Furthermore, it should be discussed how other countries of destination could be integrated in an EU air transit regime.

In addition it is necessary to find pragmatic solutions for returnees crossing internal borders of Member States, in particular in cases of voluntary return. This problem is particularly relevant when the returnee is a national of a country, which is under visa obligation, and would, therefore, need a visa to transit through the territory of other Member States. In such a case, the use of a secure standard travel document issued by the Member State returning the person – which would be recognised by all Member States and made equivalent to a visa – could be envisaged.

The general framework for readmission among Member States should be put back on the agenda once the Regulation on Dublin II is adopted based on a proposal by the Commission.

Assistance in cases of transit in particular for the purpose of return by air should be subject to certain rules. Subsequently the transit by other means of transportation should be tackled.

#### 2.2.8. *Mutual assistance by immigration liaison officers*

Immigration liaison officers (ILO), who are posted in countries of origin or transit, have regular contacts with the local authorities, in particular the border guard and immigration authorities at airports. Such working relations should be made available for return-related tasks.

On the arrival of returnees in the country of return the presence of an ILO may be helpful for a smoother hand-over procedure for readmission. In addition, assistance for the escorts could be offered. The network of immigration liaison officers should be further developed to that end.

Wherever possible Member States should offer and provide mutual assistance in facilitating returns in the country of return.

#### 2.2.9. *Joint Return Operations*

Removals are increasingly carried out with charter flights for different reasons. Some Member States use small charter jets in cases of non-compliant forced returns, which have proven extremely expensive. Some Member States charter larger aircraft to allow for higher numbers to be returned with the necessary escorts. This practice is

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<sup>21</sup> Cf. Council Doc. 10386/02 – MIGR 60 of 27 June 2002.

<sup>22</sup> “Chicago Convention” of 7 December 1944.

also costly especially when the capacity cannot be fully utilised, which often happens due to the unavailability of the returnee because of absconding, illness or major resistance of the returnee or legal action at a very late stage to avoid removal.

Member States could enforce returns more efficiently if they could share existing capacities by organising joint operations. Provided that adequate transit arrangements are established, Member States should seek to carry out joint charter flights for voluntary and forced returns. Joint charter flights have already been organised as pilot projects on a bi- or trilateral basis among Member States or other destination countries. The development of this practice would not only have financial advantages, but the signal effect would be higher as well.

Joint return operations should be organised by Member States starting with bi- and multilateral joint charter flights. In addition, other joint return operations by land or sea could be envisaged, where appropriate.

#### 2.2.10. Better co-ordination

Enhanced co-operation as described above requires an adequate framework for co-ordination. As mentioned before<sup>23</sup>, the creation of ICONet, the secure web-based Information and Co-ordination Network, could be conducive to that end. Apart from contact information this website could provide for other return-related services. It could contain a tool, which allows an online transit notification from one Member State to another using a unified form as suggested in the German initiative on transit by air. Additionally, ICONet could be used to co-ordinate among Member States joint charter flights to enforce returns. Furthermore, ICONet could also give information on contact points in third countries or other information on third countries that is relevant for return operations.

Nevertheless, a website cannot replace personal interaction, which is clearly needed to reach an advanced level of co-operation. Co-operation and in particular co-ordination could be assisted by setting up a technical support facility as advocated by the Commission in the recent Communication on the Common Policy on Illegal Immigration<sup>24</sup>. Multiple tasks would be entrusted to such a facilitating body. Gathering, analysing and disseminating information on return, moderating a dialogue among return practitioners, organising expert meetings, preparing joint training courses or helping to organise joint operations are just some examples of what could be done. In order to prove the usefulness of such a technical support facility it should be limited in the beginning to a small secretariat, where a number of national experts should concentrate on certain priority activities. A technical support facility could be financed with support offered by the ARGO administrative co-operation programme<sup>25</sup>, which is also available for return co-operation among Member States.

Better co-ordination of an enhanced operational co-operation on return should be achieved with the development of the Information and Co-ordination Network. In addition, the creation of a technical support facility could be envisaged to that end.

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<sup>23</sup> Cf. 2.2.3

<sup>24</sup> COM (2001) 672 final.

<sup>25</sup> Cf. Council Decision of 13 June 2002, OJ L 161 of 19 June 2002, p.11



## 2.3. Common minimum standards to ensure efficient return policies

Co-operation among Member States as described in the chapter 2.2 above is likely to be successful if based on a common understanding on key issues. Consequently, common standards should be set in the medium-term in order to facilitate the work of the services involved and to allow enhanced co-operation among Member States. In the long term such standards should establish rules for adequate and similar treatment of illegal residents, who are the subject of measures terminating a residence, regardless of the Member State which enforces the removal. For these reasons the Commission intends to take the appropriate initiatives.

### 2.3.1. *Mutual recognition of return decisions*

The efficient return of illegal residents, who have absconded after expulsion decisions issued by one Member State and have been apprehended in another Member State is of major importance to the operational co-operation on return enforcement in the EU, in particular, where inner border controls do not exist. An expulsion decision issued by one Member State should be enforced in another Member State without the latter having to issue a new expulsion decision. The Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals<sup>26</sup> underlines this necessity, although it has not established a binding framework.

The mutual recognition of expulsion decisions regarding persons who have applied for asylum requires special attention, for Member States interpret the Geneva Convention in different ways and also have different grounds for subsidiary protection. According to the Tampere European Council of 1999, a common asylum procedure and a uniform status is the objective in the longer term. The Seville Council of June 2002 confirmed this objective, adding deadlines for specific Directives to be adopted. The Commission therefore reiterates its step-by-step-approach, proposed in its Communication of November 2000<sup>27</sup>, emphasising the link between mutual recognition and harmonisation on asylum.

The establishment of a legally binding framework for mutual recognition of all measures terminating a residence, in particular expulsion decisions, should be integrated in a future proposal on return procedures.

### 2.3.2. *Removal*

Removal, as the closing act of enforcing the return of the person concerned, should be subject to minimum standards, safeguarding both the rights of the person concerned and the effectiveness of the removal. Minimum standards will facilitate operational co-operation between Member States during transit or joint removal operations as well.

As long as Member States have different asylum systems in place, a final safeguard for non-refoulement appears necessary to enable Member States to comply with their international obligations, if the risk for refoulement has not been examined before.

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<sup>26</sup> Cf. OJ L 149 of 2 June 2001, p. 34.

<sup>27</sup> COM (2000) 755 final.

Such a final safeguard should refer to the asylum procedure in place, which includes an effective remedy.

Minimum standards should also strike a proper balance between preventing abuse due to feigned diseases while taking into account the real physical state and mental capacity of the persons concerned. If the returnee claims physical or mental illness immediately before departure, this could be an attempt to frustrate the removal, but it could also be a genuine claim. A proper assessment must be carried out, especially with regard to vulnerable groups such as minors and pregnant women. Minimum standards should also deal with the conditions under which a family can be separated during the removal procedure.

Member States should be allowed to remove a person despite his or her (physical) resistance. Yet it must be clear that coercive measures have their limits. The physical integrity of the returnee during the removal is of utmost importance. The returnee's psychological condition must also be respected. Standards are needed covering the intensity of coercive measures. As far as removals by air are concerned the IATA/CAWG Guidelines on Deportation and Escort could provide the basis for developing EU provisions on escorting and use of restraints.

Co-operation on removals touches on the question of how Member States can streamline their present return practice in relation to specific countries of origin in case the actual situation makes removals questionable due to compelling humanitarian reasons (a contemporary example is Angola). If Member States want to co-operate on this, it seems logical to have minimum standards on the assessment of such situations. This could include consultation of organisations such as UNHCR or UN Administrations (e.g. UNMIK in Kosovo) or other relevant actors.

Minimum standards on removal should be set at EU level, setting a final safeguard for non-refoulement requirements in a future Directive on Minimum Standards for Return Procedures, defining common guidelines for removal on the physical state and mental capacity of the returnee as well as on the returnee's integrity during the removal operation. Moreover, an assessment mechanism should be established, which would allow assessment of the actual situation in certain countries as to whether removals are feasible or not.

### 2.3.3. *Preconditions for expulsion decisions*

Decisions on expulsion are taken at Member States level, until now according to national law. The Council already provided for initial standards for expulsion decisions in Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals adopted in May 2001<sup>28</sup>. This Directive provides, inter alia, that a third-country national is the subject of an expulsion decision in case of a serious and actual threat to public order or to national security in two groups of cases.

In order to further develop the idea of mutual recognition of expulsion decisions, the Commission takes as a starting point the distinction between mandatory reasons for expulsion decisions on the grounds of extraordinary danger for public order or

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<sup>28</sup> Cf. OJ L 149 of 2 June 2001, p. 34.

national security and other legitimate reasons, which would normally lead to an expulsion decision.

This distinction should take proper account of the conditions and safeguards that have to be fulfilled in order to end the legal residence of certain groups. Privileged third-country nationals such as long-term residents<sup>29</sup> or family members of a Union citizen may only be removed for grave reasons of public security and public order.<sup>30</sup> Special considerations should also apply in the case of third-country nationals who are born in a Member State and have never lived in their country of nationality.

The expulsion of refugees as well as other persons under other forms of international protection requires special attention, for they can only be removed in accordance with international obligations such as the 1951 Geneva Convention and the European Convention on Human Rights. In general, a decision for expulsion should in all cases be based on the individual situation. The human rights of the person concerned and whether the measure is proportionate must be adequately considered. A judicial remedy should be available, including the possibility to ask for suspensive effect.

Minimum standards on expulsion decisions should be set at EU level, defining mandatory and other grounds for expulsion, identifying groups with specific protection needs and setting minimum safeguards for judicial review in the framework of a future Directive on Minimum Standards for Return Procedures.

#### 2.3.4. *Ending of legal residence*

The Commission proposes that a person can be obliged to leave the territory of a Member State from the moment legal residence has ended. This includes rejection of an application for residence (either on grounds related to international protection or migration), expiration of a residence permit or withdrawal / revocation of it (e.g. on grounds of public order or national security), but also the ending of illegal residence of a person who has never had legal residence in the Member State concerned. Legal residence is also considered to have ended if a remedy against a decision concerning the right to stay on the territory of the Member State has no suspensive effect. All these persons should have a legal obligation to leave the Member State immediately or, if a time limit for departure has been set, before the expiry of the time limit. Seen from the EU level, the obligation to leave should be an obligation to leave the EU and not just a Member State.

Co-operation among EU Member States would ensure that persons who have no legal residence in one Member State will not leave for another Member State if they will not be allowed legal entry and residence there. To that end, the Commission will elaborate on the approximation of measures terminating illegal residence applicable throughout the EU.

#### 2.3.5. *Detention pending removal*

The Commission acknowledges the need for Member States to provide for the possibility of detention pending removal. However, a fair balance should be struck

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<sup>29</sup> Cf. Art. 13 of COM (2001) 127 final.

<sup>30</sup> Cf. the clarifications in ECJ, case C-459/99, MRAX, judgment of 25 July 2002.

between the Member States' need for efficient procedures and safeguarding the basic human rights of the illegal resident. Minimum standards at EU level defining the competencies of responsible authorities and the preconditions for detention should be set also in order to make operational co-operation between Member States during transit or joint removal operations easier. These minimum standards could cover:

- Grounds for detention pending removal. This covers detention of the illegal resident concerned in order to obtain return travel documents or to prevent the illegal resident from absconding during the removal or during transit.
- Identification of the groups of persons who should generally not or only under specific conditions be detained:
  - unaccompanied children and persons under the age of 18
  - the elderly, especially where supervision is required
  - pregnant women, unless there is the clear threat of absconding and medical advice approves detention
  - those suffering from serious medical conditions or the mentally ill
  - those where there is independent evidence that they have been tortured or mistreated while being detained before they arrived in the EU
  - people with serious disabilities
- Rules concerning the issuing of a detention order. This could include the proportionality of detention and the possibilities of suitable alternatives to detention such as reporting duties, obligatory residence, bail bonds or even electronic monitoring.
- Provisions on the judicial control. A judicial body should be competent to issue or to revise the detention order.
- Time limits for the duration of detention pending removal. Although the grounds for detention (e.g. identification or prevention from absconding) has an inherent limitation of the duration, the Commission considers it necessary to provide for an absolute time limit and time limits for judicial review on the continuation of detention.
- Rules on the conditions of detention, in particular on accommodation standards but also on legal assistance, to ensure humane treatment in all detention facilities in the Member States. The Commission's considered opinion is that for accommodation purposes returnees should as far as possible be separated from convicts in order to avoid any criminalisation.

Minimum standards on detention pending removal should be set at EU level, defining competencies of responsible authorities and the preconditions for detention in the framework of a future Directive on Minimum Standards for Return Procedures.

### 2.3.6. *Proof of exit and re-entry*

As indicated in the Green Paper a satisfactory proof of exit is important, in particular in cases of voluntary return to ensure sustainable return and to allow preferential treatment to voluntary returnees, namely to avoid that in these cases persons are banned from a later legal re-entry due to a lack of proof of their previous voluntary exit. One possibility would be to develop incentives for returnees to report back personally at a consular post of a Member State in the country of origin. Where applicable, the proof of exit could also be issued by a reliable organisation, which has been involved in the return process.

Applying the principle of the priority of voluntary return, the legal consequences of the voluntary or forced return on an application for a subsequent re-entry should be assessed. A refusal of a future visa application in order to re-enter the EU some time in the future should not be based only upon the fact that he or she has previously stayed in a Member State illegally, if the person has returned voluntarily. On the other hand restrictions should be imposed in cases of forced return.

Common definitions are needed for determining the circumstances under which a new application for a visa or a residence permit is excluded. The refusal of entry list of the SIS according to Art. 96 of the Convention implementing the Schengen agreement or the future Visa Information System could be used for this purpose.

## 2.4. **Elements for integrated return programmes**

Different patterns of return programmes and models for their execution have been developed by the international community in general over the last decade. There are fundamentally two types of return processes: strictly voluntary return where an individual decides of his or her own accord to return and is helped to do so; and situations where the state authorities oblige return with due and proper regard to international law and the human rights of the persons concerned. There is also a hybrid situation in which a person accepts the obligation of the return process but also accepts assistance from the authorities.

International organisations have been particularly active in this field for all types of returns and have managed both European Community and nationally-financed projects with varying degrees of success, again depending on circumstances. In general, the Commission's experience, starting with the Joint Actions in the framework of the "Third Pillar" of the Maastricht Treaty from 1997 to 1999<sup>31</sup> which preceded to the establishment of the European Refugee Fund in 2000<sup>32</sup> has shown that successful return projects require all or most of the following elements: pre-return advice and counselling, training/employment assistance, assistance for travelling to and/or re-establishment in the country of origin/housing, follow-up assistance and counselling post-return. Moreover, the implementing agency must have sufficient links to the authorities and non-governmental community in the country of origin as well as adequate facilities in the field (for example, locally-based staff, at least on a temporary basis, with knowledge of local languages) and the skills necessary to select, where this is appropriate, returnees with the potential to succeed

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<sup>31</sup> Budget lines B7-6008 and B-5-803.

<sup>32</sup> Council Decision of 28<sup>th</sup> September 2000 (2000/596/EC), OJ L252 p.12.

once returned. Analysis of the return-related projects accepted for financing by all these instruments strongly suggests that such projects are mainly concentrated in a limited number of Member States. This is due to the circumstances in the Member State, both the number of potential returnees and the competing needs of other issues needing finance such as reception facilities or integration programmes.

Against these factors must be weighed the cost/benefit of return programmes. Some projects (for example concerning Somalis living in Europe) can be very costly per head. Furthermore, there are practically non-quantifiable factors such as the likelihood of returnees attempting to come back to their host country. Whether a person, once returned to his or her country of origin, will remain there, depends on a series of factors, such as the legal status in the host country and the issuing of a travel documents that permit re-immigration, their economic and family circumstances, etc.

Information should be made available - as early as possible - for potential returnees on the possibilities for voluntary return to the country of origin. Such information should comprise information on return programmes, vocational or other training available, on the situation in the country of return and on possibilities for establishing a new life. Vocational or other training, which could be of use in the country of return, might be offered, either before return or in the country of return. Assistance and counselling should be offered at all stages of the return process starting from an early stage of residence in the Member States until some time after arrival in the country of destination ensuring sustainable return. In general, incentives should be assessed, which would encourage potential returnees to go back voluntarily. The Commission has, therefore, ordered a study on incentives for return, which will be available by the end of the year. On the basis of the study further steps should be considered to create sufficient incentives for return.

The general conclusion to be drawn from past experience in managing return programmes is that they must be flexible regarding their timing and administration in order to respond to circumstances on the ground. This requires a more cohesive use of Community-based programmes and national programmes backed by clear policy guidelines to that end.

In addition to the Joint Actions of 1997 to 1999 and the European Refugee Fund (ERF), the Commission has also used budget line B7-667 (for which a legal basis will be proposed by the end of 2002) in relation to the activities of the High Level Working Group on Asylum and Immigration for return-related issues. The Commission will shortly be entering a phase when it will be considering the future of the ERF one of whose main strands is voluntary return. Given the requirements of the European Council in Seville<sup>33</sup>, the Commission will need to reflect on both the optimum financial and co-ordination mechanisms for return. The Commission will present a report to the Council in the early autumn of 2002 on the budgetary aspects of the conclusions of the European Council.

The scope of financial assistance for return should cover voluntary return, forced return and support for return of irregular migrants in transit countries.

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Cf. no. 33 of the conclusions.

The voluntary return element in a financial assistance for return would target return and reintegration of both illegal residents and legal residents, if they wish to return and there is a public interest in supporting this. Items like individual travel costs, transport of personal possessions, the first expenses after return and a limited start-up support could be taken into consideration in this framework.

The second element of such a financial assistance scheme strictly limited to illegal residents - would be the financial support for enforcement measures. This element would contribute emphasising the need for solidarity and burden-sharing among Member States on return with regard for instance to travel costs for returnees and escorts.

The third element of a financial assistance for return would focus on interception. Third countries could be assisted in returning irregular migrants insofar as they do not fulfil the entry conditions of the country concerned, they are not in need for international protection and the persons are in transit with a view to entering the EU illegally.

The EU should develop its own approach for integrated return programmes. Such programmes should cover all phases of the return process, starting with the pre-departure phase, the return as such, the reception and reintegration in the country of return.

Integrated return programmes should be tailored to specific countries to take the specific situation, the case load and needs of the country duly into account.

Further consideration should be given to a financial instrument, which might cover voluntary return, forced return and support for return of irregular migrants in transit countries. The Commission will come back to this issue soon when presenting the report on financial instruments in the area of immigration and asylum.

## **2.5. Intensification of co-operation with third countries**

In order to strengthen the co-ordination and improve complementarity and coherence of the external actions of the Union, the intensification of EU co-operation with third countries on return should be carried on, on a case by case basis, in the context of the elaboration or revision of the country strategy papers and regional strategy papers, which elaboration or revision falls under the Commission responsibility and to which the Member States are fully associated. Furthermore, the specific situation of the candidate countries shall always be taken into account, which includes making full use of the mechanisms of the Association agreements.

### *2.5.1. Enhanced administrative co-operation*

The intensification of co-operation with third countries on return would start with enhancing administrative co-operation. Where appropriate, the EU could offer support in the institution and capacity building for the reception and reintegration of returnees. Technical co-operation might be envisaged as well. Principally, consideration should be given to all reintegration measures, which help to ensure the sustainability of the return, such as e.g. start-up support for housing or the reintegration in the labour market including vocational training. Finally, the return

dimension should be part of the overall political dialogue on migration related issues with the country concerned.

The EU should promote enhanced administrative co-operation with third countries, which should address all stages and levels of the return process.

### 2.5.2. *Community readmission agreements*

The Seville European Council also called for the speeding-up of the conclusion of readmission agreements already being negotiated. As previously stated in its Green Paper, the Commission will therefore make a further effort to push forward the current negotiations in order to complete them in due time and – to the extent possible - in line with the negotiating directives issued to it. To achieve this, it will need a greater level of political and diplomatic support from the Member States than they have been willing to provide so far. However, from the very diverging course of negotiations with the first seven countries, it is already possible to draw one important conclusion. As readmission agreements work mainly in the interest of the Community, third-countries are naturally very reluctant to accept such agreements. Their successful conclusion, therefore, depends very much on the positive incentives ("leverage") at the Commission's disposal. In that context it is important to note that, in the field of JHA, there is little that can be offered in return. In particular visa concessions or the lifting of visa requirements can be a realistic option in exceptional cases only (e.g. Hong Kong, Macao); in most cases it is not. It is, therefore, essential to give more thought to the crucial question of what other incentives, not only from the JHA area but from all Community areas (e.g. trade expansion, technical/financial assistance, additional development aid etc.) could be offered to the relevant countries in return. Although the Seville European Council stressed – once again – the EU's willingness to provide, within the limits of the financial perspective, adequate technical and financial assistance, no satisfactory answer was given to the question of how to deal with countries that, despite this offer, are not interested in concluding a readmission agreement.

The Commission will, therefore, continue its reflection on incentives or compensations in the context of readmission agreements in consultation with the Member States, in particular by reflecting on the possibility of increasing complementarity with other policy areas, including political and diplomatic measures by Member States, in order to help achieve the Community's objectives in the field of return and readmission.

### 2.5.3. *Transit and admission arrangements and agreements with other third countries*

If direct returns to the country of origin are not possible or appropriate, other avenues of co-operation with third countries should be explored. In particular in the case of practical obstacles, such as complicated or non-existing travel connections to the country of origin, possible transit countries could be approached with a view to gaining their support relating to the – voluntary or involuntary – transit of returnees through their territory.

Transit provisions should be systematically included in any Community readmission agreement and, in the absence of such agreements, separate transit arrangements should be envisaged, where appropriate.



### 3. CONCLUSIONS

Following the mandate of the Seville European Council of 21 and 22 June the Commission herewith presents the essential elements of a Return Action Programme, which the Council is asked to endorse by the end of the year.

The Commission has identified a number of actions, in particular in the area of operational co-operation, which require a stronger commitment of the Member States enforcement services and could be achieved in the short term. In addition, a Community Return Action Programme requires a vision which would build a comprehensive package for medium-term measures at EU level. This should include enhanced operational co-operation based on common co-ordination and – where necessary – legislative adjustments.

The Council is invited to endorse the Return Action Programme before the end of the year in line with the mandate of the Seville European Council.

## ANNEX –Definitions

Term	Definition
Return	Comprises the process of going back to one’s country of origin, transit or another third country, including preparation and implementation. The return may be voluntary or enforced.
Illegal resident	Any person who does not, or no longer, fulfil the conditions for presence in, or residence on the territory of the Member State of the European Union.
Illegal entrant	Any person who does not fulfil the conditions for entry in the territory of the Member States of the European Union.
Voluntary return	The assisted or independent departure to the country of origin, transit or another third country based on the will of the returnee.
Forced return	The compulsory return to the country of origin, transit or another third country, on the basis of an administrative or judicial act.
Readmission	Act by a state accepting the re-entry of an individual (own nationals, third-country nationals or stateless persons), who has been found illegally entering to, being present in or residing in another state.
Readmission agreement	Agreement setting out reciprocal obligations on the contracting parties, as well as detailed administrative and operational procedures, to facilitate the return and transit of persons who do not, or no longer fulfil the conditions of entry to, presence in or residence in the requesting state.
Expulsion	Administrative or judicial act, which states – where applicable – the illegality of the entry, stay or residence or terminates the legality of a previous lawful residence e.g. in case of criminal offences.
Expulsion order	Administrative or judicial decision to lay the legal basis for the expulsion.
Detention pending removal	Act of enforcement, deprivation of personal liberty for return enforcement purposes within a closed facility.
Detention order	Administrative or judicial decision which forms the legal basis for the detention pending removal
Removal <sup>34</sup>	Act of enforcement, which means the physical transportation out of the country.
Removal order	Administrative or judicial decision to lay the legal basis for the removal (in some legal systems synonymous with expulsion order).
Legal re-entry	Admission of a third-country national or stateless person to the territory of the Member State of the European Union after prior departure.
Rejection	Refusal of entry to a state
Transit	Passage through a country while travelling from a country of departure to the country of destination.

<sup>34</sup> The English word “deportation” is also used in this context.