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*The EU Return Policy: Premises ad Implications*



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**Collective Action to Support the Reintegration of Migrants in their  
Country of Origin  
MIREM Project  
(MIGRATION DE RETOUR AU MAGHREB)**

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**The EU Return Policy : Premises and Implications**

By Jean-Pierre Cassarino

## The EU Return Policy : Premises and Implications\*

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The issue of return has become a “vital and integral component”<sup>1</sup> of the EU immigration and asylum policy. The need to define and consolidate a common return policy has become more pressing since the entry into force of the [Amsterdam Treaty](#), as has been repeatedly stressed in the ensuing European Councils in [Laeken](#), [Seville](#), [Thessaloniki](#) and [Brussels](#) (November 2004).

More recently, in his [address to the French Senate](#) in March 2006, the European Commissioner for Justice, Liberty and Security, Mr. Franco Frattini, recalled the [draft directive on common standards and procedures in Member States for returning illegally staying third-country nationals](#) presented by the Commission in September 2005. One of the main points of this directive was that a “return policy is an integral and crucial part of the fight against illegal immigration” and that common standards should therefore be set in order to enhance the operational cooperation among Member States.

Before analysing the premises and implications of the consolidation of the EU return policy, a terminological clarification is needed. In other words, what precisely is meant by ‘return’ must be explained and defined.

### A Terminological Clarification

It is in this respect that the [detailed comments on the above-mentioned draft directive](#), published in October 2005, are of great interest. Actually, with a view to avoiding any misunderstanding regarding the terminological usage of ‘expulsion’, the Commission staff deliberately chose not to use this term in the draft directive deciding instead to use of the terms ‘return’ and ‘removal’ which, as stated in the October 2005 document, seems “more specific and easily definable terms.”

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<sup>1</sup> COM(2002)564 final, p.6.

It has to be said that this terminological usage does not reflect the various types of return patterns. Nor does it build upon the vast corpus of literature on return issues that has been produced by scholars from various disciplines since the 1960s.

The return (or removal) policy of the EU focuses exclusively on the forced or assisted (i.e., voluntary) return of persons. This focus stems from the assumption that the fight against illegal immigration is contingent on the consolidation of a common return policy, which in turn determines the efficiency of the EU comprehensive approach to migration.

This assumption was mentioned in the conclusions of the [December 2001 Laeken European Council](#), which emphasised that a “true common asylum and immigration policy” would depend, among other things, on the conclusion of EU readmission agreements with some targeted third countries and on the consolidation of instruments aimed at securing the effective removal of illegal migrants. This assumption, which views return policy as a crucial instrument in the battle against illegal migration and human-trafficking, has also shaped the definition and understanding of return as such.

In the years before the proposal of the directive on common standards for return illegal third-country nationals, various consultations took place as a result of the April 2002 [Green Paper on a Community Return Policy on Illegal Residents](#). The Green Paper acknowledged the existence of various categories of returnees making a clear-cut distinction between those who decide autonomously to go back to their country of origin and those who are forced to. The focus was, however, on the latter, i.e. on the forced and assisted return of persons residing illegally in the European Union. Admittedly, the Commission recognised that the return of persons who decide autonomously to go back to their countries of origin should deserve further attention, owing to its potential impact on return migrants’ countries of origin, and that it should be “subject to further reflection on the part of the Commission, at a later stage”. However, since then, no systematic and in-depth approach to the link between return migration and development in migrants’ countries of origin has been proposed by the Commission, although, in its [communication on migration and development](#), dated September 2005, it noted that “the return of migrants to their country of origin may have a significant positive impact in development terms.” This statement has not, however, been conducive to the adoption of any concrete provisions facilitating the participation of return migrants in the development of their country of origin.

This terminological clarification is of paramount importance to understand the main orientations of the EU return policy since the early 2000s, and to realise that it has been predominantly aimed at fighting against illegal migration and at dealing with the removal of rejected asylum-seekers.

Furthermore, it should be stressed that while migration scholars have always attached the notion of return to the fact that an individual was going back to his/her country of origin after a certain period of time lived abroad, the operational definition proposed in November 2002 by the Council in its [Return Action Programme](#) disregarded the time dimension which is intrinsically linked with the return process. Return was (and is still) defined as:

*“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 [i.e., assisted] or enforced.”*

Moreover, this definition only addresses the effective removal of the migrant from the EU territory and not his/her reintegration into his/her country of origin. This narrow definition, albeit indicative, has had a certain bearing on the scope and premises of the EU policy as applied to return *or* removal.

### **The premises of the EU return policy**

Since the 1999 [Tampere European council](#), a common return policy has increasingly been viewed as an instrument aimed at tackling illegal migration and at protecting the integrity of the EU migration and asylum policy as well as the migration and asylum systems of the Member States.

It was this cause-and-effect relationship that allowed for the gradual consolidation of the return policy of the EU. At the same time, the need to take into consideration all stages of migration, including return (whether voluntary or forced), was reasserted in the framework of [The Hague programme](#) adopted at the November 2004 Brussels European Council. The Hague programme, which followed the 5-year Tampere programme, was crucial in giving more coherence to the “[comprehensive approach to the management of international migration](#)” and in defining the premises of the EU’s return and readmission policy.

The aforementioned [return action programme](#), proposed as a result of the conclusions of June 2002 Seville European Council, allowed an initial framework of measures to be identified. These measures were not only aimed at establishing a common return policy, but also at demonstrating to each EU Member State that a comprehensive approach to return and removal issues could reveal its full added-value along three different lines:

1- By enhancing cooperation among Member States:

The exchange of information and the facilitation of removals by air flights are two interrelated fields of action that have been privileged by the EU.

The first field of action pertains to the establishment and consolidation of information systems, at the EU level, allowing undocumented aliens to be more easily identified. Identification is a common and expensive problem facing most EU Member States. The Visa Information System ([VIS](#)), which was established in 2004 with a view to assisting in the identification and removal of illegal immigrants who lack travel or identity documents, has been at the centre of debates, just like other electronic mechanisms such as [ICONet](#) (i.e., the secure [web-based Information and Coordination Network](#)) and the second generation Schengen Information System ([SIS II](#)).

These debates were not so much related to the objectives of these information systems, which aim to facilitate removals by sharing data among EU Member States, as to their accessibility and exchange procedures which are based on the strict respect of confidentiality and personal data protection rules, enshrined in the principle of availability.

The [action plan implementing the Hague Programme](#) stipulated that the exchange of information between European law-enforcement agencies should be based on the “principle of availability”. In other words, information required by a law enforcement officer in a given Member State should be made available by his counterpart working for another law enforcement agency in the Union. This principle requires, however, the respect of precise conditions pertaining to the integrity of the data exchanged, as well as to their secured confidentiality and to the protection of individuals from abuse of data. Although no explicit reference is found in the text of The Hague Programme, the respect of these strict conditions is guaranteed in the European Union by Directive

95/46/EC, dated 24 October 1995, and by [Regulation \(EC\) 45/2001](#) adopted by the Council and the European Parliament in December 2000.

There is no question that the conditions of access to personal data determine the performance of whole systems, as well as their efficiency and added-value. In an attempt to respond to EU Member States' demands for greater efficiency in the field of information-sharing, the European Commission sought to create a "delicate balance" between security challenges and the protection of the fundamental right to privacy.

In its November 2005 communication on [improved effectiveness, enhanced interoperability and synergies among European databases in the area of Justice and Home Affairs](#), the European Commission became decisively more responsive to the demands of certain influential EU Member States by proposing to make common information systems more "interoperable" ; a new notion introduced by the Commission staff.

In the field of return, the Commission stressed that access to VIS and SIS II would have a significant impact on the fight against illegal immigration and facilitate the identification of undocumented illegal aliens, as a prelude to their removal. One of the objectives of this communication was to identify the shortcomings of the mechanisms supporting the exchange of cross-border information between law-enforcement agencies with a view to better conciliating the principle of availability, as enshrined in The Hague Programme, with newly introduced notions such as "connectivity", "interoperability", and "synergy". It is too early to argue whether these new notions and initiatives will have any impact on the full implementation of the principle of availability and on the key conditions that need to be respected in relation to the exchange of data and the protection of confidentiality.

Importantly, the introduction of these new notions in the aforementioned November 2005 communication seems to be symptomatic of the European Commission's need to show EU Member States that it is willing to consider additional "[architectural and organisational changes](#)" in order to provide a concrete added-value to key security-related migration issues, including as mentioned the identification of illegal aliens and their subsequent removal operations. Moreover, these new notions indicate that the development of the common policy on removal and readmission will depend, among

others, on the extent to which the EU will further support EU Member States' efforts in fighting against illegal migration, bearing in mind that the latter have been more keen to coordinate their removal operations (e.g., by organising [joint return flights](#)), with a view to lowering their costs, and to cooperate on the exchange of data, than to harmonise their legislation regarding the expulsion of illegal aliens.

The exchange of information between law-enforcement agencies also constitutes a prerequisite to better coordinating inter-state cooperation in carrying out removal operations by air. It has to be said that such removal operations have, on various occasions, been encouraged. To give an example, the December 1995 [Council recommendation on concerted action and cooperation in carrying out expulsion measures](#) enumerated provisions aimed at facilitating transit for expulsion purposes. The need for concerted action between EU Member States on removal or expulsion matters was stressed in the November 2003 [Council directive 2003/110/EC](#) on removals by air which defined, among others, the bilateral arrangements that two EU Member States may adopt to jointly implement their removal operations. One year later, at the initiative of the Italian government, the [Council decision dated 29 April 2004 on joint return flights](#) for removals, went much further than the 2003 Council Directive in that it considered the possibility for an EU Member State to organise a joint flight for the removal of third-country nationals by placing a "call for participation" at the EU level, allowing any participating Member State to take part in the removal operations as long as it contributes equally to the financial costs and operational arrangements.

The 2003 Council Directive and 2004 Council decision confirm the existence of sophisticated patterns of cooperation between EU Member States on removal issues and transit by charter flights. However, beyond the sophisticated aspects of EU Member States' return practices, their long-standing consolidation may pose a problem to the EU when it comes to abiding by common standards and rules on return matters.

## 2- By adopting common standards as applied to removal procedures

EU Member States' legal frameworks related to expulsion procedures differ substantially from one another, not only in terms of the terminology used in the



context of removals and returns, but also in terms of provisions pertaining to temporary custody and the use of coercive force.<sup>2</sup> The resilience of such differences may well be reflective of the desire of each EU Member State to preserve a certain degree of autonomy in dealing flexibly with removal procedures without being constrained to comply with common standards on return and readmission issues that are often viewed as being shaped by domestic security concerns.

The EU, however, favours the harmonisation and adoption of common rules as is clear from the [draft directive](#) presented by the European Commission in September 2005 on the adoption of common standards and procedures in Member States for returning illegally staying third-country nationals.

One of its main breakthroughs is the proposal of “a European dimension to the effects of national return measures by establishing a re-entry ban valid throughout the EU”, as stated in the [November 2002 Return Action Programme](#). It also proposes:

- to favour voluntary over forced return. The possibility to opt for voluntary return would have to be fostered by Member States. To do so, the draft directive advocates a two-step procedure whereby a return decision is issued to an apprehended individual who is informed that he or she has to leave the European territory. The removal order, whereby a Member State uses coercive measures to expel an individual from the European territory, should be issued as a last resort;
- to limit the use of temporary custody to forced return as well as its duration to a maximum of 6 months (reviewable once a month);
- the enhanced sharing of information as regards the return decisions, removal orders and re-entry bans issued by other Member States;
- that coercive measures should comply with the respect of the fundamental rights of the persons removed, in accordance with international law and the [European Convention on Human Rights](#).

Some Member States have been critical of the provisions contained in the draft directive. To give an example, the maximum 6-month temporary custody will notably change the ways in which some EU Member States deal with removal procedures. In

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<sup>2</sup> For a comprehensive approach to the policies adopted by each EU Member State on removals see IOM, *Return Migration: Policies and Practices in Europe*, IOM, Geneva, 2004.

fact, this duration, which remains bound to the principle of proportionality, is on average much longer than the maximum duration legal in most EU Member States. In France, the maximum duration of temporary custody is 32 days, since the entry into force of Law n. 2003-1119 dated 26 November 2003. In Spain, Ireland, and Italy, the detention of an illegal alien is respectively limited to a maximum of 40 days, 30 days, and 60 days. These time limits are generally set with a view to having enough time to collect the documentation and data allowing the identification process of the illegal aliens to be carried out in order to obtain the required travel documents (i.e., consular laissez-passers) and to eventually repatriate the person. However, extending the time limit, as proposed in the draft directive, also means increasing the financial costs, as well as the administrative and judicial burden, linked to detention.

EU Member States' main concerns regarding the provisions contained in the draft directive may lie in:

- the EU's attempt to give a preference to voluntary over forced return. In accordance with the draft directive, an apprehended alien may benefit from a period of voluntary departure of four weeks during which he or she should leave the EU territory. This is based on the principle, mentioned in Art. 6(2), that a return decision (i.e., an order to leave the EU territory) should always be issued before and separately from a removal order (i.e., expulsion);
- the attempt to excessively harmonise removal procedures, particularly regarding the delivery of temporary custody orders;
- the fact that most EU Member States already have consolidated experience in dealing with removals. Although most of them agree to further enhance cooperation on removal and return issues, at the level of the EU, they do not view this process of enhanced cooperation as being necessarily conducive to the adoption of common standards, for the harmonisation of EU Member States' return procedures might lead to an interference in their current practices and ways of dealing with forced return and readmission issues.

More problematically, the draft directive does not clarify what is meant by "illegal stay". This lack of clarification implies that the draft directive applies equally to rejected asylum-seekers and undocumented aliens while potentially impacting on the rights of asylum-seekers, as enshrined in the [1951 Geneva Convention](#). Admittedly,

the “proposal provides for a right to an effective judicial remedy against return decisions and removal orders” (Art. 12) but it does not specify the precise situations that might be considered. Moreover, the aforementioned 6-month custody, as well as the vague notion of “illegal stay” (Art. 3(b)) and the conditions of removal, have raised many concerns from human rights organisations and from the [UNHCR](#).

### 3- By intensifying cooperation with third countries:

The word cooperation, in the context of a bilateral dialogue on migration and readmission issues and in the parlance of the Commission staff, pertains to the gradual mobilisation of non-EU state actors. Given the resilience of asymmetric patterns of development between sending and receiving countries, the intensification of cooperation between the EU and third countries is unlikely to be based on the existence of shared interests justifying and explaining the attainment of common objectives. Rather, the intensified cooperation with third countries finds its roots in the emergence of a dominant interpretative framework pertaining to the “management of international migration” which emerged since the 1990s through the recurrence of consultative meetings, at international and regional levels, gathering governmental officials from sending and receiving countries.

A thorough analysis of these consultative meetings goes beyond the scope of this study. It is important to understand however, that it was their recurrence that consolidated a new lexicon (e.g., “management”, “root causes”, “temporariness”, “balanced approach”, “comprehensiveness” and so forth). The adoption of this new lexicon was a prerequisite to the recognition of common guiding principles and to the gradual legitimisation of a regulatory regime through which migration flows would be effectively managed.

Moreover, the identification of mutual benefits was a crucial step to presenting migration management in positive terms (i.e., the “balanced approach”), not only by enhancing the contributory effects of migration on domestic development and growth, but also by reasserting the managerial centrality of the state. This step is also aimed at strengthening the public credibility of states with regard to the control of their borders and the possession of instruments capable of protecting their citizens and defending their rights. Security concerns are in fact part and parcel of migration management policies, whether these are adopted by receiving or sending countries. Furthermore,

their enforcement implies a sort of dichotomy between what is managed and legitimate, and what is unmanaged and illegitimate and potentially subject to abuse and human-trafficking.

These informal consultative processes have also contributed to the reinforced cooperation between the EU and third countries on return issues. In fact, the fundamentals of the EU's "[balanced and integrated approach to migration management](#)", including the EU return policy, draw substantially on these consultative meetings.

The introduction of the [European Neighbourhood Policy](#) (ENP) in 2003 laid the basis for a slightly different cooperative framework from the one that was put forward at the European Councils in Seville and Thessalonica. Although the ENP builds on the conditionality that was proposed following these two European Councils as well as on the proactive measures aimed at monitoring and assessing the willingness of third countries to cooperate on such issues as readmission and the fight against illegal migration, its main rationale lies in delivering a new offer to third countries. In fact, the ENP proposes to turn them into fully-fledged participants in the gradual establishment of a set of common objectives as applied to the management of migration flows (whether legal or illegal). The recurrent reference to such new notions as "[shared responsibility](#)", "shared values" and "[joint ownership and co-responsibility](#)" are illustrative of the EU's desire to make third countries more involved in the management of migration flows.

This cooperative framework, enshrined in the [ENP action plans](#), constitutes an attempt to show that the measures and provisions adopted by Brussels can no longer be [predominantly responsive to the interests and security concerns](#) of the EU. They also have to serve the vested interests of third countries' governments.

This change of perception regarding cooperation with third countries stemmed from:

- the awareness that providing "compensatory measures" and incentives would allow the EU and its Member States to exert a stronger "leverage"<sup>3</sup> on third countries with a view to encouraging them to become more cooperative on migration and border management issues;

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<sup>3</sup> COM(2003) 323 final, p. 14.

- the desire of the EU to further integrate migration issues in its external relations with third countries, by proposing a “global development package”<sup>4</sup> to the latter while encouraging them to enter into readmission agreements.

This revamped framework of cooperation, based on a differentiated or *ad hoc* approach to the management of international migration, was a prerequisite to showing to third countries that the removal of illegal aliens, which constitutes a top priority in the EU return policy and in the [action plan implementing the Hague Programme](#), was no longer an end in itself but rather a stage in the reintegration process of the removed persons. Actually, the point is to secure the [durable \(or sustainable\) return](#) of illegal third-country nationals with a view to avoiding their re-emigration to Europe or “secondary movements”. This objective should be achieved by implementing the [Integrated Return Programmes](#) (IRPs) already proposed in 2002 by the European Commission in the context of its common return policy on illegal residents.<sup>5</sup> The effectiveness of the IRPs is dependent on the cooperation of third countries insofar as they are aimed at securing the sustainability of return. From a logistical and financial point of view, the [European Return Fund](#), which is expected to be operative from 2007 until 2013, will support the pre- and post-return operations included in the IRPs.

However, there is no question that their effective implementation will also depend on the extent to which third countries’ governments respond to the incentives proposed by the EU and on their structural and institutional capacity to effectively deal with the reception of the removed persons. Defining realistic incentives or [compensatory measures](#) which could be attractive enough to guarantee the effective and durable cooperation of third countries remains an unresolved issue for the EU. Various incentives have been offered to targeted third countries by the EU, including the possibility to benefit from:

- judicial and technical assistance to cooperate on the control of migration flows, in the context of the B7-667 budget line, today’s [Aeneas programme](#);
- preferential trade access to the EU internal market for some items produced by third countries. However, such preferential treatment must comply with the competition rules of the World Trade Organisation;

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<sup>4</sup> COM(2002) 703 final, p. 5.

<sup>5</sup> COM(2002)564 final, p. 21.

- visa facilitations and preferential [entry quotas for economic migrants](#), above all for those citizens who are nationals of a third country that signed a Community readmission agreement. However, such provisions would require enhanced coordination between the EU Member States.

Despite the existence of these incentives, the EU return policy and the Community readmission agreements continue to be viewed by most third countries' governments, including Mediterranean third countries, as responding predominantly to the interests of the EU. At the same time, their reluctance to conclude readmission agreements may stem from the fact that their weak institutional and structural capacity to deal with the inflows of removed persons may have disruptive effects on their domestic economies as well as on society. Similarly, the conclusion of Community readmission agreements might jeopardise their diplomatic relations with their neighbouring countries, above all with those of which some removed aliens may be national, while potentially hampering their cooperation strategy in the region. Finally, some Mediterranean countries, particularly Algeria, Morocco and Tunisia, have repeatedly voiced their opinion that the fight against illegal migration should not limit itself to the conclusion of readmission agreements. They believe that this phenomenon would be better tackled by targeted long-term developmental and poverty-reduction programmes designed to lower the differentials between the South and the North of the Mediterranean.

The extent to which the EU is willing to take into account this contrasting vision will certainly determine its ability to enhance its cooperation with third countries on return and readmission issues. Most importantly, the EU no longer has the option of ignoring this contrasting vision, given the increased power acquired by these Mediterranean third countries over the last few years, since they began to participate in the reinforced control of the external borders of the EU. Their participation has generated an unprecedented interconnectedness, as these third countries have become strategic partners in the fight against illegal migration.

Consequently, the EU will soon need to find additional innovative solutions and incentives to address the expectations of these third countries, particularly as it would seem that the latter intend to capitalise on their empowered position and leverage to make the joint management of migration in the Euro-Mediterranean area more

responsive to their economic and political agendas, as well as to their developmental needs.

## **Perspectives**

Meanwhile, since the June 2002 Seville European Council, various Member States and European Council meetings have expressed growing concerns about the [slow progress](#) of the Commission in the field of readmission and return issues. In fact, since [September 2000](#), out of the eleven third countries for which the European Commission has been mandated by the Council to negotiate readmission agreements, only four community agreements have so far entered into force (Sri Lanka,<sup>6</sup> Albania,<sup>7</sup> Hong Kong, and Macao, plus an “[approved destination status](#)” agreement signed in May 2004 with China).

In its EU [presidency programme on asylum and immigration](#) (July-December 2005), the United Kingdom asked EU Member States to further support the Commission in concluding readmission agreements with third countries. It has to be said that this call reflects the fact that the cooperation between EU Member States and the Commission has not always been optimal. Perhaps because the implementation of Community readmission agreements, based on the strict respect of removal procedures, may overlap the existing (and less formal) patterns of cooperation on readmission issues that some EU Member States have continued to develop with third countries, at a bilateral level, over the last decade.

The foundation of the G5 in 2003, which gathers together the Ministers of the Interior of France, Spain, the United Kingdom, Italy and Germany, may be viewed as being symptomatic of the growing concerns that these Member States have expressed regarding the capacity of the EU institutions to deal effectively with removal issues, the identification process of undocumented aliens and readmission. The [revitalising function of the G5](#), mentioned by former Minister of the Interior Dominique de Villepin in his public address, illustrates the desire of the G5 countries to act as a “new engine” for an enlarged European Union. Indeed, since the entry of Poland into the G5, turning the G5 into the G6 at its meeting on 22 March 2006 in Heiligendamm,

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<sup>6</sup> SEC(2003) 255 final. The agreement entered into force on 1<sup>st</sup> May 2005.

<sup>7</sup> COM(2004) 92 final.

this objective has become clearer and more explicit. In his [official statement](#) on 16 February 2006 at the Berlin-based Konrad Adenauer Foundation, French Minister of the Interior, Nicolas Sarkozy, declared: “My own vision is that, from a mere arithmetical point of view, it has become difficult to take clear decisions rapidly when there are 25 of us. It is because of this inability to decide that I took the initiative in creating the G5 of the Ministers of the Interior. The G5, whose enlargement to Poland was requested by myself [...], has turned out to be a pragmatic and informal solution to the inertia of Europe.”

It is difficult to foresee whether the G6/G5 proactive initiatives will have any direct implications on the EU’s return and readmission policy. Just like the EU, the G5 too advocates enhanced cooperation on the exchange of data allowing the identification process of undocumented migrants to be improved, but the need to comply with time-consuming and lengthy procedures related to the protection of personal data remains a thorny issue.

Nevertheless, it has become clear that, in order to ensure the effectiveness of its return policy, the EU will have to perform a balancing act between the security concerns of some Member States and the need to respond in a credible manner to the pressing development-oriented expectations of some (strategic) third countries.