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From:	Presidency
To:	Permanent Representatives Committee/Council
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Subject:	Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) - Progress report

Effective returns are crucial for an efficient and holistic migration management policy. Therefore, the return of third country nationals staying illegally in the EU is one of the priorities of the Union's migration policy. The Return Directive 2008/115/EC adopted in 2008 established common standards and procedures in Member States for returning illegally staying third-country nationals while respecting their fundamental rights and the principle of *non-refoulement*. Since the adoption of the Return Directive in 2008, the challenges in EU return policy have considerably changed and increased. While the Commission, Member States and the agencies have already undertaken significant endeavours, the overall number of returns is still not satisfactory and therefore, needs to be significantly increased.

On 12 September 2018, the Commission tabled a proposal for a revised Return Directive (recast), which includes a number of targeted amendments while not affecting the scope of the original Return Directive. The proposed changes aim at addressing some of the legal and practical challenges and issues, sometimes arising from differing interpretations of the provisions of the current Return Directive. The revised Return Directive intends to maximise the effectiveness of the EU return regime and ensure a more consistent application across Member States, whilst safeguarding fundamental rights and the principle of *non-refoulement*.

The Commission proposed the following changes of the EU Return Directive: accelerated border procedures, clearer and faster procedures for issuing return decisions including the obligation to issue a return decision in connection with the termination of the legal stay, streamlined appeal procedures, an obligation to cooperate for persons subject to a return procedure, a stricter approach to voluntary departures, clear rules on detention, a common and non-exhaustive list of objective criteria to determine the risk of absconding, a return management system and the possibility to issue an entry ban during border checks at exit. One of the major novelties proposed was the establishment of the border procedure to enable the rapid return of applicants for international protection, whose application was rejected following an asylum border procedure provided in Article 41 of the Asylum Procedure Regulation, in order to prevent gaps between the procedures and ensure complementarity.

Since the tabling of the proposal, a substantial number of discussions in different formats were organised by the Presidency on the revised Return Directive.

The first exchanges of views on the revised Return Directive were already held at the informal SCIFA meeting on 20-21 September 2018. At the October JHA Council delegations also shared their general comments on the proposed legislation. The Integration, Immigration and Expulsion working party (IMEX) held extensive debates on all the articles of the revised Return Directive at the meetings on 9 October 9 November, and on 3 December 2018. In order to ensure consistency among different files and to speed up the negotiations, the Presidency organised several horizontal debates on SCIFA on 23-24 October 2018 and JHA counsellors' level on 20 November and 29 November 2018 on the border procedures as outlined in the Asylum Procedure Regulation, Reception Conditions Directive, Schengen Border Code and revised Return Directive and on Article 16 remedies. Another JHA counsellors' meeting is scheduled for 12 December 2018 to further examine the revised Return Directive.

The discussions held so far indicate by and large a consensus on the direction of the revised Return Directive towards having a more stringent approach to returns. Significant progress has been achieved in moving towards an agreement as regards the list of factors indicating the risk of absconding, the obligation for third country nationals to cooperate with national authorities as well as the consequences for non-cooperation, the adoption of the return decision, granting of voluntary departure, the possibility to issue the entry ban without issuing a return decision, design and modalities of the return management system as well as national voluntary return and reintegration programmes.

At the same time, a number of issues require a further in-depth discussion with a view of moving towards consensus. Debate should still take place on the possibility to return a third country national to any safe third country and not only the country of origin or transit. This option was repeatedly requested by several Member States already in the consultation phase in July and would significantly expand the scope of the revised Return Directive and is not foreseen in the Commission proposal for a revised Return Directive.

Another possibility not provided in the Commission proposal for a revised Return Directive, but which has also been addressed by some delegations is the principle of mutual recognition of return decisions issued by other Member States. It should be noted, however, that the current EU legislation already allows for this option. Furthermore the forthcoming revision of the Schengen Information System will enable Member States to see the return decisions issued by other Member States. It may be worth to evaluate the added value of these new possibilities before taking the next steps forward.

Article 16 on remedies and Article 22 on border procedures also require further in-depth discussions. The Commission proposal for Article 16 outlined a complex system of remedies against return decisions, with a view of harmonising to a certain extent a very diverse scene of remedies currently available in different Member States. Intensive discussions have already taken place as regards different provisions of this article, including on the possibility of bringing an appeal against a return decision before an administrative authority, having the appeal examined by more than a single level of judicial authority, the suspensive effect of the appeals, the deadlines for lodging the appeals.

Article 22 concerning the border procedure for returns raised many discussions, especially as regards the nature and scope of the application of this new procedure. No-withstanding the on-going discussions on the Asylum Procedures Regulation, a common understanding seems to have been achieved that the scope of the procedure defined in Article 22 of the Return Directive should follow the scope of Article 41 of the Asylum Procedure Regulation. Some delegations were strongly convinced that this procedure should be applied for deciding whether third country nationals seeking international protection should be granted access to the territory of Member States.

The Austrian Presidency is determined to achieve as much progress as possible on the revised Return Directive by the end of its term in order to establish a truly resilient and effective EU migration system.
