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From:	Presidency
To:	Delegations
Subject:	Main elements towards a more European approach to return decisions - Discussion paper

Mutual recognition of return decisions can facilitate and speed up the return process and improve cooperation and mutual trust among Member States. Moreover, it can also contribute to deterring irregular migration and discouraging unauthorised secondary movements within the Union.

Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals sets out a valuable basis for reducing the administrative burden of return procedures in the Schengen area as a whole. However, two main problems have hampered the obtention of significant results so far:

a) There was no way to know if return decisions had been issued to a certain person by other Member States.

b) Differences among the requirements and guarantees set out by the Member States' legal systems have not allowed for the automatic implementation of mutual recognition in many cases.

The first problem has now been addressed by the entry into operation of the Schengen Information System (SIS) recast on 7 March 2023[1], which introduced a new alert category – 'alert on return' in the SIS. The alert on return serves two main objectives:

1. Allowing national authorities to actively follow up whether the returnee effectively leaves EU territory.

2. Supporting the enforcement of return decisions.

On 16 March 2023 the Commission adopted a recommendation on mutual recognition of return decisions and expediting returns[2], which, building on that progress, sought to give mutual recognition a new impetus.

However, the second issue (non-alignment of Member States' legal systems) has not been solved, and is likely to remain a considerable obstacle.

In any case, the Spanish Presidency considers it is worth making an additional effort to promote mutual recognition.

To this end, we propose holding a discussion on some steps towards a more European approach to return decisions, which eventually can pave the way for a fully-fledged European return decision and represent a further step towards a common EU system for returns.

While the Return Directive sets out the common standards and procedures to be applied when returning persons with no right to stay in the EU, it leaves Member States a margin of discretion with regard to the exact form and content of return decisions. Member States' practices vary considerably and are linked and adapted to each national legal order.

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1 Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals.

2 Commission Recommendation (EU) 2023/682 of 16 March 2023 on mutual recognition of return decisions and expediting returns when implementing Directive 2008/115/EC of the European Parliament and of the Council.

To achieve a more European approach to return decisions there is a need to bring Member States' practices with regard to return decisions closer. This is key for advancing and facilitating the process of mutual recognition of return decisions between Member States.

Although the Return Directive already gives Member States the possibility to use a standard form for return decisions (and some Member States make use of this), there is a need to broaden this and consider working towards a common standard form, used by all Member States, which can be made available in all official EU languages. Such a standard form should be readily available in Member States' return case management systems to facilitate use and follow-up.

This common standard form for return decisions could include:

– the reasons in fact and law for the decision, including a statement on illegal stay, the obligation to leave for a third country and a reference to the assessment of the principle of non-refoulement,

– information on entry bans,

– information on available legal remedies,

– information on practical means to comply with the return decision, such as help with transportation costs or any reintegration support available,

– the consequences (i.e. removal) in the event of non-compliance with the period for voluntary departure, if this has been granted,

– the consequences in the event of onward movement to other Member States, including the fact that an alert on the return decision will be entered in the Schengen Information System, visible to all Member States, and the possibility that a decision already taken by one Member State may be recognised and directly enforced by another Member State.

To facilitate the process of mutual recognition, such a common standard form could also be complemented by a section (or an annex) to be used in order to facilitate enforcement and to notify the (return/recognition/enforcement) decision to the person concerned. It would contain fields to be filled in by the recognising Member State, including relevant guarantees and legal remedies. This section or annex would set a common approach that supports the process in the enforcing Member State even if, depending on the procedural requirements set in national law, an additional administrative decision might be needed. It would also facilitate the implementation of point (1)(g) of Commission Recommendation (EU) 2023/682 on the notification of the third-country national concerned.

We invited the delegations at the informal Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) meeting on 13-14 July 2023 (in Madrid) to discuss the idea of developing a common standard form for return decisions and, as a second part of the form, a standard provision on notification and enforcement of a recognised return decision. There was strong support for the development of the common standard form, especially the first part, even if some Member States would still obtain no benefit from it due to their internal legislation, which would require a much deeper harmonisation of procedures at EU level in order to be able to implement mutual recognition. Some ideas were provided by delegations concerning the content of the common standard form, but most thought that work should be continued at technical level.

At the forthcoming Integration, Migration and Expulsion (IMEX) Working Party meeting we are interested in defining the way forward concerning the development of the common standard form and in finding out the delegations' opinion on some additional ideas. We propose discussing the following issues, some of them concerning immediate steps to be taken, others concerning possible legal adjustments that could favour mutual recognition:

a) **Where should the common standard form for return decisions and its main elements be discussed (IMEX Working Party, Contact group "Return Directive", High Level Network on Returns)?** Depending on the answer, the main weight of its development would fall either on the Presidency or on the Commission, although the excellent cooperation between them would surely continue.

b) **Would it be useful to have the common standard return decision uploaded in the SIS, so that it could be automatically notified to the person when found in another (or the same) Member State?** Currently, the return decision as such is not among the data that can be entered under Article 4 of Regulation (EU) 2018/1860. This would require legal amendment.

c) **Should room be left for return decisions not using the common standard form? In which cases?** For the moment, the use of the common standard form will only be a recommendation, but further harmonisation might be envisaged in the future.

d) **Would it be useful to enable a second Member State to flag the SIS return alert entered by the first Member State, if appeals against its enforcement have succeeded?** A flagged alert would not become ineffective in other Member States, but could suggest that it might be advisable to consult not only the first Member State (having inserted the return decision), but also the flagging Member State. This would require legal amendment.

e) **In order to reduce the possibilities to appeal mutual recognition, would it be useful to reach a compromise on limiting the cumulative detention period served in multiple Member States for the same return decision to the maximum established by the Return Directive?** For example, if a third country national is subject to a return decision in Member State A and is detained there for X days, without success in the enforcement, and if this person is later found in Member State B, which recognises Member State A's return decision and resorts to detention for Y days, then neither X nor Y could exceed the maximum detention periods set out in the respective national legislation, and X+Y could not exceed the maximum time set out in the Directive[3]. Information would be exchanged through SIRENE.

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[3] The case's circumstances would determine which of the two limits should apply: 6 or 18 months.