

# Implementation of the Return Directive and its Monitoring – EU Developments (2009-2015)

LHCR International Conference

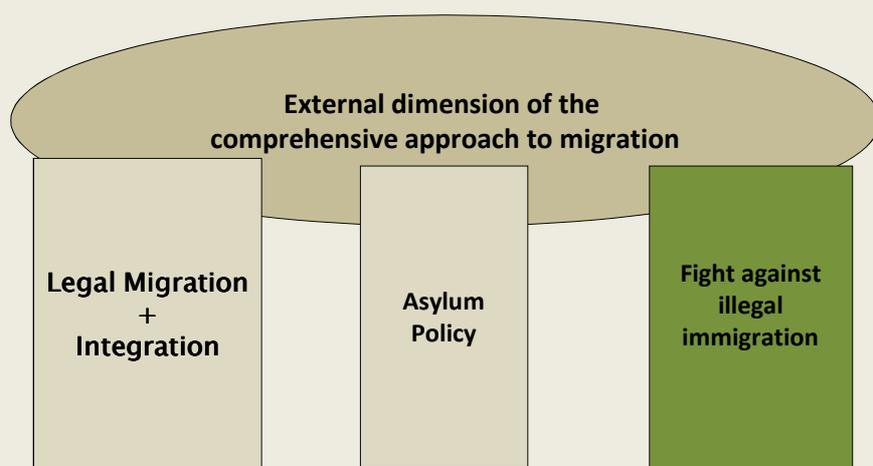
*"The Implementation of the Return Directive: challenges and good practices from the perspective of the Central and Eastern European countries"*

Riga, 26-27 May 2015

**Dr Tamás MOLNÁR Ph.D.**

*Former member of the COM Return Directive Contact Committee (2009-2015)  
Chief international law advisor, Prime Minister's Office, Deputy State Secretariat for  
Hungarian Minorities and Diaspora (Hungary)*

## I. The Return Directive: Part of a comprehensive approach to migration



L 348/98	EN	Official Journal of the European Union	24.12.2008
<p><b>DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL</b>  <b>of 16 December 2008</b>  <b>on common standards and procedures in Member States for returning illegally staying third-country nationals</b></p>			
<p>THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,</p> <p>Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) thereof,</p> <p>Having regard to the proposal from the Commission,</p> <p>Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>(1)</sup>,</p> <p>Whereas:</p>	<p>ation should go beyond the mere fact of an illegal stay. When using standard forms for decisions related to return, namely return decisions and, if issued, entry-ban decisions and decisions on removal, Member States should respect that principle and fully comply with all applicable provisions of this Directive.</p> <p>(7) The need for Community and bilateral readmission agreements with third countries to facilitate the return process is underlined. International cooperation with countries of origin at all stages of the return process is a prerequisite to achieving sustainable return.</p>		

## II. Return Directive – General objectives

- Common standards for
  - An effective return policy (for ISTCNS)
  - With speedy and efficient return procedures
  - In full respect of the human rights of the returnees, e.g. *non-refoulement*, right to private and family life, best interest of the child (UN conventions, EU Charter)
- Eliminating "grey zones" (see **Art.6** – return decisions "shall" be issued)
- Promoting voluntary return
- Effects of national return measures should be given a European dimension (e.g. entry bans)

### III. Important deadlines and territorial scope

- Entry into force: 13.01.2009 (Art.22) → important for "stand still" clause as well (readmission to another MS under bilateral RAs – Art. 6(3))
- Deadline for transposition (Art.20): 24.12.2010 (2 years after publication) → concerning free legal assistance/ representation: 24.12.2011
- RD has been applicable for more than 4 years. First report by COM: by the end of 2013 (Art.19)
- Scope *ratione loci* = RD binds 30 States (all EU MS except UK, IE + 4 Schengen Associated States – CH, NO, ICE, LIE)
- As of now: all States notified full legal transposition (except ICE), but many MS after the deadline

### IV. Implementation of the Return Directive and its monitoring – Toolbox

**Q:** after the entry into force (January 2009), how it was implemented by MS + monitored and facilitated by COM?

Tools:

- **Contact Committee** (regularly convened by COM)
- **Monitoring the legal transposition MS by MS** (by COM)
- **Evaluation of the actual application of the Directive in the EU** (not only legal conformity, but in practice, too)
- **Projects on various aspects of the return procedure** (e.g. *non-refoulement*, legal status of non-removable TCNs, UAMs, forced return monitoring, detention)
- **Return Handbook** (prepared by COM) – still to come
- [*Growing case-law of the CJEU*]

## Contact Committee

- Organised and convened by COM (DG HOME, Unit B.1.), with the participation of MS return experts
- Since 2009, so far 18 meetings, in informal and operative spirit
- Aim = to facilitate the identification of possible problems and remaining questions at an early stage and to offer an opportunity for open and informal discussion → meetings contributed considerably to a consistent implementation of the Directive at national level
- Minutes: like a "commentary", article-by-article, with Q & A
- Follow-up and discussing recent developments in CJEU case-law on return
- Info exchange on all relevant activities, projects etc. → enhancing coordination & transparency

## Monitoring the legal transposition – MS by MS

- Carried out by COM (based on work done by TIPIK as contractor)
- Conformity assessments (tables) for each MS → indication article by article whether transposition in national law is conform, partially conform or non-conform
- Based the conformity assessments → organised programme of work on the transposition of RD (2012-2013) → MS were questioned about any remaining issues with their transposition + details of identified shortcomings and possible solutions were discussed (technical bilateral meetings)
- Major remaining issues:
  - EU-wide effect of entry bans
  - definition of risk of absconding
  - criteria for prolonging the period of voluntary departure
  - rules to be respected when removing by air
  - forced return monitoring
  - criteria for imposing detention/detention conditions
- Majority of MS revised their legislation/committed to do so → in cases of no agreement: EU Pilot Procedures launched

## Practical application of the Directive in the EU

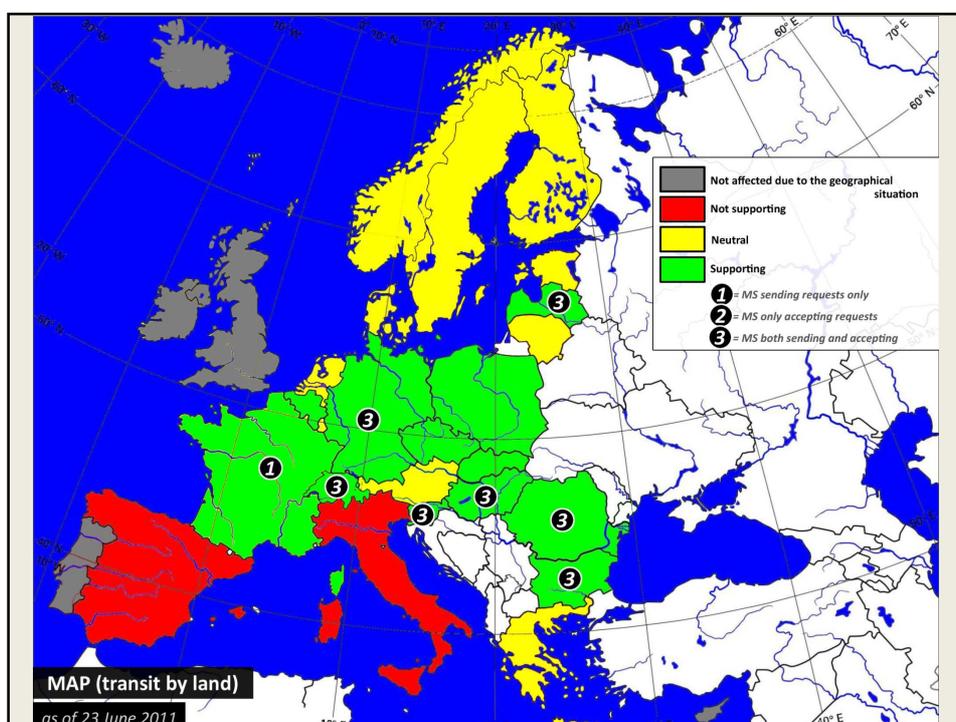
- COM commissioned a company (MATRIX) to carry out evaluation and prepare a study ('meta-study' based on different types of existing information and studies, as well as input from all relevant stakeholders), 2012-2013 (final study: **October 2013**)
- COM has also examined focused reports e.g. by the FRA, CoE bodies, UNHCR, NGOs into the practical situation in MS
- Obstacle: little quantitative data was systematically collected at MS level on most of the issues covered by the study (e.g. *data on average length of detention, grounds for detention, number of failed returns, use of entry bans proved to be available only in few MS*)
- COM communication on EU return policy (**COM(2014) 199 final**) was largely inspired by and built on those findings

## Practical application of the Directive in the EU

- Outstanding issues and divergent practices (COM communication):
  - **Reviews of detention (intervals, bodies)**
  - **Concept of risk of absconding (Art. 3(7)) and its objective criteria in national legal systems**
  - **Alternatives to detention**
  - **Detention conditions (incl. for minors/families)**
  - **Voluntary departure**
  - **Forced return monitoring (Art. 8(6))**
  - **Safeguards & remedies**
  - **Criminalization of illegal entry and stay**
  - **Use and length of entry bans**

## Projects on various aspects of the return procedure

- Half-day workshops in the Contact Committee → accompanied by studies (see: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/categories/studies/>)
  - *Minors in return procedures*
  - *Forced return monitoring*
  - *Reintegration of returnees*
  - *Situation of non-removable returnees*
- HUPRES (April 2011) : compilation of the application of the non-refoulement principle in MS in case of ITCNs (12 MS replied), Council doc. 8980/11 (not public)
- Transit by land of returnees (Annex 39 of SBC HB) → voluntary basis
- FRA projects, e.g. on detention, forced return monitoring, criminalisation of irregular entry and stay + guidelines on the apprehension of migrants in an irregular situation – fundamental rights considerations (see: <http://fra.europa.eu>)



## Facilitating implementation: Return Handbook

- Envisaged in COM communication on EU return policy → Council took note of it (June 2014 JHA Council Conclusions)
- **Aim** = compiling common guidelines, best practice and recommendations to be used by MS competent authorities when carrying out return-related activities + as a point of reference for return-related Schengen evaluations
- **HB = soft law** → does not create any legally binding obligations upon MS + does not establish new rights/duties → bases itself to a large extent on the work conducted within the Contact Committee & regroups in a systematic and summarised form the discussions/findings therein
- **Council's position**: paying attention to the efficiency of administrative procedures, to limit itself to those issues already covered by the *acquis*, in full respect of the competences of the MS, as well as to avoid any message which can be understood as encouraging illegal immigration/stay
- COM drew it up in close cooperation with MS (within the Contact Committee, since October 2014) → **latest draft** presented in **April 2015**

## V. Conclusions

- ✓ Multi-layered, complementary tools for monitoring + facilitating the implementation of the Return Directive
- ✓ Rather soft forms (dialogues, on technical level, informal consultations) → formal enforcement mechanisms = measure of last resort (EU Pilot, then infringement procedure)
- ✓ Goal = to solve non-conformity, to achieve uniform application in practice and to increase the efficiency of return procedures
- ✓ EU return *acquis* over the last decade has led to significant legislative & practical changes in all MS
- ✓ All MS now generally accept the following policy objectives:
  - *respect for fundamental rights;*
  - *fair and efficient procedures;*
  - *reduction of cases in which migrants are left without clear legal status;*
  - *primacy of voluntary departure;*
  - *promotion of reintegration and fostering of alternatives to detention*
- ✓ Room for improvement in the practical implementation : **1)** ensuring respect for fundamental rights (e.g. detention conditions, effective legal remedies) and **2)** effectiveness (e.g. faster procedures and higher rates of return)



**Thank you for your kind attention!**

**Questions?**

Dr. Tamás MOLNÁR  
[tamas.molnar@me.gov.hu](mailto:tamas.molnar@me.gov.hu)