EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE, FREEDOM AND SECURITY

The Director General

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Ms Claire Rodier
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Subjet: European Community Readmission Agreements

Dear Ms Rodier,

Thank you for your letter dated 20 January 2009, addressed to the President of the European Commission, Mr Barroso, concerning European Community Readmission Agreements. President Barroso has asked me to reply on his behalf.

With a call to the necessity of transparency in the negotiations and application of European Community readmission agreements (ECRA), your letter essentially addresses three issues: human rights concerns, specific statistics regarding the number and nationalities of persons returned under existing agreements and the criteria applied in the negotiations, past and present, of ECRAs. I will reply to these three issues in that order.

ECRAs set out reciprocal obligations on both the EU Member States and the partner country, as well as detailed administrative and operational procedures, to facilitate the return and transit of all categories of illegally residing persons (own nationals, third-country nationals, stateless persons). The agreements do not define the preconditions for the legality of a person's presence in the EU or in the partner country – this remains entirely an issue to be assessed in accordance with national, or EC law, by the national authorities. Consequently, the agreements only come into play once the competent authorities of a Member State or of the partner country – or courts, as the case might be – have finally established that a person does not have, under any circumstances (including humanitarian ones), a right to stay. Asylum seekers for instance are not included amongst this category as they enjoy a right to stay for the duration of the examination of their case.

Although the Commission is responsible for negotiating ECRAs, it is not involved in their day-to-day operation. The actual physical return/removal of a person rests entirely with the competent authorities of the Member States and of the partner country. They will have to comply with all relevant obligations under International law, including the principle of non-refoulment, and they will be held liable for their return/removal decisions before their national courts. In this connection it is important to note that all ECRAs include a so-called 'non-affection' clause, explicitly stating

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that the Agreement shall be "without prejudice to the rights, obligations and responsibilities of the Community, the Member States and [partner country] arising from International Law". In this context it has to be emphasised, that the recently adopted return Directive (Directive 2008/115/EC) contains binding provisions on the standards and procedures in Member States for returning illegally staying third country nationals. The Directive provides for clear and transparent rules concerning return and removal, use of coercive measures, detention and re-entry, which take into full account the respect for human rights and fundamental freedoms of the persons concerned. By December 2010 these common standards will have to be transposed and be given full effect by Member States. The Commission will put a specific emphasis on checking the correct application of the provisions of the return Directive dealing with detention, legal remedies and treatment of vulnerable persons.

The preceding paragraph (and this brings us to the second issue) already suggests that the Commission does not necessarily dispose of statistics regarding the number and nationalities of persons returned under existing ECRAs. This is further compounded by the fact that the most important ECRAs, i.e. the agreements with Russia, Ukraine, Moldova and the Western Balkan countries (excluding Albania) have only been in force for little more than a year, and that many EU Member States are still in the process of phasing out their existing bilateral readmission agreements (to the extent that they have them) with these partner countries. It is exactly for this reason that the Commission decided not to launch a quantitative and qualitative evaluation of ECRAs before the second semester of 2009.

It should also be noted in this regard that the third country nationals' clauses in the agreements with Ukraine and Russia have not entered into force yet – this will happen on 1 January 2010 and 1 June 2010 respectively.

Finally, with regard to the third issue, please allow me to refer you to the Conclusions of the General Affairs Council of 2 November 2004, on the Common Readmission Policy, and the Conclusions of the Justice and Home Affairs Council of 12 and 13 June 2007, on Community Readmission Agreements with third countries. In the former, the Council establishes the criteria to be used for determining with which countries readmission agreements should be concluded, and in the latter some guiding principles for the negotiation of ECRAs are elaborated.

Let me, to conclude, say a few words regarding transparency and the role of the European Parliament. The current (Nice) Treaty does not provide for involvement of the European Parliament in the adoption of negotiation directives for ECRAs, nor in the actual negotiation of such agreements. This, however, will change significantly in the Parliament's favour if the Lisbon Treaty would enter into force. In the mean time, Vice-President Barrot, as well as my services, continue to stand ready to engage in debates with the Parliament on the Common Readmission Policy and informing on the results of that policy.

I trust this letter answers your questions.

Yours sincerely,

Jonathan Faull