# Chapter 1
# Introduction

One of the key instruments framing cooperation between the European Union (EU) and third countries for purposes of expelling irregular third-country nationals are the EU Readmission Agreements (EURAs). These are international agreements laying down common administrative rules and conditions for the 'readmission' of nationals,[1] third country nationals (TCNs) and stateless persons either to their country of origin or to a country through which they entered or transited on route to the EU. During the last 16 years, and as of May 2016, the EU has concluded 17 EURAs with various non-EU countries.

EURAs constitute a "vital component" in the wider external migration law and policy.[2] Enhancing cooperation with third countries of origin and transit in the field of readmission has been reconfirmed as a policy priority in the external dimensions of the 2015 European Migration Agenda[3] and the subsequent EU Action Plan on Return.[4] Readmission is officially framed as an 'essential' instrument in increasing return and ensuring the success of EU expulsions policies. The European Commission argues that current expulsion systems are 'ineffective', based on the rates of successful returns of third-country nationals issued a removal order.

[1]According to the Oxford English Dictionary Online the notion of 'Readmission' means: to readmit/'Readmit': to admit again. The European Commission defined 'readmission' as follows "Act by a state accepting the re-entry of an individual (own nationals, third-country nationals or stateless persons), who has been found illegally entering to, being present in or residing in another state" (European Commission 2002, Annex). The Communication distinguished 'readmission' from 'return' and 'expulsion'. Return was defined as "Comprises 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 or enforced." The notion of 'expulsion' comprised "Administrative or judicial act, which states—where applicable—the illegality of the entry, stay or residence or terminates the legality of a previous lawful residence e.g. in case of criminal offences."

[2]The Council of the EU has reiterated since early 2000s that cooperation with third countries on return and readmission policy is an integral and vital component in the fight against illegal immigration. Council of the EU (2002a, b),

[3]European Commission (2015a).

[4]European Commission (2015b).



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EURAs are deemed to play a key role in increasing the enforcement of removal orders of irregular immigrants. Contrary to their intended goal, it is unclear what value the EURAs contribute in facilitating or increasing the expulsion rates of irregular migrants. Little is known about their operability, uses and effects on the ground.

The adoption and practical implementation of EURAs have faced a series of multi-faceted challenges and criticism of their effectiveness as a tool in the management of migration. EU policy documents have consistently highlighted the obstacles that have impeded the negotiations of EURAs. The academic literature has deeply examined the origins of these legal competence dilemmas and challenges to the rights of both asylum-seekers and refugees and their difficult cohabitation with formal and informal bilateral readmission arrangements with third countries.[5] The scholarly discussion has also focused on the place of EURAs in the so-called 'external dimensions of EU migration policies', and the development of accompanying incentives and conditions by the EU in light of third-country hesitation or lack of interest to cooperate on readmission deals with the Union.[6] Less attention has been paid to the actual reasons why people cannot be expelled in the scope of 'readmission' practices, in particular when it comes to own nationals of the third countries concerned, and what do the most relevant practical and legal barriers behind the implementation of already concluded EURAs tell us about the legitimacy and value added of EU readmission policy.

EURAs generally lay down common operational procedures and administrative rules for 'swiftly' identifying 'migrants to be readmitted' and issuing the necessary travel documents (*laissez-passer*) for their expulsion. Still, the "identification of migrants and delivery of travel documents for their return" has been signalled as one of the most common obstacles affecting the operability of EU readmission practices.[7] A fundamental condition for the EURAs expulsion model to be operational is the success in the procedure for determining 'who is the person' found to be irregularly entering or present in the EU's territory and the legality of such an expulsion once that identity is determined in light of EU law and fundamental rights standards. The identification of the nationality of that person represents the fundamental premise for any readmission regime to function. Determining who the person is and her/his identity constitutes the *sine qua non* for unlocking readmission.

EURAs lay down a common list of documents aimed at facilitating the proof or presuming the determination of nationality of the person to be readmitted between the signatory third country and the EU for the purposes of the EURA. Much attention has been paid to the challenges posed by the inclusion of third country nationals and stateless persons transiting these countries clauses in EURAs. Not enough attention

[5]Coleman (2009), Cassarino (2007, 2010, 2014), Panizon (2012), Billet (2010), Schiffer (2003), Roig and Huddleston (2007), Bouteillet-Paquet (2003).

[6]Wolf (2014), Trauner and Kruse (2008), Carrera and Hernandez (2011).

[7]European Commission (2015b), p. 7.

has been given in the literature to implementation challenges of EURAs when it comes to own nationals. This is despite the fact that the process of determining the individual's identity has proven to be one of the most controversial aspects in the implementation of EURAs, which we call the identity determination challenge. This challenge is of particular relevance with respect to cooperation with third countries which are not geographically adjacent to an EU Member State. EURAs have foreseen procedures for readmitting those not qualifying as nationals (i.e. TCNs). Yet the main criterion for readmitting TCNs—i.e. irregularly and directly entering EU's territory—will be more difficult or even impossible to meet for countries that are not closely located in the EU's neighbourhood.

This book aims to close that knowledge gap by examining the implementation dynamics and obstacles affecting the readmission of nationals to their countries of origin in the scope of EURAs.[8] There have been several instances where sharp disagreements have emerged between EU Member States and third countries that have concluded a EURA as to whether the persons to be readmitted are own nationals. Why can nationals not be returned to their own state of origin? What is referred to in EU documents as the unwillingness of countries of origin to readmit or repatriate their own nationals often hides a deeper disagreement between the states concerned as to whether the person(s) involved are or are not nationals of the assigned country of origin.

Identifying who is whose national by EU Member States' authorities in the context of readmission opens up a whole series of existential dilemmas: first from the perspective of the sovereignty of third countries of (alleged) origin and the legal

[8]An assessment of the scope and implementation of EU Member States (bilateral) readmission policies and instruments with third countries falls outside the scope of this study. The analysis does not either cover the use of so-called 'readmission clauses' which have been introduced in international (mixed) agreements, e.g. Article 13 Cotonou Partnership Agreement (23 June 2000, revised in 2005) between the European Community and ACP (African, Caribbean and Pacific) countries. Article 13.5.c states that "c) The Parties further agree that: (i)—each Member State of the European Union shall accept the return of and readmission of any of its nationals who are illegally present on the territory of an ACP State, at that State's request and without further formalities;—each of the ACP States shall accept the return of and readmission of any of its nationals who are illegally present on the territory of a Member State of the European Union, at that Member State's request and without further formalities. The Member States and the ACP States will provide their nationals with appropriate identity documents for such purposes. In respect of the Member States of the European Union, the obligations in this paragraph apply only in respect of those persons who are to be considered their nationals for the Community purposes in accordance with Declaration No 2 to the Treaty establishing the European Community. In respect of ACP States, the obligations in this paragraph apply only in respect of those persons who are considered as their nationals in accordance with their respective legal system. (ii) at the request of a Party, negotiations shall be initiated with ACP States aiming at concluding in good faith and with due regard for the relevant rules of international law, bilateral agreements governing specific obligations for the readmission and return of their nationals. These agreements shall also cover, if deemed necessary by any of the Parties, arrangements for the readmission of third country nationals and stateless persons. Such agreements will lay down the details about the categories of persons covered by these arrangements as well as the modalities of their readmission and return."

standards laid down in international legal instruments as regards states' powers in determining nationality, and second regarding the agency of the individual as a citizen and as a holder of fundamental human rights. This process raises several important questions: Who is a national of 'whose' country? What are the procedures through which someone's nationality is determined and who is entitled to take that decision in light of international standards? What rights do individuals possess and which ones might prevent the enforcement of an expulsion order?

The outcomes of any identification process in the context of expulsions are in turn intimately linked to other impediments to removal that are related to the set of rights and procedural safeguards ascribed to the administrative status of the person concerned. In fact, these impediments constitute essential rule of law guarantees now formally enshrined in EU citizenship and migration law as well as the EU Charter of Fundamental Rights. They relate to effective remedies against removal decisions, proportionality tests and fundamental rights standards in cases of humanitarian considerations or other personal and family reasons which, irrespective of the individual's identity, *de jure* or *de facto* make her/him 'non-removable' or non-expellable from a given country of residence.

This book argues that the challenges affecting the identification procedures laid down in EURAs reveal one of the 'weakest links' affecting the *effectiveness* of EU readmission policies. First, they pose a profound test to the sovereignty of the third country and international law standards in determining who is a national of which country; and second, they blur individuals' agency as holders of fundamental human rights and freedoms. The understanding of operational effectiveness in readmission policies from the perspective of increasing expulsion rates is inconsistent with international legal standards framing inter-state relations and the rights of individuals subject to expulsion practices.

The book starts by setting the scene in EU readmission policy. Chapter 2 examines the ways in which the European Commission and the Member States currently frame the effectiveness of EU return policies on the basis of 'successful returns' rates, and the policy and legislative initiatives which have been advanced to increase the number of expulsions. Chapter 3 assesses existing knowledge regarding the role played by travel documents and identity determination as obstacles preventing the person to be expelled or readmitted to her/his country of origin. The chapter illustrates the challenges in determining identity on the basis of two recent practical examples: (i) the quasi-suspension of the EURA with Pakistan in light of the so-called 'European Refugee crisis' and (ii) the UK Supreme Court judgment in *Pham v. Secretary of State for the Home Department*.

Chapter 4 studies the administrative procedures and common rules envisaged by EURAs aimed at ensuring a swift identification or 'identity determination' of the nationality of the persons to be readmitted to their country of origin. It focuses on the ways in which nationality is to be determined or presumed in the scope of the 2010 EURA with Pakistan, and compares it with those foreseen in the five EURAs that have been concluded since with Armenia, Azerbaijan, Cape Verde, Georgia,

and Turkey. Particular attention is paid to the differences and commonalities between the EURA with Pakistan and the other five EURAs in terms of the norms and documents determining the nationality of the person to be readmitted. Chapter 5 critically analysis the challenges affecting the operability of EURAs. It is argued that these mainly relate to the lack of accountability and transparency mechanisms as well as the dilemmas that they pose to international and European standards in the determination of nationality by states, and the individual as a holder of fundamental human rights.



## References

Billet C (2010) EC readmission agreements: a prime instrument of the external dimension of the EU's fight against irregular immigration: an assessment after ten years of practice. Eur J Migr Law 12:45–79

Bouteillet-Paquet D (2003) Passing the buck: a critical analysis of the readmission policy implemented by the European Union and its member states. Eur J Migr Law 5:359–377

Carrera S and Hernández i Sagrera R (2011) Mobility partnerships: 'Insecurity partnerships' for policy coherence and migrant workers' human rights in the EU. In: Kunz R, Lavanex S and Panizzon M (eds)Multilayered migration governance: The promise of partnership. Routledge, London

Cassarino JP (2007) Informalising readmission agreements in the EU neighbourhood. Int Spectator 42(2):179–196

Cassarino JP (2010) Readmission policy in the European Union. Study for the European Parliament, Brussels

Cassarino JP (2014) A reappraisal of the EU's expanding readmission system. Int Spectator 49 (4):130–145

Coleman N (2009) European readmission policy. Third country interests and refugee rights. Martinus Nijhoff, Leiden

Council of the EU (2002a) Comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, Brussels, 28 Feb 2002

Council of the EU (2002b) Proposal for a return action programme. 14673/02, Brussels, 25 Nov 2002

European Commission (2002) Communication on the Community return policy on illegal residents. COM (2002) 564 final, 14 Oct 2002

European Commission (2015a) A European agenda on migration. COM (2015) 240, 13 May 2015
European Commission (2015b) Recommendation establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks. C (2015) 6250, 1 Oct 2015
Panizon M (2012) Readmission agreements of EU member states: a case for EU subsidiarity or dualism? Refugee Surv Q 31(4):101–133
Roig A, Huddleston T (2007) EC readmission agreements: a re-evaluation of the political impasse. Eur J Migr Law 9:363–387
Schiffer M (2003) Community readmission agreements with third countries—Objectives, substance and current state of negotiations. Eur J Migr Law 5:343–357
Trauner F, Kruse I (2008) EC visa facilitation and readmission agreements: a new standard EU foreign policy tool? Eur J Migr Law. 10(4):411–438
Wolf S (2014) The politics of negotiating EU readmission agreements: insights from Morocco and Turkey. Eur J Migr Law 16(1):69–95