

RETURN POLICY: DESPERATELY SEEKING EVIDENCE AND BALANCE

ECRE'S ASSESSMENT OF LATEST DEVELOPMENTS IN EU POLICY AND LAW ON RETURNS

I. INTRODUCTION

Since 2015 the European Commission and Member States have put considerable efforts into making returns more “effective”, defined as increasing the number of irregularly-staying third-country nationals returned to a third country from the European Union (EU). The recent push for higher return rates from policy makers was caused by the higher than usual number of people arriving irregularly in 2015, a number which has since dramatically decreased. Despite this decrease, return remains a focus, with the trend for ever more restrictive policies both towards individuals and in relations with third countries.

The European Commission [has argued](#) that a low number of returns undermines the credibility of asylum and migration policies for the public and is a cause of secondary movement and irregular migration. ECRE accepts that returns are a legitimate part of migration policy, but the lack of evidence for many of the [assumptions](#) behind recent policy decisions (including on close structural links between secondary movements and return, people’s willingness to return voluntarily being “dependent” on the threat of forced return, and the “pull factor” of return assistance) is of great concern. ECRE also [rejects](#) a purely numerical measure of the effectiveness of returns, arguing instead for consideration of what happens post-return. Overall, ECRE supports a broader approach grounded on agency, dignity, and a longer-term vision for individuals and communities; return should not be taking place without three pre-requisites: fair and coherent asylum policies; fair and humane return policies; and fair and transparent relations with third countries based on human rights.

Despite the recent focus and resources spent on returns by the EU and Member States, there has actually been a decrease in the overall number and the rate of return since 2016 (see tables below). Numbers of non-EU nationals returned with the assistance of Frontex also **decreased** between 2017 and 2018. The difficulties in increasing returns are due to numerous complex variables, many of which are out of the control of Member States and certainly of the individual ordered to leave. This policy note looks at what makes returns so difficult and argues that changing a complicated policy like return should not be rushed. Reform should be based on review and impact assessment including on the fundamental rights of the individual. Policy makers must accept the complexity of the situation for the individuals concerned and ensure that those with no prospect of return in the foreseeable future can reside in dignity in the EU.

II. ANALYSIS

Before the Council Justice and Home Affairs meeting of 6-7 June 2019, the Presidency **underlined** that low return rates remain “an important challenge”. Figures are below. The rate is the percentage of those with a return order who are physically returned.

Table 1 Returns from the EU 28

Year	2015	2016	2017	2018
Total ordered to leave the EU	533,395	493,790	516,115	478,155
Total returned from an EU country (most but not all to a third country)	227,975	250,015	214,175	198,375
Total return rate	42.74%	50.63%	41.5%	41.49%

Source Eurostat, June 2019.

So-called effective return rates (i.e. to third countries) are even lower.

Table 2: Effective Return Rates from the EU to third countries

Year	2015	2016	2017	2018
Effective return rate (to third countries)	36.4%	45.8%	36.6%	Not yet released

Sources from the European Commission in the links above.

On several occasions the Commission has also pointed out that the effective return rate would be lower still if the Western Balkan countries (Albania, Bosnia and Herzegovina, North Macedonia, Montenegro and Serbia) were not included. For example, it would have dropped as low as 27% in 2015. Return rates to Western Balkan countries from 2017 are included in Table 3 below as a comparison. They are significantly higher than the average.

Table 3: The return rates to Western Balkan countries in 2017

Country	Albania	Bosnia and Herzegovina	Former Yugoslav Republic of Macedonia	Montenegro	Serbia
Return rate and number of nationals returned 2017	Over 100%* 28,850	72% 2,680	130% 5,580	Over 100% 820	Over 100% 7,920

Source: [Report from the Commission to the European Parliament and the Council, Second Report under the Visa Suspension Mechanism {SWD\(2018\) 496 final}](#)

* A return rate of over 100% indicates cases from a backlog from previous years.

III. SO WHY ARE RETURNS SO COMPLEX?

PROTECTION NEEDS AND VULNERABILITY

First, looking at the main countries of origin of those irregularly entering the EU (a key focus for policy makers), [in 2018](#) they were Syria, Morocco, Afghanistan, Iraq, Turkey, Algeria, Guinea, Tunisia and Mali for irregular border crossings. Thus, many of those arriving irregularly are from countries where there is conflict and/or severe human rights violations. This means many will have a genuine need of international protection or could have other grounds to stay such as the best interests of the child or family reunification. As well as those whose protection needs are recognised, there may be others whose needs do not fit into current legal protection categories or whose applications are not fairly treated; there are also those who are highly vulnerable. These factors may inhibit return.

A 2016 European Migration Network (EMN) [report](#) found that asylum seekers whose applications for international protection have been rejected are more likely to be affected by risks caused by volatile security situations in countries of origin, and that there is a greater prevalence of medical cases than among other categories of returnees. This group can also have additional vulnerabilities caused by the journey to and their treatment in Europe, including because of immigration [detention](#). [These](#) must be taken into account as part of the assessment in return procedures given the often fragile countries to which people could be returned.

COOPERATION WITH THIRD COUNTRIES

The effectiveness of the EU's return policy depends largely on the cooperation of third countries in identifying, (re-)documenting and (re)admitting their citizens. This factor was underlined in the Commission's first [assessment](#) on the application of the Return Directive from 2014, the Explanatory Memorandum of the Commission [Proposal](#) for a Recast Return Directive in 2018 and in a recent [briefing](#) to the Council. However, cooperation is not always simple. It can be difficult for third countries to balance their own political interests with those of the EU, particularly when their citizens have positive views of migration, when countries have their own migration pressures, or, for example, when the economy is reliant on remittances.

Where it works, i.e. in the Western Balkans, countries are close neighbours of the EU and part of the stabilisation and association process, with a view to eventual EU membership. They are now peaceful countries. They have also concluded readmission agreements, visa liberalisation dialogues, and roadmaps with the EU that offer visa-free travel for their nationals. Since 2016, a visa suspension mechanism can trigger a suspension of visa-free travel should the country not comply with specific benchmarks including on return.. It is not obvious how this model can be transferred to other regions where the "carrots" of visa liberalisation and EU membership are not available. Other stumbling blocks include the third country national clause and that the benefits of visa facilitation has been more restrictive than expected. Without carrots EU is trying more "sticks". The [visa code](#) has been amended with penalty measures should countries not cooperate on readmission. This is despite the Commission [admitting](#) "there is no hard evidence on how visa leverage can translate into better cooperation of third countries on readmission". The Partnership Framework on Migration has attempted to introduce migration into all dealings with third countries. When new readmission agreements were not forthcoming or too slow, readmission-type clauses were introduced into other agreements with third countries. Frontex now has the mandate to conclude agreements with third countries on return.

The EU has also concluded "arrangements" or informal agreements on return with six countries. These are Afghanistan, Ethiopia, Ghana, Niger and Nigeria. An agreement was also signed with Mali but this caused considerable public unrest and was withdrawn. These informal agreements bypass the scrutiny of the European Parliament, and due to disquiet in the third countries, some are not even public. There are as yet no clear figures on who is being returned by informal agreement. The monitoring of these informal agreements is done through joint working groups with no public information on the results. It is also unclear to what extent this approach of pushing returns is really successful, i.e. whether sanctions work. Also unclear are the involvement of EU institutions other than DG Justice and Home Affairs, such as the European External Action Service, and whether the negative effect on the EU's reputation as an international actor is being reviewed.

CHALLENGES FOR MEMBER STATES IN ENFORCING RETURN DECISIONS

The Commission has identified internal challenges for Member States in implementing return decisions, because of what they see as a lack of clarity in the current Return Directive. This led to a [Recommendation](#) to make returns more effective in 2017 followed by a Commission [Proposal](#) for a Recast Return Directive

in 2018. The latter takes a particularly punitive approach to individuals, with stricter rules for voluntary departure, linking the issuance of return decisions to the termination of legal stay, a new assessment for risk of absconding and obligation on the individual to cooperate, stricter rules for remedies against return decisions, longer detention periods, and a new border procedure. In ECRE's view the proposal was rushed through too quickly after the Recommendation of 2017 with no review of how the Recommendation of 2017 was implemented and its effects (as a bare minimum) on fundamental rights and return rates. ECRE has also raised **concerns** about the proposal's impact on fundamental rights. Ensuring greater respect for the fundamental rights of returnees is a win-win scenario. If an individual is treated more humanely they are more likely to accept a return decision and consequent return, for example if they have been given a fair hearing. It is also better for national authorities and the EU, as any system is more credible when it is judged to be fair.

INDIVIDUAL FACTORS

Finally individuals can and do resist return. However, the punitive approach in the new Commission proposal includes provisions on the risk of absconding that are both too broad and too vague. They will significantly increase the detention of potential returnees, introducing new grounds for detention, longer detention periods, and an additional detention regime proposed at the border, all of which are disproportionate measures. There is no clear evidence that increased detention increases returns, however, it does cause the individual serious harm. Increasing detention also makes individuals less likely to contact the authorities and cooperate. An over-reliance on returns shifts resources away from pathways to regularisation for those who qualify, and from practical options for those who cannot be returned, including support to live a dignified life, which assists people in preparations for return when it becomes possible.

CONCLUSIONS

The current focus on return is disproportionate and unrealistic when many of those arriving irregularly in the EU are from countries where there are conflicts and serious human rights violations. By rushing policy change after policy change with an ever more restrictive focus, and without proper review or accountability, the EU and Member States are in danger of inflicting considerable harm on individuals and on the reputation of the EU as an international actor. There is also little to show in terms of results, particularly if effectiveness is only judged on the numbers of returns not their duration.

IV. RECOMMENDATIONS

- » The Commission should move to a broader assessment of the effectiveness of returns that considers the impact of returns on individuals, communities and countries of return.
- » The Commission should ensure that there is a transparent reporting procedure on fundamental rights observance by Member States in return procedures. This should be presented annually to the European Parliament alongside expertise from the Fundamental Rights Agency, ombudsmen and civil society.
- » The recast Return Directive is unnecessary, represents a disproportionate, unrealistic focus on return as the "solution" to the situation in Europe and should be withdrawn. If negotiations go ahead, restrictions on voluntary departure should be lifted, the Council and Parliament should withdraw the border procedure, the risk of absconding criteria and additional grounds for detention, and ensure reasonable time limits and conditions for individuals to appeal.
- » More emphasis should be given by the Commission and Member States to assisting those who cannot be returned. Regularisation, even through a temporary status, should be granted by Member States to enable a dignified life in Europe and a strong foundation for reintegration upon return.
- » There should be an independent evaluation of the impact of return policy on relations with third countries, covering the reputation of the EU, and impact on the actions of third countries in relation to migration, including dissemination of bad practice.

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