A Draconian Return System

High Humanitarian Cost of the Forthcoming Return of Irregular Migrants

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Unless the European Parliament puts up a fight to eliminate or amend the worst parts of the currently circulating draft regulation on a "common system for the return of third-country nationals staying illegally in the Union", which looks unlikely, the EU may soon adopt a new approach. This draft regulation shows how far the EU has shifted towards positions of the far right, and how little it is interested in human rights and pragmatic solutions for rejected asylum seekers and other non-EU migrants who have lost, or not been granted, a permit to stay.

In March 2025, the European Commission proposed a regulation on returns after intense pressure from the Member States. It is intended to replace the currently applicable Return Directive of 2008 and aims at "speeding up and simplifying the return process". The Council adopted a "general approach" on the draft regulation last December. It would essentially make an already far-reaching coercive framework even more draconian. The Council's position is still to be negotiated with the European Parliament, where a legislative resolution is in the making. As majorities in the Parliament since the last elections can be formed both in the middle and on the right (including the far right) side of the political spectrum, a final version of the return regulation may soon be adopted – and end up close to the Council's position.

For years, maybe decades, politicians in the EU have complained that the return of rejected asylum seekers does not work well enough (see here or here), arguing that asylum and migration systems are pointless if those who are not granted a right to stay end up remaining anyway. There are many reasons behind low return rates (as explained here or here, for example), such as violence and conflicts in countries of origin, rejected asylum seekers having no travel documents or not wanting to leave because they perceive their rejection as unfair, countries of origin refusing to readmit their nationals, disrupted travel connections, insufficient capacity in the Member States to deal with returns, as well as numerous other practical, legal and political obstacles. But instead of trying to understand and explain these problems and dealing with people staying in Europe irregularly with flexible solutions that also provide for regularisations or other alternatives in cases where return is unrealistic or inappropriate, many EU lawmakers today seem to believe that progress lies in weakening human rights standards and punishing desperate people. As pointed out here, the texts from the Commission and the Council raise doubts about their compatibility with international human rights obligations.

Anywhere but not in the EU

As media reporting has focused on already, the return proposal establishes a legal basis for the concept of the so-called "return hubs" in third countries, an idea which is politically promoted as an "innovative solution". Yet the idea of deporting people to countries with which they have no connection, like the Trump administration has done, looks particularly radical. The purpose (as discussed here and here) is to enable Member States to deport people, who for some reasons cannot be brought back to their countries of origin, to other countries outside the EU, provided one or several Member States manage to secure an "agreement or arrangement" with these countries. The Council's position widens the potential use of this concept (compared to the Commission's proposal) by allowing not only adults, but also families with children to be sent to such hubs. Meanwhile, it is not (yet) clear how they would work in practice, where they would be

created, how many people could be taken there, and what the EU side would have to offer to secure an agreement or arrangement with a target country.

A return system without humane alternatives

The Council's version of the regulation also contains numerous other provisions that deserve attention as well. One key point is that it limits the possibilities for third country nationals to effectively challenge return decisions and find alternatives to returning. An overall goal seems to be that once a third-country national is ordered to leave, they should have no other option than actually doing so (or being removed). Removals can under certain circumstances be postponed, but there are no rules on withdrawal of removal decisions. A return decision can also indicate one or several countries for a person to return to, or no such country, which can make it difficult to appeal a decision with reference to the situation in a specific country of return. Moreover, appeals would not always have suspensive effect. Member States can also issue return decisions when there is a risk of refoulement. In such cases, the removal is to be postponed, but the return decision may remain. As explained here, this implies the risk of a return decision being taken and carried out before a decision to postpone a removal is made, which can violate the non-refoulement principle.

Moreover, while the Commission's text had at least provided that a Member State may, at any moment in the return process, issue a residence permit or other authorisation to stay for humanitarian or other reasons – thus regularising a person's status – the Council wants this provision deleted. This can make it difficult (if not impossible) for asylum seekers, who are not found to be refugees or in need of subsidiary protection (or – where available – a national protection status), and who are therefore rejected and issued a return decision, to get legal residence on other grounds such as family ties, humanitarian or compassionate reasons, or poor health. If this is what the Council wants the regulation to do, it raises concerns about unnecessary and unproportional EU overreach.

Moving to another Member State and trying to get protection or residence there is also an option that the new system aims to rule out. A return decision issued by one Member State is intended to be recognised and enforced by the other Member States as well – these Member States are not required to make their own assessment or take their own return decision. While the Commission wanted to make mutual recognition of return decisions mandatory, the Council has weakened this, most likely because mutual recognition could put greater burdens on some Member States than on others. But the direction is clear.

More coercion, longer detention

Under the Return Directive of 2008, voluntary return has been the preferred type of return. The Commission's proposal from March 2025 already abandoned this principle, and the Council doesn't seem to reinstate it. Instead, forced return now looks like the standard scenario as return decisions would not have to include a period for voluntary departure.

The Commission's draft also provides for hugely expanded and stricter coercive measures, not least detention pending removal. While under current law detention may be imposed for up to 18 months, the Commission proposed a new maximum period of 24 months. Even if it is not clear why a person that cannot be returned within 18 or 24 months might suddenly become removable with more time added, the Council provides for additional periods of up to 6 months in certain situations, with no absolute upper limit. The catalogue of grounds for detention is also widened, and the Member States may even add additional grounds provided for in national law. This risks leading to detention becoming the rule rather than an exceptional measure of last resort.

The Council also expands third country nationals' obligations to cooperate with the authorities of the Member States regarding their return, and the Member States get to undertake far-reaching "investigative measures" for the purpose of preparing or ensuring return. For example, they may search the third-country national and his or her place of residence "or other relevant premises", search and seize personal belong-

ings, and impose other investigative measures, where provided for in national law. The Council also adds, in an article about third country nationals' obligations to cooperate, that they may not physically or verbally oppose their return. (If they do, that can be a ground for detention.)

Consequences

While the Council's version of the return proposal creates a rigid system that weakens long-standing human rights standards as regards, for example, the non-refoulement principle or the prohibition of arbitrary detention, the question remains whether it will at least achieve its aim, which is to facilitate, increase and speed up returns. This is highly questionable. The coming regulation not only expands obligations for third-country nationals in the return procedure – it also demands quite a lot from Member States' authorities, for example when it comes to enforcement of return decisions, detention capacity, alternatives to detention, controls, and deportation. In situations where the number of people subject to return decisions is low, the new system could in principle be manageable. Whenever caseloads are high, however, capacity problems can arise, even if assistance by Frontex is available. To make the return system work better, Member States should try to avoid channelling more people than necessary into the return system, and instead contemplate alternatives to return, such as regularisations. But the current discussions about resuming returns to Syria and Afghanistan, the EU's new rules on safe countries of origin and safe third countries, and the Council's version of the return regulation itself, among other developments, all suggest the opposite. This can lead to higher caseloads. Unless large numbers of people can be offloaded in "return hubs" in third countries, which still looks unlikely, there is a substantial risk that the number of individuals who get stuck in the return system will grow.

Fairness set aside

Recital 8 in the Council's common approach provides for some – perhaps surprising – honesty. The Commission had formulated that a "common procedure for return that is firm and fair should be set up (…)". In the Council's version, the words "and fair" are crossed out. And indeed, the proposal shows that fairness towards people who come to Europe in search of protection, safety or better opportunities, and who see their aspirations shattered as their asylum requests are rejected, or who for other reasons are unable to obtain or maintain legal residence, does not seem to be something the Member States care much about.

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