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NOTE

From: Presidency
To: Working Party on Integration, Migration and Expulsion (IMEX Expulsion)
Subject: Presidency discussion paper on steps towards a well-functioning return system

Delegations will find in annex a discussion paper on the above-mentioned topic for the Integration, Migration and Expulsion (IMEX Expulsion) working party meeting on 24 July 2024.

Steps towards a well-functioning return system

An effective return system is an inevitable requirement of a common migration policy and the main missing element of the migration and asylum reform at the moment. In June 2019, the Council adopted a partial general approach¹ on the proposal for a recast Return Directive, but only limited results have been achieved after this part of the comprehensive legislative reform stalled, and EU-wide return figures remain significantly below the expected level. In the last six months, several discussions on possible directions for the development of the internal dimension of return have been held, which have also demonstrated that opinions are divided among Member States as to whether the general approach on the recast Return Directive is sufficient or needs to be modified and updated. In addition, co-legislators should also take into account the fact that the application environment has changed significantly in recent years and that some sectoral legislation has evolved considerably. Also return has become a top priority and part of the Schengen cycles, including the current one (2024-2025).

At the Integration, Migration and Expulsion (IMEX Expulsion) working party meeting in June 2024, elements were summarised (ST 10414/24) that could contribute to a more effective implementation of returns. During the first semester of 2024, some Member States have also specifically highlighted aspects that should be discussed in more depth (WK 3791/2024 REV1) within the IMEX Expulsion working party. The aim of the Presidency is to reflect on these elements during the six months and build on the previous work to explore possible directions from a more operational perspective.

The only way to achieve an effective return procedure is to find the appropriate synergy between the essential components such as the obligation to cooperate with the authorities and the guarantee of the fundamental rights of the persons subject to the procedure. If this synergy is not achieved, the effectiveness of enforcement is jeopardised, and this may have an impact on our external dimension ambitions and on cooperation with third countries.

¹ Which now amounts to a full general approach, given that the border procedure has been moved to Regulation EU 2024/1349.

More effective return of persons posing a security risk

There has been a strong interest from Member States in establishing a more effective procedure for dealing with third country nationals posing a risk to public order, public security or national security. These efforts have been reflected in the new legal framework concerning the mandatory border procedure and the criteria for ordering detention (Regulation EU 2024/1349). It will be now of utmost importance to implement these provisions in practice, as the ultimate goal is not only to ensure the availability of persons subject to return, but to carry out effective returns to third countries.

Our mandate on the recast Return Directive already contains a number of elements to facilitate the return of third country nationals who pose a security threat² compared with the current Directive. The Council general approach foresees that no voluntary departure period shall be granted for such returnees, also, it establishes a threat to public order, public security, or national security as a new ground for detention in return procedures.

Article 2(2)(b) of the current Directive and the recast also gives Member States the possibility not to apply the Directive to third-country nationals who are expelled as a criminal sanction or as a consequence of a criminal sanction, but this does not generally apply to those who pose a security threat but are not subject to a relevant conviction. In the previous discussions, Member States indicated that it would be useful to examine the possibility of other derogations that could contribute to a more effective return of such third country nationals.

Since March 2023, Member States are required to introduce a return alert in the Schengen Information System (SIS) on third-country nationals subject to return decisions. This should be done without a delay following the issuance of a return decision. The return alert also indicates whether "the return decision is issued in relation to a third-country national who poses a threat to public policy, public security or national security". This so-called "security flag" can also contribute to the rapid identification of persons posing such a risk and channelling them into the appropriate return procedure.

² In this paper, 'security threat' is used to cover a risk to public order, public security or national security, as referred to in the recast Return Directive.

Taking into account that the respect of fundamental rights in return procedures is an essential element of the procedure (e.g. the right to an effective remedy), recital 18 of the recast Return Directive links the automatic suspensive effect of appeals against return decisions with the potential breach of the principle of non-refoulement. Recital 20 of Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more efficient and (4)(d) of Commission Recommendation C(2023) 1763 of 16 March 2023, also provides guidance on when to apply a suspensive effect. As indicated in recital 27 of Recommendation 2017/437 Member States should instruct their national authorities competent for carrying out return-related tasks to apply this Recommendation when performing their duties.

It foresees that an automatic suspensive effect of appeals against return decisions should be granted only when there is a risk that the third-country national concerned would be exposed to a real risk of ill-treatment in case of return, in violation of Articles 19(2) and 47 of the Charter of Fundamental Rights of the European Union, as interpreted by the Court of Justice of the European Union.

The principle of non-refoulement is taken into account and examined during the whole return procedure (before issuing a return decision and during the phase of enforcement of such decision). Since the goal is to have swift removal of third country nationals posing a security threat, the possibility to exclude the automatic suspensive effect if there is no potential breach of non-refoulement should be examined.

The non-suspensive effect of appeals is one element among others highlighted in the draft Guideline of High-Level Network for Returns (HLN) as a recommendation. The Presidency aims at bringing the work of the EU Return Coordinator and the HLN closer to IMEX Expulsion working party, and Member State experts made it clear that they wished to discuss the issues covered by the draft Guideline in other forums. Therefore, at the forthcoming IMEX Expulsion working party meeting, the Presidency invites delegations to reflect upon the following questions:

1. *Do you apply the non-suspensive effect in practice in the return cases of third country nationals who pose a security threat? If yes, what assessment criteria do you apply?*
2. *Do you consider that the use of the non-suspensive effect can contribute to a more effective return of third country nationals who pose a security threat? Do we need clearer rules in this area to ensure a harmonised procedure?*
3. *What other challenges have you identified (e.g. identification of third country nationals posing a security threat, proper use of the SIS security flag) that may impede or prevent the effective return of third country nationals posing a security threat, within the current legislative framework?*
