European Commission

EMN European Migration Network

INFORM

The effectiveness of return in EU Member States

The return of illegally-staying third-country nationals is one of the main pillars of the EU's policy on migration and asylum. However, recent Eurostat data show that return rates at EU level have not improved despite the important increase in the number of rejected asylum applications and in the number of return decisions issued since 2014. In its 2015 EU Action Plan on Return and subsequently in its 2017 Communication on a more effective return policy and the accompanying Recommendation, the Commission emphasised the need for a stronger enforcement of EU rules on return in order to increase the overall effectiveness of the EU's return policy. The EMN conducted this study with the purpose of investigating good practices and challenges in Member States' application of EU rules on return and equivalent standards.

KEY POINTS TO NOTE

National debates increasingly focus on return, which is widely considered as a priority across Member States. National practices implementing the EU framework – or equivalent standards – vary between Member States, as a result of different administrative practices, different interpretations of rules, as well as EU case law. As shown by return rates in the EU in recent years, challenges remain to the effective implementation of returns, including regarding the implementation of EU rules and equivalent standards.

Challenges attached to the effectiveness of return relate primarily to the risk that a third-country national absconds – including during the asylum procedure and the granted period for voluntary departure; the difficulty in arranging voluntary departures in the timeframe defined in EU rules and standards or equivalent; the application of rules and standards, including CJEU case law, on detention; the capacity and resources needed to detain third-country nationals in the context of return procedures; the length of the return procedure, in particular when the decision is appealed..

While it is difficult in the absence of evaluative evidence to draw conclusions on the effectiveness of different national measures used by Member States to enhance the effectiveness of return, some good practices were identified in the study, for example:

- Adopting a flexible approach to rules applicable to return and tailoring them to the individual merits of a case is also reported as a good practice to speed up some return procedures. This can be done by fastening the return process (e.g. shortening appeal deadlines or the period for voluntary departure) in cases where this is deemed necessary.

- The involvement of civil society players, NGOs and international organisations in the handling of return cases and in detention centres helps fostering trust with third-country nationals and providing them with adequate, tailored support.
- In the same vein, some Member States invest in the management of their detention facilities and training of staff, adopting a multidisciplinary approach to accommodate the needs of the detainee (in particular when s/he has special needs) and facilitate the return process.

MAIN FINDINGS

What recent changes were reported by Member States in their legal and/or policy framework?

Between 2015 and 2017, fifteen Member States (AT, BE, DE, EE, EL, FI, FR, HR, HU, IE, IT, LU, NL, SE, UK) reported recent changes in their national legal and/or policy framework (e.g. as a result of the migration situation in 2015-2016 or the European Commission Recommendation issued in March 2017), including amendments of asylum and migration laws and policies. In recent times, the focus of national debates has shifted towards the topic of return, involving both the institutional sphere (Ministries, governmental offices) and the public sphere, including NGOs and International Organisations working on migration as well as the media. Almost all Member States (with the exception of Croatia) reported that the return of irregularly staying third-country nationals was a national priority.

Do Member States systematically issue a return decision to irregularly-staying third-country nationals?

The Return Directive applies to all third-country nationals staying irregularly on the territory of an EU Member State bound by the Directive,[1] although Member States can refrain from applying the Directive to third-country nationals who are subject to a refusal of entry, who are apprehended/intercepted while irregularly crossing the external border of the Union and have not obtained an authorisation or right to stay, who are subject to return as a criminal law sanction or who are the subject of an extradition procedure (derogations provided under Article 2(2)(a) and (b) of the Return Directive). A majority of Member States make use of these derogations by refusing at borders or forcibly returning the third-country nationals concerned.

The majority of Member States issue return decisions when:

- ⇢ The whereabouts of the third-country national concerned are unknown (AT, BE, CY, DE, EE, ES, FI, FR, HR, IE, IT, LU, NL, SE, SI, SK, UK);
- ⇢ The third-country national concerned lacks an identity or travel document (AT, BE, CY, DE, EE, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, NL, SE, SI, SK, UK); or
- ⇢ Irregular stay is detected during an exit check (AT, CZ, EE, ES, FI, HR, HU, LT, LU, LV, NL, MT, SE, SK). However, albeit Member States' legislation provide such possibility to issue return decisions, practices vary on this point.

In addition, nineteen Member States (AT, CY, CZ, DE, EE, EL, ES, FI, FR, HU, IE, IT, LT, LV, NL, MT, SE, SK and UK) have measures in place to effectively locate and apprehend irregularly staying third-country nationals whose whereabouts are unknown. In eighteen Member States (AT, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IT, LT, LU, MT, NL, SE, SI and UK), the return decision is issued together with the decision to end the legal stay of a third-country national. Whether these are issued in the same document and/or simultaneously varies between responding Member States and on the procedure at hand.

[1] Ireland and the United Kingdom are not bound by the Return Directive, thus the measures and practices implemented vary compared to other Member States. This is signalled throughout this Synthesis Report.

Return decisions had unlimited validity in 12 Member States (BE, DE, EE, ES, FI, FR, IE, LT, LU, NL, SI and SK).

However, the legislation in a majority of Member States (AT, BE, CY, CZ, DE, EE, EL, ES, FR, HR, HU, IE, IT, LT, LU, MT, NL, SE, SI, SK and UK) foresees the possibility to grant a residence permit or other authorisation to stay for compassionate, humanitarian or other reasons to third-country nationals staying irregularly on their territory, in certain conditions. A majority of Member States also reported having mechanisms in place to take into account changes in the individual situation of third-country nationals concerned before enforcing a removal.

How is the risk of absconding assessed by Member States?

Most Member States have included objective criteria in their national legislation to assess whether a third-country national risks absconding, with the exception of two Member States (IE and UK).

Measures aiming to avoid the risk of absconding, as per Article 7(3) of the Return Directive, cover situations in which a potential risk of absconding may be prevented by imposing certain obligations on the third-country national during the period for voluntary departure. The most commonly used measures in Member States are the regular reporting to the authorities and the submission of documents to the authorities.

The assessment of the risk of absconding was mentioned as a particular challenge by a number of Member States, due to the difficulty in assessing it in practice on the basis of objective criteria, and/or the high standards imposed by national judicial authorities in some Member States.

How do Member States effectively enforce return decisions?

A number of Member States reported imposing sanctions against third-country nationals who did not comply with a return decision and/or intentionally obstructed the return process. These can take the form of a fine, imprisonment, residence restriction in case of obstruction of the return process, or benefits cuts. While it does not constitute a sanction as such, the possibility to resort to detention was also brought up by Member States as a way to encourage cooperation during the return process.

A majority of Member States indicated that their national legislation also offered the possibility to recognise a return decision issued against a third-country national by another Member State (AT, BE, CZ, DE, EL, ES, EE, FI, FR, HR, LT, LU, LV, MT, SI, SK) under certain conditions. However, in practice, several of these Member States indicated that they never or rarely enforced such a return decision. The main challenge invoked for mutual recognition is the difficulty in knowing whether a return decision has effectively been issued by another Member State and whether it is enforceable.

Several Member States reported that they could make use of EU travel documents for return in application of Regulation 2016/1953[2] (AT, BE, DE, EE, FI, FR, LT, LU, LV, NL, UK). On the other hand, eight Member States stated that they did not use EU travel documents at all (CY, CZ, EL, ES, HR, HU, IE, MT, SK). In practice, some Member States reported that the acceptance of EU travel documents by third-countries varied, with only a small number of third countries accepting them.

All Member States make use of detention under certain conditions during return procedures. The main grounds invoked by Member States to use detention in the context of return procedures are:

- Risk of absconding (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IT, LT, LU, LV, MT, NL, SE, SI, SK, UK);
- Third-country nationals avoiding/hampering the preparation of the return/removal process (AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, LT, LV, LU, NL, SE, SI, SK, UK);
- Non-compliance with the period of voluntary departure or the terms of the return decision (AT, BE, EE, EL, FR, IE, LT, LU);

[2] Regulation (EU) 2016/1953 of the European Parliament and the Council of 26 October 2016 on the establishment of a European travel document for the return illegally staying third-country nationals and repealing the Council Recommendation of 30 November 1994

- Threat to public order/security and/or commission of a criminal offence (BE, CY, DE, EE, EL, FI, HU, IE, IT, LT, SE, SI, UK).

A majority of the Member States transposed the maximum detention period allowed by the Return Directive into their national legislation. Indeed, the absolute maximum length of detention allowed was of 18 months, as per Article 15 of the Return Directive, in thirteen Member States (BE, CY, CZ, DE, EE, EL, HR, LT, LU, LV, MT, NL, SK). In other Member States, the following maximum detention periods were also reported: 12 months in four Member States (FI, HU, SE, SI), 10 months (AT), 6 months (HU, LU), eight weeks (IE), 90 days (IT), 60 days (ES), and 45 (FR). In the United Kingdom, which is not bound by the Return Directive, there is no statutory limit to the length of detention.Reviews of the lawfulness of the detention decision are available in all responding Member States, especially in cases where the decision was taken by an administrative authority, either *ex officio*, or upon the third-country national's request. In all Member States, the length and/or relevance of detention is also reviewed on a regular basis by an administrative authority, by a judicial authority, or both.

Third-country nationals who are ordered to leave the territory are accommodated in specialised facilities for third-country nationals in seventeen Member States (BE, CY, DE, EE, EL, ES, FI, FR, HU, IT, LT, LV, LU, NL, SE, SK, UK). A number of exceptions to this rule were signalled, such as irregularly staying third-country nationals imprisoned for criminal activities or posing threat to public security, risks for public order in the detention facility, or people with mental illness who could stay in a care facility.

What are the procedural safeguards and remedies available to third-country nationals during the return process?

In a majority of Member States, the respect of either the principle of *non-refoulement* or of Article 3 of the ECHR was systematically assessed as part of a decision taken on whether or not to return an irregularly staying third country national. Member States which reported not to be systematically assessing the principles above, nonetheless reported doing so at least during one step of the process.

Deadlines to challenge the return decision existed in all Member States, yet these varied quite significantly and some Member States had different deadlines according to different circumstances, going from one week to 75 days from the notification of the decision. In a majority of Member States, appealing a return decision had a suspensive effect, although in some Member States this effect could be lifted depending on the merits of the case.

Hearings of the third-country national on the return decision are available in a majority of Member States. The possibility of holding a return hearing in conjunction with other hearings was not possible in a number of Member States (CY, CZ, EL, FI, HR, HU, LV, LU and SK). However, the possibility of organising joint hearings for return was available in different procedures:

- During the asylum procedure if a rejection of the claim appears likely (AT, EE, EL, NL);
- During the procedure for the granting of a humanitarian residence permit (AT);
- During the procedure for the granting of a residence permit (EE, FI, SI).

In addition, the possibility for a joint hearing on return and detention was available in a few Member States (AT, MT and NL).

All Member States reported that they used some alternatives to detention in the context of return procedures. The most widely used means to locate and monitor a third-country national in view of his/her return was to impose the obligation to report regularly to the authorities upon the individual. In addition, a majority of Member States also required the third-country national to surrender his/her passports and/or travel documents, and/or to be accommodated in a given location.

Identified challenges related to the impossibility in practice to offer the release of a third-country national by bail as his/her financial situation would not enable it; the possibility of absconding of the individual while the alternative to detention is used; and the identification of a fixed address to place third-country

nationals under home custody. Good practices highlighted by Member States included involving NGOs in taking care of detainees, to de-escalate conflicts and avoid incidents, as well as good management of specialised detention centres and open centres.

What specific measures were adopted by Member States to guarantee third-country nationals' family life and state of health, as well as adequate conditions for children in the return process?

A majority of Member States elaborated in their legislation a definition of vulnerable categories in the context of the return process.

The detention of minors is largely made conditional to specific circumstances and some Member States prohibited the detention of minors in any circumstance (CY, IE, IT, MT). More specifically, the detention of unaccompanied minors (UAMs) is allowed in a few Member States as a means of last resort to prevent absconding or for reasons of public security. The detention of accompanied minors is generally admitted but only in exceptional cases to maintain family unity, to prevent absconding, or only immediately before departure.

In some Member States, other vulnerable groups, for example victims of torture, psychological, physical or sexual violence can be detained with a few Member States also providing for special facilities taking into account their special needs. In other Member States, vulnerable groups are not detained unless it is necessary as a last resort or shortly before their return.

The obligation to take into account the best interest of the child (BIC) in return procedures was implemented by all Member States in their policy or legal framework. When performing the assessment of the BIC, the large majority of Member States took into account a combination of factors, notably the child's identity and family life, the child and parents' (or care giver's) view, protection and safety of the child, situation of additional vulnerability, the child's right to health and access to education. While the return of minors is generally accounted as a possible durable solution for both accompanied and unaccompanied minors (UAMs), some Member States reported to ensure the BIC by prohibiting the return of minors, mainly UAMs, in any circumstances, unless this serves to maintain family unity or follows a request for voluntary return by family members in the country of origin or by the legal guardian of UAM (BE, CY, CZ, FR, IT, MT, SK). In terms of guarantees for UAMs during the BIC assessment process, some Members States foresee the obligation to nominate a legal guardian for the minors, who is responsible for initiating the procedure to assess the BIC and for contributing to the assessment of the case (BE, CZ, EE, ES, FI, IT, LT, LV, HU, LU, NL). Other Member States also provide special dedicated accommodation facilities with access to specific services to assist UAMs during the entire BIC assessment period (EE, FI, HU). Generally, UAMs were not specifically targeted by Assisted Voluntary Return and Reintegration (AVR(R)) programmes or other form of support to return, however they were eligible to apply and hence to benefit of such assistance.

All the responding Member States, foresaw the possibility to postpone the removal of a third-country national based on health reasons. Such a suspension of the execution of the return decision was generally only permitted for a temporary period of time until the health situation allowed to travel.

How do Member States regulate the period for voluntary departure?

The period for voluntary departure is automatically granted with the return decision in the vast majority of Member States (AT, BE, DE, CY, EE, EL, FI, HR, IT, LT, LU, LV, NL, SE, SI, SK), while six Member States (CZ, IT, HU, LV, MT, UK) reported that the voluntary departure procedure started following a request submitted by the third-country national concerned.

In all Member States, the period granted to third-country nationals to depart voluntarily is between seven and thirty days. Nearly all Members States, with the exception of Italy and Slovenia, indicated that they, at times, shortened the period for voluntary departure to less than seven days. Some Member States foresee the possibility to both waive and shorten the period for departure while others only provided for a waiver of the period of voluntary departure.

Almost half of the Member States establish mechanisms to check whether third-country nationals irregularly staying in the EU has left within the period for voluntary departure. For this purpose, some Member States impose an obligation to declare the departure at the border crossing point through identification on site, to submit a crossing border certification previously handed over to the third-country national, or record the departure in the aliens register.

What are the grounds and conditions for entry bans in Member States?

A majority of Member States reported imposing automatically an entry ban in the cases foreseen by Article 11(1) of the Return Directive, while four Member States (CZ, EE, ES, HR and IT) automatically impose an entry ban with all return decisions issued. Ireland and the United Kingdom, which are not bound by the Return Directive, also impose an entry ban systematically with a deportation order.

An entry ban can be imposed in cases where:

- There is a risk of absconding (BE, CZ, EE, EL, FI, FR, HR, LU, MT, NL, SI, SE, SK);
- The third-country national poses a risk to public policy, public security or national security (AT, BE, CY, CZ, DE, EE, EL, FI, FR, HR, HU, IT, LV, LT, LU, MT, NL, SE, SI, SK, UK);
- The application for legal stay was dismissed as manifestly unfounded or fraudulent (AT, BE, CZ, DE, EE, EL, FI, FR, HR, LV, LT, LU, NL, SK, SE, UK).

National legislation in all Member States – with the exception of Ireland and Malta – provides for different durations of the entry bans depending on the grounds on which it was imposed. In most Member States, entry bans do not exceed five years in cases where a third-country national breached immigration laws (see also Annex I). Entry bans exceeding the duration of five years defined in the Return Directive are usually imposed in cases not related to the Directive and where it is determined that a third-country national posed a particularly serious threat to public policy or national security. The duration of the entry ban starts running on the day when the third-country national leaves the EU (AT, CY, DE, EE, ES, HR, HU, IT, LV, MT, SI, SK) or on the day when the third-country national left its territory (AT, DE, HU, NL, LT, UK).

A third-country national ignoring an entry ban is sanctioned or considered a criminal offence in most Member States (AT, BE, CY, CZ, DE, EL, ES, FI, FR, HR, IE, LV, LU, MT, NL, SK, SE).

The main challenges identified by Member States are related to compliance with entry bans on the part of the third-country nationals concerned. This can be due, in part, to Member States' national legislation where entry bans enter into force only at the time of notification of a return decision. This is an issue in particular as regards third-country nationals who were issued a return decision and an entry ban but remained on the territory of the EU, hence stripping the entry ban of any legal effect. Another challenge was monitoring the compliance with entry bans and cooperation with other Member States in the control of entry.

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