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NOTE

From: Presidency
To: Working Party on Integration, Migration and Expulsion (Expulsion)
Subject: Presidency paper on addressing challenges relating to migrants
in a situation of prolonged illegal stay

Delegations will find below the Presidency paper on addressing challenges relating to migrants in a situation of prolonged illegal stay to be discussed at the forthcoming informal Integration, Migration and Expulsion (IMEX) Working Party meeting to be held on 7 May 2020.

Presidency paper on addressing challenges relating to migrants in a situation of prolonged illegal stay

The return of illegally staying third-country nationals is becoming increasingly important as the number of asylum applications in EU continues to rise (up by 12 % in 2019 compared to 2018), and a high percentage of asylum applications are refused. The ability to return illegally staying third-country nationals quickly and efficiently helps to keep asylum systems functional, protects them from overburdening and acts in general as a preventive measure against illegal migration by sending a clear message to potential irregular migrants. Since the EU return rate has been relative low – it has not exceed 40 % in the last few years – there are a significant number of persons pending return.

In 2019, 612 700 first-time asylum seekers applied for international protection in the 27 Member States of the European Union (EU), up by 12 % compared with 2018 (549 000), but around half of the number recorded in the peak year 2015, when 1 216 900 first-time asylum applicants were registered¹. Many of the applications will be refused, leading to return decisions and a further increase in the number of returnees.

Among third-country nationals pending return there is group of irregular migrants who temporarily cannot be returned for legal, practical or technical reasons, in line with the provisions of Article 9(2)(b) of Return Directive (2008/115/EC). They therefore end up in a situation of prolonged illegal stay, which can last for a number of years.

Although there is no common EU definition for this specific group of migrants, we should regard them as constituting a category of third-country nationals who have been issued with a return decision which has become enforceable, but certain circumstances (e.g. compliance with the principle of non-refoulement, inability to establish identity and country of origin/previous residence, health issues, lack of cooperation from the third country) prevent their return. There is an important distinction to be drawn between justified and unjustified reasons for non-return, and between reasons which fall within the sphere of influence of the returnee and those depending on external factors.

¹ Eurostat, <https://ec.europa.eu/eurostat/documents/2995521/10554400/3-20032020-AP-EN.pdf/6ee052a9-ffb8-d170-e994-9d5107def1a8>

There is no definitive data on the number of persons belonging to this category, but we can assume that this number is significant and constantly increasing due to the high number of new asylum applications in the EU and low return rate. According to the statistics, it can be assumed – albeit on a very tentative basis – that there are up to 300 000 migrants per annum² who do not return following a return decision. As a result, some end up in a situation of prolonged illegal stay. Member States can impose obligations on third-country nationals pending return, such as the requirement to report regularly to the authorities, the deposit of an adequate financial guarantee, the submission of documents or the obligation to stay at a certain place, in line with Article 7(3) of the Return Directive.

The status of migrants in a situation of prolonged illegal stay represents a significant challenge for the Member States, and may have consequences such as homelessness, labour exploitation, petty crime, and health and social issues, creating difficulties for both the migrants and the authorities. This situation may place migrants in a vulnerable situation, which could make them more likely to become victims of human trafficking, or to represent a risk to public order and security or national security.

Migrants in a situation of prolonged illegal stay who pose a threat to national and public security constitute a specific challenge. In the aftermath of several security incidents involving third-country nationals, Member States have on several occasions expressed the need to step up efforts to ensure the return of criminals, suspected terrorists and hate preachers. The links between irregular migration and public security risks tend to attract significant public interest and may damage public trust in migration management.

² https://ec.europa.eu/home-affairs/sites/homeaffairs/files/elibrary/documents/policies/legal-migration/swd_2019-1055-staff-working-part2.pdf , page 85

EU law accords Member States broad discretion in terms of dealing with migrants in a situation of prolonged illegal stay. The stay of third-country nationals pending return/removal is considered as illegal unless a Member State decides to grant a permit or a right to legal stay in accordance with Article 6(4) of the Return Directive. The same Directive does not regulate the conditions of residence of third-country nationals who are staying illegally and who have not been removed. However, Article 14 of the Return Directive provides that such individuals are to be issued with a written confirmation of their postponed obligation to return and provides them with some basic safeguards, such as an access to emergency healthcare. It is worth mentioning that in the Proposal for a recast of the Return Directive none of the abovementioned provisions have changed significantly, therefore no proposal has been made to further regulate the status of migrants in a situation of prolonged illegal stay at the EU level.

In March 2013, the European Commission published a study³ on the situation of third-country nationals awaiting return in the EU Member States and Schengen Associated Countries, which aimed to shed more light on the situation in this area and which was intended to serve as a basis for policy-making and possible legal initiatives.

The study found that, in the majority of the Member States, this area was not regulated and there were differences as regards the terminology used. It also demonstrated that, even if the return decision had not been executed for a number of years, in most Member States this had no effect on the person's status as an irregular migrant.

No in-depth research has been carried out or measures undertaken on this issue since the study was published, although the migration and security situation has changed significantly, particularly due to the large number of irregular border crossings into the EU as of 2015. Moreover, there is no systematic database of or strategic approach towards such a category of illegally-staying third-country nationals, making it even more challenging to identify adequate policy responses. However, the European Migration Network is currently carrying out a study looking into the phenomenon of irregular migrants in a situation of prolonged illegal stay as well as the responses of national authorities.

³ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/irregular-migration-return/return-readmission/docs/11032013_sudy_report_on_immigration_return-removal_en.pdf

In its recent Fitness Check on EU legislation on legal migration, the Commission concluded⁴: *The situation of third-country nationals in a protracted situation of irregularity is currently decided solely at national level (e.g. through toleration statuses or long-term postponement of return), which may create in practice grey areas that the adoption of the Return Directive sought to eliminate. The variety of differing Member State approaches for dealing with non-removable returnees may constitute an incentive for secondary movements since this category of migrants may try to move to those Member States which offer the best conditions of stay. A common discipline amongst Member States concerning the treatment of non-removable persons could prevent this from happening. In addition, the argument can be made that the existence of large numbers of ‘non-removables’ with few rights and limited possibility to work in order to come up for their own living contributes to a negative public perception of migration and undermines the public acceptance of a sustainable EU migration policy as a whole. Common standards which would grant at least certain categories of ‘non-removables’ a right to work might contribute to alleviate this phenomenon.*

Despite the insufficient research and lack of policy on the issue of migrants in a situation of prolonged illegal stay, it is evident that this remains an important and sensitive issue – also due to the large number of irregular migrants, the fact that they cross internal borders without difficulty and the variety of authorities and stakeholders concerned at various levels – which should be further addressed at EU level.

⁴ doc. 8097/19 ADD1, p.89

Against this background, the Croatian Presidency invites delegations to answer the following questions with a view to exploring possible means of addressing the situation of migrants in a situation of prolonged illegal stay, while avoiding false expectations and constantly encouraging their return to countries of origin:

1. How is the issue of third-country nationals in a situation of prolonged illegal stay addressed nationally?
2. What measures are taken to promote the return of such third-country nationals and are they proving effective? What other measures could be taken to promote return?
3. Could the granting of any rights in addition to the basic minimum safeguards as provided for in Article 14 of the Return Directive to this category of persons be regarded as a pull factor? If so, what alternative solutions might there be, and can you share any best practices in this regard?
4. Do you consider that harmonisation of measures or a coordinated EU approach to measures as regards third-country nationals in a situation of prolonged illegal stay could help to deal with this challenge?
