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NOTE

From: Presidency
To: High-Level Working Group on Asylum and Migration/
Strategic Committee on Immigration, Frontiers and Asylum

Subject: Policies and tools to enhance readmission cooperation
– Presidency discussion paper

INTRODUCTION

It is a key aim for the EU to develop a coherent strategy towards a range of third countries, with migration-related issues as an integral part of overall, broader cooperation with third countries. The EU's approach to external relations needs to be integrated and the EU and Member State level actions towards key migration countries well aligned. The strategy needs to take into account the complexity of migration-related matters and the broader strategic interests and objectives of EU's external relations, specific context of each partner country. For this reason, the EU has pursued to build comprehensive, tailor-made partnerships with third countries which take into account the objectives in all policy sectors and ensure coherence between migration and other policy fields. The EU's comprehensive approach to migration provides an efficient framework with which to engage with third countries on migration issues in mutually beneficial ways. The approach recognises that regular migration and mobility, including legal pathways and circular migration, can make a positive contribution to sustainable development.

One of the priority areas in such partnerships is a well-functioning and effective return and readmission process. Currently, return rate of irregular migrants in the EU remains low. This undermines the overall legitimacy and sustainability of migration and asylum policies, in which protection should be provided to those in need. Consequently, enhancing cooperation with third countries on returns and readmission should be one important element of the EU's specific partnerships with each third country. While taking into consideration the specific situation of each country, this approach should take into account that it is every country's international obligation to take back its own nationals.

There has been a broad discussion in the EU in recent years on the need to enhance cooperation on readmission through the use of tailor-made leverages and incentives. The Commission's Communication from June 2016 on establishing a Partnership Framework with third countries (doc. 100015/16) called for the use of all policy tools to support migration partnerships, including development and trade, for the purpose of delivering on returns and readmission. In its conclusions from 2016 and 2017 and most recently October 2018, the European Council invited the EU and the Member States to do more 'to facilitate effective returns', for instance by 'creating and applying the necessary leverage by using all relevant EU policies, instruments and tools, including development, trade and visa'. Moreover, there is a general understanding that migration, including returns, should be firmly embedded in the EU's overall relationships with third countries.

In the European Agenda on Migration, the Commission notes that 'the EU should be ready to use all leverage and incentives at its disposal'¹. In the recently published report on the implementation of this Agenda, the Commission notes that visa policy 'will be one important additional tool'. However, 'additional incentives and leverages should be sought also in other policy areas, on a case by case approach'. During the discussions on the revised Return Directive, a number of Member States insisted on the importance of using wider leverage and incentives to reinforce and complement more effective national return procedures.

¹ However, no conditionality can be attached to needs-based humanitarian aid in line with the Humanitarian Principles; COM(2016) 385 final

The above mentioned illustrates that the Member States have a common understanding on that a credible migration and asylum policy requires the swift return of those with no right to stay, and that we need to continue the discussions in order to find the appropriate EU and Member State level measures to improve cooperation on readmission and, ultimately, the EU return rate. We need concrete procedures for situations in which a third country systematically refuses to cooperate on returns and readmission. Functioning return policy would greatly alleviate the pressure on frontline Member States and on Member States exposed to secondary movements, and therefore support the development and implementation of a well-functioning Common European Asylum System. Moreover, it should also be seen in conjunction with measures aiming at opening legal pathways. It is therefore crucial to establish cooperation on readmission as a central part of broader, balanced, comprehensive and ultimately more effective partnerships with key countries. In order to achieve this, there is a need to coordinate at EU level the use of different measures.

Finding new ways to enhance readmission cooperation with third countries has been one of the priorities of the Finnish Presidency. The discussion was launched in the informal SCIFA in July 2019. At the beginning of the new legislative term, it is timely to engage in an in-depth discussion on the use of leverages. With the amendment of the Visa Code coming into force in February 2020, the EU will soon have a concrete leverage tool at its disposal backed by an assessment of third countries' cooperation on readmission. This assessment by the Commission, based on information provided by Member States, could facilitate discussions on the use of other leverages as part of comprehensive partnerships with third countries, while noting the broader interests of the EU's external relations.

The use of instruments from and within different policy fields requires cross-sectoral debates and cooperation at EU level as well as cooperation with and among the Member States, in order to raise awareness on all sides and explore the opportunities to advance EU objectives in different policy fields, including migration, in a sustainable manner. In these discussions, we should note and share our national experiences and see what lessons we can learn in view of planning the potential future tools at EU-level.

Using leverages from any policy sector requires consideration of the legal basis, the role of different actors, the interests and objectives of different policy fields, the wider context of the EU's relations with the third country in question as well as the specific situation of the third country in question. Furthermore, efficient and sustainable use of such tools demands well-functioning coordination. In July's informal SCIFA, an idea of an EU Coordination Mechanism for Returns was proposed.

As follow-up to the launch of the idea in July, the Finnish Presidency now aims to take the debate to a more concrete level. This paper aims to explore different possible options to enhance the use of leverages towards third countries.

CURRENT SITUATION

The newly agreed amendments to the Visa Code (Regulation amending Regulation 810/2009), applicable from 2 February 2020, are the first concrete steps taken to improve cooperation on returns by introducing a system whereby the EU can use various visa related measures as a leverage to get third countries to commit to functioning readmission. The new visa leverage mechanism consists of two distinct steps. The first is the Commission's regular assessment, based on objective criteria, of the cooperation of third countries on readmission. A Member State may also notify the Commission if it is confronted with substantial problems in cooperation on readmission with a third country. This part in itself is not an element of visa policy but rather that of return and readmission policy.

In the second step, the Commission shall propose the Council to adopt a decision to apply visa restrictions or visa facilitation, taking into account prior efforts to improve cooperation and the EU's overall relations with a particular third country. These legal provisions, once implemented and effectively applied, will provide the EU with a leverage mechanism in the area of visa policy. A similar mechanism already exists for third countries exempted from the visa requirement, providing for a possible reintroduction of the visa requirement, among other criteria if the third country does not cooperate on readmission.

In its September 2019 meeting, the Integration, Migration and Expulsion (IMEX) Working Party discussed the use of the visa leverage, the possible challenges linked to measuring and objectively assessing third countries' cooperation on readmission and the possible role of different Council Working Parties in the process. In this discussion, the Member States highlighted the need for comparable data on both quantitative and qualitative aspects of cooperation and the objective and equal treatment of third countries. The role of Frontex in collecting data will be central. However, efforts will be needed from Member States to provide reliable data in a timely manner.

Member States broadly agreed that the IMEX (Expulsion) Working Party could be the most suitable group for the presentation of the Commission's assessment report and the first discussion on the report and on possible notifications by the Member States on problems in cooperation on readmission with a third country. IMEX could work as the first platform for coordinating the messages to third countries from the Commission and the Member States after the assessment and before a proposal for measures is made. Some Member States considered SCIFA as another possible platform. In any case, given their broader overview of the EU's external relations, the views of the geographic Council working parties should always be sought and taken into account before a proposal is made.

The previous discussions on a visa leverage mechanism could work as a starting point for the development of a comprehensive EU leverage coordination mechanism for readmission. Starting from February 2020, the Commission will, at least once a year, assess the level of cooperation on readmission with all relevant visa-required third countries. This assessment by the Commission could inform discussions on the use of incentives and leverages in a broader context in the future.

In view of the above, the Finnish Presidency proposes a general discussion on possible ways forward to improve our cooperation on readmission with third countries and invites delegations to reflect on different options. On the side of the Member States, it will be important to improve compatible data collection on returns as well as carry out an evaluation of current return policies in order to carefully assess what works and what does not. It will be necessary to identify best practices in different policy areas other than visa policy to come up with workable tools to enhance returns.

POSSIBLE WAYS TO MOVE FORWARD

The Presidency invites the delegations for a discussion on how the use of leverage to improve the EU's cooperation on readmission could be better advanced within a partnership approach and in the context of an integrated EU external action towards relevant third countries. In order to take the discussion to a more concrete level, the Presidency presents different options, as a non-exhaustive list, for structures that could be introduced in order to advance the use of leverages, on the basis of the example of the visa leverage mechanism.

Possibility of establishing an informal readmission leverage mechanism

The Commission's proposal to include provisions on visa leverage in the legislative proposal for the revised Visa Code submitted on 14 March 2018 was based on the positive experience gained from the establishment of an informal visa leverage mechanism by Coreper in 2017. The mechanism was launched for the first time a few months later to identify measures in the field of visa policy to improve readmission cooperation with Bangladesh.

The informal mechanism comprised a number of criteria to assess the cooperation on readmission of a third country as well as a toolbox of possible visa measures to be taken in case the level of cooperation is assessed to be insufficient. The mechanism was to be coordinated by Local Schengen Coordination and regularly monitored by Coreper.

The informal visa leverage mechanism was never formally used. However, its mere existence helped to promote cooperation with Bangladesh and later with Côte d'Ivoire. The way in which the Coreper mechanism was set up could serve as a model for a more general flexible leverage mechanism for other policy areas.

As in the case of the informal visa leverage mechanism, the new, more generally applicable mechanism could be established by Coreper, through a Presidency note explaining the functioning of the mechanism. The informal coordination mechanism could use the regular assessment of the cooperation of third countries on readmission, which the Commission will carry out pursuant to Article 25a (2) in the Visa Code.

The basis for the informal mechanism would be similar to the former visa leverage mechanism established by Coreper in 2017. It would include a possibility for Coreper to invite the Commission and the Member States to identify measures at EU and national level that are appropriate in their consideration and could be used as a leverage to enhance cooperation on readmission, taking into account the overall relations of the EU and the third country in question. Any measure proposed by the Commission would then be discussed in the appropriate Council bodies to ensure the proper involvement of all relevant policy sectors, while taking into consideration the overall relations between the EU and the third country in question.

If the informal leverage mechanism would function well, as it did with visa policy, it could be the first step towards including such a mechanism in EU legislation.

Possibility of including leverage provisions in the Return Directive

Reference to visa leverage was included in the Council's partial general approach on the proposed recast of the Return Directive (Article 24a), but other than that, the EU's return framework does not currently contain a reference to the use of leverages or guide the assessment of readmission cooperation. If the mechanism would be included in EU legislation, one possible place for it could be in the Return Directive.

The recast Return directive could contain an article outlining the following building blocks of the leverage mechanism:

- *Assessment of readmission cooperation on the basis on the Visa code provisions*

As mentioned above, some of the elements of the visa leverage mechanism are not elements of visa policy as such but rather those of return and readmission policy, and therefore could be included in the legislation on returns. In particular, the Commission's assessment of the cooperation on readmission of a third country does not relate to measures taken under visa policy. For this reason, a provision included in the Return Directive could contain a cross-reference to Article 25a (2) of the Visa Code. Similarly, the possibility for a Member State to notify the Commission on problems in readmission cooperation with a third country could be added with a cross-reference to Article 25a (3) of the Visa Code.

- Identification of measures to be taken to improve cooperation on readmission

The Visa Code also contains a provision that mentions the 'steps taken by the Commission to improve the level of cooperation of the third country concerned in the field of readmission and the Union's overall relations with that third country' before deciding whether a proposal is needed on a given visa measure. However, neither the 'steps taken' nor the obligation of the Commission to take such steps are laid down in the Visa Code.

These steps could be defined in the new Article of the Return Directive as follows:

- Informing the third country in question about the result of the assessment and using the EU's diplomatic relations to improve cooperation with the third country concerned,
- Proposing a readmission agreement or an informal arrangement with the EU and,
- After evaluating the overall relations of the EU and the third country in question, considering different measures to improve cooperation on readmission through negative or positive incentives.

The defined possible measures could at this point be the use of existing instruments or international agreements in general, and the use of existing visa leverage mechanisms.

- *New proposals for action*

If the previous steps have not produced adequate results, the final step would be the possibility for the Commission to propose one or several appropriate measures, taking into account the overall relations of the EU and the third country. In practice, the Commission's assessment, the impact of different steps and any appropriate proposals made would be discussed in the appropriate Council bodies to ensure consideration of all relevant policy sectors and that the broader foreign policy interests are taken into account.

Possibility of a new regulation on EU readmission leverage mechanism

Another, longer-term possibility could be the adoption of a new regulation establishing an EU readmission leverage mechanism. This would be based on a Commission proposal and would comprise the different steps considered by the Commission, with cross-references to the relevant sectorial instruments, including the proposals to amend these, if necessary. As in the case of the possible article in the Return Directive, the new regulation would define the assessment of readmission cooperation, the notification procedure for the Member States, the measures that would follow and the way to select and coordinate between the various tools.

Other possible options

The above described ways to move forward are options that can be clearly presented based on our experience of the establishment of the visa leverage mechanism. However, there might be other possible options which are worth discussing. The Presidency warmly welcomes an open discussion on these as well.

Against this background, and in the wider context of building partnerships with third countries, the Member States are invited to consider the following questions:

1. Do the Member State consider there is a need to establish either a formal, legislative mechanism or an informal leverage coordination mechanism to increase third countries' cooperation on readmission and to enhance coordination?
2. How would Member State assess the practical benefits and feasibility as compared to the possible legal and political complications of such a mechanism? Do the Member States have other concrete ideas on how the use of leverages and incentives to enhance cooperation on readmission could be better advanced in the context of integrated EU external action towards relevant third countries?
3. Do Member States have good national practices to share regarding positive or negative incentives to enhance cooperation on readmission with third countries? How are these actions coordinated among different actors at national level?