MONITORING THE IMPLEMENTATION OF RETURNS: A COMPLEX PUZZLE WITH MISSING PIECES

ECRE'S ASSESSMENT OF CURRENT RETURN MONITORING INITIATIVES

I. INTRODUCTION

ECRE has argued that the European Commission and Member States have had a disproportionate focus on return since 2015, at the expense of fair asylum procedures and monitoring the implementation of the current asylum acquis. States have a legitimate right to return irregularly-staying migrants including asylum seekers whose applications for protection have been rejected. However, certain prerequisites are necessary before return can take place: fair and consistent asylum systems should properly examine if a person will face a well-founded fear of persecution or serious harm if returned; fair return procedures should enable people to return in dignity and in respect of their fundamental rights; fair and transparent partnerships with third countries must respect fundamental rights and be open to scrutiny. In ECRE's view, the credibility of return procedures, and thus the extent to which individuals, third countries and other stakeholders want to engage with them, rests on these three criteria being in place. Respecting fundamental rights is also a basic obligation that must be upheld when any EU Institution or Member State applies any policy or programme. The monitoring of return procedures is extremely important in this context, not least because of the severity of the consequences if fundamental rights are not upheld for individuals who could be returned to a situation of persecution or inhumane treatment.

The current monitoring of return processes in the EU is not adequate, and is scattered across different institutions and stakeholders. There is no specific, independent monitoring framework to report on fundamental rights compliance by Member States that covers pre-return, the return process as well as follow-up in and with the country of return.

This Policy Note analyses current return monitoring initiatives below. The scope of this paper is limited to the issue of monitoring returns. All other issues in relation to return are examined elsewhere in ECRE's work.

II. ANALYSIS

QUANTITATIVE MONITORING: THE STATS

Although ECRE has criticised the overreliance on evaluating returns solely on the numbers (the return rate), quantitative data is an important element in evaluating what is happening on the ground. Eurostat currently holds return statistics on third-country nationals who receive an order to leave, as well as information on the country of destination, unaccompanied minors returned, sex of the returnee, type of return, type of assistance received, type of agreement for the return, and the destination country.

Return statistics do not give us the whole picture (for example, pre- or post- return monitoring or why someone who has received an order to leave has not been able to do so). The statistics include people who Member States agree cannot be returned (e.g. those with a deportation ban or where there is a moratorium on returns to a specific country). This skews the return rate and provides impetus for policy change that may not necessarily be in the correct direction. The statistics can also be slow and incomplete, which impedes monitoring. For example, as of November 2022, there was still no figure for 2021 for eight Member States for the most basic return statistic 'third country nationals returned following an order to leave'. In addition, Eurostat return statistics cover enforced and 'voluntary return,' referring to a third-country national complying voluntarily with the obligation to return where 'no enforcement procedure has been launched,' i.e. 'voluntary departure,' (Article 3(8) of the Return Directive). Purely 'voluntary' returns (without a return decision) are difficult for states to capture. However, Eurostat's 'voluntary' return covers a broad spectrum of 'voluntariness', which should in itself be monitored (for example, reports by Amnesty International on coercion in Lithuania).

IMPACT AND OTHER ASSESSMENTS

The 2018 Return Directive sets minimum standards for the return of third country nationals. According to Article 19, the European Commission (the Commission) should report every three years to the European Parliament and the Council on its application by Member States. There was an evaluation, followed by a Commission Communication on EU Return Policy in 2014. Since then, there has been no formal evaluation of the application of the Directive, despite a recast of the Return Directive being proposed in 2018. It was left to the European Parliament to conduct a substitute impact assessment in 2019 and a report on its implementation in 2020. The New Pact on Migration and Asylum from 2020 (the Pact) is an example of policy making with little evidence of its evidence base. On returns the Commission Working Document discusses the 'burden' of dealing with '"unfounded, inadmissible or fraudulent asylum applicants who, through the use of procedural and legal loopholes in the national asylum systems, are able to delay or prevent their return." Other allegations include Assisted Voluntary Return and Reintegration 'shopping', but the evidence base is slim, with references to Member State assertions or assessments of return systems through Schengen evaluations.

SCHENGEN BORDERS CODE MONITORING

Schengen evaluation missions, though often cited as grounds for policy change, are opaque and reports are not public. In addition, a European Parliament study concluded that they only provide a snapshot-style evaluation of a specific Schengen policy area (e.g. return) in a particular country at a certain time. After criticisms including on fundamental rights monitoring, a revised mechanism was adopted by the Council in 2022. The Commission will now provide a comprehensive annual report covering the Schengen evaluations carried out the previous year and the implementation of recommendations. Unannounced visits without prior notification can take place in response to 'substantiated indications' of serious violations of fundamental rights. If there is a risk of a systematic fundamental rights violation, the Council should adopt urgent recommendations to correct it. The new system is an improvement but untested, and still essentially peer-review. As Member States will be assessed once every seven-year cycle, with potential for thematic/unannounced visits, neither is this ongoing, detailed monitoring.

REPORTING BY THE EUROPEAN MIGRATION NETWORK (EMN)

The European Migration Network (EMN) provides information on returns from the majority of Member States in a chapter of its Annual Report on Migration. The 2021 report provided updates *inter alia* on the number of third country nationals who left the country by type of return; by type of assistance; and the top five countries for enforced and voluntary return disaggregated by sex; enforced return and detention; alternatives to detention; reintegration measures; and cooperation with third countries on return and readmission. This is important information often lacking elsewhere, but is self-reporting. The EMN Return Expert Group (EMN-REG) has also

been appointed to monitor the implementation of internal EU elements of the EU strategy on voluntary return and reintegration. This is a useful step in Member State accountability on the implementation of returns, albeit of a non-binding strategy. A working methodology is being developed so Member States can report on 1) Improving the legal and operational framework; 2) Improving coordination; 3) Effective return counselling and referral; 4) Quality of support (quality monitoring frameworks for selection of service providers as well as for monitoring and evaluation); 5) Funding. Whilst the framework is still being developed there is a notable lack of monitoring of fundamental rights. It is also not independent.

REPORTING BY THE EUROPEAN BORDER AND COAST GUARD AGENCY (FRONTEX)

Frontex's role in forced returns and voluntary departure has grown enormously over recent years with a total budget for 2021 of over 543 000 000 Euros with expenditure on direct 'return activities' going up from 12 000 000 Euros in 2019 to 50 000 000 Euros in 2021 with other budget lines also relevant. Increased budgets and responsibilities should also mean increased monitoring and accountability, however, unfortunately this has not been the case. The European Parliament recently refused to discharge Frontex' 2020 budget, citing serious misconduct and its failure to protect the fundamental rights of migrants and refugees. Frontex's reporting on its work on returns is limited. In its report on 2021 there are basic numbers of those returned with the agency's assistance, by charter flight and scheduled flights, and a breakdown of forced/ 'voluntary' return. In 2021 return support teams were placed in four international airports (Rome, Frankfurt, Amsterdam and Vienna) but there is little further information on their role. The Fundamental Rights Officer (FRO) at Frontex is mandated to provide 'in-house' monitoring of the Agency's compliance with fundamental rights, to report potential violations and provide advice and recommendations including on the little-used Complaints Mechanism for returnees. The 2021 FRO annual report includes a recommendation for information on the Complaints Mechanism to be more visible but again a lack of information means it is unclear how useful this internal complaints mechanism is.

FORCED RETURN MONITORING

Under Article 8(6) of the Return Directive, Member States are obliged to establish a system for monitoring forced return, although not on every flight, and reports are not often public. The Fundamental Rights Agency (FRA) publishes an annual update of different forced return monitoring systems, including indicators for an effective forced return monitoring system: the organisation responsible for monitoring forced return and how independent it is from the body it is monitoring; the number of operations monitored; the phases of monitored return operation; the number of staff trained and working as monitors; and whether the monitoring body issues public reports. In 2021 France, Hungary and Poland did not seem to monitor any flights and in other States the monitoring did not cover in-flight or the arrival phases of return. Even where Member States provide a monitor for a flight, the monitor only monitors the returnees from that particular Member State, so there can be an issue on the same flight with another returnee that is completely unmonitored.

Three of the Frontex Fundamental Rights Monitors recruited in 2021 were assigned as forced-return monitors to the pool to support Member States. In 2021, they monitored a total of 18 return operations supported by the Agency as well as the pre-departure phase of three return operations (Poland to Iraq) by scheduled flight in December 2021.The annual report contains several good practice examples from this monitoring including an improvement in conditions for waiting areas for families and recommendations for improvements including to monitor high risk flights and to have two monitors on board in case of longer or high-risk flights.

Where independent monitors such as ombudsmen with a duty to publish reports on their work are involved in forced return monitoring, more coordinated linked-up reporting, such as a shadow report, would provide a fuller picture of what is happening.

MONITORING RETURN IN THIRD COUNTRIES

Once a person has returned there is little possibility for them to re-engage with Member States in case of difficulties and Member States generally do not monitor what happens. As returns are being encouraged to countries where there is ongoing conflict, or indeed of vulnerable groups, post-return monitoring becomes even more important to ensure States have complied with human rights obligations, and that people are safe. Currently there is little standardised or public monitoring of returnees' situation post-return, save for reports from implementing partners on reintegration support or ad hoc research. A recent report by the Swedish Red Cross highlighted several challenges and factors to support individuals upon return, particularly those with vulnerabilities, but as yet there is no specific system for information like this to inform discussions on return policy. Frontex's new mandate means a role in monitoring the effectiveness of reintegration assistance and the new Return Coordinator and the High-Level Network for Return have a role to 'promote a more coherent approach to reintegration assistance in relation to specific partner countries.' However, this again seems patchy and more focused on harmonising support packages than monitoring the situation for returnees.

MONITORING RELATIONS WITH THIRD COUNTRIES ON RETURN

The main monitoring of relations with third countries on return is through the Visa Code Regulation to ensure that third countries are cooperating on returns. This in itself is telling. The European Commission completed its first report in 2021 assessing how third country governments respond to return and readmission requests issued by EU Member States with the possibility of using visa facilitation or restriction as leverage to make third country governments cooperate more on return. The list of countries for which the EU envisaged visa measures was not public, but it was reported that the EU considered adjusting the visa regime for Iraq, Iran, Libya, Senegal, Somalia, Mali, The Gambia, Cameroon, the Democratic Republic of Congo, Egypt, Eritrea, Ethiopia and Guinea-Bissau. ECRE had concerns about exchanging returns for visas both for individuals who may face human rights violations, but also for the EU's wider relations with a country or region.

THE RETURN COORDINATOR

The Return Coordinator was appointed in March 2022. As it is a new role, it remains to be seen how the coordinator engages with the different efforts to monitor return. A useful first point would be to bring together the scattered threads of EU monitoring on return implementation to identify gaps and improvements so that different stakeholders can start to have confidence EU return policy is being implemented with fundamental rights at its core.

III. RECOMMENDATIONS

» At national level, all stages of forced and voluntary return procedures should be monitored by an independent body, such as the ombudman or national complaints mechanism, which is not responsible for examining applications for asylum or execution of refusal of entry and returns. Civil society should be involved in monitoring and public monitoring reports should be issued.

» Member States should ensure timely and complete statistics on returns are available. They should be disaggregated to show those currently not able to return (ongoing appeal, moratorium, deportation ban or other) and the European Commission should amend the return rate accordingly.

» Member States should ensure monitoring covers all stages of return: pre-, during and post-removal. Post-removal monitoring should feed into impact assessments of reintegration programmes to ensure they work for individuals and communities.

» The European Commission should introduce more rigour in EU policy discussions and documents and show a clear evidence base for return policy making.

» The European Commission with the support of the Return Coordinator should ensure that there is an open, public reporting procedure on fundamental rights observance by Member States on return procedures, presented annually to the European Parliament. Expertise from the Fundamental Rights Agency, ombudsmen and civil society should be used alongside Member State and Frontex reports and Schengen evaluation information.

» The European Commission and the EU External Action Service should assess the broader impact of the EU's punitive focus on return cooperation on its relations with third countries, alongside its annual assessment of third countries' cooperation with regard to readmission, and include it in its report back to the European Parliament on Visa Code implementation.