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Readmission agreements of the European Union - A policy instrument with lacking incentives

Introduction

In 2015, the European Union faced a new dimension in terms of number and variety of origin of people seeking asylum in member states of the European Union (EU). Until September 2015, Eurostat registered over 645,015 first-time asylum seekers in the territory of the EU.[1] The European external migration policy once again faced critics and pressure arising from the events in 2015 in the Mediterranean Sea and other 'hotspots' of migration routes, such as Greece and the Balkan states. Following the *European Agenda on Migration,* proposed by the European Commission under its president Jean-Claude Juncker in May 2015, documents, plans and policies have been discussed and set up. While in 2015 political debates mainly focused on the distribution of asylum seekers and the securitization of the Union's external borders, with the events in Cologne on New Year's Eve 2016, another aspect, an effective European return policy is being stressed. And the record is not a positive one. In 2014, less than 40 percent of the decisions issued a departure of irregular staying migrants were exercised.[2] African states, especially, often challenge the European migration policy, disregarding for example the obligation to readmit own nationals.[3]

Negotiating European Union Readmission agreements with third states

Aware of this problem, the European Commission published the *EU Action Plan on Return* in September 2015. It highlights the return of people who do not have the right to stay in Europe as an "essential part"[4] of a functioning EU migration and asylum system. In its communication, the European Commission therefore aims to 1) increase the effectiveness of the EU system to return irregular migrants and 2) enhance cooperation on readmission with countries of origin and transit. The idea behind this : where there is a functioning system of systematic return, many people might be kept from risking their lives if they know they will be forced to return.

Readmission pertains to the removal of "any person who does not, or no longer, fulfil the conditions of entry to, presence in or residence".[5] Since the treaty of Amsterdam has provided competences in this policy field, the EU aims to strengthen its cooperation with countries of origin and transit in readmission agreements.[6] Today, the competence to conclude such agreement on the level of the European Union is integrated in Article 79 (3) of the TFEU.

And these readmission agreements on European level do not only rephrase agreements already concluded on bilateral level between a member state and a non-member-state.[7] In contrast to most agreements on state-level, EU readmission agreements also require the readmission of third state members, who transited through the contracting non-member state. It is this 'third national clause' which constitutes "[o]ne of the main stumbling blocks in the negotiation of readmission agreements".[8] It involves a set of high social, political and economic costs for the non-member state.

Resonance of national policy objectives in the negotiations

The negotiations on readmission agreements with non-European countries have hence recently become more and more difficult. On the one hand, when the EU entered into negotiations with Turkey and Morocco, both countries showing resistance to sign such agreements for a long time.[9] On the other hand, it has become practicse to embed readmission agreements in a broader framework of negotiations on migration and mobility. In negotiations with third states, having no prospect of accession, this allows the achievement of EU interests in migration policy as well as the promotion of "deal-sweeteners".[10] Visa facilitation has become one of the main incentives when it comes to negotiations on readmission agreements.[11] Financial assistance for implementing an agreement can be seen as another incentive.[12]

Until today, over 17 readmission agreements have been concluded and the EU is in negotiation with another five states.[13] The different outcomes, periods of negotiation and levels of integration show the importance of third state preferences in the negotiations on this policy instrument, as in its

nature, readmission agreements are seen as an agreement on the one hand and incentive-based policy instruments on the other hand.[14]

The position of a third state in negotiations with the EU is influenced by different factors: the first group consists in the geographical and political closeness to the EU and the salience of emigration in general and migration towards countries of the European Union in particular.[15] While this group of variables is being considered as independent from the negotiations at stake, a second group of variables is characterized by the negotiation-framework. Notably the credibility of threats and promises and the domestic adoption costs for the third state are determined by the incentives being made by the European Union during the negotiations and can be influenced by the Union itself.

To be able to cooperate on the readmission of own and third country nationals, the EU provides incentives in the form of other agreements, such as visa facilitation or visa liberation agreements. A mobility partnership (MP) can be seen as an 'umbrella', or framework, covering different types of projects and agreements. It comprises a broad range of instruments and programmes on issues like development aid, temporary visa facilitation, circular migration programmes and the fight against irregular migration, including the readmission of irregular migrants.[16]

Readmission agreements African countries – hard bargainers challenge the policy instrument

On regional level, the Cotonou agreement between the EU and the ACP-countries contains in Article 13(5)(c) a readmission phrase and an obligation to readmit their nationals. Further negotiations on more detailed readmission agreements are settled in the same article. In subsequent revisions the EU was, without success, particularly interested in further developing this article and making it automatically binding and self-executing.[17] Recently the EU put the topic 'return' on the agenda of the EU-African Valletta Summit in Malta in November 2015, reaffirming the importance of cooperation on readmission and return.[18] With Cape Verde, only one African state signed a EU readmission agreement until today. The archipelago can however be considered a particular case, depending strongly on trade with EU member states and seeing itself as a country with its feed in Africa, but with its head in Europe.[19] With its agreements on labour migration with several EU member states[20] and a Special Partnership

signed in 2007, main premises have been settled before the negotiations on a readmission agreement.

The EU shows great interest in readmission agreements with principal transit states in (North) Africa, such as Morocco and Algeria. But the negotiations become more difficult with third states, which are aware of their bargaining power and which cannot be entice with the 'carrot' of potential membership.[21] As "hard bargainers",[22] these states refused in signing a readmission agreement with the EU for over ten years. Moreover, a signature on a mobility partnership does not lead immediately towards the two flagship agreements on readmission and visa facilitation, as has been shown in the negotiations with Morocco. In a period of over ten years of negotiations, Morocco challenged the instrument of European readmission and was only willing to cooperate, once a package deal with visa facilitation was finally agreed upon. [23]

The lack credibility of EU promises

Coherence in external and migration policy of the EU is one of the most influencing factors for the perception of credibility of promises.[24] The EU's external migration policy is characterized by its multidimensionality. Each of the dimensions requires different legal bases and integration methods. As a result, pluralistic decision-making levels and different objectives appear.

However recommended by the European Commission, a majority of member states do not apply readmission agreements on the European level for all their returns but adapt national agreements and administrative procedures. Beside official readmission agreements, some member states fell back on a broader framework of non-official or non-standard agreements and cooperation on a bilateral basis (for instance police agreements or economic partnerships including a readmission phrase). Such informal bilateral agreements provide a flexible response to the different assumptions of such an agreement and can be easily renegotiated. Dealing with readmission through channels such as memoranda of understanding or exchange letters, provides the governments with broader room for manoeuvre. However, falling out of parliamentary and juridical control, they undermine the credibility of the European readmission policy. In 2014, the EU member states held more than 300 bilateral contracts with over 85 third-party countries.

Moreover, the mobility partnerships, are constructed as a legally non-binding declarations between the Commission, interested member states of the European Union and a third state. Participation on the side of the EU member states on such a declaration is voluntary. This had led to a divergent involvement of each member state, with France taking part in all mobility partnerships and Austria, Finland, Ireland and Malta not participating in any declaration. On the one hand, a member state decision to sign the partnership can be seen as well considered. On the other hand however the lack of a common position of the member states also sends also a message of non-coordination on European level towards potential partner states and therefore risks undermining the credibility of negotiations. Accordingly, as has been showed by Sarah Wolff in her work on the negotiations of readmission agreements with Turkey and Morocco, the lack of a common position of EU member states during the negotiations lead to a distrust on the credibility of EU promises on the Turkish side. Changes in the set of promises, can also lead to distrust. In the negotiations with Cape Verde, visa liberalization was demanded in return to the readmission of third state nationals. Even though Cape Verde succeeded in implementing visa liberalization in the first draft, with additional negotiation rounds, the offer has been replaced by the one of visa facilitation. Such changes in the European bargaining position cause uncertainty and lack of credibility and can endanger the conclusion of other agreements.

Recommendations

1. The European Commission has put emphasis on visa facilitation as a tangible incentive. However, mixing-up of agreements on readmission and those on visa facilitation also implies the risk of losing the possibility to negotiate on readmission agreements without the incentive of visa facilitation. This has been shown vividly during the negotiations on a readmission agreement with Turkey. Therefore, a framework partnership should consist of exchangeable tools, adapting adequate and specific incentives for each third country.

2. The negotiations on readmission agreements showed, that most third-countries are unwilling to accept the 'third national clause'. As readmission agreements with a third national clause represent high domestic costs for a third state, the need for third national clauses should be evaluated. Confronted with a high number of irregular migrants from countries without readmission agreements

with the EU, the focus should lie on the conclusion of such agreements. Sending back irregular migrants to transit states is a short-sighted and insufficient application of readmission. In the third Quarter of 2015, over 16,200 people have been registered as repeat applicants and sent back to transit states, where they often suffer as much as in their home countries, which does not serve as an adequate solution.

3. After they entered into force, the actions taken on mobility partnerships with third countries such as Cape Verde showed a clear imbalance between legal labour migration and the fight against irregular migration. In terms of credibility of promises this figures as a clear obstacle. The EU should therefore increase its actions on labour migration. Furthermore, educational seminars and study trips should be facilitated as has been done in opening the Erasmus Plus programme for more partner countries.

Conclusions

Recent negotiations with non-member states on EU readmission agreements have shown a need to restructure this policy tool. With its Action Plan on Return, the European Commission tries to address the main challenging points. However, a main obstacle in the negotiations of readmission, a common policy on migration of the EU member states, remains problematic. Without a common position in its external migration policy, the EU instruments lack of credibility, and a conclusion of agreements on such sensitive matters as readmission agreements becomes less likeable.

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