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Negative Sanctions and the EU's External Migration Policy

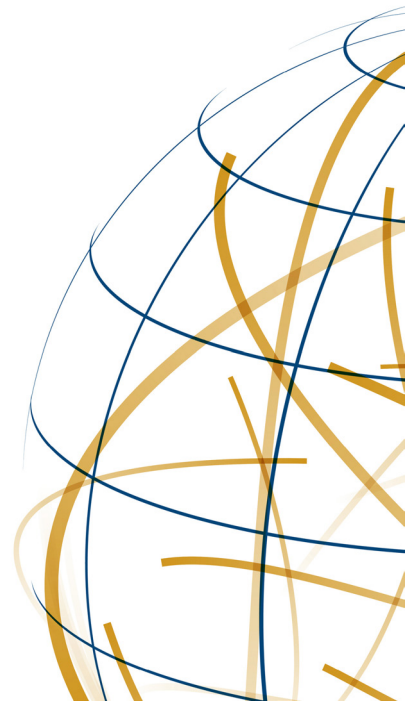
“Less for Less” Not Fit for Purpose

David Kipp, Nadine Knapp, and Amrei Meier

The European Commission has announced plans to present a new “Pact on Migration and Asylum” during the German EU Council Presidency. It is expected to provide impetus for the long-overdue reform of the Common European Asylum System, for the strengthening of the EU’s external borders, and for improved cooperation on migration policy with third countries. Many EU states see the latter as being particularly urgent in order to persuade countries of origin to readmit citizens who are obliged to leave the EU. In addition to positive incentives, sanctions against third countries that are unwilling to cooperate are increasingly being discussed. Although sanctions can have a short-term effect, they do not appear to be sustainable and can jeopardise more far-reaching goals of European foreign and development policy. Therefore, during its Presidency, Germany should instead advocate for migration policy instruments that aim to achieve a long-term and fair balance of interests between the EU and third countries.

Over the past 20 years, a common EU policy has developed in European border, asylum, and migration policy, at least in some areas. For a good decade, the European Commission has, for example, been able to negotiate with third countries on behalf of the member states on the readmission of rejected asylum seekers and irregular migrants, and it has already concluded 18 agreements to this end. Nevertheless, the return rate has fallen throughout the EU in recent years and, according to Eurostat, stood at 32 per cent in 2019. That means that only about one in three third-country nationals who were obliged to leave the country have

returned to their country of origin. It is likely that the Commission will propose measures to increase the return rate within the framework of the announced “Pact on Migration and Asylum”. Apart from legal and administrative hurdles in the member states, the implementation of the obligation to leave the country often fails due to the unwillingness of third countries to take back their citizens. The question is how the readmission obligation under international law can be better enforced while maintaining human rights standards.



Positive and Negative Conditionality

The principle of conditionality is regarded as one lever to influence the behaviour of a state. A distinction is made between positive and negative conditionality: The former aims to reward a state if it fulfils the imposed conditions (“more for more”); the latter concentrates on punishing or sanctioning a state for the lack of – or no – cooperation, for example by reducing, suspending, or terminating benefits (“less for less”). However, the effectiveness of restrictive measures is difficult to measure and is highly controversial in academic discourse.

The EU has been using the instrument in various policy areas for decades. For example, cooperation with third countries has been linked to political conditions such as the fulfilment of democratic or human rights standards. One important area of application is the EU enlargement policy, albeit with a mixed record: The prospect of EU membership could not motivate all accession countries to undertake sustainable reforms.

Conditionality in Migration Policy

At the end of the 2000s, the Commission also transferred the principle of conditionality to its external migration policy. It agreed so-called mobility partnerships, primarily with states in the eastern and southern neighbourhood. With these dialogue processes it aimed, among other things, to improve the level of cooperation with partner countries in the readmission of rejected asylum seekers or irregular migrants by offering the prospect of visa facilitation. However, this succeeded almost exclusively with the eastern neighbouring countries, but not with other states such as the North African partner countries Morocco and Tunisia.

In the Migration Partnership Framework, newly established in 2016, agreements were reached with five more distant African countries of transit and origin, namely Niger,

Nigeria, Senegal, Mali, and Ethiopia. Here, the incentive in the form of visa facilitation was waived. Instead, these countries were to be persuaded to cooperate in the readmission of their citizens primarily by means of financial incentives from the newly established EU Trust Fund (EUTF) for Africa.

In addition, informal and legally non-binding readmission agreements have increasingly been concluded in recent years, namely with Afghanistan (2016), Ethiopia (2018), Bangladesh (2017), Côte d’Ivoire (2018), Guinea (2017), and Gambia (2018). In addition to positive incentives, in these cases the EU is increasingly relying on negative sanctions.

Sanction 1: Reduction of Development Cooperation

One lever in this respect is the reduction of development cooperation. However, whether such measures increase the readiness of partner countries for readmission depends strongly on the respective context. For example, at the beginning of 2018 – after delaying the disbursement of EUTF funds – the Commission succeeded in agreeing with Ethiopia on a legally non-binding readmission protocol. As a result, the return rate rose from 8 per cent in 2017 to 17 per cent in 2019. Afghanistan, too, agreed to improved cooperation with the EU in 2016 in a declaration entitled “New Way Forward”. The EU’s implicit threat to cut financial aid, on which the national budget relies heavily, contributed to this. The new agreement enabled member states to significantly increase return rates in 2016, from 4 per cent across the EU in the previous year to 28 per cent.

Despite these increased rates of return, the EU’s action raises questions about its effectiveness, sustainability, and legitimacy. For example, if we look at the absolute number of returnees from EU countries to Ethiopia, it is striking that the number was only 205 in 2017 and 240 in 2019. In view of these small numbers, the question of proportionality arises. In Afghanistan, in

turn, after a brief increase, the return rate decreased again already the following year and was only 8 per cent in 2019 (2,370 returnees). Deportations to Afghanistan are heavily criticised by both UNHCR and non-governmental organisations due to the devastating security situation on the ground. The example also illustrates the difficulties generally associated with the threat of negative sanctions in a fragile context: If financial aid is cut off in the absence of cooperation, this can contribute to further destabilisation of the country, counteracting the security and development policy interests of the EU.

In other cases, the leverage effect of European development cooperation seems limited. For example, negotiations on a readmission agreement in 2016 failed due to Nigeria's lack of interest. As a result, a planned vocational training project financed by the EUTF to the tune of €50 million was not implemented. However, Nigeria is not dependent on these development funds like other countries. Other sources of income play a far greater role. On the one hand, there are remittances from migrants. They contribute a much larger share to the national budget than the total volume of development cooperation. In 2018, for example, remittances to Nigeria amounted to \$24.3 billion, whereas public development cooperation funds amounted to only \$3.3 billion. On the other hand, the EU is not Nigeria's only potential partner for cooperation: China in particular has become an important economic partner for Nigeria in recent years. Chinese investments and construction contracts between 2015 and 2018 were estimated at \$26.7 billion. Against this background, the European threat to reduce development funds cannot generate strong pressure.

Sanction 2: Visa Restrictions

Another application area of negative conditionality is to link readmission to EU visa policy. As early as 2017, the Committee of Permanent Representatives of the member

states created an informal mechanism intended to sanction third countries that did not cooperate in the readmission of migrants. In February 2020, it received a new legal basis with the amendments to the Schengen Visa Code. The new code stipulates that citizens of a country that does not cooperate sufficiently with the EU in the view of the Commission must accept longer visa processing times and higher fees.

However, it is not only unclear what "sufficient" cooperation will look like exactly. The overall effectiveness of a stricter visa policy must also be questioned. Visa restrictions have led to readmission agreements with Bangladesh (2017) and Côte d'Ivoire (2018). However, the return rate has not risen since then: In the case of Côte d'Ivoire, it has remained largely unchanged, and in the case of Bangladesh, it has even fallen – from 17 per cent (2017) to 11 per cent (2019). There is therefore no evidence of a leverage effect from the more restrictive visa policy.

As a counter-example, a similar mechanism already introduced in 2016 in cooperation with the countries of the Western Balkans is often cited. Here, the threat to suspend visa-free travel in the absence of cooperation has greatly increased the number of returns. However, what makes this example significantly different from other contexts is the geographical proximity of the cooperation countries to the EU, the intensity of cooperation in other areas, and the prospect of EU accession as a positive incentive.

In contrast, European visa requirements are already difficult to meet for many of the main African countries of origin of asylum seekers. Therefore, visa restrictions do not seem to be a particularly effective lever.

Sanctions in Other Policy Areas

In recent years, the Commission has repeatedly stated that it wants to use all policy areas for its migration policy objectives including mobility, energy, security, and digital policy. According to the EU

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trade strategy (Trade4All), the synergies between trade policy and migration are also to be explicitly strengthened. So far, however, aspects of return policy have not been included in EU negotiations with third countries. It is conceivable, however, that the pressure on the Commission, which is responsible for trade agreements, will continue to increase. This could be linked to demands to include conditionality clauses in agreements linking trade preferences to cooperation on readmission policy. Such an approach would not only contradict the World Trade Organization's requirement for equal treatment, but would also have strategic disadvantages. Such measures could undermine important efforts such as intensified trade relations and dialogue on an equal footing with African partners announced with the reorientation of the EU-Africa Strategy. This, in turn, could further strengthen China's influence on the continent.

Conclusions

Experience with negative conditionality shows that the threat of punitive measures has occasionally generated more cooperation on readmission. As a consequence, however, return rates have only risen temporarily, with overall very small absolute figures. Not only is the effectiveness of such a policy in question. It also often thwarts more far-reaching objectives of European foreign and development policy. This is the case when the threat of sanctions jeopardises partnership-based cooperation at eye level – partner countries reorient themselves as a result, and the EU therefore loses its ability to exert influence. Particularly against the background of the Covid-19 pandemic, it is not advisable to cut development cooperation funds to partner countries that are unwilling to cooperate. This

would aggravate the negative consequences of the global recession and the declining remittances on the living conditions in those countries.

Instead of pursuing the idea of negative conditionality, the German government should, in accordance with its departmental approach, advocate for comprehensive cooperation on migration policy during the German EU Council Presidency, based on a long-term and fair exchange of interests with third countries. This would also mean keeping an old promise and granting partner countries more legal migration opportunities if they cooperate on return policy. At the same time, improved democratic control of external migration policy by the European Parliament is indispensable to ensure transparency and compliance with human rights standards.

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