THE PROCESSING OF MIGRANTS' HEALTH DATA UNDER THE NEW EU RETURN REGULATION[*]

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ABSTRACT

Il presente contributo analizza il trattamento dei dati di salute nell'ambito della Proposta di regolamento della Commissione europea del 2025 che istituisce un sistema comune per il rimpatrio dei cittadini di paesi terzi soggiornanti irregolarmente nell'Unione. Sebbene la proposta miri a migliorare l'efficienza procedurale e ad armonizzare i meccanismi di rimpatrio, solleva notevoli preoccupazioni per quanto riguarda la tutela dei diritti dei migranti alla privacy e alla protezione dei dati personali, nonché la governance etica dei dati relativi alla salute. Consentendo la condivisione e il trasferimento d'informazioni relative a vulnerabilità, salute e necessità mediche, nonché di dati di salute, la proposta di regolamento sui rimpatri rischia di violare i diritti alla privacy e alla protezione dei dati personali dei cittadini di paesi terzi coinvolti. Il documento sostiene la necessità di un quadro normativo basato sul rispetto dei diritti fondamentali e sul Regolamento relativo allo spazio europeo dei dati sanitari per salvaguardare la salute dei migranti nel contesto della governance digitale della migrazione dell'Unione europea.

This paper analyses the processing of health-related data under the European Commission's 2025 Proposal for a Regulation establishing a common system for the return of third-country nationals staying illegally in the Union. While the Proposal seeks to improve procedural efficiency and harmonise return mechanisms, it raises significant concerns regarding the protection of migrants' rights to privacy and personal data protection, and the ethical governance of health-related data. By enabling the sharing and transfer of vulnerabilities, health, and medical needs information, as well as health-related data, the proposed Return Regulation risks violating the rights to privacy and personal data protection of the third-country nationals affected. The paper argues for a fundamental rights-based framework grounded in the European Health Data Space Regulation to safeguard migrants' rights within the European Union's digital migration governance context.

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1. Introduction

Migration and health policies intersect in many different ways, repatriation and return procedures being one of the main points of legal and ethical concern (A. Albanese, 2017: 12). Migrants' health may be a decisive factor for postponing or challenging an expulsion order and, currently, Directive 2008/115/EC contemplates the state of health of third-country nationals (TCNs) as a determining element for prohibiting their refoulement (art. 5 and, e.g., *Paposhvili v. Belgium*).

On 11 March 2025, the European Commission put forward a Proposal for a Regulation establishing a common system for the return of third-country nationals staying illegally in the Union. The new Regulation has been advanced to overcome the failure of negotiating the 2018 Proposal. The proposed Return Regulation places greater emphasis on digital surveillance infrastructures (EU Council, 2025) and, specifically, on the processing of migrants' sensitive information, e.g. health-related data (AccesNow, 2025). However, the safeguards foreseen in such an instrument are disappointing, and the new Return Regulation has been criticised for undermining the privacy and data protection rights of migrants through unsafe sharing of sensitive information (Human Right Watch, 2025). According to PICUM & Médecins du Monde International (2025), while the Proposal for a Return Regulation aims to improve migrants' continuous care throughout the repatriation process, informed consent and data-sharing (or -transfer) activities are not adequately addressed.

This paper explores whether—and to what extent—the proposed Return Regulation reconciles the objectives of the European Union's (EU) return policy with the legal requirements safeguarding the processing of health-related data, and whether the European Health Data Space (EHDS) framework offers a more coherent rights-based solution. Having illustrated the importance of migrants' health to be returned, as well as the need of governing their personal data (par. 2), we inspect two sets of provisions foreseen under the new Return Regulation: health-information sharing between Member States (par. 3.1.) and transferring of health-related data to third countries (par. 3.2). Finally, we compare the safeguards provided for in the Proposed Return Regulation with the data protection regime provided for in the EHDS Regulation to highlight possible gaps and weaknesses for enhancing migrants' right to personal data protection in the return context (par. 4).

2. Background: migrants' health in return procedures and health data governance

2.1. Migrants' health in return procedures

Migrants subject to a return or repatriation order suffer from different health backgrounds. For instance, migrants in an irregular situation might endure long journeys in precarious conditions—such as overcrowding and unsanitary conditions—until entering the EU, which can lead to serious physical and mental illnesses. They also tend to have great difficulty accessing health services in the country of destination or transit (Y. González-Rábago & others, 2025) unless held in reception centres.

Specifically on return, migrants' access to continuous care can be deceitful, particularly for those with chronic conditions, disabilities, or mental-health needs. When return decisions are recognised across Member States, or removals are arranged via readmission, migrants may experience an abrupt interruption of treatment or a lack of follow-up treatment. Detention contexts introduce further legal and human-rights oversight needs according to the European Committee for the Prevention of Torture (CPT). Indeed, health risks associated with detention increase depending on its duration: migrants detained under the return regime may face inadequate health care, limited access to services, increased exposure to communicable diseases or psychological stress, and a lack of transparent monitoring (F. Biondi dal Monte, 2025: 2). During the COVID-19 pandemic, for example, TCNs in an irregular situation were subjected to mandatory polymerase chain reaction testing, but the disease ended up spreading rapidly in reception centres (M. M. Mentzelopoulou & M. Spinelli: 5 ff.). Such vulnerabilities ensured that migrants' health became a subject of great attention in the context of returns, and with it, the governance of their data related to health.

2.2. Health data governance in the return context

Health-data governance touches ethical and legal concerns (Organisation for Economic Co-operation and Development (OECD), 2016), especially when applied to groups of TCNs in vulnerable situations (Council of Europe, 2025: 30 and 35). Migrants with an irregular situation may try to avoid contact with health-care systems for the risk of conflating information with migration enforcement and, precisely, for fearing detention or an expulsion order (M. Patillo and others, 2023). Moreover, when migrants in an irregular situation participate in data collection, their precarious legal status, power asymmetries, language barriers, and cultural differences amplify vulnerability *vis-á-vis* the rights to privacy and personal data protection (International Organisation for Migration (IOM), 2023: 17). Consequently, it is very difficult to find information on irregular migrants' health-related data.

G. Marchetti & others (2020) highlight that immunisation practices applied to migrants—including asylum seekers and migrants in an irregular status—vary from one Member State to another within the EU and that, in the absence of interoperable solutions between the States of origin, transit, and destination, it is not possible to know people's clinical history, which is why they may be subjected to unnecessary burdens. For their part, P. Benavente & others (2025) warn about the existence of multiple barriers for refugees, migrants, and irregularly staying TCNs when it came to receiving the COVID-19 vaccine, such as waiting times, distance from vaccination centres, and trust. Indeed, the irregular status might discourage migrants from moving within and outside the country where they are located, and, therefore, many TCNs did not go to vaccination centres during COVID-19. These challenges and gaps form the backdrop against which the proposed Return Regulation's provisions on health-related data must be assessed.

3. The proposed Return Directive and its implications for the health of TCNs

The proposed Return Regulation introduces a comprehensive overhaul of the EU's return system for TCNs without a legal right to stay in the EU (EU Council, 2025). It would provide for a common return procedure applicable across the Member States by introducing new mechanisms to recognise and enforce a European Return Order and prevent onward unauthorised movement within the Union. In addition, the Return Regulation would ensure information on data sharing and transfer relevant to return operations, including identity, travel documents, and biometric data for identification purposes. The legislative text notes that 'efficient administrative cooperation and information sharing should be based on clear rules', including those in Regulation (EU) 2018/1860 on the Schengen Information System (SIS) for return purposes (F. Tassinari, 2022). Nevertheless, the European Data Protection Supervisor (2025: 9) noted that, in reality, the system implemented by the Return Regulation would allow Member States to choose between different sources of information, including national ones, paving the way towards an unknown, new initiative on digitalisation of case management in the area of return.

3.1. Health-information sharing between Member States

In terms of health-related data, the Proposal significantly expands the scope of the information that might be shared among the Member States, while providing minimal safeguards. First, it introduces new provisions on migrants' health checks staying in the territory of a Member State for readmission and reintegration purposes (recital 12 Return Regulation). Second, it includes 'emergency health care and essential treatment of illness' as a condition for postponing removal (art. 14 Return Regulation) and to the benefit of detained vulnerable persons [art. 34(4) Return Regulation]. Information on the vulnerability, health,

and medical needs of TCNs [art. 38(6), let. k) Return Regulation] is not contemplated by existing EU components and large-scale Information Technology (IT) systems according to art. 4, point 15, of the interoperability Regulation (EU) 2019/818, or as supplementary information in compliance with the SIS Regulation (EU) 2018/1860 [art. 38(4) Return Regulation]. Thus, Member States will need to find other channels to convey the information. Art. 38(5) of the proposed Regulation adds that the requested data shall be 'adequate, relevant, accurate, limited to what is necessary for the intended purpose and shall set out the grounds on which it is based' in respect of the principle of minimisation [art. 5(1), let. d) General Data Protection Regulation (GDPR)].

Nevertheless, the proposed Return Regulation will enable the sharing of "vulnerability", "health", and "medical-needs" data of TCNs, with little mention of independent oversight or data-protection safeguards (HUMAN RIGHTS WATCH, 2025). Health data is a special category of personal data under the GDPR art. 9, requiring enhanced safeguards, including a valid legal basis for processing it under art. 9(2) GDPR—e.g., reasons of substantial public interest as per art. 9(2), let. g)—, and further conditions implementable in national law (O. FEENEY ET AL., 2020). Notably, the latter requisite, also known as "opening-clause", may pose significant obstacles to the sharing of health-related data among the Member States, thus hampering the continuity of migrants' healthcare treatment (*Krankenversicherung Nordrhein* §66, and I. DE MIGUEL BERIAIN, 2023). Besides, health-data processing within the EU must comply with the GDPR's art. 6 core principles.

Ethical data governance for migrants' health- data suggests inserting additional, specific safeguards, like: ensuring voluntary and informed consent, or information on the appropriate legal basis chosen for processing; participation of migrant communities in health data-governance decisions, if possible; strict purpose limitation (data collected for health care should not be shared or linked for law enforcement needs); anonymisation or pseudonymisation where appropriate as per art. 89 GDPR; data protection impact assessment in case of large-scale processing [art. 35(3), let. b) GDPR]; clear accountability and transparency rules under the responsibility of the data processor and controller (K. BOZORGMEHR & OTHERS, 2023). Arguably, concerns surrounding the processing of health information are even more acute when these are transferred beyond the EU.

3.2. Transferring health data to carry out the return operation and reintegration

Under the new Return Regulation, the transfer of health-related data of TCNs to third countries for the return operation and reintegration should be carried out according to Chapter V of the GDPR, Chapter V of the EU Data Protection Regulation (EUDPR), and in respect of the principles of non-refoulement, proportionality, and necessity under the EU Charter of Fundamental Rights (CFREU) [art. 41(3) Return Regulation]. Such a reference implies full compliance with EU personal data protection legislation by the competent authority or the European Border and Coast Guard Agency (EBCG Agency), together with

the relevant case law (*Maximillian Schrems I and II,* e.g.).

Art. 41 of the proposed Return Regulation contemplates two types of transfers: medical assistance data transfer [art. 41(1) Return Regulation] and transfer of data concerning health [art. 41(2) Return Regulation]. In both cases, the transfer would be carried out on an *ad hoc* basis [cfr. art. 49 of the GDPR] when meeting two cumulative conditions: The transfer is necessary for the purposes of carrying out the return operation or providing integration assistance (1.); and the TCN whose data is transferred had been informed that their personal data may be shared with the authorities of a third country to carry out the return operation (2.). Additionally, when transferring medical assistance data, the competent authority/EBCG Agency should verify that the transfer does not risk breaching the principle of non-refoulement.

Hence, any transfer of health-related data can be justified based on reasons of substantial public interest [art 9(2), let. g) GDPR], or to protect the vital interests of the data subject [art 9(2), let. c) GDPR]. Consent, in fact, is only one of the possible legal bases for the legitimate processing. The proposed Return Regulation does not clarify key points regarding the health data governance, though, such as the "competent authority" responsible or in charge of the processing (i.e., accessing and transferring), including law enforcement agencies, migration authorities, or specialised medical personnel involved in the return procedure. As far as the EBCG Agency is concerned, the transfer of health-related data follows art. 86(3) of Regulation (EU) 2019/1896, which (arguably) recalls the EBCG Agency's agreements and arrangements concluded in line with Chapter V of the EUDPR (L. MARIN, 2020). Yet, the Agency has no explicit competence regarding the inspection of migrants' health when returned (art. 10 Regulation (EU) 2019/1896).

Finally, the Return Regulation requires that the controller inform TCNs that their health data may be shared with the authorities of a third country. Any such transfer for return or reintegration purposes shall be documented and made available to the competent supervisory authority '[…] including the date and time of the transfer, information about the receiving third country's competent authority, the justification that the transfer complies with the conditions laid down in paragraph 1 or 2 and the personal data transferred' [art. 51(1) GDPR and 52(1) EUDPR]. However, health data transfer is not always the optimal solution if the European Health Data Space (EHDS) is taken as a relevant normative and technical comparator.

4. Reconciling health-data processing in the return policy with the EHDS initiative

Two different infrastructures are being implemented under the EHDS Regulation (namely MyHealth@EU and HealthData@EU), which will become the main channels for processing electronic health data in the EU, including migrants'. Specifically, the EHDS Regulation will enable the processing of electronic health data for the provision of healthcare (primary use),

or for purposes other than the initial one, as specified under Chapter IV of the EHDS Regulation (secondary use).

As such, the sharing of information between the Member States concerning TCNs' vulnerability, health, and medical needs could be performed via MyHealth@EU, if the purpose of the processing is traced back to the provision of healthcare [e.g., art. 9(2), let. c) GDPR] rather than return, readmission, and reintegration straightforwardly. With this reading, TCNs would be ensured the right to access their electronic health data, insert information in their own Electronic Health Record, rectify personal electronic health data, restrict the access of health professionals and healthcare providers, and the right to opt out from the access to their personal electronic health data (arts. 3-10 EHDS Regulation). Besides, the processing of electronic health data under the EHDS Regulation would enable access to such sensitive information—cf. Annex I EHDS Regulation—to health professionals only, 'irrespective of the Member State of affiliation and the Member State of treatment' [art. 11(1) EHDS Regulation]. In sum, the EHDS would ensure that health-care rights and data-protection rights thereto are not compromised during the return procedure, and that migrants retain accessible and effective avenues to seek redress in case of breach.

As far as the transfer of health-related data is concerned, the scope of the EHDS Regulation does not cover their processing in the context of return (art. 53 EHDS Regulation). However, the EHDS Regulation introduces important safeguards to process and protect even non-personal health data, which might turn out to be of a sensitive nature if reidentification is possible. Moreover, the EHDS Regulation incorporates by reference the regime on the transfer of personal data set down in the GDPR Chapter V. Thus, the access to or transfer of personal electronic health data to a third country or international organisation should be supported by enhanced safeguards as per art. 9(4) GDPR and arts. 24(3) and 75(5) EHDS Regulation [art. 90 of the EHDS Regulation]. This implies that a third country or international organisation's national contact point might become an authorised participant to MyHealth@EU or HealthData@EU, guaranteeing (as a general rule) the non-disclosure of individuals' health data outside the EU. In this sense, the 'physical' extraction of data from one database to another (and the possible loss of control that would result from it) would not be possible, which ensures that personal, health-related data are always stored in a Secure Processing Environment (SPE).

5. Final remarks

The proposed Return Regulation represents a long-awaited turning point in the EU's migration architecture, completing the 2020 Pact on Migration and Asylum. It will create a system where migrants' health and data governance intersect with return enforcement procedures, raising data protection concerns. Among others, the processing of health-related data must comply with the enhanced safeguards provided for in the GDPR art. 9, taking into account the disadvantaged position of this group of people. Thus, the paper proposes

clarifying the methods for sharing and transferring migrants' electronic health data, as well as the authorities responsible for this, taking the EHDS Regulation as an example for both intra- and extra-EU exchanges.

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