



Statewatch analysis The original EU Directive on return (expulsion)

Summary

From September 2005 to December 2006, the Member States in the EU Council discussed a proposed Directive on 'return' (expulsion) of third-country nationals from the EU. At Member States' insistence, safeguards in the proposed Directive relating to persons in transit zones, human rights grounds for refraining from expulsion, restrictions on forced removal and suspended enforcement of expulsion decisions, re-entry bans, procedural safeguards and detention conditions were watered down.

Introduction

The coordination of policy and practice regarding expulsion has historically taken second place to border control in the EU. But Member States have been discussing a Directive which is designed to ensure that expulsion from any EU country means expulsion from the whole territory of the EU. The proposed Directive on common standards and procedures in member States for returning illegally staying third country nationals (COM/2005/391 final), under Article 63(3)(b) TEC, is the latest attempt by the EU to deal with the problems caused by the ability of irregular migrants to move between member States to avoid expulsion to their countries of origin, and to impose common standards in relation to expulsion decisions, legal safeguards, detention and the process of removal.

Background

The first measure adopted by the Council since the revised EC Treaty brought combating illegal immigration within EC competence was **Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third-country nationals**. Adopted in May 2001, the Directive's purpose was to make possible the recognition of an expulsion decision made by one Member State on grounds of criminality or other threat to public policy or national security, or breach of immigration law, against a third-country national who moved to another Member State. The Directive enabled, but did not require member States to enforce each other's expulsion decisions. If they did so, it would be by reference to national rules, and procedural safeguards were written in to the Directive. Member States enforcing

others' decisions would be compensated, and a Council Decision to that end was adopted in 2004, **2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC.**

Despite the financial compensation measures, the mutual recognition of expulsion decisions directive has been rarely used.¹ Proceedings for infringement had to be brought against four member states for failure to transpose it into national law. The UK (which opted in) did not transpose it but claimed to the Commission that UK law already complied with the Directive² - a claim which is certainly not self-evidently true.

In a series of documents on return policy from the Commission to the Council and the Parliament prepared in 2001 and 2002,³ the Commission referred to the need for operational coordination among member States, the need to prioritise voluntary return, and in parallel, the need to strengthen third States' obligation to re-admit their own nationals, which could be done by re-admission clauses in association agreements. The Commission emphasised the importance of a binding instrument which would ensure that no matter where an illegal immigrant or overstayer was within the EU, he or she should expect to be returned home, subject to international protection needs, human rights and to the best interests of children.

The Commission's Green Paper recommended the adoption of common EU-wide standards for ending lawful residence, expulsion decisions, detention and removal, to include safeguards to ensure compliance with international protection obligations, minimum standards for detention, including setting time limits and defining vulnerable persons who should not be detained, setting out common standards for methods of restraint and use of escorts, and for dealing with people with medical or psychiatric problems. It also suggested a mechanism for identifying countries to which removal should not take place for humanitarian reasons.

The Council adopted a Return Action Programme, on 25 November 2002, which had four components:

- (a) Immediate enhanced practical co-operation, including exchange of information and best practices, common training, mutual assistance by immigration officers and joint return operations;
- (b) Common minimum standards for return;
- (c) Country specific programmes;
- (d) Intensified co-operation with third countries on return

¹ See Outcome of proceedings of Working party on Migration and Expulsion/ Mixed Committee (EU-Iceland/Norway/Switzerland, 23 October 2006, 14608/06 p2, fn 1.

² Baroness Scotland, Hansard (HL) 19.1.05, WA 103.

³ Communication to the Council and the European Parliament on a common policy on illegal immigration (COM/2001/0672 final); Green Paper on a Community return policy on illegal residents (COM/2002/0175 final); Communication to the Council and the European Parliament on a Community return policy on illegal residents (COM/2002/564 final).

The Return Action Programme claimed to cover both forced and voluntary return, including the voluntary return of legal residents, but in practice it dwelt on forced return, and emphasised operational cooperation in expulsion of third country nationals as an immediate priority. One practical outcome was the **Directive on Transit for Expulsion, 2003/110**, which set out a mechanism for Member States' cooperation in expulsion of third country nationals. Another, **Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States of third country nationals who are subjects of individual removal orders**, enabled member States to share expulsion charter flights. Its annex includes provisions designed to ensure that returnees are checked for fitness to fly, and that medical records, documentation and escorts (who must be unarmed) are provided. A doctor must be present on all joint flights, and only a doctor may administer medication. The use of coercive measures on those refusing or resisting removal must be proportionate and must not prevent normal breathing. Sedatives are forbidden. The annex provides that removal is to be stopped if necessary to prevent harm to someone determined to resist. The legal status of the annex is unclear.

Difficulties identified by the Commission and the Council in enforcing expulsion EU-wide include the identification of irregular or undocumented migrants (without which it is impossible to ascertain whether they are the subject of enforcement proceedings in another member state, and equally impossible to return them to a putative country of origin); their re-documentation for removal; the associated problem of the reluctance of countries of origin to take their nationals back, never mind nationals of other countries who have travelled through their countries to get to Europe); irregular migrants' resistance to return; and their ability to move to another member state to avoid expulsion.

The problem of non-cooperating states of origin or transit has been tackled by a series of Community readmission agreements - with Russia, Ukraine, Albania, Sri Lanka and the Chinese Special Administrative Regions of Hong Kong and Macao (and under negotiation with Pakistan, China, Turkey, Morocco, Western Balkans states and Moldova), and readmission clauses written into cooperation agreements with Algeria, Armenia, Azerbaijan, Croatia, Egypt, Georgia, Lebanon, Macedonia, most Latin American states, Uzbekistan and the Cotonou Agreement between the EU and the African, Caribbean and Pacific (ACP) Countries.

Identification of undocumented migrants is being tackled by measures including the development of the Visa Information System (VIS) to include biometrics (fingerprints of all applicants for visit visas),⁴ which has been

⁴ Proposed Regulation concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (COM/2004/835 final, tabled on 26 December 2004.

criticised on data protection grounds⁵ (the EURODAC system already contains fingerprints of asylum seekers in EU member states). A central function of the future VIS will be its use in identifying undocumented persons apprehended in the Member States and retrieval of personal information. In addition, the new **Council Regulation (EC) 1987/2006 on the establishment, operation and use of the Second Generation Schengen Information System (SIS II)**, also includes provision for the use of biometric identifiers for 'wanted' persons, including 'aliens' to be refused entry to all Member States. As the House of Lords EU Committee acknowledged in its report on SIS II,⁶ there are no common criteria for listing persons to be denied entry, and in some Member States, anyone issued with an expulsion decision - and all failed asylum-seekers - are automatically made the subject of an 'alert' to stop them entering any other Member State.

The proposed Directive

On 1 September 2005 the Commission published its **proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (COM/2005/391 final)** to implement its plans for a common Community returns policy, replacing parts of the Schengen Convention. The proposed Directive's provisions were re-written in a series of meetings of the Council's Working Party on migration and expulsion/ Mixed Committee of the EU-Iceland/Norway/ Switzerland, from late 2005 to late 2006,⁷ and the Finnish presidency put forward compromise proposals,⁸ which were in turn hotly debated.

The search to define common standards for expulsion has revealed entrenched differences of approach among Member States to the termination of lawful residence, the criteria, conditions and time limits of detention, appeal rights, the mechanics of expulsion, and the standards and criteria to be applied in dealing with those eligible for removal but who cannot for the time being be removed. Member States' insistence on continuing to do things their way has resulted in slow progress towards a binding instrument, and ultimately to the radical redrafting of the proposal by the German Presidency in 2007 (see separate analysis).

The Directive excludes from its scope any consideration of the criteria for expulsion, and concerns itself only with third-country nationals staying illegally in the territory of a member State. As originally drafted, it held that although its provisions need not apply to those refused entry in a

⁵ Opinion of 23 March 2005 on the Proposal for a Regulation of the European Parliament and of the Council concerning the Visa Information System (VIS) and the exchange of data between Member

States on short stay-visas, OJ C 181, 23.7.2005, p. 13; 'EU data protection working party criticises proposals on VIS, Statewatch news online

<http://www.statewatch.org/news/2005/sep/09eu-vis-art-29-rep.htm>

⁶ HL EU Committee, 9th report of 2006-7, HL 49, para 67.

⁷ EC documents 14814/05, 6008/06, 10002/06, 11051/06, 11456/06 (interinstitutional files).

⁸ Documents 13451/06 (Presidency compromise suggestions on Articles 1-10, 6.10.06), and 15165/1/06 REV 1 (Presidency compromise suggestions on Articles 11-22, 15.11.06).

transit zone, they should have no less favourable treatment in respect of safeguards in the implementation of removal and its postponement.⁹ These minimal guarantees for fair treatment of those in transit zones were watered down for lack of support by Member States, who would prefer no reference at all to those in transit zones.¹⁰ Following these revisions, it is not clear whether the Directive would have applied to all refused asylum claimants, who may not have been admitted to the territory at all in some member States.¹¹

The Directive would not have applied to EEA nationals, or to third-country nationals who are family members of EU or EEA nationals exercising free movement rights.¹²

Art 4 would have provided that, as a minimum standards instrument, the Directive was without prejudice to more favourable provisions in bilateral or multilateral agreements, Community provisions (such as Directive 2003/109/EC on the status of long-term residents and Directive 2004/5/83/EC on minimum standards for qualification as refugees), and to Member States' right to adopt or maintain more favourable provisions which are compatible with the directive.

'Return' would have been defined as the process of being sent back to one's country of origin, transit or another third country.¹³ Thus, it would have included the bizarre concept of 'return' to a country which the person has never been in.

The original draft envisaged a two-stage process for return: a return decision (ie, the expulsion decision) followed, generally after 28 days, with a removal order, although it provided for the possibility of serving both together.¹⁴ This immediately caused problems with the Dutch delegation, who complained¹⁵ that the two-stage process fundamentally undermined the way of doing things in the Netherlands, which is to serve a decision to refuse further leave to remain, an expulsion decision and a removal order all together, which they claimed streamlines procedures and clarifies and consolidates appeal rights. They obtained a 'clarifying recital' following Art 3(d) enabling this practice to continue. The Dutch delegation also

⁹ Art 2(2).

¹⁰ Article 2 became Article 3 in the Presidency's compromise proposal 13451/06 of 6 October 2006; procedures on removal at the border were specifically excluded by a new Art 3(2). Art 3(3), the old 2(2), includes minimum standards for those in transit zones, but no delegation wants to retain the paragraph.

¹¹ In some Member States, including the UK, asylum seekers who claim at the port are not given leave to enter, but 'temporary admission', so they are never considered to have 'entered' the country even if they are there awaiting the outcome of their claim for years. It is not clear whether the Directive will apply to such people, who are refused leave to enter when their asylum claim is rejected.

¹² Art 3(4), originally Art 2(3).

¹³ Art 2(c), originally Art 3(c).

¹⁴ Art 6(1)-(3).

¹⁵ In the working party meetings referred to in fn 6 above; and also in a separate document, *Dutch position on the return directive*, 15701/06 (22 November 2006).

complained that people unlawfully on the territory did not need the ‘grace period’ of 28 days to leave before a removal order could be served, since they must be aware of their status as overstayers or illegal entrants. They wanted the Directive to withhold the possibility of voluntary departure from overstayers and illegal entrants.

Respect for fundamental rights

The preamble to the original proposed directive referred to the best interests of the child and respect for family life as primary considerations (recital 18), and provided that the Directive is without prejudice to Refugee Convention obligations (recital 19) and respects fundamental rights (recital 20).

Art 5 as originally drafted required Member States to take account of the nature and solidity of third country nationals’ family relationships, the duration of their stay in the Member State and the existence of family, cultural and social ties with their country of origin. Member States must also take account of the best interests of the child in accordance with the UN Convention on the Rights of the Child. Art 6(4) provided that no return decision may be issued where return would breach fundamental rights such as non-refoulement, the right to education or family unity. Art 6(5) enables member States to offer a right to stay for compassionate, humanitarian or other reasons.

In the Council Working Party many Member States objected to the idea expressed in Art 6(4) that rights to education and to family unity precluded removal. The UK and Greece also objected to references to ‘social ties’ in Art 5. The Finnish delegation proposed merging articles 5 and 6(4) into a provision requiring member States to have regard to the principle of non-refoulement, family relationships and family, cultural and social ties with the country of origin, and the best interest of the child. The Finnish Presidency compromise proposal, merging Arts 5 and 6(4), gave effect to these objections and suggestions, omitting references to rights to education and family unity, and to cultural and social ties. The amended Art 5 required Member States considering action under the Directive to take account of: the principle of non-refoulement; family relationships; and the duration of the person’s stay in the Member State; and the best interest of a child. **The result is a significant dilution of human rights compliance in decisions under the directive.**

Termination of illegal stay

Chapter II deals with the termination of illegal stay. Subject to international obligations and humanitarian considerations, Art 6 would have obliged Member States to issue a return decision to any third-country national staying illegally on the territory. As originally drafted, Art 6(6) precluded a return decision against an illegally resident third-country national with residence rights elsewhere in the EU who goes back voluntarily, and Arts

6(7) and (8) precluded a decision while an application for granting or renewing a residence permit or other right to stay is being pursued.

A number of States, including the UK, objected to the provision precluding return decisions against illegal immigrants with residence rights in another EU member state. Many Member States also objected to the provisions requiring authorities to wait until pending applications had been determined before issuing return decisions. A new Art 6(2) in the compromise proposal provide that illegal migrants with residence rights elsewhere in the EU must go there immediately to prevent enforcement of a return decision, while Art 6(5), formerly Arts 6(7) and (8), replace the prohibition by a discretion to refrain from issuing a return decision where an application is pending.

The original Art 6(2) provided that the person should normally be granted four weeks to make a voluntary departure unless there was reason to believe he or she would abscond. Conditions may be imposed such as residence, reporting and deposit of a financial guarantee. Where there was a risk of absconding, or where someone issued with a return decision has not left within the 4-week period, Art 7 provided for the issue of a removal order, which was required to specify when removal will be enforced and to which country. The Dutch objections to these provisions have been noted above. In addition, Germany, Estonia and the UK were unhappy about restricting the issue of a removal order to those presenting absconding risks and those who had not returned voluntarily, wanting to issue immediate removal orders against a broader range of people including persons deemed a threat to public security, those with no resources and those who could not be identified. A large number of delegations, including that of the UK, also resisted the provision for Member States to indicate how long removal would take when issuing the order.

In response to the Dutch and other objections, the Finnish Presidency compromise (Art 6(3)) would have allowed member States to derogate from the voluntary departure provisions where the person poses a risk to public security, public order or national security. It also would have allowed member states to extend the period for voluntary departure, in response to objections that a four-week maximum period does not allow resident migrants much 'packing-up time'. The provisions in Art 7 for issuing an immediate removal order would no longer have been tied to the risk of absconding, nor would they have required a prior period of voluntary departure to have been granted, and the requirement to specify when the order will be enforced would have been diluted. **Thus, in response to Member States' objections, the provisions on forced removal would have been much tougher and the Commission's principle of giving priority to voluntary departure would have been fundamentally undermined.**

Art 8 as originally drafted provided that enforcement of a return decision could be postponed for an appropriate period having regard to individual circumstances (Art 8(1)), and had to be postponed where a third country national could not travel due to his or her physical state or mental capacity; where technical reasons made it impossible to enforce removal humanely

and with respect for the person's fundamental rights and dignity; and (in cases concerning unaccompanied minors) where there was no assurance of reception by a parent, guardian or competent official on return (Art 8(2)). In the compromise proposal, Art 8(1) would have become part of Art 6(3), while the requirement to postpone enforcement by reason of specified circumstances has turned into a discretion to postpone by reference to those circumstances. **Once again, pressure by Member States resulted in a dilution of protection for those subject to enforcement action.**

Ban on re-entry

Art 9, on re-entry bans following removal, proved extremely contentious. In its original form, it provided that removal orders were to include a re-entry ban of no longer than five years, (longer in cases of serious threat to public order or public security: Art 9(2)), and return decisions could do so. Factors to be taken into account in setting the length of the ban included whether it was the first removal order and public policy and public security considerations, and the ban could be withdrawn, in particular where it was the first expulsion, the person reported back to a consular post of a Member State and reimbursed the costs of the procedure. In addition it could exceptionally be suspended temporarily. The re-entry ban was said to be without prejudice to the right to seek asylum in one of the Member States: Art 9(5).

In the working party meetings, the UK expressed the view that states should be left to decide who should be made subject to a ban and for how long, while a group of other member states considered that in principle the ban should be for life, so that if re-entry was allowed it would revoke only the removal order and not the return decision. **As a result of these and other objections, Art 9 was substantially re-written.** The new proposal would have contained a clarifying recital to the effect that in cases of voluntary departure pursuant to a combined return decision and removal order, the re-entry ban attached to the removal order would not take effect. Article 9(2) would have specified that return decisions are to include a re-entry ban where there are concrete reasons for believing that the person may try to re-enter the EU illegally, having illegally entered or absconded before. They should also include a re-entry ban if the person represents a threat to public order, public security or national security, having been convicted of an offence carrying at least 12 months' imprisonment in a Member State, or where there are serious grounds for believing that they has committed or intends to commit serious offences in a member State. There would have been discretion to include a re-entry ban in other return decisions. The guidelines on the length of a re-entry ban would have been removed save for the maximum period of five years with the possibility of more in serious public order, public security or national security cases. An additional provision, Art 9(5), would have required a Member State considering offering a right to stay to a subject of another member State's re-entry ban, to consult that State and to take account of its interests. These provisions would have reflected the rules governing the current Schengen Information System (SIS) and the future SIS II.

Member States expressed dissatisfaction with the re-entry ban provisions in the compromise proposal.¹⁶ The UK and Irish delegations wanted member States to have complete discretion on the issue, while other Member States including Germany, Hungary, Spain, Netherlands and Poland wanted return decisions to include automatic re-entry bans. Belgium wanted discretion for overstayers and an automatic ban for illegal entrants.

Coercion

Art 10 would have provided that coercive measures to carry out removal must be proportionate and reasonable, and implemented with respect for fundamental rights and dignity, and Member States would have had to take into account the common Guidelines on security provisions for joint removal by air, annexed to Decision 2004/573/EC (the joint expulsion Decision). The German and Belgian delegation wanted to move the references to reasonable force and fundamental rights and dignity to the Preamble. In a more constructive intervention, the Finnish delegation proposed explicitly limiting the use of coercion to situations where the person refuses or resists removal. Save for a reference to national legislation, however, the Finnish Presidency compromise proposal made no amendments.

Procedural safeguards

Chapter III of the proposed Directive would have contained procedural safeguards. Art 11 would have required member States to state the reasons (factual and legal) for the decision, the main elements of which must be translated on request, and inform the subject of available legal remedies. Germany, Ireland, Luxembourg and Austria wanted to exclude those apprehended while entering illegally from the scope of the procedural safeguards of Article 11, and this would have been done by omission of the reference to Article 11 from the provisions of Art 3(3) on the transit zone. The UK proposed withholding reasons for a return decision where disclosure could 'pose a threat to national security', but this proposal has not been taken up. Finland, again the only constructive commentator, suggested that translation of the reasons document should be automatic rather than on request, as it is linked to the fundamental right of appeal against the return decision, and the words 'on request' would have been removed in the compromise proposal.

Art 12 provided for an effective judicial remedy, either suspensive or providing for the possibility of suspensive effect, with the possibility of obtaining legal advice and representation (by legal aid if necessary) and interpretation. Eleven member States rejected the need for judicial (as opposed to administrative) remedies, and thirteen entered reservations to the provision requiring appeals to have or allow for suspensive effect. The UK suggested excluding suspensive effect from appeals deemed manifestly unfounded. Nine Member States objected to the obligation on member

¹⁶ Document 13025/06, 16 October 2006.

States to provide legal aid. The Finnish Presidency compromise would have amended Art 11 to allow the remedy to be before an impartial body enjoying safeguards of independence, which has the power to review the decision and temporarily suspending its execution. Member States would have been able to subject the legal aid provisions to the proviso that they do not favour third country nationals over own nationals.

Art 13 originally provided that conditions of stay for those who cannot be removed for the time being had to be no less favourable than the conditions for asylum seekers set out in articles 7-10, 15 and 17-20 of Directive 2003/9/EC (the Reception Directive). These provide for limited freedom of movement for asylum seekers, measures to maintain family unity, access to the education system for minors, essential health care and provision for vulnerable people including children and torture survivors. Art 13 also have provided for written notice of suspension of removal for a specified period. A record number of States, 21, entered reservations to Article 13, objecting particularly to the requirement to treat those unable to be returned no less favourably than the specified conditions of reception for asylum seekers laid down in the Reception Directive. The UK objected to giving exact warning of when the removal order is to be enforced, to keep the deterrent effect of the removal and to reduce the risk of absconding.

The Presidency compromise proposals on Art 13 would have removed the references to the Asylum Reception Directive, but sought to reinstate similar provisions by requiring the maintenance of family unity as far as possible, standards of living capable of ensuring basic subsistence, necessary health care including at least emergency care and essential treatment of illness, and (subject to length of stay) access of minors to the education system. The special needs of vulnerable persons were to be taken into account. The requirement to notify of the date of removal would have been amended to bare notification of the temporary non-execution of the removal order. There has thus been considerable watering down of procedural protection, but less dilution of substantive rights (which however were pretty minimal in the first place).

Temporary custody

Chapter IV deals with detention, 'temporary custody', which according to the original draft of Art 14, should be imposed only where necessary to prevent a risk of absconding where less coercive measures would not suffice, and should be authorised either in advance or within 72 hours, in urgent cases, by judicial authorities. Temporary custody should be reviewed by judicial authorities monthly and the maximum period was six months. The Working Party considered the provisions for temporary custody at its meeting on 18 October 2006 (13934/06). The UK, Belgium, France, Portugal and Ireland wanted the requirement to detain someone believed to be an absconding risk (Art 14) to be made optional. Twenty-one delegations, including the UK, France and Belgium, entered reservations to the provision requiring temporary custody orders to be issued by judicial authorities, rather than administrative ones (not Germany, where only judicial

authorities can order temporary custody). There were also many reservations to the provision imposing a maximum of six months' detention (somewhat surprisingly, the UK delegation did not object to this, although currently UK law imposes no maximum time limit on detention for removal). Changes in the Finnish Presidency's compromise include extending detention powers to cover risks of 'avoiding or hampering' the removal process; allowing administrative authorities to issue temporary custody orders (subject to judicial review within 48 hours) and a maximum period of 4 to 8 months, extendable in cases of non-cooperation by the subject or delays in re-documentation. An additional clause provided that temporary custody ceases to be justified where it appears that a reasonable prospect of removal no longer exists. The Dutch delegation objected to the requirement for speedy judicial review of detention, on the ground that this overloads the judiciary and is not necessary to comply with Article 5(4) of the ECHR (obligation to allow the legality of detention to be tested promptly in a court).¹⁷

Safeguards relating to temporary custody would have been set out in Art 15. They would have included rights to contact legal representatives, family members, consular authorities and international bodies and NGOs. Detention should generally be in specialised facilities but, if in prison accommodation, detainees must be kept separate from ordinary prisoners. Children should not be detained in prisons and unaccompanied minors are to be separated from adults unless it is in the child's best interest not to do so. The situation of vulnerable people is said to require 'special attention.' These provisions were already a significant dilution of the Commission's indication in its second Communication on the returns policy,¹⁸ that unaccompanied children, elderly people, pregnant women, those with a serious physical or mental condition or disability, and those with independent evidence of torture, should generally not be detained.

In the Working party, some Member States protested at the cost of maintaining special facilities and wanted the freedom to use ordinary prisons. In the compromise proposal, requirements of humane treatment and respect for basic human rights would have been moved from the text to the Preamble, while provisions for prompt access to legal representatives, family members etc would have been watered down. However, the requirement for specialised facilities or segregation from criminal prisoners would have been retained.

Mutual enforcement

Chapter V (Art 16) dealt with apprehension of a subject of a return decision or removal order in another Member State. It provided that the second State has the option of carrying out the removal itself, pursuant to the decision of the first member State or under its own national legislation; requesting the expelling member State to take the person back; or issuing a residence

¹⁷ Dutch position on the return directive, 15701/06 (22 November 2006).

¹⁸ COM/2002/564 (final), 14 October 2002.

permit for protection-related, compassionate, humanitarian or other reasons.

Article 16 was considered at the Working Party's meeting of 6 November 2006 (14608/06). The UK, Belgium, Denmark, Germany, France, Italy and Portugal expressed concern at the 'added value' of the legal framework the Article sought to establish regarding member States' options on apprehending an illegal entrant subject to another Member State's return decision or removal order, given that a directive on mutual recognition of expulsion decisions already exists (2001/40/EC). Art 16 had not been re-drafted and was to be 're-evaluated'. The omission of this Article from the finished Directive would appear significantly to reduce the capacity of the Directive to achieve the goal of expulsion from the EU as a whole - although clearly, Member States didn't see it this way.

The Dutch delegation, supported by Denmark, Italy, Poland and Greece, expressed the view in the Working party sessions that the proposed Directive as a whole gave third-country nationals excessive rights and guarantees. By the end of discussions on the original draft, that was clearly no longer the case; the effect of the Working Party's deliberations, as we have seen, being significantly to increase Member States' discretion and to dilute the rights and safeguards of those affected by expulsion decisions. There was no longer any requirement to postpone removal because of fear that a returnee's health will suffer, or because of concerns regarding the destination country; no longer the safeguard of judicial (as opposed to administrative) review of removal decisions, and the attempt to prioritise voluntary over forced removal was unsuccessful.

The framework programme and European return Fund

The Commission's proposed Directive on returns is to be seen in the context of its framework programme for managing future migration to the EU. Its **Communication from the Commission to the Council and the European Parliament establishing a framework programme on solidarity and management of migration flows for the period 2007-2013 (COM/2005/123 final)** explains that half a million irregular migrants are apprehended annually in the EU, and 300,000 are removed. It proposes financial solidarity mechanisms covering four areas:

- controls and surveillance of external borders;
- return of third-country nationals residing illegally in the EU;
- integration of legally resident third-country nationals;
- asylum.

There will be an External Borders Fund, a European Refugees Fund (ERF), a European Integration Fund, and the return programme will have its own 'European Return Fund', as proposed by the Council in the Hague Programme, to be set up in 2008 to pay member States for expulsions on a basis taking into account both the numbers being expelled and the number

of returns carried out satisfactorily by the member State in the past. The four funds are said to complement each other as a coherent ensemble, both politically as parts of the EU's migration policy and operationally. The development of further functionalities for the VIS, SIS II and EURODAC systems is expressly not ruled out in the Framework programme communication. The concept of 'integrated return management' is central to the return programme, as is the need for sharing of information on the effectiveness of return programmes, conditions of return, incentives and more equitable cost-sharing of enforcement action.

With this proposed Directive, the EU is getting close to completing the project of Fortress Europe which it embarked on in the late 1980s to 'compensate' for open internal borders. The idea is that there will be no hiding place anywhere in the EU for those entering or staying illegally. Wherever they go, once traced they will be liable to be removed. Someone who is ordered to leave Italy, or Spain, or Denmark, can be picked up in the UK, France or Germany and removed from the EU.

The original 'Return Action Programme' emphasised the importance of proceeding as far as possible by voluntary returns. But in the process of agreeing the Directive, the principle of voluntariness has been abandoned, as have a number of safeguards which were designed to ensure that expulsion was fair, and that the rights of vulnerable people - children, the mentally or physically ill and torture victims - were properly protected. What is left is legislation which, if implemented, is likely to result in the spread of the worst expulsion practices, emphasising speedy removal over due process and human needs.

Sources (click to access)

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6. Council doc 15701/06: Dutch position paper

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Note: This analysis was prepared in February 2007 prior to the new proposals from the German Presidency - only the tenses have been changed to account for this.

