



Statewatch analysis Revising the proposed EU Expulsion Directive

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Summary

The German Presidency's proposed redraft of the Commission's proposed Directive on expulsion would rid the Directive of nearly all its content, including in particular the human rights safeguards against expulsion, the procedural rights of individuals, protection against and during detention, and safeguards against starvation pending expulsion and brutality during expulsion.

Introduction

In September 2005, the Commission proposed a Directive addressing the issue of 'return' (expulsion) of third-country nationals from EU Member States. During negotiations within the Council up until December 2006, Member States insisted upon weakening many of the proposed safeguards in the text (on the original proposal and the first set of proposed amendments to it, see the separate analysis).

In February 2007, the German Presidency of the EU Council suggested a radical new approach to the text, which would remove many of the provisions of the Directive altogether and simply refer to national law as regards most of the remainder (see Council doc. 6624/07, the 'German paper').

The paper states that extensive harmonisation of all aspects of expulsion should be ruled out. Instead:

"In some areas (re-entry and residence bans, legal remedies and temporary custody), the Presidency can see scope for phased Community-wide harmonisation. As a first stage, in the Presidency's view, Community rules should cover only some aspects of return and removal and must make allowance for Member States' established arrangements and procedures. More extensive harmonisation of return, including all the procedural rules, should be attempted only in the long term. In any event, it needs to be ensured that return and removal are not prevented or delayed by Community provisions."

In fact, as we shall see, even the provisions on re-entry and residence bans, legal remedies and temporary custody suggested by the German text are not really worthy of being described as ‘first-stage’ EC harmonization.

Return decisions and removal orders

The German paper suggests that there should be no EU regulation (at least for now) of the time period to return following a return decision, or as regards the application of removal orders. Nor (in accordance with proposed amendments by the Finnish Presidency) should EU law set out any conditions which would restrict the grounds on which a removal order could be issued.

As for postponement of removal orders, the German paper suggests that there should be no entitlement to postpone removal, only a possibility of postponement in specific cases. This appears to go further still than the weakening of Article 8 of the proposal in the Finnish Presidency amendments.

Re-entry bans

The German paper suggests that an EU-wide re-entry ban should be mandatory where a removal order has to be enforced, but would be optional in other cases. This would only entail a marginal increase in harmonisation in this area, and in particular would be objectionable as it would not set out circumstances in which a re-entry ban could *not* be issued (such as cases of voluntary compliance with a return decision or removal order within the required time limit).

The German paper leaves options open as regards whether bans would in principle be limited in time, or in principle indefinite. On this point, it should be recalled that on many occasions, the European Court of Human Rights has ruled that indefinite or lengthy entry bans will in some cases breach individuals’ right to respect for their private and family life.

Remedies

The German paper states that ‘[w]hether a return decision or removal order has to be issued in writing and what exceptions to this are allowed, what information on legal remedies is supplied to those concerned and in what language decisions are conveyed to them’ should be governed entirely by national law. This would empty Article 11 of the proposed Directive of any meaningful content.

While ‘[t]here should be legal remedies available against return decisions and removal orders’, the details are again to be left entirely to national law. Access to legal aid would be governed by national law, and national law would determine whether or not appeals against removals would have suspensive effect or even whether the persons concerned would have the

possibility to request suspensive effect. This would mean that Article 12 of the Directive would have little practical impact.

Detention

The German paper states that detention should be possible in cases where it would assist carrying out expulsions. There is no reference to providing for alternatives to detention.

The paper also states that '[l]ength of custody, legal safeguards available and review should be governed by Member States' own national law', and that detention conditions should be outside the scope of the Directive.

Expulsion to another Member State

The German paper makes the extraordinary claim that EC powers as regards expulsion to another Member State are 'in dispute', even though several measures dealing with this issue have been adopted and the relevant provisions of the Schengen *acquis* have been allocated to an EC Treaty 'legal base'. Therefore it argues that the Directive should contain no provision on this issue. This runs the risk that persons with a residence right in another Member State will be expelled outside the EU instead.

Treatment of individuals

The German paper states that treatment of individuals should not be regulated in the Directive. Presumably this means that the provisions on treatment pending expulsion as well as during expulsion will be dropped (Articles 10 and 13 of the Directive). This would end any opportunity for EC law to address the often terrible living conditions of persons awaiting expulsion (a serious issue if expulsion is delayed for months or years) or the frequently unpleasant and inhumane, and sometimes fatal, treatment of persons during forced expulsions.

Documents (click on link to access)

Statewatch analysis: The original EU "return" (expulsion) Directive:
<http://www.statewatch.org/news/2007/apr/eu-expulsion-sw-analysis-I.pdf>

COM (2005) 391: Proposed expulsion Directive:
<http://www.statewatch.org/news/2007/apr/eu-expulsion-dir-com-391.pdf>

Council doc. 6624/07: German Presidency paper
<http://www.statewatch.org/news/2007/apr/eu-expulsion-dir-6624-07.pdf>

5874/07:
<http://www.statewatch.org/news/2007/apr/eu-expulsion-dir-5874-07.pdf>

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