



Statewatch supplementary analysis: The Returns Directive - the final stages?

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Introduction

The EP and the Council have now reached agreement on a text of the proposed 'Returns Directive', although the Council has already changed its position on this agreement and it remains to be seen whether the plenary EP will support it. Despite some positive changes to the text which result from the EP's involvement in the negotiations, the agreed text of the returns Directive is still fundamentally deficient from the point of view of human rights as well as the basic principles which should underpin EU immigration and asylum law. Unless further amendments can be made, MEPs would have a difficult choice between approving an insufficient Directive and leaving in place inadequate levels of protection pursuant to national law.

Background: the Returns Directive

In September 2005, the Commission proposed the 'Returns' Directive, in order to set minimum standards to regulate various aspects of the process of expulsion from Member States. From the outset, the Directive was subject to qualified majority voting in the Council, along with the 'co-decision' process with the European Parliament (EP), which gives the Council and the EP equal powers regarding the adoption of legislation (see the more detailed discussion of the process below). The UK and Ireland chose to opt out of the Directive, while Denmark is precluded from opting in. The Directive would, if adopted, apply in part to the EU's Schengen associates (Norway and Iceland, and soon Switzerland and Liechtenstein).

Since interior ministries are particularly reluctant to set minimum standards in the area of expulsion, the negotiations on the Directive at Council level have been lengthy and difficult. During the German Council Presidency, in the first half of

2007, there were concerted efforts to water down the text considerably, which were analysed in detail in the [Statewatch analysis of May 2007](#). The subsequent Portuguese Council Presidency made an effort to negotiate with a view to improving the standards discussed during the German Presidency, presumably so that there was a realistic chance of agreement with the European Parliament. The text under discussion at the end of this period was analysed in the [Statewatch analysis of January 2008](#).

In the meantime, the EP had agreed on a joint position regarding the Directive within the civil liberties committee (the LIBE committee), which adopted a report containing proposed amendments to the Directive in September 2007. However, the vote on this report in the full plenary of the EP was delayed so that the EP could negotiate with the Council on the content of the Directive. The Slovenian Council Presidency, in the first half of 2008, began to negotiate formally with the EP on the Directive, with the result that a new Council draft of the Directive in February 2008 contained many concessions to the EP position which had been discussed. This draft, and a slightly revised version dating from March, were discussed in the [Statewatch supplementary analysis of April 2008](#).

An agreement between EP and Council negotiators was since reached on 23 April 2008. However, the Council Presidency initially failed to convince other Member States to back this deal. In order to convince them to support it, the Presidency made several changes to the text, as set out in [Council doc. 8812/08](#). It now falls to the EP either to hold a plenary vote on this text, or to resume negotiations with the Council with a view to reversing some or all of these changes.

Background: the 'co-decision' process

As pointed out above, the key feature of the co-decision process is the exercise of equal legislative powers as between the EP and the Council. The process begins with a Commission proposal, which is then examined simultaneously by a committee of the EP and a working group of the Council, sometimes with supplementary opinions from other committees and working groups respectively. Sooner or later, the EP reaches an agreement within the main committee, which is then voted upon by the plenary EP. For its part, the Council also reaches agreement within the working group, although this often requires agreement to be reached on the most difficult issues at the level of Member States' permanent representatives (equivalent to ambassadors) to the EU, known as 'Coreper', and/or at the level of ministers in the JHA Council.

At this point, the EP and the Council can do a deal on the text, which is known as a 'first-reading' agreement. This entails negotiations between the 'rapporteur'

appointed by the EP committee to oversee the report, on the one hand, and representatives of the Council Presidency (or successive Council Presidencies) on the other hand. There is no formal system to govern this process, and it is greatly lacking in transparency. Any deal reached at this stage must be approved by a qualified majority vote in the Council and by a **majority of the votes of MEPs** in the EP (ie if 600 MEPs are present and voting that day, a proposal needs 301 votes to pass).

If agreement is not reached at this stage, then the plenary EP votes for its first reading opinion, and the Council then adopts its first-reading position, known as a 'Common Position'. The process then moves to a 'second-reading', when the EP votes as to whether to accept the Common Position, or to reject or propose amendments to it. A rejection or proposed amendments at this stage require a majority of MEPs in favour (ie 393 out of the current 785 MEPs, regardless of how many MEPs are present and voting that day). The Council then decides, by a qualified majority, either to accept all of the EP's amendments or not. There are usually informal negotiations between the Council Presidency and the EP's rapporteur throughout the second-reading process and even beforehand, with a view to reaching a second-reading deal.

If there is no second-reading deal, then a 'conciliation committee' consisting of equal numbers of MEPs and Council representatives is convened. This committee has the task of negotiating a deal on the text. If it fails, then the legislative process is terminated. If it succeeds, then the final deal has a 'third reading' before the Council and EP, which must vote in favour by a qualified majority and by a majority of the votes respectively. The second and third reading processes are both subject to deadlines set out in the EC Treaty.

Most legislation subject to the co-decision process (about two-thirds) is now agreed at first reading. Around 30% of measures are agreed at second reading, and 5% at third reading. It is possible for the process to fail, either because the EP rejects the legislation at second reading, the conciliation committee fails to reach a deal, or because the Council or EP does not support the conciliation committee's text at third reading. Also, the proposal will be blocked if the Council fails to reach a first reading Common Position; this is by far the most common reason for proposed EC legislation not be adopted. Finally, a negative vote by the EP at first reading does not technically veto the legislation, but it has the practical effect of blocking the negotiations because it indicates that the EP would presumably then veto the measure officially at second reading.

A fundamental feature of the process is the cooperation between the EP's two largest parties: the Christian Democrats (EPP) and the Socialists (PES). The Liberals (ALDE) usually participate in agreements as well, and sometimes smaller

parties (the green, left and regionalist parties) also participate. The main reason for the two largest parties to cooperate is the special voting rule at second reading (a majority of the MEPs, rather than a majority of the vote), which influences first-reading tactics as well. This special voting rule is relevant because usually only 60-70% of MEPs turn up for votes. In light of this it is nearly impossible to obtain a vote for second-reading amendments or a second-reading veto unless the two largest parties have both agreed to this.

The practice as regards visas, borders, immigration and asylum law to date is to agree *a//* legislation at first reading. Twelve out of twelve adopted measures have been the subject of first-reading deals, and three more measures have been agreed at first reading. In the particular case of the returns Directive, a provisional 'first-reading' deal has again been reached. However, as noted above, this deal had to be altered to gain acceptance in the Council, and it remains to be seen whether the plenary EP will support the deal.

Remarkably, the Council Presidency and the EP rapporteur have not followed the usual practice of ensuring agreement among the two biggest parties, as the Socialists do not support the agreement. The agreed text will only be adopted in the EP plenary if there are enough votes from the EPP and ALDE parties, probably with some votes needed from the PES as well and perhaps some smaller parties as well. Press reports have indicated that some members of the ALDE have misgivings about their group's support, while some PES members have misgivings about their group's opposition. A significant point here is that the PES originally voted for the report on the Directive in the LIBE committee, but has since changed its mind following opposition from civil society, particularly as regards an 18-month period of detention for irregular migrants.

If there is a majority of the vote in support of the Council's current position when the EP plenary vote is held, then the Directive will be adopted in that form. If there is a majority of the vote in support of amendments, then the Council will either agree to all of them or adopt its own draft of the legislation, in the form of a Common Position. If a Common Position is adopted, then the EP will need to get a majority of *MEPs* at second reading to support amendments in order to compel the Council to address them; practically this means that at least some of EPP members will have to be convinced to support these amendments. The most important factor in the Council's position will be the approach of the next Council Presidency, France, which reportedly will be taking a very conservative line on issues of expulsion. The Presidency might decide, for example, not to continue with discussions on this proposal, or to seek further changes, likely in a more conservative direction.

A final point to mention is that a close vote might be decided by the position of British MEPs, while a very close vote might even be decided by the votes of Danish and Irish MEPs, even though those Member States will not be bound by the Directive. While those MEPs have every legal right to vote on the Directive, the 'political' right to do so might be questioned by some. But if those MEPs abstain from voting at *second* reading (if there is one in this case), this will count as if it were a vote *against* any amendments or a veto of the proposal, since amendments or a veto need the support of a majority of MEPs (rather than a majority of those voting) to pass at second reading.

Overview: the Returns Directive

General provisions

Chapter I of the Council's agreed version of the text (in Council doc. 8148/08) contains five Articles. Article 1 sets out the subject-matter of the proposal: 'common standards and procedures for returning illegally staying third-country nationals', in accordance with human rights law. Article 2 sets out the scope of the Directive: it would apply to all third-country nationals staying illegally in a Member State, except that Member States could decide (optionally) not to apply it to persons who were refused entry, or who were stopped 'in connection with' irregular crossing of an external border and who were not later allowed to stay in that Member State, or are being removed for criminal law reasons. Also, the Directive does not apply to persons with EC free movement rights.

Article 3 sets out definitions. The most important definitions are: the definition of 'return', which can be either to a country of origin or transit, or to another third country which the person concerned chooses to return to and in which that person will be accepted; the definition of 'entry ban', which applies to all the participating Member States; and the definition of 'risk of absconding', which is the 'existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is subject to return procedures may abscond'.

Article 4 concerns more favourable provisions, which can be set out either in agreements between the EC and/or the Member States with third countries, or in other EC legislation, or in national legislation, provided that such national legislation is 'compatible with this Directive'. Article 4(4) also requires Member States to apply certain rules in the Directive, and the principle of non-refoulement, to persons who have been excluded from its scope because they were refused entry at the border or stopped in connection with an irregular border crossing. Article 5 requires Member States to take 'due account of' the best interest of the child,

family life and the state of health of the persons concerned, and to respect the principle of non-refoulement, when implementing the directive.

Return decisions, removal and entry bans

Chapter II of the Council's agreed text contains six Articles concerning the 'termination of illegal stay'. Article 6(1) requires Member States to issue a return decision to every third-country national staying illegally on their territory, without prejudice to the exceptions in the other paragraphs of Article 6. First of all, Article 6(2) provides that a third-country national who holds a residence permit or other authorisation to stay in a second Member State is required to go back there instead; he or she would only be expelled to a third country in cases of non-compliance with the obligation to return to the second Member State or for reasons of 'national security or public policy'. Next, Article 6(2a) states that a third-country national may instead be sent to another Member State pursuant to pre-existing bilateral deal, but in that case the second Member State will then expel the person concerned to a third country. Article 6(3) gives a very wide discretion to Member States to regularise stays of irregular migrants, 'for compassionate, humanitarian or other reasons', although if a return decision has already been issued, Member States have the option of merely suspending it, rather than withdrawing it. Article 6(4) states that Member States 'shall consider refraining from issuing a return decision' to persons whose applications for renewal of a permit to stay are pending. Finally, Article 6(5) makes clear that a return decision can be issued as a single act along with a decision terminating legal stay.

Article 6a then addresses voluntary departure. The basic principle is that a return decision must allow for a possible voluntary departure within a period of between 7 and 30 days, although this is subject to exceptions. On the one hand, Member States 'shall, where this is necessary', extend the period for voluntary departure for an 'appropriate period' in 'individual case[s]', such as family and social links or the length of stay. On the other hand, if there is a risk of absconding, if an application for legal stay has been dismissed as 'manifestly unfounded' or fraudulent, or if there is a risk to public policy, public security or public health, Member States may refrain from permitting voluntary departure or grant a period shorter than seven days.

Article 7 requires Member States to remove a person once the period for voluntary departure has expired, or if no such period has been granted. Any coercive measures must be used as a 'last resort', and must be 'proportional', 'not exceed reasonable force' and be in accordance with human rights and the dignity and integrity of the person concerned. Member States must provide for 'an effective forced return monitoring system'. Article 8 implicitly sets a limit on the application of Article 7 by requiring or permitting removal to be postponed in

certain cases. Article 8a sets out specific safeguards concerning the return or removal of unaccompanied minors.

Article 9, concerning entry bans, was one of the most controversial provisions of the Directive. The final Council text states that an entry ban *must* be issued where a return decision was issued without a period for voluntary departure being granted or where an obligation for return was not complied with. In other cases, an entry ban *may* be issued. The length of the entry ban must be based on 'all relevant circumstances of the individual case' and 'shall not in principle exceed five years', although longer bans are possible in cases of 'serious threat to public policy, public health or national security'.

Member States 'shall consider withdrawing or suspending' an entry ban if the person concerned can demonstrate that he or she in fact left in compliance with a return decision. They must not apply an entry ban to victims of trafficking in persons who have been granted a residence permit pursuant to other EC legislation, but this is 'without prejudice' to the obligation to issue an entry ban where an obligation to return was not complied with, and also subject to an exception on grounds of public policy, public security or national security. Member States may refrain from issuing, or withdraw or suspend, an entry ban 'in individual cases for humanitarian reasons', and 'may withdraw or suspend' a ban 'in individual cases or certain categories of cases for other reasons'. A Commission statement indicates that when the operation of the second-generation Schengen Information System (SIS II) is reviewed, that will be 'an opportunity to propose an obligation to register in the SIS entry bans issued under this Directive', although of course Member States might choose to register those entry bans in the SIS even before they are obliged to do so.

Procedural safeguards

Chapter III, containing three Articles, concerns procedural safeguards. Article 11 requires return decisions, removal decisions and entry bans to be issued in writing and contain reasons in fact and law as well as information on remedies, although the obligation to give factual reasons can be limited by national law. The main elements of the decision must be translated upon request. Member States have an option not to provide a translation where persons have entered irregularly; but in that case they must supply information by means of a standard form. Article 12 gives a right to appeal before some sort of body, which shall have the power to review the decisions related to return, along with the possibility to obtain legal advice and legal aid *if national law permits it*. Article 13 provides for safeguards pending return, in the case of voluntary departure or postponement of a removal decision. The persons concerned must be given written confirmation of their position, and Member States must 'ensure that the following principles are taken

into account as far as possible', except where persons are in detention: family unity; emergency health care and essential treatment of illness; minors' access to basic education; and 'special needs of vulnerable persons are taken into account'.

Detention

Chapter IV contains four Articles concerning the controversial issue of detention. Article 14 states that persons subject to return procedures 'may only' be detained 'in order to prepare return and/or to carry out the removal process in particular when' there is a risk of absconding or if the person concerned 'avoids or hampers' the return or removal process. Detention is only justified while removal arrangements 'are in process and executed with due diligence'. It can be ordered by administrative or judicial authorities, and must be 'ordered in writing with reasons in fact and law'. If the detention was ordered by administrative authorities, there must be some form of 'speedy' judicial review. There must be regular reviews of detention, either automatically or at the request of the person concerned. If there is no 'reasonable prospect of removal' or the conditions for detention no longer exist, the person concerned must be released immediately. Conversely, detention shall be maintained as long as the conditions exist; this shall not exceed six months, except where national law permits a further period of up to one year because the removal operation is likely to last longer due to lack of cooperation by the person concerned or delays in obtaining documentation.

Article 15 concerns detention conditions, and addresses in turn: the place of detention (special facilities 'as a rule', separation from ordinary prisoners if detained in prison); the right to contact legal representatives, family members and consular authorities; the situation of vulnerable persons; the possibility for independent bodies to visit detention facilities; and information to be given to the persons concerned.

Article 15a sets out detailed rules on the detention of minors and families, while Article 15b allows Member States to derogate from certain aspects of the rules concerning speedy judicial review and detention conditions in 'exceptional' situations.

Chapter VI, concerning final provisions, in particular requires Member States to apply the Directive six months after adoption, and requires the Commission to report on its application every three years after that.

The EP/Council deal

The [Statewatch supplementary analysis of April 2008](#) pointed out that the EP had obtained concessions from the Council as regards the protection of excluded groups, a minimum period for voluntary departure, the postponement of removal, limiting the scope of the mandatory entry ban, exceptions to the entry ban, the scope of the right to a remedy, information on return decisions, the right to legal aid, the grounds for detention, the non-mandatory nature of detention, the review of detention, detention conditions and the detention of children.

However, the same analysis argued that the text was still too weak at that time as regards the maximum time-limit for detention, substantive safeguards against expulsion, the scope of the Directive, the rules on mandatory postponement of expulsions, the rules on mandatory re-entry bans, the possible limits on information given to expellees, the lack of automatic suspensive effect of appeals, and the grounds for and review of detention.

To what extent have these concerns been addressed by the final text agreed between the EP and the Council? The EP/Council's agreed text contains the following substantive changes as compared to the Council's March version of the text:

- a) the preamble now contains statements that consideration of expulsion decisions should 'go beyond the mere fact of illegal residence' (recital 4), that the immigration status of asylum-seekers should be determined in accordance with the asylum procedures directive (recital 5b), and that there should be a written confirmation of the status of people who cannot be expelled (recital 8);
- b) Article 2(2)(a) refers also to a subsequent acquisition of a 'right' to stay, rather than just an authorisation, as a grounds for applying the Directive to persons who were refused entry or stopped in connection with an irregular border crossing;
- c) the definition of the country of 'return' no longer includes countries in which the person concerned has established links, but rather only applies to countries of origin or transit or where the person concerned agrees to go and will be accepted (Article 3(c));
- d) there is an obligation, rather than an option, for Member States to extend the permitted period for voluntary departure 'where this is necessary' (Article 6a(2));
- e) one of the exceptions from the obligation to permit a period for voluntary departure has been narrowed down, referring to a *manifestly unfounded* application for a legal stay, rather than just an *unfounded* application (Article 6a(4));

- f) the obligation to provide for 'an effective forced return monitoring system' has been inserted (Article 7(6));
- g) assistance given to unaccompanied minors before return decisions are issued must be given by 'bodies other than the authorities enforcing return' (Article 8a(1));
- h) the possible withdrawal or suspension of an entry ban on grounds of timely compliance with a return decision is no longer 'upon request' of the person concerned, and entry bans can also be withdrawn or suspended on grounds other than humanitarian grounds (Article 9(3));
- i) there is an option, rather than an obligation, for Member States not to translate the grounds for their return decisions, et al, for persons who have entered illegally; and the standard form to be used in such cases will be set out by national legislation, instead of in an Annex to the Directive (Article 11(3));
- j) it is specified that detention can take place 'only' in order to prepare return and carry out the removal process (Article 14(1));
- k) an extension of detention for periods longer than six months is no longer permitted on grounds of pending appeal procedures (Article 14(5)); and
- l) independent bodies also have the possibility to visit ordinary prisons if they are being used to detain irregular migrants (Article 15(4)).

It can be seen that the text has been improved overall, particularly as regards the more limited definition of the country of 'return', the obligation to extend the period for voluntary departure, the narrower scope of the exception from the obligation to permit voluntary departure (which also narrows the scope of the obligation to issue entry bans), the obligation to provide for 'an effective forced return monitoring system', the independent assistance to unaccompanied minors before return decisions are issued, the wider possibilities for withdrawal or suspension of entry bans, the optional (rather than mandatory) exception from the obligation to translate return decisions, the more limited grounds to justify detention in general, and detention for longer than six months; and the scope for independent bodies to visit prisons.

However, the Council's revised version of this agreement has made a number of substantive changes to the text, as follows:

- a) recital 6 in the preamble states now that an extension of the period for voluntary departure 'should be provided for when considered necessary'; this appears weaker than the obligation in the main text (in Article 6a) that 'Member States shall, when this is necessary, extend' this period;
- b) recital 7 in the preamble now states that legal aid 'should' be made available and rules on legal aid 'should be laid down in national legislation, while Article 12(4) now states that legal aid 'may', not 'shall' be granted;

- c) recital 9 now states that Member States 'should be able to rely on various possibilities to monitor forced return'; this does not directly contradict the obligation in Article 7(6) to provide for 'an effective forced return monitoring system';
- d) recital 10 in the preamble now states that, as regard the length of entry bans, the fact of multiple prior return decisions or removal orders or the entry of national territory during an entry ban 'should be particularly taken into account'; this could be applied to weaken the obligation to set the time period of the ban in individual cases as well as the normal five-year limit on entry bans; and
- e) there is a new Council statement, requested by the EP, to the effect that 'the implementation of this Directive should not be used in itself as a reason to justify the adoption of provisions less favourable to persons to whom it applies'.

Despite the further concessions made to the EP's position in the EP/Council deal, which have been undercut to some extent by the Council's revised version of the deal, there has been limited or no progress as regards the points identified as problematic in the previous analysis. In particular: 18 months of detention would still be permitted (although admittedly the number of grounds for permitting it would be reduced); the substantive safeguards against expulsion have not been strengthened (although admittedly the rules on mandatory postponement of expulsions have been strengthened); the scope of the Directive is still too limited; the obligation to establish a mandatory entry ban is still too broad (and the corresponding obligation *not* to issue an entry ban is far too narrow), as is the extent of Member States' *option* to issue entry bans (although the corresponding grounds for the option *not* to issue an entry ban have at least been broadened); the possible limits on information given to expellees are still too broad; the lack of automatic suspensive effect of appeals has not been rectified; and rules on the grounds for and review of detention still need improvement.

As for the Council statement that the implementation of the Directive should not be used as an excuse for lowering standards in Member States, this provision is identical to provisions inserted in the *main text* of many EC social policy Directives. The Court of Justice has stated that such provisions have some legally binding effect (judgment in Case C-144/04 *Mangold*). However, the case law of the Court has consistently stated that mere Council statements which do not appear in the text of the legislation usually do not have any legal relevance.

If the Council and the EP wish genuinely to ensure that the standards in Member States are not lowered by means of the adoption of the Directive this provision should at least appear in the main text of the Directive. Better still, this objective could be accomplished by applying standstill clauses as regards the most

controversial aspects of the Directive. For example, it could be specified that only Member States who *already* provide for detention of irregular migrants for more than six months (as of the date of the adoption of the Directive, or better still, as of 1 January 2008) may continue to detain such migrants for longer periods than six months after the adoption of the Directive, and that furthermore such Member States may not extend any maximum period that already exists on that date in their national law (for example, a 9-month maximum cannot be extended to 12 or 18 months). This would guarantee that *no* irregular migrant could be detained for more than six months after the Directive was adopted, except for those who could be detained for that period already. Alternatively, it could simply be provided that no Member State could extend the maximum period of detention of irregular migrants as it existed in its national law as of the date of adoption of the Directive.

Such a rule would still represent a compromise with those Member States that already detain irregular migrants for long periods, and some would still understandably object to it in principle. But at least the risk of Member States lowering their standards to the minimum level allowed by the Directive would be prevented, as regards detention for over six months. This approach is not novel in the area of immigration and asylum law, as it was used to permit Member States to *continue* to apply very low pre-existing standards as regards certain aspects of the family reunion Directive and the asylum procedures Directive - with the consequence that no *additional* Member States would be permitted to apply such low standards as regards those specific issues in future.

Conclusion

The [April 2008 Statewatch supplementary analysis](#) of the proposed Directive concluded that '[t]he EP and the Council have to decide whether their endlessly-repeated support for the principles of fairness, human rights and human dignity is a genuine commitment, or simply empty rhetoric'. Although the EP's involvement in the legislative process has undeniably led to higher standards, and indeed further improvements have been made to the text of the Directive in the final EP/Council deal, the text does not go far enough to 'ensure that minimum standards of proportionality, fairness and humanity are satisfied'.

If the Directive is adopted in its current form, there is a risk that Member States with higher standards will lower them, at least in part, to the minimum permitted by the Directive. Furthermore, those Member States which already have standards at the minimum permitted by the Directive are very unlikely to raise them. On the other hand, the Directive would likely require some Member States to raise their standards on at least some issues. Moreover, a 'race to the bottom' towards lower standards could still occur if the Directive were *not* adopted, and in fact in that

case some or all Member States could set even *lower* standards than those which would be permitted by the Directive. If MEPs push for positive amendments to the text, there would be a risk that the incoming Council Presidency will not pursue further discussion of the Directive with a view to considering those amendments (particularly since the amendments would have to be supported by a *majority of MEPs* at second reading), or that the incoming Presidency will try to lower standards in this area.

MEPs therefore face a difficult choice between two alternative courses, neither of which would ensure sufficient protection for the basic principles that should underpin EU immigration and asylum law. The fundamental problem with the deal on the returns Directive is that they should never have been forced to make such an invidious choice in the first place.

References

[Commission proposal for Returns Directive \(COM \(2005\) 391\)](#)

[Statewatch analysis, May 2007](#)

[Statewatch analysis, Jan 2008](#)

[Statewatch supplementary analysis, April 2008](#)

[Agreed Council text of the Directive: Council doc. 8812/08, 16 May 2008](#)