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Return Me – If You Can
10th Anniversary of the Adoption of the
EU Return Directive – A Success Story?

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Return Me – If You Can 10th Anniversary of the Adoption of the EU Return Directive – A Success Story?

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Abstract

The EU Return Directive will celebrate its 10th Anniversary in 2018. As part of the Schengen Acquis, this Directive is also binding for Switzerland. This Working Paper analyses whether the Directive has actually achieved its aim of setting up a “fair and transparent regime for returns”, by pointing out four major problems, also identified by the Court of Justice of the European Union.

Keywords

EU law, return, irregular migration, detention, right to be heard, asylum

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1 Introduction

In December 2018, the EU Return Directive celebrates the 10th anniversary of its adoption by the European Parliament and the Council. Ten years later, it's time to reflect on the success of the directive – or rather on its failure?

According to Recital 4 of the Directive, “*clear, transparent and fair rules need to be fixed to provide for an effective return policy*”. Did the Directive meet these expectations?

The more than 20 cases decided by the Court of Justice of the European Union (CJEU), which interpret provisions of the Directive, seem to lead to the conclusion that the opposite is true: The Directive has neither simplified and accelerated return procedures, nor provided for a better protection of returnees during these procedures.

On the practical side, it is also obvious that the return track record of the Member States over the past years is rather weak.¹ Many of the third country nationals ordered to leave actually do not return to their country of origin. Lots of them prefer to abscond and live as irregular migrants somewhere in Europe.

In 2015, 533'395 third country nationals were ordered to leave the European Union, compared to 493'785 persons in 2016. In 2015, 196'180 third country nationals effectively returned to their country of origin, against 226'150 in 2016. The total return rate was 36.78 % in 2015 and 45.8 % in 2016.² Data on 2017 is not yet available. When the Western Balkans are taken out of these statistics, the return rates drop even further.

The low number of returns may be explained by many factors: Various practical problems appeared that cannot really be addressed by the law, for example the need for more financial and human resources and more cooperation among Member State. Besides that, a decisive factor for a successful return policy is almost completely out of the hands of the EU and its Member States: the (lack of) cooperation with third countries supposed to take back their own nationals.³

Additionally, as already mentioned, a certain number of legal pitfalls have been identified, mostly thanks to requests for a preliminary ruling of the CJEU under Article 267 TFEU. The present paper will focus on these legal weaknesses of the Directive, as elaborated by CJUE case-law. The insights gained on these problematic issues may be useful for a recast of the Return Directive, which is already being discussed.

¹ See the available data on <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database> and https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_annex_5_returns_en.pdf.

² https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_annex_5_returns_en.pdf.

³ See Report from the Commission to the European Parliament, the European Council and the Council - Progress Report on the European Agenda on Migration, COM(2017) 669 final, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20171114_progress_report_on_the_european_agenda_on_migration_en.pdf.

2 The History of the Return Directive

After long and laborious debates, Directive 2008/115/EC “on common standards and procedures in Member States for returning illegally staying third country nationals” was adopted by the Parliament and the Council on 16 December 2008 and published as “Christmas present”⁴ in the Official Journal of the European Union on 24 December 2008.⁵

The Directive marked a turning point in EU migration policy history, as until 2008, there simply was no EU Return Policy. Returns were a matter of domestic law. On a European level, the existing tools only aimed at facilitating cooperation among the Member States.⁶

The legal basis for the Directive was Article 63 (3) (b) of the Treaty on the European Community (now Article 79 (2) (c) TFEU). It is important to note that the Directive is not an instrument in the area of Asylum Law, but applies to all third country nationals illegally staying on the territory of the Member States (Article 2 (1) of the Directive). The reasons for the illegal stay may be various (illegal entry, loss of a residence permit due to loss of work or disruption of family ties, visa overstay, rejected asylum claim, etc.).

The adoption of the Directive triggered many debates among NGOs and academics and it immediately received the nickname “Directive of shame”.⁷

The deadline for implementing the Directive expired on 24 December 2010. Switzerland is also bound by the Directive due to the Schengen Association Agreement signed in 2004 and entered into force in March 2008.⁸

In March 2014, the Commission published a first evaluation of the Return Directive.⁹ In its communication, the Commission mentions five areas in which implementation of the Directive by the Member States was either incomplete or varied considerably from one Member State to another: detention, voluntary departure and monitoring of forced return, safeguards and remedies, criminalization of irregular entry and stay and the launch of return procedures and entry bans.

⁴ See Francesco Maiani, *Directive de la honte ou instrument de progrès ? – Avancées, régressions et statu quo en droit des étrangers sous l’influence de la Directive sur le retour*, in : Epiney / Gammethaler (eds.), *Schweizerisches Jahrbuch für Europarecht 2008/2009*, 2009, 289.

⁵ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0098:0107:en:PDF>.

⁶ See Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals, OJ L 149, 2.6.2001, p. 34–36 or 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, OJ L 261, 6.8.2004, p. 28–35.

⁷ For further references see Francesco Maiani, *Directive de la honte ou instrument de progrès ? – Avancées, régressions et statu quo en droit des étrangers sous l’influence de la Directive sur le retour*, in : Epiney / Gammethaler (eds.), *Schweizerisches Jahrbuch für Europarecht 2008/2009*, 2009, 289. See also Steve Peers, *The EU’s Returns Directive: Does it improve or worsen the lives of irregular migrants?*, 28.3.2014, <http://eulawanalysis.blogspot.ch/2014/03/the-eus-returns-directive-does-it.html>.

⁸ <https://www.admin.ch/opc/de/classified-compilation/20042363/index.html> (German) and OJ L53, 27.2.2008, p. 52.

⁹ European Commission, *Communication from the Commission to the Council and the European Parliament on EU Return Policy*, COM(2014) 199 final; there Part IV.

In order to provide guidance to Member States' authorities when carrying out return related tasks, the Commission adopted a first version of the common "Return Handbook"¹⁰ in 2015. An updated version was published in September 2017.¹¹

¹⁰ European Commission, Recommendation Establishing a common « Return Handbook » to be used by Member States' competent authorities when carrying out return related tasks, C(2015) 6250 - Annex.

¹¹ European Commission, Recommendation Establishing a common « Return Handbook » to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6506 - Annex.

3 Overview on the Return Procedure

The Directive imposes on the Member States to follow a **3-step approach**:

1. Return decision
2. Voluntary departure
3. If no voluntary departure: forced return



According to Article 6 (1) of the Directive, Member States are obliged to issue a **return decision** to any third country national staying illegally on their territory. Exceptions to this principle are set up by Article 6 (2) to (5). Among them is the possibility to grant a residence permit or other authorization offering a right to stay. The Directive does not create new obligations for the Member States to grant residence permits to irregular migrants.¹² However, it is clear that Member States are not allowed to tolerate the presence of illegally staying third-country nationals on their territory without either launching a return procedure or granting a right to stay.¹³ In order to avoid grey zones, there is no third option.¹⁴

A return decision shall provide for an appropriate period for **voluntary departure** (Article 7 (1)). If there is a risk of absconding, or if an application for a legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person concerned poses a risk to public policy, public security or national security, Member States may refrain from granting a period for voluntary departure or may grant a period shorter than seven days (Article 7 (4)).

If no period for voluntary departure has been granted or if the obligation to return has not been complied with within the period for voluntary departure, Member States shall take all necessary measures to **enforce the return decision** (Article 8 (1)).

Member States may use force to remove the irregular migrant, but the principle of proportionality must be respected: Article 8 (4) states that where “Member States use – as a last resort – coercive measures to carry out the removal of a third country national who resists removal, such measures shall be proportionate and shall not exceed reasonable force”.

Return decisions shall be accompanied by an **entry ban** if no period for voluntary departure has been granted or if the obligation to return has not been complied with (Article 11). The length of the entry ban shall not exceed five years (Article 11 (2)).

Detention is possible if there is a risk of absconding or if the third country national concerned avoids or hampers the preparation of return or the removal process (Article 15 (1)). However, according to Article 16, detention shall take place as a rule in specialized detention facilities. In any case, third-country nationals shall be kept separated from ordinary prisoners.

¹² European Commission, Recommendation Establishing a common « Return Handbook » to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6506 – Annex, p. 65 (13.2.). See also CJEU, C-146/14, Mahdi, ECLI:EU:C:2014:1320, para. 87 and 88.

¹³ European Commission, Recommendation Establishing a common « Return Handbook » to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6506 – Annex, p. 19 s. (5.).

¹⁴ European Commission, Recommendation Establishing a common « Return Handbook » to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6506 – Annex, p. 20 (5.).

4 Selected Problematic Issues

With the help of the case-law of the CJEU, several critical aspects can be identified. The vague provisions of the Directive and the big margin of discretion that is left to the Member States make fundamental rights violations more probable than it is the case with other EU migration law instruments. The following sub-sections further illustrate selected problems.

Relationship Return – Criminal Proceedings

In several cases already decided by the CJEU, the relationship between the return procedure and criminal proceedings has been clarified.

The Court has emphasized that anything that infringes the “*effet utile*” of the Directive, which means anything that delays the effective return, is incompatible with the Directive. Member States must not apply rules which are liable to jeopardize the achievement of the objectives pursued by a directive, which means rapid return to the country of origin.

Therefore, the following principles must be respected:

- If illegal entry and/or stay are criminal offences, they may be sanctioned by fines, but not by a prison sentence.
- The sanctioning of other criminal offences by a prison sentence is compatible with the Directive.
- It is not possible to sanction illegal stay by either a fine or a removal (if the two measures are mutually exclusive). The Directive obliges the Member States to adopt a return decision.
- If the return procedure has failed or if the third-country national has returned to the Member State by violating an entry ban, prison sentences are compatible with the Directive. The Directive does not preclude penal sanctions being imposed on third-country nationals to whom the return procedure established by the Directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return.

As the case-law on the issue is now abundant, it would make sense to synthesize and codify it.

Right to be Heard

An important lacuna of the Directive is that it does not mention (at all) the right to be heard during the return procedure. The CJEU has emphasized in three judgments that the right to be heard is a fundamental right that forms integral part of the EU’s legal order. It is now affirmed not only in Articles 47 and 48 of the Charter of Fundamental Rights, which ensure respect for both the rights of the defense and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) of the Charter provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken.¹⁵

However, it is not necessary to hear a person several times. For example, if a decision determining a stay to be illegal and the return decision are taken separately (see Article 6 (6)), and the person

¹⁵ CJEU, C-249/13, Boudjlida, ECLI:EU:C:2014:2431, C-166/13, Mukarubega, ECLI:EU:C:2014:2336; C-383/13 PPU, G. and R., ECLI:EU:C:2013:533.

concerned was able to present his/her point of view on the question of whether the stay was illegal and whether there were grounds which could, under national law, entitle the authority to refrain from adopting a return decision, or if the return decision is taken directly after a decision on an asylum application, where all reasons for a possible violation of the non-refoulement principle have already been discussed, it is then not necessary to hear the person a second time. The CJEU has made clear that “the right to be heard before the adoption of a return decision cannot be used in order to re-open indefinitely the administrative procedure”.¹⁶

Even if the CJEU has clarified the right to be heard, it should be integrated into the Directive to remove any doubt. Also, the consequences of an infringement of the right to be heard should be regulated. Generally, the non-respect of the right to be heard should render the decision invalid insofar as the outcome of the procedure would have been different if the right was respected.¹⁷

Detention Conditions

Detention is a very problematic issue in general. For example, the Directive neither defines the “risk of absconding” nor what exactly a person has to do to “hamper the preparation of return” (Article 15 (1)). Furthermore, Article 15 (3) stipulates that detention shall be reviewed at “reasonable intervals”. It is not clear what this exactly means and should therefore be regulated explicitly in a recast of the Directive. The CJEU has made clear that the maximum period of detention of 18 months (Articles 15 (5) and (6)) cannot be extended. Where the maximum period of detention has expired, the person must be released.¹⁸

Another critical aspect are the detention conditions. According to Article 16 (1), “detention shall take place as a rule in specialized detention facilities. Where a Member State cannot provide accommodation in a specialized detention facility and is obliged to resort to prison accommodation, the third-country nationals in detention shall be kept separated from ordinary prisoners.” In a judgment of 2014, the CJEU has emphasized that even if the person concerned gave her consent, it is not legal to detain her or him together with ordinary prisoners. Member State cannot take account of the wishes of the third-country national concerned.¹⁹

In a similar context, the CJEU also held that the requirement of separate detention facilities is imposed upon the Member States as such, and not upon the Member States according to their respective administrative or constitutional structures. If application of the national legislation transposing the Directive is entrusted to authorities falling under a federated state (like in Germany), the State is not obliged to set up specialized detention facilities in each federated state. However, it must be ensured (via agreements on administrative cooperation) that the competent authorities of a federated state that does not have such facilities can provide accommodation for third-country nationals pending removal in specialized detention facilities located in other federated states.²⁰

¹⁶ CJEU, C-166/13, Mukarubega, ECLI:EU:C:2014:2336, para. 71.

¹⁷ CJEU, C-383/13 PPU, G. and R., ECLI:EU:C:2013:533, para. 38.

¹⁸ CJEU, C-357/09 PPU, Kadzoev, ECLI:EU:C:2009:741, para. 62 and 71.

¹⁹ CJEU, C-474/13, Pham, ECLI:EU:C:2014:2096, para. 22 and 23.

²⁰ CJEU, C-473/13 und C-514/13, Bero and Bouzalmate, ECLI:EU:C:2014:2095, para. 28 et seq.

Fate of “non-removable returnees”

As mentioned before, the Return Directive leaves Member States the choice of either issuing return decisions to illegally staying third-country nationals or to grant a permit to (in other terms: regularize) these persons.²¹ There is no obligation to grant a residence permit; this remains a mere possibility.²² This also means that the Directive does not contain a right of non-removable returnees to be regularized at a later stage, even if there is no reasonable prospect of removal.²³ However, in the 2017 Return Handbook, the Commission recommends considering regularization based on the assessment of the individual situation of the non-removable returnee and general policy reasons, taking into consideration the following elements:

- Cooperative or non-cooperative attitude of the returnee
- Length of factual stay in the Member State
- Integration efforts made by the returnee
- Personal conduct of the returnee
- Family links
- Humanitarian considerations
- Likelihood of return in the foreseeable future
- Need to avoid rewarding irregularity
- Impact of regularization measures on migration pattern of prospective (irregular) migrants
- Likelihood of secondary movements within the Schengen area.

When reading the list, it becomes evident that the situation of long-term non-removable returnees is highly unsatisfactory. It should be emphasized in the Directive (and the Handbook) that regularization must at least be considered in the light of Article 8 ECHR (right to private life), as interpreted by the European Court of Human Rights, according to which regularization must become possible after a certain (long) laps of time, considering the individual situation of the irregular migrant, especially his or her integration into the host society, family ties and difficulties to re-integrate into his or her country of origin.²⁴ It would be better to define at least some of these criteria in the Directive, in order to harmonize this aspect and not to create a reason to do “forum shopping” in the EU Member States.

²¹ European Commission, Recommendation Establishing a common « Return Handbook » to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6506 – Annex, p. 20 (5.).

²² European Commission, Recommendation Establishing a common « Return Handbook » to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6506 – Annex, p. 20 (5.).

²³ European Commission, Recommendation Establishing a common « Return Handbook » to be used by Member States' competent authorities when carrying out return related tasks, C(2017) 6506 – Annex, p. 65 (13.2.). See also CJEU, C-146/14, Mahdi, ECLI:EU:C:2014:1320, para. 87 and 88.

²⁴ ECHR, application no. 3295/06, Agraw / Switzerland, ECLI:CE:ECHR:2010:0729JUD000329506 ; application no. 23218/94, Gül / Switzerland, ECLI:CE:ECHR:1996:0219JUD002321894. See also Roswitha Petry, Die rechtliche Bewältigung irregulärer Migration: Die Situation der “Sans-Papiers”, in: Achermann et al. (Hrsg), Jahrbuch für Migrationsrecht 2014/2015, 2015, 3, 7.

5 Conclusion

All in all, taking into consideration the cases already decided by the CJEU, it is a matter of fact that the directive is too vague and incomplete in important aspects. These lacunae considerably increase the danger of an inconsistent transposition of the directive and fundamental rights violations in the Member States.

Even *if* one considers an interpretation and application in accordance with fundamental rights to be possible under the current regime²⁵, it cannot be denied that Member States have to make a considerable effort to find out *how exactly* to be in line with fundamental rights when applying the directive. It is evident that this is *not* an ideal situation for an instrument aiming at a certain harmonization and comparability between the Member States. For the time being, the case-law of the CJEU has to be constantly monitored in order to be aware of how to best implement the directive.

As to the regularization of irregular migrants, the Directive unfortunately does not go beyond applicable Public International Law: The principle of state sovereignty clearly allows for regularization at any time. The directive consequently does not create any additional obligations of the Member States to regularize irregular migrants. Even worse: It can be argued that the Directive seems to accentuate the difficult situation of long-term irregular migrants, as it does not explicitly foresee a possibility to obtain a residence permit if the return procedure was unsuccessful. The only way out of a situation of protracted irregularity is via the application of Article 8 ECHR (as interpreted by the European Court of Human Rights).

For all these reasons, it can be argued that the Directive has not really achieved its aim of setting up a fair and transparent regime for returns. A recast of the Return Directive would not only be helpful to remove the existing gaps and improve the situation of returnees, it would also provide a better framework for the Member States obliged to implement it.

²⁵ Francesco Maiani, Directive de la honte ou instrument de progrès ? – Avancées, régressions et statu quo en droit des étrangers sous l'influence de la Directive sur le retour, in : Epiney / Gammenthaler (eds.), Schweizerisches Jahrbuch für Europarecht 2008/2009, 2009, 289, 314.