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Returning Illegal Third-Country Nationals residing in the EU: The Return Directive

An Issue of EU Concern?

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1. Introduction

Over the past years the European Union (EU) has expanded its competences in many areas, especially affecting existing policies within the Member States.

One of these fields includes the issue of illegal migration. Initially, this was a sensitive policy area of national priority. But following the inflow of numerous illegal migrants through the outer borders of the EU, it was realized that the problem had to be tackled on a higher basis than the nation state. Among the issues under debate is the return of illegal immigrants regulated in the Return Directive agreed on in August of 2008. The intention behind this Directive is to streamline procedures and standards in the EU to a certain extent while respecting fundamental and human rights at the same time. The main focus is on the issues of detention, legal safeguards, entry ban, return and removal. Just to give a short insight of the current situation using the statistics of Germany as an example: On December 31st, 2007 about 718 individuals were held in detention, 10 of them were under the age of 18. From 2005 to 2007 about 8 persons were kept in detention longer than 17 months. During the same time span, about 18.944 people were kept in detention facilities, while 7194 were kept in prison. 36 women were pregnant and 377 were unaccompanied minors.¹

But does the matter of return really have to be dealt with on the European level and would it not be more effective to do this on national level since every Member State has a unique initial situation, its own needs and priorities? Furthermore, what are the consequences and changes for the Member States of the EU as well as for the illegal migrants? Does the influence of the EU on illegal migration lead to advantages or even disadvantages?

To make it short, the main aim of this paper is to find out whether the issue of return should be dealt with on EU level.

Since the Directive was not adopted until last year, literature and appropriate research is rather rare. Especially the future effects on national legislation have hardly been dealt with. Hence, I mainly worked with primary literature, namely the relevant legislative acts issued by the German government and the EU, in order to describe the Directive and the current legislative situation in Germany. In regard to secondary literature, most information, mainly in terms of criticism, has been published by non-governmental organizations (NGOs). Background information giving insight on the process of how the Directive was established was provided by the proposal issued by the Commission, the working papers of the Council, Parliament and, of course, by the working groups. Useful information on the situation in

¹ Compare Document Drucksache 16/11384, p. 1

Germany was also given by research papers issued by the Federal Office for Migration and Refugees (BAMF). Concerning the numbers used, for example, the estimates of how many irregular migrants are residing in the EU, it has to be said that these are very vague and not reliable. Many illegal migrants never report to authorities because they are scared of removal etc. They remain underground and only numbers of those who are eventually caught exist. Drawing conclusions from them is very unlikely to produce a reliable result. In case of the numbers of individuals in detention used above it is mentionable, that some of the German *Länder* did not or were not able to publish exact figures. Thus, the real figures are probably higher.

The structure of my paper will be the following: First of all, I will introduce the concept of multilevel governance in the EU. Then, I will proceed by presenting a short history of the policy area and the development of the actual Return Directive. In order to display the basis of the Multilevel Governance Theory a short outline of actors involved in the policy process will be presented. After that I will outline the actual Return Policy. What does it intend to regulate and does it make sense to tackle such an issue at EU-level? Then, the case of Germany is supposed to serve as an illustration of what effects the Directive will have on national legislation and illegal migrants as well. Subsequently, I will present the most often mentioned critics of the Directive. At last, a short conclusion will intend to summarize the paper and express my own point of view.

2. The European Union and Multi-level Governance

In order to have an overview and understanding of the process of introducing the Directive and the reason for dealing with the issue at EU level it is helpful to have a theory in mind.

Up to the 1980s studying the EU was always dominated by approaches developed from the theory of international relations, mainly pluralism and intergovernmentalism. The former led by neofunctionalists argued that national governments were gradually losing control in the integration process, being more interdependent within a web of supranational, national and nonstate actors. The latter led by realists stressed the exact opposite view that national governments had the main control over the most important policy areas. However, the arguments of neofunctionalists were only able to be upheld until the mid 1960s. After that national authority strengthened and was reasserted by governments having a veto in most areas. This changed when progress in the field of integration was made and the single market program was introduced. The Single European Act (SEA) was signed in 1986 expanding the competences of the EU significantly and dismissing national vetoes in many policy areas. Changes created by the single market program eventually triggered the development of new theories challenging the former approaches.² The term Multi-level Governance was first introduced by G. Marks in 1992 as sub-national governments started to receive an increased role in the EU's structural policy.³

The concept of governance describes the fact that the state alone is not the most important actor in decision-making processes anymore, but accompanied by non-state actors and institutions as well, interacting on various layers and centers within the political sphere. The concept of multilevel implies that all levels, from sub-national, national to international are interconnected and thus, have to be taken into account. Thus, the theory is commonly used to describe the interactions of numerous actors and levels which are involved in the decision-making process of policies within the EU.

Over time the relationship between the different actors has advanced to be less hierarchical and more interactive.⁴ These changes have been especially prompted during European Integration. First off, there has been a shift in the horizontal relationship between state and society. Secondly, at the same time, the vertical relationship between actors positioned at national, supranational and subnational level has changed.⁵ A result of the enhanced collective decision-making of Member States is that the nation state loses much of its sovereignty. The EU, on the other side, has advanced to one of the most important levels since some of its institutions, e.g. the Commission, are of supranational nature. Yet, the theory

2 Compare Bache (2008), p.22/23

3 Compare DeBardeleben/ Hurrelmann (2008), p. 213

4 Compare Nugent (2006), p. 555-557

5 Compare Bache (2008), p. 21

acknowledges that states remain to play a central role in the EU, they just do not monopolize policy making on EU level anymore. Three claims are derived based on this change of power. First, policy making competences do not reside with the states alone, but are shared by different actors at different levels. Second, since decisions are made by states collectively, the individual state loses significant power. Third, political arenas have become interconnected since sub-national actors operate in national and supranational arenas which leads to the creation of transnational associations. The reason why states lose or transfer some of their sovereignty is based on the perception that there is a difference between institutions and their actors. While institutions determine how authority and power are structured and allocated within a territory, political actors, groups and individuals indeed perform within these institutions but are also capable of changing them. These changes originate from the preferences the actors have. When applied to the EU and the loss of national sovereignty it is therefore important to concentrate on the actors within the state institutions. These act in their own interests and usually not in that of the institutions (states, national governments) they work for. Hence, it is not necessarily a priority for them to sustain the state as an institution.⁶

The following chapter somewhat displays the change and interaction between different actors described by the Multilevel Governance Theory.

3. The History of Asylum and Migration Policies in the European Union

Initially, the areas of asylum and migration were believed to be of national priority. On EU level cooperation only took place on an informal basis, mainly in form of working groups. But after the Schengen Agreement caused the dismissal of the internal borders and the flow of migrants increased drastically, it was realized that nation states alone could not handle the challenges anymore.⁷

First steps in enabling the pooling of competences in the area of migration on EU level were made in the Treaty of Maastricht (1993) which established the European Union and its three pillar system as we know it today. Next to the economic policies covered by pillar one, two additional pillars introduced new policy areas. Of importance here, is the third pillar “Justice and Home Affairs (JHA)” which includes the issue of asylum and migration and thus created the basis for a legal foundation for the EU to act within. However, it is not possible to make legislation under Pillar II and III.⁸

It was not until the enactment of the Treaty of Amsterdam in 1999 that EU legislation was finally

6 Compare Bache (2008), p.25/26

7 Compare Schieffer (1998), p. 21/22

8 Compare www.europa.eu (6.07.2009)

enabled in the area of asylum and migration by transferring the policy field to the Treaty of the European Community (Pillar I). The overall aim was to facilitate the establishment of an area of freedom, security and justice.⁹ Yet, the decisions made by the Council of Ministers had to be taken by unanimity while the European Parliament (EP) had no possibility of influence whatsoever. Nevertheless, the Treaty obliged the Council to pass relevant legislation in the area of asylum and migration within five years after the implementation of the Treaty. The Tampere Summit held in the same year was intended to outline the common EU approach on migration. Arguing that the policy area is a cross-border policy which affects all the other Member States, it was agreed that a common EU asylum and migration policy was necessary.¹⁰

The Treaty of Nice, enacted in 2003, brought changes in the decision procedure regarding the area of asylum and refuge by introducing qualified majority voting in the Council, easing the integration process in this area.¹¹

After the Commission recognized the need of a return policy in order to fight illegal immigration effectively in its Communication on a Common Policy on Illegal Immigration, it issued a Green Paper in April 2002 (Green Paper on a Community Return Policy) which presented the ideas, aims and intentions the Commission had regarding the issue of return. The paper stressed that it was necessary to adopt a common return policy with clear, transparent and fair rules for persons who are residing illegally in the EU, while considering human rights, as well as human dignity and offering effective legal remedies. Next to experts who were invited to speak, various interested individuals, stakeholders and organizations had the opportunity to share their opinions and views and discuss the issue with “representatives of the EU, Member States, candidate countries, countries of origin and transit of illegal migratory movements, other countries of destination, international organizations, regional and municipal authorities, non-governmental organizations and academic institutions”¹².

The results of the consultation of all relevant stakeholders were taken into account in the Community Return Policy on Illegal Immigrants in October 2002. Based on it, the Council finally adopted its Return Action Program in November of that year. Its aim was to establish common standards and facilitating operational return.¹³

After the deadline of five years, given by the Treaty of Amsterdam, had passed and the enlargement round had taken place, the EU launched “The Hague Program” in 2004. Next to issuing a policy plan on legal migration, one of the measures of the program also intended to agree on a Directive on returning

9 Compare Nugent (2006), p. 97

10 Compare www.europa.eu (6.07.2009)

11 Compare www.euroactiv.com (6.07.2009)

12 See www.eur-lex.europa.eu COM(2005)391 Final (13.07.2009)

13 Compare www.eur-lex.europa.eu COM(2005) 391 Final (15.07.2009)

illegal resident third-country nationals. The respective Directive was introduced by the Commission in form of a proposal in 2005 for the first time but was not approved by the EP until June 2008. Member States will have 24 months from the date of publication in the Official Journal of the EU to comply with the regulations and laws set out in the Directive (24.12.2010). In regard to Article 13 (4), they have a time span of even 36 months (24.12.2011).¹⁴

The Process

Three years of negotiation took place until the Directive was finally agreed on. During this time the EP managed to pass over 70 amendments by making use of the co-decision procedure and even the final agreement was not as harmonious as it could have been. While 369 votes favored the Directive, 197 votes were against it and 106 votes even absented.¹⁵ These numbers display the heated debate about the issue. In fact, the entire process to shift the area of asylum and migration from the state to the EU level was difficult and lengthy. In case of the Directive and its longsome process, this is mainly a result of the many different actors that were involved in introducing it. Just as the theory of Multilevel Governance explained, the Member States themselves lose their initial importance, while other levels, like the EU gain more of it. Establishing directives, like the Return Directive, takes place on a multi-level basis, namely that of the state and that of the EU. Besides, NGOs, as well as governmental institutions (IOs) influence the process. This was already displayed by the consultation process following the introduction of the Green Paper. Not only governments were asked to express their opinions, but all relevant stakeholders, including NGOs and experts. Since mentioning all involved actors would go beyond the scope of this paper, a short presentation of some actors is intended to visualize the basis of the theory and its consequences for the Directive.

The usual policy making process ensures the inclusion of the main EU institutions and therefore many different actors as well, including working groups and standing committees. After the Commission, whose main responsibility is to propose and develop policies and legislation, has issued a draft policy, it is sent to the Council and EP which pass legislation together by making use of the co-decision procedure.¹⁶ While Commissioners are supposed to act independent of their national country's interest, the EP and Council are influenced by various actors, from EU as well as national level. Particularly through the Council, Member States are eager to defend their national interests. This is also true for the Council's working groups consisting of experts and national officials from each state whose

14 Compare § 20 Directive 2008/115/EC

15 Compare www.euroactiv.com (6.07.2009)

16 Decision procedures vary from policy area to policy area. In case of the area of asylum and migration the co-decision procedure applies since 2005.

responsibility is to carry out a detailed analysis of the proposals issued by the Commission.¹⁷ In the case of the proposed Directive, it was discussed with the Commission by the Council's Working Party on Migration and Expulsion several times. During these meetings numerous issues were deliberated on. As an example, Austria wanted to exclude third-country nationals from the Directive who have entered the Member State within a specific deadline and who could be expelled without a specific return decision. Its argument was that it could no longer carry out expulsions on the basis of provisions allowing faster procedures for persons who fell into the framework of readmission agreements concluded with Hungary, the Czech Republic and Slovakia. Many Member States also feared that the rights granted were too excessive and would impede and complicate return. In contrast, the working group was also anxious to reveal provisions that would lead to legal uncertainty. Among other concerns, it pointed out that Article 2 which regulated that the Directive would not only apply to third-country nationals not fulfilling the conditions of entry set out in the Schengen Agreement¹⁸ but also to those otherwise staying illegally in the territory of a Member State would cause legal uncertainty regarding the term "otherwise".¹⁹ As already mentioned, many members were also very restrictive regarding the guarantees given to illegal migrants. In their opinion voluntary departure should be restricted in case the person poses a threat to public order, public and national security. All these objections eventually caused a watering down of the provisions in the compromises presented by the different Council Presidencies in favor for national interests. For instance, during the Finish Presidency, Member States achieved that national legislation would remain regarding the procedures on removal at the border, limiting the scope of the Directive. The proposal of the German Presidency included among other changes the provision that the decision of allowing for voluntary departure would be left to national authorities.²⁰

Discussions were also held within the EP which is characterized by both ideological and national interests. The reports issued by the different committees were adopted almost unanimously by the MEPs and improved the Commission's proposal in many aspects. An independent Standing Committee on Immigration, Refugee and Criminal Law also saw its task in revising the draft of the Commission, the EP's final draft and the Council paper. Its main criticism was the mandatory character of the Directive which caused conflicts with human rights obligations. For instance, the paper issued by the Council as well as the draft by the Commission state that Member States "shall" keep in detention a third-country national under a number of conditions. The Committee recommended that "shall" should be replaced by

17 Compare Nugent (2006), p. 197

18 Conditions of entry: a valid passport, a valid Schengen Visa or a residence permit equivalent to it, having sufficient means for the intended stay, not being designated for the purpose of refusing entry, not being considered a threat to public security and safety

19 Compare Document 14814/05, p. 3-5

20 Compare Acosta (2009), p. 27-30

“may” since a legal obligation to detain a person and hence depriving him of his freedom is not consistent with the European Convention of Human Rights. Instead, an individual assessment should take place in order to determine whether detention is necessary or not. Here, it is obvious that the Committee especially took human rights interests in consideration. This is not surprising when you examine the composition of the committee. It was established in 1990 by five NGOs, namely, the Dutch Bar Association, the Refugee Council, The Dutch Section of the International Commission of Jurists, the Netherlands Centre for Immigrants/ FORUM and the National Bureau against Racism (LBR).²¹ After adopting these reports the informal trilogues between the Slovenian Presidency, the Commission and the EP’s Rapporteur Manfred Weber were initiated in order to come to a common position before first reading. Although the proposal issued by the EP was much more favorable than that of the Council (e.g. the EP argued that illegal migrants needed to be provided with legal help if necessary, whereas the Council did not support the opinion; the EP wanted to grant a voluntary departure period of at least four weeks, while the Council provided for a period of only up to 30 days), agreement was reached in June of 2008. Throughout this course, many NGOs, like Statewatch, outraged about the Directive, tried to influence the EP and convince its members not to adopt it.

Although the short outline of the policy process did not mention all involved actors, it displays the interactions between them and the arising difficulties stemming from these. In fact, the different interests of the various people involved in the policy-making process are one reason for the duration of time it took to pass the piece of legislation.

Another cause was the reluctance of the Member States to give up their sovereignty in the specific area of asylum and migration. Trying to introduce common standards and procedures has revealed differences in the Member States systems concerning, for example, their duration of detention and the handling of removal in general. Of course, many see a reason and importance in their own legislation and would rather prefer to make no changes at all. Besides, many EU members also fear the creeping institutionalism of the EU. Gaining competences in one area will expand to others in the long run, causing a decrease of national sovereignty. Eventually, this caused a compromised version of the draft. One example: While the Commission’s proposal included the issuing of a return decision and a removal order, only the former was realized. Additionally, the draft had envisaged that the Directive could also be applied to persons who have been refused entry in a transit zone of Member States. Even if the state decides not to apply the Directive it has to ensure that the person receives the same treatment and protection. After not being able to agree on what is meant by the term “transit zone”, it was removed for

21 Compare www.commissie-meijers.nl (17.07.2009)

good due to some Member State's unwillingness. Thus, these individuals are not granted the same protections as those falling under the Directive. Another downturn concerning the protection of human rights was the dismissal of Article 6 Paragraph 4 which bound Member States not to issue a return decision where they are obliged to comply with human rights, especially those laid down the European Convention of Human Rights.²² Watered down and eventually more restrictive policies are not as effective leaving the question if the EU level is the right place to manage the issue. This question will be dealt with in the section following the introduction of the actual Directive.

As already displayed, the inclusion of various actors whose interests are at stake not only includes disadvantages, but advantages as well.

One advantage is that people from various levels have the opportunity to voice their criticism and are able to point out important aspects that need to be changed or added for humanitarian reasons etc. The original proposal, for instance, allowed states to send back third-country nationals not only back to their country of origin, but any other country. Of course, this is not acceptable, because it would give governments the possibility to send illegal migrants to countries they have never been to and hence, have no connection whatsoever to. Aspects of human rights obligations were also highlighted by the Standing Committee of Experts on International Immigration, Refugee and Criminal Law.

As a consequence, making sure that everybody is heard enables the EU to establish a new point of view and to notice issues that affect people which the institutions have not thought of before. Furthermore, if a common position is found it will be more likely that Member States recognize the need and importance of the Directive for themselves and chances are higher that they will implement it effectively. The assurance of acknowledging as many views as possible also creates more positive attention and acknowledgement for the EU.

Even though the concerns of individual Member States are put aside it is for the sake of those of the community in general. A common position may not favor everybody, but it also ensures that nobody has too many disadvantages. In general, harmonization of policy areas strengthens the EU and its capacity to act. Additionally, it enhances the credibility and importance of the EU. Countries around the world will notice the cohesion among EU members which increases in the different areas over time.

4. The Return Directive- Details

The Return Directive provides the Member States with common standards and procedures which requires them to guarantee third-country nationals legal safeguards and ensure the compliance with

human rights conditions. The following section will introduce the Directive in more detail.

Common Standards and Procedures

The main purpose of the Directive is to set out common standards and procedures which are to be applied by the Member States when returning illegal third-country nationals residing within their territory to their country of origin or any other country. Illegal stay is defined as the presence of a third-country national on the territory of a Member State without fulfilling the conditions laid down in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.²³

When applying the Directive members have to ensure compliance with fundamental rights and international law, including refugee protection and human rights obligations.²⁴ Member States are not required to apply it to third-country nationals who have come irregularly by sea, land or air without subsequent authorization. Nonetheless, their treatment and protection concerning coercive measures, postponement of removal, emergency health care, special care of vulnerable persons and detention conditions should not be less favorable compared to those falling under the Directive.²⁵

Important to mention is that the Directive ensures that Member States cannot adopt rules that are harsher, but it does enable them to adopt or keep provisions that are more favorable for the third-country national.²⁶

As a common discipline aiming at reducing the number of illegal migrants, Member States should either grant illegal migrants a residence permit or any other authorization to reside in the country, or should take a return decision, requiring the person to leave the territory.²⁷ Next to ensuring that the ending of the illegal stay is carried out through a fair and transparent procedure, several other aspects need to be taken into account when making this decision.

First of all, if the third-country national has applied for a residence permit already and the procedure is still pending, the Member State shall consider refraining from taking a return decision.²⁸

Whenever no legal stay has been granted and a return decision has been taken, the time period of voluntary departure should be appropriate and should cover a time period of at least seven, up to thirty days.²⁹ Provided that there is a risk of absconding, the obligation to report to authorities and depositing a financial guarantee should be considered. Only if the application to stay has been proved to be

23 Compare § 3 Directive 2008/115/EC

24 Compare § 1 Directive 2008/115/EC

25 Compare § 4 Directive 2008/115/EC

26 Compare § 4 Directive 2008/115/EC

27 Compare www.euractiv.com (14.07.2009)

28 Compare § 6 Directive 2008/115/EC

29 Compare § 7 Directive 2008/115/EC

unfounded or fraudulent, or the person poses a risk to security, the state may resist giving a time period for voluntary departure or decide to shorten the period granted.³⁰ Has no voluntary time period of departure been granted or the person has not left within the time period given the state shall take all necessary measures to enforce the return decision. These should always be proportionate and should not exceed reasonable force.³¹ Additionally, national legislation providing for removal is supposed to correspond to fundamental rights, including dignity and physical integrity.³²

Following a forced removal, the Member State shall provide for an effective forced-return monitoring system.³³

In the event that no period for voluntary departure was given or the obligation to return was not complied with, the Member State shall consider an entry ban, which should not exceed a time period of five years.

Detention is seen as a measure of last resort. A person who is subject to return can only be detained in order to prepare his return or to carry out the removal itself. Additionally, the respective person has to be at risk of absconding or he or she has to be guilty of hampering the preparation of return. Besides, detention may not exceed six months, but may be extended to twelve due to special circumstances (e.g. lack of cooperation).³⁴

Legal safeguards

In order to comply with the fundamental rights laid down in the Community and international law and to protect the individual's interest, the Directive intends to offer illegal migrants a number of procedural safeguards.

Firstly, return decisions, entry bans and decisions on removal have to be issued in writing and give reasons in fact and in law why the decision was taken, as well as information about remedies that are available to the illegal migrant. Reasons in fact and law also need to be given in case of detention.³⁵ In addition, the state should offer a translation of the main parts of the return decision and information about the legal remedies which are available if requested. However, the provision to give information might be limited in case of the need to safeguard national security, defense, public security and in connection with the prevention, investigation, detection and prosecution of criminal offences. Has the person entered the EU without applying for an authorization to legally reside in the territory, the

30 Compare § 7 Directive 2008/115/EC

31 Compare § 8 Directive 2008/115/EC

32 Compare § 8 Directive 2008/115/EC

33 Compare § 8 Directive 2008/115/EC

34 Compare § 15 Directive 2008/115/EC

35 Compare § 15 Directive 2008/115/EC

Member State may refrain from supplying a translation.³⁶

Anyway, every third-country national shall have the possibility to afford an effective remedy to appeal or seek revision of the return decision. The authority responsible for the appeal decision has to be independent and impartial. If necessary the person in question should also receive legal advice, representation and linguistic assistance.³⁷ If the person in question cannot afford such legal assistance it should be made available free of charge in accordance with relevant national legislation.

Has the third-country national been detained, a review of his detention should take place on regular intervals.³⁸

Humanitarian Provisions

One main concern was to ensure that the provisions are fully compatible with fundamental rights, international law, including refugee protection and human rights obligations derived from the European Convention of Human rights. As a consequence, the Directive pays special attention to families, minors and vulnerable people.

Hereby, the Principle of Non-Refoulement can be said to be one of the most important elements of the Directive. According to it no third-country national is to be sent back to a country where his life or freedom is threatened due to war, crisis or any other endangering circumstances. As a consequence, removal can be postponed or even annulled.³⁹ Special attention when applying the Directive is also to be given to the best interest of the child, the family life of the illegal migrant and his state of health.⁴⁰ In general, the Directive leaves Member States a high degree of freedom when refraining from or taking back a return decision while choosing to grant the third-country national a residence permit. Arguments can vary and include humanitarian, compassionate or other reasons (e.g. a child is attending school, social links).⁴¹ Exceptions and extensions of the voluntary period of departure or the abandonment of issuing an entry ban can also be based on these assumptions.⁴² Especially, vulnerable people, families and minors are supposed to be treated with special carefulness. For instance, in the case that a period of voluntary departure has been granted or removal postponed, authorities should ensure that family unity is maintained, emergency health care and medical treatment is available, minors can keep attending

36 Compare § 12 Directive 2008/115/EC

37 Compare § 13 Directive 2008/115/EC

38 Compare § 15 Directive 2008/115/EC

39 Compare § 9 Directive 2008/115/EC

40 Compare § 5 Directive 2008/115/EC

41 Compare § 6 Directive 2008/115/EC

42 Compare § 7/9 Directive 2008/115/EC

school and the needs of especially vulnerable people are taken into account.⁴³

Furthermore, special provisions need to be taken for unaccompanied minors. Again, the best interest of the child should be given consideration first and consultation with other appropriate bodies should take place. In case a return decision is taken it has to be ensured that the minor is returned to his or her family, a nominated guardian or adequate reception facilities.⁴⁴

Humanitarian consideration is also given in cases of detention. Not only that this measure is supposed to be least favoured, the period should also be as short as possible and only for the time removal arrangements are made.⁴⁵ During detention, the person is to be kept in a special facility. If no such facility is available, he can be kept in prison, but separate from ordinary prisoners. However, contact to family members, legal representatives and competent consular authorities should be made available if requested. In order to ensure a detention according to human rights provisions non-governmental, as well as national and international organizations should have the possibility to visit the detention facilities. Families and minors are only to be detained as other measures are exhausted. Families should be given separate accommodation while guaranteeing privacy. Minors, on the other hand, should be able to take part in leisure activities appropriate to their age and should also have access to the educational system.

If the person is given no period of voluntary departure, the Member State should take all necessary measures as long as they are proportionate and do not exceed reasonable force in accordance with fundamental rights with respect for dignity and physical integrity of the person to be removed.⁴⁶

But why does the issue of returning illegal migrants have to be dealt with on a European level and is a harmonization in this area necessary?

Even though it took some time for the EU to be able to take action within the area of asylum and migration, especially that of illegal migration, and harmonization deemed to be rather slow because Member States were unwilling to give up sovereignty, it was of great importance for numerous reasons. First of all, the aim of establishing an area of free movement of goods, persons, services and capital has facilitated the uncontrolled movement of these. As already mentioned, the removal of the borders within the EU posed a problem for handling illegal migration by the nation states themselves. According to estimates, around 5.5 million irregular immigrants are residing within the territory of the EU.⁴⁷ Due to no borders they are able to move from one territory to another. Germany, for instance, has followed by the

43 Compare § 14 Directive 2008/115/EC

44 Compare § 10 Directive 2008/115/EC

45 Compare § 15 Directive 2008/115/EC

46 Compare § 8 Directive 2008/115/EC

47 Compare www.assembly.coe.int (29.07.2009)

enlargement round of 2004, no outer EU borders anymore. As a result, it has to rely on the border controls of others that might not be as stringent. Hence, the increase of third-country nationals crossing the outer borders of the EU without permission and being able to move freely within EU territory required a common approach. Wars and crisis all around the world are also contributing to the rise of illegal migrants and thus the urgency to find rules on procedures how and whether they should be returned to their country of origin. This growth in interconnection leaves Member States alone somewhat helpless. At the same time anti-immigrant sentiment is spreading and pressure for taking action is increasing. A result of this anti-sympathy would surely have been stricter and maybe even draconian national laws. An EU wide piece of legislation prevented such an outcome, since reactionary views were diluted by the opinion to protect fundamental rights, a core principle of the EU.

Second, the fact that the states in which migrants could move to have different approaches concerning the return of third-country nationals needed an EU wide arrangement. Article 1 already sets out the main reasoning for requiring Member States to implement the Directive. It is supposed to be ensured that a minimum of common standards and procedures are introduced while safeguarding human rights obligations and refugee protection set out in Community as well as international law. Currently, should individuals be caught as an illegal migrant their treatment varies from one state to another. Detention, for instance, deviates extremely between Member States. While France has a limit of 30 days, other countries like the Netherlands, Greece, Denmark and Britain have no limits at all.⁴⁸ The Directive limiting the period of detention to six months ensures that Member States cannot keep third-country nationals for an unlimited time period presenting improved standards and human rights conditions. This is also true for coercive measures and the issuing of an entry ban. Creating common procedures and standards on removal and return guarantees that at least a minimum standard of protection is complied with in any state being a member of the EU. Yet, the Directive acknowledges that each Member has its own needs and preconditions by providing them to apply provisions that are more favorable. This is somewhat reinforced by having chosen the form of a directive in the first place. Compared to regulations, which have general application, directives “shall be binding as to the result to be achieved (...), but shall leave to the national authorities, the choice of form and methods”.⁴⁹ Furthermore, it is intended to close national loopholes. Some Member States do not have a country-wide piece of legislation regulating the return of illegal migrants. In Germany it is up to the *Länder* to establish a law regarding the conditions of pre-removal detention. But only two *Länder* of the existing 16, namely Berlin and Brandenburg, have done this. According to research even these two fail to guarantee a detention correspondent with human rights obligations, since detained individuals have proved to have

48 Compare Prakash (2008)

49 Compare Busby/ Smith (2006), p. 55

even less rights than prisoners. In the UK detainees are often even not given reasons why they are detained.⁵⁰ These common problems and additional ones are intended to be tackled by introducing the Directive. It can be said that common standards that allow Member States to adopt and maintain even more favorable provisions benefits mostly illegal migrants in the end. In this light, even the EP acknowledged that some not perfect rules were better than none.

Third, a jointly agreed on policy strengthens the credibility of the EU towards other countries, since it not only proves a common stand and will of the members, but also assures that illegal immigrants are treated adequate and similarly throughout the EU. Furthermore, news of degrading detention centers in Italy where individuals have to wait for their “removal” in inhuman and terrible conditions have spread the word. An independent Commission set up by the Minister of Interior found out that there was among other problems no psychological assistance or social care and detention facilities were overcrowded. Moreover, vulnerable people, such as women and children have to live with drug abusers and criminals and detention time was often up to two months.⁵¹ Of course, these conditions damage the image the EU has as a free, democratic institution securing the rights of every individual. Thus, regarding the current situation of illegal migrants in the EU, it is necessary to ensure at least a minimum standard in each Member State. Fourth, dealing with the issue at EU level encourages Member States to cooperate more intensively. Working together fosters the exchange of experiences and information. This, in turn, might promote the use of best practices. The Return Directive is a small step towards the introduction of a common Immigration Policy throughout the EU and enables it to slowly familiarize its members with the manifestation of such, former sensible national issues, on EU level.

The most often expressed concern is that, even though the Directive is supposed to be without prejudice to more favorable conditions, Member States stance towards the issue can be affected negatively. One, Member States may have the right to adopt or maintain these provisions as far they are compatible with the Directive, but they are not required to. That means that national standards are at risk of being lowered instead of retained if they are more advanced since most Member States have a very strict view on illegal migration. Now, they have the opportunity to enforce this view. For instance, if national law in a Member State states that detention cannot be longer than 30 days, like it is the case in France, the Directive allows him to extend this period. Two, it is unlikely that members that have the minimum standards laid out in the provision will raise them.⁵² In fact, developments have shown that countries are more likely to tighten their laws regarding illegal migrants. This is even encouraged in times of economic depression or events like the financial crisis, since citizens fear the loss of their jobs due to the

50 Compare www.detention-in-europe.org (19.07.2009)

51 Compare www.detention-in-europe.org (19.07.2009)

52 Compare Peers (2008), p. 9-11

increase of the black-market often employing illegal migrants. Thus, the governments will be pressurized to introduce tighter laws if possible.

Someone might also argue that each state has its own special preconditions and capacities preventing the Directive to be effective. Some states, for example Spain, experience a higher inflow of illegal migrants than others. That means their adjustments in terms of special detention facilities or legal assistance are higher and therefore pose additional financial and administrative burdens on the state. However, the above mentioned arguments refute such a debate since the advantages clearly outweigh the disadvantages. Not only is the state's unique situation acknowledged by leaving it some leeway to act within, but additionally fundamental rights are guaranteed and the EU's credibility bolstered.

5. The Case of Germany

Since the Return Directive will not need to be implemented until the year 2010, it is useful to find out to what extent the Member States need to adjust their national legislations. Since it would be too extensive to elaborate on the changes of 27 EU members, I will only concentrate on only one country, namely Germany. How is it affected by the Directive and what changes have to be made in regard to the current law regulating the return of illegal migrants? While it is difficult to estimate how many illegal migrants are residing in the country, estimates vary from 100,000 up to one million⁵³, it can be said that around 20.000 to 30.000 individuals are subject to removal each year.⁵⁴ What procedures do they face now and what changes will the Directive bring for them?

At present, the return policy is part of the asylum policy in Germany. Forced return is regulated by the Residence Act (German: *AufenthG*) and includes deportation (*Abschiebung*) as well as expulsion (*Zurückschiebung*).⁵⁵ In general, the law is intended to navigate the limitation and moving in of foreigners, not only illegal migrants. All measures regarding the termination of residence, detention and return measures are implemented by the *Länder*.⁵⁶ Since it would be too excessive to outline all existing legislation of each *Land*, I will focus on the main legislation, the Residence Act. The following section will highlight the most important provisions in order to compare them with the Directive.

53 Compare Kreienbrink et al. (2005), p. 12

54 Compare www.ksfh.de (29.07.2009)

55 Compare Kreienbrink (2006), p. 4

56 Compare Kreienbrink (2006), p. 32

Terms

German law does not have a clear definition of “return”. Despite that the term “voluntary” is mentioned, it is not clearly defined either. What the law defines is expulsion, obligation to leave the country, removal and deportation.⁵⁷

Thus, the Directive provides Germany with a legal definition of the terms “return” and “voluntary” which have not been determined in their meaning yet. Most important, though, is the failure to provide a legal definition of illegal residence under German law. Is the term illegality only applied to those individuals who have not been registered and have not been granted a residence permit or also to people who are currently “tolerated” because removal cannot be carried out and thus, are still under an obligation to leave the country, as well as those who have not received a toleration certificate and residence permit, but are registered? The Directive closes this loophole by defining illegal stay as the presence of an individual on the territory of a Member State who does not fulfill the conditions of entry laid down in Article 5 of the Schengen Border Code or other conditions for entry, stay or residence in that country. Thus, according to the Directive, persons being in possession of a toleration certificate do not fall under its scope.

The Procedure

As soon as an individual’s residence permit has expired or he or she was not in the possession of one in the first place, the person is obliged to leave the country immediately or within a certain deadline (expulsion order).⁵⁸ Has the illegal migrant not complied with the requirement or he poses a risk to security and no appeal has been successful, the state enforces this duty through deportation. For that reason a notification of deportation is issued, first setting a time limit for voluntary return and then threatening with deportation if the deadline has been crossed. It also states the country to which the person will be sent to. However, there is also a notification that he or she might be sent to other countries that would allow or are obligated to accept his entry. A deportation order is issued by the relevant authorities in case of risks to security or terroristic threats and does not have to include a deadline. The Federal Office for Migration and Refugees will then review whether there are certain obstacles in the country of origin preventing return.⁵⁹ In case an application for asylum is in process, the obligation to leave the country will be dismissed and hence, detention cannot be imposed or has to be ended, since it is only possible in connection with the preparation of removal.

57 Compare Kreienbrink (2006), p. 4

58 Compare §50 AufenthG

59 Compare Kreienbrink (2006), p. 7

The procedure in both the Directive and Act is similar. Compared to the Return Directive, German authorities are currently able to send third-country nationals to whatever country with the precondition that it would allow entry or is obliged to. Following implementation this would need to be altered since the Directive provides for a returning the individual to a country which he voluntarily decides to return *and* will be accepted. Both have in common, that in case the individual has applied for a permit, procedures are put on a hold.

Clearly missing though is an effective forced-return monitoring system the Directive calls for.

Detention

The Residence Act allows for the establishment of so-called departure centers by the *Länder*. As a matter of fact, the intention behind these centers is not only to facilitate return measures but also to encourage voluntary departure by providing counseling and support, as well as keeping restricted conditions in them (e.g. guarded access checkpoints, searches, residency restrictions, ban of gainful employment etc.).⁶⁰ There are also detention facilities which illegal migrants required to leave the country can be sent to. Precondition for detention is a judicial order. At the same time authorities have to consider the aspect of proportionality. Is detention adequate and necessary in order to achieve removal?⁶¹

There are two types of detention possible, preparatory or security detention. The former is applied whenever a decision whether the person will be returned or not cannot be taken immediately and it is foreseen that he or she will hamper or hinder removal. Preparatory detention has a limit of six weeks. The latter can be ordered by a judge in case the individual has entered the territory unauthorized, poses a threat to security and federal authorities have issued a removal order, has moved and has not reported that to authorities as required, has not appeared for his removal or has or is at risk of absconding. Nevertheless, this kind of detention is only possible if it is secure that removal will take place within the next three months and that the speediness of the process is independent of the detained person's behavior. Detention may last up to six months, but may be extended to another twelve if he or she hinders removal and the principle of proportionality is observed.⁶²

In any case conditions of detention are supposed to be reviewed on a regular basis and detention itself should be limited to the shortest period of time possible especially concerning minors.⁶³ Is there a need of a translator in order to facilitate communication with his counsel, the costs will have to be borne by

60 Compare Kreienbrink (2006), p. 8

61 Compare Keßler (2008), p. 450

62 Compare §1, §2 AufenthG

63 Compare Bethäuser/ Lex (2006), p. 23

the treasury.⁶⁴

As can be seen most provisions are somewhat similar to those of the Directive. Germany, as a state of law, recognizes the principle of proportionality as well as basic rights such as personal freedom and human dignity. Nevertheless, in contrast to the Residence Act, the Return Directive specifically mentions that detention should always be a measure of last resort and limits its application to two conditions. One in case of the risk of absconding and two, if the individual tries to hamper or hinder preparation of return of the removal process.⁶⁵ This should also be considered to be expressed more specifically in the Residence Act. Is the individual a risk to security, the Residence Act states that the person will not be granted a period for voluntary departure and will be removed. Hence, this will have to be changed in German law. Moreover, the fact alone that an individual is residing in the country illegally cannot be a reason anymore to detain the person. Even though the Directive does not apply to those who have come irregularly by land, sea or air it does apply to them as soon as they have crossed the border for a period of time already and are caught later. Hence, detention of these persons without the conditions laid down in the Directive is not possible anymore.⁶⁶ Especially the last two arguments (he or she has not appeared for his/her removal and he/ she is at risk of absconding) justifying detention are rather vague and give considerate margin to act within. This is also true for the Directive. Cases have been made public in which people have been detained for dubious reasons, publicly defended as the risk of absconding. For instance, an individual was arrested and brought into a detention facility as he was about to get into a train with a ticket back to his country of origin, but without an identity card.⁶⁷ Another measure would be pointing out to other efforts than detention (e.g. reporting to authorities on a regular basis).

Concerning the time limitation of detention both pieces of legislation correspond. However, this is not true for the departure facilities which have no time limitation at all.⁶⁸ Thus, it will have to be reviewed whether this really conforms with the Directive and whether a limited time period should be introduced here as well.

Besides, even though voluntary departure is an option for illegal migrants and facilitated through the departure centers, there is, once a notification of deportation has been issued, no minimum time period which authorities have to grant the person concerned to leave on a voluntary basis. As a result, a minimum of seven up to thirty days would have to be included into the law.

A more favorable measure in German law is that detention can only be instructed by judicial order and

64 Compare Heinhold (2006), p. 24

65 Compare §15 Directive 2008/115/EC

66 Compare Keßler (2008), p. 450/451

67 Compare Groner (2008), p. 6

68 Compare Kreienbrink (2006), p. 7

not administrative authorities.⁶⁹ As the Directive provides Member States with the possibility to maintain or adopt more beneficial provisions this will be continued but can also be changed if wanted. Yet, this is rather unlikely since it is constituted in the Basic Law.⁷⁰ Another condition not underlying any mandatory changes is the maximum period of detention. Again, German provisions are more favorable since detention may only be continued after the initial six months if removal is hindered by the detained. The Return Directive, on the other hand, allows for extension even if it is not the detained persons fault, but the third country's delay in providing necessary documents.⁷¹

Human Rights Conditions

Important human rights, such as human dignity, freedom of the individual, equality and so on can be found in the German Basic Law and are legally enforceable. Article 25 of the Residence Act also allows for the prospect to grant a limited residence permit for humanitarian, personal or public interest.⁷² The option to establish specific committees is also given in order to enable the granting of a residence permit in cases of severe hardship. These so-called hardship committees make recommendations to authorities when other legal options have been made use of already. While individuals who have committed criminal offences are excluded from this possibility, it is open for illegal migrants.⁷³ Besides, Article 60 also spells out specific conditions under which foreigners and illegal migrants cannot be removed. These are in concordance to the refoulement principle laid down in the Directive and include among other reasons the risk that his or her life or freedom is endangered due to his or her race, religion, citizenship, the affiliation to a certain social group or his political orientation.⁷⁴ Is removal because of humanitarian or under international law not justifiable it is also possible to suspend removal for as long as six months.⁷⁵ Are these six months exceeded the *Länder* authority can decide to grant a residence permit. When removal cannot take place because of factual or legal reasons and no residence permit is issued. If the respective person resists removal, all necessary measures may be taken as long as they are proportionate.⁷⁶

Yet, it is allowed to detain especially vulnerable people, like pregnant women, minors, and women with little children. Minors at the age of 16 are already considered capable of taking part in procedural steps

69 Compare §62 AufenthG

70 Compare §104 GG

71 Compare §15 Paragraph 6 Directive 2008/115/EC

72 Compare §25 AufenthG

73 Compare § 23 AufenthG/Kreienbrink (2006), p. 24

74 Compare §60 AufenthG

75 Compare §60a AufenthG

76 Compare Kreienbrink (2006), p. 8

and are therefore also able to be sent back.⁷⁷ Details of their care and treatment are laid down by the *Länder* creating certain difficulties when implementing the Directive. Bremen, for instance, is the one of the few *Länder* which explicitly states that pregnant women, as well as minors are only detained due to exceptional circumstances, here: criminal offences. As a matter of principle Hamburg does not detain families with minors. Most *Länder* provide pregnant women with the same assistance that is available for female prisoners usually comprised of psychological and medical care. Some do not detain children with parents in general while others only detain one of the parents. North-Rhine Westphalia offers minors special activities and each minor has his own counselor.⁷⁸

The Directive itself lays down special provisions for minors as well as families. Again, detention is seen as last resort and should be as short as possible. In contrast to the provisions stating that minors should, for example, be able to engage in leisure activities and go to school, German detention centers rarely offer special treatment for children. In comparison to the Residence Act, the Directive considers everybody younger than 18 a minor. Thus, the possibility to return minors after the age of 16 cannot be justified without proving the special circumstances requiring such action.⁷⁹ Is an unaccompanied minor sent back, German authorities will also have to make sure that he or she will be sent to relatives, a nominated guardian or special reception facilities. Such provisions do not exist up to now.

In Germany, detention can either take place in special facilities or prisons. Under the Directive this is only possible in certain circumstances and individuals have to be kept separate from ordinary prisoners. Furthermore, health care needs to be provided as well as the opportunity to contact family members and legal representatives. Families also need to be guaranteed privacy by providing them with separate accommodations. As not every *Land* has these required facilities, Germany will have to establish more special detention facilities guaranteeing all these rights especially for those who are vulnerable.

Regarding the right to contact family members some German prisons only allow a visiting time of 30 minutes in a two months period of time, a condition that will most likely have to change as soon as the Directive is implemented.⁸⁰

Legal Safeguards

The notification of deportation has to contain the name of the country to which the third-country national will be sent to. The names of other countries that would allow entry or are obliged to take him or her to which he can also be sent to do not have to be included.

77 Compare §80 AufenthG

78 Compare Document Drucksache 16/11384, p. 26-29

79 Compare Keßler (2008), p.451

80 Compare Keßler (2008), p.453

Deportation orders have to be in written form, as well as give reason and instruction for possible legal remedies. The order must also be reviewed regularly if there are grounds for granting special protection against removal. The person must also be given the opportunity to contact a legal counsel of his choice. An application for a preliminary legal counsel has to be issued within seven days following the deportation order.⁸¹ Whenever an expulsion order has been issued, the person concerned can appeal against the decision which in turn will cause a delay of the proceedings. This is also true for detention. Moreover, according to German procedural law, legal assistance is only possible in exceptional cases. Again, this varies from *Land* to *Land*. The majority of them, like Baden-Württemberg and Berlin, offer some kind of free legal assistance (usually provided by NGOs, the *Land* or volunteers). Thüringen is the only one not offering such a possibility. That means that this will have to be adjusted. The Directive allows for a time period of 36 months, December 2010, to comply with the provision, albeit in accordance with relevant national legislation or rules regarding legal aid. Therefore, legal safeguards largely correspond to those laid down in the Directive.

Ban

According to §11 Residence Act expulsion, deportation or removal automatically leads to a permanent ban to enter the country again. There is a possibility to limit the time period of this ban on request which is often done.⁸² After implementing the Directive this will have to be changed since a ban is only justified in cases where no period of time for voluntary departure has been granted or the obligation to return has not been complied with.⁸³

Two actors are especially affected by resettling the issue of return from the level of the state to the EU: the Member States, here Germany and its *Länder*, and the illegal migrants themselves. Germany, however, will not have to adopt any major changes in order to comply with the Directive. Nevertheless, most importantly, it will have to introduce better conditions for illegal migrants in detention. Meaning, not only the establishment of special facilities, but also the opportunity to contact important persons, like relatives, on a regular basis and providing minors with improved treatment according their age, as well as access to education. Of course, this will require first and foremost financial expenses. Particularly the requirement to provide free legal assistance to those who cannot afford it will demand capital. In reality, most illegal migrants have little or no money to be able to pay for that.

81 Compare §58a AufenthG

82 Compare Kreienbrink (2006), p. 8

83 Compare §11 Directive 2008/115/EC

The changes will also cause more bureaucratic input. For instance, now it is possible to detain a person just on grounds of his or her illegal stay. In fact, detention is a convenient way to ensure the removal of a person. There is no need to keep up with his whereabouts or to administer a deposit. In the future, it will be made more difficult to reason detention and the implementation of measures that need to be taken before detention can be executed (e.g. reporting to the authorities on a regular basis) increasing the workload of authorities. The same goes for the monitoring system that needs to be inaugurated. Problematic is, however, that it is rather unclear how such a monitoring system is supposed to look like in the end. The Directive itself does not offer any answer to this question.

As for migrants, German law allows for more beneficial provisions in some cases as does the Directive in others. Either way, their situation is not worsened, but rather improved. Of course, it is questionable whether a possible period of detention of 18 months is really necessary in order to achieve the aim of removal, but it must be positively acknowledged that countries that have no limit at all right now will be required to implement one.

Difficult is the division of competences in Germany. The *Länder* are responsible for many provisions, like the detention and the enforcement of removal. As a result, support and care of needy individuals vary from one *Land* to the other as indicated above. When implementing the Directive, the *Länder* will have to undertake changes in their legislation as well. Here, the approach of the Multi-level Governance theory can be seen. More levels are included, but this development also complicates the implementation of laws.

One possible drawback is that Germany may adopt those provisions that are stricter in the Directive since it is not obliged to maintain the more favorable national ones. As stated before, in times of crisis, like the financial crisis right now, countries tend to constrict the laws on migration in general. Besides, *Länder* which refrain from detaining minors and pregnant women may do so after having implemented the Directive. This is also true for other more favorable provisions.

Despite the listed shortcuts the Directive can be described as a successful compromise between the need of fighting illegal migration while safeguarding human rights at the same time. It is doubtful whether Member States themselves would implement a more protective piece of legislation on their own. Now, they may have to guard a certain level of protection and treatment but are still able to navigate some aspects for themselves. The case of Germany proves that even though Member States face some burden in terms of finance and workload the advantages are clearly enjoyed by the illegal migrants. This proves that regulating such an issue at EU level is beneficial for the community as a whole while changes are bearable. In addition, not only in the EU or even in Germany itself do conditions in detention and the actual removal vary. Some are more favorable in one *Land* than in the other. The Directive would give Germany the chance to adjust this in the entire country guaranteeing the same treatment, conditions and

respect of rights in all 16 *Länder*. As for other countries, it is foreseeable that their alterations will be more extensive and time-consuming. Spain and Italy, for instance, have been criticized numerous times for their stance towards the expulsion of third-country nationals and the conditions in their detention facilities.

6. Criticism

The previous chapter argued that illegal migrants benefit from both the Directive and the national laws since more favorable conditions are allowed to be maintained or adopted and the Directive itself ensures a minimum standard of human rights protection. But exactly these minimum standards caused a heavy debate led mainly by NGOs and countries from Latin America. The latter even labeled it the “Directive of Shame”. So instead of pushing the EU’s credibility, the new piece of legislation induced mostly criticism.

In general, measures are seen as being too harsh. A possible detention period of 18 months is believed to be disproportionate to its purpose of the actual removal preparations. Indeed, the Directive itself states in Article 15 that third-country nationals can only be kept in detention in order to prepare return and/or to carry out the removal process. It is questionable whether a period of up to 18 months is really needed for these procedures. The Directive also allows the detention of families, minors and vulnerable people. In this context it has been pointed out that the definition of vulnerable persons is very restrictive, excluding other categories of individuals in need of protection, for instance, people who are victims of slavery, slave trade, human trafficking or any kind of discrimination.⁸⁴ Therefore, it is suggested to extend the category of “vulnerable”. However, the main question is whether enabling the detention of vulnerable third-country nationals is not disproportionate as well? In Germany, 56 people in detention have tried to commit suicide since the year of 1993.⁸⁵ The figure shows how measures like these affect the individual’s mental situation considerable, even if it is only for a short time. Therefore, the maximum period of possible detention should be considered to be lowered and an examination of each individual case should be made in order to decide whether detention is really necessary. In the case of vulnerable people, like minors, the Directive should prevent detention of them entirely.

As too crude perceived is also the entry ban which has to be imposed in some circumstances (e.g. if no period for voluntary departure has been granted) while the Member States are free to decide on this in other cases. Critical is that the Directive does not offer any legal remedies in this case creating legal

84 Compare www.fidh.org (30.07.2009)

85 Compare Document Drucksache 16/11384, p. 1

uncertainty. As the third-country national is removed to another country it is not sure how and whether he can appeal for a withdrawal of the ban. Therefore, clearer rules on this issue are needed. Moreover, it is disproportionate preventing family reunions, the right to asylum and activities like cultural exchange and hence affecting fundamental rights negatively.⁸⁶ Apart from this, it is believed to be more than disproportionate to leave it open to the states whether to issue an entry ban or not for those who have left the country voluntarily like it was expected from them. Moreover, measures like these stigmatize the third-country nationals as criminals guilty of breaking the law.

Furthermore, even though states are required to extend the period given for voluntary departure if necessary, a possible period of seven days is extremely short in order to prepare for leaving.

As a matter of fact, the term voluntary seems rather ironic, since illegal migrants may leave voluntary before being removed but have no real option only being able to choose between leaving on their own or being forced to.

Dealing with the issue on EU level clearly leads to the strengthening of Fortress Europe. Rather than trying to integrate these third-country nationals effectively and giving them a real chance to stay in the country, many states will make use of the Directive and will expel them. It is contradictory that the opportunities for EU citizens to be able to travel, work and study all across Europe are extended while people coming from outside the EU are sent back to their countries of origin. Of course, poverty, unemployment and the hope for a better life lure these people to Europe. As a consequence, it is also necessary to tackle the reasons these people come there for, instead of trying to find the best ways of getting rid of them. Thus, there is not only the need to establish fair and effective asylum systems in order to give illegal migrants a chance to stay, but also the requirement to support third countries in enabling their citizens to have a better life.

As already mentioned the Directive encourages those Member States that have higher standards to lower these to the minimum standards laid down in it, while those who have the minimum standard are less likely to raise them. Additionally, even if laxer measures can be applied, it serves as a guideline probably applied by most.

So, although chapter 4 has acknowledged the need of the Directive in order to ensure at least a minimum standard of protection for illegal migrants in the entire EU, there are some flaws that remain and which should be considered to be changed in the near future.

86 Compare www.fidh.org (30.07.2009)

7. Conclusion

According to the theory of Multilevel Governance many actors on various levels are involved in EU decision-making. Exactly this has postponed the introduction of the Directive, but has also guaranteed an inclusion of various interests that enabled a wider perspective while creating the Directive. NGOs and the EP made sure that human rights are respected as much as possible. The disadvantage was that the variety of actors has created a more compromised and in some aspects even more restrictive piece of legislation than intended.

But why has a directive to be established on the EU level? Given the fact that the Member States are dealing with the issue of return in different manners, it is more effective to comply with a directive which ensures common standards and procedures throughout the EU eliminating great divergences than leaving the issue to the states to handle on their own. Only an EU- wide piece of legislation can ensure at least a minimum standard. Moreover, by successfully implementing the Directive the EU is gradually establishing an EU wide migration policy strengthening its overall competences compared to the Member States. At the same time a common approach is likely to strengthen the EU's credibility towards other countries. However, in this context the question arises, how effective an EU Directive can be if Denmark, the United Kingdom and Ireland have opted out of it?

The case study of Germany has proved that Member States will have to make some adjustments to their current legislation, some probably more than others. But this is not a mentionable disadvantage, only additional work in order to ensure that fundamental rights are protected. If this is put in comparison, it is worth the effort. In particular, illegal migrants benefit more from this Directive than they used to under national legislation. The possibility to maintain and adopt provisions that are more favorable as well as having considerable leeway when deciding to grant individuals exceptions, respects the individual circumstances of third-country nationals as well as of the Member States. Due to the increase of xenophobia it is questionable whether states will make use of their right to grant exceptions and more favorable conditions. Troubling, however, is also the prospect for some states to lower their former standards to only a minimum provided by the Directive. Chapter 6 also proves that some provisions still leave room for criticism. Human rights are not protected entirely. While EU citizens have the freedom to move freely within the territory it becomes increasingly more difficult for third-country nationals to enter the outer borders of the EU. I also doubt that even though the Directive encourages states to consider the individual circumstances of the affected third-country nationals that members will make the effort to realize this. Often, authorities that have had no contact to the people whatsoever make the final decision on whether the person can stay or not. The bureaucratic input would be way too high in order to

allow an in depth analysis of each situation. As a result, people are sent back to countries which they hardly know and to which they just have a loose connection or even only vague memories. Since you are considered an illegal migrant as soon as your toleration certificate or residence permit has expired you are very likely to have established a settled life in a state.

Despite some drawbacks, dealing with the issue on the EU level can be described as good measure to guarantee a minimum of rights for illegal migrants who have to be returned. Some Southern Member States clearly do not comply with fundamental rights. Therefore, a higher responsibility of the issue might change this. Moreover, nobody can deny that some kind of channeling is necessary; otherwise migration flows would be unplanned. A few countries, like Spain and Italy have to deal with a large number of illegal migrants entering their territory each year. Their capacities are often not capable of accommodating a large number of individuals and authorities are frequently overstressed. Yet, the governments do not seem to see the need to change the situation. The Directive is not only an impulse, but also a binding requirement to do so. At last but not least, the question remains whether Member States will entirely comply with the Directive? In reality, they often do not even comply with their own rules and find loopholes to act within. This will have to be observed whenever the deadline for implementation has passed.

List of Abbreviations

BAMF	Federal Office For Migration and Refugees
EP	European Parliament
EU	European Union
IO	International Organisation
JHA	Justice and Home Affairs
NGO	Non-governmental Organisation
SEA	Single European Act

8. References

Primary Literature

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