

Latin American Reactions to the Adoption of the Returns Directive

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1. Introduction

The European Union has had a clear-cut competency to deal with immigration since the entry into force of the Treaty of Amsterdam in 1999. Since then, addressing irregular immigration, including the repatriation of irregular residents, has been a central part of the EU's common immigration policy. The EU always defended the idea that an effective returns policy was key to ensuring public support for other elements in the policy, such as legal migration and asylum.¹ It was understood that third-country nationals who did not have a legal status enabling them to stay in the EU, either on a temporary or a permanent basis, should leave. A credible threat of a forced return, it was inferred, would send a clear message to potential irregular migrants that irregular entry into the EU would not lead to fixed residence.² With that

premise in mind, the EU began to adopt different legal instruments to deal with irregular immigration from 2000 on.³ This process culminated in the adoption of the Returns Directive in 2008, as discussed below.

This Directive was widely criticised by commentators both within and outside the European Union. For instance, the United Nations High Commissioner for Human Rights censured it, arguing that it was difficult to combine the measure with the protection of individuals.⁴ Even more notable were the critiques from Latin America, which is a region that the EU has recently recognised as a 'strategic partner'.⁵

¹ European Commission, Communication on Policy Priorities in the Fight against Illegal Immigration of Third-Country Nationals, COM (2006) 402, Brussels, 19.07.2006.

² European Commission, Communication on a Community Return Policy on Illegal Residents, COM (2002) 564, Brussels, 14.10.2002.

³ D. Acosta (2009), "The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/115: The Returns Directive)", *European Journal of Migration and Law*, Vol. 11 (1), pp. 19-39, at 22-23.

⁴ M. Ilies (2009), *Irregular Immigration Policy in the European Community: Action at All Stages of the Irregular Migration Flow (WP)*, Working Paper 38/2009, Real Instituto Elcano, 17 July, p. 13.

⁵ See for instance the Lima Declaration, "Addressing our Peoples' Priorities Together", Fifth Latin America and Caribbean-European Union Summit, Lima, 16 May 2008.

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This paper deals with two issues. First, it acknowledges the effect that measures such as the Returns Directive has on the external relations and image of the European Union abroad.⁶ This is important in light of the future adoption of the new multiannual programme in the area of freedom, security and justice (the Stockholm programme) and the emphasis it places on consolidating a global approach in the management of a common immigration policy. Second, it scrutinises the way in which member states are implementing this particular Directive and recommends options to transpose it, taking into consideration the concerns expressed by Latin America. This is also relevant if the European Union and its member states are willing to show a commitment to the political compromises adopted with strategic partners such as Latin America.

In order to do that, the main characteristics of the Directive are outlined below. The most important critiques from Latin America to its adoption are then presented, as are the responses that the European Parliament and the Spanish government gave to those concerns. Next, the way in which some member states, notably Spain, Italy and Portugal, are implementing the Directive are considered (these member states are relevant because of the high number of Latin American citizens residing there). The paper ends with some conclusions and policy recommendations.

2. The adoption of the Returns Directive

The Directive on common standards and procedures in member states for returning illegally⁷ staying third-country nationals⁸ (hereafter the Returns Directive) was officially published on 24 December 2008 following its approval by the European Parliament on 18 June 2008 and its formal adoption by the Council on 9 December 2008.⁹ The Returns Directive is the first important

⁶ See E. Guild, S. Carrera and A. Faure Atger, *Challenges and Prospects for the EU's Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, Centre for European Policy Studies, Brussels, April 2009, p. 17.

⁷ The term irregular or undocumented migrant will be used throughout this document.

⁸ OJ 2008, L 348, 24.12.2008, p. 98. The Directive is applicable to all the EU member states except for the United Kingdom, Ireland and Denmark.

⁹ For an analysis of the negotiations see D. Acosta (2009), "The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/115: The Returns Directive)",

immigration instrument adopted under the co-decision procedure.

The objective of the Directive is to set out "common standards and procedures to be applied in Member States for returning illegally staying third-country nationals" (Art. 1). The concept of return includes the country of origin, a transit country or any other country to which the irregular migrant voluntarily decides to return and in which he or she will be accepted. The Directive deals with a number of issues regarding the return procedure. Among its most controversial provisions are the following: the exclusion of some irregular migrants from its scope, the possibility to detain a migrant for a period up to 18 months, the possibility of a re-entry ban into the EU for a period of 5 years and the chance to detain and return unaccompanied minors. On the positive side, the Directive prioritises a period of voluntary return ranging from 7 to 30 days, although in some cases this period might not be granted. Also, the Directive sets the obligation for member states to issue a return decision (Art. 6) although some exceptions apply, notably the possibility to grant a residence permit for compassionate, humanitarian or other reasons (Art. 6.4).¹⁰ Finally, the Directive provides different guarantees for the irregular migrant during the whole procedure of expulsion, such as the respect of the principle of non-refoulement (Art. 5), the possibility to appeal against a return decision (Art. 13) or certain guarantees regarding the detention of minors or families (Art. 17).

3. The reaction from Latin America

The adoption of the Returns Directive elicited a tremendous amount of criticism, mainly from different international organisations and Latin American States. The latter constituted an unprecedented common reaction from this region to an EU measure. This is very relevant as Latin America is considered by the European Union to be a strategic partner. Immigration plays a crucial role in that partnership, as was well-reflected in the declaration of the last Latin America and

European Journal of Migration and Law, Vol. 11 (1), pp. 19-39.

¹⁰ For a concise analysis of the Directive see A. Baldaccini (2009), "The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive", *European Journal of Migration and Law*, Vol. 11(1), pp 11-17.

Caribbean-European Union summit in Lima in 2008.¹¹

In a very short period, between 9 June and 4 July 2008, all the important regional actors rejected the Directive. The Organization of American States (OAS) expressed its concerns in a resolution, and instructed its Secretary-General to accompany a high-level mission to the EU to learn about and discuss the implications of the Directive.¹² MERCOSUR deplored the Directive and recalled the historical hospitality with which Latin American countries received migrants from Europe in the past.¹³ The Union of South American Nations (UNASUR) issued a similar statement.¹⁴ Finally, the foreign ministries of the Andean Community addressed a letter to the European Union in which they declared the need for a common reflection on the negative consequences that this Directive would have on Latin American migrants in the European Union.¹⁵

At a parliamentary level, the Latin American Parliament (Parlatino),¹⁶ the MERCOSUR Parliament (PARLASUR),¹⁷ the Central American Parliament (PARLACEN)¹⁸ and the Andean Parliament criticised the Directive for what they termed as restrictive and inhuman provisions.

¹¹ Recital 27 of the Declaration was entirely devoted to immigration. It stated, among other things, that “We call our regions to further develop a structured and comprehensive dialogue ... (that) will also address the issues of regular and irregular migration”.

¹² Permanent Council of the OAS, CP/RES. 938 (1654/08), ‘OAS Action on the European Union’s Returns Directive on Migration Issues’, 26 June 2008.

¹³ “Declaración de los países del MERCOSUR ante la Directiva de Retorno de la Unión Europea”, Tucumán 1 July 2008.

¹⁴ “Declaración de la Unión de Naciones Suramericanas sobre la ‘Directiva de Retorno’ de la Unión Europea”, 4 July 2008 (<http://www.comunidadandina.org/unasur/4-7-08directivaUE.htm>).

¹⁵ “Communication from the Andean Community to the European Union”, 9 June 2008 (http://www.comunidadandina.org/documentos/actas/CartasCancilleres_TroikaUE_migraciones.pdf).

¹⁶ “Declaración de la Mesa Directiva sobre la Directiva del Parlamento Europeo y el Consejo para el retorno de nacionales ilegales”, 3 July 2008 (<http://www.parlatino.org/web/presidencia/declaraciones/699-declaracion-mesa-directiva-parlatino.html>).

¹⁷ “Declaración en Defensa de los Derechos Humanos de los Migrantes”, MERCOSUR/PM/DECL. 10/2008, 27 June 2008 (<http://www.parlamentodelmercosur.org/archivos/DECL.10%202008.pdf>).

¹⁸ “Pronunciamento del Parlamento Centroamericano”, 30 June 2008 (<http://www.migrante.com.mx/pdf/pronunciamento.pdf>).

At an individual level, all governments in Latin America condemned the Directive for its repressiveness.¹⁹ The Brazilian President, Luiz Inácio Lula da Silva, in a clear reference to the European Union, even declared this year that the recent legislation adopted in Brazil, by which thousands of undocumented migrants would obtain a regular status,²⁰ was a lesson to the developed countries.²¹

Also, a little bit later on 19 September 2008, the final declaration of the VIII South-American Conference on Migration, meeting in Montevideo, expressed its refusal of the Returns Directive “and the criminalization of migrants that might imply the application of this kind of rules...”²² Moreover, it exhorted the European Union to regularise those migrants from South America in an undocumented situation.²³

The harsher criticisms were mostly addressed to the European Parliament, which approved the Directive negotiated with the Council in its first reading, without introducing a single amendment. These criticisms were also directed at the Spanish government as it supported the Directive both in the Council and in the European Parliament. This has important consequences as Spain is the most important destination country of Latin American migrants in Europe, with almost 2 million coming from that area, some of whom are undocumented.²⁴ These concerns meant that the European Parliament and the Spanish government took a

¹⁹ *EU Observer*, 23 June 2008, “Latin America Could Halt EU Trade Talks Over Return Directive”; “Carta abierta de Evo Morales a propósito de la ‘directiva retorno’ de la UE”, 12 June 2008 (<http://www.telesurtv.net/noticias/contexto/index.php?ckl=392>).

²⁰ Brazilian Law No. 11.961/2009.

²¹ *El País*, “Brasil Defiende su Amnistía a Inmigrantes”, 7 July 2009 (http://www.elpais.com/articulo/internacional/Brasil/defiende/amnistia/inmigrantes/elpepuint/20090707elpepuint_1/Tes). See also the Statement by Mr. Luiz Inácio Lula Da Silva, President of Brazil, addressing the ILO Summit on Global jobs crisis, 15 June 2009 (http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/statement/wcms_108182.pdf).

²² Declaration of Montevideo, “Migration, Development and Human Rights of Migrants”, VIII South-American Conference on Migrations, Montevideo, Uruguay, 19 September 2008, paragraph 5.

²³ *Ibid.*, paragraph 10.

²⁴ C. González-Enríquez (2009), “Country Report Spain”, *Undocumented Migration. Counting the Uncountable. Data and Trends across Europe* [on line]. *Clandestino* (<http://clandestino.eliamep.gr/wp-content/uploads/2009/02/spain.pdf>).

leading role in trying to explain the Directive to its Latin American counterparts, as we will see below.

There were some common elements in the documents adopted as a reaction to the Directive. First, most of them recalled the historical hospitality with which Latin America received European migrants in previous centuries.²⁵ Second, they almost unanimously made reference to the Lima Declaration, mentioned above.²⁶ This is significant as it reveals that Latin American countries attached greater importance to this political declaration than the European Union did. Third, some institutions went so far as to ask for the modification of the Directive itself.²⁷ At a more specific level, two institutions, the Latin American Parliament and the MERCOSUR Parliament, expressed their preoccupation about two particular issues: the possibility of detention for a period of up to 18 months and the likelihood of imposing a re-entry ban for 5 years. These two issues are intrinsically linked with the option that member states have of giving the irregular migrant a period of voluntary departure, as will be analysed below.

4. Reactions from the EU to the reactions from Latin America

After the adoption of the Directive, both the European Parliament and the Spanish government felt the need to embark on a process of explaining the effects of the Directive to their Latin American counterparts.

The European Parliament tried to reassure Latin America through the work of its Euro-Latin American Parliamentary Assembly.²⁸ Its two co-presidents approved a declaration on 14 July 2008 in which they recommended the intensification of political dialogue on the issue.²⁹ To that end, it was later decided in the meeting of the EuroLat

Executive Bureau in Antigua on 27 February 2009, in response to a Latin American proposal to set up a 'Migration-ALC Working Group'. This working group comprises six members for each of the two components of the Assembly. Among the tasks that were assigned to the group were: the drawing up of fundamental principles on which to build a Euro-Latin American consensus on migration, allowing differentiated special treatment when European migration legislation is being applied to emigrants from Latin America and the Caribbean; and the monitoring of the process whereby the Returns Directive will be transposed into the domestic legislation of the EU Member States.³⁰ The working group held its first meeting in Madrid in April 2009, but it seems that some of the MEPs who voted in favour of the Directive did not turn up. Thus, in order for it not to be a futile exercise, it is hoped that, following the recent European Parliament elections, the working group would at least serve the purpose of a forum of dialogue on these issues.

Also, the bi-regional dialogue on migration between the countries of Latin America and the Caribbean was launched in June 2009, in order to fulfil the commitments of the Fifth EU-LAC Summit in Lima. This could be a starting point to prepare the next EU-LAC Madrid meeting in 2010.

Regarding the Spanish government, its explanations of the Directive were two-fold: first it was argued that it would introduce better guarantees for irregular migrants in those member states of the EU that had a more restrictive legislation, for example, those in which it was possible to detain an irregular migrant for longer than 18 months.³¹ The second argument that the Spanish government made in order to reassure its Latin American counterparts was that the Spanish legislation provided better guarantees than those in

²⁵ This was the case in the OEA, Parlacen, MERCOSUR, UNASUR, MERCOSUR Parliament and South-American conference on Migrations documents.

²⁶ This was the case in the OEA, Parlacen, MERCOSUR, Andean Community, Latin American Parliament and South-American conference on Migrations documents.

²⁷ This was the case in the Parlacen, MERCOSUR, MERCOSUR Parliament and South-American conference on Migrations documents.

²⁸ The Euro-Latin American Parliamentary Assembly - EuroLat was created in 2006 to bolster EU-Latin American relations. EuroLat is a joint multilateral Parliamentary Assembly composed of 150 members, 75 from the European Parliament and 75 from the Latin American component.

²⁹ http://www.europarl.europa.eu/intcoop/eurolat/documents/declarations/directiva_retorno_07_2008_es.pdf

³⁰ http://www.europarl.europa.eu/intcoop/eurolat/documents/press_statements/bureau_antigua_2009_en.pdf

³¹ This argument is not so easily upheld. In fact, out of the eight countries that did not have a set detention limit, two are not bound by this Directive (Denmark and the UK) and two more (Finland, the Netherlands) never detained people for such a long period. There were only some cases of detention longer than 18 months in Bulgaria, Cyprus, Estonia and Sweden. See STEPS, *The Conditions in Centres for Third Country Nationals (Detention Camps, Open Centres as well as Transit Centres and Transit Zones) with a Particular Focus on Provisions and Facilities for Persons with Special Needs in the 25 EU Member States* (Brussels, European Parliament Committee on Civil Liberties, Justice and Home Affairs, 2007).

the Directive. Thus, the Spanish authorities stated that internal legislation would not be changed.³²

Far more important than these explanations is the way in which the Directive is being implemented in the internal legal orders.

5. The implementation of the Returns Directive

As has already been mentioned, the two elements in the Directive that came in for the most criticism were the re-entry ban and detention. Both are intrinsically linked to the period of voluntary departure, which is a priority in the Directive.³³ In brief, if a period of voluntary departure is granted, the authorities will not be obliged to impose a re-entry ban, and moreover, the migrant will not be detained. On the contrary, if that period is not granted or if the migrant does not leave in the period allowed, the national authorities will be obliged to impose a re-entry ban and detention will become a possibility provided that there are no less onerous measures that can be imposed. The period for voluntary departure may not be granted if there is a risk of the migrant absconding, when s/he poses a risk to public policy, public security or national security, or when an application for a legal stay has been dismissed as manifestly unfounded or fraudulent. Consequently, it is important to see the way in which member states are implementing the possibility to grant a period for voluntary departure.

Spain is currently debating the amendments to its previous immigration legislation in Senate. The proposal put forward by the government introduces a new Article granting a period for voluntary departure that did not exist before.³⁴ The proposal establishes that this period will not be offered if the person might abscond, if he or she poses a risk to public policy, public security or national security, or if he or she impedes or makes his/her removal difficult. This last case is probably not in line with the Directive. Nevertheless, the proposal seems to go in the right direction in order to privilege voluntary departure. Furthermore, the maximum period for the imposition of the re-entry ban is

reduced from ten to five years, except where the person poses a security risk. On the negative side, the period of detention is extended from 40 to 60 days.

Italy has partially implemented the Directive with its new Security Law.³⁵ Its implementation is a clear example of what member states should not do. First of all, it establishes that entering or staying in Italy without permission constitutes a crime punishable by a fine of €5,000 to €10,000. This has very important consequences as the Returns Directive provides in Art. 2(b) that “Member States may decide not to apply this Directive to third-country nationals who...(b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law...” Secondly, the new law does not provide for a period of voluntary departure. Moreover, the re-entry ban can be applied for a minimum of 5 years up to 10 years. Finally, amongst other restrictive provisions, the legislation also lengthens the amount of time irregular migrants can spend in detention from 2 months to 6 months.³⁶ This is important for Latin America as there are almost 200,000 citizens, mainly from Ecuador and Peru, residing in Italy.³⁷ In fact, Ecuador immediately condemned the legislation.³⁸

Portugal is another major destination country for Latin American immigration, especially for Brazilians. Brazilians in fact constitute the biggest number of immigrants with around 100,000 out of fewer than 500,000.³⁹ The number of irregular migrants is difficult to determine. However, Brazilians constitute the most numerous nationality of the migrants found in an undocumented situation.⁴⁰

In Portugal, Law 23/2007 regulates the entry and residence of foreign nationals.⁴¹ This Law provides

³² *El País*, “España Explica que Nunca va a Aplicar la Directiva de Retorno”, 8 August 2008 (www.elpais.es).

³³ See recital 10 of the Directive and Art. 7.

³⁴ Art. 63(bis) of the Proyecto de Ley Orgánica de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, Boletín Oficial de la Cortes Generales, 1 July 2009 (<http://www.intermigra.info/extranjeria/archivos/legislacion/PROYLEY.pdf>).

³⁵ Law 15 July 2009, No. 94, Disposizioni in materia di sicurezza pubblica.

³⁶ See Art. 14(5) as amended.

³⁷ B. Padilla and J. Peixoto (2007), *Latin American Immigration to Southern Europe*, Migration Policy Institute, 28 June.

³⁸ Secretaría Nacional del Migrante (SENAMI), “Ecuador Responsabiliza a Italia por sus Emigrantes”, 7 July 2009 (<http://www.senami.gov.ec/content/view/291/94/>).

³⁹ Serviço de Estrangeiros e Fronteiras, “Relatório Imigração, Fronteiras e Asilo 2008.”, p. 28.

⁴⁰ *Ibid.*, p 57. .

⁴¹ Lei no 23/2007 de 4 de Julho “Aprova o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional”.

for a maximum detention period of 60 days.⁴² There is a 5 year re-entry ban⁴³ and the period of voluntary departure is set between 10 and 20 days.⁴⁴ According to official sources from the Portuguese Ministry of Interior there would be no changes to these provisions in the transposition of the Directive into national law.⁴⁵ Hence, the implementation of this Directive will produce no major legislative changes to the situation of those irregular migrants from Latin America present in Portugal, notably from Brazil.

6. Conclusions and recommendations

The criticisms to the Returns Directive by Latin America are not ill-conceived. In the process of the externalisation of immigration control embraced by the European Union, this is the first serious challenge on international relations grounds. However, the European Union would ignore the Latin American criticisms at its peril. In fact, the recent implementation by some member states brings more negative than positive news for the rights of irregular migrants.⁴⁶ This goes against the final political statement included by the Council in the Directive, which declared that its implementation should not be used in itself as a reason to justify the adoption of provisions less favourable to persons to whom it applies.

This matter is still very important for Latin American countries, as the recent Quito Declaration shows, in which the Returns Directive and some member states' practices such as those of Italy are condemned.⁴⁷ In light of the above, a number of policy recommendations can be put forward:

- The Directive provides some possibilities for a generous implementation regarding the rights of irregular migrants. Significantly, Art. 4 allows member states to apply or adopt more

favourable provisions, provided they are compatible with the Directive. In turn, Art. 6(4) establishes that member states may at any moment grant an autonomous residence permit for compassionate, humanitarian or other reasons. Finally, if return is the option adopted by a member state, it should nevertheless take place in a reasonable way. In that sense, it is important that member states prioritise the voluntary return as provided by the Directive and refrain from imposing a re-entry ban. This is also in line with what the Commission is proposing for the Stockholm programme.⁴⁸ In order to do that, member states should limit the cases in which a period for voluntary return is not given as well as interpret those cases restrictively. Also, member states have to comply with the obligation laid down in Art. 8(6) of the Directive of providing “for an effective forced-return monitoring system”.

- Also, contrary to what Italy has done, member states should take into consideration the case law by the European Court of Justice by which it declared that when transposing a Directive they have “to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed”.⁴⁹
- In that sense, by the end of 2010 the European Commission will have to see which member states are in breach of the Directive and take appropriate action under Art. 226.
- The European Union should think about the consequences of the message that it sends abroad, in particular to special partners, if it prioritises such issues as return of irregular migrants. This might have negative effects “in terms of the EU’s own credibility on human rights and the principle of solidarity in the world”.⁵⁰
- Finally, the Spanish Presidency of the European Union, which begins in January

⁴² Art 146 of Lei no 23/2007.

⁴³ Art 144 of Lei no 23/2007.

⁴⁴ Art 138 of Lei no 23/2007.

⁴⁵ Ministério da Administração Interna, “A nossa Opinião sobre a Directiva do Retorno”, 14 June 2008 (<http://opinioao.mai.gov.info/2008/06/14/a-nossa-opinioao-sobre-a-directiva-do-retorno/>).

⁴⁶ The Greek case may also be mentioned here. Art. 48 in Law 3772/2009, amending Art. 76 of the Law on Migration 3386/2005, allows for the extension from the previous 3 to 12 months of the period of detention for irregular migrants.

⁴⁷ Declaration of Quito, IX South-American Conference on Migrations, Quito, Ecuador, 22 September 2009.

⁴⁸ Commission Communication, An area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment COM(2009) 262, 10 June 2009, Brussels, p. 26.

⁴⁹ See Case C-129/96 *Inter-Environnement Wallonie ASBL v Région wallonne*, paragraph 50.

⁵⁰ E. Guild, S. Carrera and A. Faure Atger (2009), *Challenges and Prospects for the EU’s Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, Centre for European Policy Studies, Brussels, April, p. 17.

2010, could play a positive role in encouraging member states to implement the Directive using the less restrictive clauses provided in the Directive. In fact, the next EU-LAC summit will take place in Madrid on 18 May 2010 and will provide an excellent opportunity for European governments to take the concerns of Latin America into consideration.

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