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A blessing in disguise?! Discretion in the context of EU decision-making, national transposition and legitimacy regarding EU directives

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13 | Return Directive

13.1 INTRODUCTION

This chapter deals with the EU Return Directive which seeks to establish a common approach towards returning illegally staying third-country nationals within the European Union. The negotiations and transposition of the Directive are analysed to examine the role of discretion in these processes.

Illegal or irregular immigration from non-EU countries is one of the biggest challenges the EU currently has to tackle. How to deal with the wave of immigrants that embark on the journey to Europe where they enter the territory illegitimately, being determined to stay at all costs but with little or no chance that this plan comes true? Today more than ever, it seems, this question is at the heart of the European integration process. Arguably, irregular migration and the general question of how to cope with all the people that like to enter and stay on EU territory, is one of the biggest crises the European Union faces, now and in the future. But the question of irregular immigration had been a pressing topic for some years already. For the year 2007, estimates by the European Commission concerning irregular third-country nationals staying in the European Union amounted to between 4 and 8 Million whereas more modest figures, between 2 and 4 Million (roundabout 0,4 and 0,8 percent of the whole EU population) – have been presented in academic research (Düvell and Volmer, 2011). Whether there are less or more irregular residents, the fact remains that the European Union is an economically and politically attractive destination for many who have no legal right to stay. Far from staying inactive, the EU has taken measures in response to this development, arresting 200.000 irregular immigrants in the first half of 2007, of which nearly 90.000 of them were subjected to return measures (Hanna, 2008).¹ And yet, in 2014, still 276.113 migrants entered the EU irregularly. This represents an increase of 138% compared to the same period in 2013.²

1 P. Hanna 'EU illegal immigration law faces knife-edge vote', in Reuters 17 June 2008.

2 Cf. 'Irregular Migration & Return', available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission/index_en.htm (accessed 6 July 2015).

13.2 THE DIRECTIVE

In fact, return policy has been promoted for more than a decade as a cornerstone of EU immigration policy and, in particular, as an essential part of an integrated return management system entailing the uniform application of relevant EU legislation. Such a system has been a primary aim of the EU, at least on paper, ever since.³ The first decisive step towards realising this aim was the EU's 2008 Return Directive which seeks to establish a common approach to terminating illegal stays.⁴ While the Directive has been characterised as an instrument of 'more vigorous action against illegal immigration' (Schieffer, 2010: 1507), it shows at the same time the efforts of the EU, to avoid forced returns and facilitate the voluntary departure of irregular residents. What exactly does the Return Directive entail?

The Directive is a comprehensive piece of legislation, comprising 30 recitals and 23 Articles which are divided into five chapters. The Directive lays down detailed arrangements for the various aspects related to the return of third-country nationals found to be illegally present in the territory of a Member State. Chapters 2 through 5 address the key elements of the EU return procedure, consisting of the 'termination of illegal stay', 'procedural safeguards' and 'detention for the purpose of removal'. The overall objective of the Directive is to establish EU-wide common standards and procedures for returning illegally staying third-country nationals,⁵ while at the same time observing fundamental human rights throughout this procedure (Article 1). The Directive is applicable to third-country nationals whose stay on the territory of a Member State is illegal while those enjoying the Community right of free movement⁶ are not part of its scope (Article 2). 'Illegal stay' applies when immigrants do not or have ceased to fulfil the requirements of Article 5 of the Schengen Borders Code or other conditions for entry (Article 3). The Directive lays down common minimum standards and allows Member States to provide for more favourable provisions as long as they are compatible with the Directive (Article 4). In any event, Member States have to comply with the principles of non-refoulement⁷ as well as the best interests of the child, family life and state of health (Article 5). The return of irregular migrants is established as a phased process. Ille-

3 Cf. Council conclusions - Laeken (2001) and Seville (2002).

4 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24 December 2008, pp. 98-107.

5 Third-country nationals are hereafter also referred to as 'non-EU nationals'.

6 As defined in Article 2(5) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13 April 2006, pp. 1-32.

7 The principle entails that no (true) victim of persecution may be extradited to their persecutor, to respect the best interest of children, family life and the health of the person concerned.

gal stays are ended by means of a return decision (Article 6). Any return decision shall provide for a voluntary departure period of between seven and thirty days, which under certain conditions, may be modified (Article 7). Only under particular circumstances, stricter measures against irregular migrants shall be applied. They shall be removed (Article 8), subjected to an entry ban (Article 11) or a detention order (Article 15-17). Member States are obliged to provide for decisions related to return in written form as well as to offer appeal and review procedures for non-EU nationals (Articles 12 and 13). In emergency situations, Member States may derogate from the judicial review and detention requirements (Article 18). The Directive affords Member States a relatively wide margin of discretion, in particular through chapter II which includes the most important operational and discretionary provisions.

13.2.1 Immigration law and return⁸

The Return Directive is the first legal measure in the area of irregular immigration falling under the co-decision procedure and application of qualified majority voting in the Council. This new decision-making regime marked a turning-point in the development of EU immigration policies and the wider scope of the justice and home affairs area (JHA). While the intergovernmental legal nature of asylum and migration remained unaltered by the Maastricht Treaty (1993), a new institutional and legislative framework for this area was established by the Amsterdam and Nice treaty revisions (1999; 2003), together with the aim of creating an Area of Freedom, Security and Justice (Hailbronner, 2010: 2-3).⁹ The corresponding legal arrangements confirmed that the EU was about to become an active player in the formulation and coordination of policies in justice and home affairs, which previously representing the third pillar of the EU treaty framework, had mainly been shaped by intergovernmental cooperation. But these changes happened at a very gradual pace since a number of JHA matters continued to be subject of unanimity and consultation of the European Parliament and were therefore still largely decided by the Member States.¹⁰ Evidently, this was not the case with illegal immigration, at least not to the same extent as in other

8 Due to the earlier, more detailed outline in chapter 9 concerning the Blue Card Directive, the treatment of the justice and home affairs area shall be brief but complemented by insights into the evolution of EU immigration, and in particular return policy.

9 To this end a new title was entered into the Treaty establishing the European Community headed 'Visas, asylum, immigration and other policies related to free movement of persons'. The aim of an Area of Freedom, Security and Justice is thus to guarantee that the European Union is firmly grounded on security, rights and free movement realised by a set of home affairs and justice policies designed to achieve this goal. Its establishment proceeded gradually, shaped by various programmes adopted by the Council of the European Union in the period 1999-2014.

10 The transitional arrangements should grant both the Member States and the Commission an adequate time frame for preparing necessary changes in law. Cf. Article 63 TEC.

sub-domains of the JHA area, since the Council of the European Union eventually established that matters related to illegal immigration should be decided by qualified-majority voting and co-decision with the Parliament.¹¹ It, thus, seems that Member States acknowledged the particular urgency of the matter and need for a common strategy in tackling irregular migration.

Nonetheless, asylum and migration as matters of common interest appeared relatively late on the EU's agenda. This was mainly due to the persistent unwillingness of Member States to share their sovereign powers, resulting in a prevalence of loose intergovernmental arrangements and measures adopted by simple cooperation, common positions or actions – all of which were, in any case, decided without much influence of the EU. Only the establishment of the Schengen area and a more advanced cooperation since the late 1980s moved this development in another direction (Hailbronner, 2010: 1). It was at that time that both the upsides and the downsides of the abolition of checks at internal borders and the free movement of persons (confined to EU citizens) became obvious. In dealing with one of these downsides, illegal immigration was addressed since 1986 within the framework of the ad hoc working group on immigration that had been founded to combat illegal immigration. In fact, this ad hoc working group showed the first definite outlines of a more intensive collaboration between Member States at the EU level and it exceeded the narrow confines of inter-state dialogue. Decision-making under its framework, however, was mainly in the hands of EU and Member State officials and took place at a great distance from the public. This form of supranational cooperation was therefore perceived as lacking both transparency and legitimacy (Guild, 1999; Lavenex and Wallace; 2005; Kostakopoulou, 2007).

Another ten years passed until Member States agreed on a more serious commitment which exceeded short-term perspectives and ad hoc programmes, and included policies addressing illegal immigration and the managing of returning immigrants. The 1999 European Council in Tampere marked the starting signal for a coherent approach in the field of immigration and asylum. As was signalled by the summit, common efforts should be geared towards the establishment of a comprehensive Community Immigration and Asylum Policy. Within its framework the voluntary return of (illegal) immigrants should be promoted.¹² Since then, various ideas and programmes have been elaborated and presented to put such an approach into practice, showing the determination of both the Commission and the Council to make return policy an integral part of EU immigration policy.

11 As followed from the Council's 2004 passerelle decision the old decision-making regime applied to matters of legal migration but not to illegal migration. See Recital (7) and Article 1(2) of Council Decision of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty (2004/927/EC), OJ L 153M, 7 June 2006, pp. 485-486.

12 Cf. Council conclusions – Tampere (1999).

Based on a 2001 Commission action plan (European Commission, 2001), the Council developed and agreed on a common approach to combat illegal immigration and human trafficking which includes return as well as readmission policies as integral and vital elements in fighting illegal immigration. The plan of the Council, in turn, provided ground for a Commission Green paper which further explored various issues linked to the return of non-EU nationals (European Commission, 2002a). Regarding the management of return, the Commission gave consideration to both voluntary and forced return options and addressed aspects that were later on addressed by the Return Directive such as appeal and review options for irregular migrants in return procedures. The Commission paper did not represent a fully-fledged proposal but, instead, invited reactions from stakeholders (European Commission, 2005)¹³ which were used for mapping out more concrete steps towards a Community Return Policy on Illegal Residents (European Commission, 2002b) leading eventually to the adoption of the Council Return Action Programme (Council of the European Union, 2002). The Return Action Programme emphasised the need for Member States to advance mutual collaboration and cooperation with third countries for facilitating return and readmission of illegal immigrants. Further Council programmes were inspired by it: At Stockholm (2001),¹⁴ the notion of a fair and voluntary return and aim of ensuring fundamental rights protection in asylum and migration policies was re-endorsed, drawing on the content of the earlier adopted The Hague programme (2005).¹⁵ During the European Council meeting at The Hague the aim was set to have in place an instrument on common standards and procedures for returning illegally staying third-country nationals, which at the same time guaranteed respects for human rights and dignity.

This latter goal was sought to be realised by the adoption of the Return Directive which had been preceded by other legal measures addressing certain aspects of cooperation in the field of return (see table 17).

13 As noted in the proposal for the Return Directive, the group of stakeholders participating in the consultation process included representatives of the Member States, candidate countries, countries of origin and transit of illegal migratory movements, other countries of destination, international organisations, regional and municipal authorities, non-governmental organisations, and academic institutions. See COM(2005) 391 final.

14 See Council conclusions - Stockholm (2001).

15 The Hague programme (2005/C 53/01).

Table 17: Development of EU return procedure

2010	European Council, The Stockholm Programme (2010-2014) - An open and secure Europe serving and protecting the citizens
2008	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals
	Council European Pact on Immigration and Asylum
2005	European Council, The Hague Programme (2005-2010): Strengthening Freedom, Security and Justice in the European Union
2004	Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals represent first important legal milestones
	Council Decision 2004/191/EC setting out the criteria and Council adopted its Return Action Programme of 28 November 2002
2003	Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit
2002	Green Paper of the European Commission on a Community Return Policy
2001	Directive 2001/40/EC on mutual recognition of decisions on the expulsion of third-country
	Common policy on illegal immigration
1999	European Council, The Tampere Programme (2000-2005): Member States decide to set up a common European asylum system and a joint European immigration policy

Not being the first legislative act in this context, the Return Directive was nevertheless a decisive one. As a measure which should not only complement already existing EU instruments, the Directive stood out because of its 'horizontal application dimension': its requirements should be applied horizontally and therefore to *any* third-country national not or no longer fulfilling the conditions for entry, stay or residence in a Member State.¹⁶ What's more, the Directive represented the first step towards harmonisation of different national standards and procedures in the area of return.

Return and readmission are nowadays key components of EU immigration policies.¹⁷ Since the adoption of the Return Directive, the EU has steadily continued its legislative activity in this field. The adoption of not only further

¹⁶ Cf. recital (5) of the Directive's preamble.

¹⁷ Cf. 'Return and Readmission', available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/irregular-migration-return-policy/return-readmission/index_en.htm (accessed 6 July 2015).

directives but also regulations¹⁸ seems to illustrate the deepening of collaboration of Member States as well as the rising influence of the EU. Greater EU impact, however, does not remain undisputed in an area not belonging to the traditional fields of EU action. This is a fact which has repeatedly been illustrated, not least through the negotiations on the Return Directive but also more recently by debates about systematic external border checks and the reintroduction of border controls in the Schengen area as requested by several Member States to combat terrorist acts and cope with immigration (Barigazzi, 2015; Hasselbach, 2015).¹⁹

13.2.2 Purpose and background to the directive

The proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals was submitted as part of a package of measures in the field of immigration and asylum (European Commission, 2005).²⁰ By tabling this proposal the European Commission sought to respond to the call from the European Council's declaration of The Hague summit meeting. Member States had agreed on the need for concrete measures to realise the common objective of an effective, fair and human policy on removal and return of irregular migrants.²¹ Moreover, the Commission justified the need for a common EU-wide approach to returning non-EU nationals, by pointing to the cross-border dimension of irregular immigration, becoming particularly evident in cases of apprehension and return. The Commission proposal took special account of Member States' wishes to introduce minimum standards to guide them in procedures, geared towards the removal of illegally staying residents. It addressed a range of crucial components that should become part of an EU immigrant-return policy. Starting out with provisions on the return decision and removal order, it contained rules on the use of coercive measures, the application of temporary custody and issuing of re-entry ban, thereby providing for a common minimum set of legal and procedural safeguards to warrant effective protection of the interests of the individuals concerned. Provisions regarding family relationships and the best interest of the child as well as judicial remedies for third-country nationals²² furthermore

18 See for instance the Schengen Borders Code Regulation (EU) No 610/2013, the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council.

19 J. Barigazzi, 'EU to tighten border controls in wake of attacks. Commission asked to propose new Schengen rules by end of year', in *Politico* 20 November 2015. C. Hasselbach, 'Migration: A new age of isolation for Europe?', in *Deutsche Welle* 13 June 2015.

20 The other measures concerned three Commission Communications, on Integration, on Regional Protection Programmes, and on Migration and Development.

21 The terms 'migrants' and 'immigrants' are used interchangeably. The same applies to the terms 'irregular' and 'illegal' stay.

22 See Articles 5 and 12.

underlined the Commission's intention to achieve an adequate treatment of returnees, one which should respect human rights and international law. To this end, the proposal conceptualised return as a two-phase process, including a return decision providing irregular migrants with the option of voluntary departure which, only, in a next step, should be followed by an act ordering their removal.

Not in all respects did the proposal fully realise what had been envisaged in the run-up to its submission. It did not include rules on the safeguarding of public order and security by means of expulsion or removal of irregular migrants, for the reason that, amongst others, this aspect was already covered by other EU legislation (European Commission, 2005, pp. 4-5). This does not change the fact that the Commission proposal, nevertheless, foresaw the use of coercive measures, temporary custody and entry bans.²³ The proposal also stayed behind the original expectation that it would provide for full harmonisation by means of a common legal framework. It is true that the proposal's long-term objective was to achieve adequate and similar treatment of irregular migrants throughout the EU, including the additional objective of facilitating the work of national authorities, allowing enhanced co-operation among Member States in matters of return. It, additionally, strived for, and eventually realised, the possibility for Member States to apply more favourable provisions to third-country nationals falling under its scope (Schieffer, 2010: 1507).²⁴ But exactly this latter aspect shows that the Directive did not imply the full harmonisation of national return procedures but, instead, established a minimum harmonisation approach to return management which precluded the entire alignment of national rules, implying, instead, the continuation of national, albeit limited, legal divergence throughout the EU.

13.3 NEGOTIATIONS

The Commission proposal was submitted on the basis of Article 63(3) (b) TEC (now Article 79(2)(c) TFEU) and examined at length at lower and higher levels²⁵ within the Council and under successive Presidencies.²⁶ Finding a common position on the proposal was apparently difficult and only achieved after more than three years of negotiations (see table 18).

23 Cf. Articles 9 and 14.

24 See Article 4 of the proposal.

25 Including amongst others: working Party on Migration and Expulsion, Working Party: Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) involving senior level officials and the Permanent Representatives Committee (Coreper).

26 Negotiations started in 2006 under the Presidency of Austria, followed by Finland, Germany and Portugal in 2007 as well as Slovenia and France in 2008.

Table 18: Timeline for negotiations on the Return Directive

01 Sep 05	Adoption by Commission proposal
27 Apr 07	Committee of Regions opinion
18 Jun 08	Adoption of the directive at first reading by European Parliament
08 Dec 08	Approval by the Council of the European Parliament position at 1st reading
16 Dec 08	Formal adoption by Council and European Parliament

It was certainly not facilitated by the fact that a compromise had to be struck not only among EU Member States. Also the Schengen associates (non-EU Members) Iceland, Norway, Switzerland and Liechtenstein had to be taken on board.²⁷ Additionally, negotiations were more protracted due to disagreements between the Council and the European Parliament which, acting as co-legislator, had a relevant role to play at the negotiation table (Baldaccini, 2009; 2011; Lutz, 2010). Due attention was paid to the Commission proposal by three of its Committees: the Committee on Civil Liberties, Justice and Home being chiefly responsible for formulating the European Parliament's position on the proposal which was adopted in September 2007. The Committee was herein supported by the Committee on Foreign Affairs and the Committee on Development. According to Baldaccini, it was evident from the outset of the negotiations that the positions between the Council and the European Parliament differed considerably which precluded the possibility of an early compromise between the two:

For Member States the objective was that common standards could facilitate the work of national authorities handling return operations [...]. The European Parliament, on the other hand, was more concerned with the situation of persons who may be the subject of a return decision and removals taking place within a legal framework that respects fundamental rights and contains adequate safeguards and procedural guarantees (Baldaccini, 2009: 125).

In addition to preference divergence, communication and interaction between the co-legislators was lacking which hardened their respective positions and furthermore obstructed finding a common agreement. Finally, disagreements between Members of the European Parliament had further, retarding effects on the progress of negotiations. While some Members of Parliament took a pragmatic approach by seeking realistic solutions, others

²⁷ Their participation in the negotiations and implementation of the Directive was required given the fact that the Directive entailed a development of provisions of the Schengen acquis within the meaning of the respective association agreements of these countries with the EU. More concrete, the Directive is applicable to third-country nationals who do not or do not anymore meet the entry conditions established by the Schengen Borders Code (Regulation (EC) No 562/2006).

seemed to pursue a more ambitious agenda, underestimating or ignoring, however, the uncompromising stance of the Council on aspects of their concern (Lutz, 2010: 19-20).²⁸

Shifting the focus to the Council, the negotiations were marked by the demands of Member States for more flexible arrangements. The arrangements proposed by the Commission were found too rigid to be embedded into national legal structures (Council of the European Union, 2006a; 2006b). While the subject matter of the Directive was in everyone's interest, the way the Commission had given substance to it was hardly to the satisfaction of the Member States and drew their criticism in a number of respects. How did in particular the Dutch Government react to the Commission proposal? In fact, the Dutch Government was among its sharp critics. While subscribing to the need for common rules to more efficiently manage the return of non-EU nationals staying illegally on EU territory, the Government considered the proposal to be flawed due to its lack of sufficient discretionary room for the Member States. Given the fact that the proposal did not entirely match corresponding legislation applicable in the Netherlands and, additionally, proposed new elements, which hence would have to be introduced into national legislation (return decision and entry ban requirements), discretion was apparently seen as an important means to cope with the (formal) implementation of the Directive (*Parliamentary Papers II* 2005/06, 22112, no. 397, pp. 16-18).

For this reason, the Dutch delegation did not hesitate to frequently interfere in the negotiations on the proposed Directive by forwarding numerous requests for amendments, and by explaining its position on the Commission proposal in more detail in a paper addressed at all other Member State delegations in the Council. This position paper reflected its wish to bring the Commission proposal more in line with own legislation (Council of the European Union, 2006c). Viewed from the outside, the Dutch delegation seemed to take a relatively hard stance, at times. This becomes, for instance, obvious from the fact that it objected to the idea that measures for return should not be applied in cases of illness of the third-country national concerned or for humanitarian reasons (Council of the European Union, 2006b, p. 2).²⁹ According to its own statement, this approach was not motivated by the desire to impair the safeguards proposed for third-country nationals. It was, instead, motivated by the concern of the Dutch Government that the Directive would have far-reaching consequences for the statutory procedure in the Netherlands. The Dutch delegation therefore wished to focus

28 The different positions of Members of the European Parliament on the Commission proposal are also reflected by the fact that the Parliament's report included a minority opinion rejecting the report as a whole. This rejection was mainly caused by the Directive's provisions concerning detention which were viewed as incompatible with a fair and human approach to irregular third-country nationals in return procedures. See European Parliament, 2007, p. 29.

29 In spite of the Dutch opposition, the Article remained virtually unchanged. See Article 6(4) of the final Directive.

on the technical design of the Directive (Council of the European Union, 2006c, p. 2), arguably to bring the latter more in line with own legislation. During the negotiations, the Dutch delegation succeeded in asserting not all but some national preferences. For instance, along the lines of a proposal it had forwarded, EU rules concerning the issuing of return decisions in case of pending procedures were reformulated. This resulted in a better match between EU and national rules on this matter (Council of the European Union, 2006b, p. 4).

13.3.1 Scope and definitions

The criticism voiced by the Dutch delegation was mostly targeted at issues that more generally triggered intensive debates in the Council, relating to the key operational provisions of the Directive's chapter two and three. But there were also some general issues with which Member States did not entirely agree.

At the first meeting of the Working Party on Migration and Expulsion in November 2005, several Member States expressed the view that the draft Directive offered 'excessive rights and guarantees', indicating that it went too far in respect of the envisaged (favourable) conditions for irregular immigrants staying on their territories (Council of the European Union, 2006d, p. 2). In particular, Member States were not willing to grant these rights and guarantees to those third-country nationals that had been refused entry in a transit zone of a Member State but who should nevertheless be treated according to standards laid down by the Directive proposal.³⁰ The Netherlands, Czech Republic, and Germany were amongst those Member States which objected to this requirement. As a result, the provisions regarding the Directive's application area were considerably changed in the course of the negotiations. According to the final Directive, Member States are allowed to entirely exclude certain categories of irregular migrants from the Directive's scope of applicability, including those that are subject to criminal law cases. This way, Member States ensured that the Directive would not harmonise matters of criminal law or extradition (Schieffer, 2010: 1511-1513).³¹ Hence, Member States adopted a minimalist approach towards harmonisation, seeking to avoid closer alignment with EU law. Being on the one hand keen to have in place harmonised return conditions for the efficient removal of irregular migrants, Member States seemed, on the other hand, unwilling to accept too far-reaching harmonisation, even though this might ensure better legal and procedural safeguards for the protection of particular groups of irregular migrants (Baldaccini, 2009; 2011). In any case it can be considered as detrimental to the Directive's objectives that the agreed exclusions from the Directive's scope allowed for different application possibilities by Member States. This was likely to cause legal diversity,

30 See Article 2(2) of the Directive proposal.

31 See Article 2(2) of the final Directive.

and was therefore not conducive to the result to be achieved: the introduction of common standards and procedures for the return of irregular third-country nationals (Schieffer, 2010: 1512). Owing to the interference of the European Parliament, however, the Directive eventually provided for some level of protection of those irregular migrants that were excluded from its remit. In this regard, the Directive establishes that protection shall become effective in a number of aspects pertaining to the return procedure: with a view to Member States' application of coercive measures, as well as under circumstances concerning the postponement of removal, and in respect of pending return procedures and requirements concerning detention.³²

Several Member States also questioned the use of the concept of 'illegal stay'. The Dutch, Polish, and Swedish delegation wondered whether asylum seekers whose application was rejected, could be considered as falling under the Directive's scope (Council of the European Union, 2006d, p. 3). Especially the Netherlands made no secret of the fact that they disapproved of the horizontal dimension of the Directive which made EU rules applicable to any illegal immigrant (Council of the European Union, 2006d, p. 2). The Commission, on the other hand, argued that alongside some general standards that were applicable to all returnees, the Directive's substantive provisions would imply differentiation in treatment (Council of the European Union, 2006d, p. 2). Nonetheless, the envisaged horizontal application of the Directive was repeatedly criticised by the Dutch delegation. This, however, did not result in any changes being made to the Directive in this respect.

13.3.2 Return decision

The Dutch delegation forwarded several suggestions for amendments, especially during the debates about the return decision (Article 6). The proposed return decision represented one of the more controversial issues and the corresponding provisions were considerably redrafted during the negotiations. First of all, many Member States criticised the Article on the return decision for its lack of flexibility. It appeared that issuing a return decision for any illegally staying immigrant as envisaged by Article 6(1) was not compatible with a number of national legal frameworks. From the Dutch perspective, national rules and practices worked differently compared to the system laid down by the Directive proposal. The Directive proposal foresaw that illegal residence should be terminated by issuing a decision entailing the return of migrants with irregular status. But applicable legislation in the Netherlands did not provide for a separate act ordering the return of this group of migrants. For this reason the Dutch delegation sought to relax this requirement. To this end it forwarded an amendment to Article 6(1) which put emphasis on the applicability of already existing national legal arrange-

32 The relevant requirements are set out in Articles 8(4), 8(5), 9(2)(a), 14(1)(b) and (d) as well as in the Articles 16 and 17.

ments. Accordingly, the obligation to issue a return decision to any illegal immigrant as envisaged by the proposal should apply ‘unless the illegality and / or the obligation to leave the territory and / or the authority to remove *arise from national legislation* [italics added]’ (Council of the European Union, 2006e, p. 5). Furthermore, in the context of the debates on the provisions concerning the return decision, the Dutch delegation repeated its request for differentiation in treating irregular migrants and forwarded a proposal to this end. The proposal suggested distinguishing between three categories of returnees: non-EU nationals that illegally entered a Member State’s territory (illegal entrants), unsuccessful asylum seekers, and third-country nationals that legally entered but whose stay had ceased to be legal (so-called ‘overstayers’). The Directive’s legal and procedural safeguards should only apply to the latter category of migrants. Illegal entrants should not be granted a voluntary departure period at all. In addition, and to guarantee an efficient procedure involving less administrative burdens, neither overstayers nor illegal entrants should receive a decision related to residence, return and / or removal (Council of the European Union, 2006c: 4). The Dutch request for treating groups of illegal immigrants differently was shared by other delegations such as the Estonian, Italian, Polish and Swedish delegations (Council of the European Union, 2006d, p. 7; see also 2006a). Germany shared the view that it should be possible to directly implement the return decision as well as to require the immediate departure of illegal residents in particular cases (Council of the European Union, 2006a, p. 2). Views differed, among the Member States, on the length of the voluntary departure period. While Poland favoured a period of two weeks, the Netherlands, Germany and Belgium agreed with the proposed maximum of four weeks. In the view of the Dutch delegation this would promote voluntary return (Council of the European Union, 2006a, p. 2).

The proposed two-step approach which consisted in the first step, to issue a return decision and, in a second step, a removal order (Article 6(3)), met with strong criticism. Member States criticised that this requirement was not compatible with national rules and practices, and that it caused too much red tape, eventually leading to delay in the return of irregular migrants (Schieffer, 2010: 1522). For the Netherlands the proposed EU rules were highly inconvenient. A few years before the negotiations, the Dutch law on aliens had undergone a fundamental reform which had resulted in concentrating the three separate decisions on residence, return and removal in one, the so-called ‘decision with multiple consequences’, in order to accelerate asylum and return procedures (Winter and Bolt, 2007: 4-5). The Dutch efforts had been geared towards streamlining the activities related to return, with the result that the procedure as a whole had become simpler and more efficient. This apparently led to a decrease of the total number of procedures, while at the same time it increased the clarity of rules for their application. This was confirmed by a 2000 evaluation report on the Dutch

Aliens Act.³³ Seeking to preserve its own system and being convinced of its efficiency, the Dutch delegation sought to amend EU rules, by suggesting an additional, new Article which would allow Member States to retain regulations similar to those applicable in the Netherlands, in cases where the rejection or withdrawal of a residence permit included both decisions on return and removal. Acknowledging the existing differences between Member States in managing the return of irregular non-EU nationals, the Netherlands, additionally, suggested that Member States applying a system similar to that proposed by the Directive, should be able to retain their national rules (Council of the European Union, 2006c, p. 6). Alongside the Netherlands, also other Member States, including Greece, Portugal, and Lichtenstein, wished to maintain their national legal arrangements already in place. The Commission, however, argued that the proposed rules concerning the return of irregular migrants provided for enough flexibility. In this regard it pointed to the permission allowing Member States to decide whether to issue return decisions and removal orders together or by means of separate acts (Council of the European Union, 2006a, p. 4). And yet, concessions were made to the Member States, showing in the fact that the final Directive allows Member States to adopt a separate administrative or judicial decision or act ordering the removal of the third-country national concerned.³⁴

13.3.3 Entry ban

The provisions concerning the removal of third-country nationals illegally staying on the territory of a Member State caused intensive debates in the Council and were considerably redrafted as a result (Schieffer, 2010: 1526-1530). But even more controversial was the proposed EU-wide entry ban which reflected a coercive approach to those irregular migrants who disobeyed EU or national immigration rules. National practices appeared to differ considerably from the proposed EU rules. Member States such as the United Kingdom and Sweden criticised the mandatory character of the Article, requesting for the imposition of an entry ban to be an option but no obligation for Member States (Council of the European Union, 2006f, p. 2). The proposal furthermore established that the time frame for an entry ban should not exceed five years.³⁵ Instead of a maximum duration, Poland, however, preferred to have a minimum length of applicability for entry bans. Germany, on the contrary, was in favour of an unlimited entry ban which should apply by default and only be withdrawn under certain conditions. It was herein supported by Switzerland and several other Member

33 See the report by the Evaluation Committee Aliens Act 2000 [Commissie Evaluatie Vreemdelingenwet 2000] (2006), available at: <https://www.wodc.nl/onderzoeksdatabase/voorbereiding-nulmeting-evaluatie-vreemdelingenwet-2000.aspx#publicatiegegevens> (accessed 8 July 2015).

34 Cf. Article 8(3) of the final Directive.

35 Cf. Article 9(1) of the proposal.

States, including the Netherlands. Moreover, drawing on the ideas of the initial Commission proposal (European Commission, 2005, p. 8), the Netherlands together with Spain, Ireland, Hungary and Poland advocated the automatic issuing of re-entry-bans to facilitate processes and ease burdens in the administration (Council of the European Union, 2006g, p. 2). The Commission followed up on this request. To register entry bans, the second Generation Schengen Information System (SIS II)³⁶ should be used and the Commission committed itself to propose at the next review of the system a corresponding obligation for Member States. In doing so the Commission sought to accommodate Member States' preferences and to address especially Dutch concerns (Council of the European Union, 2007a, p. 19). These were probably caused by the fear that without using an official EU registration system, there would be only insufficient transparency and exchange of information between the Member States regarding the entry bans already imposed by all of them, reducing the efficiency of the entry ban regime as a result.

Another, persistent concern, of the Dutch delegation was the requirement to issue return decisions in writing.³⁷ It seemed to imply unnecessary burdens and, above all, did not match the Dutch rules and practices (Council of the European Union, 2007b, p. 32). Besides, it was found incompatible with the proposed definition of the return decision in Article 3(d) which did not imply the obligation for Member States to use a written format. In spite of this critique, the requirement remained in place.³⁸ Discretion was instead granted to Member States in respect of the obligation to provide all irregular migrants with a translation of the key elements of a decision related to return. Accordingly, Member States were allowed to exclude from this measure migrants that had illegally entered national territory and stayed unauthorised.³⁹

13.3.4 Remedies

The proposal foresaw a number of procedural safeguards, amongst them the right for irregular migrants to an effective judicial remedy against decisions related to return and / or removal orders before a court or tribunal. The judicial remedy should either lead to the suspension of the decision or entail the right for non-EU nationals to apply for suspension of the enforcement until the endorsement of the decision or ending of the suspension. Furthermore, Member States were obliged to provide for legal and linguis-

36 By means of SIS II competent national authorities can issue and consult alerts on persons supposed of having been involved in a serious crime or lacking the right to enter or stay in the EU.

37 See Article 11(1) of the proposal.

38 Cf. Article 12(1) of the final Directive.

39 See Article 12(3) of the final Directive.

tic assistance as well as legal aid to those not having the means to afford it.⁴⁰ These provisions, and in particular the latter aspect concerning the provision of legal aid to those unable to afford it, represented the most contentious issues between the Council and the European Parliament in the negotiations on the Directive. In fact, it was only due to the persistence of the European Parliament that Member States were eventually obliged to make legal aid available to those irregular migrants lacking sufficient financial means (Baldaccini, 2011: 11-12).

A number of Member States, including the Netherlands, opposed the obligation to provide for judicial remedy against a court or tribunal, arguing that it should be sufficient to lodge an appeal in front of an administrative body and that the proposed EU rules did not match those national legal systems which only allowed Court access in very few cases. Apparently, this objection was taken into account. The final Directive establishes that not only a competent judicial but also administrative authority or competent body can review decisions related to return.⁴¹ In addition, free legal aid would be granted on request but only under certain conditions, one of them being, as requested by the Dutch and Spanish delegations, that the provision of free legal aid would be in accordance with relevant national legislation (Council of the European Union, 2006g, p. 6).⁴²

EU requirements regarding remedies were also criticised in the particular case of detention.⁴³ From the viewpoint of the Netherlands as presented in its position paper (Council of the European Union, 2006c), the Article was in various respects incompatible with national legislation which, for instance, did not include a maximum period for the detention of illegally staying third-country nationals (*Parliamentary Papers II* 2005/06, 22112, no. 397, p. 18). Next to this incongruence between EU and Dutch law, the Netherlands considered the obligation to ensure confirmation of a detention decision within 72 hours by a national court as particularly detrimental and as a 'disproportional burden for the judiciary' (Council of the European Union, 2006c, p. 5). While endorsing the need for judicial review, it brought into consideration the fact that international law, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), merely stipulated to have decisions reviewed within short time, without, however, prescribing any exact period for judicial reviews to be carried out. Still more important, the Dutch delegation argued that EU proposals would undermine recent efforts that had been undertaken to amend national law. These efforts had been carried out upon requests by the

40 See Article 12 of the draft Directive.

41 See Article 13(1) of the final Directive.

42 See Article 13(4).

43 Initially, detention was referred to as 'temporary custody' but it was changed during the negotiations into 'detention' upon the request of the European Parliament who found it a more suitable term to describe the content of the Article. See European Parliament, 2007, p. 7.

Dutch judiciary and with the aim of lifting burdens which previous legislation had imposed.⁴⁴ To preserve its own rules seemingly challenged by EU law, the Dutch delegation forwarded an amendment which was, however, worded in rather broad terms, being motivated by the intention to seek the support of other delegations (Council of the European Union, 2006c, p. 6).

The Dutch request had no immediate effect, but was followed by another slightly different suggestion for amendment which was forwarded by the Dutch delegation at a later stage of the negotiations. According to this suggestion, third-country nationals should have, at all times, the possibility to appeal against a detention decision in front of a competent judicial authority. But the time needed to process the appeal should not be determined by the Directive. As put in the words of the Dutch delegation, judicial review should be carried out 'within a reasonable time limit laid down in the national legislation' (Council of the European Union, 2008, p. 25). In this way, the Dutch delegation sought to ease EU rules and make them more compatible with own legislation.

The Dutch suggestion was not directly taken over, but it seems that it had some impact on the reformulations of the relevant provision. For instance, the requirement of having a detention decision issued by an administrative authority reviewed within 72 hours from the start of its application was dropped and reference instead made to a 'speedy judicial review of the lawfulness of detention to be decided on as speedily as possible from the beginning of detention'. As an alternative, the third-country national should be informed about and granted the right to take relevant proceedings that should provide for the speedy judicial review of the lawfulness of the detention decision with an outcome shortly after the launch of proceedings.⁴⁵ To facilitate a final compromise and to secure a qualified majority in the Council, the Commission assured the Member States of financial support from the European Return Fund to cope with financial burdens flowing from the implementation of the provision on free legal aid (Schieffer, 2010: 1537).

Rules relating to detention were very controversial not only within the Council where Member State disagreement was mostly the result of the highly divergent national rules and practices in this respect (Baldaccini, 2011: 12; Schieffer, 2010: 1542). It was also a matter on which the opinions of the two co-legislators diverged. In contrast to the Council, the European Parliament disapproved of the detention requirement, preferring a less strict approach towards irregular migrants. The European Parliament succeeded in partly asserting corresponding preferences as evidenced by the fact that

44 Taking effect from 1 September 2004, the reviewed procedure put an end to the so-called 'ten-day-review': this former review system implied judicial review of the custodial measure within ten days, which, as it seems, heavily increased the workload for the Dutch judiciary up to a point that it became unbearable and infeasible for the latter to cope with it.

45 Cf. Article 15(2)(a) and (b) of the final Directive.

the obligation to keep irregular migrants in detention was amended: The obligation for Member States to make use of the detention procedure upon having applied all other available and less coercive measures was eventually turned into an optional measure (Baldaccini, 2011: 12).⁴⁶

Despite this successful outcome for the European Parliament, its overall impact has been assessed as limited in scope (Baldaccini, 2009; 2011). And yet, this does not change the fact that it undertook great effort to influence the negotiations on the Return Directive. To this end, it kept on forwarding amendments and sought to assert its preferences in a number of informal trilogue meetings during the ‘hot phase of negotiations’ between summer 2007 and spring 2008 (Lutz, 2010: 23; see also Schieffer, 2010: 1506). Granted, its efforts to influence the content of the Directive produced mixed results. On the one hand, the European Parliament succeeded in changing the Directive proposal in a way that resulted in more emphasis being put on a fair, human and transparent approach to which Member States had previously committed themselves. In this regard, the Directive obliges Member States to take due account of a number of key principles of international and human rights law⁴⁷ in the implementation of the Directive. Additionally, upon the request of the European Parliament new provisions were incorporated including specific obligations for Member States with regard to the return and removal of unaccompanied minors, detention of minors and families as well as effective monitoring requirements regarding forced-return procedures.⁴⁸ On the other hand, while the European Parliament’s amendments left here and there traces in the operational part of the Directive (chapters 2 and 3), many of its amendments to the substantive provisions were not taken into account. It therefore seems that Member States’ interests prevailed. For instance, the European Parliament could not prevent the incorporation of Article 18 which allows Member States in emergency situations – in the presence of an exceptionally large number of irregular migrants and the absence of administrative capacities and facilities – to derogate from the Directive’s requirements regarding remedies and detention which imply a rather favourable approach to irregular migrants. The European Parliament also failed in realising its objective to become more involved in the implementation of the Directive. Its request to appoint an Ombudsman from its own ranks, who should ensure that return procedures were carried out in an efficient and human way in collaboration with the Member States, was not incorporated.⁴⁹

46 Compare Article 15 of the Directive proposal with Article 14 of the final Directive.

47 See Article 5 addressing the non-refoulement, best interests of the child, family life and state of health, which was amended along the lines of its proposal. See European Parliament, 2007, p. 11.

48 See Articles 10 and 17 of the final Directive.

49 See Article 16a inserted by amendment 69 of the European Parliament’s report on the Commission Proposal. See European Parliament, 2007, p. 25.

Having discussed EU decision-making on the Return Directive, including the Dutch position on the proposal, the following sections aim to shed light on the role of discretion in the negotiation process.

13.4 ANALYSIS

Recital (12) of the Return Directive addresses the situation of those migrants whose illegal stay has officially been established but who have not yet been removed. The recital stipulates that national authorities should provide these migrants with a written confirmation of their situation to prepare them for administrative controls and checks. The Directive continues to stipulate that ‘Member States should enjoy wide *discretion* [italics added] concerning the form and format of the written confirmation and should also be able to include it in decisions related to return adopted under this Directive’.

The explicit mentioning of discretion in the Directive, as illustrated by this example, very rarely happens.⁵⁰ It may give a foretaste of the essential role that discretion played during the negotiations on the Return Directive. The analysis brings to light further insights showing the relevance of discretion in the negotiations. Member States’ general assessment of the Directive as providing for too little flexibility and their subsequent search for more discretion – reflected in the change of mandatory into optional requirements or the incorporation of additional may-clauses into key provisions – show that discretion played a vital role in Member States’ considerations about the Directive proposal. This was also confirmed by the civil servant involved in the negotiations. The position taken by the Dutch delegation on a number of aspects illustrates this point well.

13.4.1 Discretion and policy area

According to the first expectation addressed, where more discretion is granted to Member States, the association is that the EU has little leverage over decision-making and is institutionally not as firmly anchored as in other more Europeanised areas. This expectation certainly holds true for the present case. The coding exercise and literature on the negotiations confirm that the Directive contains a high margin of discretion. The interviewees, who were involved in the negotiations as well as transposition of the Directive, agreed with this observation but additionally pointed out that some of the Directive’s Articles are of more prescriptive nature than may be expected

⁵⁰ At least that can be said with certainty for the directives which have been closer examined in the framework of this study and which cover more policy areas than those examined in the case studies.

at first sight.⁵¹ In any case, the Return Directive grants a rather wide than narrow scope of discretion to Member States. This may not be too surprising given the fact that EU influence in the area of justice and home affairs, and illegal immigration in particular, remained limited for some time. The history of the policy area illustrates that integration in the area evolved gradually and from small steps, gaining momentum in the late 1990s with the communitarisation of important aspects of immigration and asylum law, including illegal immigration as established by the Treaty of Amsterdam (1999). Only then most matters of justice and home affairs were moved from an area where the EU merely exercised supportive competence to the first pillar, with illegal immigration eventually being subjected to the Community method – albeit under the condition that competence was not exclusively exercised by the EU but in observance of the principle of subsidiarity.

Against this background, the case of the Return Directive emerges as a prime example illustrating the expected link between discretion and policy area. In a nutshell, where more discretion is granted, the influence of the EU in legislative and institutional terms is limited. And yet, at the same time it has to be kept in mind that the negotiations on the Return Directive marked a watershed in the history of EU law-making on irregular migration because of the fact that the Directive was the first measure in this field to be decided by co-decision, giving the European Parliament greater leverage in legislative decision-making. However, since co-decision was applied for the first time, the implications of the increased influence of EU institutions in decision-making on matters of irregular migration may not have immediately become visible. The negotiations on the Return Directive rather suggest that Member States succeeded in retaining considerable decision-making competence regarding the various aspects addressed by the Directive. This does not remove the fact that, in the longer run, legal and institutional influence of the EU is likely to become more important, suggesting that the link between discretion and policy area as it now stands will change: with greater EU leverage in decision-making, less discretion will be made available to Member States for the implementation of EU law where it concerns matters of (irregular) migration.

The present case is furthermore interesting in terms of the relationship between discretion and policy area because it illustrates the sometimes paradox nature of EU integration. The repeated commitments of the Member States to a common approach in the area of return policy in the run-up to the negotiations on the Directive stand in sharp contrast to their attempts to retain as much decision-making competence as possible by seeking more discretion for implementation. This tension was also inherent in the Directive proposal. As Schieffer neatly puts it, providing for the minimum harmonisation clause in Article 4 was based on the ‘tacit understanding that, and contrary to the wording of the title and art. 1, the Directive sets out

51 For instance, as regards EU requirements concerning entry bans and detention (Articles 11 and 16).

minimum rather than common standards' (2010: 1519). In this regard, discretion has been assessed negatively, being associated with a strict approach to the interpretation of the Directive's requirements and seen as stimulating efforts to minimise safeguard requirements to the disadvantage of irregular migrants (Baldaccini, 2009; 2011). Whether this critique is justified or not remains to be seen. In any case, the Directive, albeit being discretionary, has also caused a more positive echo. In this context, it has been noted that the Directive has beneficial effects for the status of irregular migrants. Based on European case law relating to the interpretation of certain provisions of the Directive, it is argued that the latter has contributed to strengthening the legal position of third-country nationals and that it has the potential to lead to more equal rights or at least standards of protection before courts (Crosby, 2014: 136-137).

13.4.2 Discretion, political sensitivity and compatibility

Not only discretion's relevance was made explicit during the negotiations on the Return Directive. Also the reasons for why it played a vital role became quite evident. Without doubt, the Directive's subject matter is politically sensitive as shown by the fact that its scope and the proposed elements of the return procedure (return / removal decisions, entry ban, and detention), caused debates and represented one reason for why negotiations dragged on. More concrete, the political sensitivity of the Directive resulted from the fact that it addressed the domain of immigration control and therefore an area that formerly used to entail the exercise of sovereign state power. Guild brings it to the point: The control of the nation state over the admission, residence and expulsion of aliens is a fundamental attribute of national sovereignty which has been affected by the development of the European Union, reaching a crucial (turning) point with the communitarianisation of decisive aspects of immigration and asylum law with the entry into force of the Treaty of Amsterdam. In an area of transferred competence, where decision-making competences have been ceded to the EU level, the Member States can no longer adopt rules which are inconsistent with Community law (Guild, 1999: 61-62; 68). What's more, while immigration in general may raise concerns about its consequences for national welfare systems, in the particular case of the Return Directive, Member States feared the administrative and legal burdens of the proposed return procedure, as illustrated especially by their rejection of the two-step approach in managing the return of irregular migrants and their objection to the provisions on legal remedies. Member States were concerned that they would have to change already existing national regimes governing the residence, return and removal of irregular migrants. Against this background discretion was sought as a 'way out' of political sensitivity and controversy (expectation 2). The conflict about the two-step approach in returning irregular migrants was off the table after Member States had been afforded discretion in deciding whether or not to issue two separate orders, removal or return, or one

that combines the removal and the return decisions. Including more discretion into the Directive proposal eased legislative decision-making also in other respects. Discretion granted in the form of may-clauses and derogations from, for instance, judicial review and detention requirements in emergency situations, helped secure the approval of Member States on controversial items of the Directive (legal and procedural safeguards for irregular migrants). The same was achieved by explicitly taking into account national legal orders in the (re-)formulation of Directive provisions. Furthermore, the incorporation of discretion into the Directive mitigated gaps between EU and national rules (expectation 3). It becomes obvious from the negotiations that the proposed EU rules were repeatedly perceived as being incompatible with national rules. Next to the Netherlands many other Member States took this view, seeking therefore, to maintain own national legal arrangements as evidenced, for example, with respect to the provisions regarding the return decision. Member States' input into the negotiations was apparently made with a deliberate view to their domestic rules and practices. The Dutch delegation sought to translate such wishes into action by forwarding a position paper including corresponding amendments drafted in a way that reflected the recognition of the considerable legal diversity of national laws in this respect. At the same time the delegation's written statement promoted the approach, applied in the Netherlands, to the management of returning irregular migrants. This has to be seen, hence, as an attempt to upload or translate national legal arrangements into the Directive text. However, in the end, seeking more discretion and getting it incorporated into the Directive, turned out to be the more effective solution to cope with both incompatibility and legal diversity.

13.4.3 Discretion and European Parliament

Alongside the Council, where compromises had to be struck, also the role of the European Parliament has to be considered, since it was another key actor in the negotiations on the Directive. While a greater role of the European Parliament in legislative decision-making has been linked to the support of legislative harmonisation and, consequently, less discretion being granted to Member States (expectation 4), the present analysis does not deliver conclusive evidence in support of this expectation. According to its own statement, the European Parliament sought to strengthen its role as a 'champion of human rights and humanity' and therefore strongly supported the establishment of mandatory minimum standards to ensure fair and human treatment of returnees and an approach to return that precluded the use of discretion to proceed with a forced return (European Parliament, 2007, p. 27; 31). On the one hand, this shows the European Parliament's determination to fulfil its self-imposed role of being a fighter for human rights. The Directive, on the other hand, 'merely' introduced minimum standards, which were, however, accepted by the European Parliament. Albeit promoting a more ambitious approach regarding harmonisation, the European Parlia-

ment was apparently aware of the fact that a Directive proposal exceeding the minimum harmonisation approach would have had no chance of success in the Council. In other words, the European Parliament in principle agreed with the tacit understanding that the Directive would establish minimum instead of common standards. The amendments forwarded by the European Parliament were geared towards bringing the Commission proposal more in line with the principle of proportionality and respect for human rights (European Parliament, 2007, p. 37) but regarding discretion, there was no clear rationale developed. In other words, the results of the analysis do not show that the European Parliament sought to reduce the margin of discretion granted to Member States for implementation. The lack of a coherent strategy may relate to the fact that the European Parliament made its first appearance on the negotiation scene as co-legislator on issues of irregular migration, which suggests that it had not yet much experience in exercising its new role. But discretion was also not necessarily perceived as negative. Where it served to realise its human rights objectives and its promotion of a case-by-case approach taking into account the specific circumstances of individual cases, the European Parliament even preferred the incorporation of additional discretion into the proposal. This is, for instance, evidenced by its request to leave it to the discretion of the Member States to impose return decisions (European Parliament, 2007, p. 46).

13.5 CONCLUSION

The analysis has brought to light that discretion played an essential role in the negotiations on the Return Directive. In fact, this case is a good example for illustrating the potential that discretion is expected to unfold in decision-making processes under particular circumstances. With a view to the negotiations on the Directive, discretion facilitated decision-making and striking a compromise on the Commission proposal. Discretion contributed to overcoming political controversy in the Council while at the same time, from the perspective of Member States, and with a view to implementation, it offered the prospect of being able to mitigate effects from a lack of compatibility between EU and national rules as well as to reduce administrative and legal burdens expected to result from the implementation of the Directive into national law. Finally, even though some may consider discretion as encouraging Member States to adopt restrictive measures on matters related to immigration, it should be born in mind that discretion contributed to the adoption of the first harmonisation instrument concerning the return of irregular migrants. Seen in this light, discretion facilitated the introduction of minimum standards in an area, which back then was barely influenced by the EU. Did discretion also have a positive impact on the transposition of the Return Directive in the Netherlands? The subsequent descriptive analysis seeks to provide insights that shall serve to answer this question and help to find out which other factors mattered in the Dutch transposition of the Directive.

13.6 TRANSPOSITION

Despite the many controversial issues on which the negotiating parties had to agree, the Return Directive was finally approved and adopted at first reading on 9 December 2008 with the Belgian delegation abstaining. The Directive had to be transposed by 24 December 2010, except for the legal aid provision of Article 13(4) for which the deadline had been extended by one year to accommodate Member States' preferences and to ensure their support for the final compromise text (Schieffer, 2010: 1550). The United Kingdom, Ireland and Denmark did not participate in the adoption of the Return Directive and are not subject to its implementation or bound by it. This is in accordance with their respective positions established by the Protocols to the Treaty of Amsterdam.⁵²

The Directive was met with strong criticism worldwide, attracting the attention of the media including the Dutch news (BBC News, 2008; Zoon, 2008).⁵³ Various non-governmental organisations, heads of governments of Latin-American countries, as well as the UN High Commissioner for Human Rights denounced a number of the Directive's measures, especially the conditions and length of detention and entry bans which they criticised as being inhuman and criminalising irregular migrants (Schieffer, 2010: 1506; Baldaccini, 2011: 135; UN Human Rights, 2008).⁵⁴ Negative publicity was also caused by the fact that the Directive's transposition was problematic in numerous Member States of which only four notified full transposition before the deadline. Without doubt, national transposition performances left much to be desired (European Commission, 2011), leading to twenty infringement proceedings being issued against Member States,⁵⁵ including the Netherlands. Meanwhile nearly all of these proceedings have, however, been closed, (European Commission, 2014). This does not change the fact that deficient transposition undermined the Directive's objectives and the direct effect of certain provisions resulting in action being taken by the European Court of Justice (Rafaelli, 2011).⁵⁶

52 The protocols include their opt-outs from Title IV TEC regarding Visas, asylum, immigration and other policies related to free movement of persons.

53 BBC News, 'Q&A: EU immigration policy', in BBC News 14 October 2008; C. Zoon, 'Latijns-Amerika beraadt zich op sancties vanwege Terugkeerrichtlijn, Europa keert geschiedenis de rug toe en criminaliseert migratie', in De Volkskrant 24 juni 2008.

54 See 'UN experts express concern about proposed EU Return Directive', available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=8440&LangID=E> (accessed 14 July 2015).

55 This follows from the Commission's powers under Article 258 TFEU.

56 According to the Court, the transposition measures adopted by Italy referring to the provisions on detention were undermining the Directive's objectives. The Court recognised the direct effect of the relevant Articles 15 and 16. See case C-61/11 PPU El Dridi, judgment of 28 April 2011.

13.6.1 Process and measures

The Netherlands notified full transposition in the course of 2012, hence with more than a year delay (European Commission, 2014, p. 12).⁵⁷ Additionally, the delay in the formal transposition of the Directive had as a consequence that transposition was also legally incorrect, leading to a number of cases being brought before national courts. This concerned, in particular, infringements of provisions with direct effect and, as a consequence, the relevant cases centred on state liability for breach of EU law (Cornelisse, 2011).⁵⁸ Moreover, Dutch courts as well as legal experts questioned the adequacy and legal correctness of the draft transposition measures especially with a view to the formal implementation of the Directive's provisions on detention (Cornelisse, 2011; see also Van Riel, 2012).

Critique at the domestic level was not confined to judiciary and legal circles. The way the requirements of the Return Directive should be incorporated into national law as envisaged by the Minister for Immigration, Integration and Asylum Affairs,⁵⁹ Leers, was questioned by national interest groups (Amnesty International the Netherlands, 2011; VluchtelingenWerk Nederland, 2011)⁶⁰ and caused political debates between the Minister and Parliament which was involved in the transposition process, since the Directive required for statutory change alongside an amendment to the Alien Decree and some additional measures, including regulation at the lower level (see table 19).

57 By 24 December 2010 when the deadline for transposition ended - except for the legal review provisions of Article 13(4) - the Netherlands had only partially implemented the Directive by means of already existing legislation. The Minister made an official announcement of the Directive's partial implementation Cf. *Government Gazette*, 2011, 4082. By the end of September 2011 the Commission opened an infringement proceeding against the Netherlands due to non-compliance with the Return Directive. Cf. 'EU law monitoring - European Commission - Netherlands', available at: http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_country_netherlands_en.htm (accessed 15 July 2015).

58 Direct applicability of directive provisions, like in the present case, follows if three criteria are met. These criteria were established by case law: the directive's result must entail the granting of individual rights, it must be feasible to detect the content of these rights from the relevant directive provisions and, finally, a causal link must exist between non-compliance of the Member State concerned and the negative implications of it for the individuals affected. See: Van der Burg and Voermans, 2015, pp. 48-50; Hailbronner, 2010, p. 22.

59 Hereafter referred to, in short, as Minister for Immigration and Asylum.

60 Amnesty International (2011), 'Vreemdelingendetentie in Nederland: Het moet en kan anders', available at: https://www.amnesty.nl/sites/default/files/public/1110_vreemdelingendet.pdf and VluchtelingenWerk Nederland (2011) 'Jaarverslag 2011', available at: <http://www.vluchtelingenwerk.nl/artikel/jaarverslag-2011> (both accessed 20 July 2015).

The main bone of contention between Parliament⁶¹ and the responsible Ministry was that transposition included the criminalisation of the offence against the prohibition of re-entering the Netherlands.⁶² Such an offence should be made punishable by a maximum of six months' imprisonment or a monetary penalty in category three.⁶³ Even if the Directive allowed for coercive measures to be taken as a last resort in returning irregular migrants,⁶⁴ the criminalisation of the offence against the prohibition of re-entering the Netherlands was not seen as justified by it.

Table 19: Fact sheet transposition Return Directive

Transposition deadline:	24 Dec 10
Publication transposition legislation:	10 March 11 15 Dec 11 22 Dec 11 30 Dec 11 16 March 12
Sort transposition measure (and number):	Parliamentary act (1) Order in council (2), Ministerial decision (1) [Announcement (1)]
In charge:	Ministry of Justice
Legal Framework:	Dutch Alien Act 2000 Dutch Alien Decree 2000

On the contrary, it was considered to be legally incorrect – because the Directive did not include any corresponding obligation. In addition, it was found to conflict with the national approach of one-to-one transposition⁶⁵ entailing that no other requirements should be laid down in national law than those provided for by the Directive (*Parliamentary Papers II* 2011/12, 32420, no. 14, p. 86). Not only that, in the light of case law of the Euro-

61 The measure had been subjected to further scrutiny by the General Committee for Immigration and Asylum of the House of Representatives and the Standard Committee for Immigration and Asylum of the Dutch Senate.

62 Cf. Article 66a under paragraph 7 of the Dutch Alien Act in conjunction with Article 197 of the Dutch Penal Code [Wetboek van Strafrecht].

63 Before 1 January 2014 monetary penalty in category three boiled down to an amount of 6.700 Euro which is currently 8100 Euro. Cf. Article 23 of the Dutch Penalty Code. See also Van Riel, 2012, p. 73. It should be noted that these amounts differ from the one that was mentioned in the plenary debates (3800 Euro). See *Parliamentary Papers II* 2011/12, 32420, no. 14.

64 Cf. Article 8(4) of the Return Directive.

65 In Dutch referred to as 'EU-implementatie sec'. Cf. Instructions for drafting legislation no. 331.

pean Court of Justice⁶⁶ the envisaged criminalisation of the offence against the prohibition of re-entering was considered to run counter to a fair and human treatment of irregular migrants. What's more, the view was taken that all means provided for by the Directive should be exhausted before such a severe measure was applied. Finally, the added value of the measure was questioned since, in fact, it was expected to prolong the stay of the third-country national arrested given the fact that removal of the person concerned was only possible upon completion of the sentence imposed (*Parliamentary Papers II* 2011/12, 32420, no. 14, p. 68). The Minister, by contrast, held the view that the measure would not undermine but strengthen the Directive's objective to foster effective return (*Parliamentary Papers II* 2011/12, 32420, no. 15, p. 86). To support his argument, the Minister referred to the advice of the Dutch Council of State on a previously submitted transposition measure (*Parliamentary Papers II* 2011/12, 32420, no. 15, p. 86; Leerskes and Boersema, 2014: 12-13). This transposition measure, which represented a draft amendment to the Dutch Alien Act, had been devised under the former Minister Ballin and the Council of State had taken the view that in light of the relevance of the principle of loyal cooperation and the necessity to ensure the effectiveness of the Directive, the measure should provide for sanctioning measures in respect of an offence against the prohibition of re-entering the Netherlands (*Parliamentary Papers II* 2009/10, 32420, no. 4, p. 5; Ederveen, 2011: 17).

One year prior to the debates between the Minister and the Dutch Parliament on the transposition of the Return Directive, in October 2010, a change of government had occurred coinciding with the transposition of the Directive, and including the transfer of the responsibility for asylum and migration matters from the former Ministry of Justice (now Ministry of Security and Justice) to the Ministry of the Interior and Kingdom Relations and, more precisely, to a Minister without portfolio for Immigration, Integration and Asylum (European Migration Network, 2012: 11).⁶⁷ After the fall of the former Dutch cabinet the envisaged transposition measure – an amendment to the Dutch Alien Act – was declared controversial and transposition not further pursued. Transposition therefore came to a standstill for virtually two months before being taken up again (Everdeen, 2011: 18). With the change of Ministry also came a change of approach towards transposition. Minister Leers, from the Christian-democratic political party (CDA) interpreted the Return Directive differently and stricter than his predecessor and party colleague Ballin (*Parliamentary Papers II* 2010/11, 32420, no. 9; see Everdeen, 2011; Dörrenbächer et al., 2015). Under Minister Leers, the proposed amendment to the Dutch Alien Act was substantially amended (Advisory Com-

66 Cf. Case El Dridi (footnote 416) and case Achughbabian C-329/11, judgment of 6 December 2011.

67 A study commissioned by the Ministry of the Interior and Kingdom Relations.

mittee on Migration Affairs 2011; Committee Meijers, 2011),⁶⁸ the measure for pursuing the offence against the prohibition of re-entering the Netherlands included as well as the imposition of the entry ban made obligatory (whereas the Directive made it optional) (Zwaan, 2011b: 268).

By amending both the Dutch Alien Act and Decree for the purpose of transposing the Return Directive, the Minister sought to use already existing legislation to the most possible extent in order to leave the structure of the Dutch law on aliens largely intact (*Official Bulletin*, 2011, 664, p. 11). The Minister's transposition strategy was targeted at the inclusion of the substantially new elements which the Directive introduced – the return decision and the entry ban – into the Dutch Alien Act. In addition, more detailed rules should be established by means of the Dutch Alien Decree and other lower-level instruments⁶⁹ (*Official Bulletin*, 2011, 664, p. 11).

The aim of leaving the national legal framework largely unaltered and implementation costs low while converting EU rules into the body of national legislation becomes obvious in several ways. To begin with, the return decision was merely added to Article 27 of the Alien Act which comprised rules governing the application of the decision of multiple consequences in matters of immigration. As a result, the scope of the decision was extended by an additional consequence: the obligation for migrants identified as having an irregular status, to return to their country of origin. The obligation for the non-EU national to return was established as a consequence of two possible scenarios: if the application for the renewal of the residence permit was refused, or in case that the residence permit would be withdrawn.⁷⁰ The entry ban was not merely added to already existing national rules but required the creation of additional rules, established by the new Article 66a of the Dutch Alien Act. In transposing other requirements of the Directive concerning this aspect, use was also made of already established Dutch rules, policy rules in particular, which were considered as being a suitable part of transposition legislation, expected to cover parts of the Directive. To ensure compliance with the general transposition obligation to provide for legally binding transposition measures, these policy rules received the status of general binding rules (*Official Bulletin*, 2011, 664, p. 11).

68 See Commissie Meijers 'Notitie Strafbbaarstelling overtreding inreisverbod', CM1018 24, December 2010, and the Advisory Committee on Migration Affairs (ACVZ): 'Briefadvies tweede nota van wijziging implementatie Terugkeerrichtlijn', ACVZ/ADV/2011/002, 17 januari 2011. According to the assessments of the national committees of experts in the area of immigration law on which the Parliament's critique was partly based, the amendments under the new Minister were so far-reaching, that it would have been a more logical course of action if the Minister had tabled a new legislative proposal for the purpose of transposition.

69 This refers to the use of the Dutch Alien Circular and Alien Regulation 2000 for further clarification of rules established in the Dutch Alien Act.

70 Cf. Articles 27 and 45 of the Dutch Alien Act.

The civil servants involved, on behalf of the Netherlands, in the EU negotiations and subsequently transposing the Directive into Dutch law, pointed out in the interview that the transposition of the Directive's requirements was complex. In particular, the issue of how to convert EU rules into the Alien Decree was not considered as having been an easy matter, which may explain the late adoption of the amendment to the Decree by the end of 2011. But also the adoption of the amendment to the Alien Act took some time. Apparently in spite of the achievements made in the EU negotiations by bringing the proposal more into line with the Directive, its transposition turned out to be more complex than initially expected. This was confirmed by the interview partners.

13.6.1.1 Scope

The Directive allows Member States to exclude specific groups of illegally staying third-country nationals from its scope in specific border cases and criminal law cases.⁷¹ Exclusion concerns third-country nationals that have been refused entry into the territories of the Member States based on the Schengen Borders Code⁷² – a requirement that affects a larger group of people being excluded from the Directive's remit. Furthermore excluded from the Directive's scope is the group of third-country nationals that have been intercepted and apprehended when irregularly crossing the external border of a Member State by land, air, sea, without subsequently being permitted to stay. Finally, the application of the Directive is not mandatory as regards non-EU nationals who are subject to extradition procedures and expulsions for criminal law reasons. If Member States decide not to apply the rules of the Directive, they are expected to apply their own national legislation. This latter option was applied by the Dutch Government which, thus, made use of discretion in transposing the relevant Directive requirements (*Official Bulletin*, 2012, 103). Applying the Directive in this way was fully in line with the Government's wishes to leave existing national rules and practices unchanged. In this regard, it was pointed out by the transposing Ministry that the possibility to exclude certain groups from the Directive's scope matched with the spirit of the Dutch law on aliens. Hence, discretion

71 See Article 2(2).

72 Article 13 in combination with Article 5 specifies the conditions of entry into the EU's territory and refusal of access.

was apparently used to achieve a good match between the Directive and national law (*Government Gazette*, 2011, 4082).⁷³

13.6.1.2 Voluntary departure period

In giving the illegally staying third-country national the possibility to leave the Netherlands within four weeks, Article 62.1 of the Alien Act transposes the Directive's requirement to provide for a voluntary departure period between seven and thirty days once a return decision has been issued.⁷⁴ The Directive obliges Member States to extend the voluntary departure period by paying regard to the relevant circumstances of the individual case, including social and family circumstances of irregular migrants.⁷⁵ This obligation has been transposed by means of Article 62.3 of the Alien Act but further specifications have been provided by lower-level measures. According to these specifications, extension of the voluntary departure period is only granted if the third-country national provides the authorities with the documents that are necessary to realise the voluntary departure procedure.⁷⁶ The EU Directive, however, does not impose such a requirement. For this reason, the corresponding Dutch transposition of EU rules was found to be in disharmony with the Directive (Van Riel, 2012: 71).

The Article affords Member States some discretion which was used by the Ministry by imposing certain conditions on the third-country national for the period of voluntary departure⁷⁷ such as the duty to regular reporting to the authorities, to stay at a certain place within the Netherlands and to submit certain documentation including, amongst others, travel and identity documents as well as a deposit of an adequate financial guarantee.⁷⁸

73 The matter of exclusions was subsequently transposed by means of orders in council, which, as underscored by the Administrative Law Division of the Council of State, could only be a temporary solution since the corresponding rules needed to be laid down in statutory law. To this end, the current Minister has submitted a legislative proposal in January 2015. Cf. *Parliamentary Papers II* 2014/15, 34128, no. 2 & 3. Interestingly, in contrast to the previous approach by Minister Leers, this proposal does not foresee the broad use of discretion granted by the Directive. At the same time, like his predecessor, the current Minister takes the view that the way the Directive is transposed is in line with the intention to incorporate EU requirements by staying in tune with Dutch law. Cf. *Parliamentary Papers II* 2014/15, 34128, no. 3, p. 7.

74 See Article 7(1) of the Directive.

75 See Article 7(2) of the Directive.

76 Cf. Article 6.3 of Alien Regulation.

77 See Article 7(3) of the Directive.

78 Article 4.51b Article 5.1 and the new provision 4:52a and 4:52b of the Alien Decree.

Furthermore, the transposing Ministry made use of the option, provided by the Directive, to either shorten the voluntary departure period or to decide that no voluntary departure period should be granted to the third-country national concerned, which according to the Directive, is only possible under specific circumstances: first, in case of risk of absconding – a condition which was further specified in Dutch transposition legislation,⁷⁹ second, if an application for legal stay was rejected on the grounds of being unfounded or fraudulent or, third, if the third-country national concerned was found to pose a risk to public policy, public security or national security.⁸⁰ These EU rules were transposed by means of already existing legislation as well as by revising provisions of the Dutch Alien Act.⁸¹

With a view to the transposition of these requirements, two aspects of the way the Dutch Ministry transposed EU rules have been criticised. First, according to Dutch transposition legislation, an application for legal stay is rejected and the period for voluntary departure refused or shortened if the application includes incomplete or faulty information.⁸² Faulty or incomplete information, however, has another meaning than the term ‘fraudulent’ used in the Directive. According to the European Court of Justice ‘fraudulent’ implies *deliberately* offering wrong or insufficient information (Van Riel, 2012: 70).⁸³ The provision of incomplete and faulty information, by contrast, does not necessarily result from a deliberate act. Hence, Dutch transposition appears to be disproportionate. The same seems to hold true regarding another ground which Member States can use to justify changes to the requirement of providing irregular migrants with an appropriate period for voluntary departure. The Directive establishes that these changes are possible if the person concerned poses a risk to public policy, public security or national security. The Dutch transposition of this requirement established that departing from the voluntary departure period set out in the Directive, is not only justified for reasons of ‘national security’ but also where it follows from ‘public order’ issues. The Directive does not, however, refer to the notion of ‘public order’ as constituting a ground for departure from EU rules.⁸⁴ What’s more, the public order criterion is used in Dutch law to justify the shortening of the voluntary departure period, whereby the mere suspicion that a third-country national committed a crime suffices to depart

79 Reasons to believe that a risk of absconding exists have to be based on objective criteria. See Article 3(7) of the Directive. These criteria are established in Article 5.1b Alien Decree whereby, according to the Dutch Minister, considerable discretionary room was used. Cf. *Official Bulletin*, 2011, 664, p. 20.

80 See Article 7(4) of the Directive.

81 Cf. 62.4, 31.2d, e, k and 62.2 (new) of the Alien Act.

82 See Art. 62.2 under b Alien Act.

83 See for instance case C-285/85, *Germany v Commission of the European Communities* [1987] ECR I-3203.

84 See Article 31.2 under k Alien Act. Additionally, Van Riel points to the fact that the notion of ‘public order’ has not yet been further clarified by the European Court of Justice. See Van Riel, 2012, p. 70.

from the Directive (Van Riel, 2012: 70).⁸⁵ The strict interpretation of EU rules in this respect does not seem to match the Directive's spirit and objective to promote voluntary instead of forced returns.⁸⁶

13.6.1.3 Entry ban

Return decisions shall be issued together with an entry ban in the absence of any period being granted for voluntary departure or in case of non-compliance of the third-country national with a return decision that has already been issued. In all other cases, it is up to the Member States to decide whether or not they wish to impose an entry ban.⁸⁷ EU rules have been transposed accordingly by means of the new Article 66a which was added to the Dutch Alien Act. The Directive does not only grant discretion with respect to the circumstances under which entry bans may be issued but also provides for the possibility to refrain from issuing, withdrawing or suspending an entry ban for, amongst others, humanitarian reasons or in individual cases.⁸⁸ Discretion has been used by establishing that the Minister can decide to refrain from imposing an entry ban on humanitarian grounds or other reasons.⁸⁹ These circumstances were further specified by means of lower-level regulation.⁹⁰ The fact that this aspect was not regulated by statutory law drew criticism from the Dutch Parliament (*Parliamentary Papers I* 2011/12, 32420, no. 10, p. 39). Moreover, legal experts in immigration matters questioned⁹¹ whether this way of transposing the entry ban provisions left enough room to take into account the specific circumstances of individual cases to which EU rules would have to be applied⁹² (Van Riel, 2012: 72).

13.6.1.4 Detention

The Directive's provisions regarding the detention of irregular migrants for the purpose of removal as well as the conditions of detention⁹³ have almost entirely been transposed by already existing legislation. As established by the Directive, in the absence of other less coercive measures, detention of irregular migrants is allowed, but only for return / removal purposes and

85 This can be derived from the Dutch Alien Circular 2000, part (A) which further specifies Dutch rules concerning the shortening of the departure period on the basis of Article 62.2 Alien Act.

86 See recital (10) of the Directive.

87 Cf. Article 11(1) of the Directive.

88 See Article 11(3).

89 Cf. Article 68 of the Alien Act.

90 Cf. Article 6.5.2 of the Dutch Alien Decree. This clarification resulted from the debates in Parliament. In a letter to the Dutch Senate the Minister indicated that he would undertake corresponding steps. Cf. *Parliamentary Papers I* 2011/12, 32420, H, p. 2-4.

91 This becomes evident from assessments by the Committee Meijers and the Advisory Committee on Migration Affairs (ACVZ). See footnote 68.

92 See recital (6) underlining that decisions under the framework of the Directive shall be taken on a case-by-case basis as well as recital (22) which refers to the best interests of the child and respect for family life as promoted by international human rights treaties.

93 See Articles 15 and 16.

in particular when there is a risk of the person absconding or if the person hampers the preparation of the return or removal process. In any case, detention shall last as short as possible.⁹⁴ Most of the Directive's provisions have been transposed by Article 59 of the Alien Act which was hardly changed, except for the fact that the maximum lengths of detention which the Directive prescribes were added to already established national rules: Detention may last up to six months which may be extended by another twelve months under exceptional circumstances.⁹⁵ The conditions under which detention of illegally staying third-country nationals may become applicable (risk of absconding, procedure being hampered) were added to the Dutch Alien Decree.⁹⁶ Article 59 of the Alien Act, however, also established that detention of irregular migrants is possible for reasons of public order and national security – circumstances which the Directive does not include. National courts questioned the legal correctness of transposition in this respect also in light of European case law specifying the conditions of detention for illegally staying third-country nationals and clarifying that Member States cannot invoke grounds of public order or public safety for detaining a person under the Return Directive (Cornelisse, 2011: 14).⁹⁷ The transposing Ministry seems to have solved the issue by incorporating the Directive's grounds for detention into the Dutch Alien Decree, killing two birds with one stone: Hence, by making use of lower-level instruments such as the Decree, Article 59 of the Alien Act did not need to be changed. At the same time, completeness of transposition was ensured regarding the grounds for detention which have to be made applicable under the framework of the Return Directive.

13.6.2 Parliamentary debates

In conformity with the Dutch legislative process, the proposal for amending the Alien Act for the purpose of transposing the Return Directive was examined by both the House of Representatives and the Senate⁹⁸ of the Dutch Parliament and debates with the Minister took place in October and

⁹⁴ See Article 15(1) of the Directive.

⁹⁵ See Article 15(5) and 15(6) of the Directive which have been transposed by Article 59.5 and 59.6 of the Alien Decree.

⁹⁶ Cf. Article 5.1a of the Alien Decree.

⁹⁷ Cf. *Kadzoev* case C-357/09 PPU, judgment of 30 November 2009 - [closed].

⁹⁸ Shortly before the debates the draft transposition measure had been subjected to further scrutiny by the General Committee for Immigration and Asylum of the House of Representatives and the Standard Committee for Immigration and Asylum of the Senate.

December 2011 respectively.⁹⁹ Given a delay of meanwhile almost one year that had resulted in a reasoned opinion from the European Commission, the Minister asked for a speedy treatment by Parliament which should be concluded before the Christmas break.¹⁰⁰ In fact, the need for a speedy treatment illustrates the time lag between the adoption of the Directive and the parliamentary consultations. That so much time had lapsed was according to the Minister due to the fact, that transposition was much more complex than was initially thought and that, additionally, adjustments of the transposition measure in light of both the advice of the Council of State (*Government Gazette*, 2012, 1231) and European case law as well as the Minister's responses to parliamentary questions had required additional time (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 87). That a relatively fast parliamentary process was realised in the end does not obscure the fact that Members of Parliament were dissatisfied with some aspects of the proposed measure. The national Parliament was not intensively involved in the EU negotiations on the Directive but it showed great interest once it participated in its transposition (interview). While the government coalition of Christen Democrats (CDA) and Liberal Democrats (VVD) with support of the right-wing PVV (Freedom Party) backed the Minister's proposal, it was criticised by several other parties in Parliament, including the Christen Union (ChristenUnie, CU), the Social Democrats (PvdA) and still more left of the party spectrum, by the Dutch Democrats (D66) and the Greens (GroenLinks). In spite of their different party affiliations, disapproval was based on similar reasons. The common view was that the draft measure was disproportionate and ineffective and therefore counterproductive to the Directive's objective of fostering voluntary departure and a generally fair and human treatment of irregular migrants (*Parliamentary Papers II* 2010/11, 32420, no. 14 & 15).

The criminalisation of the offence against the prohibition of re-entering the Netherlands mentioned above was not the only reason for this view. The Minister was reproached for what seemed to several Members of Parliament a restrictive interpretation of the Directive showing in the

99 Usually the plenary debates in the House of Representatives carry much more political weight. Debates in the Senate, by contrast, are confined to questions of legal technique and quality of draft legislation. In the particular case of immigration, matters are politically sensitive and, as the involvement of the Dutch Senate in the case at hand shows, at times political and legal issues intertwined. That is why the descriptive analysis takes a closer look at the plenary debates not only in the House of Representatives but also the Senate.

100 In a letter to the President of the Senate, the Dutch Minister for Immigration and Asylum informed that on 29 September 2011 the European Commission issued a reasoned opinion against the Netherlands due to the absence of notification of national transposition measures. If non-compliance persisted, the Commission would start an infringement proceeding against the Netherlands before the European Court of Justice and imposing a fine of about 3 925 000 Million Euro. Cf. *Parliamentary Papers I* 2011/12, 32420, A. See European Commission, 'Met reden omkleed advies' (reasoned opinion), 2011/0285, Brussel, 29 September 2011.

Minister's choice to make use of the possible maximum length regarding detention, whereas, in their view, he could have opted for shorter periods in support of the Directive's objective of voluntary return (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 38; 42). Moreover, the fact that according to Dutch transposition legislation detention of irregular migrants was made possible for reasons of national security and public order, and therefore based on more grounds than established by the Directive, made critics in Parliament believe that the Minister gave preference to detention over the speedy return of irregular migrants (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 50-51). Transposition as proposed by the Minister was, however, not only found to hamper an effective return procedure. It was also considered detrimental to the Directive's objective of providing returnees with sufficient procedural safeguards. The view that was held by some Members of Parliament was that the Minister's transposition measure was geared towards a rather coercive return procedure whereas the Directive implied a stepwise approach to voluntary return in line with the principle of proportionality and by taking due account of specific circumstances of individual cases as well as European case law providing further guidance in the application of EU rules on return. It was criticised in Parliament that such an approach was not explicitly laid down in the draft transposition measure and that also other crucial aspects were not established by statutory law but by lower-level instruments which from the viewpoint of legal certainty and democratic control gave grounds for concern (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 41). For instance, according to Parliament the Directive's rules concerning the position of vulnerable groups (e.g. handicapped or elderly people) or those that should for humanitarian reasons be excluded from measures of return should be included into the Alien Act (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 41; *Parliamentary Papers II* 2010/11, 32420, no. 14, p. 69). The Minister rejected all points of criticism by giving the following arguments to justify his approach. First, where the Directive implied choices, these had been used to transpose the Directive while staying in line with the Dutch legislation on aliens. Furthermore, he argued that it was not necessary to follow the Directive's rules to the letter and that his approach was justified by the fact that already existing national legislation and regulations covered large parts of the Directive and could therefore be used to transpose its requirements into Dutch law (*Parliamentary Papers II* 2010/11, 32420, no. 15, p. 97). Where aspects of the Directive were not yet regulated by national law, like in the case of the maximum lengths for detention, transposition remained close to the Directive's text (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 78). Second, the Minister argued that opting to regulate a number of aspects by lower-level instruments, i.e. by means of delegated legislation, instead of statutory law, was compatible with the system and structure of the Dutch Alien Act and would offer sufficient flexibility to transpose future amendments of EU rules on return more efficiently since lower-level regulation (orders of council, ministerial decisions) would be faster adjusted than statutory law (*Parliamentary*

Papers I 2010/11, 32420, no. 10, p. 80-81). While acknowledging the need for efficient government decision-making, Members of the Dutch Parliament requested the Minister to specify transposition law regarding the stages and elements of the return procedure where the Minister intended to make use of the discretion granted by the Directive (*Parliamentary Papers I* 2010/11, 32420, no. 10, p. 88). But on the whole, the Minister's explanations and justifications did not take the wind out of the sails of the critics in Parliament who still forwarded several amendments. These suggestions for amendments, however, did not bring about any substantial adjustments to the proposed transposition measure. In addition, the proposed transposition law was supported by a majority of the Dutch House of Representatives¹⁰¹ as well as by the Senate after consultations between the Minister and the Senate in December 2011 (*Parliamentary Papers I* 2011/12, 32420, no. 12, p. 25).¹⁰²

After having outlined in detail the transposition measures and process, it is considered time to move from description to explanation and to look into the role of discretion and other factors expected to affect the national transposition of directives.

13.7 ANALYSIS

From the viewpoint of discretion the insights into the plenary debates about the draft transposition measure are highly relevant. A number of the issues addressed above, directly relate to the following aspects which are further looked into hereafter: how the Minister intended to use the discretion granted by the Directive, for what reasons and how this use was assessed by Parliament. Addressing these aspects in more detail serves to shed light on the role of discretion in the transposition of the Return Directive.

13.7.1 Discretion-in-national-law

The first and obvious point is that discretion played a relevant role in the transposition of the Return Directive. This point notwithstanding, the matter becomes more complex when considering in more detail the role of all

101 Alongside the coalition government and the PVV, also the Reformed Political Party (SGP) supported the proposal. Most amendments were rejected, some withdrawn. See *Parliamentary Papers II* 2011/12, 32420, letter to the Senate 'Overview of votes in the House of Representatives', 2 November 2011.

102 As mentioned earlier, in the Netherlands the House of Representatives has greater political significance than the Senate. The Senate has to be understood as 'chambre de réflexion', focusing largely on the legal quality of draft legislation. In considering formal law (bills) the House of Representatives has more powers than the Senate which has no right of amendment and can, in principal, only reject or accept a proposal. Due to the different scope of decision-making competences, the Dutch bicameral system is considered as asymmetric Cf. Breeman and Timmermans, 2012, p. 153; p. 166.

relevant factors, above all discretion, in explaining the Dutch transposition performance and its outcome.

To this end, several expectations are addressed, starting with the one linking a smooth transposition process and compliance with EU law to the availability of higher levels of discretion granted by the Directive for the sake of implementation (expectation 5). The Return Directive does include a number of facultative provisions and therefore grants a rather wide scope of discretion which was largely used by the transposing Ministry to incorporate the requirements of the Directive into Dutch law. But does that mean that transposition was facilitated and transposition carried out in a timely and legally correct way? Based on the descriptive analysis the immediate answer is 'no'. After all, the Dutch transposition was not timely and legal correctness challenged by national courts – due to infringements of provisions with direct effect, resulting from belated transposition. What's more, due to the delay in transposition, the Netherlands faced an infringement proceeding by the Commission. This being said, it can be concluded that having a wider scope of discretion available for transposition, did not result in timely transposition as predicted. Did discretion, on the other hand, impede the transposition of the Return Directive? Without intending to exclude too readily this possibility, the analysis of the transposition process brings other factors into play that contributed to slowing down the formal implementation of the Directive. First, there is the change of government in October 2010 and the different course taken by the new Government in transposing the Directive thereafter. This change in the political circumstances led to a turning point in the transposition of the Directive because prior to it, the first steps in transposing the Directive had been made: the draft amendment to the Alien Act had been assessed by the Council of State and preparations for parliamentary debates were under way.¹⁰³ With the new Government in place transposition, however, was put on hold for two months, and when the process was 'restarted' the deadline for transposing the Directive had already expired. What's more, transposition was certainly not helped by the fact that the new Minister adopted a different approach in transposing the Directive than his predecessor. Other reasons for the delay were mentioned by the Minister himself: the complexity of transposition had been underestimated – as confirmed in the interviews – and adjustments following from further advice of the Council of State and European case law were time-consuming, and additionally contributed to the delay in transposition.

Whereas discretion does not seem to have played a facilitating role in achieving timely transposition, viewed from another angle, it was nevertheless relevant for the formal implementation of the Return Directive in the

103 Cf. *Parliamentary Papers II* 2011/12, 32420, no. 7. It should, however, be noted that by that time, more than 1.5 years had passed since the adoption of the Directive which points to a slow pace of progression of transposition already prior to the political changes in October 2010.

Netherlands. The analysis shows that in translating the Directive's scope and operational provisions – return decision, entry ban, voluntary departure period and detention of irregular migrants – into the national legal framework, discretion was used to convert EU rules with the lowest possible impact for already existing Dutch legislation on aliens. Maintaining national rules and practices vis-à-vis irregular migrants was a priority of the Minister as can be derived from his line of reasoning presented in Parliament. The approach adopted by the Minister, however, seems to have taken too little account of the Directive's objectives and spirit. Therefore the preservation of national rules – at all costs as it seems – met with criticism, also because it seemed to make Dutch transposition prone to legal incorrectness (Cornelisse, 2011; Everdeen, 2011; Zwaan, 2011b: 272). In this context, discretion was perceived negatively, as shown by the debates in Parliament. From the viewpoint of Parliament discretion was used by the Minister to realise his restrictive approach towards irregular migration being reflected in minimalist choices regarding the Directive's provisions, including those establishing favourable conditions for irregular migrants such as legal and procedural safeguards.

13.7.2 Discretion, transposition actors and disagreement

Does the disagreement of Members in Parliament with the Minister's draft transposition measure, including the Minister's use of discretion, offer evidence in support of the expectation that the involvement of more than one actor in transposition has adverse effects on the process if also more discretion is available (expectation 9)? First of all, it is indisputable that with Parliament being involved in the transposition of the Return Directive, controversy emerged about the way the process should be carried out. This supports the expectation that the process was slowed down as a result of the joint effect of discretion and the number of transposition actors. On the other hand, parliamentary treatment went relatively swift. This was most likely due to the evident time constraints – the deadline of transposition had expired more than half a year earlier – and the fact that the Minister had urged Parliament to rapidly process the Directive dossier. In addition, while voicing criticism regarding the Minister's course in transposition, those Members of Parliament who disapproved of the proposed transposition measure could not put a halt to the process. While several parties in Parliament rejected the proposal in the final vote, they were in the minority. Taking the foregoing into consideration, the adverse effect on transposition resulting from the interaction of parliamentary involvement and availability of a wider scope of discretion is considered to be small. In other words, the *actor interaction expectation* does not fully apply but partially holds true.

Taking a step back to the EU level, disagreement with the content of the Directive, expressed by the Member States during the Council negotiations, is also expected to influence transposition performance under certain conditions. More precisely, the *disagreement interaction expectation* (E6) implies

that Member State disagreement with a directive's requirement raises the likelihood of deficient transposition of corresponding EU rules. This effect becomes more positive as the degree of discretion decreases. As argued in the descriptive analysis of the negotiation process, the initial Commission proposal did not correspond with Dutch preferences in a number of respects due to a lacking match between EU and Dutch rules in the area of return management. Owing to the fact that the Dutch return procedure had been revised only a few years prior to the negotiations and that, additionally, it had proven its worth, the efforts of the Dutch delegation were geared to bringing the proposal closer in line with the legal arrangements on which its own return management system was based. This was crowned with success in a few respects: the two-step approach was abandoned, the legal remedies requirement relaxed. In addition, the Directive includes a number of discretionary provisions which enabled the transposing Ministry to make own choices in transposition. But it is exactly the Directive's high margin of discretion which stands in contrast to the small discretion margin on which the expectation under consideration is based. The conclusion therefore is that the expectation does not have any relevance in explaining the deficient transposition of the Directive.

13.7.3 Discretion and compatibility

A relevant fact remains that despite some changes being made to the Directive during the negotiations, EU and Dutch rules concerning the return of irregular migrants still did not match in a number of respects once the Directive had to be (formally) implemented by the Dutch authorities. This is a relevant aspect given the fact that discretion and compatibility are expected to interact, thereby affecting transposition. To put it in more concrete words: expectation 7 posits that compatibility between the EU directive and national legislation raises the likelihood of proper transposition, and that, additionally, this effect becomes more positive as the degree of discretion increases. Hence, discretion may facilitate transposition if there also is a good match between EU and national law. As earlier established, during the EU negotiations the Dutch Government achieved to bring the Directive proposal more in line with the Dutch legal system. In spite of this achievement, transposition did not proceed smoothly. It turned out to be more complex once it got under way at the national level. In addition, in the course of the process, adjustments had to be made to the transposition measures, not only in following up the advice of the Council of State but also due to European case law concerning the (formal) implementation of the Directive. All this seems to indicate that the incompatibility between the Directive and national law was greater than expected by the Dutch Government prior to the actual transposition of the Return Directive.¹⁰⁴ This observation

104 I wish to add that, in my view, complexity does not necessarily imply incompatibility, but in the present case it seems that both are linked to each other.

is supported by the concept of legal fit used in the dissertation to assess the incompatibility between EU and national law. Based on this conceptualisation, EU and national rules show a mismatch of a moderate to high scope:¹⁰⁵ transposition made it necessary to adopt more than two legislative acts of a higher order¹⁰⁶ which did not merely replace existing legislation but required that amendments were made to it, although the Minister was keen to limit the implications from transposition for national legislation. Seeking to keep the Dutch law on aliens intact even if this rather emphasised than minimised the incompatibility between national and EU rules, and the fact that the Minister used discretion to achieve this end, lends support to the idea that low compatibility and discretion taken together impeded timely transposition. These findings, on the other hand, do not square with the core idea of the expectation that proper transposition is achieved through compatibility and discretion interacting and facilitating it. Hence, the expectation, as it stands, is not supported by the empirical evidence.

13.7.4 Discretion and administrative capacity

Finally, in line with expectation 8, the question rises if the Dutch transposition was impeded by lacking administrative capacity, which by interacting with a wide margin of discretion, is expected to have retarding effects on the pace of transposition. The administrative authority mainly responsible for the transposition of the Directive was the Ministry of the Interior and Kingdom Relations, and more in particular the Minister for Immigration and Asylum and the ministerial departments assisting him. Insights gained from the analysis of the transposition documents as well as the interviews with the civil servants involved in both the negotiations and transposition of the Directive delivered no evidence of insufficient knowledge among transposition actors. Nor did the empirical analysis yield any proof of coordination problems between the policy and legal units involved in the Directive dossier. Hence, the expectation linking discretion and administrative capacity is not found to hold true.

105 To recall: 'High misfit is registered when a directive requires the adoption of many (more than two) legislative acts, when these acts are of a higher order (laws and regulations) and when the transposition measures are mostly extensive amendments rather than new acts. A moderate degree of misfit is observed when many, high order acts are adopted but the acts are new and do not replace existing legislation.' Cf. Steunenberg and Toshkov, 2009, p. 960.

106 Alongside the amendment of the Alien Act and Decree, another (temporary) order in council was required to transpose the Directive.

13.8 CONCLUSION

Discretion played a relevant role in the Dutch transposition of the Return Directive. It was used by the Minister in his attempt to preserve national rules and practices in dealing with third-country nationals staying illegally on the territory of the Netherlands. Preserving the national legal system, and therefore already established rules and practices towards irregular migrants, is apparently not unique to the Netherlands. This kind of approach to the transposition of the Return Directive was also applied in other Member States (Zwaan, 2011a; 2011b). In the Netherlands the use of discretion served to fit the provisions of the Directive into the national legal framework. But how discretion was exercised by the Minister in transposing the Directive was not fully supported by Parliament. The Minister's transposition approach sparked parliamentary debate which, while probably slightly delaying the process, is rather negligible in explaining the long-term delay in the formal implementation of the Directive. What can be established is that with a view to the parliamentary debate, discretion was associated by opposition representatives in Parliament with the imposition of restrictive measures by the Dutch Government. What's more, while discretion did not enter into play by strengthening the positive effects of compatibility between EU and national rules, it seems to have negatively affected the formal implementation of the Directive, contributing to the long-term delay in transposition. Finally, the analysis brought to light that transposition was further slowed down by additional factors which relate to the political circumstances accompanying the incorporation of the Directive into Dutch law. These concern the change of government and the adoption of a different approach to transposition as well as the complexity of the process, which was only fully realised by those in charge once transposition had to be carried out in practice.

