

The Directive on Mutual Recognition of Expulsion Decisions: Symbolic or Unbalanced Politics?

Kees GROENENDIJK

Professor of sociology of law and chairman of the Centre for Migration Law, University of Nijmegen, The Netherlands

1. Introduction

In May 2001 the Council adopted a Directive on the mutual recognition of decisions on expulsion of third country nationals.¹ This Directive is one of a series of measures recently adopted under the new Title IV of the EC Treaty on French initiative.² The Directive is indicative of the priorities of the Member States in the development of a European migration policy and of the shortcomings of the legislative process under Title IV EC Treaty. Member States should have implemented this Directive in their national legislation before December 2002.

The enforcement of expulsion decisions is a major problem in most Member States. Often only a small percentage of such decisions are actually enforced by public authorities.³ In most of the cases the persons concerned leave the state on their own means after the decision, continue to stay illegally or succeed in getting their position in the state of residence regularized in one way or another. Enforcement of expulsion decisions is necessary if a restrictive immigration policy is to be taken seriously by migrants and the native population. However, it is a difficult and unpleasant task for the officials concerned, if only because expulsion often has serious negative consequences for the person that has to be expelled. Shifting that burden from one Member State to another does not necessarily result in greater effectiveness. The transfer of the burden should not reduce the rights of the individuals concerned, especially not of those third country nationals with lawful residence in another Member State.

¹ Council Directive 2001/40/EC, OJ 2001 L 149/34.

² Other French initiatives adopted were Council Regulation 1091/2001/EC of 28.5.2001, OJ 2001 L 150/4, on freedom of movement with a long stay visa, Council Directive 2001/51/EC of 28 June 2001, OJ 2001 L 187/45, supplementing the provisions of article 26 of the Convention implementing the Schengen agreement of 14 June 1985, Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residency and Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residency, both adopted on 28 November 2002, OJ 2002 L 328/1 et 17.

³ In France in 1996 only one third of the expulsion decisions was actually implemented, P. Weil, *Mission d'étude des législations de la nationalité et de l'immigration, Rapports au Premier ministre*, Paris 1997 (La documentation Française), p. 99. In the Netherlands only one quarter of the rejected asylum seekers reported as having left the country in 1997, were actually expelled in a government controlled way, W. van Bennekom a.o., Netherlands, in: B. Nascimbene (ed.), *Expulsion and detention of aliens in the European Union countries*, Milan 2000 (Giuffrè), p. 413-440, at p. 415.

In my opinion the Directive will provide little assistance with the expulsion of third country nationals illegally in a Member State and may well produce unreasonable negative effects on the position of third country nationals legally resident in the EU.

2. Material scope

The purpose of the Directive is to make possible the recognition of an expulsion decision issued by one Member State against a third country national present within the territory of another Member State (Article 1). The Directive intends to create a competence for one Member State (the “enforcing” State) to recognize and enforce a decision made by another Member State (the “issuing” State). There is no obligation to do so.

According to Article 3(1) of the Directive recognition may take place in three cases:

- the third country national is convicted for an offense punishable with a prison sentence of at least one year; (thus, the actual sentence may be only a week or a small fine);
- serious grounds for believing that the person has committed serious offences or solid evidence of his intention to commit such offences in a Member State; (here a conviction is not required);
- a failure to comply with national rules on the entry or residence of aliens (again no conviction is required).

The opening sentence of Article 3(1) states that recognition is possible if “a third country national is subject of an the expulsion decision based on a serious and present threat to public order or to national security and safety, taken in the following cases”. This clause refers to the cases described under the first and the second indent only.

The wording of this clause is ambivalent. It resembles but is not identical to the wording used by the ECJ in its case-law on the public order exception to the free movement of Union citizens in Directive 64/221.⁴ It is not clear whether the clause presents another condition to be fulfilled before recognition is allowed, or whether by definition there is a serious and present threat when the criteria of the first and second indent are met. In the latter interpretation, the clause would have no independent meaning. In the first interpretation, where it has the same meaning as the public order exception with respect to Union citizens and Turkish citizens⁵, the scope of the

⁴ ECJ 27.10.1977, case 30-77, ECR 1977, p. 1999 Bouchereau

⁵ See ECJ 10.2.2000, C-340/97, ECR 2000, I-957 Nazli, where the Court held that the public order exception in Article 14 of Association Council Decision 1/80 has the same meaning as in Article 39 ECT.

Directive would be severely restricted.⁶ Considering the broad standard formulated under the third indent, to which the public order clause does not apply, it seems rather unlikely that the Member States intended to restrict the scope of the first two indents to such a great extent. A broad interpretation of the clause may be warranted with respect to persons that never had a residence right or have lost that right. However, with respect to a person lawfully resident in another Member State, there are good reasons for a strict interpretation of Article 3(1). Possibly, the ambivalence of this clause is an indication that the drafters did not have a clear picture of the diversity of the residence status of the persons falling under the personal scope of the Directive.

In any event, the threshold for expulsion decisions that may be recognized is rather low. In two of the three cases it is not necessary that the imputed offense has been established by a court or another judicial authority. A conviction is not required. Considering the complexity of national immigration legislation of Member States, the chances that a third country national during his residence will have violated at least at one time one of the many rules on timely reporting to the authorities or timely applying for permits or their extension are rather high. They are not dissimilar to the odds that a decent union citizen has occasionally violated a minor traffic rule or filed his tax return too late.

The Directive creates a new instrument intended to be complementary to the existing rules on removal of third country nationals under the Dublin Convention, the incorporated Schengen Implementing Agreement and the readmission agreements.⁷

3. Personal scope

The personal scope of the Directive is problematic in several aspects. It applies both to third country nationals without and those with a residence permit in a Member State. Third country family members of union citizens who have exercised their right of free movement, are excluded from the application of the Directive (Article 1(3)). Surprisingly, no explicit exemption is made for other categories of third country nationals with residence rights under Community law. Turkish citizens with residence rights under the Association EEC-Turkey are not mentioned in the Directive. However, the Community can not unilaterally restrict rights granted under an agreement

⁶ The French language version of the Directive used the words “et prise dans les cas suivants”. This suggests that the opening clause constitutes a separate condition to be fulfilled.

⁷ See Article 1 and Article 3(3) of the Directive.

concluded by the Community with a third country. Application of the Directive to these Turkish nationals would be a violation of Community law. Third country nationals are defined in Article 2(a) as anyone who is not a national of a Member State. This appears to imply that the Directive can be applied by the Member States to citizens of the EEA-states. However, expulsion of EEA-citizens having residence rights under the EEA-Treaty is allowed on very restricted public order grounds only. The one-sided perspective of the drafters of the Directive is illustrated by the fact that they did not forget to mention that Norway and Iceland, under their agreement on the application of the Schengen-acquis and its development, are bound to apply the Directive, but they forgot to exempt the citizens of these EEA States from the Directive.⁸

The original French proposal excluded minors from the scope of the Directive. This was in line with a long tradition of French immigration law. The expulsion of minor aliens has been forbidden in France since the adoption of the 1945 Aliens Act.⁹ The other Member States removed this protective rule at their first revision of the French proposal.

4. Territorial scope

The directive will apply to at least thirteen Member States and two EEA States. The UK has participated in the adoption and thus is bound by the directive. Ireland had not yet opted-in and, hence, is not bound. Denmark has not participated in the adoption. But, since the directive in the preamble is said to build upon the Schengen acquis, Denmark under Article 5 of its special Protocol may decide within six months to transpose the directive into its national law. Norway and Iceland will be bound under their agreement with the Schengen States that also covers the development of the Schengen acquis.¹⁰

5. Procedure

The Member State that chooses to recognize the expulsion decision has to verify that the decision is still in force and not suspended (Article 3(1) last sentence) and should allow the third country national to use a remedy available under the national legislation of the enforcing State (Article 4). If the national legislation of that State does not provide for a separate remedy against expulsion decisions, the third country national has no legal remedy

⁸ See the preamble of the Directive under point 8.

⁹ Article 25(1) of the Ordonnance relative aux conditions d'entrée et de séjour en France des étrangers of 2.11.1945.

¹⁰ See under points 5-8 of the preamble to the Directive.

against the enforcement at all. If there is a national remedy, the proceedings will, probably, focus on whether the criteria of Article 3(1) are fulfilled and whether the national law of the issuing Member State has been correctly applied. This requires that sufficient information on the case and knowledge of the relevant legislation of the issuing Member State are available. Hence, that State has to provide “all documents needed to certify the continued enforceability of the decision”, possibly by using the SIRENE network. Moreover, both States shall make use of all appropriate means of cooperation and exchanging information (Article 6).

The 1995 EC Directive on data protection¹¹ is applicable (Article 5). But authorities may refuse to give information to the expellee on the basis of the public security exception in the Directive. The enforcing State has to examine the situation of the person concerned in order to ensure that the enforcement of the expulsion decision does not violate relevant international instruments and national rules (Article 6). It was deemed necessary to provide explicitly in Article 3(2) that the Member States “shall apply this Directive with due respect for human rights and fundamental freedoms”. Obviously, this is an implicit reminder that the case-law of the Court in Strasbourg is the bottom line. The European Convention on Human Rights is explicitly mentioned in the preamble only. After the implementation the issuing State should be informed about the enforcement.

This procedure may appear attractive from the perspective of the issuing State. From the perspective of the other Member States it seems far less so. The procedure may entail a lot of administrative efforts, time and costs. After Germany and other Member States became aware of these costs, a new provision was added that Member States should compensate each other for any financial imbalances resulting from the application of the Directive where the third country national can not be made to pay the costs. The Council, acting on a proposal from the Commission, will make rules on this form of burden sharing (Article 7). The Member States did not want to create room for free riders. The Commission had to make a proposal on the compensation to be adopted by the Council before 2 December 2002. By that time no proposal had been made. In July 2002, when the Member States were asked for their views on this compensation, Austria declared that the “causation” principle should apply: a Member State which orders expulsion but does not enforce the order itself, should meet any costs which another Member State incurs in carrying it out¹².

¹¹ OJ 1995 L 281/31.

¹² Council Document 11237/02 MIGR 71 of 25 July 2002.

6. The legislative process

France filed its proposal in June 2000 together with three other proposals all related to illegal immigration. In August it was published in the Official Journal.¹³ Three months later the proposal was revised on essential points in the Council's Working Group and COREPER.¹⁴ At the Justice and Home Affairs Council (JHA) of November 2000 the proposal was discussed immediately in the Mixed Committee. France exerted great pressure on the other Member States to adopt the redrafted proposal. At that time it was still uncertain whether agreement on the revision of the EC Treaty could be reached in Nice during the French Presidency. Hence, the need for another visible product of the Presidency. During the November 2000 JHA Council Member States virtually reached agreement on the revised proposal.¹⁵ However, formal adoption at that Council was not possible because the Parliament of one Member State had not given its consent¹⁶ and the European Parliament had not yet had an opportunity to give its opinion, as required by Article 67 ECT. The EP's Civil Liberties' Committee met three times to discuss and adopt its report on the original French proposal. In January 2001 the Council consulted the Parliament on the thoroughly revised version of the proposal. In its opinion of March 2001 the EP rejected the French initiative, basically on the ground that Article 63(3) ECT was not the correct legal basis for a measure on mutual recognition of expulsion decisions.¹⁷ After the one parliamentary scrutiny reservation was lifted¹⁸ and the EP had given its opinion, there were no more formal barriers to its adoption. After renewed French pressure at the JHA Council in March 2001, the Council unanimously adopted the Directive in May.

The repeated pressure to adopt the proposal at short notice, the thorough revision of the proposal soon after its publication, and the fact that the revised proposal was not published, all restricted the possibilities for national parliaments and interested citizens to influence the legislative process. I can

¹³ OJ 2000, C 243/1.

¹⁴ Council Doc 13095/1/00 Rev 1 of 17.11.2000.

¹⁵ The press communique of the French Presidency stated with regard to this proposal: "Le Comité Mixte a confirmé le consensus réalisé au niveau des hauts fonctionnaires sur le projet de directive de la Présidence française "(.....)", 13865/00 (Presse 457).

¹⁶ The Dutch Parliament, reacting to a letter from the Meijers Committee of 22 November 2000 severely criticizing the proposal, at first refused to give the Dutch government the required consent, see Tweede Kamer 23490, nos. 176 and 178.

¹⁷ For the first Committee Report of 5.12.2000 see EP document A5-0394/2000 and for the Report of 27.2.2001, see EP document A5-0065/2001. The EP delivered its opinion on 13.3.2001. The opinion has not yet been published.

¹⁸ The Dutch parliament had to vote twice on a motion requesting the government not to agree with the proposal, because votes were equally divided between the left and the right wing parties on the first vote; see Tweede Kamer 14 december 2000, p. 36-2977 and Tweede Kamer 23490 no. 180.

see no trace of any influence of the EP, the national parliaments or of NGO's on the content of the Directive.¹⁹ Possibly, the Commission has been influential in correcting some of the obvious flaws in the original French proposal, e.g. one of the several conflicts with Community law and the references to the Schengen acquis. I do not see any justification for the exceptional speed of the legislative process, other than the wish to show that the Member States were active in this field.

7. Critical comments

I have four major comments on the Directive. Firstly, it is doubtful whether it will be an effective instrument for the realisation of its goal. Secondly, the situation of third country nationals lawfully residing in the EU may be unduly and unnecessarily harmed by the Directive. Thirdly, the preconditions for the use of the instrument of mutual recognition in the field of expulsion are not yet present. And, finally, the instrument of a Community law directive is used in a way that is not in accordance with its nature. I will elaborate on each of those four comments below.

7.1. Effectiveness

The official aim of the Directive according to its preamble is "to ensure greater effectiveness in enforcing expulsion decisions". Will the Directive really make a serious contribution to the realization of this aim?

With respect to persons not having residence rights in any Member State more practical alternatives are available. The authorities of a Member State confronted with an illegal third country national present in their territory, generally will be inclined to establish first whether another state, inside or outside the EU, is obliged to accept that person under the existing readmission agreements. Often, removal to a neighbouring state is the easiest and cheapest way to deal with the matter. If this option is not available, the authorities will naturally prefer to take an expulsion decision under their national law and enforce that decision in one way or another. Why would they make the effort to find out whether an expulsion decision exists in another Member State, whether that decision is still valid and not suspended, obtain the necessary documents and information on the relevant law of the other Member State, check whether the criteria of the Directive apply, and run the risk that events having occurred after that decision will be raised in proceedings before a national court? The possibility to get a partial refund for

¹⁹ The first critical discussion of the original French proposal was published in the ILPA European Update of December 2000, hence after the November JHA Council had reached agreement on the revised proposal.

the costs under a future scheme dealing with imbalances, will hardly be a serious ground for using the new instrument offered by the Directive.

With respect to persons entitled to reside in another Member State the obvious alternative will be to tell the undesired person to go to that State.

An official of the French Ministry of Interior mentioned to me two aims his government had in mind when making its proposal: to send a message to the third-country national, against whom an expulsion order was made, that he would not be welcome in any of the other Member States; moreover, any French expulsion order implemented by another Member State would be a net gain for France. The latter aim would lead to a transfer of the costs between Member States rather than at an increase of decisions being enforced. Once other Member States became aware of this purpose, they supported the inclusion of provisions on financial compensation between the Member States in Article 7 of the Directive. A system of compensation will reduce the attractiveness of the idea of mutual recognition in the perspective of the issuing State. The first aim is based on the unlikely supposition that third country nationals are aware of the message and that it will enhance their readiness to leave the EU voluntarily.

The presence of obvious alternatives and the administrative costs and efforts to be made by the “enforcing” State, that will not be fully refunded under a future scheme, makes me seriously doubt whether the proposed transfer of the burden of enforcement will result in a considerable net increase of expulsion decisions actually been enforced by the Member States. After all, the Directive does not increase the number of officials enforcing expulsion orders in the Member States neither does using the Directive diminish their administrative tasks. Given their limited means they will have to choose between enforcing a foreign expulsion order or a national one. In most cases that choice will not be difficult.

7.2. Lawful resident third country nationals

The drafters probably had primarily illegal immigrants in mind. Nevertheless, the Directive applies to persons having lawful residence in a Member State as well. In the preamble the Council refers to its competence under Article 63(3) ECT to adopt “measures on immigration policy within areas comprising conditions of entry and residence as well as illegal immigration and illegal residence.”

In my opinion the Directive does not properly take into account the position of third country nationals having lawful residence in a Member State. Their residence right can be based on Community law (e.g. Turkish nationals, EEA-

nationals and persons having residence rights under the Europe Agreements), on the national law of a Member State or on both. The lack of respect for residence rights under Community law has already been dealt with above in the discussion of the personal scope of the Directive. Here, I deal with the position of persons having residence rights under national law. The original French proposal did not mention lawfully resident third country nationals at all. It only contained a rather vague provision that the enforcing Member State should first “examine” the situation of the person under the relevant international agreements and under the applicable national rules (Article 4(2) of the proposal). This did not even commit the Member State to respect that status.

In the final text of the Directive there is one provision on persons holding a residence permit issued either by the enforcing State or by a third Member State. The enforcing State is obliged to consult both the Member State that issued the permit and the one that issued the expulsion decision. The mere existence of an expulsion decision of another Member State, based on one of the first two grounds (conviction or suspicion of a criminal offence) mentioned above, “shall allow for the residence permit to be withdrawn if this is authorized by the national legislation of the State which issued the permit” (Article (3)(1)(a) last sentence).

This provision does not apply to expulsion decisions based on a failure to comply with the immigration legislation of a Member State. Would this really allow the enforcing State to expel a third country national with a residence permit in another Member State, even if the law of that state does not allow withdrawal of the permit on that ground?

The rules of Article 3(1) of the Directive are without prejudice to Article 25 of the Schengen Implementing Agreement (SIA). Article 25 deals with the case that an alien registered by one Schengen state in the SIS appears to hold a residence permit in another State. The latter State then has to be consulted and may consider whether there are sufficient grounds for withdrawal of the permit. Article 25(2) SIA explicitly provides that if the residence permit is not withdrawn the reporting State shall withdraw the registration from the SIS. The Directive does not contain a similar rule. If the Member State decides not to withdraw the permit, the third country national may continue to be confronted with the negative effects of the expulsion order in all the other Member States forever.

The Directive may have the effect that a conviction for a small fine or a short term in prison, the mere suspicion of having committed a crime, or any infringement of the immigration legislation of another Member State will

give rise to the question whether a residence permit (a term that is not specified in the Directive) should be withdrawn.

Moreover, the criteria of Article 3(1) of the Directive apply irrespective of the length of the lawful residence of the third country national in a Member State. Even persons with long term residence could be expelled on the basis of a suspicion of having committed a serious crime or a minor violation of the immigration law of any of the Member States.

One can only hope that the administrative effort of the obligatory consultation with two Member States will turn out to a sufficient barrier to the application of this Directive to third country nationals with a residence permit in another Member State. As explained above, Member States do have an attractive alternative. They can require the person to go to the Member State that issued the residence permit. Under Article 23 of the SIA a third country national who loses his right to circulate for three month in a Schengen State, must travel to the Schengen State that issued him with a residence permit that is still valid. The presence of that practical alternative does not take away the need to avoid that lawfully resident persons are unduly harmed by the implementation of this Directive.

Since the Directive does not provide serious protection of third country national with (long) lawful residence, the protection of their status depends primarily on national law.²⁰ In my opinion the Directive needs to be amended on this issue. Moreover, in the Commission's recent proposal for a Directive concerning the status of third country nationals who are long term residents²¹ it should be stipulated that the Directive on mutual recognition of expulsion decisions does not apply to persons having the status of long term resident or having permanent residence under the national law of a Member State.

Finally, I see a major risk that national law on expulsion will be adapted to new "European" rules. It will prompt pleas to lower the national standards on protection of lawful third country residents to the thresholds specified in Article 3 of the Directive. In the German Immigration Act that was adopted in June 2002 but declared unconstitutional by the Bunderverfassungsgericht on procedural grounds in December 2002, it is provided that expulsion ("Abschiebung") is possible as soon as the local aliens police has recognized the expulsion decision of another Member State in accordance with Article 3

²⁰ Protection may be provided by other international instruments, such as the ECHR or the Geneva Refugee Convention.

²¹ COM(2001)127 def of 13.3.200. This proposal was published in the Official Journal more than five months after its adoption by the Commission, OJ 2001 C240/79.

of the Directive.²² The Commission in its April 2002 Green Paper on a community return policy on illegally residents suggested the development of a binding and general system of mutual recognition of expulsion decisions that would go beyond Directive 2001/40²³. This idea was repeated in the Commission's Communication on return policy of October 2002.²⁴ The UK government in an official reaction to that communication considered that the Directive should be evaluated before a further legally binding framework is necessary.²⁵ The Council in its Return Action Programme, adopted in November 2002, also voiced a more careful position on this issue. The Council only stated that the implementation of the Directive "will provide Member States with the necessary experience to consider possible amendments or changes of the directive."²⁶

7.3. Mutual recognition of decisions of foreign administrations

The EC has a long tradition of recognition and enforcement of judgments of civil courts of other Member States. The case law of the ECJ has stimulated the recognition of decisions of authorities to admit goods to the market in one Member State enabling those goods to be transported to and sold in other Member States. On the basis of Title VI of the EU Treaty new forms of recognition and enforcement of decisions of judicial authorities in criminal cases are under consideration. In the field of immigration (conditional) recognition of decisions of the administration of other Member States was part of the Schengen Implementing Agreement. The decisions to issue a visa or a residence permit, to allow entry across the external border, or to register a third country national in the SIS, generally, were accepted as creating rights for individuals and obligations for the authorities in other Schengen States.²⁷ The Dublin Convention entails an implicit recognition and enforcement of the (negative, not the positive) decisions of other Member States on asylum requests.

In my opinion there is a difference between recognition of decisions concerning the quality of goods and the recognition of judicial decisions in civil cases, where parties have freely decide to contract, on the one hand, and decisions of administrative authorities concerning detention or prosecution of persons or the expulsion of non-citizens from the country, on the other hand.

²² See Art 58(2)(3) Aufenthaltsgesetz, being part of the Gesetzes zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländer (Zuwanderungsgesetz) of 20 June 2002, Bundesgesetzblatt 2002, I, p. 1946.

²³ COM(2002) 175 def., p. 18.

²⁴ COM(2002) 564 def., p. 10 and 11.

²⁵ Select Committee on European Scrutiny, Fifth Report, Community return policy on illegal residents, par. 22.7, doc (23894) 13164/02.

²⁶ Council doc. 14673/02 of 25 november 2002, par. 53.

²⁷ In Article 5, Article 19 and Article 21 SIA.

In the latter cases public authorities unilaterally infringe on the civil rights or freedom of individual persons and restrict or end their position in society. In the latter cases human rights are more often and more directly involved. The infringement may be justified. But that justification should be subject to judicial scrutiny.

Mutual recognition is not a substitute for harmonisation or for common rules. The basic idea of mutual recognition of decisions of courts or authorities of other states is that the substantial or procedural rules of the other states are different, but the decisions are recognized and enforced by another state notwithstanding those differences. The choice to recognize the decision of the authorities of other states in the field of immigration as in the field of criminal law requires that the relevant material and procedural rules of the states concerned have certain characteristics in common and that treatment in accordance with certain minimum standards is ensured. Interestingly, the Schengen states on the basis of the 1990 SIA provided for the development of common rules and practices with respect to the crossing of the external border and the issue of visa, at the time when they agreed to mutually recognize each other's decisions in these matters.²⁸ With respect to expulsion decisions no such common rules are available, nor is their development provided for in the Directive. The only common standards are the few minimum rules that appear from the case-law of the ECtHR.

7.4. Denaturalization of the Directive?

The Directive only creates a competence and no obligation to recognize expulsion decisions of other Member States. Moreover, on four essential points it refers to the national legislation of the enforcing Member State: in Article 1(2) with respect to the implementation of an expulsion decision, in Article 3(1)(a) on the withdrawal of a residence permit, in Article 4 with respect to remedies, and in Article 6 on taking account of the personal situation of the third country national. The question arises whether the use of the Community measure of a directive is correct. A directive should bind the Member States as to the aim to be realized (Article 249 ECT). Apart from providing the necessary information to the enforcing Member State (Article 6) and possible future rules on compensation for "financial imbalances" (Article 7), the Directive contains few obligations for Member States. The obligation of Member States to bring their national legislation in line with the Directive before December 2002 in law does not require much. In October 2002 the Dutch Minister of Immigration officially declared that the implementation of the Directive does not require any change in the Dutch

²⁸ E.g. Article 6(3), Article 9 and Article 17 SIA.

immigration legislation, because the Directive creates the possibility to recognize a decision made by another Member State and expulsion in all relevant cases will be possible on the basis of the present Dutch Immigration Act²⁹.

8. Some conclusions

It is doubtful whether the Directive will produce the intended increase in expulsion decisions actually being enforced. However, the political effect of the Directive could be that Member States will amend their national rules on expulsion with the argument that they should be in line with the new “European” rules in Article 3 of this Directive. In many Member States this would lead to a lowering of the present level of protection granted to lawfully resident third country nationals.

In the preamble to the Directive reference is made to the conclusions of the Tampere European Council stating that a common European policy on asylum and migration “should aim both at fair treatment of third country nationals and better management of migration flows”. The drafters of the Directive appear to have paid more attention to the “management” than to the fair treatment aspects. The high speed of the legislative process that produced this Directive – political agreement being reached before the EP had even received the revised proposal – clearly contrast with the attitude of the Member States with respect to proposals granting rights to lawfully resident third country nationals. The standards set by the Commission in its 1999 proposal for a Directive on family reunification have been watered down considerably during the discussions in the Council’s Working Groups.³⁰ The Directive on mutual recognition of expulsion decisions that may create serious risks for the position of lawfully resident third country nationals was adopted before the Council had even started the discussion on the Commission’s proposal on the status of third country nationals with long-term residence in the Member States. Preventing illegal migration and illegal residence still has a higher priority than the situation of lawfully resident migrants. In this and other aspects the legislative activity of Member States under Title IV of the EC Treaty so far, still resembles the time they were adopting non-binding resolutions and recommendations concerning migration under the pre-Amsterdam Third Pillar.

²⁹ Staatscourant 25 October 2002, no. 206, p. 10.

³⁰ Steve Peers compared the amended Commission proposal of September 2000 with the text discussed in the JHA Council of May 2001. He found seventeen key points were the Commission proposal has been altered. Only two of these seventeen point could be considered an improvement from the perspective of migrants, ILPA European Update, June 2001. In the latest version of this proposal (COM(2002)225) after heavy pressure from Member States the minimum standards are once again reduced considerably, see ILPA European Update, December 2002, p. 11.