

# Non-removable Returnees under European Union Law

## *Status Quo and Possible Developments*

EMN expert seminar, Riga, 22-23 March 2017, Fabian Lutz

Key legal documents: The EUs Return Directive 2008/115/ EC, complemented by ECJ case law and the Commissions "Return Handbook" (Commission Recommendation C(2015)6250 of 1.10.2015)

Key studies: 2013 Study "*Situation of third-country nationals pending postponed return/removal in EU MS*" by Ramboll; 2008 Study "REGINE – Regularisations in Europe" by ICMPD (followed up by the 2014 *Study on the Labour Market Trajectories of Regularised Immigrants - REGANE I*)

Latest Commission policy documents: *Communication COM (2017)200 of 2.3.2017 on a more effective return policy in the EU – a renewed action plan;* *Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*

### **1. The issue**

Under the Return Directive, Member States are obliged to issue a return decision to any third-country national staying illegally in their territory. Member States are not allowed to tolerate in practice the presence of illegally staying third-country nationals on their territory without either launching a return procedure or granting a right to stay. This obligation on Member States to either say A or B aims at reducing 'grey areas', to prevent exploitation of illegally staying persons and to improve legal certainty for all involved.

It may, however, also increase in practice the absolute number of cases in which Member States issue return decisions which cannot be enforced due to practical or legal obstacles for removal (primarily delays in obtaining the necessary papers from third countries; and non-refoulement cases).

The quantitative dimension is difficult to establish: Extrapolating from statistics on numbers of return decisions which could not be enforced (amounting on average to ca 60% out of 500.000 per year) one can assume – with a lot of precaution - that the issue concerns around 300.000 migrants per year.

The scope of situations leading to postponed return is broad: Pending appeal with suspensive effect; postponement due to non-refoulement principle; health reasons; technical reasons; failure of removal efforts due to lack of identification; problems in obtaining papers from third countries, .....

Current Member State approaches of dealing with cases of postponed return differ widely, including granting of temporary residence permits, formal toleration statuses, de facto toleration or inaction. - It is, however, important to highlight that legally speaking any third-country national physically present on the territory of an EU

Member State is either staying legally or illegally. There is no third option. This applies also to the qualification of existing national toleration statuses.

One key criterion (used by MS and also by ECJ) and accompanying any policy debate in this field relates to the existence of "justified reasons for non-return" vs "non-justified reasons for non-return":

*"Justified reasons for non-return"*: The Commission Return Handbook distinguishes reasons *outside* the scope of influence of the returnee (such as delays in obtaining necessary documentation from third countries caused by bad cooperation of third country authorities; crisis situation in country of return making safe return impossible; granting of formal postponement of return/toleration status to certain categories of returnees, ...) and *reasons* within the sphere of the returnee which are recognised as legitimate or justified by Union or national law (e.g. health problems or family reasons leading to postponement of removal; pending appeal procedure with suspensive effect; decision to cooperate with authorities as witness).

*"Non-justified reasons for non-return"*: These are reasons within the scope of influence of the returnee which are not recognised as legitimate or justified by Union or national law, such as: lack of cooperation in obtaining travel documents; lack of cooperation in disclosing ones identity; destroying documents; absconding; hampering removal efforts; The mere subjective wish to stay in the EU can never be as such considered as "justified reason".

Issues dealt with in more detail below:

1. Rights pending postponed return
2. Documentation/papers pending postponed return
3. Detention and criminal law sanctions;
4. Continued encouragement of return
5. Pathways to legal stay

## 2.1. Rights pending postponed return

Return Directive – Article 14(1): *Member States shall, ..., ensure that the following principles are taken into account as far as possible in relation to third-country nationals during the period for voluntary departure granted in accordance with Article 7 and during periods for which removal has been postponed in accordance with Article 9:*

- (a) family unity with family members present in their territory is maintained;*
- (b) emergency health care and essential treatment of illness are provided;*
- (c) minors are granted access to the basic education system subject to the length of their stay;*
- (d) special needs of vulnerable persons are taken into account.*

However, other important rights under the Asylum Reception Conditions Directive, such as access to employment and material reception conditions, are not listed.

The scope of situations covered by Article 14(1) is broad: It covers the period of voluntary departure as well as any period for which removal has been formally or de-facto postponed in accordance with Article 9 Return Directive.

The provision of emergency health care is a basic minimum right. Access to it must not be made dependent on the payment of fees.

Access to education: The limitation of “subject to the length of their stay” should be interpreted restrictively. In cases of doubt about the likely length of stay before return, access to education should rather be granted than not be granted. A national practice where access to the education system is normally only established if the length of the stay is more than fourteen days may be considered as acceptable.

Other basic needs: In its judgement in case *Abdida* (C-562/13), the ECJ found that Member States are obliged to also cover other basic needs, in order to ensure that emergency health care and essential treatment of illness are in fact made available during the period in which that Member State is required to postpone removal. It is for the Member States to determine the form in which such provision for the basic needs of the third country national concerned is to be made.

The logic upon which the ECJ relied to establish this obligation was that the requirement to provide emergency health care and essential treatment of illness under Article 14(1)(b) may be rendered meaningless if there were not also a concomitant requirement to make provision for the basic needs of the third country national concerned. Based on this logic developed by the ECJ, and in light of the indications provided for in relevant case-law of the ECtHR, it can be derived that enjoyment of the other rights enumerated in Article 14(1) (such as in particular: access to education and taking into account needs of vulnerable persons) also give rise to a concomitant requirement to make provision for the basic needs of the third country national concerned.

Even though there is no general legal obligation under Union law to make provision for the basic needs of *all* third country nationals pending return, the Commission encourages Member States – in its Return Handbook - to do so under national law, in order to assure humane and dignified conditions of life for returnees.

## **2.2. Documentation/papers pending postponed return**

Return Directive – Article 14(2): *Member States shall provide the persons referred to in paragraph 1 with a written confirmation in accordance with national legislation that the period for voluntary departure has been extended in accordance with Article 7(2) or that the return decision will temporarily not be enforced.*

Form of the written confirmation: Member States enjoy wide discretion. The confirmation can either be a separate paper issued by the national authorities or part of a formal decision related to return. It is important that it allows the returnee to clearly demonstrate – in case of a police control – that he/she is already subject of a pending return decision and that he/she benefits from a period of voluntary departure, a formal postponement of removal or that he/she is subject of a return decision which can temporarily not be enforced. The confirmation should specify, if possible, the length of the period of voluntary departure or the postponement. Recital 12 of the Return Directive specifies: *"In order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation. Member States should enjoy wide discretion 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."* In Member States in which data exchange systems allow for the quick verification of the status of irregular migrants in case of police controls on the basis of certain personal data or reference numbers, the written confirmation requirement can be considered as fulfilled if the person is provided with (or already owns) documents or papers containing these personal data or reference numbers.

## **2.3. Detention and criminal law sanctions**

**Detention:** Return Directive – Article 15(1): *Unless other sufficient but less coercive measures can be applied effectively in a specific case, Member States may only keep in detention a third-country national who is the subject of return procedures in order to prepare the return and/or carry out the removal process, in particular when:*  
(a) *there is a risk of absconding or*  
(b) *the third-country national concerned avoids or hampers the preparation of return or the removal process.*

*Any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence.*

Imposing detention for the purpose of removal is a serious intrusion into the fundamental right of liberty of persons and therefore subject to strict limitations.

No detention for public order reasons: The possibility of maintaining or extending detention for public order reasons is not covered by the text of the Directive and Member States are not allowed to use immigration detention for the purposes of removal as a form of "light imprisonment". The primary purpose of detention for the

purposes of removal is to assure that returnees do not undermine the execution of the obligation to return by absconding. It is not the purpose of Article 15 to protect society from persons which constitute a threat to public policy or security. The - legitimate - aim to "protect society" should rather be addressed by other pieces of legislation, in particular criminal law, criminal administrative law and legislation covering the ending of legal stay for public order reasons.

See also ECJ in *Kadzoev*, C-357/09, para 70: "*The possibility of detaining a person on grounds of public order and public safety cannot be based on Directive 2008/115. None of the circumstances mentioned by the referring court (aggressive conduct; no means of support; no accommodation) can therefore constitute in itself a ground for detention under the provisions of that directive.*" The past behaviour/conduct of a person posing a risk to public order and safety (e.g. non-compliance with administrative law in other fields than migration law or infringements of criminal law) may, however, be taken into account when assessing whether there is a risk of absconding (see section 1.6. above): If the past behaviour/conduct of the person concerned allows drawing the conclusion that the person will probably not act in compliance with the law and avoid return, this may justify a prognosis that there is a risk of absconding.

**Criminal law sanctions:** Return Directive – as interpreted by ECJ in cases *El Dridi*, C-61/11, *Sagor*, C-430/11 *Achughbabian*, C-329/11, *Filev* and *Osmani*, C-297/12:

Member States are free to lay down penal sanctions in relation to infringements of migration rules, provided such measures do not compromise the application of the Return Directive. It is up to national law to determine which types of infringements of migration rules are penalised. Nothing prevents Member States from also addressing and taking into account in their national penal law infringements of migration rules committed in other Member States:

The imposition of a – proportionate – financial penalty for illegal stay under national criminal law is not as such incompatible with the objectives of the Return Directive since it doesn't prevent a return decision from being made and implemented in full compliance with the conditions set out in the Return Directive (*Sagor*, C-430/11). National legislation which foresees – in the event of illegal stay – for either a fine or removal is incompatible with the Return Directive since it undermines its effectiveness (*Zaizoune*, C-38/14).

Immediate expulsion under national criminal law (in cases which aren't excluded from the scope of the Return Directive under Article 2(2)(b) – see section 2.3. above) is only allowed in so far as the judgement stating this penalty complies with all safeguards of the Return Directive (including on the form of return decisions, legal safeguards and advance consideration of the possibility of voluntary departure). (*Sagor*, C-430/11)

House arrest under national criminal law is only allowed if guarantees are in place that house arrest does not impede return and that it comes to an end as soon as the physical transportation of the individual concerned out of that Member State is possible. (*Sagor*, C-430/11)

Member States are not free to impose imprisonment under national criminal law on the sole ground of illegal stay before or during carrying out return procedures since this would delay return. (*El Dridi*, C-61/11)

Member States are free to impose penal sanctions following national rules of criminal procedure, on third-country nationals to whom the return procedure established by the Return Directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return.

#### **2.4. Continued encouragement of return**

The fact that return or removal cannot be carried out for practical reasons for a certain (possibly undetermined) period does not imply that the Return Directive stops applying. As long as an illegally staying third country national is present in a Member State, he/she remains covered by the scope of the Return Directive - even though the maximum time period for detention may have been reached.

The obligation – under Articles 6-8 of the Return Directive - to take all necessary measures to make return happen, also covers situations of long term protracted irregularity extending in certain cases to several years.

The ECJ highlighted in *El Dridi* that the Return Directive foresees '*a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility*'. In accordance with the principle of proportionality, Member States are obliged to use – at all stages of the procedure – the least intrusive measures. This implies that in certain circumstances, such as in cases in which hitherto non-cooperating returnees change their attitude and demonstrate credibly their willingness to cooperate and to depart voluntarily, Member States should allow for voluntary departure instead of removal.

To follow-up this obligation poses practical challenges. A policy of continued encouragement may be the most successful one:

On the one hand there should be continued promotion of possibilities for voluntary departure and reintegration assistance. Reliable information on the situation in the country of origin and information by NGOs and other actors dealing with migrants may also be helpful in this context.

On the other hand, it should be made clear that there is no perspective of regularisation for those who refuse to cooperate.

#### **2.5. Pathways to legal stay**

In some exceptional cases, non-removable returnees may obtain a **right to stay based on family formation**: Marriage with mobile EU citizen; Getting a child with EU citizenship; obtaining a national permit based on Article 8 ECHR; ....

The more generally applied pathway to legal stay, applied by Member States for different reasons, notably to avoid destitution and social problems, is **regularisation**.

Currently there is no general obligation under Union law to grant a permit to non-removable returnees, but Member States are free to do so any moment<sup>1</sup>. And - as we can learn from the findings of the Ramboll study - nearly all Member States have provision in place allowing for a case-by case regularisation under certain circumstances.

Is there a case for developing common EU criteria for regularisation? The following arguments may be made:

1. Prevention of secondary movements: Common rules should help avoiding that non-removable illegals are "shopping around" and try to move to those Member States which offer the best conditions of stay.

2. Avoid pull-factor for illegal immigration: The adoption of uncoordinated ad-hoc measures (such as generous one-shot regularisation measures or mechanisms) by MS may be perceived as a "reward for irregularity" and a potential stimulus for further irregular immigration to the EU as a whole. A "common discipline" amongst Member States concerning the treatment of non-removable persons may prevent Member States from adopting national measures considered as "too permissive" by others.

3. Close a gap in the EUs migration policy: There is currently no common approach towards persons who have not obtained a protection status but who can nevertheless not be removed. In this context, there is a case for common rules providing for a useful basic safety net for all those who – in spite of a rejected protection application - cannot be removed for non-refoulement or other humanitarian reasons.

4. Foster human rights compliance and upgrade the public image of the EU vis-a-vis third countries: The EU is committed to a humane and dignified treatment of returnees at all stages of migration procedures. Common EU rules in this field (and the related enforcement mechanisms) may improve human rights compliance in Member States and avoid that unsatisfactory treatment of migrants causes damage to the reputation of the EU as a whole, even if it concerns only singular cases or the situation in one or few Member States.

5. Maintain public acceptance of sustainable EU migration policy: The argument can be made that the existence of large numbers of "non-removables" with few rights and limited possibility to work in order to come up for their own living contributes to a negative public perception of migration and undermines the public acceptance of a sustainable EU migration policy as a whole. Common standards which would allow at least certain categories of "non-removables" to work or to acquire a consolidated status may contribute to alleviate this phenomenon.

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<sup>1</sup> In this regard the ECJ expressly clarified in *Mahdi*, C-146/14, paras 87 and 88: " ... the purpose of the directive is not to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and in respect of whom it is not, or has not been, possible to implement a return decision. - However, Article 6(4) of Directive 2008/115 enables the Member States to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory".

At political level, the European Council agreed (in its 2008 European Pact on Immigration and Asylum) to use only case-by-case regularisation rather than generalised regularisation, under national law, for humanitarian or economic reasons.

### 3. Likely future developments

The current priorities of EU migration policy are threefold: 1. limiting the numbers of irregular arrivals, 2. reforming the asylum system/Dublin and 3. increasing return rates. The discussion we are having here today clearly does not fall within these priorities. But the dilemma of what to do with non-removables exists and will continue to exist. What are then the likely scenarios for future developments ?

#### 3.1. Rights

Stay with status quo as set out by ECJ and Return Handbook. Possibly further case-law coming up on other rights mentioned in Article 14.

#### 3.2. Papers

Stay with status quo as set out by ECJ and Return Handbook.

#### 3.3. Detention and criminal law measures?

**Detention:** Stay with status quo as set out by ECJ in Kadzoev case and Return Handbook, using the maximum leeway offered. COM Recommendation (EU) 2017/432:

*(10) For the purpose of effectively ensuring removals of illegally staying third-country nationals, Member States should:*

*(a) use detention as needed and appropriate in the cases provided for in Article 15(1) of Directive 2008/115/EC, and in particular where there is a risk of absconding as provided for in points 15 and 16 of this Recommendation;*

*(b) provide in national legislation for a maximum initial period of detention of six months that can be adapted by the judicial authorities in the light of the circumstances of the case, and for the possibility to further prolong the detention until 18 months in the cases provided for in Article 15(6) of Directive 2008/115/EC;*

*(c) bring detention capacity in line with actual needs, including by using where necessary the derogation for emergency situations as provided for in Article 18 of Directive 2008/115/EC.*

**Penal sanctions:** Possibility to consider legislative harmonisation following up ECJ jurisprudence (Achughbalian, C-329/11, par 48-49) according to which Member States are free to impose penal sanctions following national rules of criminal procedure, on third-country nationals to whom the return procedure established by the Return Directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return. COM Recommendation (EU) 2017/432:

*(11) In relation to illegally staying third-country nationals who intentionally obstruct the return processes, Member States should consider using sanctions in accordance with national law. These sanctions should be effective, proportionate and dissuasive and should not impair the achievement of the objective of Directive 2008/115/EC.*

#### 3.4. Continued encouragement of return

Non-removable returnees are under a continued obligation to return and Member States should regularly assess their situation to see whether return is possible because situations changed. In parallel to the proposed obligatory regular re-

assessment of the international protection needs in the area of asylum, increasing attention will also be paid to this fact when it comes to return.

Next to this, the notion of a "*hostile environment*" is also mounting – at least in the political debate. The idea would be to convince returnees – by granting only very limited rights - that they will not be able to find a sustainable perspective in the EU. Given that ECHR standards oblige EU Member States to provide for a certain minimum level of rights for any human being and given the devastating situation in certain countries of origin, the effectiveness of such policy approach is more than questionable.

**Foster voluntary departure:** COM Recommendation (EU) 2017/432:

*(22) Member States should have operational assisted voluntary return programmes by 1 June 2017, which should be in line with the common standards on Assisted Voluntary Return and Reintegration Programmes developed by the Commission in cooperation with Member States and endorsed by the Council (1). (23) Member States should take action to improve their process of disseminating information on voluntary return and assisted voluntary return programmes to illegally staying third-country nationals, in cooperation with national education, social and health services.*

**Enhanced cooperation with third countries:** COM Return Communication (2017)200:

*"The Commission will:*

- monitor and address ongoing issues in the implementation of the Readmission Agreements.*
- work to swiftly conclude negotiations of the Readmission Agreements with Nigeria, Tunisia and Jordan while striving to engage with Morocco and Algeria.*
- together with Member States, step up the efforts to improve practical cooperation, by agreeing with third countries readmission procedures, communication channels and workflows, while ensuring compliance with the EU Charter of Fundamental Rights.*

*The European Union and its Member States will, within the Partnership Framework, employ their collective leverage in a coordinated and effective manner to agree with third countries tailor-made approaches to jointly manage migration and further improve cooperation on return and readmission."*

### **3.5. Pathways to legal stay**

At the 21 March 2014 meeting of the Contact Group Return Directive a brainstorming paper on non-removables (CC return 50 – annexed) was discussed with Member States experts, setting out the possible frame for common standards on regularising (or not regularising) non-removable returnees.

In essence, the paper proposed:

- For co-operating non-removables, a "may" clause and a possibility for "in loco" applications for legalisation after – e.g. – a minimum stay of 18 months and a "shall" clause providing for legalisation after 5-10 years of factual stays linked to fulfilment of three criteria: social integration, good conduct, impossibility to carry out return in foreseeable future. For non co-operating non-removables, no pathway to legalisation*

should be offered - provided that it is possible to move to the category of "co-operating" at any point in time,

- Pending their possible legalisation, cooperating returnees should be also offered access to work (possibly after a certain period, possibly aligned with Article 15 RCD); access to material reception facilities (possibly aligned with Article 18 RCD) and other rights (healthcare, vocational training ...) may be provided in line with RCD standards.

Member States experts expressed, however, quasi-unanimous opposition to the development of harmonised EU solutions in this field. Member States argued that the current rules and the current level of harmonization is fully satisfying and that there is no need for additional best practices or interpretative texts, which – in Member States perception – might risk leading to undesired effects. The reasons given for this opposition were the following:

1. Successful return should be the primary objective and **all efforts should be focused on increasing return rates**. Discussing rights of irregular migrants (as well as pathways to regularization) would send a wrong policy signal and might even encourage irregular migration. Granting rights to non-removables should therefore be a "non-topic" and managed at national level only.
2. The wish of Member States not to be **subject of additional obligations** resulting from a rights based approach for "non-removables".
3. Concern not to be **caught in a "soft-law" trap** (Best practices leading to Guidelines and potentially leading to proposals for hard law...).
4. Concern about **the European Court of Justice interpreting extensively** the existing *acquis* and following migrants-rights based interpretations.

The Commission's arguments in favour of a more harmonized approach at EU level (prevention of secondary movements; need for "common discipline"; preventing jurisprudence from taking the lead of policy development; need to face reality (large numbers of non-removables) and to find practical solutions) could not convince Member States.

As regards the conduct of case-by case regularisations, the Commission recommended – in its 2015 Return Handbook - that the assessment criteria that could be taken into account by Member States should include both individual (case related) as well as horizontal (policy related) elements such as in particular:

- the cooperative/non-cooperative attitude of the returnee;
- the length of factual stay of the returnee in the Member State;
- integration efforts made by the returnee;
- personal conduct of the returnee;
- family links;
- humanitarian considerations;
- the likelihood of return in the foreseeable future;
- need to avoid rewarding irregularity;

- impact of regularisation measures on migration pattern of prospective (irregular) migrants;
- likelihood of secondary movements within Schengen area.

What are the likely future developments ?

- Member States will continue addressing the issue at national level, taking into account (but not bound by) criteria suggested in the Return Handbook.
- Possibly a further exchange of info on national practices in internal consultations between Member States and informal discussion on "best practices".
- and .... ?



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL HOME AFFAIRS

Directorate B: Immigration and asylum  
**Unit B.1: Immigration and integration**

MIGRAPOL  
CC Return Dir 50

**CONTACT GROUP "Return Directive"  
(2008/115/EC)  
21 March 2013**

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**Subject:** Brainstorming on best practices in relation to "non-removable returnees"

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**Summary:**

In 2012/13, Ramboll had carried out for the Commission a comparative "*Study on the Situation of third-country nationals pending postponed return/removal in the EU Member States and the Schengen Associated Countries*". The findings of this study were presented at previous meetings. The text of the study is publicly available in the e-library of DG HOME's Europa website under: [ec.europa.eu/dgs/home-affairs/e-library/documents/categories/studies](http://ec.europa.eu/dgs/home-affairs/e-library/documents/categories/studies)

It appears useful, notably in the context of the upcoming preparation of a "*Return Handbook*", to collect best practices in this field, based on existing best practices at national level.

This brainstorming document aims at stimulating a discussion on the possible substance of such best practices.

**Action to be taken:**

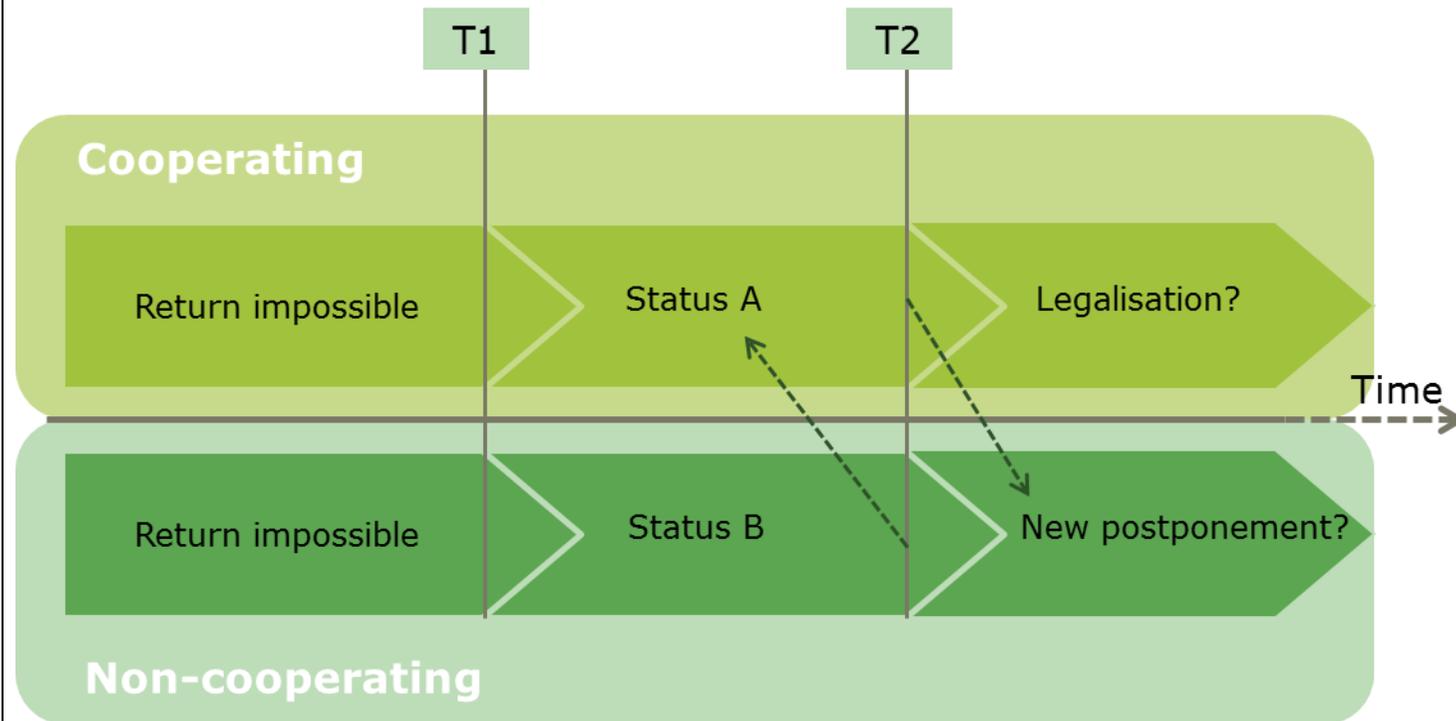
For discussion at the meeting. - It is planned to have a substantive in-depth discussion of the questions raised in this brainstorming document. The presence of experts familiar with this policy field would be highly welcome.

Best practices on "non-removable returnees"

Brainstorming paper for 21 March 2014 meeting of CC Return

<i>Issue</i>	<i>Considerations</i>	<i>possible answers/options</i>
Why discuss the issue?	One of the core aims of the Return Directive is to reduce grey areas in relation to irregular migrants who are found on the territory of MS. The Return Directive obliges MS to decide to either grant a permit (to regularise) or to issue a return decision and in principle to execute this decision effectively. It leaves, however, one <u>gap</u> : It does not tackle the cases in which MS issue return decisions which cannot be enforced due to practical or legal obstacles for removal (e.g. delays in obtaining the necessary papers from third countries; non-refoulement principle, non-cooperation etc.).	The issue is to a limited extent addressed in Article 14 and recital 12 of the Return Directive. In practice, due to a lack of more harmonised rules, irregular third country nationals in exactly the same situation live under completely different conditions depending on the MS they live in. One could envisage three options for further addressing the issue:  1. Propose <u>legislative action</u> in this field 2. <u>Doing nothing</u> – and wait for jurisprudence to further develop case law (based on ECHR and EU Charter) 3. Seek agreement on <u>best practices/soft law</u> as a first step towards possible further harmonisation.
Why at EU level?	<p>1. <u>Prevention of secondary movements</u>: Common rules should help avoiding that non-removable illegals are "shopping around" and try to move to those Member States which offer the best conditions of stay.</p> <p>2. <u>"Common discipline"</u>: A "common discipline" amongst Member States concerning the treatment of non-removable persons will prevent Member States from adopting "permissive" national measures which may cause "reputational damage" to less "generous" MS.</p> <p>3. <u>Avoid pull-factor for illegal immigration</u>: The adoption of uncoordinated ad-hoc measures (such as generous one-shot regularisation measures or mechanisms) by MS may be perceived as a "reward for irregularity" and a potential stimulus for further irregular immigration to the EU as a whole.</p>	

	<p><u>4. Close a gap in the EUs asylum policy:</u> There's currently no common approach towards persons who have not obtained a protection status but who can nevertheless not be removed. In this context, there is a case for common rules providing for a useful basic safety net for all those who – in spite of a rejected protection application - cannot be removed for non-refoulement or other humanitarian reasons</p> <p><u>5. Foster human rights compliance:</u> The EU is committed to a human and dignified treatment of returnees at all stages of the return procedure. Common EU rules in this field (and the related enforcement mechanisms) may improve human rights compliance in Member States.</p> <p><u>6. Upgrade the public image of the EU vis-a-vis third countries:</u> Unsatisfactory treatment of migrants may cause damage to the reputation of the EU as a whole, even if it concerns only singular cases or the situation in one or few Member States.</p> <p><u>7. Maintain public acceptance of sustainable EU migration policy:</u> The argument can be made that the existence of large numbers of "non-removables" with few rights and limited possibility to work in order to come up for their own living contributes to a negative public perception of migration and undermines the public acceptance of a sustainable EU migration policy as a whole. Common standards which would allow at least certain categories of "non-removables" to work or to acquire a consolidated status may contribute to alleviate this phenomenon.</p>	
Policy objectives/interests to be respected?	<ul style="list-style-type: none"> <li>- avoid incentives for irregular migration and secondary movements</li> <li>- avoid undue budgetary burden</li> <li>- avoid destitution and social problems</li> <li>- maintain public support/trust in MS migration policy</li> <li>- foster human rights compliance</li> <li>- avoid that Courts take over role of legislator</li> </ul>	Finding the "right" balance is difficult. One size fits all is not possible. Need to differentiate according to case scenario.
Basis for discussion?	<p>The 2012 Ramboll study on the situation of TCNs pending return/removal in EU MSs analysed the situation in MS and suggested to consider/discuss further action based on a simple basic categorisation of irregular migrants obliged to return:</p> <p>Group A: Those who cooperate with the authorities</p> <p>Group B: Those who don't cooperate with the authorities</p>	



Ramboll addressed the situation of both temporary and permanent non-return/removability.

Ramboll suggested to consider in particular the below six questions:

- First, the question of how to define the distinction between the two categories - cooperating returnees and non-cooperating returnees?

1. Is it possible to apply this distinction (cooperating returnees and non-cooperating returnees) in practice?

2. Is the proposed categorisation a suitable starting point for further discussion?

<p>- Second, what should the <u>rights</u> attached to the different statuses (A and B) be? Should cooperating third-country nationals for example be granted a right to work?</p>	<p>1. Which basic rights should be offered to <u>both category A and B</u>?  <i>NB: Article 14 of the Return Directive already provides a list of certain rights which should be offered in any case:</i></p> <ul style="list-style-type: none"> <li>- right to obtain <u>written confirmation</u> confirming the postponement (in case of police control)</li> <li>- <u>family unity</u></li> <li>- emergency <u>healthcare</u> and essential treatment of illness</li> <li>- access to basic <u>education</u> for minors</li> <li>- Special needs of <u>vulnerable persons</u>.</li> </ul> <p>Recital 12 mentions need to define "basic conditions of subsistence" – what does this imply <i>in concretu</i>? Could the term "<u>cover basic needs</u>" (Article 18(9) last sentence Reception Conditions Directive (RCD) be used as reference point?</p> <p>2. Which additional rights should be offered to <u>category A only</u>?</p> <ul style="list-style-type: none"> <li>- <u>Access to work</u> (possibly after a certain period, possibly aligned with Article 15 RCD)?</li> <li>- access to <u>material reception facilities</u> (possibly aligned with Article 18 RCD)</li> <li>- <u>other rights</u> (healthcare, vocational training ...) in line with RCD standards?</li> </ul> <p>3. Should MS be allowed to offer more favourable</p>
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	treatment (such as access to work) to Category B – or would this undermine the idea of a "common discipline"?
- Third, what should the criteria be for being “ <u>moved</u> ” from one category to <u>another</u> ? Should it for example be something similar to the Danish practice applied for granting residence permits – to have been cooperating with the authorities for (e.g.) 18 consecutive months?	<p>1. Should a move between A and B be possible?</p> <p>2. Should common criteria be developed or should this be done within MS discretion on case-by-case level?</p>
- Fourth, at which point in time (if ever) should the third-country nationals be able to obtain <u>legalisation</u> – a time frame for the cooperating category vs. the non-cooperating?	<p>1. A possible approach for <u>category A</u> would be a "may" clause and a possibility for "in loco" applications after – e.g. – a minimum stay of 18 months and a "shall" clause after 5-10 years of factual stays linked to fulfilment of three criteria: social integration, good conduct, impossibility to carry out return in foreseeable future. Would you agree with such approach?</p> <p>2. Provided that it is possible to move to Category A at any point in time, <u>no pathway to legalisation should be offered to Category B</u> (those who continue to be non-cooperative). Would you agree with such approach or would you plead in favour of a "may clause" for regularising category B cases after a long period of time (e.g. 10 years)?</p>
- Fifth, should all these criteria and definitions be legally established or should it rather be decided on a case-by-case basis for instance by the use of (common EU) guidelines?	Would you agree that development of best practices/non-binding Guidelines is the best way forward at this point in time?

<p>- Sixth, what about those non-returnable third-country nationals who are considered a <u>threat to society</u> e.g. because they have committed serious crimes? Can they be given a status (A or B) and rights similar to those of other third-country nationals in postponed return? Or should they be treated as a separate category, as they already are in some of the study countries?</p>	<p>Would you agree that there is no need to deal with this group as a separate category? (Reasoning: third-country criminals who had committed a crime and who had served a criminal law penalty imposed on them should afterwards be treated like any other third-country national.)</p>	
<p><i>Further issues to discuss</i></p>		
<p>Re-detention under the Return Directive</p>	<p>Are MS free to re-detain returnees who had been released from detention after expiry of the maximum period or because of absence of reasonable prospect of removal? Should a difference be made in this respect between category A and B?</p>	<p>Consideration: the effet utile of the maximum deadlines prescribed by paragraphs 5 and 6 should not be undermined. Re-detention of the same person at a later stage <u>may in exceptional cases be legitimate</u> (both for cat A and B) if an important change of relevant circumstance takes place (for instance the issuing of necessary papers by a third country), if there is an arising risk of absconding and if there is a "reasonable prospect of removal". Would you agree with this approach?</p>
<p>Criminal law sanction (imprisonment) for irregular stay</p>	<p>Is it possible to imprison non-cooperating returnees under national criminal law after the expiry of the maximum detention period of 18 months?</p>	<p>Consideration: In the Achoughbabian case the ECJ set out "<i>In particular, Directive 2008/115 does not preclude penal sanctions being imposed, following national rules of criminal procedure, on third-country nationals to whom the return procedure established by that directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return. (Par 48)</i>" It results that</p>

		<p>MS are in principle free to imprison non-cooperating returnees under national criminal law after release from administrative pre-removal detention. This criminal law imprisonment must, however, relate to a crime different from mere illegal stay, otherwise the <i>effet utile</i> of Article 15(6) (which limits the overall deprivation of liberty for mere migration reasons to 18 months), would be undermined.</p> <p>Would you agree with this approach?</p>
Minors	Shall more favourable practice/rules be established for minors?	<p>Like in all fields of migration the Return Directive in principle asks MS to take into special consideration the situation of vulnerable persons and thus especially that of children. Should this imply that children have to be regularized after shorter time periods or under more generous rules?</p> <p>What should be done to prevent abuses and possible negative side-effects of favourable rules (risk of increased trafficking in children)?</p>

