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Motivations, experiences and consequences of returns and readmissions policy: revealing and developing effective alternatives

Deliverable D8.2
Policy Brief

Policy recommendations for the dignified treatment of irregularised, non-removable third-country nationals in the EU

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Authors

Sergio Carrera (Senior Research Fellow and Head of Unit, CEPS) and Júlia Pőcze (Research Assistant, CEPS). With contributions to the promising practices from Michelle Levoy and Chiara Catelli (PICUM).

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Executive summary

This Policy Brief builds on the key findings of a comprehensive comparative study[1] examining seven EU Member States: Belgium, Germany, Greece, Italy, Slovenia, Spain and Sweden.[2] Based on desk research and the national reports, the study analysed the legal and policy responses to the treatment of irregularised third-country nationals (TCNs). Specifically, it focused on persons classified as 'non-removable' or 'non-deportable', and others who, despite lacking any such official classification, remain in an irregularised situation.

After assessing the status quo in these seven countries, the Policy Brief showcases the most crucial findings when it comes to the implementation of the EU Return Directive, with particular attention being given to the provisions dealing with the situation, treatment and fundamental rights of TCNs who cannot be expelled based on legal, technical or practical grounds.

Based on the findings of a MORE comparative study assessing promising practices across these countries, this Policy Brief also includes references to national practices that should also be considered at the EU level.

Regarding the anticipated replacement of the return framework by the European Commission with new legislation, these findings serve as the basis for actionable, forward-facing policy recommendations for the EU's approach to non-removability and future EU expulsion policies.

1. Relevant provisions of the EU Return Directive and their assessment

There are several provisions in the Return Directive (Directive 2008/115) that centre on the treatment of non-returnable individuals with expulsion orders that were – at least temporarily – postponed or suspended. Particularly, there are four key elements in this

[1] https://zenodo.org/records/14747937

[2] While the United Kingdom is part of the overall comparative assessment under the MORE Project and was examined in the Comparative Reports and Synthesis Reports (Deliverable D2.1 under the project), this Policy Brief specifically addresses EU policymakers and therefore omits the UK from consideration.

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context: Recital 12 and Articles 9, 13 and 14, which lay down limited safeguards and some rules for providing socio-economic rights, access to justice and documentation of non-returnability.

While the EU Return Directive fails to provide a harmonised approach covering and addressing the situation of legal limbo resulting from the protracted non-deportability of irregularised TCNs, some of the above-mentioned Articles lay down clear legal obligations to EU Member States, which when read in combination with the EU Charter of Fundamental Rights ('Charter') and Court of Justice of the EU (CJEU) case-law, lay down a ceiling of administrative guarantees and rights which national policies cannot go below.

1.1 'Basic conditions'

Recital 12 suggests that national law 'should' define the 'basic conditions of subsistence' for irregular, non-removable TCNs. The recital also makes it clear that Member States 'should' issue a written confirmation of non-returnability to the individuals in such situations. However, the broad discretion explicitly granted to Member States, as well as the use of the term *'should'*, stands at odds with regulatory fragmentation and the implementation gaps found in the comparative assessment.

On 'basic conditions', Article 14 lays down procedural safeguards regarding TCNs who may still depart voluntarily or whose removal was suspended. Member States are *obliged* to ensure that four core principles are considered in how they treat these individuals. These principles are (1) the maintenance of family unity with family members residing on the territory, (2) access to emergency healthcare and essential treatment, (3) access to basic education for minors and (4) considerations for the special needs of vulnerable people.

While Article 14 includes a 'shall' clause – making the provision of the above principles obligatory – some of these terms are fairly broadly defined and therefore allow for discrepancies between national interpretations. It is also presented as an exhaustive list, even though the comparative findings indicate that the inaccessibility of adequate housing, regular employment, non-emergency healthcare or social assistance can have a detrimental impact on TCNs' dignity and may cause them to fall into destitution.

Concerning the 'basic conditions of subsistence', the comparative report has found that in all the assessed countries, irregularised individuals are either largely excluded from accessing socio-economic rights and justice or only have limited and ineffective or

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inadequate access to these rights. This includes especially important rights for upholding human dignity such as non-emergency healthcare, adequate accommodation and social assistance.

Usually, TCNs encounter severe legal and practical barriers to securing essential socio-economic rights. But even if they can practically access certain rights, the 'basic label' under which these conditions are currently presented by the Return Directive fails to uphold the higher set of standards required by European and international human rights law and the Charter, which call for these rights to be adequate, effective and decent. Illustrative examples include the obligation to ensure both an adequate standard of living and adequate housing, *decent* work and a decent existence through social and housing assistance. The resulting picture is one perpetuating a cycle of *hyper-precarity*.

1.2 Written confirmation of non-returnability

In Recital 12, Member States are called to provide written confirmation to individuals proving that they cannot be returned, which is subsequently underlined by Article 14(2). The comparative analysis revealed the tendency to offer some form of documentation about the postponed or suspended return decision/removal order. According to the Return Directive and the CJEU case law, issuing such a document is a Member State obligation.[3] However, the Directive opted not to include any clear guidelines for national authorities to follow, explicitly giving them wide discretion to define the form and format of such 'confirmations'.

Consequently, there is quite an array of discrepancy across national approaches. For instance, if the return decision is temporarily postponed, then it is communicated through a separate document in Belgium; meanwhile, in Sweden, permission to stay or a temporary residence permit may be issued alongside a return decision[4]

[3] CJEU (2024), *LF v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* [Changu], Case C-352/23, 12 September 2024, paragraphs 60 and 61.

[4] This is supported by the MORE national reports. For instance, the Belgian Immigration Office tends to issue a written decision to the TCNs but the report showed that those residing in administrative detention centres may not receive such a document and are instead first orally informed about their expulsion being suspended or postponed, with a written certificate possibly following upon their release. By contrast, the Swedish national report indicated that there is no written suspension confirmation but that the Swedish Migration Agency may issue a 12-month residence permit. A different approach was observed in Italy, where national research found that written documentation is issued to those who appeal a return order at the Magistrate Court, which serves

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1.3 Grounds for suspending or postponing removals

Article 9 of the Return Directive establishes different grounds for postponing removals, with one being presented as mandatory and others as 'optional' for national authorities. Its first paragraph includes two obligatory grounds, which, by the nature of the *shall* clause, allows no discretion for EU Member States. These two grounds are *non-refoulement* (as envisaged in international refugee and human rights standards) and if the appeal lodged by an individual is granted a suspensive effect by the competent national authority. In paragraph (2), grounds presented as 'optional' are listed that are connected to assessing the specific circumstances of individual cases, so that the TCN's physical or mental state, as well as any possible technical reason, could lead to expulsions being postponed. The wording of the second paragraph suggests that this list is non-exhaustive, which has likely contributed to discrepancies among the Member States as to what authorities may consider as additional grounds for the non-enforcement of a return decision.

Additionally, Article 5 requires Member States to take due account of 'the best interests of the child', family life, health conditions and the non-derogable principle of *non-refoulement*[5] when implementing the Directive. As confirmed by a recent CJEU judgment, these assessments must be undertaken by the authorities *ex officio*, and authorities also must review previous return decisions considering *non-refoulement* every time a new procedure is launched, including applications for residence permits.[6]

In reality, the countries each established their own varying grounds for suspending return orders, with most of them framed as *de jure* grounds and laid out in national legislation. Yet the formal existence of such reasons in the letter of the law may not be automatic guarantees for postponement/suspension, should the requirements be met. Some cases seemingly include a wide range of different grounds anchored by applicable legislation that

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as evidence of temporary postponement until the date of the hearing, but this postponement does not come with any short-term permit or other documentation.

[5] The principle of non-refoulement protects several fundamental rights and requires national authorities to carry out individual assessments in all cases to ensure that the prohibition of ill-treatment and torture (Article 3 of the European Convention on Human Rights [ECHR]) remains untouched, which also includes examining whether the medical condition, mental health state and overall physical and psychological health situation of a returnee would be negatively impacted upon their removal. See: Gionco, M. and Levoy, M. (2022), *Barriers to return: Protection in international, EU and national frameworks,* PICUM, pp. 10-12.

[6] CJEU (2024), *K, L, M, N v Staatssecretaris van Justitie en Veiligheid* [Ararat], Case C-156/23, 17 October 2024, paragraphs 35 et seq.

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are then not consistently applied and respected in practice by all the national authorities.[7] Furthermore, Article 9(2) of the Return Directive fails to acknowledge that some of the foreseen situations, such as those related to mental/physical health, may in fact lead to EU Member States being obliged to not issue a return decision/removal order.

The CJEU confirmed in *X v. Staatssecretaris van Justitie en Veiligheid*,[8] that national authorities may adopt a return decision, or enforce a removal order, 'only if it has taken into account that person's state of health'.[9] A return decision or enforcing a removal order should be precluded where it would expose a TCN to a 'real risk of a significant reduction in his or her life expectancy or a rapid, significant and permanent deterioration in his or her state of health, resulting in intense pain'. The Court also confirmed in this same case that the medical treatment of irregularised TCNs forms a part of their private life under Article 7 of the Charter and held that EU Member States may have legally binding obligations to halt expulsions when considering both the family and private life of irregularised TCNs.

1.4 Effective remedies

Article 13 of the Return Directive stipulates that TCNs must be afforded an effective remedy – either by way of appeal or judicial review – which may lead to the suspension of their return. In paragraphs (3) and (4), the provision also makes it mandatory for Member States to provide individuals with the possibility to obtain legal advice, representation and linguistic assistance, to be granted free of charge upon request. Under 'effective remedy', a distinction

[7] For example, 'statelessness' is envisaged as a formal ground for suspending removals in Slovenia. However, although the country is party to the Statelessness Convention, there is no 'statelessness determination procedure' (SDP) available. Consequently, the definition of 'statelessness' under Slovenian law remains narrower than the Convention's definition, which may lead to individuals not being granted a suspension of removal although they meet the Convention's requirement for determining statelessness. As the national report found, even if the authorities have determined that the individual is stateless under Slovenian law, they are not obliged to consider a statelessness claim and may refuse to grant protection.
See: The Peace Institute, Institute on Statelessness and Inclusion & European Network on Statelessness (2017), Joint Submission to the Human Rights Council at the 34th Session of the Universal Periodic Review [OHCHR], Slovenia, point 14., p. 4 and K. Vucko (The Peace Institute, 2023) for the Statelessness Index, https://index.statelessness.eu/country/slovenia.

[8] CJEU (2022*), X v. Staatssecretaris van Justitie en Veiligheid,* Case C-69/21, Judgment of 22 November 2022 [Grand Chamber].

[9] Ibid., paragraph 95.

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is made between redress against (1) a return and a removal order and (2) a subsequent decision rejecting a request for the suspension of removal.

Despite the mandatory nature of the article, which must be read in light of Article 47 of the Charter, MORE research suggests that there is a considerable lack of accessible information and awareness among affected individuals about available legal recourse and access to justice avenues. Without comprehensive information and support as to their rights and options, TCNs are enduringly hampered in their ability to seek recourse and residence security. Likewise, while there may be viable pathways towards regularisation or the transitioning of administrative status, this 'knowledge gap' acts as a significant obstacle and reinforces exclusion and injustice. Other than a lack of sufficient clarity about the available legal tools, the understandable fear of forced removal also prevents them from enquiring about their rights and exercising them, thus reinforcing their precarious situation without a real way out of this limbo.

A promising practice: Case management initiatives

The countries analysed have developed initiatives offering different forms of support to undocumented migrants to find durable solutions, including through individualised case management support to regularise their status. In Belgium, since 2022, the administrations of major Belgian cities such as **Ghent, Antwerp, Bruges and Brussels**, together with local civil society organisations, have been running **several projects to provide accommodation for an indefinite period to homeless migrants, while providing counselling services to find durable solutions.** They are part of the *Shelter and Orientation projects* which receive financial and operational support from Fedasil. As a condition, migrants must cooperate with social workers in finding a durable solution, with priority given to a residence permit. The aim is to provide stability and intensive coaching and guidance for homeless undocumented migrants who are committed to finding a durable solution for their future. However, a major downside is that these initiatives do not protect migrants from the risk of expulsion if there is no regularisation option for the person concerned.

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2. Key comparative findings

2.1 Hyper-precarity created by systemic barriers and failed implementation

The comparative analysis yielded results that reflect severe disparities in the policy approaches to the non-returnability of certain TCNs in irregularised situations. This diverse range of disparities include inconsistent practices in recognising and enforcing grounds that justify postponing or suspending deportation, as well as in documentation, making residency rights accessible, providing socio-economic support and access to effective remedies.

While the Return Directive offers a 'basic', applicable framework for all these areas, such a framework does not stand up to the level of protection required by international, regional and EU fundamental rights standards, and is implemented in highly heterogeneous and disparate ways across all the examined countries.

However, there is one commonality: the comparative report found evidence of significant, systemic barriers that impede non-returnable, irregularised TCNs from leading a dignified, secure life, which leads to 'hyper-precarity', i.e. a highly precarious living situation where access to social protection, rights and the transition to a secure residence status is severely compromised, and where individuals may routinely be subject to exploitative working conditions and inadequate standards of living and destitution.[10]

These systemic barriers, in turn, find their roots in the lack of compliance with legal obligations – including ones stemming from international law as well as primary and secondary European law – and a lax approach towards effectively enforcing the protective standards envisaged in the EU Return Directive, and their alignment with the Charter , as interpreted by the CJEU.

[10] For the term 'hyper-precarity', see, for instance: Zou, M. (2015), 'The Legal Construction of Hyper-Dependence and Hyper-Precarity in Migrant Work Relations', *The International Journal of Comparative Labour Law and Industrial Relations*, Vol. 31, No. 2, pp. 141–162., and Lewis, H., Dwyer, P., Hodkison, S. and Waite, L. (2015), 'Hyper-precarious lives: Migrants, work and forced labour in the Global North', *Progress in Human Geography,* Vol. 39, No. 5, pp. 580-600.

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2.1.1 The road to non-returnability

This regulatory fragmentation and the resulting precarity is showcased by the varying policy approaches towards recognising, implementing and respecting the grounds that justify postponing or suspending return decisions/removal orders.

As introduced above, the Return Directive recognises several grounds that *could* lead to the (temporary) suspension or postponement of a return decision. That notwithstanding, both the Directive and the applicable CJEU case law[11] and the European Court of Human Rights (ECtHR)[12] establish obligations that are binding upon the EU and its Member States. These reasons are anchored by human rights grounds stemming from – but also going beyond – the *non-refoulement* principle, as well as considerations including:

- physical and mental health, including being unable to access adequate medical treatment in the country of return;
- familial ties in the country, respect for private life, the best interests of the child;
- technical circumstances, such as a lack of identification, appropriate means of transport or cooperation from the country of return and
- statelessness or being the victim of violence or trafficking.

In the countries examined, *non-refoulement* and related considerations were found to be anchored by law and recognised in practice In the area of medical reasons preventing return. Though the report highlighted the recognition of health-related grounds for postponement, the CJEU[13] held that Member States are precluded from even *adopting* a return decision if there is a real risk that a TCN's serious illness would be significantly exacerbated due to the lack of appropriate care in the country of removal. Yet MORE research found that such medical grounds do not necessarily preclude authorities from issuing a return decision anyway, even if its enforcement is postponed later.[14]

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[11] See, for instance: *Aranyosi and Căldăraru* (2016), *K.A. and Others* (2018), *X v. Staatssecretaris van Justitie en Veiligheid* (2022), *Bundesamt für Fremdenwesen und Asyl v AA* (2023).
[12] Such as, *M.S.S. v. Belgium and Greece* (2011) and *Paposhvili* (2016),
[13] See *Staatssecretaris van Justitie en Veiligheid,* supra footnote 5.
[14] For example, German law assumes that deportation is not precluded on health grounds, unless the TCN provides a qualified medical certificate proving that their illness may 'interfere with deportation', which would then lead to a temporary suspension. In Slovenia, the Aliens Act recognises health reasons as grounds for

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Although there are several legitimate grounds preventing authorities from issuing and enforcing return decisions – which are unequivocally legally binding – these are often described 'obstacles' to 'effective' migration management and return, rather than being recognised as legal obligations.

Such framing is fallacious and misleading, as recognising and applying these grounds is a matter of complying with international law and human rights obligations or being held responsible and consequently liable for dehumanising socio-economic exclusion, arbitrary detention and illegal expulsions.

2.1.2 Dissonance between 'policy' and 'reality'

Despite the existence of legal obligations compelling authorities not to issue return decisions or enforce removal orders, or to postpone or suspend them if any of the grounds mentioned above apply, the trajectory of the EU-wide policy agenda giving priority to returns at all costs inadvertently encourages non-compliance and blame-shifting games by competent national authorities. With immigration enforcement and accelerating returns being increasingly prioritised, these serve as the overarching aims for the EU's current expulsion policy, and meeting these goals may often require that an individualised assessment of existing circumstances and grounds for non-expulsion is not duly carried out.

Non-compliance with these obligations therefore appears to be justified by the overriding policy priorities, even though expulsions stemming from the pursuit of this aim could very well be unlawful and violate absolute human rights. Consequently, while an increased return rate may be branded a 'policy success' or as an indicator of 'effectiveness', the EU's

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extending the period for voluntary departure, presupposing that a return decision is still to be adopted by the authorities. Likewise, legislation from Greece and Belgium all frame medical reasons as grounds for postponing or suspending an existing return decision rather than being impediments to adopting expulsion orders.

For Germany, see: Aliens Act, Sections 60(7) and 60a(2c), as well as Schütze, T. (2023), The (Non-)Status of 'Duldung': Non-Deportability in Germany and the Politics of Limitless Temporariness, *Journal of Refugee Studies* 36(3), pp. 409–429. For Slovenia, see: Aliens Act, Article 73(2). Greece: EMN, Fouskas, T. et. al. (2020), 'National Report : Greece', p. 10., https://home-affairs.ec.europa.eu/document/download/e4404716-36e2-42cc-9201-e748b1e7386d_en?filename=greece_ltism_study_2020_en.pdf. Belgium: Residence Act, Article 74/17 § 2.

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acceleration-focused policy approach to enforced removals[15] could end up constituting an 'obstacle' to effectively meeting EU Treaty founding principles under Article 2 TEU and the Charter. Both emphasise the human dignity of *every* person irrespective of their immigration status.

Despite all this, enforcing return decisions, just like access to justice and human rights, remains low in practice.[16] Yet what does this actually tell us about policy implementation dynamics and do these numbers also hide the existence of legitimate grounds for non-removal and the practical reality of applying alternative policy approaches to expulsions?

MORE research shows that competent national actors implementing the return policy often end up considering other alternatives as more 'effective' responses to the situation of non-returnable TCNs. Such alternatives include the transitioning of statuses based on individual assessments or group-based regularisations.

This example underlines that – often unjust – efforts that are technically in line with the 'effective' policy responses envisioned may constitute the successful implementation of political priorities. Existing alternatives to return, though against the grain of policy objectives, may end up being not only more humane, but also more 'effective' and realistic.

A promising practice: Access to permits

Another promising practice was the Italian special protection status, which was introduced by a 2020 legal reform to replace a previous humanitarian permit, and then subsequently abolished in 2023. The special protection status provided the possibility to grant a permit to people with barriers to return, based on the right to family and private life that was evaluated by balancing factors such as work, housing situation, family ties, and duration of stay in Italy as criteria. This practice was considered promising because it provided an additional pathway to access a residence permit, as well as protection from deportation and access to work (without being dependent on the employer) and social services.

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[15] See, European Commission, *A humane and effective return and readmission policy,* https://home-affairs.ec.europa.eu/policies/migration-and-asylum/irregular-migration-and-return/humane-and-effective-return-and-readmission-policy_en.

[16] See Eurostat's quarterly statistics – *Returns of irregular migrants*, last updated on 6 December 2024, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Returns_of_irregular_migrants_-_quarterly_statistics.

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2.2 Extreme limitations on access to rights and justice

The lives of irregularised TCNs are marked by an administrative 'limbo' – they do not have regular, secure statuses but can neither be deported, thus existing in a legal vacuum and a non-policy domain that heavily impacts their ability to lead a dignified life. While in limbo, access to socio-economic rights is extremely limited and usually conditional, exacerbated by a lack of sufficient legal and social support and ineffective access to justice in cases of human rights violations. Even when certain 'basic' rights are formally ensured and, in principle, also accessible, they often fall short of human rights law standards or are contingent upon further administrative requirements and exclusions, preventing effective access and perpetuating precarity, as well as their 'cooperation' with authorities in their return procedures.

The comparative analysis has revealed critical commonalities when it comes to systemic obstacles and structural discrimination that essentially prevent irregularised TCNs from seeking basic services, including healthcare, housing, employment and justice. For example, non-emergency or long-term medical care for irregularised TCNs is often contingent on strict eligibility requirements, such as proof of regular residency or financial contributions. Notably, individuals may also be unable to navigate often complex administrative procedures due to language barriers and a lack of support.[17]

Furthermore, while (temporary) shelters, social or other state-subsidised low-cost housing options may be *technically* available – though often overcrowded and insecure – undocumented people are often excluded from accessing these, which leads to their overwhelming concentration in the private housing market. Due to high levels of discrimination in the housing market, irregularised TCNs may be forced to accept inadequate housing conditions, often offered way above market prices or further exclusion on the grounds of their undocumented status.[18] Meanwhile, the inaccessibility of the formal labour market for irregularised TCNs means that they have no choice but to engage in irregular employment to keep themselves afloat. However, this accelerates the risk of

[17] This was highlighted in all MORE national reports. See also: Carrera, S. and Shabbir, A. (2024), *Humanising EU Migration Policy: The transitioning of statuses in the EU regular and labour migration law*, CEPS Report, Brussels.

[18] See: PICUM (2020), *Written Submission to the Consultation for the Action Plan for the implementation of the European Pillar of Social Rights*, Brussels and Clair, A., Reeves, A., McKee, M. and Stuckler, D. (2019), 'Constructing a housing precariousness measure for Europe', *Journal of European Social Policy*, No. 29, pp. 13–28.

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exploitation, suboptimal working conditions without the chance to earn a living wage or receive otherwise available benefits from the employer. In a similar vein, while social benefits and decent working conditions are severely limited, MORE research showed education to be the one area where somewhat broader access is provided for irregularised children. While the right to compulsory education tends to be recognised for children – which is framed as an *obligation*, rather than a right – it is rarely extended to adults. This logic shows that accessibility may also be dependent on whether the person seeking to access socio-economic rights is being perceived as someone trying to fulfil an obligation set out by the state or asking for a benefit offered by the same entity without *quid pro quo*. At the same time, several barriers to the effective access to education remain, including limited possibilities to continue studying beyond compulsory education[19] or accessing support for education-related costs.[20]

A promising practice: El Padrón and arraigo

The Padrón is Spain's municipal administrative residents register, which can include even those without a regular residence status. Being registered in the Padrón allows irregularised TCNs to access certain socio-economic rights and benefits, including free access to the public health system and education for children. Additionally, Spain offers the 'arraigo' scheme, which grants temporary residence authorisation to TCNs on the grounds of 'rootedness' in the country (i.e. social ties), humanitarian or other exceptional considerations.

Yet there are other barriers. On the one hand, 'cooperation' with the authorities may be another problematic structural barrier. Newer legal instruments concerning migration and returns often frame rights as 'conditional', only to be granted *if* the TCNs cooperate with the competent authorities, even to their own detriment (such as cooperating to enable their own removal from the country's territory at the expense of their own human rights).[21] The notion of 'non-cooperation with authorities' pursues a penalisation or punitive approach for people to enjoy their human dignity, even in cases where grounds for postponing, suspending or

[19] This is only the case in Greece – the other countries examined require a residence permit for continued studies.
[20] For example, in Belgium, *de facto* restrictions were found by the national report, which pointed out that undocumented children rarely receive support or access to adequate school equipment, extracurricular activities and other educational activities not strictly covered by basic education.
[21] See, for example, the *Asylum and Migration Management Regulation* (Regulation (EU) 2024/1351 of 14 May 2024), Recital (58) and Article 18(1).

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halting expulsions are in fact mandated by the law. It tends to be blurrily constructed and applied subject to disproportionately large margins of manoeuvre by relevant national authorities, which is incompatible with the need to ensure equality before the law by every person. Once again, this logic is based on the understanding that to be *deserving* of access to 'basic necessities', the individual must meet certain requirements to be deemed eligible and cannot receive them by the mere virtue of being a person in need.

Additionally, the absence of support and information prevents individuals from making use of available legal recourse and aid against unjust removal orders or the refusal to formally suspend deportation despite the existence of legitimate grounds that should prevent expulsion. These barriers to effective remedies, while serving the purpose of indeed accelerating procedures, essentially re-frame the rights of TCNs as 'secondary' and opens the way to systemic violations with little opportunity for redress. Crucially, many hesitate or choose not to assert their entitlements and rights due to the fear of being 'found out', sanctioned or forcefully expelled.

This challenge is further exacerbated by the lack of a 'firewall' to secure access to adequate services. In this context, a 'firewall' would mean that public and private service providers, including healthcare workers, teachers, social service employees and civil society actors, would be relieved from any 'reporting duties'[22]. If a firewall is put in place, these providers will not have to report irregularised TCNs to the competent immigration authorities[23], thereby shielding them from the dangers of looming criminalisation and forced expulsions. In this way, irregularised TCNs can have effective access to essential services without fear of forced deportation, criminalisation or other forms of retaliation.

Civil society organisations play a key role in helping non-returnable individuals. However, their activities are underfunded or are not well-equipped to handle all incoming requests.

Additionally, irrespective of migration policy priorities, the treatment of non-removable TCNs must align with international and regional human rights standards, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European

[22] European Commission against Racism and Intolerance (2016), *ECRI General Policy Recommendation No. 16 on 'Safeguarding irregularly present migrants from discrimination'*, CRI(2016)16, Point 11 (page 8). https://rm.coe.int/ecri-general-policy-recommendation-no-16-on-safeguarding-irregularly-p/16808b5b0b.

[23] PICUM, *FAQ – Reporting obligations and firewalls,* Point 9 (page 6). https://picum.org/wp-content/uploads/2024/12/FAQ-Reporting-Obligations-Firewalls.pdf. Refer to Objective 15 of the UN Global Compact on Migration (GCM) covering 'Provide access to basic services for migrants'.

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Social Charter and the EU Charter. These standards prioritise unequivocal respect of human dignity, negating any attempt to 'balance' human rights against migration policy priorities. Effective access to fundamental rights is neither negotiable nor a possible trade-off in favour of seemingly 'efficient' procedures.

The national policies examined in this report fail to comply with these standards and legal obligations.

A promising practice: Initiatives promoting access to rights

In **Belgium**, the *'Up together' project*, developed by Jesuit Refugee Services (JRS) Belgium, provided **accommodation and support to non-returnable migrants** between 2015 and 2018. The project explicitly targeted people who could not return to their country for administrative, legal or medical reasons and who were released from detention with no place to stay and no right of residence. The project brought together families and individuals to create social networks of solidarity and provide housing and support to these non-returnable TCNs. Although the project ended due to a lack of funding, it was able to provide support and accommodation to 19 people (including seven children) upon their release from an administrative detention centre.

3. Priorities for the EU

The main objective of the Return Directive is to establish 'an effective removal and repatriation policy that fully respects the fundamental rights and dignity of the persons concerned'. Therefore, fundamental rights compliance is by design a core part of the equation and must go together with any assessment of its 'effectiveness'.[24] Respect for human dignity and access to fundamental rights must be provided to all persons on EU territory – irrespective of their administrative status.

This Policy Brief therefore calls on the EU and its Member States to radically re-evaluate their policy approaches that prioritise expulsion-driven effectiveness, possibly at the expense of dignity and rights. The biggest challenge towards more humane practices

[24] CJEU (2018), *Gnandi*, Case C-181/16, Judgment 19 June 2018, paragraph 48; and CJEU (2022), *X v. Staatssecretaris van Justitie en Veiligheid,* supra footnote 5, paragraph 88. In paragraph 89 of this same judgment the CJEU held that 'It follows that, when they implement Directive 2008/115, including when they envisage adopting a return decision or making a removal order in respect of an illegally staying third-country national, *Member States are required to respect the fundamental rights which the Charter grants to that national*' (Emphasis added).

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remains the lack of common interpretation and rigorous EU-led enforcement of protective elements across the EU Member States.

However, in line with the Commission's 2024-2029 priorities[25], new legislation is expected to be adopted to 'reform' the 2018 Return Directive. At the time of writing, this instrument is still being drafted and little is known about its precise content.[26] However, based on the Political Guidelines, it is likely that a new legislative proposal will centre on the Commission's so-called fair and firm' approach[27] to returns, which is understood as a system aimed to accelerate expulsions and increase the rate of enforced return decisions.[28] However, this approach prioritises the 'speed' of administrative proceedings, even to the detriment of human rights safeguards. Paradoxically, this may mean that an expulsion policy, which is supposed to be 'fair', will likely fall short of the EU's own fundamental rights standards and commitment to uphold human dignity[29] across all policy areas, in direct contradiction to the Treaties' core principles.

At the same time, adopting a new legislative instrument will not solve the main challenge pointed out in the comparative research and without a change in the overall policy approach, namely that the same issues of lacklustre enforcement, fragmented interpretations and prevailing coercive and punitive practices will remain when it comes to EU safeguards and rights. Therefore, the best course of action for the Commission and the EU legislators would not be an overhaul of the Return Directive but rather to put all their efforts into better enforcing it in line with the Charter, as interpreted through CJEU standards and international/regional human rights obligations and commitments.

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[25] European Commission (2024), *Europe's Choice – Political Guidelines for the next European Commission*, Strasbourg, 18 July 2024, p. 16, https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf.

[26] The new instrument will likely to be a Regulation, though this remains unconfirmed. The proposal is expected to be published by the Commission in March 2025. See: Ionta, N., Euractiv, 24 February 2025, https://www.euractiv.com/section/politics/news/exclusive-commission-pushes-to-fast-track-asylum-rules-review/ and InfoMigrants, 20 February 2025, https://www.infomigrants.net/en/post/62957/melonibrunner-promise-to-expedite-eu-migration-pact-and-list-of-safe-countries.

[27] See, for instance, Commission President Ursula von der Leyen's Mission letter to Henna Virkkunen, Commission Executive Vice President for tech Sovereignty, Security and democracy, page 5, https://commission.europa.eu/document/3b537594-9264-4249-a912-5b102b7b49a3_en and to Magnus Magnus Brunner, Commissioner for Internal Affairs and Migration, page 7, https://commission.europa.eu/document/ea79c47b-22f8-4390-a119-5115dc40fc3e_en.

[28] European Commission, supra footnote 8.

[29] As laid down in Article 2 TEU.

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Against this background, the Policy Brief puts forward four recommendations aimed at better implementing the current legal framework for a more humanising strategy that is reflective of the realities on the ground, and which frames the situations of non-removability, the transitioning of status and regularisations of TCNs as policy priorities.

3.1.1 Effectively enforce the protective elements of the Return Directive

The European Commission should ensure the proper implementation of the aforementioned protective elements of the EU Return Directive in a more effective and timely manner, including the provisions covering the situation of non-removable TCNs and their socio-economic rights as laid down in Recital 12 and Article 14.

This means that national authorities must also be directed to recognise the Directive's safeguards and some of the grounds for postponing or suspending a return decision and the enforcement of the removal order as mandatory, not 'facultative' options. In short, our research does not provide evidence of the need for revising or recasting the current Return Directive. Instead of proposing a new instrument, the Commission should be dedicated to effectively enforcing and issuing new guidance for better implementing the Directive and for a more unified interpretation of it by the Member States, with particular attention to its protective provisions in line with the Charter. This would address the existing regulatory fragmentation and deficits in the area of non-returnability by promoting clear and uniform approaches to the treatment and documentation of irregularised TCNs. This way, inconsistencies can be reduced and a more uniform policy landscape across the Union established.

3.1.2 Ensure broad access to socio-economic rights and effective remedies

In the same vein, the EU must promote and ensure Member States' compliance with the socio-economic rights discussed above, including those enshrined in Article 14 of the Return Directive and those envisaged in the Charter. Such rights, stemming from obligations under international and regional human rights law and in alignment with the UN Global Compact on Migration, must be granted to *all* individuals irrespective of administrative immigration status. Instead of focusing on policing and punitive measures, strategies focused on social inclusion, the eradication of poverty, adequate standards of living/housing, healthcare/medical assistance and decent employment should be given priority.

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Particularly, national authorities must be obliged to adopt, uphold and promote social policies allowing effective access to healthcare, employment, housing and assistance to uphold human dignity and avoid destitution and hyper-precarity.

3.1.3 Establish a 'firewall' for confidentiality in essential social services and the work of civil society actors, and funding Case Management

EU policy should introduce a firewall approach whereby medical staff, employers, teachers, social workers, civil society and other essential service providers both in the public and private sectors do not have reporting obligations towards law enforcement authorities when encountering individuals in an irregular situation.[30] This 'firewall' is necessary to allow undocumented TCNs to seek help, access to basic social services and get support whenever they need it without fear of arbitrary deportation and undue criminalisation.

Additionally, promising practices such as case management initiatives offering holistic individualised support to undocumented TCNs with the aim to work towards case resolution should be amplified, shared across the Member States and supported by targeted funding. Such stable, long-term case management or free legal aid programmes should be broadly accessible to all individuals requiring support in finding and pursuing avenues to case resolution, which may include voluntary return and longer-term regularisation.

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[30] This also follows the recommendations by the Fundamental Rights Agency's (FRA) and the European Commission against Racism and Intolerance (ECRI). In this context, the FRA acknowledged that 'detections at or next to public institutions such as schools, hospitals or courts, as well as reporting or exchange of personal data between these institutions and immigration law enforcement bodies may create a general atmosphere of fear among migrants in an irregular situation, deterring them from accessing such institutions and thus disproportionately interfering with their fundamental rights', recommending that 'medical establishments', 'schools' and 'civil registries should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes'. See: FRA (2013), *Apprehension of migrants in an irregular situation – fundamental rights considerations*, Point e) as well as Recommendations 3, 5 and 7, https://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation_en.pdf.
Meanwhile, ECRI recommends that '[t]ere must be clear firewalls which separate the activities of state authorities which provide social services and, where applicable, the private sector, from immigration control and enforcement obligation', as firewalls are 'ineluctable consequence of states' duties to protect everyone within their jurisdiction from discrimination'. See: ECRI (2016) *General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination,* Adopted on 16 March 2016, Recommendations 3 and 11, https://rm.coe.int/ecri-general-policy-recommendation-no-16-on-safeguarding-irregularly-p/16808b5b0b.

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3.1.4 Transitioning of Status and Regularisations as *Effective* Policies

Finally, new EU Guidance on returns – as suggested above – should include actionable steps towards abolishing administrative 'limbo'. This would entail ensuring that those who cannot be returned are granted access to accessible and expedient procedures to be granted autonomous residence permits or other authorisations conferring a right to stay and ensuring security of residence to the beneficiaries. Existing practices – as observed in both Spain[31] and Greece[32] in spite of their diverging political approaches – to provide the possibility of registration and thus, to a certain extent, socio-economic rights, as well as access to more stable residence permits on humanitarian or other grounds (as underlined in Article 6(4) of the Return Directive), should be supported, promoted and expanded as an 'effective policy', with the possibility of transitioning to long-term permits.

[31] As discussed above in Section 2.2. On Spain's *Padrón* and *arraigo*, see also: González-Enríquez, C. (2009), 'Country Report Spain', *Undocumented Migration – Counting the Uncountable. Data and Trends,* CLANDESTINO Project, pp. 20-2; García-Juan, L. (2021) 'The disruptive regularisation mechanism in the Spanish law that challenges the reform of the Common European Asylum System', Migraciones, Vol. 51, May 2021, pp. 31-60. and Fiontelli, C., Cassain, L. and Echeverria, G. (2024), *Spain – Country Brief on Irregular Migration. Policy Context*. MIrreM Project – Measuring Irregular Migration, 05/2024, pp. 8, 12 https://irregularmigration.eu/wp-content/uploads/2024/11/MIRREM-Finotelli-et-al-2024-Spain-Country-Brief-on-Irregular-Migration-v1.pdf.
across Europe

[32] In 2023, Greece passed new legislation (Law No. 5078/2023, Government Gazette A 211/20.12.2023, 'Reform of professional insurance, Rationalization of Insurance legislation, Pension Arrangements, Appointing and hiring system for public service educators and other provisions'), which introduced a new residence permit for employment purposes to third-country nationals. The permit is to be granted for three years, also to the spouses, parents and children of the TCN, with the possibility of transitioning to a different category of residence permit after its expiry in line with the migration code. The Greek national report estimated that up to 30,000 irregularised TCNs will benefit from the scheme, which will help address the significant labour shortages in the country.
See also: https://etias.com/articles/greece-residency-permit-labor-shortage and https://migrant-integration.ec.europa.eu/news/greece-new-online-platform-tcn-residence-permit-applications_en.

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Motivations, experiences and consequences of returns and readmissions policy: revealing and developing effective alternatives

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