



# **Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries**

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**EuroAsylum**



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## List of abbreviations

AT	Austria
BE	Belgium
BG	Bulgaria
CH	Switzerland
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EC	European Commission
ECHR	European Convention on Human Rights
EE	Estonia
EL	Greece
EMN	European Migration Network
ES	Spain
EU	European Union
FI	Finland
FR	France
FRA	Fundamental Rights Agency
HU	Hungary
IE	Ireland
IOM	International Organisation for Migration
IS	Island
IT	Italy
LI	Liechtenstein
LT	Lithuania
LU	Luxemburg
LV	Latvia
MT	Malta
MS	Member State
NGO	Non-governmental organisation
NL	The Netherlands
NO	Norway
PL	Poland
PT	Portugal
RMC	Ramboll Management Consulting
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovak Republic
TCN	Third-country national
UK	United Kingdom
UNHCR	United Nations High Commissioner for Refugees



## List of Definitions

Term	Definition for the purpose of the report
<b>Study countries</b>	European Union Member States and the non-EU states parties to the Schengen Agreement (Iceland, Norway, Switzerland and Liechtenstein);
<b>Third-country national</b>	Any person who is not a citizen of the European Union within the meaning of Article 17(1) of the Treaty establishing the European Community (TEC) and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code;
<b>Irregular migrant</b>	Any third-country national who does not fulfil, or no longer fulfils the conditions of entry in a country, as set out in Article 5 of the Schengen Borders Code or in the national law of that country; terms used interchangeably are "undocumented migrant" and "illegal migrant";
<b>Third-country national with pending/postponed return or removal</b>	Any third-country national who is recognised by the national authorities of the study countries as being in a situation where he/she cannot be returned or removed;
<b>Official postponement</b>	A judicial or administrative decision which gives third-country nationals the permission to stay in the territory of the country until their return or removal is executed. In several study countries, such official postponement is referred to as 'toleration status';
<b>Return</b>	The process of a third-country national going back – whether in voluntary compliance with an obligation to return or enforced – to: <ul style="list-style-type: none"> <li>• his or her country of origin, or</li> <li>• a country of transit in accordance with Community or bilateral readmission agreements or other arrangements, or</li> <li>• another third country, to which the third-country national concerned voluntarily decides to return and in which he or she will be accepted;</li> </ul>
<b>Return decision</b>	An administrative or judicial decision or act, stating or declaring the stay of a third-country national to be illegal and imposing or stating an obligation to return;
<b>Removal</b>	The enforcement of the obligation to return, namely the physical transportation out of the country;
<b>Entry ban</b>	An administrative or judicial decision or act prohibiting entry into and stay on the Schengen territory for a specified period, accompanying a return decision;
<b>Risk of absconding</b>	The existence of reasons in an individual case which are based on objective criteria defined by law to believe that a third-country national who is the subject of return procedures may abscond;
<b>Voluntary departure</b>	Compliance with the obligation to return within the time limit fixed for that purpose in the return decision;
<b>Vulnerable persons</b>	Minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.



## **0. Executive summary**

### **0.1 Purpose of the study**

The overall aim of the study is to provide a factual and comparative picture of the situation for third-country nationals pending return or removal in EU Member States and Schengen Associated countries (hereinafter referred to as the "study countries"), to provide a solid basis for further policy reflection on possible legislative initiatives in this field.

Within the EU and Schengen area, the Return Directive is the key legal instrument for returning third-country nationals. It provides common standards for EU Member States<sup>1</sup> and Schengen Countries to follow in return and removal procedures. These common standards and procedures cover areas such as the use of coercive force, return, removal, detention, and re-entry. The Directive also provides provisions on postponement of removal (Article 9), specifying criteria for when a Member State shall and may postpone a removal, and on safeguards pending return (concerning rights to family unity, health care, access to education for minors and specific needs of vulnerable persons) (Article 14).

However, looking at the national legislations, there appear to be many different interpretations of the Return Directive provisions for dealing with third-country nationals pending return; and the issues of relevance to this study continue to be approached in different ways across the EU and Schengen area. Policies and procedures are often fragmented and unclear; and often there is no specific legislation addressing the situation of this group of third-country nationals. What is more, while there are studies, such as the one by the Fundamental Rights Agency, on regulations and practices with respect to irregular migrants in general, almost no study looks specifically into the sub-group of third-country nationals pending return or removal.

International and European conventions on human rights grant basic rights to all persons, irrespectively of their status and cooperation with the authorities, once they are on the territory of an EU Member State. However, these basic rights are not yet fully available in all Member States, as evidenced in a report by the European Fundamental Rights Agency on irregular migrants.<sup>2</sup>

The importance of this study thus lies in developing knowledge of legislation, procedures and the practical situation of third-country nationals pending return in the 31 study countries, in order to establish a basis for an informed discussion between Member States and Schengen Associated Countries in developing a framework for dealing with persons in this situation; a framework that balances effective controls with the countries' international obligations on human rights. Better information in this area is crucial to facilitate better policy decisions and a more balanced strategic approach.

### **0.2 Establishing analytical groups for comparison**

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<sup>1</sup> Except Ireland and the UK who have decided not to opt into this area of Community law (cf. <http://soderkoping.org.ua/page18091.html>)

<sup>2</sup> European Fundamental Rights Agency, *Migrants in an Irregular Situation*, 2009.



The study's focus is on all third-country nationals who have received a return/removal order but (for various reasons) continue staying in the host country (for a longer or shorter period), with a particular emphasis on situations of (officially) postponed return/removal.

The primary data, collected through 31 country studies drafted by national experts on the basis of desk research and qualitative interviews with relevant stakeholders and experts on the topic in the individual countries, revealed that there is no systematic approach to regulating the situation of the study group.

Looking across these 31 country reports, it is evident that most countries do not have a specific terminology for third-country nationals pending return or removal; instead they often distinguish between:

- forced or voluntary return, irrespective of whether either of these courses of action was (officially) postponed or not;
- failed asylum seekers, third-country nationals perceived to be a threat to society, or other illegally staying third-country nationals (over-stayers, illegal labour migrants etc.), irrespective of whether their return/removal was (officially) postponed or not.

The terminology applied by the study countries illustrates that third-country nationals who received a return decision and appear in this situation of pending return/removal come from different "streams" of inflows in the study countries (e.g. from the asylum system), and/or that they are meant to leave the country through different "paths" (e.g. cooperation on voluntary return).

Looking at the target group's legally established rights in the different countries, it becomes apparent that while some third-country nationals pending return/removal in some of the study countries remain on a par with irregular migrants, other groups may be granted or may earn some additional rights as compared with irregular migrants.

For the sake of comparability and in order to establish some trends and commonalities across the study countries, the consortium developed three analytical groups, which represent the maximum level of generalisation possible. In constructing this typology, it was essential to find a common denominator for the comparison of the situations in the different study countries. Since the study's main focus is on (legal) rights of third-country nationals pending return (with regard to family unity, healthcare, employment, education and accommodation, as defined by the Return Directive), the typology was made accordingly. The groups are thus devised according to the different types of status they are granted and take into account this status relative to the other identified groups in terms of the particular rights it grants.

**Table 1: The consortium's typology (representing the maximum level of generalisation possible)**

<b>Group 1</b>	<b>An official postponement, sometimes also known as toleration status (or "Duldung"), which gives third-country nationals the permission to stay pending their return or removal and <u>grants them additional rights compared to those enjoyed by other TCNs pending return/removal.</u></b>	AT, CH, CZ, DE, EL, LI, LU, NL, PL, RO, SI, and SK
<b>Group 2</b>	An official or <i>de facto</i> <b>postponement</b> of the return (sometimes extension of the return date), where the third-country nationals maintain the rights granted by the return order, but have <u>no access to additional rights.</u>	All countries
<b>Group 3</b>	<b>No postponement and no distinct rights granted;</b> the	AT, BE, BG, CH,



	third-country national pending return/removal has no particular status – neither by practice nor by law – and enjoys only the basic rights granted to all third-country nationals in an irregular situation.	CZ, DK, EE, EL, ES, FR, IE, IT, LT, LU, LV, NL, NO, PL, PT, RO, SI, SK, UK
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All countries have third-country nationals pending return/removal in several of the above-mentioned groups. Twelve countries may grant a specific status with additional rights beyond the ones granted by the return order (group 1) - usually a “tolerated stay” or “Duldung”. The rights attached to these specific statuses, however, vary greatly according to the country, and in some instances grant rights very similar to a temporary residence permit (CZ, LU, PL, RO, SK).

Twenty-one of the study countries (BE, BG, CY, DK, EE, ES, FI, FR, HU, IE, IS, IT, LT, LV, MT, NO, PT, SE, and UK), do not have any official postponement providing additional rights, and third-country nationals who cannot return or be removed from these countries thus fall into either group 2 or 3 (official or de facto permission to stay pending return without additional rights). Four of these countries (FI, IS, MT, SE) have, however, decided to regulate the situation of third-country nationals, whose return or removal is not possible due to technical reasons (e.g. lack of documentation, lack of cooperation from the countries of origin or the countries of return, etc.) by issuing a temporary residence permit. As opposed to some other countries, Finland, Iceland, Sweden and Malta apply existing legal acts concerning temporary residence permits in general, rather than establishing a specific category and provisions for those who cannot be removed or returned. The residence permits will in almost all cases be withdrawn when the factors impeding the return/removal cease to exist. In these countries the permit is granted *instead* of a postponement.

In all study countries, some third-country nationals pending return/removal can officially or unofficially be granted a permission to stay pending return/removal (group 2), thereby allowing them to maintain the rights they were granted when receiving the return order (which differ from country to country).

The last group refers to situations where no official postponement and no distinct rights are granted. Disregarding situations where third-country nationals abscond, 23 study countries reported situations falling under this group (group 3). These usually relate to third-country nationals not cooperating or otherwise failing to return, and being released from detention, but also to over-stayers and/or illegal labour migrants pending return/removal. Those third-country nationals do not have any rights other than those derived from existing directives and international conventions, which are enjoyed by all third-country nationals in an irregular situation.

Considering that the situation for those in the last group (3) in no way differs from that of any other illegally staying third-country national, in terms of rights, they are less relevant for the objective of this study, namely to establish the distinctive rights of third-country nationals pending return or removal.<sup>3</sup> Therefore this group is left out of the further analysis, after the initial overview, and the cross-analysis of the rights accorded to third-country nationals in the different groups in different countries focuses on groups 1 and 2 (for an overview of the distribution of the different groups in the different countries, please see table 2 of the report).

<sup>3</sup> The rights of illegally staying third-country nationals have already been covered in other studies, such as the FRA report previously mentioned.



### 0.3 Legal and practical situation of third-country nationals pending return

As a general finding, it can be concluded that the rights and situation of third-country nationals pending return are not very well established in legal terms. In most of the study countries there is no or limited specific legislation pertaining to the target group. As an interviewee from one of the study countries explained: from a legal point of view, this group of “non-returnable” third-country nationals should not exist; according to the law you are either *in* (receive a residence permit) or you are *out* (receive a return order and leave the country), and there are hence no provisions for those who are neither nor (i.e. received a return order but still, in practice, residing in the country).

In those countries, which may in some situations provide an official postponement status, the legal rights of this group of third-country nationals pending return are usually more well-defined. Meanwhile, for those who are pending return without an official postponement (group 2), their rights to family unity, healthcare, employment, education and accommodation and their access to these rights, in practice, vary within and between the countries – sometimes also depending on where the third-country nationals reside (the type of accommodation).

While some groups of third-country nationals pending return or removal live under (legal or practical) conditions similar to those of undocumented migrants,<sup>4</sup> others maintain a life close to that of asylum seekers (as the majority have usually entered the target group through this path), especially if they remain at the reception centres<sup>5</sup>. Often both groups of third-country nationals can be found within the same country, and their situation usually depends on where they are accommodated, how they entered the system, whether they cooperate on the return, and the amount of time they have spent in the country.

As outlined above (group 1), twelve of the study countries have introduced what may be referred to as an **official postponement (or toleration status) with additional rights**, which may be granted to some non-returnable third-country nationals, depending on different criteria in different countries.<sup>6</sup> These additional rights may include: the right to freely choose a residence or not live at centres; (sometimes) social welfare benefits; (sometimes) access to the labour market; (sometimes) access to additional medical assistance; (sometimes) access to adult education.<sup>7</sup>

Third-country nationals with an official postponement granting additional rights (group 1) is – in legal terms – the most well-defined group of those sub-groups that were identified in the study countries. In some countries, other sub-groups (often established by practice rather than law) are allocated additional rights, depending on different criteria. Many countries allocate additional rights to:

- Third-country nationals who cooperate on the (voluntary) return; and
- Vulnerable third-country nationals.

<sup>4</sup> Usually meaning that no accommodation is provided; only access to emergency health care; rights to schooling for children but not for adults; no right to employment.

<sup>5</sup> Meaning that accommodation is provided and usually also schooling for children; sometimes training for adults; no access to the labour market in most cases; sometimes access to health care at the centres; sometimes allowances, but often reduced amount compared to asylum seekers. For further details, please see table 2 of the report and the country reports.

<sup>6</sup> For an overview of the different criteria, please see section 3.2.2. and table 6 of the report.

<sup>7</sup> For more details, please see table 5 of the report or the country reports.



Voluntary return is a priority in all countries and several of them therefore grant additional rights to **third-country nationals willing to cooperate during the return process**. Only four of the study countries (BG, IE, MT and PL) do not have any specific provisions for third-country nationals who cooperate with the national authorities on their return. In the remaining study countries, they either grant additional rights while pending voluntary return, and/or require cooperation before granting postponement or a right to legal stay. Additional rights may include financial help under certain conditions (BE, DK, LI, SE, SI, UK), a work permit (DE, SE), participation in internships (DK, SE), reimbursements of costs paid while pending return (CH) and the granting of basic health care (ES). In 23 countries (AT, BE, CH, CY, DE, EE, EL, ES, FI, FR, HU, IS, IT, LI, LT, LU, LV, NL, NO, PL, RO, SE and SK), cooperation on the return process is a prerequisite for obtaining an official postponement of the return in the form of a prolongation of the permission to stay and/or it is a prerequisite for obtaining a right to legal stay.<sup>8</sup>

All of the study countries foresee special provisions for **vulnerable third-country nationals**. These can again relate to issues of family unity, healthcare, education, employment, and reception conditions.<sup>9</sup> Additional rights for vulnerable third-country nationals particularly relate to minors for whom most countries have special provisions concerning the use of detention (e.g. the right to accompany a parent in detention or non-use of detention for minors – or only under exceptional conditions), access to schooling, appropriate accommodation, and access to additional healthcare (such as access to special services or full medical insurance coverage). Additional healthcare is also a right allocated to third-country nationals with serious illnesses and pregnant women, in most countries. Several study countries remarked that they do not apply specific legislation for vulnerable third-country nationals pending return or removal as a group, since vulnerable persons are meant to be covered by the asylum law and should be granted some form of (temporary) residence permit if they are considered too vulnerable for return.

When looking across countries, the basic rights with respect to family unity, healthcare, education and employment are to a large extent identical for all third-country nationals pending return/removal (variations are mainly found between those sub-groups that are allocated additional rights). In terms of **accessing these rights in practice**, however, differences in their situation do arise and are particularly dependent on where they are accommodated. With respect to accessing rights it seems to be especially important if the third-country national is offered accommodation or not, and if this accommodation is at a reception centre or a detention centre.

Those third-country nationals (failed asylum seekers) who are allowed to stay in more open reception facilities generally have the best access to exercising their rights, as they have access to the services provided by the centres, such as healthcare, food, clothing and sometimes training courses, but often restrictions are imposed on their movement. Accommodation in reception centres also increases the likelihood that the children are enrolled in schools or receive some kind of education.

Those third-country nationals who are not provided with accommodation (either because they decide to move out of the state-provided facilities, e.g. a reception

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<sup>8</sup> For more details, please see section 3.3. and table 7 of the report or the country reports.

<sup>9</sup> Please note that this only refers to third-country nationals who have received a return/removal order, and therefore does not include third-country nationals in an irregular situation whose return/removal has been cancelled on the grounds of specific vulnerabilities (e.g. the granting of a temporary residence permit for humanitarian reasons, such as illness). For more details, please see section 3.4. and table 8 of the report or the country reports.



centre, or because this option is not provided) can end up in one of two situations depending on their resources and social networks: if they have the means to support themselves (e.g. from social benefits, a right to work, their family/network or illegal activities), they can lead a more or less normal life, although always under the risk of removal. If they cannot provide for themselves, they usually depend on charity organisations to survive.

If in detention, third-country nationals often have better access to some rights, such as healthcare provided by on-site medical staff, but cannot access others such as a (potential) right to employment or education.<sup>10</sup>

When it comes to possibilities for, in time, **obtaining legal stay**, only around half of the study countries (AT, CH, CZ, DE, DK, FI, IS, LI, LT, LU, NL, NO, PL, SI, UK) have provisions established specifically for this target group.<sup>11</sup> Among those study countries that do have a specific procedure in place for legalisation of third-country nationals pending (postponed) return/removal, several commonalities can be identified. **Some countries foresee a procedure directed specifically at failed asylum seekers. Another frequent condition for legalisation among the study countries relates to the duration of the postponed return/removal procedure.** Other conditions to enter a legalisation procedure explicitly mentioned by some of the study countries include situations of "severe personal hardship" (Switzerland) and various issues relating to minors (Germany, the Netherlands).

#### **0.4 Effects of the current legal basis and actual situation of third-country nationals pending return/removal**

In addition to establishing an overview of the rights and situation of third-country nationals pending return/removal, all national experts, in drafting the country reports, also collected information on the effects of the current legal basis and actual situation on: 1) fostering the protection of human rights; 2) public opinion; and 3) secondary movements and pull factors.

In most study countries, there were no existing studies carried out on these specific issues, and in particular there was no knowledge to be found on their link with the very specific (and in most cases limited) legislation pertaining to third-country nationals pending (postponed) return/removal. Instead, the national reports had to rely on the interviewees' opinions and assessments. Where opinions were offered, they tended to relate to the effects of general migration and asylum policy. The cross-analysis of the information collected in the national reports hence reflects the views of the respondents, given mainly on the basis of their knowledge, experience and personal opinions, without much factual evidence to support them. On the basis of this, it can be said that:

- The national (asylum) systems were generally considered to be respecting basic human rights (especially before and up to the point when the asylum decision is made), but a number of issues or critical points remain in most countries, in particular when it comes to accessing rights in practice (such as

<sup>10</sup> For more details, please see section 3.6. of the report or the country reports.

<sup>11</sup> It should be noted that this study only looks into situations resulting directly from a postponed return/removal order. Therefore this section does not include regularisation resulting from a change in status; meaning, for example, a successful appeal procedure and more general protection statuses given to any illegally staying TCN, often prior to the issuing of a return/removal order.



accessing healthcare for third-country nationals pending return in general and access to education for children more specifically).

- For most respondents it was not possible to distinguish this specific target group – and legislation pertaining to it – from debates and legislation on immigration or asylum matters in general. Thus, it is not likely that changes to the legal situation of this target group specifically will receive a lot of attention among the public in most of the study countries. However, there is a risk that it will receive negative attention in a number of countries where public opinion towards migration is known to be negative and critical towards any changes that might be interpreted as a loosening of control and access to the countries.
- Along the same lines, it was believed by some that anything which can be perceived as a loosening of control and can be interpreted as giving easier access to European countries may have pull effects. On the other hand, it was believed by other respondents that more harmonisation will reduce push and pull effects between the countries. And others again found that the “generosity” of the asylum and migration systems (or their reputations internationally) have very little effect on migration patterns compared to other factors, such as family or community ties, the presence of other immigrants with a similar background, relatives or acquaintances, the economic situation in the host country and geographic location. These were considered by some to be stronger incentives in choosing a destination country.

## **0.5 Conclusions and recommendations**

### Conclusions

On the basis of the cross-analysis of the country report, the study draws six main conclusions:

1. In most of the study countries, there is no dedicated legislation or even specific terminology for third-country nationals pending return/removal.
2. In several of the study countries, despite the route to legalisation offered by some, third-country nationals can have their return/removal order pending for years and this will not necessarily impact their rights and situation.
3. Official postponement (especially with specific rights attached to it) is usually only granted to third-country nationals who cooperate and/or in situations where the postponement is a result of obstacles beyond their own influence.
4. It is not necessarily the countries that grant an official postponement status that provide the widest range of rights for third-country nationals pending return.
5. More than half of the study countries do not explicitly foresee any channels and conditions through which third-country nationals with a postponed return order may enter a regularisation procedure.
6. With respect to accessing rights in practice, an especially important determining factor seems to be whether the third-country national is offered accommodation or not, and if this accommodation is at a reception centre or a detention centre.

### Recommendations and open questions for further discussion



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On the basis of discussions with representatives of the study countries' national authorities, NGOs, international organisations and EU institutions at a conference in Brussels in January 2013 and with inspiration from some of the existing practices in Member States, the study consortium has developed some ideas and recommendations on how to potentially address some of the issues raised in the study and at the conference:

- Distinction should be made between obstacles to the return/removal of third-country nationals of (a) a legal and humanitarian nature, and (b) of a technical or practical nature.
  - a) Relates to cases where the presence of the third-country national on the territory of the host country is required for legal proceedings (legal reasons), and where the return of the third-country national would put his/her life and health at risk (humanitarian reasons – similar to the criteria for granting subsidiary protection; cf. Directive 2011/95/EU, Article 15).
  - b) Relates to cases where the return of a third-country national is hindered by missing travel documents, non-cooperation of the return country, lack of transport capacity, etc. In these cases it would be relevant to establish whether the obstacles to return are induced by the third-country national's (non-)cooperation. Both "co-operators" and "non-co-operators" should receive a corresponding status/postponement, but the rights attached to the respective status would be different, so as to reward third-country nationals who cooperate in making their return possible.

The ideas presented should by no means be considered as a finalised, ready-to-implement solution; rather, they are meant to serve as inspiration for continued conversations between the EU Member States, Schengen Associated Countries and the European Commission; many questions are still open for discussion, such as:

- How should the distinction between the two categories - cooperating and non-cooperating be made?
- What should the rights attached to the different categories be? Should cooperating third-country nationals for instance be granted a right to work?
- What should the criteria be for "moving" from one category to another?
- At which point in time (if ever) should the third-country nationals be able to obtain legalisation?
- 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?
- What should be the common approach towards non-returnable third-country nationals who are considered a threat to society because they have committed serious crimes?



## 1. Introduction

The overall aim of the study is to provide a factual and comparative picture of the situation for third-country nationals pending return in EU Member States and Schengen Associated countries, in order to provide a solid basis for further policy reflection on possible legislative initiatives in this field.

Public concerns around the impact of irregular migration and the difficulties governments face in returning failed asylum-seekers, over-stayers, illegal migrants and other third-country nationals, make it politically difficult for governments to deal with third-country nationals whose return/removal has been postponed, while at the same time fulfilling their international obligations on human rights. This can often lead to a *de facto* situation where people are left in limbo without access to social and financial benefits or to the labour market while pending return. This has become a real issue in many EU Member States and Schengen Associated Countries.

This issue and the absence of clear rules on the area in many countries, was recognised by the Commission in its June 2009 *Communication on an area of freedom, security and justice serving the citizen*,<sup>12</sup> which called for the national needs and practices of Member States to be studied and for the consideration of the possibility of establishing common standards for taking charge of illegal immigrants who cannot be deported.

These concerns and the study at hand are also closely linked to the Directive 2008/115/EC on *Common standards and procedures in Member States for returning illegally staying third-country nationals* (hereinafter referred to as the Return Directive), and in particular Article 14 on "safeguards pending return". Article 14 states that, as far as possible, four key principles should be taken into account during the period preceding voluntary departure and during periods for which removal has been postponed: (i) family unity with family members present in the territory; (ii) emergency health care and essential treatment of illness; (iii) access to the basic education system for minors, subject to the length of their stay; and (iv) measures to address the special needs of vulnerable persons.

These four principles have thus been a focal point in the study's objective of establishing an overview of the rights and practical situations of third-country nationals pending return across the Schengen and EU Member States (hereinafter referred to as the "study countries"). Moreover, in collecting, processing and comparing information in these 31 study countries, it has also been an objective to potentially identify best or good<sup>13</sup> practices in the existing treatment of third-country nationals pending postponed return; good practice in this context means systems where the legislation as well as practice, as a minimum, ensure that international and European human rights are respected. Ultimately, the study should, as such, also be of help to the Commission's further work in potentially devising common rules in the field of removal, in line with the Return Directive.<sup>14</sup>

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<sup>12</sup> COM(2009) 262 final

<sup>13</sup> The identification of best practices requires comparison of the effects of different regulations and practices. It is not expected that this comparison can be conducted rigorously. It is therefore more correct to talk of good practices, in which it is recognised that something better might exist, but that if the practice is followed one is in general implementing a good practice.

<sup>14</sup> Paragraph 20, preamble of Directive 2008/115/EC.



Besides the Commission Communication and the Return Directive, there are of course also other pieces of legislation at both EU and international level, which constitute important elements of the framework for this study. Hence, before presenting the findings from the collection of primary data in the study countries, the next sections of this introduction chapter will elaborate on the policy background for this study, presenting the main elements of the existing legislative basis in this field, and highlighting existing knowledge and studies, on which the study also builds.

## 1.1 Legislation and regulation related to return

Efforts by the EU to devise a common legal and operational framework relating to measures preceding and implementing voluntary and forced removal can be traced back to the early 2000s, in particular with the adoption of the *Communication on a common policy on illegal migration*.<sup>15</sup> The communication noted, in particular, that a common EU return and readmission policy should be based on three elements: common principles (for example the priority of voluntary return over forced return); common standards; and common measures. The Communication further called for the development of minimum EU standards for detention orders (defining the competence of responsible authorities and the preconditions for detention); minimum rules on the conditions of detention (e.g. accommodation standards); and time limits for detention before removal.

Expanding on these broad principles, the *EC Green Paper on a Community Return Policy on Illegal Residents*,<sup>16</sup> published on 10 April 2002, formulated the following additional recommendations of relevance to this study:

- The identification of measures to improve cooperation between receiving States, countries of origin and UNHCR, IOM and NGOs with a view to facilitating voluntary and involuntary returns.
- The development of services providing information and helping to prepare people for return.
- The identification of ways of improving the number of expulsion decisions that are actually enforced, possibly by setting specific targets and assessing their practical impact.
- The preparation of guides to good practice on the various issues raised by the return of individuals, including involuntary repatriation (for example escorts, means of transport, and detention conditions prior to removal), which might serve as a basis for EU-wide guides.

The Green Paper was followed, in October 2002, by the EC *Communication on a Community Return policy on Illegal Residents*.<sup>17</sup> The Communication, which paved the way for the adoption of the Return Action Programme, reviewed, in particular, four major areas of action:

- The need for operational cooperation and exchange of information among EU member states to be made easier on the basis of common terms of reference, practices and training, and common measures to remove obstacles and coordinate resources. Coordination is encouraged, in particular, in areas such as the identification and documentation of the persons concerned, co-ordination of return operations and mobilisation of the necessary resources.

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<sup>15</sup> COM(2001) 672 final

<sup>16</sup> COM(2002) 175

<sup>17</sup> COM(2002) 564 final



- The adoption of common standards to facilitate the work of the national authorities handling return operations and in particular to ensure full mutual recognition of removal decisions.
- The development of a common framework that could be adjusted to the specific needs of the populations and countries concerned. Such a programme would have to cover not only return *per se* but also the different stages of its preparation and its follow-up in order to make return operations sustainable. The Commission is prepared, if necessary, to consider the possibility of releasing Community financial resources to support the establishment of such programmes.
- Closer co-operation with third countries, including at the administrative and operational levels as regards the documentation and reception of the persons concerned, and issues of transit. In formal terms, this may involve conclusion of readmission agreements, the importance of which has been regularly underlined by the European Council and the Council.

The above founding documents were followed by a range of additional policy and legislative initiatives throughout the 2000s, aiming to define and devise common guidelines and/or rules in the field of voluntary and forced return, among which the Return Directive is the most relevant.

The Return Directive is the key legal instrument for returning third-country nationals. It provides guidelines for EU Member States<sup>18</sup> and Schengen Countries to follow in return and removal procedures. The common standards and procedures cover areas such as the use of coercive force, return, removal, detention, and re-entry. The Directive also provides provisions on postponement of removal (Article 9), specifying criteria for when a Member State shall and may postpone a removal, and on safeguards pending return (concerning rights to family unity, health care, access to education for minors and specific needs of vulnerable persons).

The Return Directive also takes into consideration the 'Twenty guidelines on forced return', adopted in May 2005 by the Committee of Ministers of the Council of Europe.<sup>19</sup> These twenty guidelines form a non-binding code of good conduct for expulsion procedures that Member States can bear in mind when developing national legislation and regulations on returning illegal third-country nationals. They are based on detailed research by bodies such as the European Court of Human Rights, as well as a questionnaire on forced return sent to the Member States.<sup>20</sup> For the most part, the issues discussed under the twenty guidelines are included in the Return Directive.

According to the Return Directive, a Member State can issue a return decision to third-country nationals if they are staying illegally on the Member State's territory, although they may refrain from making the decision, for example if the Member State decides to grant the third-country national a residence permit based on humanitarian reasons. Also, a Member State should not issue a return decision if the third-country national is waiting for a renewal of their residence permit. With the exception of cases where there is cause for concern for national security or similar situations, the return decision should include a period ranging from seven to 30 days, depending on each individual case<sup>21</sup>, for the third-country national to return voluntarily. If the third-

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<sup>18</sup> Except Ireland and the UK who have decided not to opt into this area of Community law (cf. <http://soderkoping.org.ua/page18091.html>)

<sup>19</sup> Directive 2008/115/EC.

<sup>20</sup> Council of Europe 'Twenty Guidelines on Forced Return', September 2005.

<sup>21</sup> According to Art. 7(4) of the Return Directive, Member States may in some cases refrain from granting a period for voluntary departure or may grant a period shorter than seven days, if there is a risk of



country national does not return within the voluntary period, then the Member State can take the necessary measures to enforce return of the third-country national.

The Return Directive provides that the return decision itself should be issued in writing, and if the third-country national requests it, then also with a written or oral translation of the main elements, in a language that the third-country national is believed to understand. The third-country national should also be able to appeal against or seek review of the decision. In the case of detention, third-country nationals should be kept in detention for the shortest period possible, and for the most part only when there is a risk of absconding or the third-country national avoids or hampers the preparation of return. If the use of coercive measures is required, as a last resort, then they shall not exceed reasonable force.

Special attention should be paid to vulnerable persons throughout the entire return process, particularly in relation to forced return. According to the Return Directive, vulnerable persons are defined as 'minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical, or sexual violence'. For example, in the case of minors, the best interests of the child must be considered, and minors should only be detained as a measure of last resort. This is also one of the goals of the Return Fund, which specifically states that it will provide assistance for the proper treatment of these vulnerable persons. For example, it will support the exchange of information of best practices for the return of vulnerable persons.<sup>22</sup>

## **1.2 Legislation and regulation related to human rights**

In addition to EU regulations and communications on return there are several relevant international conventions on human rights, which are also part of the larger framework for the issue of return of third-country nationals.

International human rights law comprises the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights and two Covenants, one on civil and political rights and one on economic, cultural and social rights) and six core UN human rights treaties, known as thematic treaties:

- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Rights of the Child (CRC)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW)
- Convention on the Rights of Persons with Disabilities (CRPD)

Together, these instruments represent the set of international norms and standards for the protection and promotion of human rights. International human rights norms are generally applicable to every person as a consequence of being human, irrespective of their migration status. Therefore, as a general rule, human rights apply

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absconding, if an application for legal stay has been dismissed as manifestly unfounded or fraudulent, or if the person poses a risk to public policy, public or national security.

<sup>22</sup> Decision No 575/2007/EC.



to irregular migrants unless they are expressly excluded from the personal scope of application of the provision.<sup>23</sup>

However, these instruments have not been ratified by many States and the diversity of these different instruments contributes to a lack of clarity on the minimum rights applicable. This explains, in particular, the adoption in 2006 of the Council of Europe Resolution on the **Human Rights of Irregular Migrants (Resolution 1509 (2006))** which, in terms of economic and social rights, states that the following minimum rights, *inter alia*, should apply:

- adequate housing and shelter guaranteeing human dignity should be afforded to irregular migrants;
- emergency health care should be available to irregular migrants and states should seek to provide more holistic health care, taking into account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly;
- social protection through social security should not be denied to irregular migrants where it is necessary to alleviate poverty and preserve human dignity. Children are in a particularly vulnerable situation and they should be entitled to social protection, which they should enjoy on the same footing as national children;
- irregular migrants who have made social security contributions should be able to benefit from these contributions or be reimbursed if expelled from the country, for example;
- in relation to irregular migrants in work, they should be entitled to fair wages, reasonable working conditions, compensation for accidents, access to a court to defend their rights and also freedom to form and to join a trade union. Any employer failing to comply with these terms should be rigorously pursued by the relevant authorities of the member state;
- all children have a right to education, extending to primary school and secondary school levels, in those countries where such schooling is compulsory. Education should reflect their culture and language and they should be entitled to recognition, including through certification, of the standards achieved;
- all children, but also other vulnerable groups such as the elderly, single mothers and more generally single girls and women, should be given particular protection and attention.

**The Charter of Fundamental Rights of the EU** (hereinafter referred to as "the Charter") constitutes the core instrument for the protection of fundamental rights in the EU. It lays down in a single text the range of civil, political, economic and social rights granted to European citizens and all persons resident in the EU. Following the entry into force of the Lisbon Treaty in 2009, the Charter is now legally binding. All rights within the Charter apply to irregular migrants, unless explicitly stated otherwise. Nevertheless, the Charter does grant the Member States some leeway to restrict the application of certain articles, by qualifying that rights are provided "under the conditions established by national laws and practices."<sup>24</sup>

The **Directive on residence permits for trafficking victims** (2004/81/EC) defines the conditions for granting residence permits of limited duration to non-European Union (EU) nationals who are victims of human trafficking and (optionally) to "third-country nationals who have been the subject of an action to facilitate illegal immigration to whom the residence permit offers a sufficient incentive to cooperate

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<sup>23</sup> Centre for European Policy Study, *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, 2009.

<sup>24</sup> *ibid*



with the competence authorities" (paragraph 9, preamble). Member States are obliged to offer victims of trafficking a reflection period during which time they are exempt from expulsion and granted access to accommodation, medical treatment and legal aid.<sup>25</sup>

The **European Convention on Human Rights** is of general application, meaning that its rights and freedoms apply to *everyone* within the jurisdiction of the contracting parties. It covers primarily civil and political rights, such as prohibition of slavery and forced labour, right to respect for private and family life, freedom of association and free assembly, right to an effective legal remedy and prohibition of discrimination. Among this set of rights, two articles in particular are central for the protection of irregular migrants pending postponed return or removal in the EU: Article 3, on the right not to be subject to torture or inhuman and degrading treatment and Article 8, on the right to family and private life.<sup>26</sup>

These documents constitute the legal background against which the regulations and practices of the 27 Members of the European Union and the Schengen Associated Countries should be measured. However, these basic rights, which have to be granted to all persons, irrespective of their status and cooperation with the authorities, once they are on the territory of an EU Member States are not yet fully available in all Member States, as evidenced in a report by the European Fundamental Rights Agency on irregular migrants.<sup>27</sup>

Moreover, the issues of relevance to this study continue to be approached in different ways across the EU. Policy can often be fragmented, unlegislated and unclear, and attempts to regularise/formalise the position of third-country nationals awaiting possible voluntary or forced return have often resulted in political problems in terms of public opinion, at least in some Member States. The establishment of a tough public stance on immigration, creating a 'hostile environment' for those without a lawful basis to remain in-country, makes it difficult for Member States and Schengen Associated Countries to act in any way that might be perceived as inconsistent with this stance, and to position themselves as 'soft' on the situation of irregular third country nationals. It is often easier not to institute formal procedures covering these people, especially in the absence of any real knowledge of practice elsewhere.

### **1.3 A need for more knowledge**

This study focuses specifically on non-removable third-country nationals pending return, which is a sub-group of illegally staying migrants. There is no commonly agreed definition of irregular migrants in the legislation of the European Union's Member States. Instead definitions are diverse and based on different legal cultures. The main pathways into irregularity are:<sup>28</sup>

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<sup>25</sup> *ibid*

<sup>26</sup> Centre for European Policy Study, *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, 2011.

<sup>27</sup> Securing fundamental rights of migrants in an irregular situation remains a challenge in EU MS, according to this report. While EU MS have a right to control immigration, non-compliance with migration regulations cannot deprive TCNs in an irregular situation of certain basic rights to which they are entitled as human beings. These should include, naming a few, access to child health care, birth registration, access to courts and education for children. The report examines the legal and practical challenges facing EU MS as they strive to guarantee such TCNs' fundamental rights and proposes ways to incorporate those rights into the policies, laws and administrative practices that affect migrants in irregular situations. (<http://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union>).

<sup>28</sup> CLANDESTINO Research Project Final report, 2009.



- Legal entry and overstaying or legal entry and stay whilst working or engaging in self-employment in breach of immigration regulations (most relevant pathway).
- Another path is related to rejected asylum seekers who do not return, are not removed and/or who are *de facto non-removable* because of lack of documents, unclear identity, unsafe country of origin, family links or health, age and gender related constraints (second most relevant pathway).
- Frequently reported is bureaucratic failure to process residence and work permit applications, inefficient renewal and appeal procedures resulting in withdrawal or loss of status (third most relevant pathway).
- Clandestine entry (without the required documents/visa or by means of deception, for example using forged documents), often of individuals who subsequently apply for asylum, is high on the agenda though comparably low in numbers and rather the exception than the norm (least relevant pathway).

Just as there is no common European definition of irregular migrants in the legislation, there is, as this study has confirmed, neither a common term nor definition for the study's target group; it may (to a smaller or larger extent) comprise people from all of the four pathways presented above.

As we shall also see in the analysis presented in this report, there is in most countries no specific legislation pertaining to third-country nationals pending return or removal. They seem to "fall between chairs", so to speak. They have received a return decision and should therefore leave the country, but for various reasons they cannot return or be removed to their countries of origin. The reasons why they end up in this situation, and the national authorities' procedures for handling the situations, are manifold: there are migrants who lack a legal status and often cannot be legally deported, for instance because they have family, or because they lack adequate travel documents, or because of lack of readmission agreements, or because of lack of resources to deport irregular immigrants. In some countries such migrants may re-enter the official systems by receiving a "toleration status" ("*Duldung*"). In some countries, they remain in municipal registrars, whilst in other countries they remain in a limbo situation.<sup>29</sup>

While several studies on regulations and practices with respect to irregular migrants exist, there are almost no studies which deal specifically with the sub-group of third-country nationals pending return or removal. From the little existing knowledge and research analysed in the literature review at the beginning of this study, it can be summarised that the legal rights and practical situation of third-country nationals pending return, in terms of basic needs and rights such as health care, education and housing, are disparate and not very well-defined.

- **Healthcare**

- In many countries, there are often laws, decrees, and administrative regulations that either deny some rights or impose arbitrary restrictions and unequal conditions on these rights, based on nationality and immigration status. For example, social rights, such as the right to health care,<sup>30</sup> are denied or restricted for some migrants, especially those without legal residency.<sup>31</sup>
- There are legal restrictions on access to health care for pregnant asylum seekers compared with citizens in 5/21 (24%) countries. Legal restrictions

<sup>29</sup> *ibid*

<sup>30</sup> Regarding legal restrictions on medical attention beyond emergency health care in some European countries, see Médecins du Monde (2009) and Huma Network (2009).

<sup>31</sup> See PICUM, Undocumented and seriously ill: residence permits for medical reasons in Europe, 2009, pp. 14-32.



for children and adults were found in, respectively, 7/23 (30%) and 10/23 (43%) countries. In total, legal restrictions on access to health care for one or more of the three groups were found in 10/23 (43%) countries. These countries were Austria, Denmark, Estonia, Finland, Germany, Hungary, Luxembourg, Malta, Spain, and Sweden. In all countries, except Austria, legal restrictions were due to the fact that asylum seekers were only entitled to emergency care.<sup>32</sup>

- The absence of legal restrictions to access does not necessarily imply equity in access as practical barriers may hinder this. The practical restrictions identified were divided into (i) lack of awareness of available health care services, (ii) language barriers, (iii) cultural barriers, and (iv) structural barriers.<sup>33</sup>

#### • **Education**

- Even though the right to compulsory education for undocumented children is not explicitly denied in any of the states investigated in the project "Fighting Discrimination-based Violence against Undocumented Children", there are barriers impeding access to this right. According to the final report on the project, among others these obstacles include the need to show a residence permit or other identification documents, the families' fears of detection by authorities and denial of financial support for extracurricular expenses such as books and transport.<sup>34</sup> These findings are supported by the findings of the report "Economic social and cultural rights of migrant children and children born to migrant parents".<sup>35</sup>
- The project "Book of Solidarity" (Providing Assistance to Undocumented Migrants)<sup>36</sup> illustrated how undocumented children face legal, administrative and practical barriers to accessing education in various EU member states. The situation varies greatly across countries. In France for example, the children of undocumented immigrants have the right to education and the risk of being denounced appears small. In Italy, undocumented minors have the same school obligations as nationals while in Belgium, national provisions have established the right to education for children. As far as access to education for undocumented adults is concerned, it can arbitrarily be rejected or accepted. At first glance, in Sweden and Denmark, access to education for undocumented children is not provided by the law, but it appears that some schools allow them to attend classes, although they will not obtain a diploma at the end of their studies.<sup>37</sup>

#### • **Housing**

- The "Fighting Discrimination-based Violence against Undocumented Children" project<sup>38</sup> revealed that among the EU Member States surveyed by the project there was no specific reference to the right of undocumented

<sup>32</sup> Norredam et al., 'Ethnic disparities in health', *European Journal of Public Health*, 2006, Vol. 16, No. 3, pp. 285–289.

<sup>33</sup> *ibid.*

<sup>34</sup> PICUM, *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, 2008.

<sup>35</sup> United Nations Children's Fund (UNICEF) & National University of Lanus, Argentina: *Economic, social and cultural rights of migrant children and children born to migrant parents – draft 2010*

<sup>36</sup> PICUM, *Book on Solidarity, Volume I-III*. 2003.

<sup>37</sup> CEPS, *Undocumented Immigrants and Rights in the EU Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?*, 2009.

<sup>38</sup> The project was carried out by PICUM from February 2007 to February 2009. It aimed at "fighting discrimination-based violence against undocumented children in Europe by developing the capacity of concerned partners to protect undocumented children from discrimination in gaining access to housing, education and health care". The project focused on the situation in nine EU member states: Belgium, France, Hungary, Italy, Malta, the Netherlands, Poland, Spain and the UK.



children to housing. The final report pointed out that while the national legislation generally granted accommodation to all children (in shelters), undocumented families were not eligible for housing assistance and access to social housing was almost impossible in practice.

Both the above outline and the general literature review carried out in the first steps of this study illustrate that information focusing on the rights and situation of third-country nationals pending postponed return or removal is very limited. Of the 16 documents reviewed, ten contained information about this specific group. Six of the reports only contained information about serious illness and/or being a victim of trafficking as possible reasons for a return or removal to be postponed or suspended. Only a 2011 study from the European Union Agency for Fundamental Rights has looked into the rights and situation of the specific target group of this study (as part of a study on the rights of irregular migrants more generally).<sup>39</sup>

With respect to the rights and situation of irregular migrants in general, there is a substantial amount of relatively detailed information, although seldom at the level of specific sub-groups such as elderly, single women, families, and unaccompanied children, etc.

Against the background outlined above, the importance of this study lies in developing knowledge of processes/procedures and the practical situation for third-country nationals pending return, country by country across the EU and in the Schengen Associated Countries, to establish a basis for an informed discussion between Member States and Schengen Associated Countries in developing a common framework for dealing with persons in this situation, which balances effective controls with the countries' international obligations on human rights. Better information in this area is crucial in order to achieve better policy decisions and a more balanced strategic approach.

## **1.4 Methodology**

This chapter briefly describes the main steps and methodological challenges in collecting comparable data on the rights and situation of third-country nationals pending return or removal across the 31 study countries.

The primary data, which constitutes a significant part of the basis for this report, was collected through country studies. Separate national reports were drafted for each of the study countries by national experts, members of the contractor's consortium, on the basis of desk research and review as well as qualitative interviews with relevant stakeholders and experts on the topic in the individual countries. All national experts were asked to fill the collected information into a template drafted on the basis of initial piloting in two of the countries in order to ensure a certain level of comparability of the collected data across the study countries.

The contents of the national reports were then cross-analysed by members of the core team, the result of which is presented in this report.

In the data collection process, the study team faced two main challenges:

1. The difficulty of distinguishing between the rights specifically pertaining to the target group concerned and those that apply more widely. It follows from this that it has been a **challenge** inherent in this study to distinguish between the rights

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<sup>39</sup> FRA, *Fundamental rights of migrants in and irregular situation in the European Union*, 2011.



specifically pertaining to the target groups concerned by this study and those that apply more widely to all third-country nationals in an irregular situation.

The **solution** to this challenge was to have all national experts begin with and spend a significant amount of time on identifying, separating and describing different analytical categories of third-country nationals pending return or removal in each country. Since this is not a target group previously identified as *one* target group in any of the study countries, in most cases groups had to be constructed by the experts to distinguish between the different rights and situations. Only when this understanding was achieved was it possible for the national experts to clearly establish rights and situation of the third-country nationals pending return or removal. This was often done through a careful assessment of the information provided and the extent to which it could be perceived as relevant for the specific target group of the study. Throughout this process, the national experts used the interviews not just to collect answers to specific questions, but also to discuss and elaborate on a definition and possible categorisation of the target group. Furthermore, the national experts shared the initial drafts of the country reports with national government officials in order to receive comments on the categories included in the report, as well as to elicit additional information and/or close any existing gaps. As a result, all 31 country reports have been checked and commented on by the relevant national authorities and often also NGOs working in the field of return. In addition, all Member State representatives of the EU Return Committee have been offered the opportunity to provide comments on the reports. The comments provided have all been taken into account in the final editing of the national reports.

2. Another significant **challenge** in the data collection is that the target group is not a distinct group in terms of terminology used in the 31 study countries. The effect of this is that most areas of investigation of relevance to this study are poorly documented, including in terms of statistics that would help measure the exact magnitude of different situations. The study team's **solution** to address and compensate for the lack of statistics consisted of systematically seeking qualitative assessments of the extent to which a situation is perceived to exist. In some countries, national respondents were able to provide such assessments, while in others they felt they were lacking sufficient information to do so.

In terms of the lack of information about the specific situation of third-country nationals pending postponed return or removal, legislation and data pertaining to other categories than this study's specific target group, but describing similar and relevant situations was used:

- All third-country nationals detained live under the same conditions, whether their removal order has been postponed or not, so general information was used about the situation in detention centres.
- In several cases, some categories of third-country nationals pending return/removal live, to a large extent, in the same conditions as asylum seekers, so general information about the situation of asylum seekers was used in these cases.
- In other cases, third-country nationals pending return or removal live, to a large extent, in the same conditions as any other illegally staying person, so general information was used about the situation of illegally staying persons. One main difference, however, is that by definition third-country nationals pending return or removal do not have any fear of being identified since they are already in the public records. This is often perceived to be one of the main obstacles for illegally staying third-country nationals to access healthcare, education and other services; this was taken into account through this study's analysis.



Due to the above mentioned challenges, the national experts were asked to first describe the main (analytical) groups of third-country nationals pending return or removal. Based on these descriptions/constructed groups, the national experts presented the explicit rights, reasons for postponements and possibilities for legalisation ascribed to those third-country nationals. These were often based on an adaptation of a complex national legislation developed for other target groups. In other words, it was left to the discretion of the national expert in cooperation with the national respondents to develop relevant categories of third-country nationals pending return removal, as no one-model-fits-all approach exists with respect to third-country nationals pending return/removal.

The task of the core team was to look across the country reports and draw up patterns relevant for potential EU regulation. The approach applied was to:

- look through the country reports to identify possible patterns and develop analytical groups (TCNs cooperating on a voluntary return is one such analytical group identified, as most study countries grant specific rights to this group);
- test the analytical groups developed by categorising the study countries according to the analytical groups. This was done by inserting the relevant qualitative information from the country reports in overview tables under the related analytical group and conducting a cross analysis;
- more often than not, the chosen analytical groups were adopted into new and more appropriate analytical groups, based on the cross analysis, and the exercise was repeated until the best possible result was reached.

In the analysis the consortium sought to develop analytical groups that:

- fit best across the study countries, thereby leaving the least possible number of countries in which there could be any doubt about the analytical group they should be ascribed to;
- were mutually exclusive but still covered all relevant study countries;
- were expected to be the most relevant for future regulations.

It should be mentioned that any analytical group developed will always present only a partial picture of a complex national situation. It was not possible for any of the analyses to develop analytical groups that resulted in situations where the categorisation of all countries was clear-cut. The groupings were made based on careful assessments every time of what was *most appropriate* given the available information.

For a more complete understanding of the situation in a specific country, the reader will need to examine the country reports.

## **1.5 Content of the report**

**Chapter 2** presents the first findings of this study, namely that this is a very complex topic with a relatively unclear and not very well-defined target group. There is a general lack of clear and specific terminology and legislation related to the specific target group of this study, and the aim of chapter 2 is hence also to present the analytical groups developed in the context of this study for the purpose of conducting and presenting the cross-analysis, which follows in chapter 3.

Most of the study countries have several different categories of TCNs pending return/removal. The norm is that they are not well defined in the national legislation,



but that they can be identified through different rights granted to different types of TCNs pending return/removal. Based on this, the consortium developed three analytical groups (only briefly presented here and then further elaborated in section 2.2):

1. An **official postponement**, sometimes also known as toleration status, which gives third-country nationals the permission to stay pending their return or removal and grants them additional rights compared to those enjoyed by other TCNs pending return/removal;
2. An official or **de facto postponement** (extension of the return date) where the third-country nationals maintain the rights granted by the return order, but have no access to additional ones;
3. **No postponement and no distinct rights granted** - the third-country national pending return/removal has no particular status – neither by practice nor by law - and enjoys only the basic rights granted to all TCNs in an irregular situation.

As the last group will in no way differ from any other illegally staying third-country national, they are only mentioned in the initial overview. The cross-analysis will instead focus on groups 1 and 2.

**Chapter 3** follows on from chapter 2 with a cross-analysis of the different rights granted to third country nationals pending return in the different countries, depending on which analytical group they belong to; beginning with group 2, which in some ways represents the basis in terms of rights granted to third-country nationals pending return or removal. The subsequent sections then look into the types of additional rights (and the criteria behind them), which may be granted to some groups of third-country nationals pending return. Firstly, the analysis looks into the additional rights enjoyed by those in the other main group (group 1), who receive some form of official postponement. Some countries also grant additional rights to other groups of third country nationals pending return (across the analytical groups) on the basis of whether they cooperate on their return or not and depending on whether they are considered vulnerable migrants. Overviews of the rights granted to these groups are presented in sections 3.3. and 3.4.

Section 3.5 presents the legal provision *specifically* designed in the study countries to enable third-country nationals pending return/removal to obtain a right to legal stay *because* their return/removal cannot be effectuated. It should be mentioned that several countries do not have such specific provisions whereby the third-country nationals pending return/removal only have access to legalisation through the same means as all other TCNs (new applications, new information leading to reopening of the case, change in situation etc.).

The last section of chapter 3 (3.6) looks into the *actual* situation in terms of third-country nationals' access to the legally granted rights, in practice. When looking across countries, the rights with respect to family unity, healthcare, education and employment are to a large extent identical for all TCNs pending return/removal. In terms of accessing these rights in practice, however, differences in their situation do arise and are particularly dependent on where they are accommodated. The differences between the countries and internally in the country – depending on the types of accommodation – are outlined in section 3.6.

In addition to establishing an overview of the rights and situation of third country nationals pending return/removal, all national experts, in drafting the country reports, also collected information on the effects of the current legal basis and actual situation on: 1) fostering the protection of human rights; 2) Public opinion; and 3) Secondary



movements and pull factors. The results of these discussions and the issues raised are outlined in **chapter 4**.

**Chapter 5** of the final report will present the findings from the conference held in Brussels in January 2013. **Chapter 6** presents the conclusions of the report.

**Chapter 7** contains the recommendations for further steps to be taken towards establishing a more coherent approach for dealing with third-country nationals pending return or removal.



## **2. Defining the target group**

With the issues outlined in the introduction concerning lack of knowledge and data on this specific topic and the methodological challenges faced in the course of this study, it is clear that the target group of this study – third country nationals pending return/removal – is by no means a clearly defined or delineated group; neither is it homogenous. Hence, before presenting the findings of the study concerning the specific rights and situation of the target group, it is necessary to first develop a common language and reach a common understanding of which persons and situations this concerns.

### **2.1 The complexity of the situation and lack of common or clear definitions**

In agreement with the Commission, it was decided that the study's focus should be on all third country nationals who have received a return/removal order but are (for various reasons) staying in the host country (for a longer or shorter period) due to different obstacles to their return/removal. It was also decided to put particular emphasis on situations of (officially) postponed return/removal.

However, from the findings of the study it is clear that this group of third country nationals is not well defined in the study countries. There are several reasons for this, and it is necessary to first understand the complexity of the situation(s) before attempting to define the target group(s).

#### **2.1.1 It is often unclear when a third-country national enters and/or exits the target group of the study**

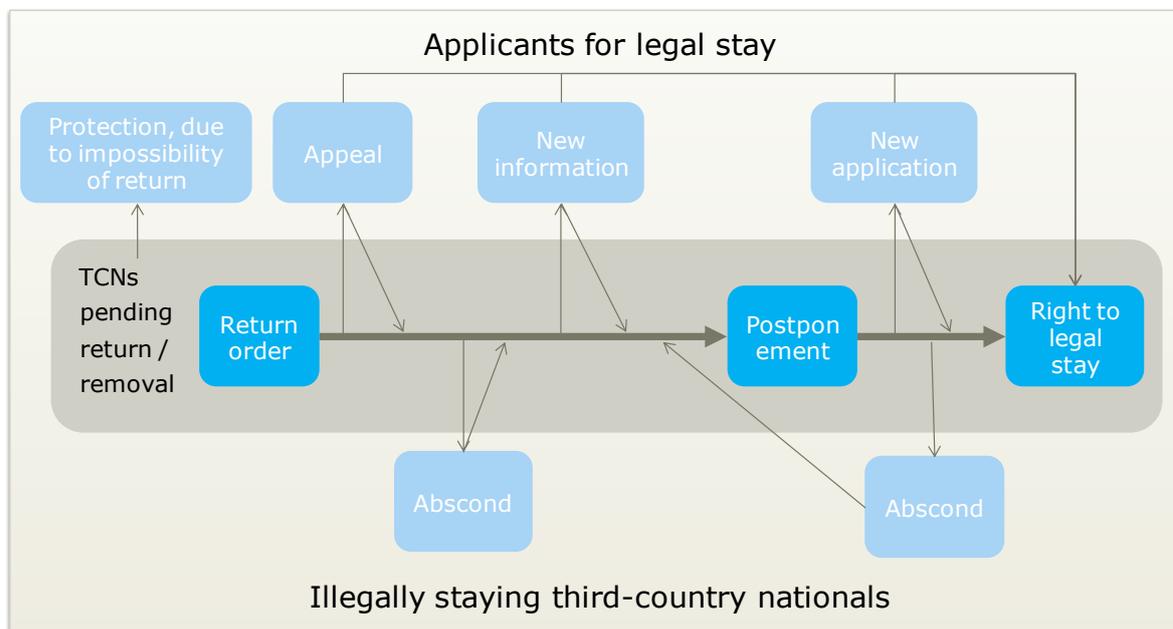
First and foremost, cases of return/removal rarely result from situations consisting of *one* application, *one* rejection and then a return/removal order or a postponed enforcement of such order. More often than not, a rejection will result in one or more appeals based on different grounds. In periods of appeals, the third-country national is once again an "applicant for legal stay" and hence treated under regulations referring to that situation. Also, third-country nationals might abscond, in which case they in most countries lose the rights they might have had while pending return/removal. It is also common to grant protection status due to the impossibility of the return for medical reasons, for family reasons, to unaccompanied minors due to lack of adequate reception conditions in country of return, to stateless people etc. It is rarely clear in the national legislation whether those protection statuses are granted before or after the return order, nor whether a protection status (temporary residence permit) is considered more as a type of postponement of the return/removal or as actual legalisation. In general, there is a lack of a clear definition of the difference between a postponement and a temporary legalisation.

It is therefore often difficult to establish whether a third-country national belongs to the target group of this study, and especially when they enter or exit this target group.

The figure below illustrates how third-country nationals are leaping in and out of the target group of this study.



**Figure 1: The target group and its sub-groups**



### 2.1.2 Third-country nationals pending return/removal are in legal terms a sub-group of illegal migrants

In all of the study countries, a third-country national is legally defined as illegally staying on the territory of the country from the time that (s)he receives the return/removal order. As such, the general legislation applicable for illegally staying third-country nationals is also applicable to the third-country nationals pending return/removal. Third-country nationals pending return/removal are thereby legally defined as part of a larger group of illegally staying third-country nationals.

Most countries do not have a specific terminology for third-country nationals pending return or removal, instead they often distinguish between:

- forced or voluntary return, irrespective of whether either of these courses of action was (officially) postponed or not;
- failed asylum seekers, or third-country nationals perceived to be a threat to society and other illegally staying third-country nationals (over-stayers, illegal labour migrants etc.), irrespective of whether their return/removal was (officially) postponed or not.

The terminology applied by the study countries illustrates that third-country nationals who received a return decision and appear in this situation of pending return/removal come from different “streams” of inflows in the study countries (e.g. from the asylum system), and/or that they are meant to leave the country through different “paths” (e.g. cooperation on voluntary return).

Some third country nationals pending return/removal in some of the study countries remain on a par with irregular migrants in terms of rights and situations. While other groups may be granted or earn some additional rights as compared with irregular migrants. In most Member States, the legal regime through which third-country nationals entered the country, or the path through which they are meant to leave, will, once they receive a return decision, determine their rights, their actual situation, and



their access to legalisation while they are awaiting return/removal. However, several countries only have specific provisions for failed asylum seekers and not the other groups of third-country nationals pending return/removal (e.g. over-stayers and convicted criminals with an expulsion order).

### **2.1.3 A cross-analysis to illustrate the complexity**

Table 1 below compares the findings of three different studies on the rights of third country nationals:

- the Fundamental Rights Agency (FRA) study on the fundamental rights of migrants in an irregular situation in the EU, with focus on chapter 2 on “Non-removed persons”, published in 2011;<sup>40</sup>
- the European Migration Network (EMN) report on the different national practices concerning the grant of non-EU harmonised protection statuses, with focus on section 3.2.5 on “Tolerated stay/suspension of removal”, published in 2010;
- the Ramboll (RMC) and Eurasyllum study on the rights and situation of TCNs pending return/removal (the current study).

The table is useful for illustrating the complexity related to postponements, residence permits, protection and toleration statuses granted to third-country nationals, as it demonstrates how difficult it is even for researchers investigating the field to agree on the terminology and interpretation of the national legislation.

The table illustrates that the three studies agree on the following:

- five countries (AT, CZ, DE, SK, and SI) have some kind of suspension, toleration status or residence permit for TCNs pending return/removal (marked in blue in the table);
- six countries (CY, DK, EE, FR, IT, and LV) do not have any suspension, toleration status or residence permit for third-country nationals pending return/removal (marked with red in the table).

If what the FRA report classifies as residence permits is included, an additional four countries (FI, NL, PL, SE) are classified as having some sort of suspension, toleration status or residence permit for TCNs pending return/removal across all three studies. Greece could also be included in this group, as the toleration status was created with a new legislation in 2011 and hence after the 2010 EMN report. (Those countries are marked with grey in the table.)

In the remaining 11 countries the experts disagree on how to interpret the legislation. The main reason for the differences is the lack of a clear definition of the difference between temporary legalisation, suspension and postponement/extension.

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<sup>40</sup> For reasons of comparison this study focuses on the categories “Suspension” and “Toleration” of the FRA report. The report also looks into the possibility of obtaining a temporary residence permit, but this includes protection status granted prior to the return order (not included in the RMC/Eurasyllum study) as well as temporary residence permits granted as a option for legalisation after a certain number of years of postponed return (included in later sections of the RMC/Eurasyllum study).



**Table 2: Comparing assessments of the national approaches to the granting of toleration status<sup>41</sup>**

	FRA <sup>42</sup>	EMN <sup>43</sup>	RMC/Eurasylum <sup>44</sup>	Comments
AT	Toleration	Yes	Yes	
BE		Yes		The provisions mentioned in the EMN study are correct, but do not provide additional rights, which is why it is not included as a particular category in the RMC/Eurasylum study.
BG	Suspension			Official postponement/suspension is possible, but does not provide additional rights, which is why it is not included as a particular category in the RMC/ Eurasylum study.
CY				
CZ	Toleration	Yes	Yes	
DE	Toleration	Yes	Yes	
DK				
EE				
EL	Suspension		Yes	New legislation; this is why it is not in the EMN study.
ES		Yes		Suspension is possible, but does not lead to toleration or provide additional rights, which is why it is not included as a particular category in the RMC/ Eurasylum study.
FI	Residence	Yes	Residence	Temporary residence permit is the norm, as also mentioned in FRA.
FR				
HU	Toleration	Yes		It is based both on asylum and aliens legislation and hence not developed for third-country nationals with a return order (is expected to be granted prior to the return order).
IE		Yes		Decision is made prior to the return decision. In the FRA report, this is categorised as a residence permit.
IT				
LV				
LT	Suspension		Residence	Suspension and a residence permit a year later are possible.
LU			Yes	Postponement is possible according to: "Loi 5 mai 2006 modifié Article 125bis".
MT	Toleration		Yes	According to RMC's respondents, this is an administrative practice without a legal basis. The visa mentioned in the FRA study was not mentioned in the RMC/Eurasylum study.
NL	Residence	Yes	Yes	A temporary residence permit can be granted to TCNs who have tried to leave the country unsuccessfully, and there is also a departure moratorium leading to suspension of the return date. This is categorised as a residence permit in the FRA report.
PL	Residence	Yes	Yes	Tolerated stay can be granted for protection (humanitarian) or technical reasons. This is categorised as a residence permit in the FRA report.
PT		Yes		While it stands correct that removal is not possible for the reason given in the EMN report, it is expected that no return order is issued. This is why it is not included as a particular category in the RMC/Eurasylum study.
RO	Toleration		Yes	A toleration status is possible according to article 102

<sup>41</sup> Empty cells indicate that the study referred to in the column does not assess that the country mentioned in the row grants a specific status to third-country nationals pending return/removal.

<sup>42</sup> In the table it is marked if the country is assessed by FRA to grant a toleration status or a suspension of the removal. When it explains differences between the three studies, it is also marked if the FRA study assesses that a country grants a residence permit to TCNs that cannot be returned or removed.

<sup>43</sup> The EMN study only reports on toleration status. A "yes" in the table indicates that, according to the EMN study, a toleration status is granted to third-country nationals pending return/removal in the country mentioned in the row.

<sup>44</sup> A yes in the table indicates that toleration or suspension (postponement) with additional rights is granted in the country concerned. A cell with "Residence" indicates that the study assesses, that in the country concerned, a residence permit is granted to TCNs who cannot be returned for technical reasons.



	FRA <sup>42</sup>	EMN <sup>43</sup>	RMC/Eurasyllum <sup>44</sup>	Comments
				and 103 of Emergency Government Ordinance Nr. 194 of 12 <sup>th</sup> December 2002. It is mainly granted as protection status prior to the return order being issued, but according to RMC/Eurasyllum respondents it is also used if postponement is necessary for technical reasons.
SE	Residence	Yes	Yes	Temporary residence permits can be granted for lasting impediments to the return. According to RMC/Eurasyllum sources, the option is not used. This is categorised as a residence permit in the FRA report.
SK	Toleration	Yes	Yes	
SI	Toleration	Yes	Yes	
UK		Yes		Decision is made prior to the return decision, which is why it is not included as a particular category in the RMC/ Eurasyllum study.

## 2.2 Development of analytical groups of third-country nationals awaiting return/removal

Given the complexity of the situation and the heterogeneity of the target group, as outlined above, it is relevant to first devise a form of typology to establish a common basis and language for understanding and creating an overview of what in essence is 31 different situations. Devising such a typology – or analytical groups – was therefore the first step in the process of cross-analysing the information gathered in the national reports.

In constructing this typology, it was essential to find a common denominator for the comparison of the situations in the different study countries. The groups are thus devised according to the different types of status they are granted and take into account where the status stands relative to the other identified groups in terms of the particular rights it grants.

As outlined in the previous sections, most of the study countries do not necessarily have specific regulations or procedures for dealing with people in this situation. Four of the studied countries (FI, SE, MT, IS) have, however, decided to regulate the situation of third-country nationals, whose return or removal is not possible due to technical reasons (e.g. lack of documentation, lack of cooperation from the countries of origin or the countries of return, etc.) by issuing a temporary residence permit in the same way as one may be granted on the basis of e.g. humanitarian concerns,<sup>45</sup> as specified in international law. As opposed to some other countries, Finland, Iceland, Sweden and Malta apply existing legal acts concerning temporary residence permits in general, rather than establishing a specific category and provisions for those who cannot be removed or returned. The residence permits will in almost all cases be withdrawn if or when the factors impeding the return/removal cease to exist. In these countries the permit is granted *instead* of a postponement. Residence permits granted on the back of a postponement (after a certain period of time) are, in this study considered a particular path into potential legalisation (these scenarios are further discussed in Chapter 3).

<sup>45</sup> We do not look into situations where a residence permit is granted due to humanitarian reasons. In order not to overlap with protection statuses granted prior to the return, the focus is kept on temporary residence permits granted for technical obstacles, as these will usually occur after the return order has been issued. For a study on temporary residence permits granted as protection status, usually prior to the return order, please see the European Migration Network report: "The different national practices concerning granting of non-EU harmonised protection statuses".



Those third country nationals who receive a (temporary) residence permit are *de facto* legalised and as such, they fall out of the target group of this study. Therefore they are not included in the further analysis.

When looking at other groups of third country nationals pending return/removal (than those granted a residence permit), the respondents from the study countries reported on legal or practical arrangements which, when assessed in terms of the status and rights they convey on third-country nationals pending return or removal, can be grouped as follows:

1. An **official postponement**, sometimes also known as toleration status, which gives third-country nationals the permission to stay pending their return or removal and grants them additional rights compared to those enjoyed by other TCNs pending return/removal;
2. An official or **de facto postponement** of the return (sometimes extension of the return date), where the third-country nationals maintain the rights granted by the return order, but have no access to additional rights;
3. **No postponement and no distinct rights granted**; the third-country national pending return/removal has no particular status – neither by practice nor by law – and enjoys only the basic rights granted to all third-country nationals in an irregular situation.

Considering that the situation for those in the last group (3) in no way differs from that of any other illegally staying third-country national, in terms of rights, they are less relevant for the objective of establishing the distinctive rights of third country nationals pending return or removal.<sup>46</sup> Therefore this group is, once presented in table 2, left out of the further analysis below. **The cross-analysis will instead focus on groups 1 and 2 - those groups with an arrangement for an official or de facto postponement with or without additional rights.**

It should be noted that all countries have third-country nationals pending return/removal in several of the above-mentioned groups. Furthermore, the study countries do not operate with this grouping and rarely with specific legislation for the group of third-country nationals pending return/removal. The three groups thus may seem rather “constructed” to, for example, interviewed experts working with this at national level. Therefore, it should be underlined that these *are* constructed groupings for analytical purposes, which, nevertheless, capture the main cross-country trends found in the study.

**Twelve countries** (AT, CH, CZ, DE, EL, LI, LU, NL, PL, RO, SI, and SK) may grant a **specific status with additional rights beyond the ones granted by the return order** (group 1) - usually a “tolerated stay” or “Duldung”. As will be discussed in the next chapter, the rights attached to these specific statuses vary greatly according to the country, and in some instances grant rights very similar to a temporary residence permit (CZ, LU, PL, RO, SK).

In countries that grant a specific postponement status or a temporary residence permit to third-country nationals who cannot be returned or removed, there is still a share of third-country nationals pending return/removal that will be granted a particular status, however, without enjoying the additional rights. The reasons for this are varied, but they often relate to: i) the postponement being provoked by the third-country national/lack of cooperation by the third-country national; ii) a reasonable

<sup>46</sup> The rights of illegally staying third country nationals have already been covered in other studies, such as the FRA report previously mentioned.



chance of a return in the near future; iii) the unlikelihood of a return due to reasons not mentioned in the legislation or; iv) the involvement of the third-country national in a serious crime and/or that the third-country national is perceived as a threat to society. More often than not, these third-country nationals will keep the right to stay pending return through an official or de facto postponement.

**In all study countries, some third-country nationals pending return/removal can officially or unofficially be granted a permission to stay pending return/removal** (group 2), thereby allowing them to maintain the rights they were granted when receiving the return order (which differ from country to country). Fifteen of the study countries (BE, BG, CY, DK, EE, ES, FR, HU, IE, IT, LT, LV, NO, PT and UK), do not have any official postponement providing additional rights (nor the option to grant a temporary residence permit), and third-country nationals who cannot return or be removed from these countries thus fall into either group 2 or 3 (official or de facto permission to stay pending return without additional rights).

The last group refers to **situations where no official postponement and no distinct rights are granted**. Disregarding situations where third-country nationals abscond, twenty-three study countries reported situations falling under this group (AT, BE, BG, CH, CZ, DK, EE, EL, ES, FR, IE, IT, LT, LU, LV, NL, NO, PL, PT, RO, SI, SK, UK). These usually relate to **third-country nationals not cooperating or otherwise failing to return, and being released from detention, but also to over-stayers and/or illegal labour migrants pending return/removal**. Those third-country nationals do not have any rights other than those derived from existing directives and international conventions, which are enjoyed by all third-country nationals in an irregular situation.

Table 3 below presents an overview of the developed typology and whether the three different analytical groups exist or are relevant for the different countries.



**Table 3: Key groups of status granted to third-country nationals awaiting return/removal in the 31 study countries<sup>47</sup>**

	<b>1. Official postponement without the granting of a temporary residence permit but <u>with additional rights</u></b>	<b>2. Official postponement of the return date or <u>de facto</u> toleration, <u>without additional rights</u> other than those granted by the return order<sup>48</sup></b>	<b>3. No official postponement and no distinct rights apart from those granted to all TCNs in an irregular situation<sup>49</sup></b>
<b>AT</b>	TCNs can be granted a "Duldung" status, if the postponement is due to reasons beyond the control of the third-country national.	<i>De facto</i> toleration if third-country nationals cooperate with state authorities.	Third-country nationals who do not cooperate come into a situation similar to an irregular person.
<b>BE</b>		An official postponement of the return order, although there is no legal basis delineating the conditions under which such postponement is granted.	TCNs who do not cooperate on their return and third-country nationals considered a threat to Belgium or who have been convicted of a crime are to be kept in detention, where only basic rights are guaranteed. If they are not kept in detention, there is no guaranteed provision of rights.
<b>BG</b>		Postponement leads to the right to remain with a status of pending return, whereby the third-country national is either held in detention or not.	A third-country national is regarded and can be treated as an irregular immigrant as soon as they cease to meet the requirements for legal stay and residence. No further conditions such as absconding are needed in order to be considered 'irregular'.
<b>CH</b>	Where return/removal is not possible, not permitted or not reasonable, aliens are granted temporary admission.	<i>De facto</i> toleration - third-country nationals not granted temporary admission remain 'pending return'.	Third-country nationals who abscond or do not cooperate are in effect in an irregular situation.
<b>CY</b>		An official postponement can be granted due to technical reasons. The return can also be postponed for third-country nationals who are cooperating in the procedures and have asked for it in relation to their ties with Cyprus, family issues and children attending school.	While legally speaking, third-country nationals pending return or removal are not considered irregular migrants, in practice they are routinely treated as such, and e.g. detained without consideration of their status.
<b>CZ</b>	Third-country nationals can be granted a toleration visa / tolerated stay status if the postponement is due reasons beyond the control of the third-country national.	An official extension of the date for voluntary return is possible if third-country nationals apply for an <i>exit order visa</i> , which is granted for a period of 7 to 60 days.	Third-country nationals who fail to comply with the return order are considered illegally staying and in practice are in a similar situation as irregular/ undocumented migrants.
<b>DE</b>	TCNs in this category can be granted a "Duldung" status, irrespective of cooperation.	Postponement of the return is possible for shorter periods, longer postponements usually result in a	Not unless they abscond.

<sup>47</sup> Empty cells mean that the option does not exist in the study country.

<sup>48</sup> Often by administrative practice and not based in the legislation.

<sup>49</sup> In several of the country reports this information was not specified. A question mark in the table, mark those countries. The information is currently being collected.



	1. Official postponement without the granting of a temporary residence permit but <u>with additional rights</u>	2. Official postponement of the return date or <i>de facto</i> toleration, <u>without additional rights other than those granted by the return order</u> <sup>48</sup>	3. No official postponement and no distinct rights apart from those granted to all TCNs in an irregular situation <sup>49</sup>
		"Duldung" status	
<b>DK</b>		<i>De facto</i> toleration for third-country nationals who cannot be returned.	Failed asylum seekers if they abscond. Over-stayers and illegal labour migrants pending return/removal.
<b>EE</b>		The voluntary return period can be officially extended, although this is rarely applied.	Third-country nationals who are expelled, do not cooperate on the return or stay beyond the 30 days they have to voluntarily leave the country.
<b>EL</b>	Third-country nationals can be granted official postponement status if the postponement is due to reasons beyond the control of the third-country national.	Official postponement of the return is possible if third-country nationals cooperate.	Third-country nationals pending return may end up in an irregular situation if the document which postpones the removal/return is not renewed. The pending implementation of a recent law which allows third-country nationals granted official postponement to work in practice results in many third-country nationals working illegally, which also puts them in an irregular situation.
<b>ES</b>		Official postponement is possible on legal or humanitarian grounds.	Third-country nationals pending return are <i>de jure</i> considered irregulars, but are only detained if they do not cooperate, the risk exists that the TCN will abscond, try to avoid or impede the expulsion, or when the third-country national represents a threat to public security.
<b>FI</b>		<i>De facto</i> toleration for third-country nationals pending return.	Not unless they abscond.
<b>FR</b>		Official postponement of the period for voluntary return can be granted to third-country nationals who request it and cooperate on their return. Third-country nationals who cannot be returned or removed are in a situation of <i>de facto</i> toleration to stay pending return.	Third-country nationals who have failed to return voluntarily within the thirty day period or who present a threat to the public order are to be immediately removed. Most of them will be staying in detention centres for the time leading to their departure.
<b>HU</b>		An official postponement of the return of up to 30 days is possible for those returning voluntarily.	Not unless they abscond.
<b>IE</b>		<i>De facto</i> toleration for third-country nationals pending return or removal to stay pending return. Minor postponements are foreseen in the	All subjects to an adverse decision are viewed as being unlawfully present and under an obligation to leave Ireland.



	1. Official postponement without the granting of a temporary residence permit but <u>with additional rights</u>	2. Official postponement of the return date or <i>de facto</i> toleration, <u>without additional rights other than those granted by the return order</u> <sup>48</sup>	3. No official postponement and no distinct rights apart from those granted to all TCNs in an irregular situation <sup>49</sup>
		legislation on practical/technical or legal/humanitarian grounds.	
<b>IS</b>		<i>De facto</i> toleration - TCNs can remain in the reception centres for up to 2 months. After this period, they are expected to find employment and provide for themselves, but failing to do so, are to apply for assistance from the Ministry of Welfare.	Not unless they abscond
<b>IT</b>		TCNs can be granted prolongation of the period for voluntary return.	If failing to return within the given period or upon release from detention.
<b>LI</b>	Third-country nationals can be granted temporary admission, irrespective of cooperation.	<i>De facto</i> toleration if the return is delayed. Third-country nationals are only detained when they do not cooperate.	TCNs may end up in such a situation only when they abscond or go into hiding.
<b>LT</b>		Official postponement referred to as 'measure alternative to detention' is issued by the Court under certain conditions to TCNs who cooperate, but whose return is temporarily not possible.	TCNs with a return/removal order who did not leave within the expected time frame are perceived as illegally staying in Lithuania and are in principle detained.
<b>LU</b>	Third-country nationals can be granted an official postponement status (with additional rights, such as the right to work), if the postponement is due reasons beyond the control of the TCN.	<i>De facto</i> toleration to stay pending return, with no official postponement.	If failing to return within the given period or upon release from detention/reception centres
<b>LV</b>		An official postponement is possible if the reason for postponement is outside the control of the third-country national. The third-country national in this case enjoys the same rights as third-country nationals pending voluntary return.	No regulation of third-country nationals released from detention, but who cannot be removed.
<b>MT</b>		Third-country nationals can be granted <i>de facto</i> toleration to stay pending return with no official postponement.	Not unless they abscond.
<b>NL</b>	Third-country nationals can be granted an official postponement status (with additional rights, such as the right to work), if the postponement is due reasons beyond the control of the third-country national.	Third-country nationals who do not cooperate have a <i>de facto</i> extension of their return, throughout which they are held in immigration detention.	If condemned for serious offences, third-country nationals are declared "undesirable" and thus treated as any illegally staying migrants.
<b>NO</b>		<i>De facto</i> toleration to stay pending return.	Third-country nationals who do not return after the deadline of their order has passed are considered illegally staying and have a status similar to irregular migrants, especially if they choose to live outside the reception centres.



	<b>1. Official postponement without the granting of a temporary residence permit but <u>with additional rights</u></b>	<b>2. Official postponement of the return date or <i>de facto</i> toleration, <u>without additional rights other than those granted by the return order</u><sup>48</sup></b>	<b>3. No official postponement and no distinct rights apart from those granted to all TCNs in an irregular situation<sup>49</sup></b>
<b>PL</b>	Third-country nationals can be granted tolerated stay if the postponed return is due to reasons beyond their control, whereby they obtain the same rights as with a residence permit.	Return/removal can be temporary suspended due to technical obstacles.	If third-country nationals fail to return, and are not granted tolerated stay.
<b>PT</b>		<i>De facto</i> toleration to stay pending return for failed asylum seekers.	Third-country nationals who do not return after the deadline of their order has passed are considered illegally staying.
<b>RO</b>	Third-country nationals can be granted tolerated stay irrespective of their cooperation (with quite extensive rights, including the right to work).	Official short-term postponement is possible for a period of maximum 30 days.	Third-country nationals who do not return after the deadline of their order has passed are considered illegally staying.
<b>SE</b>		<i>De facto</i> toleration to stay pending return	Not unless they abscond.
<b>SI</b>	Official postponement is granted under certain conditions and gives "permission to stay". Third-country nationals who cooperate are given financial assistance.	Third-country nationals not granted permission to stay can be granted official extension of the return date for a period of up to 6 months in an Aliens Centre until when can be deported.	If the third-country national is not granted permission to stay and can no longer be detained.
<b>SK</b>	Third-country nationals can be granted tolerated stay if the postponement is for reasons beyond their control, in which case accommodation is provided by the state.	Third-country nationals can be granted official short-term extension of the return date for up to 90 days.	If the third-country national is not granted tolerated stay and can no longer be detained.
<b>UK</b>		<i>De facto</i> toleration to stay pending return. Failed asylum seekers keep their Asylum Registration Card.	If a third-country national fails to comply with removal directions without permission.



### **3. Legal situation of third-country nationals pending return/removal**

On the basis of the typology of analytical groups developed above, this chapter presents an analysis of the legally established rights of the different groups in the different study countries. The first parts of this chapter focus on the officially established, legal rights (on paper) of third country nationals pending return, while the last section analyses the actual situation and extent to which they are able to access and enjoy these rights in practice.

The first section (3.1) presents an overview of the rights granted to those in group 3, which essentially means the rights that all third-country nationals pending return/removal will as a minimum enjoy in the different study countries (except if they are considered irregulars and hence fall into group 4 and out of the target group of the study). This is followed by presentations of overviews of the additional rights granted to certain groups of third-country nationals pending return/removal in some of the study countries. Section 0 presents the additional rights granted to third-country nationals with an official postponement in some countries (analytical group 2, as presented in table 2 above). Across the different analytical groups, there are also other criteria applied for granting additional rights to third-country nationals pending return/removal in some countries, such as whether the third-country national is cooperating on the return or not. Section 3.3 therefore looks into the additional rights granted to those third-country nationals cooperating on their return in some countries. And section 3.4 presents an overview of the specific situation in terms of (additional) legal rights granted to "vulnerable" third country nationals pending return/removal.

Section (3.5) presents an overview of the possible access to legalisation (i.e. a way out of the pending/postponement status and into a legal right to stay) specifically developed for third-country nationals pending return or removal in some countries. And section 3.6 presents the respondents' assessments of the practical situation in terms of third country nationals' access to the legally established rights while pending return/removal.

#### **3.1 Third-country nationals pending return, without a postponement status granting additional rights**

In the following sections the general rights of all categories of third-country nationals pending return/removal in all the study countries will be presented, except from those additional rights given to particular groups/on the basis of particular criteria, which are presented subsequently. Thereby this section summarises the rights of group 2 in the typology, or:

- Third-country nationals pending forced or voluntary return within the time limit given in the return order; and
- Third-country nationals pending forced or voluntary return with an official or unofficial extension of the date for return / a postponement status without additional rights (third-country nationals that keep the permission to stay pending).

In most study countries the rights of these two sub-groups of group 2 are more or less similar; this is the reason for presenting the rights of the different sub-groups in one table. For detailed information about the specific study countries or specific categories of third-country nationals pending return/removal, we refer to the country reports.



### **3.1.1 Rights of third-country nationals pending return who do not have an official postponement status but who have permission to stay pending return**

In terms of **family unity**, all of the study countries have either legal provisions, or practices, for families to be accommodated together, whether in open centres or in detention. In Estonia, however, third-country nationals in removal centres are most likely to live in gender based dormitories, and therefore not together as a family (children will however be accommodated with their mothers). The right to family unity (in practice or in law), however, does not mean that they will necessarily get a private family room; often families live in specific centres or specific sections but still share rooms with other families.

The extent to which third-country nationals in this category have access to **health care** varies according to country. Eleven study countries (AT, CH, DK, FR, HU, IT, LT, LU, NL, SE, UK) provide basic health care, while sixteen countries (BE, BG, CY, CZ, DE, EE, EL, ES, IE, IS, LV, MT, NO, RO, SI, SK) only provide emergency care. Full health care is provided by eight study countries under certain conditions (in Belgium for TCNs in detention and Fedasil centres; in Cyprus and Spain for third-country nationals in detention; in Greece for third-country nationals with contagious diseases; in Ireland for prisoners; in Lichtenstein for all categories; in Norway for failed asylum seekers residing in reception centres; and in the UK for failed asylum seekers). In Portugal, TCNs have access to but are also charged for emergency, primary and secondary care.

In terms of the right to **education** for third-country nationals in this category, children have a right to elementary school education in all the study countries. Further education can also be pursued under certain conditions in eight countries (AT, DE, DK, IS, LU, NO, SE, SK).

Only eight study countries grant a right to access the **labour market** under certain conditions. In Germany, all third-country nationals pending return/removal can obtain a work permit after one year, subject to the approval of the Federal Work Agency. In Denmark, third-country nationals who cooperate have limited access to internships in the centres. In Greece, third-country nationals whose return cannot be executed are in principle allowed to work. However, this right is not yet being implemented because the relevant Presidential Decree has not been issued (the law was introduced in January 2011). In Iceland, third-country nationals pending return who live outside of the centres can apply for a work permit, and in practice they will all be granted one if they are able to find a job. In Lichtenstein, all third-country nationals pending return have the right to access the labour market. In Luxembourg, rejected asylum seekers may also work for the duration of a contract signed before the return order was issued. In Malta, all third-country nationals pending return can work with some restrictions, but only if they are not detained. In Sweden, third-country nationals pending voluntary return maintain the right to work if they had a work permit and were employed prior to the return order.

In terms of **reception conditions**, the majority of the study countries provide accommodation through reception facilities, private housing or financial support. Eight countries (BE, IE, IT, LT, LV, PT, RO, SK), however, do not have any legal provisions for accommodating third-country nationals in this group, and in two countries (BE, CY) third-country nationals in this group are more often than not detained.

**Table 4: Overview of the rights and situation of third-country nationals pending return/removal**

	Family unity	Health care	Education	Labour market	Reception conditions
<b>AT</b>	Whether accommodated in open centres or detained, families shall be housed in adequate premises.	Basic health care.	Further education is possible in theory.	No right to access the labour market.	Mostly national care facilities or private housings; detention if risk of absconding is suspected.
<b>BE</b>	Families in detention centres are kept in separate areas.	Anyone in Belgium has the right to emergency medical help.  Third-country nationals in detention and Fedasil centres have access to full healthcare.  Third-country nationals registered in Belgium and with a health insurance can benefit from it while preparing for their departure.	Adults do not have access to education.	No right to access the labour market.	Third-country nationals with a pending return order have no specific access to accommodation apart from failed asylum seekers, who can stay in centres run by Fedasil until they can depart and within the limit of the thirty day period of voluntary return granted by the authorities.
<b>BG</b>	Families are to be detained in separate premises at the detention centre.  If not detained, there should be no obstacles to family unity.	Detainees are provided with 'medical assistance'. For those who are not detained, access to healthcare is restricted to emergency cases.	Adults do not have access to education.	No right to access the labour market.	An increasing number of third-country nationals in this category are kept in detention ('Special Home for Temporary Accommodation of Foreigners').  The remaining third-country nationals pending return/ removal live as illegal immigrants without access to housing or social services.
<b>CH</b>	Although there are no general legal provisions protecting family unity, in practice in 17 cantons, families pending return are not housed in emergency facilities but in better conditions meaning asylum structures or in municipalities.	Basic health care.	Adults do not have access to education.	No right to access the labour market.	In emergency facilities.
<b>CY</b>	Family unity respected but no specification as to special measures for this.	Emergency care only for those not detained. In detention there is a right to health care but it usually takes	Adults do not have access to education.	Not explicitly stated in the law, but they are not allowed to work as illegally staying aliens.	No specified right to accommodation, apart from the fact that they can be detained.



	Family unity	Health care	Education	Labour market	Reception conditions
	There are no special rooms for families in detention centres.	several weeks before a detainee can see a doctor.			
<b>CZ</b>	Persons held in detention centres can live together with family members.	Persons pending (postponed) voluntary departure are given urgent and basic treatment.  For those held in detention centres, healthcare is provided by doctors on site.	Until the age of 15, all persons have access to education, irrespective of legal status. Pre-school education is available if third-country nationals cover the costs for it.  Education in the Czech Republic is conducted in the Czech language.	No right to access the labour market.	Persons in need of financial assistance can apply for a one-time financial contribution from the state.  No specific support is prescribed for finding housing.
<b>DE</b>	Families must be detained in separate premises and ensured privacy when detained in open centres.	Medical care is limited to acute needs.	Access to professional education.	After 1 year third-country nationals pending return/removal can obtain a work permit if approved by the Federal Work Agency.	In group shelters or private houses or departure facilities; detention if risk of absconding is suspected and there is a judicial order.
<b>DK</b>	Most open centres provide for family rooms. However third-country nationals pending return /removal are not automatically granted the right to live with family members with legal residence in Denmark.	Basic healthcare beyond emergency healthcare.	Adults who cooperate can access education relevant for their reintegration, but this rarely happens.	No right to access the labour market. <sup>50</sup>  Those who cooperate have limited access to internships in the centres.	In special centres for third-country nationals awaiting return – with some access to private housing, especially for the ones cooperating.
<b>EE</b>	Because third-country nationals are free to choose their residence, they have the possibility to live as a family.  In removal centres they are most likely to live in gender-based dorms, and hence not together as a family. A child will be accommodated with his/her mother.	Access to emergency healthcare. Access to other healthcare services at own expenses.	Adults do not have access to education.	No right to access the labour market.	If not in removal centres, they can apply for emergency social assistance as all other persons without sufficient means.
<b>EL</b>	Because third-country nationals are free to choose their	Emergency care is provided in public hospitals. Persons with	Adults do not have access to education.	No right to access the labour market. <sup>51</sup>	There are no provisions for accommodation or for allowances

<sup>50</sup> A pending bill will allow for some rejected asylum seekers to work.

<sup>51</sup> There has been a recent legislative amendment, according to which, third-country nationals with officially postponed return will be eligible for work permits and work as salaried workers, but this has not yet been confirmed by a presidential decree and is thus not applied in practice.



	<b>Family unity</b>	<b>Health care</b>	<b>Education</b>	<b>Labour market</b>	<b>Reception conditions</b>
	residence, they have the possibility to live as a family.  Minors follow the parents.	contagious diseases have full coverage.			in cash or kind to people who are awaiting their removal/return.
<b>ES</b>	Families live together if the accommodation or detention facilities allow it.	In urgent cases.  Adequate medical assistance is provided while in detention.	Adults do not have access to education.	No right to access the labour market.	A judicial instruction for detention is to be sought when a risk exists that the third-country national will abscond. Provision of basic social services.
<b>FI</b>	Families can live together. Failed asylum seekers are entitled to social assistance, such as family counselling	Right to emergency healthcare only.	General right to education for adults is not granted, however some educational activities need to be provided in the reception centre.	Failed asylum seekers are by law eligible for work permits, but in practice do not have access to the labour market.	Entitled to stay in the reception centre, but this is optional. Entitled to a small financial support.
<b>FR</b>	Families must be detained in separate premises and ensured privacy when detained.	Aide Médicale d'Etat, which covers 100% of the costs of basic medical expenses against a contribution of 30 Euros. By law, there must be medical units in the detention centres.	Adults do not have access to education.	No right to access the labour market.	Accommodation only granted in emergency situations and for third-country nationals in detention centres.
<b>HU</b>	Families shall be accommodated together in detention and reception facilities.	Access to primary healthcare/emergency or essential treatment, including access to epidemiological services.	Adults do not have access to education.	No right to access the labour market.	Government-run Community Shelters and Detention Centres cover the basic needs of those accommodated there. Outside of these facilities there is no provision for either accommodation or subsistence.
<b>IE</b>	No rights specific to the target group but there is Constitutional provision for respect for family life.  Families are normally treated as entities unless failure to comply with conditions necessitates the arrest of adult(s) or an individual is already imprisoned.	Although they have no specific legal rights to healthcare except in limited circumstances, failed asylum-seekers in practice have the same access to medical care as the general population. Prisoners with a return/removal order have access to prison medical facilities. Irregular migrants with a return/removal order have very little access to healthcare.	Adults do not have access to education.	No right to access the labour market.	No formal legal provision for accommodation of this target group, but as a matter of policy, failed asylum seekers are allowed to remain in RIA centres and to continue to receive allowances.  No provision for accommodation or social support for irregular migrants with a return/removal order.



	Family unity	Health care	Education	Labour market	Reception conditions
					Prisoners with a return/removal order are housed by virtue of their incarceration, but can be released into the community on completion of their sentence if removal cannot be effected immediately.
<b>IS</b>	There is no legislation establishing a right to family unity, but families pending return in reception facilities are offered accommodation of their own.	Failed asylum seekers residing at the reception centres have the same access to health care as asylum seekers awaiting a decision (beyond emergency healthcare).  Third-country nationals outside the centres have access to emergency health care but otherwise have to purchase health insurance. They may be given partial insurance through their insurance for accidents if they are employed.	Failed asylum seekers pending return in the reception centres have access to public training courses in the Reykjanesbær municipality, similar to asylum seekers awaiting a decision.  There are no clear rights for those pending return outside the centres, but in practice some have been granted access to e.g. high school level education.	No right to access the labour market for failed asylum seekers residing in the centres.  Third-country nationals pending return outside the centres can apply for a work permit, and in practice they will all be granted one, if they find a job.	Failed asylum-seekers are allowed to remain for up to two months at reception centres while pending return.  After the two-month period or before, if they find employment, they are required to move out of the centres and to provide for themselves through employment.  Those (few) who do not manage to find a job have to apply for financial support from their municipality.
<b>IT</b>	Families are not detained because there are no appropriate facilities in detention centres.  Those living outside the detention centres awaiting return have to rely on NGO assistance.	Basic health care provided for all upon registration with a hospital or local health office.	Adults do not have access to education.	No right to access the labour market.	There is no access to public housing or other allowances in cash or kind, but those detained are provided with food and shelter.
<b>LI</b>	Families shall be accommodated together when in detention and open centres.	Compulsory and basic health care.	Adults do not have access to education.	All third-country nationals pending return/removal have the right to access the labour market.	In accommodation centre (Vaduz) or private housing.
<b>LT</b>	Yes.	Basic healthcare when living in centres.  Third-country nationals with sufficient financial resources can obtain private health insurance.	Adults do not have access to education.	Third-country nationals having their return unofficially postponed do not have the right to access the labour market.	In detention regime of the Foreigner Registration Office.  In private housing if the third-country nationals has a Measure Alternative to Detention.



	Family unity	Health care	Education	Labour market	Reception conditions
<b>LU</b>	Families must be detained in separate premises and ensured privacy.	<p>Third-country nationals in centres have access to healthcare there.</p> <p>Others can either pay for national social security or for private insurance.</p> <p>Third-country nationals who do not have the means to pay will be treated in case of emergencies. A fund under the ministry of health can be requested to cover the costs.</p>	<p>Third-country nationals above 16 who were enrolled in schools prior to the return/removal order can continue their education.</p> <p>Rejected asylum seekers and TCNs under a toleration status have access to language courses in Luxembourgish, French and German for a fee of 5 Euros.</p>	Rejected asylum seekers may work for the duration of a contract signed before the return order was issued.	<p>Failed asylum seekers are accommodated in OLAI<sup>52</sup> centres.</p> <p>Third-country nationals illegally staying in the territory have no specific rights to accommodation.</p> <p>Detention is only used when removal is likely to be executed in the near future and the third-country national refuses to cooperate or is considered a threat to public order.</p>
<b>LV</b>	Families shall be accommodated together when in detention.	<p>Emergency healthcare is provided free of charge for all third-country nationals.</p> <p>Other medical care services are charged to the third-country nationals.</p> <p>Detained third-country nationals are provided with emergency medical assistance as well as primary and secondary health care services.</p>	Adults do not have access to education.	No right to access the labour market.	<p>No state housing, except for unaccompanied minors.</p> <p>Freedom to choose the place of living for all third-country nationals.</p> <p>Detained third-country nationals live in special accommodation centres.</p>
<b>MT</b>	There is no specific legislation with respect to family unity for third-country nationals pending return/removal in Malta. In practice, when accommodated in detention or open centres, families are accommodated in separate premises.	Third-country nationals in this category are provided with emergency care for free.	Adults do not have access to education.	Access to work, but with restrictions and when not being detained.	Detention centres (max. 18 months), Open Centres or independently in Maltese society.
<b>NL</b>	If a family with minor children is resisting departure from the Netherlands, one of the parents	Only basic health care.	Adults do not have access to education.	No access to labour market.	If they fall under the Linkage Principle without Pronouncement of Undesirability: in Freedom

<sup>52</sup> The Luxembourg Reception and Integration Agency



	Family unity	Health care	Education	Labour market	Reception conditions
	(usually the father) can be imprisoned. The children stay in the Freedom Limiting Location.				Limiting Locations or Detention.  In case of Pronouncement of Undesirability: no accommodation
<b>NO</b>	There is no legislation establishing a right to family unity. In practice, however, families in reception facilities do reside together, most often in so-called decentralised reception centres.	All third-country nationals have a right to emergency health care.  Failed asylum seekers residing in reception centres have more extensive access to health care (same as before return order).	Those residing in reception centres have access to relevant training.	No right to access the labour market.	Failed asylum seekers are allowed to remain in reception centres while return is pending.  Those who choose to leave the centres lose their right to receive allowances from the state.
<b>PL</b>	Failed asylum seekers can live together as a family in a refugee centre for up to 2 months following an expulsion order on the first occasion, or up to the deadline for departure or for up to 2 weeks on any subsequent occasion.  If detained failed asylum-seeker and irregular migrant families normally have access to a family room. No rights for foreign prisoners.	Failed asylum seekers have access to health care for up to 2 months (with some barriers according to NGOs) following a negative decision, or for up to 2 weeks for those who have made multiple asylum applications. After that, they have very limited access to healthcare facilities unless they are detained.	No specific rights. According to the law, foreigners in general should have the same access as Polish citizens.	No right to access the labour market.	Failed asylum seekers are allowed to remain in refugee centres and to receive social support for up to 2 months following receipt of an expulsion order on the first occasion, or up to the deadline for departure or for up to two weeks on any subsequent occasion. But after that time they are treated in the same way as irregular migrants with no access to support of any kind. Irregular migrants and multiple unsuccessful asylum-seekers are generally detained in guarded detention centres to await removal unless they decide to return voluntarily. Those with Tolerated Stay have to report regularly to the authorities but there are no other reported constraints.
<b>PT</b>	In reception facilities, families awaiting their deportation are granted a private bedroom with private bathroom. Facilities are available for children to play.	Emergency, primary and secondary care is provided but is charged to the third-country nationals pending return/removal. NGOs might provide financial support if the third-country national is lacking	No higher and vocational education is possible because an official ID is needed.	No right to access the labour market. It is however common practice to legally register illegal third-country nationals pending return/removal with social security, which is a precondition to	No provision of accommodation or social benefits.



	Family unity	Health care	Education	Labour market	Reception conditions
		financial means.  Adequate medical assistance while in detention.		apply for a work permit.	
<b>RO</b>	Families shall be accommodated together if detained.	Emergency health care ensured for all categories. For those held in public custody (detention), non-emergency health care is also facilitated, with the active participation of NGOs	Adults do not have access to education.	No access to the labour market.	For those who are not held in public custody (detention), access to housing is either through own means or with the help of NGOs.
<b>SE</b>	There is no legislation establishing a right to family unity, but families pending return in reception facilities are offered accommodation of their own.	Failed asylum seekers have the same rights to health care as asylum seekers awaiting a decision.  Third-country nationals pending return/removal who have disappeared are excluded from these rights.	Third-country nationals pending voluntary return have similar rights and access to training and courses as asylum seekers awaiting a decision.  Persons considered not to be cooperating on their return do not have access to training or courses offered to asylum seekers.	Third-country nationals pending voluntary return maintain their right to work.  Persons considered not to be cooperating on their return lose their right to work while pending return.	Failed asylum-seekers are allowed to remain at reception centres while pending return.  Criminals and overstayers pending return usually also reside in the Migration Board's reception facilities.  Third-country nationals considered to not be cooperating have their monthly allowances reduced.
<b>SI</b>	Family unit provided for in centres.	All third-country nationals have the right to emergency health insurance and to basic treatment.	Adults do not have access to education.	No right to access the labour market.	Basic support shall be provided to all third-country nationals at the Aliens Centre. This includes third-country nationals pending return/removal, since they live in the centre.
<b>SK</b>	TCNs in detention centres are placed in separate family units to protect their privacy.	There is no specific provision of healthcare beyond emergency healthcare for third-country nationals.  Those who have the means to pay for insurance can do so.  Third-country nationals in detention centres have access to health care in the	Third-country nationals over 17 can carry on their education until the return is executed if they were enrolled in school or university before the return order was issued.	No right to access the labour market.	There is no particular right to access reception conditions. Third-country nationals pending return with no means to support themselves can be detained, and therefore be granted food and accommodation.



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	<b>Family unity</b>	<b>Health care</b>	<b>Education</b>	<b>Labour market</b>	<b>Reception conditions</b>
<b>UK</b>	Based on statutory provision, failed asylum-seekers and families with children have the right to family life.	centre. Access to primary healthcare/accident and emergency service only, except for failed asylum seekers who can access secondary and elective care.	Adults do not have access to education.	No right to access the labour market.	Statutory provision is made for all failed asylum-seekers and children to be provided assistance with accommodation (or the costs of it) and subsistence level financial support.



### 3.2 Third-country nationals with an official postponement status with additional rights

In 11 countries (AT, CH, EL, FI, LI, LU, NL, PL, RO, SI, and SK) some groups of TCNs pending postponed return/removal are granted rights beyond the ones granted to other TCNs pending return/removal.<sup>53</sup> This section describes, first, the *additional* rights ascribed to third-country nationals in countries where an official postponement leads to rights beyond those enjoyed by other third-country nationals pending return/removal (group 2 in the typology presented in table 2 above). The second part of this section looks into the reasons leading to this type of official postponement in the relevant countries.

#### 3.2.1 Rights and situation of third-country nationals whose return/removal has been officially postponed and who enjoy distinctive rights

Table 5 below gives an overview of those *additional* rights, while the text shortly outlines the main trends.

In some of the countries the official postponement status grants a wide spectrum of rights, whereas in others its impact is limited to only one or two areas.

In the majority of the 12 countries, one of the additional rights granted to third-country nationals with an official postponement status is **the right to freely choose a residence or the right to not live in accommodation centres** (all except EL, FI, and LI). In Finland and Greece all third-country nationals pending voluntary return have the freedom to choose a residence, not *only* the ones with an official postponement. Finally, Lichtenstein offers both third-country nationals pending voluntary return and third-country nationals with a temporary admission the right to accommodation and social welfare benefits. Additionally, Switzerland, Luxembourg, the Netherlands, Slovenia and the Slovak Republic can also provide **social welfare benefits** under certain conditions to third-country nationals with a postponed return/removal, while other groups of third-country nationals pending return/removal do not have access to social welfare benefits in those countries.

**Just over half of the 12 countries** (CH, EL, LU, NL, PL, RO and SK) **offer access to the labour market to TCNs with an official postponement** but do not offer the same rights to other categories of third-country nationals pending return/removal. The access can be full or restricted, and it is usually granted under certain conditions. It should be noted that other countries such as Finland, Germany, Iceland, Lichtenstein, Malta and Sweden may grant access to the labour market as well to some third country nationals pending return, but in those countries this is not an *additional* right granted to third-country nationals with an official postponement. In Germany, for example, all third-country nationals who cooperate on the return can be granted access to employment after one year, irrespective of whether they have been granted "Duldung" status or not.

**Five study countries** (CH, FI, NL, PL, and SK) provide **additional access to medical assistance** for third-country nationals with an official postponement of their return/removal, while **four countries** (FI, LI, LU, and PL) **grant access to adult**

<sup>53</sup> The "Duldung" status in Germany does in fact not grant *additional rights*. However the official postponement of the return date will in itself lead to better options for enjoying the rights granted to TCNs pending return/removal.



**education** (vocational training, language courses and/or higher education) under certain conditions.

In terms of **family unity and unification**, none of the countries grant additional rights beyond the ones granted to third-country nationals pending (voluntary) return/removal. Two countries (CH and LU) extend the rights granted under the official postponement status to family members. Switzerland grants the option for families to join a third-country national who has been granted temporary admission, although on specific conditions, while Luxembourg extends the right to stay in the territory to the family.

In addition to the abovementioned rights, Slovakia and Switzerland offer integration programmes (social, cultural etc.), and Austria allows those with official postponement the right to obtain a personal ID card.



**Table 5: Overview of the rights attached to an official postponement leading to additional rights beyond those generally granted to third-country nationals pending return/removal (group 1)**

	Family unity	Health	Education	Employment	Reception conditions	Other
<b>AT</b>	Family members of the nuclear family of third-country nationals who obtain a "Duldung" can also stay in the territory for the duration. If one member receives a "Duldung" Status the other members of the nuclear family will do so as well.	Access to health care under the social welfare system.	No additional rights	No additional rights	The right to freely choose their place of residence.	Right to obtain ID stating their status (" <i>Karte für Geduldete</i> ").
<b>CH</b>	3 years after obtaining temporary admission, spouses and unmarried children below 18 years can enter Switzerland and join the status of temporary admission if the following conditions are met: living together, existence of adequate housing and non-dependence of the family on social support.	Third-country nationals holding a temporary admission are assigned to obligatory health insurance according to the conditions that apply to asylum seekers.  Cantonal authorities can however delimit the choice of potential insurance.	No additional rights	If wages and the labour conditions are met, temporarily admitted third-country nationals can gain an unrestricted access to the labour market. However, Swiss and EU/EFTA citizens and persons with permanent residence status are given priority.	The right to choose a place of residence within the canton to which they have been assigned. Persons who do not have sufficient financial means have the right to receive social welfare benefits if nobody else can provide for them. They can also apply for emergency care. The amount of social welfare benefits is around 1.200 CHF per person per month.	The federal state supports the social, cultural and professional integration of temporarily admitted third-country nationals with a one-time payment to the cantons of 6.000 CHF per person. However, temporarily admitted third-country nationals are required, when possible, to pay back the costs of return, welfare benefits and possible enforcement.
<b>DE</b>	Spouses and parents and their minor, unmarried children shall be registered and allocated as a group.  A toleration status can be issued in order to preserve family unity.	Same access to healthcare as asylum seekers. <sup>54</sup> This limits medical care to acute needs.	The residence obligation can be departed from if access to primary, higher or professional education makes it necessary.  Right to the issuance of a school diploma after education.	Tolerated third-country nationals may apply for access to employment after staying one year in Germany. The approval by the Federal Work Agency is required.  There are exceptions for tolerated third-country nationals for which an	Third-country nationals pending return are entitled to basic welfare, incl. clothes, housing, food, etc., as well as allowances in cash.  Holders of the toleration status are allowed to stay in private houses. This can depend to a certain extent upon the welfare	Third-country nationals pending return shall be restricted in geographic terms to the territory of the Land concerned. But they may in some cases be permitted to take up residence in another Land.

<sup>54</sup> FRA, Fundamental Rights of migrants in an irregular situation in the European Union, 2011, p. 74.



	Family unity	Health	Education	Employment	Reception conditions	Other
				approval by the Federal Work Agency is not required.	policies of the different districts.	Right to translation return order and postponement into language third-country nationals understand.
<b>EL</b>	No additional rights	No additional rights	No additional rights	Access to the labour market, but only as employees (not as self-employed).	No additional rights	No additional rights
<b>FI</b>	No additional rights	Third-country nationals with municipality residence have full access to healthcare; otherwise there is access to emergency healthcare.	Right to education also for adults	No additional rights	No additional rights	No additional rights
<b>LI</b>	No additional rights	No additional rights	Access to vocational and higher education if this favours the integration and increases the third-country national's aptitude to return.	No additional rights	No additional rights	No additional rights
<b>LU</b>	Family members of third-country nationals who obtained a "reprieve of departure" can also stay in the territory for the duration of the reprieve.	No additional rights	Adults have access to language classes in French, German and Luxembourgish if they agree to pay 5 EUR, which is given to the National Language Institute.  The state also grants practical help for educational purposes, notably with school books, notepads etc.	No additional rights	Allowed to stay in OLAI (asylum) centres.	No additional rights
<b>NL</b>	No additional rights	Full access to health care, except for very specific medical treatments such as In-vitro Fertilisation (IVF) and gender operations.	No additional rights	If the postponement is longer than 6 months, the third-country national has the right to work if the employer applies for a work permit.  The third-country national is not allowed to work more	Third-country nationals have the right to stay in the asylum centres facilitated by the COA.  They receive an "Asylum seeker Allowance" (Regeling Verstrekkingen asielzoekers (RVa)). The amount they	No additional rights



	Family unity	Health	Education	Employment	Reception conditions	Other
				than 24 weeks.	receive depends on their situation.	
<b>PL</b>	No additional rights	Same rights as a foreigner with a residence permit for a fixed period.	Same rights as a foreigner with a residence permit for a fixed period.	A person granted Tolerated Stay is entitled to work in Poland.	Not required to stay in accommodation centres	No additional rights
<b>RO</b>	No additional rights	No additional rights	No additional rights	Full access to the labour market under the same conditions as Romanian nationals.	Third-country nationals are free to choose their residence, but are not provided with housing	No additional rights
<b>SI</b>	No additional rights	No additional rights	No additional rights	No additional rights	Not restricted in movement and not based in the Aliens Centre. The police may determine a specific address where the third-country national shall stay outside the Centre.  Right to an allowance as specified by the Act governing social support allowances (approximately 250€ per month).	No additional rights
<b>SK</b>	No additional rights. Family members of third-country nationals who obtained tolerated residence can also obtain it under certain conditions.	The state pays compulsory public health care.	No additional rights	Third-country nationals can access employment, but they cannot start their own businesses	The State shall provide appropriate accommodation if the third-country nationals cannot provide for it themselves.  Third-country nationals can request State social insurance and assistance. State social insurance includes family allowances, parental allowances and care giver allowances. State social assistance is granted when the third-country nationals do not have incomes reaching the minimum subsistence level. It amounts to 189.83 EUR a month for an adult, 132.42 EUR a month for a jointly considered adult, and 86.65 EUR a month per child.	The Ministry of Interior will organise programmes or activities adapted to the third-country national's situation with a view to reinforcing their possibilities of integration in Slovak society.



### 3.2.2 Reasons leading to an official postponement with additional rights

As Table 6 below shows, while the reasons for postponement in the 12 countries that have official postponement statuses granting additional rights<sup>55</sup> are relatively varied, they can be divided into six main groups:

- Reasons pertaining to the third-country national's **safety and integrity in case of return** to the country of origin, based on humanitarian (often not defined further) and **medical considerations** (including pregnant women) (AT, CH, EL, FI, FR, LI, LU, NL, PL, RO, SI, SK);
- Reasons originating from the fact that return/removal cannot be executed due to **factual or technical reasons not provoked by the** third-country national awaiting return/removal (AT, CH, EL, LI, LU, PL, SI, SK);
- Reasons stemming from a **lack of identity documents** (EL, LU, SI, SK);
- Reasons pertaining to the **presence of a child or minor** (PL, RO, SI);
- Reasons relating to a **pending appeal** (EL);
- Postponement to **enable the presence of the third country national during criminal proceedings** by a prosecution or criminal court, including participation in criminal proceedings as victims of human trafficking or human smuggling (PL).

As can be seen from the table below, there is a general lack of information with respect to the number of persons receiving official postponement for the mentioned reasons. In several cases the respondents have not even been able to give a qualitative assessment of whether the granting of a postponement on a given ground is common or not. Where information is available, the granting of official postponement statuses seems to be rare in most cases.

**Table 6: Reasons leading to an official postponement status**

	Description of reason (adapted from legal text)	Legal basis	Number obtaining postponement <sup>56</sup>
AT	Return/removal of third-country nationals to another state is inadmissible if such action would be in violation of Article 2 or 3 of the European Convention on Human Rights (ECHR), Federal Law Gazette (FLG) No. 210/1958, or Protocol No. 6 or No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty. This would lead to a <u>tolerated stay</u> .	§50 (1) FPG	N/A
	Return/removal of third-country nationals is inadmissible if their life and integrity, as private persons, would be seriously threatened as a consequence of arbitrary violence in the course of an international or national conflict. This would lead to a <u>tolerated stay</u> .	§50 (1) FPG	N/A
	Forcible return of third-country nationals to another state is inadmissible if there are reasonable grounds to assume that their life or freedom would be endangered on account of their race, religion, nationality, membership of a particular social group or political opinion, unless exists an internal refuge and flight alternative exists. This would lead to a <u>tolerated stay</u> .	§50 (2) FPG §11 Asylum Act).	N/A
	The residence of a third-country national is <u>tolerated</u> as long as the Austrian authorities consider that a forcible return to a third	§46a (1) FPG	Less than 10

<sup>55</sup> AT, CH, EL, FR, LI, LU, NL, PL, RO, SI and SK

<sup>56</sup> The numbers have been provided by respondents. N/A indicates that there are no statistics available and that none of the respondents were in position to assess how often the cited reasons leads to an official postponement with additional rights. Statements such as rare, common etc. are assessments of the respondents where no statistics are available, and the respondents felt in a position to give an assessment. Further detail can be found in the country reports



	country cannot be executed due to factual reasons not caused by the third-country national.		
<b>DE</b>	The return of third-country nationals from or to specific countries and of groups of third-country nationals in general can be postponed and the <u>toleration status</u> granted for humanitarian reasons, reasons relating to international law, or to protect German interests for a maximum of 6 months. For a period exceeding 6 months, a residence permit is issued.	Article 60a(1), AufenthG	3.637
	The return of a third-country national is postponed and the <u>toleration status</u> granted if the return is impossible for factual <sup>57</sup> or legal reasons and no residence permit is issued.	Article 60a(2), AufenthG	66.617
	The return of a third-country national is postponed and the <u>toleration status</u> issued for a week if the return has failed, no detention pending deportation has been instructed and the Federal Republic of Germany is legally bound to reaccept the third-country national in question.	Article 60a(2a), AufenthG	0
	The return of a third-country national is postponed and the <u>toleration status</u> granted if his temporary presence is considered necessary for criminal proceedings by prosecution or criminal court or for urgent humanitarian or personal reasons or important public reasons.	Article 60a(2), AufenthG	66.617
	The return of a third-country national is postponed and the <u>toleration status</u> granted in the case of parents or a single custodian of a minor child possessing a residence permit, as well as of other minor children living in the familial community.	Article 60a(2b), AufenthG	22
	The return of a third-country national is postponed and the <u>toleration status</u> granted when spouses or parents and their minor children apply for asylum at the same time or shortly after one another, the return decision of some of them may be postponed to allow for a joint return of the family.	Article 43(3), AsylVfG	N/A
<b>CH</b>	Temporary admission (" <i>Vorläufige Aufnahme</i> ") is granted to TCNs whose return/removal is <u>impossible</u> , <u>not admissible</u> or <u>not reasonable</u> . Return is <u>not admissible</u> when international commitments by Switzerland prevent third-country nationals from being returned. Return is <u>unreasonable</u> when a third-country national is confronted or actually endangered by war, civil conflict, general violence or medical emergency situation upon return to home or origin country. Return is <u>impossible</u> when a third-country national cannot travel or be returned.	Article 83 (1) AuG, Article 44 (2) AsylA	N/A
	The status of temporary admission can also be given to third-country nationals who are rejected asylum according to Article 53 and Article 54 (AsylG).	Article 83 (8) FNA	N/A
<b>EL</b>	A third-country national may not be returned in violation of the principle of non-refoulement i.e. to a country where they will be at risk of a death penalty or of being subjected to torture, inhumane or degrading treatment, or punishment.	Article 24, paragraph 1 of law 3907/2011	701 in 2011 and 904 in the first trimester of 2012
	A third-country national cannot be returned while s/he has appealed her/his return decision and while the process of the appeal is on-going.		
	A third-country national's return/removal is postponed because of poor health (physical or mental).		
	The return is not possible for practical reasons such as lack of relevant transportation means or simply the impossibility to execute the return.	Article 24, paragraph 2 of law 3907/2011	
	The necessary papers cannot be identified and hence the identity of the person cannot be established with certainty.		
<b>FI</b>	Third-country nationals residing in Finland are issued with a temporary residence permit if they cannot be returned to their home country or country of permanent residence for temporary	Aliens Act, Section 51(1)	N/A

<sup>57</sup> Examples of factual reasons impeding return are situations in which the third-country national in question does not reveal his identity or citizenship and the authorities cannot establish them. In this case, the third-country national cannot be returned and his return must in consequence be postponed.



	reasons of health or if they cannot actually be removed from the country.		
	Third-country nationals residing in Finland who are not granted asylum or a residence permit on the basis of subsidiary protection or humanitarian protection because they have committed, or there are reasonable grounds to suspect that they have committed, an act referred to in section 87(2), 88(2) or 88a(2) are issued with a temporary residence permit for a maximum of one year at a time if they cannot be removed from the country because they are under the threat of the death penalty, torture, persecution or other treatment violating human dignity.	Aliens Act, Section 89	N/A
<b>LI</b>	Return is <u>not admissible</u> when international commitments by Liechtenstein hinder third-country nationals from travelling to their home or other third countries.	Article 29 (3), AsyIA	18
	Return can be <u>unreasonable</u> if a third-country national may be affected by a situation of war, civil conflict, general violence or medical emergency upon return to their home or a third country.	Article 29 (4), AsyIA	0
	Return is <u>impossible</u> when a third-country national cannot travel or be returned or sent to a third country.	Article 29 (2), AsyIA	0
<b>LU</b>	If the third-country national justifies the return is <u>impossible</u> for reasons beyond their control, the ministry can reprieve the return for an undetermined period of time. The third-country national can then stay on the territory, yet this reprieve does not amount to the granting of a residence permit.	Article 129 law 28/09/2009	N/A
	A third-country national can benefit from a reprieve in the return order when his/her state of health demands a treatment without which there could be serious consequences, and if such treatment is not accessible in the country of return. This reprieve can last up to six months and can be renewed, but not beyond a total of two years.	Article 130-131) law 28/09/2009)	Circa 70 persons
<b>NL</b>	Removal is <u>unreasonable</u> as long as travel would be irresponsible due to the health situation of the third-country national or a family member. The third-country national can reside legally in the Netherlands for the period of their treatment, or for a maximum of one year.	B14/3.2.2. 3 Vc and Vw. Article 64	N/A
	Third-country nationals have tried to leave the country but such attempts have been fruitless (i.e. the necessary travel documentation cannot be obtained, the country of origin does not cooperate or third-country nationals are considered stateless).	B14/3/2 Vc.	N/A
<b>PL</b>	<u>Tolerated stay</u> is granted under the following conditions: If expulsion would be to a country where the right to life/freedom/personal safety could be under threat. If expulsion would violate the right to family unity or the well-being of a child, if the third-country national marries/is married to a Polish citizen or to a foreigner permanently a resident of Poland, or if there is a threat to the psychological or physical development of a child. If expulsion is unenforceable due to 'reasons beyond the authority executing the decision or beyond the control of the foreigner'. If in the judgement of a Court a person's extradition to a particular country is "inadmissible", or if the Minister of Justice refuses to extradite an individual to a particular country. Such a decision is to be taken with regard to the reasons for refusing an individual's extradition and the interests of Poland.	Article 97.1 and 97.2 of the Act of Granting Protection to Foreigners of 13 June 2003	241
	A third-country national subject to a removal order is granted tolerated stay status if they cannot be removed under Polish law.	Article 89.1, 97.1.1 and 97.1.a, Act of Granting Protection to foreigners	N/A
<b>RO</b>	Respect for family unity (children attending School or spouse legally residing)	Article 92(1)(a)	Rare



		(b) OUG 194/2002	
	Health conditions	Article 92(1)(d) OUG 194/2002	N/A
	Other justified reasons (interpreted broadly by the Office for Immigration)	Article 82(3) OUG 194/2002	Common
	Persons actively participating in criminal proceedings as victims of human trafficking or human smuggling	Article 130 OUG 194/2002	N/A
	National security and public policy or reasons of public interest	Article 69(2) and 103(d) OUG 194/ 2002	N/A
<b>SI</b>	The deportation or return of a third-country national to a country in which his/her life or freedom would be endangered on the basis of race, religion, nationality, membership of a special social group or political conviction, or to a country in which the third-country national would be exposed to torture or to inhumane and humiliating treatment or punishment, shall not be permitted.  If postponement is required by a <i>guardian for special cases</i> (nominated by the State and who acts in favour of a minor protecting his rights).  If a doctor does not recommend the immediate removal from the country due to the third-country national's health conditions. <sup>58</sup>  If a third-country national minor attends primary school in the Republic of Slovenia, postponement shall be granted until the end of the school year.  If a third-country national does not have and is unable to acquire a valid travel document of the country of his nationality.  If the country of the third-country national's nationality or, for stateless persons, of last habitual residence refuses to admit the third-country national.  If deportation is not possible because circumstances preventing return, such as natural or other disasters, occurred in the country of the third-country national's nationality or in the country where the third-country national last resided as a stateless person.  If deportation is not possible because the transportation of the third-country national from the country cannot be executed by land, air or sea.	73/2 ZTuj-2	13  Rare, but exists  Rare, but exists  Rare, but exists  Quite common  1 (Cuba)  Almost never happens  Rare, but exists
<b>SK</b>	If removal is not possible for reasons beyond the control of the third-country national, the return shall be postponed. Personal and medical reasons account for a large number of postponements, particularly pregnancies. The reasons can also be practical, such as lack of documentation or lack of cooperation from the consular authorities.	Article 58 of the Act on Aliens Stay	164

It is important to note that the information above only relates to reasons for postponement which are clearly stated in national legislation and leading to specific postponement status with additional rights. In the remaining countries official postponement/extension of the return deadline without additional rights is possible for

<sup>58</sup> Depending on the circumstances of the case, such a reason might have humanitarian or mere practical implications.



some categories of TCNs in some situations. Those reasons can be found in the country reports of the study countries.<sup>59</sup>

### 3.3 Specific provisions for third-country nationals cooperating on the return (including voluntary return)

In the previous sections, the situations of third-country nationals with an official postponement that grants them additional rights, compared to third-country nationals pending return/removal, were looked into. Another group often granted additional rights are third-country nationals cooperating on voluntary return, be it a *postponed* voluntary return or just the standard time period granted for voluntary return after the order has been issued. This section looks into the *additional* rights/provisions granted to third-country nationals cooperating on voluntary return.

Voluntary return is a priority in all countries and several of them therefore grant additional rights to third-country nationals willing to cooperate on the return process. **Four study countries** (BG, IE, MT and PL) **do not have any specific provisions for third-country nationals who cooperate with the national authorities on their return.** In the remaining study countries, they either grant additional rights while pending voluntary return, and/or require cooperation before granting postponement or a right to legal stay.

In **twenty countries** (AT, BE, CH, CY, CZ, DE, DK, EE, ES, FR, IT, LI, LT, LU, LV, NL, PT, SE, SI and UK), **third-country nationals who cooperate will not be detained, and in eight of those countries** (BE, DE, DK, ES, LI, SE, SI, UK), **they benefit from additional rights.** Additional rights may include financial help under certain conditions (BE, DK, LI, SE, SI, UK), a work permit (DE, SE), participation in internships (DK, SE), reimbursements of costs paid while pending return (CH), and the granting of basic health care (ES).

In **twenty-three countries** (AT, BE, CH, CY, DE, EE, EL, ES, FI, FR, HU, IS, IT, LI, LT, LU, LV, NL, NO, PL, RO, SE and SK), **cooperation on the return process is a prerequisite for obtaining an official postponement of the return in the form of a prolongation of the permission to stay and/or it is a prerequisite for obtaining a right to legal stay.** With a postponement, they are only granted permission to stay while pending return, whereas a legal right to stay will result in the same rights as other third-country nationals with a temporary residence permit in that country.

**Table 7: Specific provisions for third-country nationals who cooperate with the national authorities on voluntary return<sup>60</sup>**

	Additional rights while pending return/removal	Access to postponement / legalisation
AT	TCNs who cooperate are not detained and they are entitled to basic social support.	Preconditions for the granting of a <b>toleration status</b> are cooperation and the TCN not provoking the postponement.

<sup>59</sup> A full overview of protection status' granted (usually in cases where a return order is not granted prior to the protection status) can be found in the European Migration Network Study: "The different national practices concerning granting of non-EU harmonised protection statuses".

<sup>60</sup> Empty cells mean that in the country there are no specific provisions for third-country nationals who cooperate on a voluntary return.



<b>BE</b>	TCNs who cooperate are not detained and can have access to <b>material and financial help</b> under certain conditions.	TCNs who cooperate on the return (including both failed asylum seekers and other illegally staying TCNs) can obtain an official <b>postponement</b> of their return date.
<b>BG</b>		
<b>CH</b>	Asylum seekers must declare their assets and liabilities which can be used to cover emerging expenses in Switzerland. If the failed asylum seeker cooperates in the return and leaves the country within seven months after applying for asylum, those <b>costs can be reimbursed</b> . TCNs who do not cooperate may be detained.	The TCNs who cooperate are those most often granted <b>temporary admission</b> .
<b>CY</b>	While the law foresees that detention is an exceptional measure and should occur only, amongst other reasons, if the TCN does not cooperate during the preparation of the removal/return, it is actually common practice to detain TCNs pending return/removal.	Those who apply for voluntary return and ask for the prolongation of their pending return date are issued a written document that certifies that their <b>return period has been extended</b> .
<b>CZ</b>	The decision to hold a TCN in detention following the administrative expulsion procedure is a discretionary decision taken by the Foreigners Police, based on considerations such as: collaboration, indications that the TCN will not return voluntarily or that he/she is a threat to public security.	
<b>DE</b>	TCNs who cooperate are not detained and are eligible for return assistance (incl. when granted toleration status).  Tolerated TCNs may not be granted a <b>work permit</b> if they obstruct the return process.	Toleration status is granted whenever the return cannot be organised, regardless of cooperation. A <b>residence permit</b> , however, is issued under certain conditions, and only if the TCN has cooperated on the return.
<b>DK</b>	The general principle is that those who cooperate live under the best conditions. They might receive <b>pocket money</b> , they might participate in <b>internships</b> at the centre, and they are more likely to stay in open accommodation centres or private housing.	
<b>EE</b>	TCNs preparing for their (officially extended) voluntary return have the right to reside anywhere in Estonia. Other TCNs are detained.	The voluntary return date can be <b>extended</b>
<b>EL</b>		The <b>formal postponement status</b> creates a temporary right to reside in Greece. The holder of this status must remain at the disposal of the authorities and cooperate with them in order to facilitate the execution of his/her pending removal. If they fail to cooperate they lose this status and their expulsion decision becomes immediately executable (i.e. the postponement is automatically revoked).
<b>ES</b>	Cooperating third-country nationals are not detained, they are also granted <b>basic health care</b> .	Cooperation with the authorities is taken into account in applications for <b>temporary residence permit</b> by third-country nationals pending return or removal.
<b>FI</b>		The legislation does not specifically mention that lack of cooperation on the return can lead to the <b>temporary residence permit</b> not being issued, but some of the NGOs have seen this argument used in a few cases.
<b>FR</b>	Cooperating third-country nationals are not detained.	Third-country nationals who cooperate can request an <b>extension</b> of the timeframe for returning.
<b>HU</b>		Only those agreeing to depart voluntarily may have the date for departure <b>extended</b> by 30 days (or the end of a semester if a child is



		enrolled in a school).
<b>IE</b>		
<b>IS</b>		Third-country nationals who cannot yet leave the territory may obtain a <b>provisional temporary residence permit</b> until the departure is deemed possible and provided that they cooperate with the Icelandic authorities (often, however, they also receive the permit even if they do not cooperate).
<b>IT</b>	During the period pending <u>voluntary</u> return, the police commissioner may adopt one of the following measures instead of detention: <ul style="list-style-type: none"> <li>- keep the third-country national's passport and only return it at the moment of departure from the country;</li> <li>- require that the third-country national resides in a specific place where s/he can be easily traced;</li> <li>- require that the third-country national presents her/himself at a local police station on specific days and hours.</li> </ul>	Voluntary return may be <b>extended</b> after due consideration on a case by case basis of the third-country national's personal and family circumstances, in particular if children are attending school or other family and social ties with the country.
<b>LI</b>	Uncooperative third-country nationals face more restrictions and limitations. They can be put in detention for up to six months. They are not granted <b>social welfare benefits</b> since they are cared for in the detention facilities.	<b>Temporary admission</b> is only granted if third-country nationals cooperate.
<b>LT</b>	The Measure Alternative to Detention is decided by the court, and the exact content of the measure differs according to individual cases. The condition under which it granted are that the identity of the third-country national is established, the third-country national does not constitute a threat to national security and cooperates on the return process.	After 1 year in official postponement, third-country nationals can be granted a <b>temporary residence permit</b> , depending on, among else, their cooperation in the return process.
<b>LU</b>	Detention is only used when removal is likely to be executed in the near future and the third-country national refuses to cooperate or is considered a threat to public order.	Preconditions for the granting of a <b>reprieve in departure</b> are cooperation and the postponement not being provoked by the third-country national.
<b>LV</b>	Third-country nationals to be returned or removed in principle have the same rights. However, those awaiting forced removal will normally be detained, while those awaiting voluntary return will not.	<b>Temporary suspension</b> of the implementation of a return or removal order can be issued for technical reasons, as long as the reasons for the postponement are outside the control of the third-country national.
<b>MT</b>		
<b>NL</b>	Third-country nationals either live in Freedom Limiting Locations (if they cooperate on their return) or in Immigration Detention (when hindering departure).	There are several possibilities to obtain a <b>temporary residence permit</b> based on situations in which return is not possible despite the third-country national cooperating on the return process.
<b>NO</b>		<b>Residence permit</b> may be granted to failed asylum seekers if they return has been pending for more than 3 years and is unlikely to be enforced, on the condition that their identity is established and they have cooperated.
<b>PL</b>		<b>Tolerated Stay</b> status can be granted to failed asylum seekers, irregular migrants with a removal or return order, as well as foreign national prisoners if the return/removal is beyond the control of the authorities or the individual concerned.
<b>PT</b>	Third-country nationals are less likely to be detained if they cooperate on the return procedure.	
<b>RO</b>		Third-country nationals can be granted a <b>toleration status</b> if they cooperate but can still not be returned.



<b>SE</b>	Third-country nationals considered to be uncooperative on their return do not have access to <b>training or courses offered to asylum seekers</b> . They also lose the <b>right to work</b> while return is pending and their <b>monthly allowances</b> are reduced.	When a return order expires after four years, a <b>new application for asylum</b> may be lodged. For the authorities to consider a new decision and grant a right to stay on the basis of the new application, the third-country national must have shown efforts to do everything within his/her power to make the return possible.
<b>SI</b>	Third-country nationals with a permission to stay receive an <b>allowance</b> of approximately 250€ per month if they cooperate on the return procedure. They will not be detained.	
<b>SK</b>		<b>Postponement</b> must be granted for humanitarian as well as practical reasons, but only if the impossibility of the return is not due to the uncooperativeness of the third-country national.
<b>UK</b>	Third-country national without a child generally have <b>support (accommodation and subsistence allowances)</b> withdrawn once their claim is rejected, unless voluntary departure is arranged.	

### 3.4 Specific provisions for vulnerable third-country nationals pending return/removal

Table 8, below, provides some key information about special provisions in the study countries in favour of vulnerable<sup>61</sup> third-country nationals pending return/removal. As earlier chapters of this report have emphasised, it is however important to note that this table only refers to third-country nationals who have received a return/removal order, and therefore does not include third-country nationals in an irregular situation whose return/removal has been cancelled on the grounds of specific vulnerabilities (e.g. the granting of a temporary residence permit for humanitarian reasons, such as illness).

All of the study countries foresee special provisions for vulnerable third-country nationals. These can again relate to issues of family unity, healthcare, education, employment, and reception conditions.

In terms of **family unity**, eight countries (AT, CZ, DE, LV, NL, PT, RO, SI) mention explicitly that third-country nationals pending return/removal who are in detention or in asylum centres may be accompanied by a minor child of whom they are the custodian, usually on the condition that a family friendly accommodation is available in the detention or asylum centre. Thirteen countries (BE, CY, ES, FI, IE, LT, LU, LV, MT, NO, PT, RO and SK) mention explicitly that minors cannot be detained, while in five countries (BE, BG, DE, LT and NL) they can only be placed in detention in exceptional circumstances.

In terms of **health**, the majority of the study countries (AT, BG, CZ, DK, EE, DE, EL, ES, FI, FR, HU, IT, LI, LV, LU, NL, NO, PL, PT, SE and UK) foresee special services (dedicated medical treatments and facilities, and/or full medical insurance coverage) for third-country nationals with a serious illness, in addition to minors and pregnant women.

<sup>61</sup> As defined by the Return Directive (2008/115/EC), Article 3, section 9, vulnerable persons includes minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subject to torture, rape or other forms of psychological, physical or sexual violence.



In the majority of the study countries where **education** is mandatory until the age of 16 (or in some cases 17 or 18), minors generally have a right and access to primary and secondary education. In practice, however, they may face some obstacles in terms of exercising this right in some countries, especially if they are in detention. This will be elaborated and exemplified further in section 3.6.

In terms of **employment**, only three countries mention special legal provisions for vulnerable third country nationals. In Finland, victims of trafficking who have been issued a temporary residence permit can receive an unrestricted right to employment. In France, third-country nationals whose return is postponed for medical reasons may be allowed to work. They must however request permission from the authorities who will decide on a case-by-case basis. In Luxemburg, third-country nationals who obtain a postponement due to medical reasons may be allowed to work under certain conditions.

In terms of **reception conditions**, the large majority of the study countries have special provisions for minors in terms of accommodation and often also benefits. Special treatment relating to issues of age and health (including third-country nationals with disabilities) is mentioned in Ireland, Switzerland and Malta, while special provisions for victims of trafficking are mentioned in France and Norway.

**Table 8: Specific provisions for vulnerable third-country nationals pending return/removal<sup>62</sup>**

	Family unity	Health care	Education	Labour market	Reception conditions	Other
<b>AT</b>	A detained third-country national pending deportation may be accompanied by a minor child of whom they are the custodian, if a family and child friendly accommodation in the detention centre is guaranteed.	Seriously ill third-country nationals pending deportation whose medical treatment cannot be secured in the detention centre shall be taken to appropriate medical facilities and their time there will be considered as time spent in detention.	The Schooling Obligation Act obliges all people living in Austria to go to school for 9 years.		<p>Entitlements through the Basic Care Agreement are wider for minors than for adults, although this is not further specified in the legislation.</p> <p>During removal arrest, unaccompanied minors must be held separately from adult detainees, or in case their family is also detained they will be detained together.</p>	<p>Right of unaccompanied minors above 16 to have a <b>legal adviser</b>.</p> <p>Unaccompanied minors under 16 have the right to a legal adviser who is also their legal representative.</p>
<b>BE</b>	Families (with minor children) pending return or removal are in principle not detained. They are allowed to stay in private accommodation, or if this is not available, in family units.	Attention is paid to the situation of any pregnant woman in detention, whereby a report on the foreseen delivery of the pregnant woman, including the certificate of the doctor, will be provided to the Director-General of the centre.	<p>Education is mandatory for all children on Belgian territory when they are between six to eighteen years old.</p> <p>Children kept in the detention centres effectively have no access to education. Some members of staff sometimes try to organise educational activities but this does not compare with a formal school.</p>		<p>When enrolled in schools, children are registered in a system for social information (the SIS) and obtain state social security. After the return order has been issued, the insurance will be active until the end of the school year or until the departure.</p> <p>Any family with minor children whose financial state does not allow them to live in decent conditions must be cared for by the state until they can be returned. Therefore, those who do not have a home have a right to emergency accommodation granted by the CPAS.</p> <p>Third-country nationals, whose vulnerable situation has led to exploitation by a person who used them to beg or work illegally and who was condemned for this felony, can subsequently have access to accommodation granted by the CPAS.</p>	

<sup>62</sup> Empty cells indicates that in that area (family unity, health care etc.) and that country, no specific provisions exist for vulnerable third-country nationals pending return/removal.



	Family unity	Health care	Education	Labour market	Reception conditions	Other
					Families with children are in principle not placed in detention centres unless they have appropriate infrastructures. There is some disagreement with respect to whether children are detained.	
<b>BG</b>	Needs of vulnerable groups are a ground for consideration in deciding on the extension of the voluntary departure period.	<p>One of the grounds for placing a detainee in solitary confinement could be 'in order to preserve his/her life and health'; in such cases they might be placed in a 'medical stationary' at the detention centre.</p> <p>All children up to 16 have a right to medical assistance outside the scope of the obligatory health insurance.</p>	While Article 53 of the Constitution stipulates that 'everyone' has a right to free education in primary and secondary state and municipal schools, § 4 of the Law on Public Education provides that the right to free school education belongs only to foreign nationals who are holders of a permanent residence permit or are children of EU and EEA nationals residing in Bulgaria, or who have been admitted in a Bulgarian school in accordance with special international agreements.		<p>Children might be 'coercively accommodated' in exceptional circumstances for a (renewable) period of up to three months. In such cases children are placed in separate premises that provide conditions that are appropriate for their age and needs.</p> <p>Minors shall usually not be detained pending deportation. However, TCNs under 16 may be detained pending deportation when accommodation and care appropriate to their age and maturity is guaranteed.</p> <p>Minors up to 16 years of age will be granted more lenient measures ("Gelindere Mittel") instead of detention pending deportation.</p>	
<b>CH</b>			No legal basis stating the right to education for TCNs pending return. However, the former Federal Office for Aliens Questions advised that the right to compulsory education (excluding vocational training) shall be applicable to all children regardless of their status.		<p>In 15 cantons, particularly vulnerable groups of TCNs pending return benefit from higher payments of emergency care. These include unaccompanied minors, old, sick or other vulnerable persons. 17 cantons also specifically consider families.</p> <p>In some cantons, such as Freiburg and Zürich, vulnerable people receive social care.</p> <p>In the case of minors between 15 and 18 the aggregated time in detention can be</p>	



	Family unity	Health care	Education	Labour market	Reception conditions	Other
					extended only by six months.	
<b>CY</b>	Children cannot be detained in the available detention facilities, which leads to cases where one of the parents is released from detention so that childcare and family unity are provided.		Minors have the right to education.			Special attention is paid to the needs of vulnerable people but the legislation does not further specify the types of services that can be provided.
<b>CZ</b>	Migrant minors accompanied by parents or other legal guardians are placed in facilities for the detention of foreign nationals together with their parents if a detention order was issued to them. The placement of these minors in detention is not limited by age.	Emergency healthcare is only provided, explicitly, in cases of pregnancy and childbirth.  Free access beyond emergency care for formally tolerated minors.	Minors are enrolled in mandatory elementary education.			
<b>DE</b>	Should several members of one family be detained pending deportation, they must be detained separately from other detainees pending deportation and an adequate level of privacy must be ensured. The obligation to reside in a specific area can be departed from in order to respect family unity.	Pregnant women and women after childbirth are entitled to all necessary health care in relation to their situation.	Access to compulsory education differs from state to state. Most states require parents to present IDs or an address when enrolling their children. They also usually ask for presentation of a birth certificate and a medical report. Exceptions are Hamburg and North-Rhine Westphalia.		Benefits granted according to the Asylum Seeker Benefits Act can be increased when minors are involved.  Unaccompanied minors enjoy better conditions than regular refugees, since they are placed under the care of youth protection services.  Minors or families with minors are only to be detained pending deportation in exceptional cases and only as long as the minor's well-being is guaranteed.  The federal youth protection valid for German citizens also applies to tolerated minors (SGB VIII, Article 6(2)).	



	Family unity	Health care	Education	Labour market	Reception conditions	Other
<b>DK</b>	Unaccompanied minors who cannot be returned can obtain a temporary residence permit that expires when they turn 18.	There is an accommodation centre (Kongelunden) that specialises in the care of seriously ill TCNs.	Children of school age shall participate in separately arranged tuition or in tuition measuring up to the general requirements under the separately arranged tuition.		There is an accommodation centre specialised in the care of unaccompanied minors.	Unless exceptional reasons make it inappropriate, an unaccompanied minor will have a representative appointed for safeguarding his/her interests.
<b>EE</b>		<p>According to the Health Insurance Act, children (as well as unaccompanied minors) are guaranteed health insurance (full coverage).</p> <p>Ill persons, who are to be expelled, must be given treatment in the Central Hospital of Prisons if their state of health prevents their detention or expulsion.</p>	Children must attend school until they acquire basic education or attain the age of 17 years.			
<b>EL</b>		Minors, pregnant women and people suffering from contagious diseases or diseases that cannot be treated in their countries of origin have full access to public health care.	Minors have the right and obligation to attend school.			
<b>ES</b>		Right to free access to full health care treatment for minors and pregnant women during pregnancy, childbirth and for postpartum assistance.	Education is compulsory until the age of 18.		<p>Undocumented minors are placed under the care of child protection services of the responsible community.</p> <p>Minors cannot be detained.</p>	
<b>FI</b>		Minors are entitled to the same health care as permanent residents. The accommodation centre	Children have the right to education in the public schools of Finland. They will normally start by	Victims of trafficking who have been issued a temporary	Unaccompanied minors are placed in their own units and provided with full support.	TCNs in need of urgent treatment due to torture may attend the



	Family unity	Health care	Education	Labour market	Reception conditions	Other
		<p>pays the bills and can assign somebody to assist the child in booking appointments with the doctor etc.</p> <p>TCNs in need of urgent treatment due to torture have access to the special Rehabilitation Centre for Torture Victims in Helsinki or in Oulu.</p>	<p>attending school at the centre, until they are considered able to attend normal classes. It is the schools that decide if they want to accept a TCN, and not all schools do.</p>	<p>residence permit can receive an unrestricted right to employment.</p>		<p>special Rehabilitation Centre for Torture Victims in Helsinki or in Oulu.</p>
<b>FR</b>		<p>Minors have access to free medical help beyond emergency healthcare.</p> <p>The Aide Médicale de l'Etat (AME) covers 100% of the costs related to healthcare for pregnant women.</p>	<p>Education is mandatory for all 6-16 year old children on the French territory.</p> <p>Children who accompany their parents in detention centres, have no effective access to education.</p>	<p>TCNs whose return is postponed for medical reasons may be allowed to work. They must however request permission from the authorities which will decide on a case-by-case basis.</p>	<p>Victims of human trafficking are welcomed in specialised centres that provide them with accommodation and support.</p> <p>Those who cannot be removed due to their medical conditions are kept in home confinement.</p> <p>The provision of accommodation to victims of human trafficking depends on the cooperation of the TCN in the investigation and trial against those responsible for the trafficking.</p>	
<b>HU</b>		<p>Children receive any medical treatment they require free of charge, including vaccinations and paediatric care.</p>	<p>Minors are granted access to the basic education system until the age of 16, subject to the length of their stay.</p>		<p>Children tend to be accommodated in government run childcare facilities.</p> <p>Minors with family in detention are able to engage in leisure activities, including play and recreational activities.</p>	
<b>IE</b>			<p>Schools are required to accept prospective students except under very limited circumstances, not related to the citizenship of the child.</p>		<p>Children are not detained.</p> <p>If necessary children are placed in specialised care facilities.</p> <p>Disabled persons/persons with special needs are assigned to centres with appropriate facilities.</p>	
<b>IS</b>			<p>Children have an</p>			



	Family unity	Health care	Education	Labour market	Reception conditions	Other
			obligation to attend school.			
<b>IT</b>	The postponed return of the minor can lead to the postponed return of the parent. The husband of a woman who is pregnant or has just given birth receives postponement of the return/removal until the child is six months of age. Family unity can be guaranteed for people receiving treatment (i.e. an ill person receiving treatment can be accompanied by a relative).	Seriously ill TCNs have access to the treatment needed for their situation if their return has been postponed for medical reasons or due to pregnancy.	Minors enrol in public schools.		Unaccompanied minors are put in special hostels. 7,797 unaccompanied minors were reported in 2008 to the Committee for Foreign Minors. 53% of these (4,176) were hosted in Hospitality Centres.	
<b>LI</b>	Families pending return who are in detention have to be given a private room which assures an appropriate atmosphere and privacy.	When setting the day of return or during prolongation of the return date, emergency care and any necessary treatments must be provided unconditionally.	For minors, depending on the length of detention, access to education has to be ensured.  Minors must start school at the latest 30 days after their arrival in Liechtenstein.		In terms of social welfare allowances, families with several children receive coupons amounting to 10 CHF for the first child, 7 CHF for the second child and 4 CHF for each additional child.  Unaccompanied minors are assigned a legal curator to represent their interest after having received a removal order.  Children and minors below the age of 15 cannot be kept in detention.  Minors kept in detention have to be placed in facilities which offer appropriate opportunities for leisure activities according to their age.	
<b>LT</b>			All children, including unaccompanied minors, have the right to		Vulnerable persons and families with children may be detained only in extreme cases, taking into consideration	An unaccompanied minor with a



	Family unity	Health care	Education	Labour market	Reception conditions	Other
			<p>education in a nearby school until the age of 16.</p> <p>In practice, it is possible that TCN's residing outside the FRC do not effectively make use of this right provided to their children.</p>		<p>the best interests of the child and vulnerable persons.</p> <p>Unaccompanied minors are by law not detained in the Foreigners Registration Centre. They are taken into temporary guardianship / custody for the period of the child's stay in Lithuania.</p> <p>Children have the right for a meal four times a day.</p>	<p>measure alternative to detention is supervised by a relevant social agency.</p>
<b>LU</b>		<p>TCNs who obtained a postponement for medical reasons have access to additional healthcare necessary to improve their medical situation.</p>	<p>Every child in Luxembourg have right to education from they are 4 years old on until 16.</p> <p>Minors between 16 and 18 who are not under the obligation of education can obtain a professional formation.</p>	<p>TCNs who obtain a postponement due to medical reasons may be allowed to work under certain conditions.</p>	<p>Although the law states that minor can be detained, practice shows that they never are.</p> <p>Unaccompanied minors can be taken to public centres for minors.</p>	
<b>LV</b>	<p>Detained foreign minors shall be accommodated together with their parents.</p> <p>If a detained foreigner has a child who has not been detained, on the basis of a request from the detained foreigner, the child may be accommodated in the accommodation centre together with the detained foreigner.</p>	<p>The medical treatment of minors is free of charge.</p> <p>Special nutritional norms are provided for persons with certain diseases (acute tuberculosis, AIDS etc.)</p>	<p>Minor TCNs are entitled to basic education during the time period specified for (postponed) voluntary return, the time period for which the expulsion is suspended, as well as during their detention.</p>		<p>Unaccompanied minors who do not have a place of residence in Latvia, will continue to stay in a childcare facility.</p> <p>Special nutritional norms are provided in Regulation nr. 434 for children.</p>	<p>During the return procedure the personal and material interests of an unaccompanied minor shall be represented by the Orphans' Court, a guardian appointed by the court or the head of the child care facility.</p>
<b>MT</b>			<p>Children under 16 can</p>		<p>The authorities shall ensure that</p>	



	Family unity	Health care	Education	Labour market	Reception conditions	Other
			attend school.		adequate standards of living are provided for TCNs with special needs.  Unaccompanied minors are placed under the care of the Minister and are accommodated in shelters dedicated specifically to them, while pregnant and lactating women are accommodated in open centres housing families or women.  There are specialised open centres for single women, families and unaccompanied minors. There are no specific facilities for people with disabilities or psychological issues.	
<b>NL</b>	The child has the right to live with the parents in the asylum centre.	In case of postponed return for medical reasons, the TCN receives treatment in the Netherlands.  Since the introduction of the new legislation for Youth Care, children have full access to health care.	All children have the right to education irrespective of their status. They can receive an allowance of 316 euro for schoolbooks.		The government can only detain children as a last resort and the detention has to be as short as possible.	
<b>NO</b>		Children under the age of 18 have a right to (almost) full health care (except patient transportation and a personal doctor).  Pregnant women have a right to controls and care during the pregnancy or alternatively assistance to terminate the pregnancy.	Children have a right to attend school while residing in Norway.		Unaccompanied minors under the age of 15 reside in special types of accommodation administered by the child welfare authority (Barnvernsmyndigheten).  Some of the regular reception centres have special so-called "strengthened sections" for victims of human trafficking or persons in need of psychiatric care. These special sections are manned 24/7.  The offer to stay in special care sections only applies to persons who are intending to leave the country through their own means but who need care until they can travel, or are cooperating with	



	Family unity	Health care	Education	Labour market	Reception conditions	Other
					the authorities on voluntary return.	
<b>PL</b>	An individual can be granted Tolerated Stay if his or her expulsion would violate the child's right determined in the Convention on child's Rights.	Children of undocumented migrants may receive medical and dental prophylactics when attending state school in Poland.  Public authorities shall 'ensure special healthcare to children, pregnant women, handicapped people and persons of advanced age'.	Everyone shall have the right to education and education until the age of 18 years shall be compulsory.		All meals provided to a minor child of a foreigner in the centre shall be suitable for his/her age.  A foreigner shall be entitled to a 'cash equivalent' in return for 'provision of nutrition to a child under the age of 6 or a child who completed primary, lower secondary or upper secondary school'.	
<b>PT</b>	The authority responsible for the granting of housing in kind shall ensure that minor children of applicants or applicants who are minors are accommodated with their parents or with an adult member of the family responsible for them whether by law or custom.	Irregular minors are registered for the purpose of ensuring their access to health services.	Irregular minors are registered for the purpose of ensuring their access to pre-schooling and primary education.		Unaccompanied children below the age of 16 are not detained.  Unaccompanied minors are systematically served with a protection measure by the Court for Minors determining their accommodation and social support at the Portuguese Refugee Council (CPR)'s Reception Centre of Bobadela. Such protection measures are usually enforced until the minor turns 18.  Mothers and their children are detained in very rare cases and if so just in specific detention facilities.	Victims of human trafficking enjoy special rights.
<b>RO</b>	Family unity is respected and taken into account at the request of the foreigners, who must ask to be housed together with their minor children.	NGOs actively participate in the transport and access of vulnerable groups to complex medical treatment, not available on site.	Minor foreigners who live in Romania have access to legal mandatory education under the same conditions as Romanian nationals.		Minors are not subject to Public Custody.	
<b>SE</b>		Children under the age of 18 are entitled to the same health care as any	Children have a right (but not an obligation) to attend school on the		Since 1 July 2006, the municipalities have been responsible for the accommodation of unaccompanied	



	Family unity	Health care	Education	Labour market	Reception conditions	Other
		other resident in Sweden.	same terms and conditions as other children in the Swedish municipality where they live.		minors.  Children may be placed in detention, if it is considered insufficient to simply place the child under supervision.	
<b>SI</b>	A TCN minor and a family with a TCN minor pending return/removal shall be accommodated, in agreement with a guardian for special cases, in adequate accommodation facilities for minors. If this is not possible they shall be accommodated at the Aliens Centre.		Minor school children pending return/removal have the right to basic education.		Restriction of movement shall be provided separately for severely ill and other vulnerable persons with a view to ensuring an appropriate degree of privacy.  TCNs pending return/removal, for which accommodation in the Centre is not appropriate, shall be accommodated in a social security facility or provided with other appropriate institutional care, with the costs borne by the Centre.	
<b>SK</b>			Children in Slovakia have the right to free education in state primary and secondary schools.  In the detention centres, minors below 15 have the right to education if they are to be detained for more than 180 days.		Unaccompanied minors cannot be placed in detention centres.  In the case of families with children and vulnerable persons, the period of six months in detention cannot be extended.	
<b>UK</b>		There are specific provisions that afford some vulnerable groups access to secondary care, such as people who have been trafficked and children.  Unaccompanied children (failed asylum seekers or those who are victims of trafficking) are not	Additional provisions in relation to children with disabilities to ensure that they have proper access to education.		Children will always be offered care where that is required.  Central and local authorities have a statutory duty to take unaccompanied minors into care pending removal.  Failed asylum-seeking families with children will continue to receive UK Border Agency assistance with accommodation and financial support, as long as they continue to co-operate.	



	Family unity	Health care	Education	Labour market	Reception conditions	Other
		charged for hospital care.			<p>Those not requiring accommodation (who stay with friends/family), may apply for subsistence from the Border Agency's National Asylum Support Service. This subsistence covers support for accommodation and food and other living expenses.</p> <p>The Border Agency can withdraw support from families with children under 18 whose claim and appeals have been rejected and who are thought not to be co-operating with efforts to remove them. It also prevents local authorities from providing social support (financial and accommodation) for whole families although they still have the power to provide such support for children under 18.</p>	



### 3.5 Access to legalisation

This section reviews the channels and conditions through which third-country nationals facing postponed return/removal may eventually enter a process of regularisation. Only situations resulting directly from a postponed return/removal order are described, therefore this section does not include regularisation resulting from a change in status; meaning, for example, a successful appeal procedure and more general protection statuses given to any illegally staying third-country national, often prior to the issuing of a return/removal order.

As Table 9 below outlines, **16 study countries** (BE, BG, CY, EE, EL, ES, FR, HU, IS, IT, LV, MT, PT, RO, SE and SK) **do not explicitly foresee any channels and conditions through which third-country nationals whose return/removal order has been postponed may enter a regularisation procedure.**

Among those study countries that do have a specific procedure in place for legalisation of third-country nationals pending (postponed) return/removal, several commonalities can be identified.

**Some countries foresee a procedure directed specifically at failed asylum seekers.** For example in Switzerland, failed asylum seekers who have stayed at least five years in the country, whose place of residence has always been known to the cantonal authorities and who are successfully integrated may apply for a residence permit. Similarly in Denmark, if a failed asylum seeker cooperates fully with the authorities on his/her return, a residence permit may be issued, upon application, if return has not proved possible for a period of at least 18 months, and if the third-country national has assisted in the return efforts for 18 consecutive months. In Lichtenstein, failed asylum seekers who have received a removal order, have been staying at least five years in the country, have always had a place of residence known to the authorities, and who are successfully integrated, may be granted a residence permit. In Norway, a residence permit may be granted to failed asylum seekers if it has been three years since the case was opened without the implementation of the rejection, and if it is unlikely that the return decision will be enforced; if there are no doubts about the identity of the applicant; and if the applicant has contributed to making his/her return possible, including by helping to obtain travel documents issued by their countries of origin.

**Another frequent condition for legalisation among the study countries relates to the duration of the postponed return/removal procedure.** For example in Austria, third-country nationals who have held a toleration status for at least one year can obtain a residence permit if the reasons impeding their return/removal are still valid. In Switzerland, third-country nationals who have been granted temporary admission and who have stayed for five years in Switzerland can apply for a residence permit. In Germany, a residence permit may be issued if removal has been suspended for 18 months due to reasons beyond the control of the third-country national. In Iceland, a residence permit may be granted to a third-country national who has held a provisional temporary residence permit (due to postponement of a return/removal order) for at least two years. Similarly, in Lichtenstein, a residence permit may be granted to TCNs who are temporarily admitted in Liechtenstein if they have stayed in the country for a minimum of five years, if their place of residence has always been known to the authorities, and if due to advanced integration a severe personal hardship may occur. In Lithuania, the one-year temporary residence permit (due to postponement of a return/removal order) can be turned into a permanent residence



permit if the third-country national has lived in Lithuania for five consecutive years, has passed the “test of the constitution” and a language test, can prove that he/she has sufficient means, and that he/she has a place of residence. In Luxembourg, a “reprieve in departure” (postponement) can be renewed twice, after which the third-country national may obtain a temporary residence permit. In the Netherlands, in case of fruitless attempts to be removed, a third-country national may be eligible for a “not guilty permit” if he/she has cooperated on the return procedure and met some other conditions (please see the country report for further details). In Poland, a third-country national with a tolerated stay status can in principle be granted a permanent residence permit after 10 years of continuous residence in Poland. Finally, the UK may grant discretionary leave to stay if return/removal contravenes the rights of a third-country national under the European Convention on Human Rights (ECHR). Other factors that apply include: age, strength of connections to the UK, domestic circumstances, previous criminal record and any compassionate circumstances. In Finland, a third-country national issued a temporary residence permit because he/she cannot be removed from the country, and a victim of trafficking in human beings issued a temporary residence permit, are issued a permanent residence permit after a continuous residence of two years in the country if the circumstances on the basis of which they were issued with the temporary permit remain valid. In the Czech Republic, a person who is unable to leave the country for objective reasons (granted a temporary tolerated visa of over 90 days) may request to be given a long-term tolerated residence permit, through which regularisation of his stay is possible. The tolerated status can then, in turn, lead to regularisation in the form of a general long term residence permit (after three years) or permanent residence (after five years).

Other conditions to enter a legalisation procedure explicitly mentioned by some of the study countries include situations of “severe personal hardship” (Switzerland) and various issues relating to minors (Germany, the Netherlands).

**Table 9: Access to legalisation specifically applied for those who cannot be returned or removed**

	Criteria	Legal basis	Numbers receiving
<b>AT</b>	TCNs holding a toleration status for at least one year can obtain a residence permit for particular protection (“besonderer Schutz”), if the reasons impeding their return or deportation are still valid. However, this regulation is not valid for TCNs who present a threat to the community or the security of Austria or who have been convicted of a crime by a domestic court or – under certain conditions – by a foreign court. TCNs holding a residence permit for particular protection for at least one year can obtain a fixed-term settlement permit with unlimited labour market access if they fulfil the general requirements and demonstrate language skills. TCNs holding a residence permit for particular protection for at least three years can obtain a fixed-term settlement permit with unlimited labour market access under the above criteria even if the reasons impeding their return or deportation are not valid any more.	§69a (1), 41a (3) NAG	N/A
	Authorities must grant a residence permit when the return or deportation instructed according to §10, AsylG, and §52 and § 61 FPG, is permanently inadmissible. TCNs pending return can obtain a fixed-term settlement permit with limited labour market access or fixed-term settlement permit with unlimited labour market access respectively if necessary to uphold their private and family life according to Article 8 ECHR and no obstacle according to §11(1) Sentences 1 (enforceable return decision according to §52 FPG, return ban according to §54 FPG or residence ban according to § 63 or 67 FPG), 2 (return decision from another EU/Schengen member state) or 4 (residence marriage, relation or adoption), NAG, is in order.	§§43(3), 41a(9) NAG	N/A
	TCNs pending return can obtain a fixed-term settlement permit with	§§43(4),	N/A



	Criteria	Legal basis	Numbers receiving
	limited labour market access or fixed-term settlement permit with unlimited labour market access respectively in cases particularly worthy of consideration even if an obstacle according to §11(1) Sentences 3 (enforceable return decision) and 5 (overstay) is valid, when the TCN is verifiably present in Austria since May 1st, 2004, and at least half of this period has been in a legal situation.	41a (10) NAG	
<b>BE</b>	None		
<b>BG</b>	None		
<b>CH</b>	TCNs who have been granted temporary admission and who have been staying for five years in Switzerland can apply for residence permit.	Article 84 (5) FNA	1.866
	Failed asylum seekers having received a removal order, who have been staying at least five years in the country, whose place of residence has always been known to the cantonal authorities and who are successfully integrated can be granted a residence permit.	Article 14 (2) AsylA	202
<b>CY</b>	None		
<b>CZ</b>	A long-term residence permit shall be granted by the Police at the request of a TCN who has been granted a visa for over 90 days under Section 33, when the stay of such TCN has exceeded one year and if the grounds on which such a visa was still exist.	Article 43 par. 1 of the Foreign Nationals Act	N/A
<b>DE</b>	A foreigner whose deportation has been suspended may be granted a residence permit for the purpose of taking up employment commensurate with his or her vocational qualifications, if the Federal Employment Agency has granted approval in accordance with Section 39, and the foreigner has met seven specific criteria.	Article 18a(1), AufenthG	116
	The residence permit should be issued if removal has been suspended for 18 months. A residence permit may only be granted if the foreigner is prevented from leaving the Federal territory due to reasons beyond their control. Reasons due to the TCN would include providing false information, deceiving the authorities with regard to his/ her identity or nationality or failing to meet reasonable demands to eliminate the obstacles to departure.	Article 25(5), AufenthG	47.743
	A tolerated TCN born in Germany or who entered Germany before completion of his 14th birthday may be granted a residence permit if (s)he has lived in Germany continuously in the past 6 years, has gone to school for the past 6 years or earned a (vocational) degree recognised in Germany, and the application for residence is handed in after completion of his 15th birthday and before completion of his/her 21st birthday, as long as his/her integration is guaranteed.	Article 25a(1), AufenthG	187
	Parents or a single custodian of a minor according to Article 25a(1), Residence Act, as well as minors living with their families, may also be granted a residence permit if they are cooperating with the authorities and their means of living are secured.	Article 25a(2), AufenthG	15
	A TCN whose removal has been suspended should be granted a residence permit if he/she has been continuously resident in the Federal territory for at least eight years on 1 July 2007, or, if he/lives with one or more minors, or with unmarried children, and he/she has been continuously resident in the Federal territory for at least six years on the said date, by virtue of his/her deportation having been suspended, his/her residence being permitted or a residence permit having been issued on humanitarian grounds and he/she can meet a set of other specific requirements	Article 104a(1), AufenthG	4.772
	An unmarried child whose deportation has been suspended, and who is the child of a foreigner whose deportation has been suspended and who has been continuously resident in the Federal territory for at least eight years on 1 July 2007, or, if he/she lives together with one or several minors or unmarried children, has been continuously resident in the Federal territory for at least six years on the said date, by virtue of his or her deportation having been suspended, his or her residence being permitted or a residence permit having been issued on humanitarian grounds, may be granted a residence permit pursuant to Section 23 (1), sentence 1 where said child was a minor at the time of entering the Federal territory and where it appears, on the basis of the	Article 104a(2), AufenthG	369



	Criteria	Legal basis	Numbers receiving
	child's education and way of life to date, that he or she is capable of integrating into the way of life which prevails in the Federal Republic of Germany. The same shall apply to a foreigner who has been continuously resident in the Federal territory for at least six years as an unaccompanied minor by virtue of his or her deportation having been suspended, his or her residence being permitted or a residence permit having been issued on humanitarian grounds, where it appears, on the basis of the child's education and way of life to date, that he or she is capable of integrating into the way of life which prevails in the Federal Republic of Germany.		
	Unaccompanied minors having completed their 14th birthday on July 1st 2007 may be granted a residence permit if they have been in Germany for at least 6 years under legal or toleration status, speak German, have integrated into the German way of life and their means of living are secured.	Article 104b, AufenthG	75
<b>DK</b>	If a failed asylum seeker is fully cooperating with the authorities on his/her return, a residence permit may be issued, upon application, if the return of the TCN has not been possible for at least 18 months, if the person has assisted in the return efforts for 18 consecutive months, and return is to be considered futile for the time being according to the information available.	Article 9 (c), section 2	N/A
<b>EE</b>	None		
<b>EL</b>	None		
<b>ES</b>	None		
<b>FI</b>	A TCN who has been issued with a temporary residence permit under section 51 because he/she cannot be removed from the country, and a victim of trafficking in human beings who has been issued with a temporary residence permit, are issued a permanent residence permit after a continuous residence of two years in the country if the circumstances on the basis of which they had been issued with a temporary permit remain valid.	Aliens Act, Section 54(5)	About half obtain this after two years.
<b>FR</b>	None		
<b>HU</b>	None <sup>63</sup>		
<b>IE</b>	None		
<b>IS</b>	A residence permit may be granted to a TCN who has held a provisional temporary residence permit (Article 12 g) for at least two years. This requires that the applicant is able to establish his/her identity and provide some form of documentation.	Aliens Act, Article 12 f	5 cases since 2010
<b>IT</b>	None		
<b>LI</b>	Failed asylum seekers having received a removal order, who have been staying at least five years in the country awaiting their asylum decision, whose place of residence has always been known to the authorities and who are successfully integrated can be granted a residence permit.	Article 31 AsylA	0
	The government may grant a residence permit to TCNs who are temporarily admitted in Liechtenstein if they have been staying for a minimum of 5 years in the country, if their place of residence has always been known to the authorities and if due to advanced integration a severe personal hardship may occur in case of return (Hardship regulations/ Schwerwiegender persönlicher Härtefall).	Article 29 (7) AsylA in connection with Article 31 (1) AsylA	0-1
<b>LT</b>	The one-year temporary residence permit (postponement) can be turned into a permanent residence permit, if the TCN meets the following criteria: <ul style="list-style-type: none"> <li>➤ Stayed in Lithuania with a temporary residence permit for a consecutive period of 5 years</li> <li>➤ Passed the test of the constitution</li> <li>➤ Passed the language test</li> <li>➤ Can prove he/she has sufficient means</li> <li>➤ Has a health insurance</li> </ul>	LLSA. Article 53	274

<sup>63</sup> Act II of 2007 contains a definition around "exile" status (persons who fall under the protection of the principle of non-refoulement). The status in effect cancels their removal order and they therefore are not included in this study.



	Criteria	Legal basis	Numbers receiving
<b>LU</b>	A reprieve in departure (postponement) can be renewed twice after which the TCN may obtain a temporary residence permit.	Article 130 foreigners act	Very frequent
<b>LV</b>	None		
<b>MT</b>	None		
<b>NL</b>	Sick TCNs who stayed in the Netherlands on a residence permit for medical treatment for three years can be eligible for a Non Guilty Permit.	B14/3.2.2.3 Vc and Vw. Article 64	N/A
	In case of fruitless attempts to leave the Netherlands the TCN might be eligible for a 'not-guilty' permit if (s)he meets the following requirements: <ul style="list-style-type: none"> <li>➤ TCN cooperated on the return</li> <li>➤ Facts supporting the claim that TCN cannot obtain necessary documents</li> <li>➤ TCN resides in the Netherlands and no chance of applying for other residence permits</li> <li>➤ No objections or grounds for denial</li> </ul>	Vc. B14/3.1 Vc. B14/3.2	N/A
	Unaccompanied minors who have exhausted all legal means for a legalisation might get a 'not-guilty' permit if they meet the following prerequisites: <ul style="list-style-type: none"> <li>➤ Stayed in the Netherlands for 3 years, without starting the removal process</li> <li>➤ After these 3 years the TCN are still under the age of 18</li> <li>➤ The TCN has cooperated in the process of finding residence in the country of origin</li> <li>➤ The TCN has cooperated in the process of identifying his/her nationality</li> <li>➤ The TCN has cooperated in the process of identifying his/her age</li> </ul>	B14/3 1 Vc.	N/A
	In case a TCN declared 'undesirable' stayed in the Netherlands for 10 consecutive years after the first asylum application, the TCN must pass a 'sustainability test'. This test assesses whether there is an exceptional situation for the TCN to be granted a residence permit.	Vb 3.77 and 3.107	N/A
<b>NO</b>	Residence permits may be granted to asylum seekers with final rejection under section 38 of the Immigration Act if they meet the following conditions: <ol style="list-style-type: none"> <li>1. It has been three years since the case was opened without the rejection having been implemented, and it is unlikely that it will be possible to enforce the return decision.</li> <li>2. There is no doubt as to the identity of the applicant. As a general rule, the applicant must have assisted in clarifying his/her identity during the period as asylum seeker.</li> <li>3. The applicant has contributed to making his/her return possible, including by helping to obtain a travel document issued by his/her country of origin.</li> </ol>	Immigration Regulation, section 8-7	0
<b>PL</b>	A Tolerated Stay Status is a legal status in itself. An individual with Tolerated Stay status can in principle be granted a permanent residence permit after 10 years of continuous residence in Poland.	Article 64 (3), Act on Foreigners of 13 June 2003	None (Act only passed in 2003)
<b>PT</b>	None		
<b>RO</b>	None		
<b>SE</b>	None		
<b>SI</b>	A TCN has been permitted to stay for a minimum of 24 months, due to the return not having been permitted as a result of the non-refoulement principle.	51(2) ZTuj-2	13
<b>SK</b>	None		
<b>UK</b>	Long residence for 14 years or longer on the basis that removal would contravene their rights under ECHR. Other factors that apply include: age, strength of connections to UK, domestic circumstances, personal history (including character, conduct, associations) absence of a criminal record, any compassionate circumstances. Any leave granted	Granted leave to remain or indefinite leave under	1400 (Q 1-3) (less than 0.5% of all)



Criteria	Legal basis	Numbers receiving
under these criteria is discretionary. Private life considerations are also relevant, with recent Immigration Rule changes reflecting aspects of ECHR Article 3 and requiring a genuine subsisting relationship, a lengthy period of continuous residence and adequate financial support from the sponsor. This might also include EEA family relationships.	the 1971 Immigration Act (and supplementary Acts).	grants of permission to remain)

### 3.6 Actual situation: access to legally established rights

While the sections above outlined the legally established rights of different groups of third country national pending return/removal, this section looks closer at the actual situation of the target group in the different study countries in terms of ability to access those legally established rights (in practice).

When looking across countries, the basic rights with respect to family unity, healthcare, education and employment are to a large extent identical for all third-country nationals pending return/removal (variations are mainly found between those sub-groups that are allocated additional rights). In terms of accessing these rights in practice, however, differences in their situation do arise and are particularly dependent on where they are accommodated. With respect to accessing rights it seems to be especially important if the third-country national is offered accommodation or not, and if this accommodation is at a reception centre or a detention centre. This section therefore starts with an overview of how the third-country nationals pending return/removal in general are accommodated in the study countries.

Table 10 below provides an overview of the situation in the different countries regarding whether third-country nationals have the right to accommodation in centres or similar facilities, whether they are accommodated in such facilities despite not having any other rights, or whether they are required to find accommodation through their own means. The last column indicates the specific situation of those third-country nationals who have an official postponement with additional rights (group 1 in the analysis of rights above), where such are applied.

**Table 10: Overview of the main accommodation of TCNs pending return or removal<sup>64</sup>**

	Right to live in open centre/restricted residence outside of centre <sup>65</sup>	Live in open centre/restricted residence outside of centre but it is not a right	No accommodation provided	Situation if postponed with additional rights <sup>66</sup>
<b>AT</b>	X			Also in reception centre
<b>BE</b>	X		X	
<b>BG</b>			X	
<b>CH</b>		Yes – in some cantons	X	Social benefits to pay for accommodation

<sup>64</sup> X indicates that the type of accommodation is provided (for some categories of third-country nationals pending return/removal), while an empty cell indicates that the type of accommodation is not provided.

<sup>65</sup> It is usually only failed asylum seekers pending return/removal that are granted the right to stay in open centers / restricted residence outside of the centres.

<sup>66</sup> Empty cells indicate that in that country a specific toleration / "Duldung" status does not exist (see section 3.2).



<b>CY</b>			X	
<b>CZ</b>			X	
<b>DE</b>	X			
<b>DK</b>	X			
<b>EE</b>			(X <sup>67</sup> )	
<b>EL</b>			X	Nothing provided
<b>ES</b>			X	
<b>FI</b>	X			
<b>FR</b>			X	
<b>HU</b>		Yes	(X <sup>68</sup> )	
<b>IE</b>		Failed asylum seekers	X	
<b>IS</b>		Failed asylum seekers		
<b>IT</b>			X	
<b>LI</b>	X			Also in reception centre
<b>LT</b>	X		X	
<b>LU</b>		Failed asylum seekers	X	Stay at reception centre
<b>LV</b>			X	
<b>MT</b>	X			
<b>NL</b>	X		(X <sup>69</sup> )	Also in reception centre
<b>NO</b>	X		X	
<b>PL</b>	X		X	Nothing provided
<b>PT</b>	(X <sup>70</sup> )		X	
<b>RO</b>			X	Nothing provided
<b>SE</b>	X			
<b>SI</b>	X			Tolerated can have a less restricted residence pointed out
<b>SK</b>		Home confinement, if they can pay for accommodation		Appropriate accommodation
<b>UK</b>	(X <sup>71</sup> )		X	

Detention is an option in all countries, but according to the country reports, apart from the last days prior to departure, it is unlikely to be used in seven countries (CY, DK, EL, IE, NO, SE, UK).

In a large number of countries, third-country nationals pending return/removal are either detained or are responsible for their own accommodation. In these countries, third-country nationals live, to a large extent, in the same conditions as any other illegally staying person, with the exception of the lack of fear of being reported to the police and deported, since their presence in the country is normally known and accepted (de facto).

In other countries, third-country nationals pending return/removal will either be detained or will live in open centres or some other restricted residence. In most cases, only failed asylum seekers are given the option to be accommodated in reception

<sup>67</sup> Detention is the norm.

<sup>68</sup> Only if they can pay by their own means, which they usually cannot.

<sup>69</sup> Pronouncement of undesirability.

<sup>70</sup> If needed.

<sup>71</sup> Only families and UAM.



facilities, while other illegally staying migrants are usually detained or required to take care of themselves. Third-country nationals in reception centres generally have access to their basic rights through the services provided at the centre (accommodation often in family rooms, healthcare, education for children, in some cases education for adults, etc.). Effectively they will live as if they were asylum seekers, however, with very limited possibilities of integrating or participating in society, due also to the physical remoteness of most open centres. In most of these countries alternative measures such as private housing can be authorised, especially if the third-country national is not perceived to be a threat to society and if they have the financial means or networks to provide for themselves. In most cases, third-country nationals in this category will lose all entitlements to financial and social support except for basic healthcare if they do not stay in the open centres.

### **3.6.1 Access to the rights granted depending on the type of accommodation**

**Detained** third-country nationals generally have difficulties accessing their rights to family unity, although some countries provide special family rooms and units in removal/detention centres. In Cyprus, for example, women and men are kept separately in the detention centres, and there are no special rooms for families. Detention furthermore means that third-country nationals cannot practice their right to employment, should they have such a right.

While in detention third country nationals pending return/removal generally, across the study countries, have good access to healthcare, accommodation and food. In Belgium, for example, the detention centres have medical staff employed. In case of a need for special treatment, it is also possible for third-country nationals held in detention to be treated by specialists outside the centres.

In terms of children's access to education, it appears that access is mainly restricted for children in detention (in some countries). In Belgium and France, for example, children kept in detention centres effectively have no access to education. In Belgium, some members of staff sometimes try to organise educational activities but this does not compare with formal education. It should however be noted that in most study countries children are generally not detained.

In those countries where some third-country nationals are allowed to **stay in more open reception centres** while pending return/removal, they usually have access to the services provided by the centres, such as healthcare, food, clothing and sometimes training courses, but often restrictions are imposed on their movement. This is, for example, the case in Norway, where failed asylum seekers have the option of remaining in the reception centres while pending return. While residing here, they have the same access to medical care and training courses as their co-resident asylum seekers; the main difference being that their state allowance is reduced. Moreover, the third country nationals pending return in the centres have to remain available to the police (for removal) and therefore are not allowed to leave the centres for more than three consecutive days.

In several study countries accommodation in reception centres increases the likelihood that the children are enrolled in schools or receive some kind of education. In Denmark, children of school age participate in separately arranged education measuring up to the general requirements of the public school law or in local schools, and in the Netherlands children can receive an allowance of 316 EUR for school books. In Sweden the authorities put great emphasis on making sure that the children are able to attend school, that they (to the extent possible) finish a school term in the



country and receive documentation for the levels of schooling passed, upon return/removal from Sweden.

Though third country nationals pending return in open reception centres generally have good access to different rights and facilities, the fact that they may effectively spend several years in legal limbo can often have a negative effect on their mental and/or physical health.

Those third-country nationals who are **not provided with accommodation** (either because they decide to move out of the state-provided facilities, e.g. a reception centre, or because this option is not provided) can end up in one of two situations depending on their resources and social networks: if they have the means to support themselves (e.g. from social benefits, a right to work, their family/network or illegal activities), they can lead a more or less normal life. If they cannot provide for themselves, they usually depend on charity organisations to survive. This can be illustrated by the examples of Iceland and France. In the former, all third country nationals who cannot be returned are, in practice, granted a provisional temporary residence permit and (if they manage to find employment) a work permit. On this basis, they are expected to support themselves and manage their own accommodation, etc. In France, those third country nationals who are de facto tolerated because they cannot be removed, if not kept in detention or home confinement are in practice considered to be illegally residing without any rights to accommodation or to employment. Third-country nationals in this situation who do not have the means to support themselves may apply for humanitarian help.

In practice, it has been reported from several countries, that third-country nationals may face obstacles in terms of accessing health care, especially where it is subject to payment or when they are not provided with it through detention or reception centres. In Ireland, irregular migrants with a return/removal order do not come within the Direct Provision system and therefore are unlikely to have medical cards. This would normally result in having to pay for any medical treatment other than that for emergency care. Other obstacles especially for third-country nationals not provided with accommodation is lack of knowledge about their rights to healthcare, the fact that hospitals and doctors outside reception centres might not know about the right to healthcare, complicated application systems for which they do not receive support from the authorities etc.

With respect to primary and secondary education, some study countries, such as Germany, require parents to present IDs or an address when enrolling their children. They also usually ask for presentation of a birth certificate and a medical report. Exceptions are Hamburg and North-Rhine Westphalia. Often parents that do not live in reception centres cannot present those documents. In other countries, such as Belgium, schools do not require a permit when enrolling children. In case the parents do not have a permanent address in Belgium, they can use the address of an NGO that has been helping them, or even the local police station as their postal address, which is sufficient for enrolment of children in public schools. This however does not ensure that the parents know either that this is possible or that they have the resources to enrol their children. Across the study countries, there is very little evidence that the authorities are actively supporting third-country nationals pending return/removal outside reception centres in enrolling their children in schools. Lack of knowledge, lack of resources, fear of the police and the authorities may in practice prevent the children from accessing their right to education.



## 4. Effects of the current legal basis and actual situation of third-country nationals pending return/removal

In addition to establishing an overview of the rights and situation of third country nationals pending return/removal, all national experts, in drafting the country reports, also collected information on the effects of the current legal basis and actual situation on: 1) fostering the protection of human rights; 2) public opinion; and 3) secondary movements and pull factors.

In most study countries, there were no existing studies carried out on these specific issues, and in particular there was no knowledge to be found on their link with the very specific (and in most cases limited) legislation pertaining to third country nationals pending (postponed) return/removal. Instead, the national reports had to rely on the interviewees' opinions and assessments. Where opinions were offered, they tended to relate to the effects of general migration and asylum policy. The cross-analysis of the information collected in the national reports outlined below hence reflects the views of the respondents, given mainly on the basis of their knowledge, experience and personal opinions, without much factual evidence to support them.

In the following sections, the respondents' views on the issues of fostering the protection of human rights, public opinion, secondary movements and potential effects of harmonisation<sup>72</sup> are outlined.

### 4.1 Fostering the protection of human rights

As regards the effects on fostering the protection of human rights, the respondents were generally reluctant to give very clear or strong statements on this issue. Many of the respondents did not feel in a position to assess whether anything regarding the legislation or situation in their countries was directly in violation of human rights.

The respondents generally found that the legislation and systems are respecting basic human rights and are (to a large extent) well-functioning – at least up until the point when the third country national receives the return decision. Since the majority of the study countries do not have specific legal provisions, standard procedures or even terminology for dealing with non-returnable third country nationals, issues and obstacles occur in most countries and in several of them, third-country nationals pending return or removal can be said to be *de jure* and/or *de facto* in a legal vacuum. The following section outlines the main issues on rights of third-country nationals raised by the national respondents in the study countries.

It was in general assessed that where legal provisions pertaining specifically to third-country nationals pending return or removal such as arrangements introducing a **"toleration status"** have been introduced, this was **associated with a better (more certain) situation** in terms of rights. The exception here is Denmark, where respondents criticised the "motivation enhancing instruments" tied to the toleration status as being disproportionately strict in the cases where third-country nationals pending return or removal cannot be returned due to crimes committed.

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<sup>72</sup> This being a study for the European Commission the possibility of harmonisation was naturally mentioned by several respondents.



In general, however, it was found to be the case (and was criticised by several respondents) that third country nationals pending return/removal **live in a state of uncertainty**, to a large extent; either because of the lack of official status or regulation pertaining to their situation, or, as pointed out by a respondent from Austria, because in practice third-country nationals have little access to information on their rights, duties, and courses of legal action. In relation to this, countries that have made efforts towards tackling this uncertainty were mentioned as good examples. For instance in Lithuania, where, according to a recent development, a legal status is now granted one year after the suspension of a third-country national's deportation. This was seen as a positive step in fostering the human rights of third-country nationals, as the legal status gives them the right to live outside of detention, obtain a work permit or start their own business. In contrast, the slow decision-making process for cases of postponed return or removal in Ireland was criticised for resulting in asylum-seeker families being left in limbo for many years.

In terms of more specific rights, several of the respondents pointed to issues concerning **accommodation and in particular the use of detention**. The living conditions under which third-country nationals are pending return or removal were criticised in several of the studied countries. The case of Cyprus stands out as according to respondents, police stations and other prison buildings are used for the temporary detention of third-country nationals pending return/removal. Conditions of detention in these centres were reported to not foster the protection of the basic rights, such as the right to family unity, access to health care and education. It was also criticised that some countries do not provide accommodation at all to certain categories of third-country nationals pending return or removal. In Italy, third-country nationals who receive a postponement of return because they agree to depart voluntarily have no access to support services or accommodation, one respondent pointed out. In Portugal, the appeal of a decision on an asylum application has a postponing effect, and while the applicant has the legal right to stay in Portugal until the final decision in their case is taken, the applicant loses the right to remain in a national care facility. Until a decision on the appeal is made, which according to respondents may take up to one year, the applicant is then not supported with accommodation.

Respondents criticised several study countries with regard to the use of detention as a mechanism to ensure that persons pending return/removal do not abscond. Respondents from Belgium pointed out that there are no clear rules on the use of detention, while respondents from France and Cyprus reported that detention is very much the norm rather than a last resort measure, as laid down in the Return Directive. Respondents from Cyprus explained that detention is common practice particularly in the cases of asylum seekers of specific nationalities facing insurmountable problems (Iranians in particular, but also Iraqis and Somalis) that prevent their return to their country of origin. Failed asylum seekers are called to immediately leave the country through a return order, and if they do not, they are routinely detained.

Similarly, in Lithuania, under the current legislation, third-country nationals pending return/removal live under the detention regime rather than under the asylum regime in the reception centres where they are accommodated, which means that they are not allowed to leave the territory of the centre and are *de facto* detained. In particular, a concern raised by respondents from Lithuania is that there have been cases of third-country nationals being detained despite suffering from mental or psychological problems. In Spain, third-country nationals pending return/removal originating from states with which Spain has not signed readmission agreements, were reported to sometimes be kept in detention facilities until it can be established with enough



certainty that removal is not possible. The use of detention was also reported to be on the rise in Bulgaria.

Another often-reported issue was the **recognition of the right of family unity**. Some countries (e.g. Lithuania and Poland) were commended for their ability to respect family unity in practice despite the lack of legal obligations. As could be seen from table 3 in chapter 3, it was the case in several countries that family unity, although not secured by law in some countries, was still maintained in practice. Bulgaria was mentioned as a country that has made improvements in this area, where family unity is seen to be increasingly respected in relation to the regularisation mechanisms introduced. Respondents from five of the studied countries (FR, DE, SK, CH, CY), on the other hand, found that, regardless of whether it is legally established, family unity was not always considered in practice.

Several other respondents raised **access to certain rights** for third-country nationals as the main issue, rather than what is "on paper". As one respondent pointed out for the case of Cyprus, "the actual situation is much worse than what can be read in the law". The situation is not that dire in all countries or according to all respondents, but, as was seen from the section above, there seem to be issues related to accessing rights (on a larger or smaller scale) in all countries.

A couple of respondents mentioned examples of how a well-established **cooperation between government authorities and NGOs** may induce the protection of the rights of third country nationals pending return/removal. Estonia was mentioned as an example of this, as a monitoring system for forced return procedures was established between the Ministry of Interior and the Estonian Red Cross. Luxemburg, where continuous and productive communication between NGOs and the ministries was observed, was another example.

## 4.2 Public opinion

Overall, it was found, on the basis of the answers provided by national respondents, that it is not possible to distinguish the specific effects of legislation concerning third-country nationals pending return from the general migration/asylum law; and, more importantly, it is often not possible for the general public to distinguish this particular group from general issues of migration and asylum seekers. Among the general public and in the media, the main issues debated often particularly concern irregular migrants, and it may require almost expert knowledge of the area to engage in discussion of the particular rights and situation of the specific group of those pending return. This was also evidenced by the fact that in several countries, even the respondents were not necessarily able to separate this group from other migration/asylum issues and legislation.

Given these findings, it is, in most countries, not very likely that changes to the legislation or situation pertaining specifically to third country nationals pending return will attract much attention. However, there is a risk, in some countries where there is particular sensitivity in the public and political debate to migration issues, that any changes to the migration/asylum law will cause massive debates.

In most of the countries, the respondents considered that there was a **low level of awareness amongst the general population concerning the particular issue of legislation pertaining to this study's specific target group**. This was in several cases attributed to the fact that the public does not differentiate between the different



categories of third-country nationals and does not perceive those with a postponed/pending return status to be different from the general group of asylum seekers or irregular immigrants. In other countries (Finland, Estonia and Portugal), it was attributed to the number of such cases being too small to draw attention. In three of the countries (CZ, EE and SE), the respondents considered that migration issues in general, as well as the legislation concerning postponed return more specifically, were simply not a subject of interest or debate in the general public. Some respondents attributed the lack of engagement of the public in the legislative developments to the complexity of the issue – keeping up with legislative changes and their actual implications was simply too difficult for the average citizen, as one respondent from Iceland pointed out, and mainly attracted the interest of the specialized public rather than the general one, according a German interviewee.

In several countries, examples were provided of individual issues or stories pertaining to the study's target group, which have made their way to the media and public debates: personal stories of third country nationals who were affected by the procedures (e.g. in Bulgaria and Poland); discussions on how the arrangements for postponed/pending return affect children who end up residing (illegally) for years while awaiting return (in Norway); public criticism of the practice to detain children in detention centres (in France); cases of minors who had to leave the country after living there for a number of years (the Netherlands); and the conditions in reception and detention facilities (Denmark, France and Romania).

Awareness of the topic of postponed return was especially observed in the **states which due to their geographic situation are entry points for asylum seekers and immigrants to Europe** – respondents in Malta, Greece, Spain and Cyprus all pointed out that the situation of third-country nationals pending postponed return/removal is very much a subject of public debate in these countries, but again it is usually an integral part of the broader debate on migration.

Many of the national respondents reported **growing negativity towards asylum seekers and migrants in general** in their countries (AT, BE, EE, FI, HU, LT, SK, ES, CH, EL, IT, CY) in recent years. The largely **negative attitude of the general public towards migration issues in some states** was linked to the migration and asylum policies adopted in these countries. In Austria, recent legal reforms tightening the provisions concerning aliens were seen as intensifying the already negative public discourse. In Italy, the negative view of irregular migrants was reported to be mutually reinforced by the 'pacchetti sicurezza' laws voted in by the Berlusconi government, although some of the legal provisions were found to be unconstitutional later on.

What is more, several respondents reported that there was **support for a more restrictive policy** in the general public in their countries (AT, BE, EE, FR, HU, CH, UK, EL, IT, CY). The reasons suggested for the negative opinions were diverse. Respondents from Cyprus, Lithuania and Spain pointed out that, in the public debate, migrants are often accused of 'stealing jobs'. The social impact of migration (on jobs, welfare, health, housing, education) was highlighted as a public concern in general in the UK, Spain and Italy. In other countries (AT, EL, IT) third-country nationals may be seen by the public as a threat to public order.

Unlike many other countries, respondents from Ireland were of the opinion that **public attitudes to illegal migration in the country had actually eased** considerably in recent years, and that illegal migration was not causing public concern in the way that it did ten years ago.



Only in very few countries was the general public considered as having a mainly **positive or neutral attitude towards the topic of migration and asylum**. In Bulgaria, the experienced positive attitude was explained by a number of individual cases concerning third-country nationals, which garnered substantial positive media attention and public support. The Romanian experts attributed the positive view to the limited number of migrants and the fact that there have been no or very few negative cases and attention drawn to the issue by the media. The relatively low number of asylum seekers or irregular immigrants was also the reason proposed for the neutrality in public opinion or lack of public debate on the issue in several other countries (Latvia, Slovenia, the Czech Republic, Liechtenstein and Luxemburg).

Although no evidence was found for a direct cause-effect relationship between the legal situation of third-country nationals pending return and public opinion, many **examples** were given **of how public opinion had an impact on policy formulation** in a number of countries.

In Bulgaria, a regularisation mechanism for stateless persons from the ex-Soviet union introduced by the government was seen largely as a product of the public support for this particular group as a result of the attention given to a case involving Armenian nationals by the mainstream and social media. Similarly, in Poland, recent large public protests in favour of specific individuals under threat of removal had led directly to the creation of the so-called Legalisation Programme. In Norway, the interviewees considered that there has been pressure from the public to establish a maximum period for children to reside in Norway without legalisation of their stay – a policy measure the government is currently considering. In Denmark, public sentiment resulted in improvements of the living conditions at reception centres. The access to life outside the centres in ordinary houses for families having waited more than three years, and the general rule that a family should have access to two rooms, was also a result of public debate about the conditions in the reception centres where third-country nationals pending return or removal are living. However, public opinion in Denmark was also reported to have resulted in stricter policy measures. The restrictions on residence for persons falling under the “toleration status” were also implemented following public debate on cases reported by the Danish media on third-country nationals who had been expelled from the country due to crimes against humanity or crimes committed in Denmark, but who could not be returned and thus lived relatively freely in the country. Both at political level and in the general public this contradicted the general sense of justice.

The strongest direct effect of public opinion on policy was observed in Switzerland, where many legislative changes are approved in referenda. For example in 2010, 53% of all voters supported a stricter procedure in the expulsion of delinquent third-country nationals. Similarly, in other states **where the public opinion on migration and asylum issues tended to be negative, policy in the area was observed to be relatively responsive to the sentiments, and policy measures had a distinctly restrictive character**. In Belgium, a 2011 poll found that 72% of the population considered that there were too many immigrants in their country, and the national respondents assessed (accordingly) that any policy measure which would make it 'easier' for third-country nationals to reside in the country would be perceived very negatively and meet resistance. The Greek government was reported to be reluctant to implement the policy measures foreseen by the latest legal reforms in the area, as they would amongst other things give third-country nationals with postponed return/removal the right to work, which would provoke a negative reaction in the public.



## 4.3 Secondary movements

There have been several attempts over the years to achieve EU-level harmonisation of the legal basis in the area of asylum<sup>73</sup> and immigration policy, in general, as well as on returns and readmission specifically.<sup>74</sup> But as evident from the overviews presented in the previous chapters of this report there are still substantial differences amongst the studied countries. At the same time certain trends in migration flows and differences in the numbers of asylum applications lodged in particular countries can be observed.<sup>75</sup> This brings up the question of whether these trends are in fact indications of so-called asylum shopping, as claimed by some people, who believe that the "generosity" of the asylum systems and immigration laws is the main factor causing differences in the migration flows; or whether there are rather alternative factors at play in causing these movements.

From the research conducted at both national and international level in connection with this study, it is evident that this is not an area where research and evaluation efforts have been directed. As a result, almost none of the experts drafting the national reports were able to identify factual evidence of push or pull effects; and, in particular, no evidence of the effects of the legal basis and actual situation pertaining specifically to third-country nationals pending return or removal. As with the section on public opinion above, the following outline of (potential) push and pull factors hence reflect the views of the national respondents, given mainly on the basis of their knowledge, experience and personal opinions, without any factual evidence to support them.

### 4.3.1 Push/Pull effects of asylum and migration regulation and systems

As with the question regarding public opinion, it was in general difficult for the respondents to separate the situation and legislation pertaining to third country nationals pending return specifically from more general asylum and migration systems and legislation. Hence, the examples and indicators provided concern both the target group of this study more specifically and the push and pull factors in asylum and migration more generally.

A few of the interviewed experts, however, gave **examples of pull effects of legislative measures pertaining specifically to the situation of third-country nationals pending return or removal**. In Austria, the provision of reintegration schemes for Chechen asylum seekers in case of voluntary return were more extensive than, for example, in neighbouring Poland, and thus led, according to the respondents, to a higher number of applicants who entered the country in order to receive public support for their return upon rejection of asylum. Overall though, the pull effect was deemed to be negligible. In Spain, legislative provisions providing schemes for regularisation through employment were identified by the respondents as a strong pull factor prior to the economic crisis. The possibility of regularisation for third-country nationals pending return was also reported to be an important pull factor in the Czech Republic, whereas no such effect could be attributed yet to the recently introduced regularisation programme in Poland.

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<sup>73</sup> i.e. The Directive on the Reception Conditions for Asylum-seekers (2003/9/EC); the Directive on qualifications for becoming a refugee or a beneficiary of subsidiary protection status (2004/83/EC); the Directive on Asylum Procedures (2005/85/EC); and the Dublin Regulation (343/2003/EC)

<sup>74</sup> i.e. the Return Directive (2008/115/EC)

<sup>75</sup> Eurostat: [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-SF-08-098/EN/KS-SF-08-098-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-08-098/EN/KS-SF-08-098-EN.PDF); and UNHCR: <http://www.unhcr.org/507c000e9.html>



Indications of **pull effects of legislation and rights (for example in terms of access to benefits) of migrants and asylum seekers more generally** were found by respondents from some study countries. Two of the respondents from Sweden and Austria advocated the existence of so-called **asylum shopping** by pointing to high recognition rates for asylum claims from specific groups as a pull factor. For instance in Sweden, a relatively high number of unaccompanied minors from Afghanistan lodging asylum claims in Sweden coincides with relatively high recognition rates for unaccompanied minors from – especially – Afghanistan. This was regarded as an indication of the perception of the accessibility of the asylum system among migrants and refugees as a pull factor. Similarly, for three of the countries with relatively restrictive legislation (DK, NL, IT) the push effects of the tightening policies were pointed out by their neighbouring countries – Sweden, Belgium, and France respectively, who all had experienced secondary movements to their countries, in their views due to the stricter policies in the neighbouring countries. In Germany, legislative provisions granting social care benefits for asylum seekers more generous than in neighbouring countries and guaranteeing certain living conditions were considered by several of the respondents for this country to be significant pull factors. Similarly, social conditions were reported to draw a large number of asylum seekers to Switzerland, despite the otherwise restrictive character of the legislation concerning third-country nationals pending return or removal. In the United Kingdom, the well-defined asylum support structure was pointed out as one of the main pull factors for asylum seekers. Likewise, in Sweden, the asylum reception system was assessed as being among the better in Europe – granting rights to stay in private accommodation and right to work and with relatively short case handling procedures; however the respondents refrained from specifically qualifying this as a pull factor.

Regarding **push factors**, the respondents, due to the lack of supporting data, generally refrained from drawing a conclusion on whether more restrictive policies have indeed induced secondary movements. A respondent from Denmark did, however, point out that, following the introduction of stricter rules on, amongst other measures, the granting of residence permits, according to the Danish media the number of asylum seekers in Denmark decreased by 23% in 2010, while the average number of asylum seekers in Europe increased by 19%. On the other hand, respondents from Finland reported a decrease in the number of asylum applicants from 2009 to 2010 (from 5,988 to 4,018), even though the policy and practice has remained more or less unchanged. This would indicate that the decrease cannot be attributed to a push effect of legislation, but rather to other, unknown factors. Similarly, the Slovak Republic has been experiencing a downward trend regarding illegal immigration, but the root causes for this could not be traced back to the rights and situation of third-country nationals pending return or removal.

#### **4.3.2 Alternative push/pull factors**

In discussing push and pull factors, several of the respondents found that rather than stemming from legislative measures and the restrictiveness/generosity of the asylum systems, there are alternative factors, which in their views have more effect on migration flows.

Some of the factors mentioned by respondents from several different study countries were family or community ties, the presence of other immigrants with a similar background, relatives or acquaintances, as strong incentives in choosing a destination country. In Portugal, citizens from Brazil, Guinea-Bissau, Angola and Cap Verde were also reported to be drawn by the common language spoken.



Another factor, which was considered to be significant, was the economic situation in the destination countries. The economic stability in Liechtenstein was highlighted as a major pull factor, as were the employment opportunities in Spain and Portugal prior to the economic crisis. In contrast, the tough economic situation in Bulgaria and Latvia, and negative effects of the economic crisis for Spain, Portugal and Ireland, were mentioned as a push factor by the respondents from these countries.

Additionally, geographical location was found to be a more important factor than particular legislative arrangements and were found to act as pull factors in countries which are external borders of the Schengen Area ( MT, IT, ES, FI), or as a push factor for countries with a relatively remote or difficult to access geographic location (IS, PT).

#### **4.4 Views on and potential effects of harmonisation of legislation**

In discussing the questions regarding effects of/on public opinion and push/pull effects, a number of respondents also considered the possibility and potential effects of EU-level harmonisation of legislation pertaining to third-country nationals pending return and removal.

Some respondents saw advantages to such harmonisation, for example in terms of raising standards and securing minimum rights for asylum seekers (including those with a return/removal order). On the other hand, some potential disadvantages were also reflected upon. Respondents from Poland expressed concern that a harmonisation initiative could also lead to a decrease in the level of protection of human rights in some countries. Similarly, respondents from Spain noted that it would lead to the abolishment of some policies which are favourable to migrants, such as national regularisation programmes.

Furthermore, respondents from Spain considered that it will be difficult for Member States to adapt to EU directives and to reform national laws, as the harmonisation would need to be expanded to areas other than migration and asylum policy, such as the labour market rules which are often interconnected. Similarly, Swiss respondents maintained that an EU-wide regularisation and harmonisation of laws concerning third-country nationals pending return could lead to discrepancies with other existing national laws regarding aliens. On a very practical level, government respondents from Poland noted that harmonisation might lead to more bureaucracy and a consequent decrease in operational effectiveness.

Respondents from Romania were of the opinion that any harmonisation attempts should take into account the situation of countries as either Transit or Destination countries. And respondents from the UK added that any shift in the existing balance towards greater access to services for third-country nationals pending removal, for example through EU harmonisation, would need to be considered against the current policy on reducing irregular migration.



## 5. Conference held on 22 January 2013 in Brussels

### 5.1 Welcome

The conference participants were welcomed by Helene Urth, Project Director of the Study, Ramboll. Ms Urth outlined the tri-fold purpose of the conference:

- to present the findings of the study,
- to facilitate a discussion of the study subject amongst the different stakeholders, and
- to start a conversation on future policy development in this area.

### 5.2 Opening address by Belinda Pyke (Director for Migration and Borders, European Commission, DG Home Affairs)

In her address, "EU approach towards non-removable third-country nationals waiting for removal? Some thoughts", Ms Pyke reflected on the policy context of the study and highlighted possibilities for further action on the issue and the advantages of common EU rules in the specific policy area. The main themes highlighted by Ms Pyke were:

- Closing the gap in the EU's migration policy;
- Prevention of secondary movements;
- Common discipline and avoidance of pull-factors for irregular immigration;
- Maintaining public acceptance of sustainable EU migration policy;
- Fostering human rights compliance;
- Upgrading the public image of the EU vis-a-vis third countries;
- Closing a gap in the EU's asylum policy.

Ms Pyke announced that the issue of non-removable third-country nationals will be addressed in a Commission communication to be published end 2013.

### 5.3 Presentation of the study findings by the study team

The conference continued with a presentation of the study findings by Helene Urth, Project Director for the study, Ramboll, and Mathilde Heegaard Bausager, member of the study's core team, Ramboll.

The presenters started by briefly discussing the purpose of the study and the purpose of the conference and outlined the research methodology applied to the study. The key findings of the study were then presented in more detail.

### 5.4 Address by Prof. Philippe de Bruycker (Jean Monnet Chair for European Law on Immigration & Asylum at Université Libre de Bruxelles)

Prof. de Bruycker raised some key questions that he found most relevant to address on this basis:

- **Who?**
  - The target group of the study – third-country nationals who are staying illegally but who cannot yet be removed (as outlined by recital 12 of the Return



Directive) – is, in reality, a very diverse group who are treated differently among and within the Member States. In order to have some coordination on the matter, at the very least it is necessary to create an inventory of the different categories which are present in the different countries.

- In discussing the issue, one should also address the question of *why* should a return be postponed – for example, in cases of victims of trafficking, would their return be postponed for their protection, or for the purpose of obtaining more information?
- **What – rights vs. status and papers?**
  - What could a specific status for the study's target group look like? The existing Article 9(2) of the Return Directive is somewhat ambiguous with respect to the cases in which a status should be granted and the nature of such a status.
  - There is no obligation on Member States to legalise third-country nationals pending return or removal, but basic rights should, nevertheless, be granted to everyone, with additional ones potentially granted on a progressive basis depending on status of protection of the third-country national in question. Access to work was mentioned as the most important additional right that can be given and the one at the core of the political debate.
  - Issues that need to be discussed are the procedures involved in determining a status, the length of the period of postponement, as well as the possibilities for extensions of the postponement, and whether these should be tailored to the specific categories of third-country nationals pending return and for which.
- **How – Legislation or Coordination?**
  - The topic is very politically sensitive and perhaps the alternative to legislation on the issue could be more coordination between Member States – e.g. exchanging information, statistics and best practices in a similar manner as in the field of integration of third-country nationals and the 11 Common Basic Principles. This could be facilitated through the Contact Committee on the Return Directive.

Prof. de Bruycker concluded that the study could serve as a basis for further policy development on this topic and suggested that the Irish Presidency of the EU take note of the study and the conference and include it in a Council document.

The main points raised in the subsequent discussion were with regard to the feasibility of potentially moving forward with more EU legislation in this area through revision of the Return Directive, given the experience from past negotiations in the Council, where it has proven difficult to reach agreement among Member States on harmonisation of legislation in this area (mentioned were the negotiations on the Return Directive proposal and the discussions under the Hungarian Presidency).

## **5.5 Presentation by Matthias Pollmann (Federal Ministry of Interior of Germany)**

Mr Pollmann presented the "Duldung", or toleration status, which is an official postponement of the return or removal granted to third-country nationals in Germany. More specifically, Mr Pollmann addressed the following points:

- **Criteria** for receiving a "Duldung" status: The main criterion for receiving such a status is that there is an obstacle making the removal of the third-country national impossible, and that the obstacle is not likely to disappear in the near future.



- **Difference between a “Duldung” status and a residence permit:** The obligation to leave the territory is not affected by the granting of a “Duldung” status – the status is withdrawn as soon as the reason for granting it ceases to exist. A residence permit can be granted instead of a “Duldung” status in cases where the third-country national is cooperating with the authorities on the return.
- **Rationale and history behind the “Duldung” status:** The status was created in the 1960s to regulate the situation of third-country nationals who should but cannot be removed, without legalizing them by means of a residence permit.
- **Challenges and advantages of having a “Duldung” status:** Mr Pollman commented that the status serves as a “patch” for the gaps in the legislation which lead to the existence of the specific group subject to the study. One advantage is that the status guarantees access to rights for the concerned third-country nationals; however, a disadvantage is that often third-country nationals remain with this status for an undetermined period of time.

## 5.6 Group Session 1 and Plenum Session 1

With the presentation of the study findings and the reflections of the speakers in mind, the conference participants were invited to discuss the issues raised in small groups of 7-10 people.

In Group session 1, the participants were asked to discuss whether third-country nationals pending return could and should be considered a specific (legal) group, separated from undocumented migrants and those with a temporary residence permit. More specifically, the participants were asked to discuss the following questions:

1. Who should and who should not be part of this group?
2. What are the potential advantages of regarding third-country nationals pending return as a separate group with specific legislation?
3. What are the potential challenges when regarding third-country nationals pending return as a separate group with specific legislation?

Conclusions from the group discussions were presented during the plenum sessions:

Advantages of having a specific status for the study group:

- It would correct the ‘failures’ of the legal systems that result in a legal limbo situation for third-country nationals pending return or removal.
- It would provide much needed clarity on the situation of third-country nationals pending return or removal, as there are currently widely divergent practices across the Member States.
- It would ensure that the existence of this particular group is recognised in all Member States, which would facilitate access to rights and ensure that national and international laws which guarantee fundamental rights are implemented properly.
- It would prevent irregularity and criminalisation amongst third-country nationals pending return or removal.

Disadvantages of having a specific status for the study group:

- It could create pull effects, in that third-country nationals would be encouraged to immigrate illegally and discouraged from returning to their countries of origin. Many participants stressed that it is essential not to reward people who are obstructing their return/removal by granting them additional rights through a specific status.
- It could be difficult from a legal point of view, as the issue belongs to the ‘grey’ area between asylum and migration policy.



- It could be challenging to garner support amongst the general public for such a legislative initiative.

One general conclusion that can be drawn from all group sessions is that the conference participants experienced first-hand how difficult it is to talk about the subject matter due to the difficulty of defining a specific target group. Talking about a specific status for all third-country nationals without accounting for the subgroups that exist within this group (e.g. failed asylum seekers – cooperating and not cooperating, over-stayers, criminals with an expulsion order, etc.) proved to be a challenge.

## **5.7 The US experience – keynote address by Mark Lenox (representative of the US Agency for Immigration and Customs Enforcement (ICE))**

Mr Lenox started his presentation by discussing the portfolio of policy measures that the agency has developed to facilitate the removal of illegal aliens. According to Mr Lenox, in the US experience, keeping a person in detention is the most efficient way of ensuring compliance of an alien with a return order. However, there are limited detention capacities as well as legal limits to the length of the detention period (maximum of 180 days). Moreover, to justify the detention of an individual, the authorities are required to establish that there is a 'significant likelihood of removal' in the reasonably foreseeable future.

In their work to improve the efficiency of removals of illegal aliens in the US, following the events of 11 September 2001, the ICE has therefore taken steps, such as making detention facilities and removals a federal matter, to make the system more flexible and bring down the average time spent in detention. In order to facilitate removals, the agency also focused its efforts on speeding up the removal process. This was achieved via, amongst other measures, the creation of centralised ticketing capacities, the installation of Electronic Travel Documents Systems in consulates of foreign countries, and the utilisation of various foreign policy tools to ensure the cooperation of foreign governments in the removal process.

In terms of the more difficult cases – or “non-removable” aliens - Mr Lenox also talked about the US approach called 'deferred action'/'prosecutorial discretion': non-criminal aliens who are established to have ties to the community and are cooperating with the authorities are deemed to be "non-priority cases". Such aliens, if “non-removable”, can be considered for release from custody and if released are given a document stating that they are residing illegally in the country, but their cases are being processed and they are not to be detained. While still in a legal limbo with regard to their legal status, such aliens have the right to work. To keep track of the non-detained population, the ICE uses voice recognition technology for the aliens to report to the authorities on a regular basis via phone, or electronic tracking bracelets.

Aliens with final orders of removal, including aliens deemed to pose a threat to the community or flight risks, may not be detained beyond a period of six months if there is no significant likelihood of removal in the near future. Only a small number of aliens who pose certain health and safety risks, aliens with highly contagious diseases, aliens who pose serious adverse foreign policy consequences of release, security or terrorism concerns, and aliens found after a hearing to be “specially dangerous” criminal aliens, may continue to be detained for a prolonged period of time. In such cases, the agency petitions the court to allow the extension of the detention.



## 5.8 Group Session 2 and Plenum Session 2

In Group Session 2, the participants were asked to discuss the following questions:

1. Are there specific sub-groups within the general target group (third-country nationals pending return/removal)?
2. Which rights should third-country nationals in the different sub-groups enjoy?

The participants were specifically asked to reflect on the categorisation proposed in the study's recommendations (see chapter 7, Figure 2).

Conclusions from the group discussions were presented during the plenum session:

- While the majority of participants agreed that there are different sub-groups within the general group of third-country nationals pending return or removal and that it is necessary to distinguish between them, they couldn't unequivocally agree on whether the proposed categorisation would work in either theory or practice and felt that more data is needed to assess whether the categorisation is necessary and feasible.
- The distinction between cooperation/non-cooperation made sense to most of the participants and there was a general agreement that different/more rights should only be ascribed to those third-country nationals who cooperate. However, the issues raised in that respect were with the legal and practical feasibility of defining criteria such as 'cooperation' or 'reasons beyond the influence of the third-country national'.
- Other points raised by the participants were that:
  - time should be a factor in such a framework;
  - basic rights should be ensured for everyone;
  - access to the labour market is the key additional right that can be granted;
  - additional rights should be balanced against the pull effects they might bring about.

## 5.9 Summary of the plenum sessions by Helene Urth, Ramboll

Ms Urth, Project director of the study, singled out five main conclusions that may be taken from the conference:

1. It is necessary to recognise the existence of this group of third-country nationals;
2. There are subgroups which require a differentiated approach;
3. The cooperation of the third-country national could be a valid criteria for according additional rights, but "cooperation" would need to be defined;
4. Pull factors are an issue that requires further investigation;
5. Legal harmonisation may be too far-reaching this early in the discussions.



## 6. Conclusions

- 1) As the previous chapters of this report have shown, the target group of concern to this study is not homogeneous, be it in terms of terminology, legislation or treatment, in the 31 study countries. In effect, four different situations can arise according to the country and circumstances:
  - Situations in which postponed return/removal is foreseen for technical reasons in national legislation or other official texts, and which give rise to a temporary residence permit. In general, this is in countries using temporary residence permits as a postponement status rather than creating a new “toleration status”.
  - Situations in which postponed return/removal is foreseen in national legislation or other official texts, and which give rise to a specific status with rights beyond the ones granted to other third-country nationals pending return/removal (analytical group 1 in table 2).
  - Situations in which postponed return/removal is foreseen in national legislation or other official texts, but which do not give rise to any distinctive status or rights. In this case, the third-country national is allowed to stay pending and keeps the rights they had when receiving the return order (analytical group 2 in table 2).
  - Situations in which postponement is not granted and the third-country national becomes illegally staying with the rights granted to all other illegally staying third-country nationals (analytical group 3 in table 2).

In practice, voluntary return/removal and (failed) asylum seekers/others illegally staying are usually the main categories used in most of the study countries. This is reflected by the legal basis applying to third-country nationals in an irregular situation, as well as in the responses provided by government officials during the interviews conducted in the course of this study. One of the conclusions of this study is therefore that **in most of the study countries, there is no dedicated legislation or even specific terminology for third-country nationals pending return/removal.** Instead, these countries refer to other legislation relating for example to asylum seekers and illegally staying third-country nationals. Also, a number of rights granted to certain categories of third-country nationals awaiting return/removal are in fact derived from wider EU and international instruments pertaining, for example, to the principle of non-refoulement, the treatment of minors, victims of human trafficking and medical/humanitarian considerations.

Countries that have established an official status for third-country nationals whose return/removal has been postponed for humanitarian, legal or political reasons will usually adopt one of the following approaches:

- Issuing a **temporary residence permit**.
- Establishing a **specific status** for third-country nationals pending return/removal (for example “Duldung” in Austria and Germany).
- Officially stating an **extension of the return date**, whereby third-country nationals are given permission to stay in a return position without any additional rights. Terminology is often the main difference with the above category, since an extension of the return date is, in practice, more or less the same as the specific postponement status given in some countries.



- 2) The second finding of this study is that in several of the study countries, despite the route to legalisation offered by some, **third-country nationals can have their return/removal order pending for years and not have this (necessarily) impact their rights and situation.** This can result from an official decision to extend the date of return, but also from a de facto toleration, whereby the decision to postpone the return has never been officially made. The third-country nationals will therefore still be in a return position, and their rights and situation will be defined by:
  - their cooperation with the return process (i.e. those who cooperate will usually benefit from a better treatment than those who do not and/or those considered a threat to society);
  - the rights and situation prior to the return order (in this respect, over-stayers and others with close ties with the host society will often have better options to support themselves, live in their own houses, pursue education etc.).
- 3) Against this background, the third conclusion of this study is that **official postponement** (especially with specific rights attached to it) is usually only granted to **third-country nationals who cooperate and/or situations where the postponement is beyond the influence of the third-country national.** All other third-country nationals who cannot be returned will stay in a return position (usually with some rights attached to it) or will be considered as illegally staying (usually without any specific rights). In some countries, however, almost every third-country national who cannot be returned within the expected time limit will receive a postponement. This can be due to the fact that such postponement does not really affect their rights and situation apart from the date of return or it can be due to the very low number of third-country nationals who cannot be returned.
- 4) The fourth conclusion of this study is that it is **not necessarily the countries that grant an official postponement status that provide the widest range of rights for third-country nationals.** The effect of this is that in some of the countries where there is no official postponement status, the rights and situation of third-country nationals will prove to be more far-reaching than in those granting an official postponement status. This reflects the fact that failed asylum seekers have different rights in the different countries. Since a postponement (even an official one with additional rights) often just extends existing rights for a longer period of time, it does not necessarily lead to a substantial improvement in the situation of the third-country national. Furthermore, **some countries have in fact established a specific de facto "toleration status" that seeks to minimise the rights of third-country nationals granted this status.** This status has been established for third-country nationals who cannot be granted protection because of their involvement in war crimes, but who cannot be returned either due to the non-refoulement principle. They are officially tolerated but "unwanted" on the territory.
- 5) The fifth conclusion of this study is that **more than half of the study countries do not explicitly foresee any channels and conditions through which third-country nationals with a postponed return/removal order may enter a regularisation procedure.** In those countries that foresee such a procedure, this would tend to apply only to failed asylum seekers, and in only a strict minority of the study countries is such a procedure based on the duration of the return postponement. Moreover, it can take between one and ten years before legalisation is possible, depending on the Member State.



- 6) The sixth conclusion of this study is that, in terms of accessing the legally established rights in practice, differences in the situations do arise and are particularly dependent on where the third-country nationals are accommodated. **With respect to accessing rights, an especially important factor seems to be whether the third-country national is offered accommodation or not,** and if this accommodation is at a reception centre or a detention centre.



## 7. Recommendations

As outlined in the above, one of the main findings of this study is that there is a lack of coherent and specific legislation addressing the issue, and there is no common terminology for defining and distinguishing between non-returnable third-country nationals pending return in different types of situations. On this basis, the consortium proposes that further steps be taken towards establishing a more coherent approach for dealing with third-country nationals who cannot be returned. The impetus for this is twofold – firstly, for the benefit of the national authorities – to be able to effectively address the issue of third-country nationals who cannot or who refuse to return to their country of origin (or a third country), to ensure that proper assistance is given to the ones that cannot return and that action is taken towards the ones that refuse to return; and secondly, for the benefit of the third-country nationals – to avoid anyone effectively being left in “legal limbo”.

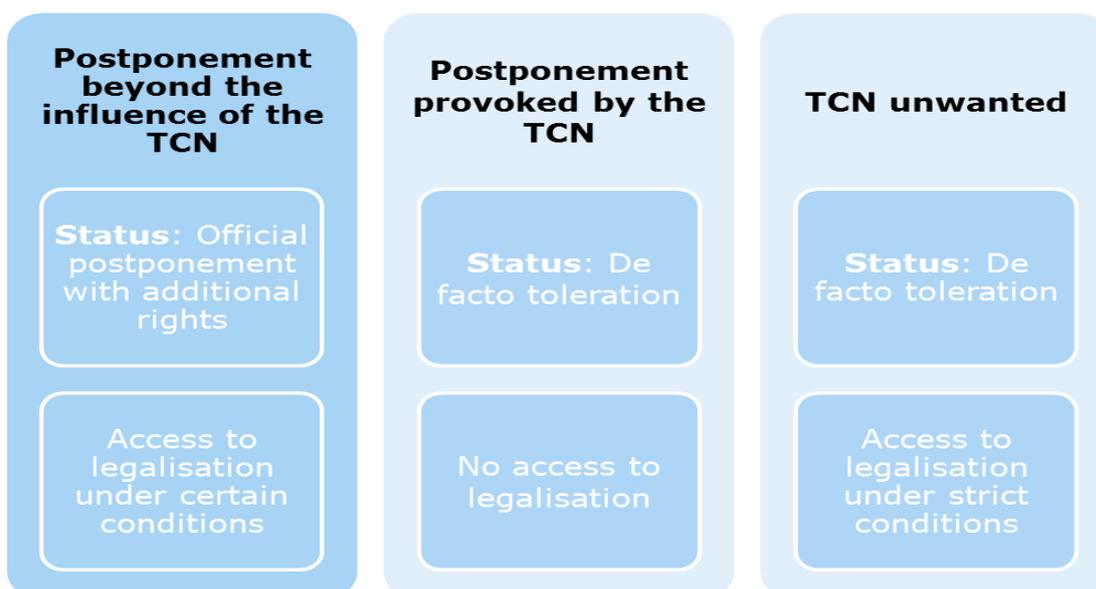
The following recommendations are inspired by some of the existing practices found in the study countries as well as the discussions between stakeholders from the study countries and EU level organisations at the conference on the findings of this study held on 22 January 2013 in Brussels.

### 7.1 Potential sub-categorisation of the study target group

At the conference, the participants were asked to discuss a proposal developed by the consortium for three overall categories of third-country nationals pending return/removal. These categories are developed on the basis of the study findings and some of the trends and patterns identified in the countries’ practices. The categories are made in an effort to try and establish a common language for talking about and distinguishing between different members of the target group.

The figure below presents a generic overview of the three proposed categories.

**Figure 2: Suggestion for three main categories of third-country nationals (TCNs) pending return/removal**





The third-country nationals belonging to the three different, overall categories are pending return for very different reasons. The conference participants were therefore asked, firstly, to consider and discuss the applicability of the three categories and, secondly, to discuss whether different measures, rights and possibilities should be assigned to third-country nationals, depending on whether the (temporary) impossibility of the return is the fault of the third-country national or not and how temporary it can be assessed to be.

From the discussions among the conference participants it was clear that it is necessary to distinguish between different categories reflecting the different types of situations, when talking about third-country nationals pending return; and there seemed to be general agreement that distinction between the categories should also be made in terms of the rights ascribed to the third-country nationals.

As to the categories proposed by the consortium, the conference participants did not necessarily see the point or a need for having a third category of so-called “unwanted” third-country nationals. Criminal third-country nationals who have been served with a removal order as part of their sentence, for example, but cannot be removed upon release from prison, should not necessarily be treated as a separate group. Serving a prison sentence should be punishment enough, it was argued, and these persons should therefore be treated on a par with other EU third-country nationals in a pending situation.

On the other hand, there seemed to be some agreement, especially among the representatives of Member State authorities, that it would make sense to somehow distinguish between situations where the third-country national is without fault and the impediment(s) to return is beyond his/her influence, and situations where the return process is obstructed by the third-country national’s non-cooperation.

Meanwhile, issues and discussions were raised regarding how to determine cooperation versus non-cooperation, whether and how it should be possible to move from one category to another, and whether and how the time factor could and should be taken into account in defining categories and in granting different rights.

The consortium therefore recommends that this idea be developed further in discussions between the study countries and the European Commission in an effort to clarify these issues and perhaps agree on some form of categorisations, definitions and criteria that would make sense and be useful across countries.

## **7.2 Establishing definitions and criteria to be applied**

On the basis of the discussions at the conference (primarily) and with inspiration from some of the existing practices in Member States, the study consortium has developed the following ideas on how to potentially address some of the issues raised in the discussions on the categorisation and legal status of third-country nationals pending return. The following should by no means be considered a finalised, ready-to-implement solution, nor should it be taken to mean that the subject has been exhausted. On the contrary, these ideas are meant to serve as inspiration for further discussions between the EU Member States and Schengen Associated countries on potentially developing future approaches to third-country nationals pending return.



In the group discussions at the conference, it was proposed that potential legal provisions or guidelines for dealing with the postponement of third-country nationals' return could take starting-point in what is already laid down in Article 9 of the Return Directive. Article 9 specifies in which situations Member States *shall* (Article 9(1)) and *may* (Article 9(2)) postpone the removal of a third-country national. The reasons for postponement given in Article 9 can be separated in what may be termed legal and humanitarian (non-refoulement) reasons (paragraph 1) and practical and technical reasons (paragraph 2). It is proposed to build on this distinction in moving forward:

- 1. Legal and humanitarian obstacles to return/removal:** Cases where the presence of the third-country national on the territory of the host country is required for legal proceedings (legal reasons), and where the return of the third-country national would put his/her life and health at risk (humanitarian reasons – similar to the criteria for granting subsidiary protection; cf. Directive 2011/95/EU, Article 15).

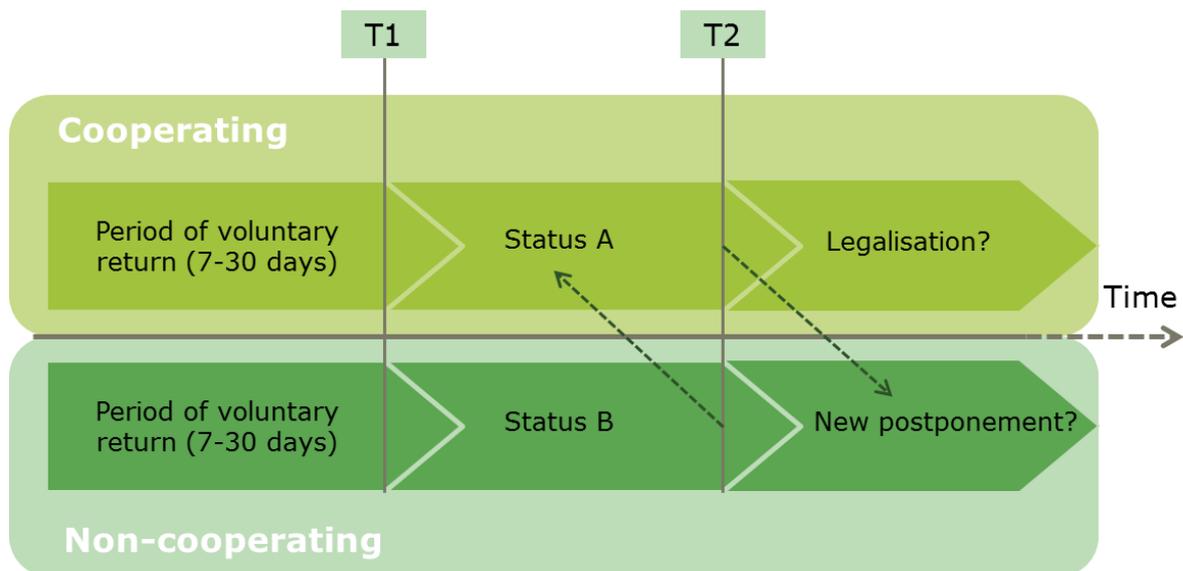
It was discussed whether the status given to persons in this situation should be in the form of a special type of temporary residence permit, which can be revoked once/if the obstacles to removal cease to exist, as already used by some countries (e.g. Hungary); or whether they should rather be given a special postponement status (separating this group more clearly from those with a legal right to stay), such as the "Duldung" provided in Germany for instance. There were different interpretations of the Return Directive as to whether it provides for one or the other – or both – solutions. This is still open for discussion.

- 2. Technical and practical obstacles to return/removal:** Cases where the return of a third-country national is hindered by missing travel documents, non-cooperation of the return country, lack of transport capacity, etc. These are the cases in which it would be relevant to distinguish between whether the obstacles to return are induced by the third-country national's (non-)cooperation.<sup>76</sup> This essentially establishes two sub-categories in the group of third-country nationals with a postponement for practical or technical reasons: The "co-operators" and the "non-co-operators".

There seemed to be general agreement during the conference discussions that both groups should receive some kind of status/postponement, but also that these should be different for the two groups and have different rights attached to them. It was also evident that it needs to be clarified how the national authorities are to distinguish between persons in one and the other category, and that it should be possible (with time) to move from one category to the other. The criteria applied for this, however, are still open for discussion. These reflections are illustrated in Figure 3 below.

**Figure 3: Sub-categorisation for postponements due to technical or practical obstacles**

<sup>76</sup> The Court of Justice of the European Union has recently referred to 'no justified ground for non-return', see Case C-329/11 Achughbabian v Préfet du Val-de-Marne, para. 48.



What Figure 3 illustrates is that after the period of voluntary return, as stated by the return order (first milestone, T1), those third-country nationals who remain on the territory of the host country should be given some kind of status – a postponement of sorts – and this status should be different depending on whether: a) the third-country national can be considered to have made a genuine attempt to leave the country or is perhaps in the process of cooperating with the authorities on a voluntary return (status A); or whether b) the third-country national remains on the territory because he/she refuses to leave and is not cooperating with the authorities (e.g. by helping to establish his/her identity) in executing the removal (status B).

After another (as of yet undefined) period of time (second milestone, T2), if the third-country national still has not returned or been removed, the situation and status should be reconsidered. If the third-country national is considered to have remained cooperative throughout the period of postponed return, and it is assessed that a return is still not possible, it could be an option to grant him/her a form of residence permit. If, on the other hand, the third-country national has not been cooperating on his/her return or removal and it is still not possible to enforce the return order, a new status – a postponement of sorts – will be granted to the third-country national.

At this point in time (T2), it should also be considered whether a person in one category should be allowed to “move” to the other, if for instance a person who was initially assessed as obstructing the return has for the past time period been cooperative. He/she should then be granted a new status – status A – and if he/she continues to be cooperative, there should be a possibility for legalisation after the “Status A” time period. On the contrary, a person originally granted status A for being cooperative can potentially be moved to the other category, if he/she has proved non-cooperative in the period between T1 and T2. These potential “moves” are indicated by the dotted, dark green arrows in the figure above.

Some of the study countries already have practices in place that are somewhat similar to what is proposed in the above. In Sweden, for instance, failed asylum seekers are offered to enter a voluntary return programme, organised by the IOM. Those who agree to cooperate on their return remain the responsibility of the asylum authority, the Migration Board (in cooperation with the IOM), and maintain those rights they had while in the asylum-seeking system (e.g. access to the labour market). Those who are assessed as not cooperating become the responsibility of the police who handle forced



removals. While pending removal they will lose some rights compared to those of asylum seekers, such as access to the labour market and a reduction in their daily allowance. What has been criticised by some study respondents about the Swedish model, however, is that the failed asylum seeker may quite quickly be deemed “non-cooperative” if he/she is reluctant towards entering the voluntary return programme. Once signed over to the police for removal, there are no options for potentially being re-assessed as “cooperative”, even if the police may find that he/she is.

Germany and Denmark are examples of countries, which have specific legal provisions for third-country nationals to obtain legal stay, within a specific time frame and given that the third-country national is cooperative (i.e. assists in the return and/or in uncovering the necessary information for enforcing the return). In both countries, 18 months is the milestone at which it will be considered whether a third-country national is eligible for being granted a residence permit, if he/she is “not likely to be removed in the foreseeable future” (Germany) or if the “return is considered futile” (Denmark). In the Danish legislation, it is furthermore specified that the third-country national has to be cooperative for 18 *consecutive* months to possibly obtain a residence permit. Meanwhile, in Denmark, it is left to the administration to assess the exact implication of the two central concepts of “cooperation” and “futile”. And in Germany, third-country nationals on a toleration status (“Duldung”) who are not considered eligible for a residence permit may in practice live on toleration indefinitely. In considering a future model, it is thus important to establish clear definitions, criteria and some sort of time frame – also for those in the “non-cooperating” category.

It is certain that to establish the much needed clarity in this area, concepts and criteria applied need to be further defined. It is also certain that to reach clearer definitions, further discussions are needed. The above ideas are proposed as a framework or platform for continued conversations between the EU Member States, Schengen Associated Countries and the European Commission. But many questions are still open for discussion:

- First, the question of how to define the distinction between the two categories - cooperating and non-cooperating?
- Second, what should the rights attached to the different statuses (A and B) be? Should cooperating third-country nationals for example be granted a right to work, as has been proposed by several at the conference?
- Third, what should the criteria be for being “moved” from one category to another? 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?
- Fourth, at which point in time (if ever) should the third-country nationals be able to obtain legalisation – a time frame for the cooperating category vs. the non-cooperating?
- 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?
- Sixth, what about those non-returnable third-country nationals who are considered a threat to society 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 (e.g. Denmark – toleration status) and the US (cf. the information provided by keynote speaker, Mark Lenox, at the Brussels conference)?



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**Country reports are attached in a separate document, Annex 1.**