Part I – Regularisations and irregular migration in the EU legal framework

Part I of this study focuses first on the concepts underpinning regularisations before outlining the key aspects of the EU legislative framework surrounding irregular migration.[178] Chapter 1 explores the notion of regularisation in more detail, providing not only a definition of regularisation but also casting light on the different categories necessary for the comparison in Chapter 4. Insights into the conceptual foundations are essential for the analysis in Chapter 2 of the EU primary and secondary law concerning the extent of Union competence in the fields of irregular stays and regularisation. The attention is first directed towards EU secondary law – namely the Return Directive – with the subsequent analysis of primary law clearly demonstrating that the EU indeed has the necessary competence to pass EU legislation on regularisations.

Chapter 1 – Conceptualising regularisations

Chapter 1 provides key insights into the concept and definition of regularisations and shines further light on these tools from the immigration law toolbox which – just as a return – end an irregular status.[179] In principle regularisations are thus acts or measures which justify the transition from the status as an irregularly staying to a lawfully residing migrant.[180]

As the term 'regularisation' is not used and applied uniformly, this study is not content with providing merely a definition (A.) but rather

178 See on this question *Hinterberger*, Die Mehrebenendimension aufenthaltsrechtlicher Irregularität. Konzeptionelle Überlegungen zum Auftreten irregulärer Migration in der EU in *Thym/Klarmann* (eds), Unionsbürgerschaft und Migration im aktuellen Europarecht (2017) 155 as well as *Hinterberger*, A Multi-Level Governance Approach to Residence Rights of Migrants and Irregular Residence in the EU, EJML 2018, 182.

179 Extracts from an earlier version of this Chapter have been published in German in *Hinterberger* in *Lanser/Potocnik-Manzouri/Safron/Tillian/Wieser* and in English in *Hinterberger*, Maastricht Journal of European and Comparative Law 2019. See Chapter 1.A.II.2. and Chapter 2.B.

180 Cf. *Pelzer* in *Fischer-Lescano/Kocher/Nassibi* 146.

also a full explanation of the constituent elements of the definition itself. The elucidated definition of regularisation then forms the framework for creating the categories of regularisations that form the central foundation for the comparison in Part II (B.). At the same time it serves to conclude the conceptual considerations in Part I before turning in Chapter 2 to the EU framework regarding irregular migration and regularisation.

A. Definition

This section explores various definitions of regularisation (I.) turning thereafter to describing the constituent elements of the definition proposed in this study (II.).[181]

I. Overview of current definitions

The lack of a common standard in Austria, Germany, Spain[182] or in EU law[183] creates considerable challenges in finding a particular approach to defining 'regularisation'. The term itself is not anchored in the national laws of these Member States:[184] it is therefore not a legal term.[185] In principle national legal systems only distinguish between residence titles, residence rights, residence approvals, residence permits, etc.,[186] which may constitute a regularisation in certain circumstances. Defining a separate, legal notion of regularisation is therefore complicated further by finding separate definitions and clear distinctions between regularisations characterised by the change in status from 'irregular' to 'regular'.

181 For detail regarding the German term, see *Hinterberger*, Regularisierungen 106.
182 As an example of Spanish literature cf. *Puerta Vílchez*, La regularización de extranjeros. Art. 31.3 y Disposición transitoria cuarta in *Moya Escudero* (ed), Comentario sistemático a la ley de extranjería (2001) 391 (391f).
183 Cf. *Baldwin-Edwards/Kraler*, REGINE (January 2009) 7.
184 Cf. *Bydlinski*, Das bewegliche System und juristische Methodenlehre in *Bydlinski/Krejci/Schilcher/Steininger* (eds), Das Bewegliche System im geltenden und künftigen Recht (1986) 21 (25).
185 Cf. *Raschauer*, Verwaltungsrecht mn 30.
186 See for example § 4 AufenthG or Art 1(2)(a) Residence Permit Regulation. For detail see Chapter 3.A.III., Chapter 3.B.III. and Chapter 3.C.III.

The respective literature also does not feature a uniform definition of regularisation.[187] Such lack of uniformity is explained to some extent by the fact that there is not just one single type of regularisation.[188] Nonetheless, certain common elements do exist, as can be seen in the following examples:

– The 'granting on the part of the State, of a residence permit to a person of foreign nationality residing illegally within its territory'.[189]
– 'Regularisation is defined as any state procedure by which third country nationals who are illegally residing, or who are otherwise in breach of national immigration rules, in their current country of residence are granted a legal status'.[190]

In their respective definitions *Apap/de Bruycker/Schmitter* and *Baldwin-Edwards/Kraler* refer to the grant of a legal status through a state procedure. However, the definitions differ in so far as the status in the first definition is granted to a person who is 'residing illegally', whereas the second refers also to a third-country national who breaches national immigration rules.

– 'Regularisation is defined as a state procedure by which third-country nationals who are in breach of national immigration rules in their country of residence are granted a legal status, but are not accorded full citizenship rights'.[191]

The grant of lawful residence via a state procedure is also an essential factor for *Lazaridis*, yet she adds greater precision to the status granted by noting that regularisation does not imply the grant of full citizenship rights.

– 'Regularization is the means by which a government provides lawful status to foreigners in an unlawful or irregular situation in respect to admission, stay and economic activity'.[192]

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187 See e.g. *Pelzer* in *Fischer-Lescano/Kocher/Nassibi* 143.

188 *Kluth*, Einheitliche Europäische Zuwanderungspolitik: Vertragsrechtliche Grundlagen und Vergleich der politischen Konzeptionen. Legalisierungsmaßnahmen, ZAR 2007, 20 (22).

189 *Apap/de Bruycker/Schmitter*, EJML 2000, 263.

190 *Baldwin-Edwards/Kraler*, REGINE (January 2009) 7; see also *EMN*, Asylum and Migration Glossary 3.0 (October 2014) 234, which refers to the definition in the REGINE-Study. See also *Kraler*, Journal of Immigrant and Refugee Studies 2019, 95.

191 *Lazaridis*, International Migration 132.

192 *Intergovernmental Committee for Migration*, Undocumented Migrants and the Regularization of their Status, International Migration 1983, 109 (109). See also the *IOM* definitions in *Perruchoud/Redpath-Cross* (eds), Glossary on Migration[2] (2011): 'Any process or programme by which the authorities in a State allow

The definition given by the *Intergovernmental Committee for Migration* (the predecessor of the *IOM*) also includes details concerning the 'lawful status' that is awarded. In addition to the right to stay, the definition also covers access to the job market, as is the presumed meaning of the term 'economic activity'.[193]

The complexity surrounding these definitions arises inter alia not only from their use of different terminology but also from the different content attributed to such terminology.[194] For example, reference is made in part to persons of foreign nationality and third-country nationals, to illegal status or irregular migration, with each term having its own meaning. Furthermore, the German term *Aufenthaltsrecht* could be translated into English as 'right to stay' or 'right to reside', though the former is the preferred translation. One may therefore never assume that the notion 'regularisations' refers to the same measures and/or procedures.

The aforementioned definitions overlap in so far as they refer to persons who do not have a right to stay in a particular country but who receive a residence permit (or similar) through an official procedure. *Kluth* describes this as a national measure with a legal effect and which leads to a change in a specific legal status.[195] The grant of a residence right is of particular interest here as the focus is on such national acts that effect the legal transition from the status as a migrant staying irregularly to one staying lawfully.[196]

II. Elements

It is clear from examining the notion of regularisation that a specific, separate and clear definition is required. Regularisation is therefore to be understood as decision issued by an administrative authority (or a court)

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non-nationals in an irregular or undocumented situation to stay lawfully in the country. Typical practices include the granting of an amnesty (also known as "legalization") to non-nationals who have resided in the country in an irregular situation for a given length of time and are not otherwise found inadmissible'.

193 Cf. *Böhning*, International Migration 1983, 171 Fn 10.

194 *Kraler*, Regularisation: A misguided option or part and parcel of a comprehensive policy response to irregular migration? IMISCOE WP No. 24 (February 2009) 8.

195 Cf. *Kluth*, ZAR 2007, 21f.

196 See the definition 'irregularly staying migrants' in Chapter 1.A.II.1.

which grants irregularly staying migrants a right to stay, provided certain minimum requirements are met.

The elements of this definition of regularisation have been derived inductively from the review of the various different definitions; they are brought together based on the objectives underpinning the comparison of the national laws.[197] The proposed definition lays down key principles and may be used for other (scholarly) studies.[198] It serves to structure and depict a legal phenomenon that has not received sufficient attention in current research. Furthermore, the definition describes the aforementioned legal change in residence status. The definition proposed here comprises four elements: (1.) irregularly staying migrants, (2.) the grant of a right to stay, (3.) a decision, and (4) satisfying the minimum requirements.

The change to a migrant's legal status is at the heart of regularisations. Generally speaking, 'regularisation' is an umbrella term for the change from an unlawful to a lawful residency status.[199] Regularisations are attached to the person and their unlawful/irregular stay,[200] whereby by removing the irregularity, the grant of a right to stay thus effects a change in legal status. From the outset, however, the national legal system must recognise that such change results from the grant of the right. The elements 'irregularly staying migrants' and 'the grant of a right to stay' thereby have a constitutive function as they are vital for the change in status: without them there is ultimately no change in status and as such they form the heart of the definition. The 'decision' and 'satisfaction of the minimum requirements' are not constitutive elements as it is conceivable that they need not be included in a definition of regularisation. I have nonetheless included these two aspects because they are generally elements of regularisations and relate to the form thereof.

1. Irregularly staying migrants

A qualification as a regularisation requires a measure to at least target persons staying irregularly in a Member State – a 'geographical criterion'

197 See Introduction D.II.
198 In general on '*wissenschaftliche Begriffe*' (scientific terms) *Raschauer*, Verwaltungsrecht mn 31.
199 Cf. *Kluth*, ZAR 2007, 21f.
200 In turn this corresponds to the view taken in this study; see Introduction D.II.3.

according to *Apap/de Bruycker/Schmitter*.[201] The personal scope of application therefore encompasses irregularly staying migrants.[202] Generally, the term 'migrants' concerns all non-citizens,[203] though in the following the term refers to third-country nationals as understood in EU law. EU primary law distinguishes in principle between Union citizens and third-country nationals.[204] In this regard, the second sentence of Article 20(1) TFEU provides that third-country nationals are all persons who do not hold the nationality of a Member State. Stateless persons are treated as third-country nationals for the purposes of the policies on 'asylum, immigration and external border control',[205] as per the second sentence of Article 67(2) TFEU. All relevant provisions of EU primary and secondary law therefore apply;[206] they are thus also subsumed in this study under the term 'third-country nationals'.

However, the personal scope of application as referred to in the following is limited even further:[207] it does not concern Union citizens,[208] citizens of an EEA State or of Switzerland. As noted above, it also does not extend to persons who enjoy international protection as beneficiaries under the Qualification Directive.[209] Moreover, the scope does not extend to relatives of a person falling into one of the aforementioned categories since such persons have privileged residence rights.[210]

In principle, the term 'irregular stay' lacks a uniform legal definition.[211] The *FRA* uses 'irregular' as a synonym for the term 'illegally staying third-

201 *Apap/de Bruycker/Schmitter*, EJML 2000, 294f.
202 For an initial approach see *Guild*, Who is an irregular migrant? in *Bogusz/Cholewinski/Cygan/Szyszczak* (eds), Irregular Migration and Human Rights (2004) 3.
203 On the terminology see *Motomura*, Americans in Waiting (2007) 3f and *Costello*, Human Rights 4.
204 For an overview see *Boeles/den Heijer/Lodder/Wouters*, Migration 30ff.
205 Cf. the heading Part V Chapter 2 TFEU.
206 Especially *Weiß/Satzger* in *Streinz* (ed) EUV/AEUV Kommentar[3] (2018) Art 67 AEUV mn 32.
207 In this sense also *Morticelli*, Irregular Migrants 74.
208 However see in this regard also *Klarmann*, Illegalisierte Migration 261–270 or *Thym*, When Union Citizens Turn into Illegal Migrants: The Dano Case, ELR 2015, 249, who both describe illegalised/illegal Union citizens.
209 See Introduction D.II.1.
210 *Hinterberger*, EJML 2018.
211 Cf. for example *Düvell* in *Falge/Fischer-Lescano/Sieveking* 23ff with further references; *Fischer-Lescano/Kocher/Nassibi*, Einleitung in *Fischer-Lescano/Kocher/Nassibi* (eds), Arbeit in der Illegalität (2012) 7 (8).

country nationals' as used in Article 3 No. 2 Return Directive:[212] '"[I]llegal stay" means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State; […]'. The EU's legislative competence concerning the Return Directive is anchored in Article 79(2)(c) TFEU.[213] The term 'unauthorised residence' used in Article 79(2)(c) TFEU is to be viewed as the counterpart to 'residing legally' under Article 79(2)(b) TFEU.[214] It is therefore notable that Commission documents use the terms 'staying illegally' as well as 'irregularly staying'.[215]

Migrants 'staying illegally' fall within the scope of the Return Directive.[216] This corresponds with the aim of this Directive 'to establish an effective removal and repatriation policy, based on common standards and common legal safeguards, for persons to be returned in a humane manner and with full respect for their fundamental rights and dignity'.[217] Despite such focus on commonality, the Return Directive affords the Member States broad discretion for the return procedure,[218] with the ECJ later determining that the Return Directive is 'not designed to harmonise in their entirety the national rules on the stay of foreign nationals'.[219]

Article 2(b) of the Employers Sanctions Directive contains a near identical definition with regard to an 'illegally staying third-country national […] present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State'. This differs from the Return Directive in so far as there is no reference to the Schengen Borders Code regarding the conditions of entry.

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212 Cf. *FRA*, Fundamental rights of migrants in an irregular situation in the European Union. Comparative report (November 2011), https://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf (31.7.2022)16.

213 Cf. *Thym* in *Grabitz/Hilf/Nettesheim* (eds), Das Recht der Europäischen Union Kommentar Band I (69th edn, February 2020) Art 79 AEUV mn 34 and *Hörich*, Abschiebungen nach europäischen Vorgaben (2015) 19 as well as Chapter 2.B.I.

214 *Bast* in *Fischer-Lescano/Kocher/Nassibi* 78.

215 Recitals 11 and 19 Recommendation (EU) 2017/432.

216 Art 2(1) Return Directive; cf. *Lutz* in *Thym/Hailbronner* (eds), EU Immigration and Asylum Law. A Commentary[3] (2022) Art 2 Return Directive mns 1ff.

217 ECJ *Mahdi*, para 38.

218 See only Arts 2(2), 6(6) and 8(6) Return Directive as well as Chapter 2.B.I. With regard to Art 3 No. 4 Return Directive see ECJ 6.12.2012, C-430/11, ECLI:EU:C:2012:777, *Sagor*, para 39.

219 ECJ 6.12.2011, C-329/11, ECLI:EU:C:2011:807, *Achughbabian*, para 28.

The EU Treaties therefore view migrants as 'legal' or 'illegal'.[220] This dichotomy has quite rightly been criticised as it fails to recognise the social process of 'illegalisation'.[221] In particular, the term 'illegal' is to be rejected due to its stigmatising effect[222] and portrayal of migrants as criminals.[223] The use is also criticised by several voices in the literature.[224] The negative connotations associated with 'staying illegally' also do not contribute to removing the stigmatism or negative connotations attached to the use of 'illegal'.[225]

The expression 'irregularly staying' is therefore preferred as it best expresses the subsequent focus on the legal status of migrants[226] and on residency laws in general. 'Irregularly staying' stands for the status of those migrants who do not have (or no longer have) a right to stay due to the violation of particular legislative provisions, be this through the breach or non-fulfilment of the provisions.[227]

220 *Costello*, Human Rights 64 and *Menezes Queiroz*, Illegally Staying 4, 7ff and especially 91. See further Chapter 1.A.II.1.–2.

221 Recently, *Klarmann*, Illegalisierte Migration 44ff; *Bauder*, Why We Should Use the Term 'Illegalized' Refugee or Immigrant: A Commentary, IJRL 2014, 327 as well as *Costello*, Human Rights 64f.

222 *Parliamentary Assembly of the Council of Europe*, Human Rights of Irregular Migrants, Resolution 1509 (27.6.2006) § 7.

223 Cf. *Błuś*, EJML 2013, 414; *Lazaridis*, International Migration 11f; *Tohidipur* in *Fischer-Lescano/Kocher/Nassibi* 42 with further references; *Pelzer* in *Fischer-Lescano/Kocher/Nassibi* 145; *Koser*, Migration 54.

224 Cf. for instance *Cholewinski*, The Criminalisation of Migration in EU Law and Policy in *Baldaccini/Guild/Toner* (eds), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (2007) 301 (305f); *Carrera/Guild* in *Carrera/Guild* 6; *Koser*, Migration 54f; *Costello*, Human Rights 64; *Dumon*, International Migration 1983, 218.

225 *Kluth*, ZAR 2007, 21 Fn 12.

226 *Costello*, Human Rights 2, refers to 'migration status' that is created by immigration and asylum laws. The term appears to be more extensive as it includes more than just a residence right. See also *Schieber*, Komplementärer Schutz.

227 Cf. also the definitions in *Uriarte Torrealday*, Algunas reflexiones críticas a partir de la jurisprudencia sobre inmigración irregular, Revista de Derecho Político 2009, 291 (297); *Düvell* in *Falge/Fischer-Lescano/Sieveking* 24; *Böhning*, International Migration 1983, 160.

The definition creates a precise legal term,[228] which harmonises the fragmented EU[229] and national[230] terminology – irregular, illegal, staying illegally, illegalised, 'sans papiers'[231], undocumented and unauthorised migrants – for the purposes of residency laws. With regard to EU law, 'irregularly staying' is to be understood as synonymous with 'illegal stay' under Article 3 No. 2 of the Return Directive.[232] Establishing such a term also contributes to modernising the language used in immigration law (in particular German terminology)[233] as the focus is placed on the migrants' perspective.[234] 'Irregular stay' is therefore used as an autonomous, dogmatic and thus specific legal term that is suitable in general for structuring the law.[235]

'Irregularly staying' comprises two elements: 'staying' requires the physical presence in the territory of a Member State whereby 'irregularity' refers to the legal status of the stay pursuant to residency laws; it therefore does not extend to applications made from abroad.

In most cases the requirement 'irregularly staying' must be satisfied at the time of the application or decision (from the administrative authorities or administrative courts[236]), or across the entire period (i.e. from application to decision).[237] In contrast to a change of status under other aspects of residency laws, it is not only possible but indeed necessary to make the application domestically, thereby allowing for an appropriate distinction to be drawn from those residence rights that can be acquired whilst abroad. A residency right acquired whilst abroad therefore cannot constitute a regularisation as the key requirement of being physically present

228 *Uriarte Torrealday*, Revista de Derecho Político 2009, 299, 312; cf. *Cholewinski* in *Baldaccini/Guild/Toner* 306.

229 See just *Klarmann* in *Thym/Klarmann* or *Menezes Queiroz*, Illegally Staying 26, 28–21.

230 Cf. *Baldwin-Edwards/Kraler*, REGINE (January 2009) 1f and see with regard to Austria, Chapter 3.A.II.1., for Germany, Chapter 3.B.II.1. and for Spain, Chapter 3.C.II.1.

231 Cf. *Tohidipur* in *Fischer-Lescano/Kocher/Nassibi* 41; *Hobbe*, Undokumentierte Migration in Deutschland und den Vereinigten Staaten (2004) 1ff.

232 Cf. *Menezes Queiroz*, Illegally Staying 30.

233 Cf. *Bast*, Aufenthaltsrecht 1ff, 291ff.

234 See Introduction D.II.3.

235 Cf. *Glaser*, Handlungsformenlehre 70.

236 On the law in Austria, Chapter 3.A.IV.–V., for Germany see Chapter 3.B.IV.–V., and for Spain, Chapter 3.C.IV.–V.

237 On the law in Austria, Chapter 3.A.III.2.a., for Germany see Chapter 3.B.III.2.a., and for Spain, Chapter 3.C.III.3.a.

on the domestic territory is not satisfied. It is for this reason that family reunification is not examined as the relevant applications are typically to be made when the family members are residing outside the territory of the Member State.[238] Certain circumstances allow for an application for family reunification to be made when the family members are already in the territory, but these cases are not examined here.

2. Granting a right to stay

As the legal consequence of a particular measure, the grant of a right to stay may allude to a regularisation, yet by itself does not shed light on the actual meaning and implications of such right. In principle the right to stay entitles a person to reside in a Member State, i.e. a lawful residency. *Farahat* describes such a right as establishing a relationship determined by territory.[239] At first glance this appears to be an appropriate description, yet closer examination reveals several complications. It is clear that each objective right accompanied by lawful residency may be understood as a right to stay in the narrow sense, but it is not necessary that a claim to residency arises, i.e. a subjective right.

The treatment of toleration under Austrian and German law complicates matters further as the instrument takes on different forms to allow factual residence that is not lawful *per se*. According to *Renner*, this concerns the actual stay without regard for duration, purpose and other circumstances such as, above all, the legality.[240] The person concerned is (provisionally) tolerated, though the national authorities are aware that the return cannot be enforced. Toleration may therefore be understood as a right to stay in a broad sense, at least for the purposes of understanding its position amongst the various instruments in residency laws.[241] It thus becomes clear that the notion of a right to stay features core and peripheral elements.

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238 Art 5(3) Family Reunification Directive.

239 *Farahat*, Progressive Inklusion 61; on 'Territorium' *Bast*, Völker- und unionsrechtliche Anstöße zur Entterritorialisierung des Rechts, VVDStRL 2016/76, 278.

240 Cf. *Renner*, Ausländerrecht in Deutschland: Einreise und Aufenthalt (1998) 156; see also *Riecken*, Die Duldung als Verfassungsproblem (2006) 35f with further references.

241 Cf. *Kluth*, ZAR 2007, 22. For detail, see Chapter 1.B.III.1.a.

In light of the above, determining whether a right to stay has been granted requires an understanding of how the right is devised. The central element for this study is for a right to stay to establish a legally-recognised, lawful residence. This change in status forms the core (a.). Three further elements are also described which determine the stability and weight of a right to stay, yet are not essential for it to be granted: whether the right is temporary (b.), whether there are any rights related to the status (c.) and whether there is the possibility to consolidate the right (d.).

a) Lawful

The first and central element concerns the status of the stay as lawful. It is a fundamental requirement for the classification as a right to stay that, by granting the right, national law establishes a lawful stay in a purely domestic manner. In this context, 'purely domestic' is used when a right to stay is granted purely on the basis of domestic rules. The lawfulness of the stay follows from the TFEU, which distinguishes between legal and illegal residence,[242] as well as the Return Directive,[243] and thus is appropriate for the comparison of the national laws. Generally, a lawful stay will take the form of a residence title, residence permit or other authorisation. From the perspective of Austrian and German law, however, toleration does not constitute a right to stay as it is not considered as granting permitted/lawful residence.

b) Temporary

The second element concerns the temporal element: the lawful residence created by a right to stay is typically subject to a time constraint. Although *Kluth* refers to a temporary right to stay in such instances, he does detail the period of time that is 'temporary' in nature.[244] By contrast, the lawful stay resulting from the grant of the corresponding right may also be permanent. For the purposes of the definition used in this study, a temporary right to stay is especially pertinent as Member States usually do not grant

242 Cf. *Costello*, Human Rights 63ff; critically of this conception *Klarmann*, Illegalisierte Migration 118ff and Chapter 1.A.II.1.
243 See Chapter 2.B.I.
244 *Kluth*, ZAR 2007, 22.

irregularly staying migrants a permanent right to stay in the course of the regularisation process.

c) Rights linked to the status

The weight of the right to stay is determined not only by its duration but also by its content. Accordingly, the third element concerns the rights that are linked to the status, in particular the access to employment as well as certain other social rights. In this respect, *Kraler* determines that migrants consider the access to employment as one of the main reasons to seek regularisation.[245]

d) Consolidation

The fourth element focuses on the legal possibility to consolidate the right once the allocated time period has expired. The notion of consolidation, which is linked to the improvement of an existing residence status, may take the form of an extension or the grant of a different type of residence right and has been covered in a number of different studies.[246]

3. Decision

The following begins by explaining the scope of the 'decision' to describe thereafter the nature of the decision as applying to a single individual (a.). Furthermore, it will also be discussed whether the decision follows from an administrative authority or an administrative court (b.)

The right to stay is granted in principle via a decision of the administrative authority or in a (subsequent) decision from an administrative court. The expression 'decision granting the right to stay' will be used hereinafter as the umbrella term for each type of residence title, residence permit,

245 Cf. *Kraler*, Journal of Immigrant and Refugee Studies 2019, 105–107. On the law in Austria, see Chapter 3.A.II., for Germany, Chapter 3.B.II. and for Spain, Chapter 3.C.II.

246 Cf. generally *Bast*, Aufenthaltsrecht 256f with further references, and *Farahat*, Inklusion in der superdiversen Einwanderungsgesellschaft in *Baer/Lepsius/Schönberger/Waldhoff/Walter* (eds), Jahrbuch des öffentlichen Rechts der Gegenwart 66 (2018) 337 (343).

Aufenthaltstitel, *autorización de residencia*, etc.[247] As the decision effects the transition from irregularity to regularity, it is more appropriate to focus on the actual effect rather than on the procedure underpinning the decision itself.[248] Here it is not the procedure itself that forms the relevant point for the change in status, but rather the time of the decision (which typically marks the end of the procedure). It is to be further noted that the Member States have different rules concerning the moment at which the decision takes effect. The effect can be *ex-tunc* (*ab initio*) or *ex nunc* (*de futuro*). Whereas *ex tunc* describes the retrospective effect, whereby the status is deemed to have changed at the moment the application was made, *ex nunc* means the change in status beginning from the time of the decision.

a) Individual

A decision granting the right to stay may concern a group as well as an individual. However, as the following adopts the standpoint that regularisations are at the basis of a decision regarding an individual, the decision is therefore directed towards a single person and not towards individuals who belong to a group by virtue of their personal characteristics. German administrative law refers in this respect to a *konkret-individueller Charakter eines Aktes*, in other words the act is individual by its very nature.[249] The term 'individual' is used in the following to describe a decision regarding a particular person and thus an assessment of whether the requirements are satisfied in each separate case. I do not analyse procedures in which a right to stay is granted without such a case-by-case assessment and corresponding decision.[250]

247 It would also be conceivable to refer to an '*Aufenthaltsgenehmigung*' ('residence approval'); see for example *Bast*, Zehn Jahre Aufenthaltsgesetz, DÖV 2013, 214 (216).

248 Cf. *Baldwin-Edwards/Kraler*, REGINE (January 2009) 7; *Lazaridis*, International Migration 132.

249 *Maurer/Waldhoff*, Allgemeines Verwaltungsrecht[20] (2020) § 9 mns 16–18. Cf. further *Raschauer*, Verwaltungsrecht mns 852ff on Austrian administrative law.

250 See Chapter 3.A.III.4.

b) Decision from the administrative authorities or the courts

The administrative authorities[251] act with governmental authority[252] in administrative proceedings. In principle the measures can follow on the basis of an application but also *ex officio*, namely where an authority acts on its own initiative when certain requirements are satisfied.[253]

The administrative (and individual) decision in Austrian administrative proceedings is generally in the form of a *Bescheid* (an administrative decision or ruling);[254] in Germany one refers to a *begünstigender Verwaltungsakt* (a beneficial administrative act, i.e. an administrative measure which establishes or confirms a right or legal advantage),[255] and in Spain the decision falls within the category of an *acto administrativo* (administrative act).[256]

Under certain circumstances a decision from the administrative court may follow from the actions taken by the administrative authorities. The administrative courts in Austria have jurisdiction for matters under residence law.[257] The decisions are made on the basis of a so-called *Bescheidbeschwerde mittels Erkenntnis* (i.e. a judgment on an appeal brought against an administrative decision or ruling).[258] Under German law the *Verwaltungsgerichte* (administrative courts) issue an *Urteil* (judgment) with

251 Cf. on Austrian law, *Kolonovits/Muzak/Stöger*, Verwaltungsverfahrensrecht (2014) mns 14 and 58, for Germany *Maurer/Waldhoff*, Verwaltungsrecht § 22 mns 13ff.

252 Cf. on the use of the term (*hoheitlich*) in Austria *Kolonovits/Muzak/Stöger*, Verwaltungsverfahrensrecht mn 381; *Hengstschläger/Leeb*, AVG (1.1.2014, rdb.at) § 7 AVG mn 3; *Hengstschläger/Leeb*, AVG (1.7.2005, rdb.at) § 56 AVG mn 13; for Germany *Maurer/Waldhoff*, Verwaltungsrecht § 1 mn 25 and § 9 mns 12–14.

253 Cf. regarding the Austrian *Aufenthaltstitel aus berücksichtigungswürdigen Gründen* ('residence permits for exceptional circumstances') § 58(1) AsylG (A) and Chapter 3.A.III.2.b.

254 Cf. *Raschauer*, Verwaltungsrecht mns 812ff.

255 Cf. *Groß*, Das Ausländerrecht zwischen obrigkeitsstaatlicher Tradition und menschenrechtlicher Herausforderung, AöR 2014, 421 (423f). In general on the administrative act see § 35 VwVfG and *Maurer/Waldhoff*, Verwaltungsrecht § 9, specifically mn 48.

256 Cf. in general the comments in *Boza Martínez/Donaire Villa/Moya Malapeira*, La normativa española de extranjería y asilo: evolución y características principales in *Boza Martínez/Donaire Villa/Moya Malapeira* (eds), La nueva regulación de la inmigración y la extranjería en España (2012) 15 (19).

257 BGBl I 51/2012.

258 §§ 7ff and 28 VwGVG, see Chapter 3.A.V.1.

regard to an appeal.[259] In Spain the *Tribunal de lo Contencioso-Administrativo* (administrative court) issues a *sentencia* (judgment) in relation to a *recurso contencioso-administrativo* (act for judicial review).[260]

4. Satisfying the minimum requirements

The grant of a right to stay is subject to the satisfaction of certain (formal and substantive) requirements.[261] However, it is not particularly expedient to list all possible requirements here as this would require an analysis of all regularisations, but examples include the minimum duration, language skills or whether there are particular humanitarian grounds. It can be noted at this early stage that one of the general criteria for a decision granting the right to stay, namely a visa, does not apply.

III. Interim conclusion

The overview of existing definitions for regularisation given at the beginning of section A above allows for the conclusion that regularisations are characterised by the change in residence status from irregular to regular. Regularisations were defined as each decision of an administrative authority or administrative court which grants a right to stay to irregularly staying migrants who satisfy the minimum requirements for such right.

By providing general principles, the dogmatic nature of the definition allows for its use in other (academic) works and at the same time serves to depict and structure this legal concept. The notion 'regularisation' is preferred to 'legalisation' (and its derivatives) as the latter otherwise casts irregularly staying migrants in a bad light. As a concept, a regularisation comprises the following elements: irregularly staying migrants, grant of a right to stay, decision and satisfying minimum requirements. However, only the first two requirements are essential.

To qualify as a regularisation, a measure must at the very least concern persons staying irregularly on the territory of a Member State either at the

259 It is also additionally possible that the German Administrative Court decides via an order. See Chapter 3.B.V.1.

260 See Chapter 3.C.V.1.

261 Cf. *Groß*, AöR 2014, 423f; *Bast*, Aufenthaltsrecht 31.

time of the application, of the decision, or throughout the period between both.

Furthermore, those staying irregularly must be granted a right to stay. The elements of such right were presented to provide a framework for determining whether such right is granted. The legally-recognised, lawful residence results in the change in status, which forms the heart of the right to stay and thus the central aspect of this study. Three further elements were also described as factors relevant for the stability and weight of the right, but without which the right may still exist. This includes whether the right is temporary, whether there are accompanying rights and whether consolidation is possible.

The expression 'decision granting the right to stay' is used broadly to describe the grant of a right to stay via a decision from an administrative authority or administrative court. The decision is key to this study as it reflects the moment at which there is a change in status. Furthermore, this study assumes that regularisations refer to a single person and thus a decision is directed towards a certain person on the basis of a case-by-case assessment of the criteria. The last element of the definition therefore refers to the formal and substantive criteria to be satisfied to grant a right to stay.

B. Classification

Whereas the creation of a dogmatic concept of regularisation was examined above, the following concerns the classification of regularisations for the purposes of an integrated comparison. This is especially complicated from a methodological perspective: many aspects must be considered as the comparison of the national laws does not follow on the basis of separate national reports, but is integrated, i.e. regularisations are classed in accordance with certain criteria and then compared.[262] The following first presents and evaluates several existing categories (I.) before proposing a new category based on the purpose of the regularisation (II. and III.). The final step draws a distinction from those topics that are not included in the analysis and thus narrows the scope of this study (IV.).

262 See Introduction D.II.2.

I. Possible starting points

In their REGINE Study for the European Commission, *Baldwin-Edwards/Kraler* present categories of regularisations by using the distinction drawn in procedural law between 'programmes' and 'mechanisms'. A programme is defined as 'a specific regularisation procedure which (1) does not form part of the regular migration policy framework, (2) runs for a limited period of time and (3) targets specific categories of non-nationals in an irregular situation', with mechanisms being a procedure that is not a programme but 'by which the state can grant legal status to illegally present third country nationals residing on its territory' often based on humanitarian grounds and 'likely to be longer-term policies'.[263]

Other authors have adopted the division into programmes and mechanisms.[264] In theory, it is feasible to use this approach for the comparison, though there are good reasons to doubt the effectiveness of these criteria. The distinction between programmes and mechanisms is interesting and certainly sensible, at least for political scientists, yet such division is not appropriate from a legal perspective as, in a multi-national context, there are too few differences and thus the scientific value added is negligible.

Additional identifiable criteria can be derived from *de Bruycker's* study published in the year 2000, which contains summaries of the laws from eight Member States and – more fundamentally – a classification of five different types of regularisations.[265] Three of the five are especially notable:[266]

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263 Cf. *Baldwin-Edwards/Kraler*, REGINE (January 2009) 8f.

264 Cf. for example *Pelzer* in *Fischer-Lescano/Kocher/Nassibi* 147.

265 *De Bruycker* (ed), Les regularisations des étrangers illégaux dans l'union européenne. Regularisations of illegal immigrants in the European Union (2000). The English summary is published in *Apap/de Bruycker/Schmitter*, EJML 2000 and for the French summary *Apap/de Bruycker/Schmitter*, Rapport de synthèse sur la comparaison des régularisations d'étrangers illégaux dans l'Union européenne in *de Bruycker* (ed), Les regularisations des étrangers illégaux dans l'union européenne. Regularisations of illegal immigrants in the European Union (2000) 24. The German and Spanish national reports (drafted by *Hailbronner* and *Gortázar*, respectively) are discussed in more detail in Chapter 3.B.I. and Chapter 3.C.I.

266 An analysis of 'Regularisation through Expedience or Obligation' and 'Organised or Informal Regularisation' would exceed the scope of this study and is therefore not covered in detail.

- The study distinguishes at first between 'permanent' and 'on-off' procedures.[267] The term 'permanent' is used to describe the regularisations set by law which are not subject to any time constraints. In contrast, 'on-off' procedures centre around the fulfilment of the conditions of regularisation on a particular date, whereby the study highlights the date of entry or presence within the territory on a particular date.
- The second category divides regularisations on the basis of their individual or collective nature.[268] The criterion 'individual' refers to the discretion available to the authorities.[269] 'Collective' regularisations, however, refer to objective criteria and thus the lack of discretion for the authorities. A legally enforceable claim, i.e. a subjective right, to regularisation could nonetheless arise where the criteria are satisfied.[270]
- A third distinction draws on the differing protection implied by the regularisations.[271] 'Regularisations for protection' concern those individuals who require protection from serious harm that would result from deportation; humanitarian, family or medical reasons may be taken into account. 'Fait accompli' regularisations, however, recognise the presence on the territory for a certain period. *Apap/de Bruycker/Schmitter* view the grant of a right to residence to irregularly staying migrants by virtue of the *de facto* situation as being especially controversial.[272]

The aforementioned typology is especially notable as it was legally the first of its kind to capture and depict certain patterns that are characteristic of regularisations.[273] Nonetheless, one of the central problems is that it does not allow for a categorisation that is sufficiently general and workable for comparative purposes. In describing the categories, *Apap/de Bruycker/Schmitter* acknowledge that it is hardly possible to use the pairs of criteria to categorise regularisations in a precise manner.[274] However, such precision is needed for the purposes of the integrated comparison. The characteristic necessary for the categorisation must therefore be especially

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267 *Apap/de Bruycker/Schmitter*, EJML 2000, 266f.
268 *Apap/de Bruycker/Schmitter*, EJML 2000, 267f.
269 With regard to the use of the term 'discretion' see *Guild*, Discretion, Competence and Migration in the European Union, EJML 1999, 61.
270 See Chapter 2.B.II.2.
271 *Apap/de Bruycker/Schmitter*, EJML 2000, 268ff.
272 *Apap/de Bruycker/Schmitter*, EJML 2000, 268.
273 References are made to these in *Sunderhaus*, Regularization Programs for Undocumented Migrants: A Global Survey on more than 60 Legalizations in all Continents (2007) 29ff.
274 See just *Apap/de Bruycker/Schmitter*, EJML 2000, 268, 269.

'watertight' to avoid overlaps and repetitions as far as possible, especially as the methodology refrains from presenting national reports.

The research undertaken by *Schieber* has already been referred to in discussing the current research in this field.[275] The author examines the complementary protective measures and uses these as the basis for her comparison.[276] However, the reference to asylum procedures constitutes a fundamental difference as it does not create an independent concept of regularisation that, unlike in this study, forms the starting point for the research.[277]

A further criterion considered in the development stages of this study concerns the division and presentation of regularisations by their criteria and their legal consequences. Such division is not without flaws as it does not allow regularisations to be presented as a whole, thereby resulting in repetitions. Where the criteria are concerned, it is conceivable to categorise according to the persons affected (e.g. workers). For the legal consequences, one approach would be to distinguish between the type or legal form of the right to stay that is granted.

The reasons outlined above ultimately convinced me to favour a categorisation based on the purpose of the regularisation. Each decision underlying a right to stay is underpinned by a legal basis – the *Aufenthaltszweck* ('purpose of the stay'), to refer to the term used in Germany.[278] As the definition is designed around such individual decisions, linking the definition to the purpose of the right is the most promising and fruitful basis for devising a precise system.

II. The basis: purpose of the regularisation

A decision granting the right to stay is in principle always linked to a particular purpose. Yet what is covered by the purpose and which perspective is taken?

The term is derived from 'purpose of the stay' which describes the relevant legal basis for granting the right,[279] such as humanitarian of familial reasons. Although 'purpose of the regularisation' and 'purpose of the stay' are in essence identical, the following favours the term 'purpose of the

275 See Introduction C.
276 *Schieber*, Komplementärer Schutz 117ff.
277 See Chapter 1.A.
278 Cf. on the German law in general *Groß*, AöR 2014, 423ff.
279 *Bast*, Aufenthaltsrecht 245.

regularisation' over 'purpose of the stay'. It is more precise and more appropriate as it does not cover all decisions underpinning a right to stay, just those that fall within the scope of a regularisation. *Bast* is correct in observing that the 'purpose of the stay' provides a basic and overarching framework in modern residency law in which the focus is on granting residency, not on deportation.[280] Indeed, as will be demonstrated, such observation for German residency law also applies to its Austrian and Spanish counterparts, supporting the assertion that linking the definition of regularisation to the purpose of the right appears especially promising for devising a precise system.

Where German law is concerned, the 'purpose of the stay' has already been identified as a primary, horizontal criterion for classification under the Residence Act (*Aufenthaltsgesetz*; AufenthG) and it is even explicitly anchored as such in statute law.[281]

The notion 'purpose of the stay' is also regulated in the Austrian law governing settlement and residence,[282] e.g. just once in asylum law with respect to the regularisations.[283] In principle the notion may be unfamiliar to the Aliens' Police Act (*Fremdenpolizeigesetz*; FPG),[284] though this is of little consequence as this legislation only concerns the issue of entry documents and measures terminating residency, amongst others.[285] Accordingly, 'purpose of the stay' may be applied in relation to Austrian law, at least for scholarly purposes. As in German law, Austrian law also adopts the approach whereby the decision to award a right to stay is typically linked to a particular reason.[286] This is confirmed by the case law of the Austrian Supreme Administrative Court, the *Verwaltungsgerichtshof*, which often uses the term '*Aufenthaltszweck*'.[287]

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280 *Bast*, DÖV 2013, 216 refers in this context to '*Aufenthaltsgenehmigungen*' (residence approvals).

281 *Bast*, Aufenthaltsrecht 218ff; *Bast*, DÖV 2013, 216 and *Groß*, AöR 2014, 423–427.

282 See just §§ 19(2), (3) or 26 NAG.

283 § 58(6) AsylG (A) and see on the regularisations Chapter 3.A.III.

284 See however § 21(2) No. 1 FPG which regulates a reason for refusing a Visa D where the purpose and conditions of the planned stay cannot be justified.

285 § 1(1) FPG.

286 Cf. *Peyrl/Neugschwendtner/Schmaus*, Fremdenrecht[7] (2018) 37ff and *Muzak*, Fremden- und Asylrecht in *Kolonovits/Muzak/Piska/Perthold/Strejcek* (eds), Besonderes Verwaltungsrecht[2] (2017) 187 (201f).

287 See just VwGH 12.11.2015, Ra 2015/21/0101 or 7.12.2016, Ra 2016/22/0013.

The above also applies to Spain.[288] The notion 'purpose of the stay' is unfamiliar to Spanish law and, as in Austrian law, lacks a regulation of such purposes,[289] but the possibility for transferred application within the context of this study remains. For instance, *Serrano Villamanta* structures the 'residence due to exceptional circumstances' on the basis of the reasons that pertinent to granting residency.[290] The 'purpose of the stay' may be equated with the '*motivo de la residencia*' in Spanish.

Determining the purpose requires consideration from the perspective of the State as well as from the migrant. According to *Motomura* and *Bast*, decisions awarding a right to stay are based on a contractual approach.[291] 'Contractual' is not to be understood here in the literal sense as a form of agreement between the parties, but rather describes the convergence between the private and public interest in awarding a right to stay.[292] In principle migrants have to comply with and subject themselves to the conditions imposed unilaterally by the State,[293] and so in effect agree to the 'standard terms and conditions' regarding the types of residence title and the rules by which they are awarded.[294] Although the State's focus is not directed towards the migrant's own personal interest in migration,[295] such as voluntary entry or remaining in the country, ultimately the State's and migrant's interests will overlap if the right to stay is granted.[296] Since every lawfully sanctioned migration process is based on this contractual approach, consideration of both

288 Cf. *Triguero Martínez*, El arraigo y los modelos actuales jurídico-políticos de inmigración y extranjería, Migraciones 2014, 433 (438).

289 See only Art 29ff LODYLE and Art 28ff REDYLE.

290 *Serrano Villamanta*, La residencia por circunstancias excepcionales. El arraigo in *Balado Ruiz-Gallegos* (ed), Inmigración, Estado y Derecho: Perspectivas desde el siglo XXI (2008) 553 (557); see also *Triguero Martínez*, Migraciones 2014, 438f.

291 Cf. *Bast*, Aufenthaltsrecht 30f with reference to *Motomura*, Americans 9–12, 15–62. *Motomura's* understanding of immigration is founded on two further notions: 'immigration as transition' as well as 'immigration as affiliation'.

292 Cf. *Bast*, Aufenthaltsrecht 219 and *Groß*, AöR 2014, 425. *Bast*, Aufenthaltsrecht 31 Fn 103 is correct in noting that this understanding is limited when applied to refugee migration as this is characterised by the involuntarily nature of entering into the migration agreement ('*durch die Unfreiwilligkeit des Eingehens des Migrationskontrakts geprägt ist*').

293 See *Groß*, AöR 2014, 425.

294 Referring here to the analogy used by *Bast*, Aufenthaltsrecht 31; cf. also *Bast*, DÖV 2013, 216.

295 *Bast*, Aufenthaltsrecht 31.

296 *Bast*, Aufenthaltsrecht 30.

the State's and the individual's personal interest are necessary to determine the purpose of the regularisation in this study.[297]

III. Purpose-based structure

The above explanations illustrate that the purpose of the regularisation is a suitable category for comparison. Regarding the methodological perspective, three different legislative sources allow the identification of the relevant purpose of the regularisation: the reasons for granting a right to stay are derived from international law, from EU law as well as from the distinctly national law of the Member States.[298]

A synopsis of the different levels shows six purposes of the regularisation that are listed in the order according to the references to international, EU, and domestic law: non-returnability (1.), social ties (2.), family unity (3.), vulnerability (4.), employment and training (5.), other national interests (6.).

Source of law	Purpose of the regularisation
International and/or EU law	1. Non-returnability
	2. Social ties
	3. Family unity
	4. Vulnerability
Purely domestic law	5. Employment and training
	6. Other national interests

Table 1: Purpose of the regularisation and sources of law

The purposes of the regularisation are divided into two categories depending on whether they are linked to international or EU law (1–4) or whether they are only anchored in national law (5–6). This depiction eases the understanding, but is purely schematic as the differences between the two categories or the individual purposes are only gradual.

Purposes 1–4 are influenced by international or EU law. The analysis of the regularisations in Austria, Germany and Spain shows, however, that the extent of the influence differs. Each are derived from higher-ranking provisions of international or EU law. For the sake of completeness, na-

297 See Introduction D.II.3.
298 See also *Menezes Queiroz*, Illegally Staying 2.

tional constitutional law in part contains corresponding guarantees that were created before the EU Member State became bound by provisions of international or EU law. However, where the derivation of regularisations is concerned, this aspect is disregarded as all Member States are now bound by the provisions of international or EU law, whereas the fundamental rights anchored in national constitutional law only apply domestically.[299] As this study takes into account the perspective of irregularly staying migrants – the so-called migrant-centred perspective[300] – the protection against expulsion under human rights and EU law will be presented as it is required for the analysis, but there is no in-depth analysis of the protection offered by the individual legislative provisions. The focus is directed towards the question of the higher-ranking sources of law that provide the source for the regularisations analysed in Chapter 4. This is an essential step to find a basic framework that can be referred to in Chapter 5 in devising an EU Regularisation Directive.

The provisions of international and EU law may trigger two different consequences for the Member States. On the one hand, it is possible that provisions such as Articles 3 and 8 ECHR represent a legal obstacle to return and thus guarantee particular protection against expulsion.[301] I use the expression 'obstacle to return' when, for factual or legal reasons, an obstacle arises in relation to the return. However, the term 'obstacle' indicates that the circumstances are not permanent and as such there remains the possibility for the return to occur (again). In the interest of simplicity, the term 'prohibited' is only used when it reflects the wording of legislation. The focus is on determining whether there is an 'obligation to regularise'. Nevertheless, the provisions of international and EU law do not oblige the Member States to grant a migrant a right to stay to in a given case.[302] The Member States therefore retain the discretion whether to approve residency of such persons.[303] A claim to residency can, however, arise at national level. Conversely, the migrants in such cases do not have a legal claim to regularisation due to higher-ranking provisions, yet it

299 On the standard, see Introduction D.II.1.

300 See Introduction D.II.3.

301 Cf. *Diekmann*, Menschenrechtliche Grenzen des Rückführungsverfahrens in Europa (2016) 153–163; *Tewocht*, Drittstaatsangehörige 418 with further references; *Cholewinski*, No Right of Entry in *Groenendijk/Guild/Minderhoud* (eds), In Search of Europe's Borders (2002) 107 (107ff);

302 For detail on Art 3 ECHR, Chapter 1.B.III.1.b. and Chapter 2.B.II.2.a. and on Art 8 ECHR, Chapter 1.B.III.2.–3.

303 See Chapter 2.B.I.

can be seen in practice that Member States often respond to the legal obstacles to return by granting a right to stay, even if they would not be obliged to do so by international or EU law. The European Commission therefore acknowledged in 2004 that '[m]ost Member States recognise that for pragmatic reasons the need may arise to regularise certain individuals who do not fulfil the normal criteria for a residence permit. By carrying out regularisation operations, governments attempt to bring such migrants into society rather than leaving them on the margins, subject to exploitation'.[304] I therefore argue that in such instances Member States often go beyond the provisions of international and EU law, notwithstanding that this development does not receive sufficient acknowledgement in the current legal discussion.

Assuming they are not interpreted as mere protection against expulsion, certain high-ranking provisions may, on the other hand, trigger an obligation to regularise, i.e. to grant a right to stay. This may first appear as contradiction, but it can be explained by the fact that the existence of a legal obligation to grant a right to stay (as opposed to the existence of a legal obstacle to return) is often disputed and depends on how the legislative provisions are interpreted. This will be demonstrated in relation to the principle of non-refoulement.[305] Arguments for such an obligation would afford migrants a legal claim to regularisation and therefore remove any discretion the Member States have in this regard.[306] In order to best present the effects of the higher-ranking provisions on the Member States, I will explain these in detail both in the following and in Chapter 2.B. and Chapter 4, outlining also whether or not there is an obligation for the Member States to grant a right to stay.

The purposes 5 and 6 are at present anchored foremost in national law and, in comparison to the purposes 1–4, have not been permeated by international or EU law, at least not noticeably. I assume for now that contextual aspects have contributed to the development and establishment of these particular regularisations, but will return to this assumption in the course of the comparison in Chapter 4. For example, the Member State may require more workers to cover domestic shortfalls.[307] This does not

304 COM(2004) 412 final, 9.
305 See Chapter 1.B.III.1.b. and Chapter 2.B.II.2.a.
306 See below, Chapter 2.B.II.2.a.
307 See Chapter 4.E.IV. on the discussion regarding the shortage of skilled workers in Germany or Chapter 4.E.I.–III. on social, employment or training roots in Spain.

mean that the EU does not also have competences in this area and has become legislatively active.[308] Regularisation purposes in national law may constitute a patchwork of EU and national rules, which especially shows the gradual nature of the differences between the two identified categories or six regularisation purposes.

Three of the six regularisation purposes identified above (namely 'social ties', 'family unity' and 'employment and training') correlate with the basic types of permissible purposes of residence accounted for by *Bast* in the German Residence Act (humanitarian grounds, family unity and employment).[309] 'Training' could be included as a fourth distinct type, though is to be rejected as it falls within the broad interpretation of employment (or occupation).[310] *Bast* only refers to selected parts of the German Residence Act in his analysis,[311] whereas the three additional purposes arise from the wider framework of this study.

1. Non-returnability

The Return Directive in principle obliges the Member States to terminate the irregular stay either by return or by granting a right to stay.[312] In this context, the first purpose of the regularisation is non-returnability, which is largely derived from human rights guarantees. The principle of non-refoulment is prominently anchored in Articles 2 and 3 ECHR as well as in Article 33 of the Refugee Convention. Furthermore, it is regulated almost verbatim in Article 19(2) CFR[313] and, according to Article 5 of the Return Directive, to receive due consideration in the implementation of the Directive.[314] The ECJ has qualified the principle of non-returnability

308 See Art 4(2)(j) TFEU.

309 *Bast*, Aufenthaltsrecht 219 refers to §§ 16–38a AufenthG.

310 For Germany, § 2(2) AufenthG as well as BeschV and for detail Chapter 3.B.II.2. For Austria, see just § 2(1) Nos. 7 and 8 NAG and on the Austrian AuslBG *Kreuzhuber/Hudsky*, Arbeitsmigration (2011) mn 61.

311 Chapter 2 Parts 4–6 AufenthG.

312 See Chapter 2.B.I.

313 Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17, 18 and 24. Art 4 CFR is not listed as Art 19(2) CFR is *lex specialis*; cf. *Lukan* in *Holoubek/Lienbacher* (eds), GRC-Kommentar[2] (2019) Art 4 GRC mn 1 with further references.

314 See also Recital 24 and *Hörich*, Abschiebungen 41 with further references. See also Art 9 and Art 13 Return Directive and Chapter 2.B.II.

under the Charter as a fundamental and subjective right;[315] according to Article 52(3) CFR, the rights under the Charter are identical to those of the ECHR.[316] This study refers only to the principle of non-refoulement under the ECHR (and thus indirectly to the CFR) as a deeper analysis would simply be far too extensive. The principle of non-refoulement absolutely prohibits the return of migrants to their country of origin where there is the threat of serious violations of human rights (torture and other inhuman or degrading treatment or punishment).[317] Broadly speaking, the regularisations within this purpose are derived from the principle of non-refoulement under the ECHR and CFR as well as the relevant provisions of the Return Directive. However, before the legal and factual reasons are explored in detail, it is first necessary to briefly explore toleration in residence law due to its close relationship to the above reasons and the context that is relevant for the later comparison.[318]

a) Status of toleration in residence law

The legal notion of toleration subsequently describes the statutory provisions in Austria and Germany.[319] Non-statutory toleration applies to Spain, where a person is *de facto* tolerated, but the situation is not governed by legislation.[320]

Toleration in Austria and Germany is not equivalent to lawful residency, but is not to be viewed as a mere irregular stay because of the particular

315 ECJ 18.12.2014, C-562/13, ECLI:EU:C:2014:2453, *Abdida*, para 46 and ECJ 19.6.2018, C-181/16, ECLI:EU:C:2018:465, *Gnandi*, para 53. See also ECJ 24.6.2015, C-373/13, ECLI:EU:C:2015:413, *HT*, para 65.

316 See just ECJ *Abdida*, para 47 on Art 19(2) CFR and ECJ 24.4.2018, C-353/16, ECLI:EU:C:2018:276, *MP*, para 37 on Art 4 CFR. Further ECJ 26.9.2018, C-180/17, ECLI:EU:C:2018:775, *X* and *Y*, para 31 with further references on Art 47 CFR.

317 Cf. *Thurin*, Der Schutz des Fremden vor rechtswidriger Abschiebung: Das Prinzip des Non-Refoulement nach Artikel 3 EMRK[2] (2012) 102ff; *Dembour*, When Humans Become Migrants (2015) 197–249 and *De Weck*, Non-Refoulement under the European Convention on Human Rights and the UN Convention against Torture (2016).

318 See only *Hailbronner* in *de Bruycker* 253.

319 For an analysis of the position of toleration in the German context see *Nachtigall*, Die Ausdifferenzierung der Duldung, ZAR 2020, 271 (275ff).

320 *Menezes Queiroz*, Illegally Staying 112 refers to this as 'de facto toleration'. See also Chapter 3.B.I.

status rights that are attached to toleration.[321] The concept is Janus-like. On the one hand, it unifies aspects of a right to stay, such as
- a partially temporary, partially permanent *de facto* residency acknowledged by law,
- status rights and
- elimination of administrative[322] or judicial sanctions.[323]

Yet on the other hand also combines aspects of an irregular stay, such as
- the decision to return, and
- the unlawful stay.

Furthermore, each legally regulated instance of toleration can qualify as a preliminary step towards a right to stay where there is the prospect of regularisation,[324] i.e. the possibility for a tolerated person to acquire a right to stay (as understood here). Conversely, this does not mean that there is a legal claim to a right to stay. *Kluth/Breidenbach* refer in this context to the creation of '*Vertrauensschutztatbestände*' for tolerated persons,[325] which are perhaps best described here as aspects which invoke legitimate expectations. Tolerated status must therefore be one of the relevant conditions for granting a right to stay,[326] though as will be shown, this does not carry the same weight in Austrian and German law.[327] Nonetheless, even in these cases of toleration, the features of a right to stay do not suffice to end the irregular stay.

The phrase 'qualified irregularity' will be used to describe the circumstances in which, despite toleration, there is no prospect of regularisation. Such phrase is appropriate as it clarifies that the stay is not regular, yet

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321 *Hailbronner* in *de Bruycker* 252 refers to tolerations as a 'quasi-residence right'.

322 For Austria, § 120(5) No. 2 FPG and Chapter 4.A.I.3.

323 See for Germany the criminal offence in § 95(1) No. 2 AufenthG and Chapter 3.A.II.1. and Chapter 4.A.I.2.

324 *Hoffmann*, Geduldet in Deutschland – Teil 1: Aufenthaltsrechtliche Auswirkungen, Asylmagazin 2010, 369 (369), also goes in the same direction.

325 *Kluth/Breidenbach* in *Kluth/Heusch* (eds), BeckOK Ausländerrecht (30th edn, 1.7.2021) § 60a AufenthG mn 1. *Kraler* refers to a two-stage regularisation procedure. Although the approach is taken from the perspective of political science (and therefore being somewhat imprecise when viewed from a legal perspective), the basic notion behind the terminology is convincing; *Kraler*, IMISCOE WP No. 24 (February 2009) 8; see also *Pelzer* in *Fischer-Lescano/Kocher/Nassibi* 158 and *Hailbronner* in *de Bruycker* 253f.

326 In Germany, toleration was a central requirement of the regularisations from the 1990s; cf. *Hailbronner* in *de Bruycker* 252f and Chapter 3.B.I. This requirement still features in current Austrian and German law; see Chapter 4.A.II.1.–2. and Chapter 4.C.II.

327 See just Chapter 4.A.I.2.–3.

is more than just a mere irregular stay.[328] This refers above all to the status rights conferred as well as the assessment that the migrant cannot be (at least temporarily) be returned. However, the lack of the prospect for regularisation excludes the additional qualification as a preliminary step towards acquiring a right to stay.

Irregular stay	Mere irregular stay
	Qualified irregular stay – legal toleration without the prospect of regularisation
	Preliminary step towards a right to stay – legal toleration with the prospect of regularisation
Right to stay	Temporary right to stay
	Permanent right to stay

Table 2: Overview of residency status possibilities – graduated model[329]

b) Principle of non-refoulement under the ECHR and CFR or factual reasons

The presence of legal or factual obstacles surrounding the removal constitutes the relevant reason for regularisations under this particular category. As already mentioned, the legal reasons refer to the principle of non-refoulement. This does not apply to international protection within the meaning of the Qualification Directive, i.e. refugees and beneficiaries of subsidiary protection.[330] Consequently, the spotlight is directed only towards the regularisations that go beyond the international protection; the principle of non-refoulement regulated in Article 33 Refugee Convention will not be examined. The Member States are in principle not obliged to grant irregularly staying migrants a right to stay for reasons of non-refoulement anchored in the ECHR (and CFR[331]) and the corresponding case law.[332] The Member States perform their duty under Article 3 ECHR by protecting such migrants from expulsion. Consequently, the practice has emerged in Austria and Germany to first tolerate such migrants.[333]

328 Cf. *Klarmann*, Illegalisierte Migration 274–278 and 286–288.
329 Cf. also *Kluth*, ZAR 2007, 22.
330 See Introduction D.II.1.
331 See already the remarks in Chapter 1.B.III.1.
332 See ECtHR 15.9.2005, *Bonger/Netherlands*, 10154/04; for criticism *Dembour*, Migrants 442–481 and in general on ECtHR case law *Menezes Queiroz*, Illegally Staying 109–111.
333 See Chapter 4.A.I.2.–3.

Although this approach is in principle compatible with both the Return Directive as well as the ECtHR case law,[334] I argue that the threat of a breach of Article 3 ECHR gives rise to an obligation to regularise under the Return Directive.[335] The legal reasons for non-returnability may refer to other breaches of human or fundamental rights, such as Article 8 ECHR, the sub-category 'non-returnability' only refers to the non-refoulement principle as understood in the ECHR and CFR.

Regularisations due to factual reasons refer to the return or in part directly to the deportation process. To give an example: the return is impossible due to the lack of travel documents,[336] whereby the country of origin refuses the readmission of the person affected. The inability to determine the migrant's origin or identity, therefore excluding return, is a further example.[337] Whereas the ECHR does not provide an obligation to regularise, it is disputed whether such obligation features in the Return Directive, though in my opinion such obligation exists where the non-returnability is permanent.[338] As above for the legal reasons, migrants in Austria and Germany will first be tolerated before a right to stay is granted.[339]

2. Social ties

The second purpose is established primarily by virtue of the right to respect for private life according to Article 8 ECHR. It describes those regularisations that are awarded on the basis of humanitarian reasons (in a broad sense). The State's interest in approving residence aims to fulfil or satisfy humanitarian obligations or considerations by granting a right to stay. This excludes those reasons that constitute non-returnability since they fall within such category (or the sub-category 'principle of non-refoulement under the ECHR and CFR or factual reasons').[340]

The reasons for the award are derived from the right to respect for private life under Article 8 ECHR (which is practically identical to Article 7

334 On the Return Directive, see Chapter 2.B.I.
335 See Chapter 2.B.II.2.
336 See the Travel Document Regulation.
337 Cf. also *Menezes Queiroz*, Illegally Staying 87.
338 See Chapter 2.B.II.2.b.
339 See Chapter 4.A.I.2.–3.
340 See Chapter 1.B.III.1.

CFR[341]). According to the ECtHR case law, the right covers 'multiple aspects of the person's physical and social identity' such as 'gender identification, name and sexual orientation'.[342] However, the Member States are not obliged to grant a residence permit or special legal status due to an existing private life per Article 8 ECHR. The corresponding ECtHR case law provides that the obligation to grant a right to stay only arises in exceptional cases.[343] If expelling a person constitutes a disproportionate intervention in their private life, this would 'just' be a legal obstacle.[344] Consequently, the decision to award a right to stay remains once again at the discretion of the Member States.

3. Family unity

The third purpose covers regularisations derived from the right to respect for family life according to Article 8 ECHR. This right is not only practically identical to Article 7 CFR[345] but, pursuant to Article 24(2) CFR, the Member States must take into account the best interests of the child 'at all stages of the procedure'.[346] The ECtHR case law provides that 'family life' covers 'marriage-based relationships, and also other *de facto* "family ties" where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy'.[347] It is

341 Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17, 20.

342 ECtHR 4.12.2008 (GC), *S and Marper/United Kingdom*, 30562/04 and 30566/04, para 66. For detail *Da Lomba*, Vulnerability and the Right to Respect for Private Life as an Autonomous Source of Protection against Expulsion under Article 8 ECHR, Laws 2017/6/32.

343 See in particular ECtHR (GC) 16.6.2012, 26828/06, *Kurić/Slovenia* paras 358f and in detail *Bast/von Harbou/Wessels*, Human Rights Challenges to European Migration Policy. The REMAP Study (2022) 199. See further ECtHR 15.6.2006, 58822/00, *Shevanova/Latvia*, para 69 and Fn 501.

344 *Farcy* in *de Bruycker/Cornelisse/Moraru* 442 with further references; *Schieber*, Komplementärer Schutz 82–100 and *Thym*, Respect for private and family life under Article 8 ECHR in immigration cases: a human right to regularize illegal stay?, ICLQ 2008, 87; *Menezes Queiroz*, Illegally Staying 104–109.

345 Explanations relating to the Charter of Fundamental Rights, OJ 2007 C 303/17, 20.

346 ECJ 14.1.2021, C-441/19, ECLI:EU:C:2021:9, *TQ*, para 44; see also ECJ 10.5.2017, C-133/15, ECLI:EU:C:2017:354, *Chavez-Vilchez*, para 70, ECJ 8.5.2018, C-82/16, ECLI:EU:C:2018:308, *KA*, para 71.

347 ECtHR 24.1.2017 (GC), *Paradiso* and *Campanelli/Italy*, 25358/12, para 140.

thus a question of fact that depends on whether there is a close personal relationship. The relevant reason for the purpose of this regularisation aims at preserving and maintaining family ties. Providing protection against expulsion under Article 8 ECHR does not mean in principle that Member States are obliged to award a right to stay or special legal status.[348]

4. Vulnerability

The fourth purpose is characterised by the focus on vulnerable groups of people or situations. In Germany, for example, these are referred to as 'hardship' cases, which describe humanitarian or personal emergencies.[349] 'Vulnerability' indeed consists of humanitarian reasons in the broad sense, and thus displays parallels to the regularisation purpose 'social ties', but it is defined as a separate purpose and can be divided into two sub-categories: 'victim protection' is derived from higher-ranked legislative provisions (specifically from EU law), whereas the sub-category 'other emergency situations' is not derived from either international or EU law.

a) Victim protection[350]

Victim protection is derived from EU secondary law. Article 8 of the Human Trafficking Directive and Article 13(4) of the Employers Sanctions Directive are the most relevant provisions in this regard.[351] The provisions apply to victims of specific criminal offences. Neither afford the affected migrant a right to receive a right to stay, rather the decision remains at the discretion of the Member State, which only has to determine the conditions for awarding such right under domestic law. The Member States provide residency status for the victims of human trafficking and for those undocumented migrants who were employed under particularly

348 See Fn 343 and 501.

349 § 23a AufenthG; cf. *Lüke*, Humanitäre Bleiberechte außerhalb des Flüchtlingsschutzes im Rahmen des Aufenthaltsgesetzes, ZAR 2004, 397 (402); for detail, Chapter 4.D.II.1.

350 In detail *Frei*, Menschenhandel und Asyl: Die Umsetzung der völkerrechtlichen Verpflichtungen zum Opferschutz im schweizerischen Asylverfahren (2018).

351 On the Employers Sanctions Directive *Vogelrieder*, Die Sanktionsrichtlinie: ein weiterer Schritt auf dem Weg zu einer umfassenden Migrationspolitik der EU, ZAR 2009, 168.

exploitative working conditions or were illegally employed as a minor. Awarding legal residence should protect the victims from further criminal acts against them. There is also often a public interest in criminal prosecution.

b) Other emergency situations

The sub-category 'other emergency situations' represents a 'catch-all' purpose in the broader sense as it can cover various different regularisations, yet each share the common feature that they are not derived from either international or from EU law. 'Other emergency situations' concerns vulnerable groups or individuals in a vulnerable situation who have no other possibility to regularise their residency. As mentioned, the German 'granting residence in case of hardship' is one such regularisation.[352]

The duration of previous stays is a further example of a reason for awarding a right to stay. This covers cases in which the duration of particular (factual and ir/regular) previous stays are relevant for the decision granting the right to stay.[353] Furthermore, legislation may provide that the duration of previous stays has to be satisfied on a particular date. As for those regularisations that may be subsumed under 'employment and training', the duration of previous stays is one of many factors that are considered in balancing interests under Article 8 ECHR. However, for the purpose outlined here, the duration of the previous stay is central to the underlying reason for granting the right to stay.

5. Employment and training

The fifth purpose (like the sixth purpose to be analysed in the following) has so far been anchored in purely domestic law, although in comparison to the regularisation purposes 1–4 there is no such distinct permeation of international and EU law. The EU has, for example, passed the Students and Researchers Directive to regulate certain aspects and provide legal

352 § 23a AufenthG and see Chapter 4.D.II.1.

353 In some regularisations this reason constitutes one of the conditions for the award, but is often only of a subsidiary character in relation to the other conditions.

claims for certain groups (e.g. students). As noted above, a patchwork of EU and national rules underpin regularisations within this purpose.

The purpose of such regularisation is linked to employment or training/education in a broad sense. It may concern an employed or self-employed activity[354] and may also be linked to training/education. Specifically, the conditions for the regularisation thus refer to employment or training/education already exercised over a particular period of time or to commencing prospective employment. The grant of a right to stay thus aims at the continuation of existing employment or to allow prospective employment to commence legally.

Employment is also one of several factors to be considered in relation to Article 8 ECHR.[355] Unlike other regularisations based on Article 8 ECHR,[356] here employment and training concern the relevant requirement for the regularisation.

6. Other national interests

The sixth purpose describes those regularisations whose reason for granting is solely based on the protection of other national interests. For example, it may be considered to grant a right to stay to allow participation as a witness in criminal proceedings or for the protection of the political interests of a Member State. In relation to 'vulnerability' and the sub-category 'protection of victims', the main focus is on the protection of victims, as the name indicates. The purpose of the regularisation discussed here primarily serves other national interests.

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354 § 2(2) AufenthG and see Chapter 3.A.II.2.

355 ECtHR 10.1.2017, *Salija/Switzerland*, 55470/10, para 51; ECtHR 20.9.2011, *AA/United Kingdom*, 8000/08, paras 62 and 66; ECtHR 15.1.2007 (GC), *Sisojeva/Latvia*, 60654/00, para 95; ECtHR 31.1.2006, *Sezen/Netherlands*, 50252/99, para 48. Detailed *Oswald*, Das Bleiberecht: Das Grundrecht auf Privat- und Familienleben als Schranke für Aufenthaltsbeendigungen (2012) 231–233 and *Reyhani/Nowak*, Beschäftigung von Asylsuchenden in Mangelberufen und die Zulässigkeit von Rückkehrentscheidungen (4.7.2018), https://bim.lbg.ac.at/sites/files/bim/attachments/reyhaninowak_gutachten_art_8_abs_2_emrk_04072018.pdf (31.7.2022) 8ff.

356 See Chapter 1.B.III.2.–3.

IV. Delimitation

The scope as well as the content of this study need to be distinguished from those topics that could qualify as regularisations under the above definition, but are not taken into consideration for the purposes of the comparison in Chapter 4.

1. Temporary protection

The Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons (Temporary Protection Directive) primarily concerns displaced persons warranting protection. The Directive has already been transposed by the Member States and provides, inter alia, the possibility to provide a residence permit once the Directive has been 'activated' at EU level by a Council Decision. Accordingly, categorisation as a regularisation would be possible. However, as the Directive has never been activated at EU level until Russia's military invasion of the Ukraine in February 2022,[357] it has not been included in the scope of this study as its relevance during the research for this study could not be seen in practice despite its transposition into national law.[358]

2. Marriage and registered partnerships

Marriages and registered partnerships are ultimately family law matters and thus belong to the civil law domain.[359] Administrative law only merely concerns the examination whether there is a marriage, partnership or adoption 'of convenience'.[360] Each act giving rise to marriage, a partnership or adoption is purely of civil law nature. This may have effects on

357 See Decision (EU) 2022/382 and regarding the non-activation *Ineli-Ciger*, Time to Activate the Temporary Protection Directive, EJML 2016, 1 (13ff). See in more detail *Ineli-Ciger*, Temporary Protection in Law and Practice (2018).

358 See Chapter 3.A.III.4. and Chapter 3.B.III.4.

359 On Austrian law *Welser/Kletečka*, Grundriss des bürgerlichen Rechts: Band I[15] (2018) mns 30, 34f and 1392ff.

360 Cf. on Austrian law §§ 117f FPG and *Messinger*, Schein oder Nicht Schein. Konstruktion und Kriminalisierung von „Scheinehen" in Geschichte und Gegenwart (2012); on German law § 27(1a) AufenthG; cf. on Spanish law Art 53(2)(b) LODYLE and *Boza Martínez*, El régimen sancionador en la normativa de extran-

the residence status of irregularly staying migrants, especially where EU citizens are involved and in circumstances in which the marriage or registered partnerships affords others the status as a family member.

In general there are no (direct) effects under residency law where irregularly staying migrants marry or enter into a registered partnership with one another. However, this study very much covers instances of marriage or adoption. Several of the regularisations analysed herein are derived from the right to respect for family life under Article 8 ECHR.[361] This right is defined, inter alia, by familial relationships that are consequently to be considered in the comparison in Chapter 4. Be that as it may, entering into marriage or registered partnership is only a matter to be considered when granting a right to stay and thus does not by itself give rise to such right. Marriages or registered partnerships may therefore not be understood as a regularisation for the purposes of this study and are thus not examined.

V. Interim conclusion

A categorisation of regularisations has been created for the purpose of the comparison of the approaches in Austria, Germany and Spain. The integrated comparison requires consideration of many different factors and thus presents a particular methodological challenge. Consequently, several existing structural approaches have been analysed with regard to their suitability as a system for regularisations.

For example, the REGINE Study divides regularisations into regularisation programmes and regularisation mechanisms. When viewed through a legal lens, however, the division into two such aspects is not appropriate as there are too few cross-jurisdictional differences to allow for a fruitful contribution. Furthermore, there is an insufficient overlap between the characteristic relevant for categorisation and the definition of regularisation used in this study. Older research is also notable due to the typology it creates, but it does not allow for a categorisation that is sufficiently general and workable for the purposes of the intended comparison.

The favoured approach is ultimately a categorisation on the basis of the purpose of the regularisation. The expression is derived from the 'purpose of the stay', which describes the relevant legal reason for granting the

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jería in *Boza Martínez/Donaire Villa/Moya Malapeira* (eds), La nueva regulación de la inmigración y la extranjería en España (2012) 471 (482ff).

361 See Chapter 1.B.III.3.

right. Although the terms are in essence identical, the 'purpose of the regularisation' is a more precise and better suited concept as it only covers those decisions which fall within the notion of regularisation. As the definition of regularisation is centred around such individual decisions, linking the definition to the purpose of the right appears as the most promising and fruitful basis for devising a precise system.

The next step extracted the relevant purposes of regularisations from sources of law across three levels (international, EU, and national law): 'non-returnability', 'social ties', 'family unity', 'vulnerability', 'employment and training' and 'other national interests'.

As depicted in Table 1, the purposes were divided into two categories determined by their link to international and/or EU law (purposes 1–4) or to purely domestic law (purposes 5–6). These can trigger two different consequences for the Member States: on the one hand, it is possible that international or EU laws represent a legal obstacle and thereby ensure particular protection against return. Nevertheless, the Member States are not obliged to grant a right to stay. The decision to approve the residency in such cases is thus at the discretion of the Member States. However, a claim to residency may arise at national level. Conversely, the migrants in such cases do not have a legal claim to regularisation by virtue of higher-ranking provisions. Practice shows that the Member States often grant a right to stay in response to the legal obstacles to return. As they are not obliged to do so under international or EU law, they thus go beyond these higher-ranking laws. This requires greater consideration in the current legal discussions. On the other hand, particular higher-ranking provisions can trigger an obligation to regularise (i.e. to grant a right to stay) in so far as they are not interpreted as merely protecting against return. This is explained by differing interpretations of the respective higher-ranking provisions, though it is disputed whether there is a legal obligation to grant a right to stay as opposed to the existence of a legal obstacle to return.

The purposes 5 and 6 are at present only anchored in purely domestic law and are not derived from higher-ranking provisions of international or EU law. This forms the basis for my (provisional) assumption that the context has contributed to the development and establishment of such different regularisations.[362]

362 See Chapter 4.G.

Finally, a distinction was drawn to those topics, namely temporary protection as well as marriage and registered partnerships, that are not analysed in the comparison in Chapter 4.

Chapter 2 – EU competence concerning irregular migration and regularisations

This Chapter[363] focuses on the European Union's legislative competence regarding irregular stays and regularisations, examining in particular both primary and secondary law. The current EU *acquis* does not feature legislation concerning regularisations, though Article 6(4) Return Directive allows the Member States to regularise irregularly staying migrants.

I will first address the EU immigration policy with regard to irregular migration in general (A.). The spotlight then pans to the Return Directive (B.) as a basis for determining whether EU primary law features a regularisation policy. Answering this question first requires an analysis of the mandates anchored in Article 79(1) TFEU (C.). This allows me to demonstrate that the EU immigration policy pursued so far is not prescribed by EU primary law. The analysis then shifts to the question whether the competences under present primary law allow the EU to pass legislation aimed at regularising irregularly staying migrants (D.).

A. Irregular migration under EU immigration policy

For the purposes of this analysis, the term immigration policy is understood as each EU policy rooted in primary law, specifically in Article 79 TFEU.[364] I therefore begin with a political concept within EU law, which I then outline in relation to irregular migration.

The use of the term 'fight' in relation to illegal immigration was first used in 1991 in a report from a meeting of the European Council.[365]

363 Earlier drafts of parts of this Chapter were published in *Hinterberger/Klammer* in *Filzwieser/Taucher*; *Hinterberger/Klammer*, NVwZ 2017; *Hinterberger* in *Lanser/Potocnik-Manzouri/Safron/Tillian/Wieser* as well as *Hinterberger*, Maastricht Journal of European and Comparative Law 2019. See Introduction D.III.

364 For detail on the notion see *Thym*, Europäische Einwanderungspolitik: Grundlagen, Gegenstand und Grenzen in *Hofmann/Löhr* (eds), Europäisches Flüchtlings- und Einwanderungsrecht (2008) 183 (183ff).

365 *European Council*, Report from the Ministers responsible for immigration to the European Council meeting in Maastricht on immigration and asylum

The Treaty of Maastricht, which entered into force in 1993, set 'combatting unauthorized immigration, residence and work' as a matter of 'common interest' requiring cooperation between the Member States.[366] The distinction between immigration and residence is notable as it creates two distinct concepts, whereby Article 79(2)(c) TFEU now refers to 'illegal immigration and unauthorised residence'.

The entry into force of the Schengen Agreement[367] in 1995 not only abolished internal border controls but the increased security and monitoring of external borders also became characteristic of the EU political agenda concerning migration.[368] The later Treaty of Amsterdam played a highly important role for the common immigration policy by bringing the policy areas within the Community domain.[369] By creating an 'area of freedom, security and justice'[370] immigration policy became a separate policy area independent of the internal market.[371] In 1999, 'illegal immigration' and 'illegal residence' became express competences after the Treaty of Amsterdam had entered into force.[372] However, unlike the Treaty of Maastricht, the Treaty of Amsterdam did not contain an express reference to

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policy (3.12.1991), SN 4038/91 (WGI 930); cf. *European Council*, Conclusions (12.12.1992), SN/456/92, No. 18.

366 Art K1(3)(c) TEC.

367 Cf. *Ter Steeg*, Das Einwanderungskonzept der EU (2006) 73ff; *Winkelmann*, 25 Jahre Schengen: Der Schengen-Acquis als integraler Bestandteil des Europarechts – Bedeutung und Auswirkung auf die Einreise- und Aufenthaltsrechte – Teil 1, ZAR 2010, 213 and *Winkelmann*, 25 Jahre Schengen: Der Schengen-Acquis als integraler Bestandteil des Europarechts – Bedeutung und Auswirkung auf die Einreise- und Aufenthaltsrechte, ZAR 2010, 270.

368 On the essence of the Schengen Agreement in its interaction with external borders see *Michl*, Dysfunktionale Außengrenze und binnenstaatliche Reaktion – zur unionsrechtlichen Zulässigkeit einseitiger Maßnahmen in Zeiten großer Migrationsströme in *Bungenberg/Giegerich/Stein* (eds), ZEuS-Sonderband: Asyl und Migration in Europa – rechtliche Herausforderungen und Perspektiven (2016) 161 (162ff). Critical, *Bigo*, Border Regimes Police Cooperation and Security in an Enlarged European Union in *Zielonka* (ed), Europe Unbound: Enlarging and Reshaping the Boundaries of the European Union (2003) 213.

369 On the development, *Bast*, Ursprünge der Europäisierung des Migrationsrechts in FS Kay Hailbronner (2013) 3 (3) or also *Desmond*, HRLR 2016, 247f.

370 Art 67ff TFEU; see for example COM(2000) 782 final and COM(2000) 167 final, with detailed contributions in *Baldaccini/Guild/Toner* (eds), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (2007) as well as *Costello*, Human Rights 17ff.

371 So *Thym* in *Hofmann/Löhr* 189f with further references.

372 Art 63(3)(b) TEC in the version OJ 1997 C 340/1; for detail *Peers*, EU Justice and Home Affairs Law. Vol 1: EU Immigration and Asylum Law[4] (2016) 445f.

'combatting' or 'fighting' irregular immigration as a common interest or purpose. The use of the term 'combat' in relation to 'illegal immigration' was reintroduced in 2009 via the Treaty of Lisbon, namely in Article 79(1) TFEU.[373]

The European Commission's 2001 Communication regarding a common policy in the 'fight' against illegal immigration and human trafficking expressly highlights that 'illegal entry or residence should not lead to the desired stable form of residence'.[374] Less than three months after this Communication, in February 2002, the European Council proposed a 'comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union',[375] which proposed short and medium-term measures, ranging from visas to returns.

In this sense Article 79(1) TFEU refers, inter alia, to the 'prevention of, and enhanced measures to combat, illegal immigration' as one of the current mandates in the Treaty.[376] The 2008 Return Directive makes a key contribution to this process and broadly harmonises the return policy.[377]

The (restrictive) immigration policy is also apparent in the 2015 'Agenda on Migration', in which the reduction of incentives for irregular migration – symbolically – forms the first of four key areas.[378] Overall, the EU also presses on with the policy[379] in its 2020 New Pact on Migration and Asylum.[380] According to the Commission, the Agenda strives to set out an effective and balanced migration policy that is fair, robust and realistic.[381] Whether these goals can actually or even be achieved by the legal instruments in place indeed requires critical analysis.[382]

373 See Chapter 2.C.I.
374 COM(2001) 672 final, 6. See also COM(2004) 412 final, 11.
375 OJ 2002 C 142/23.
376 See Chapter 2.C.I.
377 See Chapter 2.B.
378 COM(2015)240 final, 9ff; cf. *Carrera/Guild/Aliverti/Allsopp/Manieri/Levoy*, Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants (2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536490/IPOL_STU%282016%29536490_EN.pdf (31.7.2022).
379 As outlined in Introduction A.
380 COM(2020) 609 final, 2 and 7–9.
381 COM(2015) 240 final, 7f.
382 *Kraler*, Journal of Immigrant and Refugee Studies 2019, 94f.

B. Return Directive

Following the above outline of EU immigration policy concerning irregular migration, this section turns to the main instrument presently used to 'combat' an irregular stay: the Return Directive. The section first explains the general structure and content (I.) before examining whether current secondary law allows the Member States to regularise irregularly staying migrants or if they are even obliged to do so (II.).

I. General structure and content

The harmonisation and effectuation of return procedures have been in EU crosshairs since 1999,[383] with the Return Directive passed almost a decade later in 2008.[384] The Directive aims foremost at an 'effective removal and repatriation policy […] with full respect for their fundamental rights and dignity'.[385] *Hörich* states in this respect that the Directive successfully balances the interests in the effective termination of residence and the observance of the fundamental rights of the persons affected by the procedure.[386]

Chapter II of the Return Directive concerns the 'Termination of Illegal Stay' and contains the Directive's core provision, Article 6(1), whereby the irregular stay is in principle to be terminated by a return decision and the subsequent return process.[387] For the purposes of the Directive, all migrants without a residence permit or other authorisation offering a

383 See just COM(2017) 200 final and *Acosta Arcarazo*, The Returns Directive in *Peers/Guild/Acosta Arcarazo/Groenendijk/Moreno-Lax* (eds), EU Immigration and Asylum Law. Vol 2: EU Immigration Law[2] (2012) 455 (484ff).

384 For a useful overview of the background see *Lutz*, The Negotiations on the Return Directive: Comments and Material (2010) and *Pollet*, The Negotiations on the Return Directive: Challenges, Outcomes and Lessons learned from an NGO Perspective in *Zwaan* (ed), The Returns Directive (2011) 25.

385 ECJ *Mahdi*, para 38 referring to Recitals 2 and 11. See further ECJ 30.5.2013, C-534/11, ECLI:EU:C:2013:343, *Arslan*, paras 42, 60: 'effective removal'; Recommendation (EU) 2017/432 and *Hörich*, Abschiebungen 31f with further references.

386 *Hörich*, Abschiebungen 307. See also *Bast*, Aufenthaltsrecht 101ff.

387 Recital 11 Recommendation (EU) 2017/432: 'In accordance with Article 6(1) of Directive 2008/115/EC, the Member States should systematically issue a return decision to third-country nationals who are staying illegally on their territory'. Cf. *Acosta Arcarazo* in *Peers/Guild/Acosta Arcarazo/Groenendijk/Moreno-Lax* 490;

right to stay are staying irregularly. The expression 'irregular' is used in this study as a synonym for 'illegal' as used in the Directive.[388]

Article 6(1) of the Return Directive obliges the Member States to issue a return decision.[389] This was confirmed by the ECJ in *El Dridi*.[390] At first glance it appears as an instruction to the Member States, though I will show in the following that this is 'merely' one of two equal options. Issuing a return decision depends on whether it can be enforced,[391] as legal or factual obstacles to return may exist. The migrant in question can or should initially comply with the return decision by departing the Member State voluntary.[392] The ECJ made it clear in its case law that the voluntary departure according to Article 7(1) has priority over the forced removal.[393] Where the person does not leave the territory of the Member State on a voluntary basis, the decision may ultimately be enforced via forced removal.[394] Member States shall therefore return irregularly staying migrants instead of granting a right to stay. This is one of the reasons why the EU has not passed regularisation legislation.

The basic approach of issuing a return decision is subject to three exceptions.[395] The first requires irregularly staying migrants who hold a valid residence permit issued by another Member State to go to that Member

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Boeles/den Heijer/Lodder/Wouters, European Migration Law[2] (2014) 392; *Hörich*, Abschiebungen 73ff.

388 Art 2(1) and Art 3 No. 2 Return Directive and see also Chapter 1.A.II.1.

389 Art 3 No. 4 Return Directive; *Hörich*, Abschiebungen 73.

390 ECJ 28.4.2011, C-61/11, ECLI:EU:C:2011:268, *El Dridi*, para 35; affirmed ECJ *Achughbabian*, para 31, ECJ 23.4.2015, C-38/14, ECLI:EU:C:2015:260, *Zaizoune*, para 31, ECJ *TQ*, para 41 and ECJ 3.3.2022, C-409/20, ECLI:EU:C:2022:148, *UN*, para 42. Before issuing a return decision against an unaccompanied minor, the Member State concerned must carry out a general and in-depth assessment of the situation of that minor, taking due account of the best interests of the child, though this does not mean that the return will be enforced; ECJ *TQ*, paras 60 and 74–81.

391 Cf. *Hörich*, Abschiebungen 92.

392 Art 7 Return Directive. For criticism of the terminology, *Berger/Tanzer*, Die Rückführungsrichtlinie im Spannungsfeld von effektiver Rückführungspolitik und Grundrechtsschutz – eine Analyse unter Berücksichtigung der österreichischen Gesetzeslage in *Salomon* (ed), Der Status im europäischen Asylrecht (2020) 265 (280f).

393 ECJ *UN*, para 50 with further references.

394 Art 8 Return Directive; ECJ *TQ*, paras 79f.

395 See also ECJ *Zaizoune*, para 32.

State.[396] The second provides for the procedure if a person is taken back by another Member State under a bilateral agreement.[397] The most important exception is to be found in the first sentence of Article 6(4): 'Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory'.[398] The wording suggests that an individual evaluation is necessary before a residence permit can be granted to an irregularly staying migrant.[399] Generally speaking, this exception to issue a return decision rests on the national sovereignty that the Member States continue to maintain in this matter.[400] As a consequence, the first sentence of Article 6(4) allows the Member States to terminate the irregular stay by granting a residence right, i.e. via a regularisation,[401] namely a process which terminates the irregularity per the Return Directive.[402] The residence permit or 'other

396 Art 6(2) Return Directive. Cf. ECJ 16.1.2018, C-240/17, ECLI:EU:C:2018:8, *E*, paras 44–48.

397 Art 6(3) Return Directive. Cf. *Acosta Arcarazo* in *Peers/Guild/Acosta Arcarazo/Groenendijk/Moreno-Lax* 494 and *Hörich*, Abschiebungen 73ff.

398 See further also ECJ 9.11.2010, C-57/09 and C-101/09, ECLI:EU:C:2010:661, *B* and *D*, paras 115–121 and ECJ 18.12.2014, C-541/13, ECLI:EU:C:2014:2451, *M'Bodj*, paras 43–47 regarding the relationship between the Qualification Directive and Return Directive and the question of the cases in which the Member States may issue residence permits for humanitarian reasons which do not represent 'international protection' under the Qualification Directive.

399 *Costello*, Human Rights 96 therefore argues that there would be a tense relationship between regularisation programmes and the Return Directive. Similarly, *Augustin*, Die Rückführungsrichtlinie der Europäischen Union. Richtliniendogmatik, Durchführungspflichten, Reformbedarf (2016) 227–230; see however *Schieber*, Komplementärer Schutz 282, 311f and 334. On the aforementioned programmes, Chapter 1.B.I. and Chapter 3.C.I.

400 Cf. *Martin*, The Authority and Responsibility of States in *Aleinikoff/Chetail* (eds), Migration and International Legal Norms (2003); *Nafziger*, The General Admission of Aliens under International Law, AJIL 1983, 804; *Dauvergne*, Making People Illegal: What Globalization Means for People and Law (2008) 2ff; *Bosniak*, Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention, International Migration Review 1991, 737 (754).

401 Art 6(4) Return Directive; cf. ECJ *Mahdi*, para 88: 'enables' and ECJ 22.11.2022, C-69/21, ECLI:EU:C:2022:913, *X*, para 86. In this sense, *Desmond* in *Wiesbrock/Acosta Arcarazo* 75.

402 See Chapter 1.A.II.

authorisation offering a right to stay'[403] under the respective national law must afford lawful residence in order to actually terminate the irregular stay.[404] Merely tolerating the irregular stay without initiating one of the two options would contradict the Return Directive.[405]

It seems at first blush that toleration under Austrian and German law violates the Return Directive.[406] 'Tolerating' migrants means that the Austrian or German State determines that the deportation is temporarily suspended because the return decision cannot be enforced due to 'prohibitions' or 'obstacles'. 'Toleration' under Austrian and German law cannot be considered as comparable to a residence permit as it does not establish legal residency under national law.[407] It is rather to be understood as a postponement of removal pursuant to Article 9 Return Directive. The postponement forms part of the return.[408]

Article 9(1) Return Directive provides that the removal shall be postponed for as long as a judicial or administrative body has granted a suspensory effect or if the removal would violate the principle of non-refoulement;[409] the latter provision is the most relevant to this study. Article 9(2) Return Directive regulates the cases in which removal may be postponed.[410] The Directive does not regulate the arrangements for the postponement, thereby leaving this matter to national law.[411] Nonetheless, the Member States are to observe and ensure the 'procedural safeguards' in Chapter III of the Return Directive. In this respect, *Lutz* regards the

403 The Commission views the expression 'other authorisation' as a catch-all provision which covers all cases that do not fall under the notion of residence permit according to Article 2 No. 16(b) SBC; Return Handbook 2017, 105 Fn 2.

404 In this sense, Return Handbook 2017, 88f; *Lutz* in *Thym/Hailbronner* Art 6 Return Directive mns 13 and 26 and *Menezes Queiroz*, Illegally Staying 155. The national law is relevant to determine the irregular status because of the fact that Art 3 No. 2 Return Directive refers to the 'conditions for entry, stay or residence in that Member State'; cf. Return Handbook 2017, 105; ECJ 7.6.2016, C-47/15, ECLI:EU:C:2016:408, *Affum*, paras 46ff; ECJ 3.6.2021, C-546/19, ECLI:EU:C:2021:432, *BZ*, paras 43–45 and ECJ *TQ*, para 71.

405 Return Handbook 2017, 98, 100. Cf. *Menezes Queiroz*, Illegally Staying 91 and *Hörich*, Abschiebungen 73, 92 with further references.

406 See Chapter 4.A.I.2.–3.

407 § 31(1a) No. 3 FPG and § 60a(3) AufenthG; cf. Fn 404.

408 See also Chapter 2.B.II.2.a.

409 See also ECJ *Gnandi*, para 47.

410 Cf. *Lutz* in *Thym/Hailbronner* Art 9 Return Directive mn 3.

411 *Lutz* in *Thym/Hailbronner* Art 9 Return Directive mn 5. See Chapter 4.A.I.

decision to postpone as falling under the notion of 'return decision'.[412] Member States have tried in part to circumvent these safeguards by not issuing a return decision, which *de facto* constitutes a postponement.[413] Alongside their rights, irregularly staying migrants are also subject to perform certain obligations if the removal is postponed during the period for voluntary departure.[414]

Consequently, legal 'toleration' of migrants accords in principle with the Return Directive as a return procedure has been initiated and a return decision issued, but not yet enforcement. Problems arise if a Member State tolerates an individual over a long period of time without granting a right to stay (long-term non-returnability).[415] Such so-called '*Kettenduldungen*' (literally: chain tolerations) or the current '*Ausbildungsduldung*' (temporary suspension of deportation for the purpose of training) in Germany are thus especially concerning from the perspective of EU law.[416]

Each Member State may grant a residence permit to an irregularly staying migrant after the return process has commenced or has concluded with legal effect.[417] In such case the third sentence of Article 6(4) Return Directive provides that the Member States are free to decide whether to withdraw the return decision or suspend it for the duration of validity of the residence permit.[418]

In short, Member States have to decide between the return procedure or regularisation according to my understanding of the Return Directive. As already indicated above, this is why the two options for the Member States are equal in nature: both have the effect of ending the irregular stay. Following the ECJ decision in *El Dridi*, the Member States must in principle issue a return decision and implement a return process,[419] yet in *Zaizoune* the ECJ emphasised that this ground rule applies without prejudice to the exceptions under Article 6(2)–(5) Return Directive.[420] The

412 *Lutz* in *Thym/Hailbronner* Art 9 Return Directive mn 5. The Commission states that postponing the removal 'should normally be adopted together with the return decision in one administrative act'; Return Handbook 2017, 132.
413 *Lutz* in *Thym/Hailbronner* Art 9 Return Directive mn 5.
414 Art 7(3) and Art 9(3) Return Directive; also *Menezes Queiroz*, Illegally Staying 101.
415 See Chapter 2.B.II.2.b.
416 See Chapter 4.A.I.2.d. and Chapter 4.E.IV.1.
417 Cf. *Augustin*, Rückführungsrichtlinie 227.
418 Cf. *Lutz* in *Thym/Hailbronner* Art 9 Return Directive mn 3.
419 See Fn 390.
420 ECJ *Zaizoune*, para 32.

Member States are free to decide at every stage of the process – even after issuing the return decision – to grant a residence permit. Consequently, the Return Directive leaves Member States the possibility to regularise irregularly staying migrants.[421]

It cannot be overlooked that in September 2018 the Commission proposed a reform the Return Directive.[422] At the time of writing (31.7.2022), these proposals have not yet been accepted,[423] and therefore closer analysis is not required. The proposals for reform would also have no effect on the general approach of the Return Directive. The Commission believes that a 'stronger and more effective'[424] return policy would be achieved by, for example, relaxing the requirements for detention. The criticism here was that an increase in the return rate is to be achieved, yet no facts or figures were presented as to why changing individual provisions should actually have such effect.[425]

II. An obligation to regularise under the Return Directive?

It is disputed whether an obligation to regularise exists under the Return Directive or, in turn, whether irregularly staying migrants have a claim to regularisation. Such obligation to grant a right to stay cannot be derived generally from Articles 3 and 8 ECHR, as discussed above.[426] However, the

421 In this sense ECJ *TQ*, paras 71f.

422 COM(2018) 634 final.

423 Cf. *NN*, Asylum seekers appealing returns must get own travel documents, euobserver.com (6.11.2018), https://euobserver.com/justice/143290 (31.7.2022).

424 *European Commission*, A stronger and more effective European return policy (12.9.2018), https://ec.europa.eu/info/sites/default/files/soteu2018-factsheet-returns-policy_en.pdf (31.7.2022). See above Introduction A. and Chapter 2.A.

425 Cf. *Machjer/Strik*, Legislating without Evidence: The Recast of the EU Return Directive, EJML 2021, 103; *Eisele*, The proposed Return Directive (recast). Substitute Impact Assessment (February 2019), http://www.europarl.europa.eu/RegData/etudes/STUD/2019/631727/EPRS_STU(2019)631727_EN.pdf (31.7.2022); *ECRE*, ECRE Comments on the Commission Proposal for a Recast Return Directive COM(2018) 634 (November 2018), https://www.ecre.org/wp-content/uploads/2018/11/ECRE-Comments-Commission-Proposal-Return-Directive.pdf (31.7.2022) and *Peers*, Lock 'em up: the proposal to amend the EU's Returns Directive, EU Law Analysis Blog (12.9.2018), http://eulawanalysis.blogspot.com/2018/09/lock-em-up-proposal-to-amend-eus.html (31.7.2022).

426 See Chapter 1.B.III., especially Chapter 1.B.III.1.b. and Chapter 1.B.III.2.–3.

future ECtHR case law needs to be observed as this could have an effect on the application and interpretation of the Return Directive.[427]

1. Opponents of an obligation to regularise

The opponents of an obligation to regularise (such as the European Commission or *Lutz*) base their argument on the ECJ decision in *Mahdi*,[428] whereby the 'purpose of the [Return Directive] is not to regulate the conditions of residence on the territory of a Member State of third-country nationals who are staying illegally and in respect of whom it is not, or has not been, possible to implement a return decision'.[429] The Return Directive 'must be interpreted as meaning that a Member State cannot be obliged to issue an autonomous residence permit, or other authorisation conferring a right to stay, to a third-country national who has no identity documents and has not obtained such documentation from his country of origin, after a national court has released the person concerned on the ground that there is no longer a reasonable prospect of removal within the meaning of Article 15(4) of that directive. However, that Member State must, in such a case, provide the third-country national with written confirmation of his situation'.[430] In this direction also goes the *M and A* as well as the *X* decision that are discussed below in Chapter 2.B.II.2.a.

One may therefore deduce that, according to the ECJ, where removal is factually[431] impossible, there is in principle no claim to the grant of a right to stay in the form of a residence permit or other authorisation to stay (and thus to regularisation) if a return decision cannot be enforced against an individual.[432] This is rather to be understood as a postponement

427 Also *Menezes Queiroz*, Illegally Staying 87.

428 Return Handbook 2017, 138 and *Lutz* in *Thym/Hailbronner* Art 14 Return Directive mns 13f; *Menezes Queiroz*, Illegally Staying 103, 176; *Desmond* in *Wiesbrock/Acosta Arcarazo* 76; *Farcy* in *de Bruycker/Cornelisse/Moraru* 447f.

429 ECJ *Mahdi*, para 87.

430 ECJ *Mahdi*, para 89.

431 The ECJ decisions regarding references for a preliminary ruling always concern just those legal issues in order 'to provide the national court with an answer which will be of use to it'; ECJ 4.9.2014, C-119/13 and C-120/13, ECLI:EU:C:2014:2144, *eco cosmetics* and *Raiffeisenbank*, para 32. In *Mahdi,* the migrant did not have any identity documents, therefore the response from the ECJ can only be applied to those cases in which there are factual obstacles to return.

432 ECJ *Mahdi*, paras 87f and see also Fn 428.

of removal under Article 9 of the Return Directive.[433] According to Article 14(2) of the Directive, Member States are only obliged to issue written confirmation;[434] this allows for quick verification of the residency status in case of police controls, for example.[435] The postponement of removal or the written confirmation do not in any case establish a lawful stay.

The opponents of an obligation to regularise refer not only to the decision in *Mahdi* but also to *Abdida*, the first case in which the court dealt with obstacles to return resulting from health issues. According to this decision: 'In the very exceptional cases in which the removal of a third country national suffering a serious illness to a country where appropriate treatment is not available would infringe the principle of non-refoulement, Member States cannot therefore, as provided for in Article 5 of Directive 2008/115, taken in conjunction with Article 19(2) of the Charter, proceed with such removal'.[436] The ECJ also provides that, from a procedural perspective, it is also necessary that the affected individual has a remedy with suspensive effect in order to ensure that the return decision will not be enforced before the domestic authorities and courts have decided on the potential violation of Article 3 ECHR.[437] However, the ECJ does not approach the question whether the possibility or the obligation to regularise results from an obstacle to return, but merely notes that this is at the discretion of the Member States.[438] According to the Court, the persons concerned must be granted such a legal position so that their status rights accord with the obligations resulting from the Return Directive.[439] As the ECJ qualifies such cases as the postponement of removal,[440] the persons concerned thus have the minimum rights under

433 See Chapter 2.B.I.

434 Recital 12 and Art 14(2) Return Directive. The Member States may determine the form and format of the confirmation; cf. *Lutz* in *Thym/Hailbronner* Art 9 Return Directive mn 11.

435 Return Handbook 2017, 138.

436 ECJ *Abdida*, para 48. For detail *Hinterberger/Klammer* in *Filzwieser/Taucher* 120f.

437 ECJ *Abdida*, para 53. Confirmed by ECJ *Gnandi*, paras 54 and 56ff.

438 ECJ *Abdida*, para 54 with reference to Recital 12 Return Directive.

439 For detail *Diekmann*, Menschenrechtliche Grenzen; *Hinterberger/Klammer*, Der Rechtsstatus von Geduldeten: Eine Analyse unter besonderer Berücksichtigung auf das Grundrecht der Menschenwürde in *Salomon* (ed), Der Status im europäischen Asylrecht (2020) 315 (315ff) and in English *Hinterberger/Klammer*, The Legal Status of Tolerated Aliens in Austria through the Lens of the Fundamental Right to Human Dignity, University of Vienna Law Review 2020, 46 (46ff).

440 ECJ *Abdida*, paras 57 and 59.

Article 14 Return Directive.[441] More favourable national provisions are permissible according to Article 4(3) Return Directive, provided that they are compatible with the Directive.[442] The minimum rights are, in particular, the satisfaction of basic needs as well as the provision of emergency health care and the essential treatment of illnesses during the stay in the Member State.[443] Such interpretation by the ECJ opens the floodgates to many practical problems because the discretion granted to the Member States is too broad and thus accompanied by considerable legal uncertainty. This is demonstrated especially in cases of long-term non-returnability and the resulting state of limbo for the person concerned. To sum up the argumentation in *Abdida* that is used by the opponents of an obligation to regularise: postponement under the Return Directive suffices and a regularisation is not needed.

2. Proponents of an obligation to regularise

Before I turn to the proponents of an obligation to regularise, as already stated above in the introduction, I (with the ECJ) consider a person as non-returnable when 'it is not, or has not been, possible to implement a return decision'.[444] *Menezes Queiroz* offers a further definition: 'Non-removable migrants are third-country nationals who, despite their status as irregular migrants, cannot (yet) be removed from EU territory as a result of legal, humanitarian, technical or even policy-related reasons'.[445] The author states that the non-removable persons are in a 'transitory and atypical legal situation'.[446]

The Return Directive requires Member States to choose between return or regularisation.[447] This is not readily apparent from the wording of Article 6(1) Return Directive, whereby the 'Member States shall issue a return decision to any third-country national staying illegally on their territory, without prejudice to the exceptions referred to in paragraphs 2 to 5'. The first sentence of Article 6(4) Return Directive provides, however,

441 Cf. *Hörich*, Abschiebungen 127f.
442 Cf. *Hörich*, Abschiebungen 28 with reference to ECJ *El Dridi*.
443 ECJ *Abdida*, paras 59f.
444 ECJ *Mahdi*, para 87.
445 *Menezes Queiroz*, Illegally Staying 182. See also below Fn 491.
446 *Menezes Queiroz*, Illegally Staying 97ff. See also the comments in Introduction C.
447 See Chapter 2.B.I.

that 'Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory'. At first it appears that this provision is not an obligation to regularise as the Member States may decide at their own discretion whether to grant a residence permit to an irregularly staying migrant.[448] Conversely, Article 6(1) Return Directive obliges Member States to issue a return decision. An obligation to regularise could thus only exist in as far as the broad discretion for the Member States is removed entirely.

In my reading, the first sentence of Article 6(4) Return Directive provides an obligation to regularise in two circumstances. I agree with *Hörich* that such obligation exists in all cases in which the return would violate the principle of non-refoulement,[449] yet at the same time I believe that such obligation exists in all cases in which there are permanent obstacles to returning the migrant concerned. As *Acosta Arcarazo*, the arguments for an obligation to regularise in both of these cases are derived from the Return Directive itself:[450] the Member States must terminate the irregular stay either by enforcing the return decision or by granting a right to stay.[451] Issuing the return decision requires enforceability, indeed initiating the return procedure presupposes the possibility that it is successfully implemented to terminate the stay.[452] Member States are therefore faced with an obligation to regularise in all cases in which the decision to return cannot be enforced. The Return Directive gives no scope for long-term irregularity,[453] and it is for this reason that the discretion under the first sentence

448 See Chapter 2.B.I.

449 Cf. *Hörich*, Abschiebungen 125f. See also *Acosta Arcarazo*, The Charter, detention and possible regularization of migrants in an irregular situation under the Returns Directive: Mahdi, CMLRev 2015, 1361 (1377).

450 *Acosta Arcarazo*, CMLRev 2015, 1377f. In the same vein *Desmond*, The Return Directive: clarifying the scope and substance of the rights of migrants facing expulsion from the EU in *King/Kuschminder* (eds), Handbook of Return Migration (2022) 137 (146f).

451 See Chapter 2.B.I.

452 *Hörich*, Abschiebungen 92.

453 As the Commission does not derive an obligation to regularise from the Return Directive and assumes that the Member States will in principle issue a return decision, it also assumes that this practice will increase 'the absolute number of cases in which Member States issue return decisions which cannot be enforced due to practical or legal obstacles for removal'; Return Handbook 2017, 137. Consequent, the Commission accepts situations of long-term irregularity which often arise, as is shown in practice; see Chapter 4.A.I.

of Article 6(4) is in fact dissolved. Such view is best expressed in the European Commission's Return Handbook 2017: 'Member States are obliged to issue a return decision to any third-country national staying illegally on their territory, unless an express derogation is foreseen by Union law […]. Member States are not allowed to tolerate in practice the presence of illegally staying third-country nationals on their territory without either launching a return procedure or granting a right to stay. This obligation on Member States to either initiate return procedures or to grant a right to stay aims at reducing "grey areas", to prevent exploitation of illegally staying persons and to improve legal certainty for all involved'.[454] This approach – to reduce and prevent 'grey areas' – has been recently also confirmed by the ECJ.[455] The 'postponement of removal'[456] in Article 9 Return Directive also accords with this approach, but by its nature the term 'postponement'[457] incorporates a distinct temporal element that excludes 'permanent' postponement. Consequently, such wording cannot cover cases of permanent non-return.

Such interpretation is supported by the *effet utile* principle ('principle of effectiveness'), whereby provisions of EU law are afforded the most effectiveness as possible.[458] The ECJ attaches considerable weight to the *effet utile* principle in the removal process,[459] with 'an effective removal and repatriation policy […] with full respect for […] fundamental rights'[460] at its core. The Court in *Affum* stated, for instance, that imposing a sentence of imprisonment before the transfer to another Member State would 'would delay the triggering of that procedure and thus his actual removal, thereby undermining the directive's effectiveness'.[461] Furthermore, the ECJ has also dealt with the 'effectiveness' of the removal process in relation to rejected applications for international protection in *Gnandi* and with the

454 Return Handbook 2017, 100.
455 ECJ *BZ*, para 57; see, however, also Chapter 2.B.II.2.a.
456 See Chapter 2.B.I.
457 The German and Spanish versions use the term *Aufschub* and *aplazamiento*, respectively.
458 Cf. *Öhlinger/Potacs*, EU-Recht und staatliches Recht: Die Anwendung des Europarechts im innerstaatlichen Bereich[6] (2017) 15.
459 See also ECJ 14.9.2017, C-184/16, ECLI:EU:C:2017:684, *Petrea*, paras 57, 62 and 65; ECJ *X* and *Y*, paras 34–36 and 43f.
460 ECJ *Mahdi*, para 38 with reference to Recitals 2 and 11.
461 ECJ *Affum*, para 88. The German version of the decision refers to *praktische Wirksamkeit* ('practical effectiveness'), see *Hörich*, Abschiebungen 283 with further references.

rights of the defence under the Return Directive in *MG* and *NR*.[462] In addition, 'Article 8(1) of Directive 2008/115 requires Member States, in order to ensure the effectiveness of return procedures, to take all measures necessary to carry out the removal of the person concerned, namely, pursuant to Article 3, point 5, of that directive, the physical transportation of the person concerned out of that Member State'.[463] Each of these findings by the Court is based on the premise of 'an effective removal and repatriation policy […] with full respect for […] fundamental rights'.[464] Accordingly, the discretion afforded to the Member States under Article 6(4) is removed should it affect the 'effectiveness' of the Return Directive and thus be contrary to an effective removal policy. Long-term irregularity contradicts the aforementioned EU requirements and are thus not to be considered as 'effective'.[465]

The ECJ decision in *UN* also needs to be mentioned here. Even though it deals with voluntary return, the ECJ elaborates that the voluntary compliance with the obligation to return has priority over the forced removal.[466] However, the Court then continues that if a person wants to regularise his or her stay within the period of voluntary return, the Return Directive does not preclude this possibility.[467] Said period can be extended by the Member State 'until the completion of a procedure to regularise his or her stay'.[468] According to *UN*, the only limit to such an extension are the grounds laid down in Article 7(4) Return Directive, with no discernible absolute time limit. The ECJ only refers to the fact that any extension must be 'appropriate' and 'necessary because of the specific circumstances of each case'.[469]

The *UN* decision is ground-breaking in so far as the ECJ states for the first that Member States may wait for a person to fulfil the requirements of a specific regularisation before proceeding with deportation. More specifically, the ECJ held that an extension of the period for voluntary departure

462 ECJ *Gnandi*, para 50 and ECJ 10.9.2013, C-383/13 PPU, ECLI:EU:C:2013:533, *MG* and *NR*, paras 36 and 41f.
463 ECJ *Zaizoune*, para 33 and also ECJ *TQ*, para 79.
464 ECJ *Mahdi*, para 38 with reference to Recitals 2 and 11.
465 In this sense ECJ *TQ*, para 80; see further ECJ *BZ*, para 57. On the question of effectiveness see also Introduction B., Chapter 2.C.I. and Chapter 4.A.
466 ECJ *UN*, para 50 with further references.
467 ECJ *UN*, para 51.
468 ECJ *UN*, para 58 and see also paras 54 and 56 and see in general Article 7(2) Return Directive.
469 ECJ *UN*, para 62.

'may be extended for a reasonable period in the light of the circumstances of the case, such as the length of stay, the existence of dependent children attending school or the existence of other family and social links'.[470] This development in the case law that specifically refers to Article 6(4) Return Directive is not (yet) laying down an obligation to regularise,[471] but it does explicitly mention regularisations as an effective measure to end irregular stay and confirms the approach taken in this study. The position taken by the ECJ seems convincing due to the necessary and foreseeable steps that Member States and the concerned migrants may take during the extension of the period of voluntary return. In these cases, the end of the irregular stay seems foreseeable in contrast to permanently non-returnable migrants.

Hence and in my reading, the first sentence of Article 6(4) Return Directive establishes an obligation to regularise in the two cases outlined below: the option to return is not enforceable and the effectiveness of the Return Directive cannot be guaranteed otherwise.[472] The right to respect for private and family life under Article 8 ECHR and Article 7 CFR is not analysed in detail here as it would extend far beyond the scope of this study.[473] This also applies to an examination of whether an obligation to regularise can be derived from the inviolability of human dignity under Article 1 CFR[474] or if such a right exists regarding unaccompanied minors.[475]

a) Principle of non-refoulement under the ECHR and CFR

The first group of cases concerns the principle of non-refoulement as understood in human rights law under the ECHR and the CFR. The principle anchored in Article 19(2) CFR will thus also be examined, but not

470 ECJ *UN*, para 63.
471 ECJ *UN*, para 64.
472 Similar with regard to *effet utile*, *Menezes Queiroz*, Illegally Staying 176; similar in relation to permanently non-returnable, *Klarmann*, Illegalisierte Migration 292–294.
473 On ECtHR case law see Fn 343 and 501 and ECJ *X*, paras 83ff.
474 On the relationship between Art 1 CFR, the Return Directive and the State obligation to satisfy the basic needs of non-returnable persons, see *Hinterberger/Klammer* in *Salomon* and *Hinterberger/Klammer*, University of Vienna Law Review 2020.
475 Cf. *Bast/von Harbou/Wessels*, REMAP 202 with reference to ECJ *TQ*.

Article 33 Refugee Convention.[476] If a return and consequently the return decision violate this principle, Member States are obliged to grant a right to stay. As *Hörich* correctly asserts, viewed from a procedural standpoint the grant of a right to stay is the only option if issuing a return decision constitutes a breach of the non-refoulement principle.[477] The discretion under Article 6(4) Return Directive is removed. Interpreting this provision in line with fundamental rights therefore turns the 'may […] decide' into a 'must […] decide'.[478] Such interpretation of the Return Directive does not stem from the ECHR, but from Article 51(1) in conjunction with Article 19(2) CFR.[479] In such instances the possibility for the Member State to decide to terminate the irregular stay either by return or regularisation in effect becomes an obligation to regularise. This is to be assessed independently of the fact that Article 9(1)(a) Return Directive also allows for the postponement of removal in such cases. Following the structure of the Directive, postponement is subordinate to the return decision or its implementation. Hence, the postponement may only become relevant if a return decision is issued – in my interpretation this is prohibited due to the non-refoulement principle. The interpretation advocated here is supported by ECJ case law which places the protection of fundamental rights at the core of the interpretation of directives: 'In the final analysis, while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights'.[480] Furthermore, as has been noted, the Return Directive aims to create an 'an effective removal and repatriation policy […] with full respect for […] fundamental rights'.[481]

In March 2021, the ECJ stated in *M and A* that a return decision cannot be issued since this would violate the principle of non-refoulement.[482] This approach was confirmed in November 2022 in the *X* decision.[483] Somehow

476 See Chapter 1.B.III.1.
477 *Hörich*, Abschiebungen 125f and see also *Berger/Tanzer* in *Salomon* 247 and *Frik/Fux*, Subsidiärer Schutz und die Akteursproblematik – Vorgaben für eine unions- und gleichheitsrechtskonforme Novellierung, migraLex 2019, 43 (49).
478 In this sense *Acosta Arcarazo*, CMLRev 2015, 1375ff.
479 ECJ *Gnandi*, para 51 and ECJ *X and Y*, paras 27 and 31.
480 ECJ 27.6.2006, C-540/03, ECLI:EU:C:2006:429, *Parliament/Council*, para 104; see also ECJ 4.3.2010, C-578/08, ECLI:EU:C:2010:117, *Chakroun*, paras 44 and 63.
481 ECJ *Mahdi*, para 38 with reference to Recitals 2 and 11.
482 ECJ 24.3.2021, C-673/19, ECLI:EU:C:2021:127, *M and A*, paras 40, 42, 45f.
483 ECJ 22.11.2022, C-69/21, ECLI:EU:C:2022:913, *X*, paras 58f and 76.

puzzling is the decision in *BZ*. In sharp contrast to the position taken in this study, and only three months after the *M and A* decision, the ECJ held that a return decision has to be issued, even though it cannot be enforced because of the principle of non-refoulement.[484] The *M and A* as well as the *X* case thus seem to be an argument against the proposed obligation to regularise as the ECJ does not establish such an obligation.[485]

The analysis of Austrian, German and Spanish law will show that the approach in these legal systems accords in principle with the view expressed here.[486] However, although in my opinion Member States are subject to an obligation to regularise as issuing the return decision would violate the principle of non-refoulement, there are circumstances in which the Member States still issue a return decision but postpone it according to Article 9(1)(a) Return Directive.

b) Permanently non-returnable

The second group concerns cases in which migrants are permanently non-returnable for factual reasons.[487] For example, the return is impossible due to the lack of travel documents,[488] whereby the country of origin refuses to readmit the person concerned. A Member State is obliged to grant a right to stay if the return decision – and consequently the return – is permanently unenforceable, despite taking all necessary measures to implement it.[489] My interpretation accords with the aim of the Return Directive to eliminate all forms of irregularity and uncertainty concerning residency, be this via a return decision and (forced) deportation or by granting a right to stay.[490]

However, questions surround the point in time from which the non-removal of an irregularly staying migrant is deemed permanent. Following the definition advocated by *Lutz*, a person is permanently 'non-returnable' in the sense of a predictive decision if there is no longer a reasonable prospect of removal within the meaning of Article 15(4) Return Directive

484 ECJ *BZ*, paras 58f.
485 ECJ *M and A*, para 43 and ECJ *X*, paras 84–87, in particular para 86; cf. *Lutz* in *Thym/Hailbronner* Art 6 Return Directive mn 32a.
486 See Chapter 4.A.
487 See Chapter 1.B.III.1.b.
488 See the Travel Document Regulation.
489 See Fn 463.
490 See above, Chapter 2.B.II.2.

and thus the person concerned has to be released immediately.[491] An indication for determining permanent non-removal could lie in the maximum period for detention, namely 18 months. In principle the detention is limited to 6 months, but this may be extended by a further 12 months if, despite all reasonable efforts by the Member State, the removal is likely to last longer, e.g. due to the aforementioned factual reasons.[492] *Lutz* takes the 18-month *de facto* residency as the basis for his proposed EU regularisation measure aimed at 'non-returnable returnees' who cooperate with the national authorities.[493] One could therefore argue that the Return Directive imposes an obligation upon the Member States to regularise if they cannot remove a person within 18 months.[494]

The starting point for this 18-month period could be the date on which the return decision is legally effective. An alternative would be, for example, the date of the decision. This would be far easier to determine, but the decision is of course only enforceable by the Member State once it has gained legal effect. Ultimately it will be for the ECJ (or the EU legislator)[495] to determine the relevant point at which the migrant becomes permanently non-returnable thus triggering the aforementioned obligation to grant a right to stay.

Where the practice in the Members States is concerned, it should be noted that this currently does not accord with the remarks above. I only need to refer here to Germany, where the competent authorities have the possibility to 'tolerate' persons on a yearly basis, which often results in so-called '*Kettenduldungen*' (literally: chain tolerations).[496] According to the ECtHR, the protection under Article 8 ECHR typically only extends to 'settled migrants',[497] which is why in a similar case the court decided that such 'chain tolerations' are in principle compatible with Article 8 ECHR. However, the protection can also extend to irregularly staying migrants: in *Jeunesse/Netherlands* the ECtHR held that a factual, 'tolerated'

491 *Lutz*, EJML 2018, 30f and 39f. See also ECJ *Mahdi*, para 89.
492 Art 15(5) and (6) Return Directive.
493 *Lutz*, EJML 2018, 48.
494 In the same sense *Bast/von Harbou/Wessels*, REMAP 206.
495 See Chapter 5.
496 In the same sense *Bast/von Harbou/Wessels*, REMAP 201 and see Chapter 4.A.I.2.c.
497 ECtHR *Butt/Norway*, para 78; for criticism *Da Lomba*, Vulnerability and the Right to Respect for Private Life as an Autonomous Source of Protection against Expulsion under Article 8 ECHR, Laws 2017/6/32, 3ff and especially 10ff and *Dembour*, Migrants 442–481.

and irregular stay exceeding 16 years triggered the obligation for the State to grant residency under Article 8 ECHR.[498] In contrast to German law, the term 'tolerated' used by the ECtHR does not refer to formal toleration. The situation is better compared with Spain, where there is a (non-statutory) tolerated and irregular stay.[499] Furthermore, the ECtHR took further factors into consideration, for example the fact that all members of the applicant's family are Dutch nationals and the fact that the applicant did not have a criminal record. The ECtHR was faced with a further unusual case of a 'stateless migrant' in *Hoti/Croatia*[500] in which the applicant had lived for almost 40 years in Croatia, in part legally and in part tolerated by the State, thus having a claim to regularisation.[501] It is to be noted for German law that § 25(5) AufenthG provides that 'a foreigner who is enforceably required to leave the federal territory may be granted a temporary residence permit if departure is impossible in fact or in law' if the person has been tolerated for 18 months and the other requirements are satisfied.[502] There is no legal claim, but the provision can be viewed as a starting point to transpose the aforementioned obligation to grant a right to stay in cases where the situation as non-returnable is permanent. The current '*Ausbildungsduldung*' is another German provision that appears to contradict the Return Directive:[503] it suspends the deportation for the purpose of training for three years.[504]

III. Interim conclusion

In simple terms, Member States must choose between the return procedure or regularisation. They remain free to grant a residence permit at any stage of the process or even after issuing the return decision and thus the

498 ECtHR *Jeunesse/Netherlands*, para 116.
499 See Chapter 4.A.I.1.
500 See further also ECtHR 26.6.2012, *Kurić/Slovenia*, 26828/06, paras 339–362.
501 ECtHR *Hoti/Croatia*, paras 118–124; cf. *Swider*, Hoti v. Croatia – a landmark decision by the European Court of Human Rights on residence rights of a stateless person, European Network on Statelessness Blog (3.5.2018), https://www.statelessness.eu/blog/hoti-v-croatia-landmark-decision-european-court-human-rights-residence-rights-stateless-person (31.7.2022).
502 See Chapter 4.C.II.2.
503 ECJ *TQ*, paras 69ff and cf. *Roß*, EuGH, 14.01.2021 - C-441/19: Anforderungen an eine Rückkehrentscheidung gegenüber einem Minderjährigen, NVwZ 2021, 550 (552).
504 See in detail Chapter 4.E.IV.1.

Return Directive does not exclude the possibility for the Member States to regularise irregularly staying migrants. However, ECJ case law and scholarly opinions have fuelled the debate whether there is an obligation to regularise under the Return Directive. I argue that Article 6(4) Return Directive obliges the Member States to grant a right to stay to irregularly staying migrants in two sets of circumstances: the return would violate the principle of non-refoulement as per the ECHR and CFR or where the obstacles preventing the removal of the migrant concerned are permanent. Here the Member States no longer have the discretion awarded by the first sentence of Article 6(4) Return Directive as the alternative, namely return, is not enforceable.

C. EU competences under Article 79(1) TFEU

Following the insights into EU immigration policy concerning irregular migration in general and the Return Directive, the focus now shifts to the mandates and competences anchored in Article 79(1) TFEU: 'The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'. This raises the question of the objectives, possibilities and barriers that underpin these concepts and how these are to be assessed. The reference to 'immigration' includes both regular and irregular migration as well and the entry and subsequent stay.[505] I will analyse the three relevant fields, placing emphasis on the prevention of, and enhanced measures to combat irregular migration (I.) before addressing the development of a common immigration policy at all stages (II.) and the fair treatment of third-country nationals (III.).

I. Prevention and enhanced measures to combat irregular migration

The Treaty of Maastricht first contained a provision in which 'combatting unauthorized immigration, residence and work' was stipulated as a matter

505 Cf. *Thym* in *Hofmann/Löhr* 195f with further references and *Bast*, Illegaler Aufenthalt und europarechtliche Gesetzgebung, ZAR 2012, 1 (1).

of 'common interest' for the then European Community.[506] However, neither the Treaty of Amsterdam nor the Treaty of Nice contained a similarly worded provision of this kind.[507] It was first in 2009, with the entry into force of the Treaty of Lisbon, that the objectives of EU primary law were redefined and established.[508] Although the proposed Treaty establishing a Constitution for Europe never entered into force, its Article III-267 is identical to the current Article 79(1) TFEU.[509]

Preventing and taking enhanced measures to combat irregular migration reflects the direction of EU immigration policy.[510] As human trafficking is excluded from the following analysis, I will not discuss Article 79(2)(d) TFEU, namely the measures to combat trafficking in persons. The objective and the content of the term 'prevention' are especially clear. The classic risk-avoidance approach shall nip irregular migration in the bud.[511] Particular groups, especially poorly qualified or economic migrants,[512] should be deterred from entering the EU.[513] The EU shall achieve this objective above all through preventative measures.[514]

The second element concerns the proverbial 'fight' against irregular migration. The EU Treaties contain more than 20 uses of the terms 'combat' or 'combatting', for example in relation to crime, terrorism, fraud, discrimination, racism and xenophobia, immigration, or climate change.[515] Literally, 'combat' means 'a fight between two people or things'; 'to try to stop something unpleasant or harmful from happening or increasing'.[516] Reducing the number of irregularly staying migrants has meant that the

506 Art K1(3)(c) TEC.
507 See Art 63(3) and (4) TEC in the version OJ 1997 C 340/1 as well as OJ 2001 C 80/1.
508 Cf. *Peers*, EU Justice 448ff.
509 Also *Weiß* in *Streinz* (ed), EUV/AEUV Kommentar[3] (2018) Art 79 AEUV mn 6. For a comparison see *Hellmann*, Der Vertrag von Lissabon (2009) 239f.
510 *Rossi* in *Calliess/Ruffert* (eds), EUV/AEUV Kommentar[5] (2016) Art 79 AEUV mns 6 and 9 refer to the provision as '*kompetenzleitend*' (literally 'guiding the competence'). *Weiß* in *Streinz* Art 79 AEUV mn 2 refers to '*recht klar definierten Zielen*' ('clearly defined objectives').
511 Cf. *Bast*, Aufenthaltsrecht 75ff.
512 Cf. *Tewocht*, Drittstaatsangehörige 286ff, especially 449.
513 Also *Thym* in *Kluth/Heusch* (eds), BeckOK Ausländerrecht (30th edn, 1.7.2020) Art 79 AEUV mn 15 with regard to the competence in Art 79(2)(c) TFEU.
514 See for instance COM(2001) 672 final, 9.
515 TEU: Arts 3(2), 43; TFEU: Arts 10, 19(1), 67(3), 75, 79(1), 79(2)(d), 86(1) and (4), 88(1), 151, 153(1)(j), 168(1) and (5), 191(1), 208(1), 325(2) and (4).
516 *Cambridge Dictionary*, 'combat', https://dictionary.cambridge.org/dictionary/english/combat (31.7.2022).

'fight' against irregular migration has become a paradigm of EU immigration policy. One reason for this is the control Member States seek to have over the composition of its resident population.[517] *Ter Steeg* has stated that the political direction of immigration policy in the field of 'illegal' immigration clearly relates to warding off irregular migrants,[518] since irregular migration is viewed exclusively as a negative form of migration.[519] *Cholewinski* even refers to a 'war on irregular migration',[520] whereas *Engbersen* is accurate in describing the restrictive policy towards irregularly entering and staying migrants with the expression 'Panopticon Europe'.[521] The risk-aversion approach considers certain categories of migrants a particular problem, specifically those without entry or residence permits.[522] In this respect the control approach under administrative law refers foremost to the prevention and monitoring of dangerous individuals.[523] *Costello* even goes so far as to claim that 'combatting' irregular migration within the EU has developed a life of its own: 'This EU policy discourse on illegal migration sets up an institutional practice around "illegal" migration that is detached from the subtleties of the law'.[524] *Boswell* opines that irregular migration is a necessary structural feature of restrictive immigration policies and of liberal democratic states.[525] Despite these political developments, the constitutional purposes and the competences do not specify the content of 'combat'. It would thus be useful to interpret this term as being fulfilled if the number of irregularly staying migrants is reduced by whatever means.[526] Such interpretation could also apply to the German (*Bekämpfung*), Spanish (*lucha*), Portuguese (*combate*), French

517 *Hampshire*, Immigration.
518 *Ter Steeg*, Einwanderungskonzept 423 with further refences; cf. also *Cholewinski*, European Policy on Irregular Migration: Human Rights Lost? in *Bogusz/Cholewinski/Cygan/Szyszczak* (eds), Irregular Migration and Human Rights: Theoretical, European and International Perspectives (2004) 159 (159f).
519 See also *Niessen*, International Migration on the EU Foreign Policy Agenda, EJML 1999, 483 (489, 493).
520 Cf. *Cholewinski* in *Baldaccini/Guild/Toner* 305.
521 *Engbersen* in *Guiraudon/Joppke* 223. Cf. on the term panopticism *Foucault*, Discipline and Punish: The Birth of the Prison[2] (1995) 195ff.
522 Cf. *Bast*, Aufenthaltsrecht 75ff.
523 Cf. *Bast*, Aufenthaltsrecht 79ff.
524 *Costello*, Human Rights 66 refers in this context to *Samers*, An Emerging Geopolitics of 'Illegal' Immigration in the European Union, EJML 2004, 25.
525 *Boswell* in *Azoulai/De Vries* 42ff.
526 See COM(2015) 453 final, 2 or COM(2017) 200 final.

(*lutte*), Slovenian (*boj*), Italian (*contrasto*), Polish (*zwlaczenie*) and Danish (*bekæmpelse*) versions.

This also arises in view of the link between the purposes in Article 79(1) TFEU and the competences listed in Article 79(2) TFEU – the 'central provision'[527] for all matters of immigration law.[528] Measures under Article 79(2) TFEU may only be adopted in order to fulfil the mandates under Article 79(1) TFEU.[529] This means specifically that every EU legislative act in the areas of immigration must fulfil one of the aforementioned purposes – it must therefore be possible for the measure in question to achieve the purpose, at least in the abstract. *Rossi* accurately describes this as a 'functional limitation'.[530] However, the TFEU is neutral with regard to the question of how the specified purpose is achieved, just as long as it can be achieved.

Each EU legislative act must therefore fulfil a particular purpose. The fact that a measure must at least be able to achieve a particular objective on the basis of primary law requirements indicates that primary law requires such acts to have a particular degree of effectiveness. This allows one to define what constitutes the effectiveness of legislation or a legislative provision, which is especially important for the theory developed in this study: 'combatting' irregularly staying migrants at Union level will be more effective with EU regularisations that supplement the EU's current return policy. Furthermore, these comments also play a key role in examining the second (and third) research question.[531]

Based on the above, the question whether the EU can pass a regularisation legislation to 'combat' irregular migration as per Article 79(1) TFEU or whether such legislation must serve to prevent irregular migration, or concerns return,[532] can be answered as follows: a regularisation act must accord with the purpose of 'combatting' irregular migration. In this respect the Council of the European Union views regularisations as an instrument in the fight against 'illegal immigration'. Accordingly, the 2008 European Pact on Immigration and Asylum leaves the Member States the

527 *Bast* in *Fischer-Lescano/Kocher/Nassibi* 76.
528 For detail, Chapter 2.D.
529 ECJ 18.12.2014, C-81/13, ECLI:EU:C:2014:2449, *United Kingdom/Council*, paras 41f; ECJ 26.12.2013, C-431/11, ECLI:EU:C:2013:589, *United Kingdom/Council*, para 63.
530 *Rossi* in *Calliess/Ruffert* Art 79 AEUV mn 9 ('*funktionale Begrenzung*').
531 See Introduction B.
532 In this sense, *Thym* in *Kluth/Heusch* Art 79 AEUV mn 2.

option to use case-by-case regularisations.[533] The Member States should, however, refrain from so-called regularisation programmes.[534] The discretion not to issue a return decision but to instead award a residence permit to an irregularly staying migrant was subsequently codified in the Return Directive.[535]

However, under the *Realpolitik* standpoint, an EU regularisation measure is not on the horizon as the EU institutions are hardly favourable towards regularisations, fuelling remarks such as an 'anti-regularization ethos'.[536] Furthermore, *Lutz* has noted that, even where non-returnable migrants are concerned, a harmonised approach at EU level was not in the common interests of the Member States in 2018 as they consider that the existing EU *acquis* would suffice.[537]

II. Development of a common immigration policy aimed at ensuring, at all stages, the effective management of migration flows

The TFEU stipulates that the substantive requirements in Article 79(1) TFEU are to be ensured in the course of developing a common immigration policy at all stages and for the effective management of migration flows. In referring to the progressive harmonisation of this policy area, *Muzak* defines 'at all stages' as meaning that the immigration policy has to develop on a step-by-step basis and successively.[538]

Thym considers that the Treaty obligation to ensure effective migration management is based on a comprehensive regulatory approach 'in all stages'.[539] This means that EU migration law is to be understood as a 'pro-

533 *Council of the European Union*, European Pact on Immigration and Asylum (24.9.2008), 13440/08, 7.
534 On this term see Chapter 1.B.I. and Chapter 3.C.I.
535 In this sense, *Costello*, Human Rights 99 and see in detail Chapter 2.B.I.
536 *Costello*, Human Rights 98ff. In a similar direction, *Desmond* in *Wiesbrock/Acosta Arcarazo* 72–74; cf. also *Machjer/Strik*, EJML 2021, 122ff and *Bast/von Harbou/Wessels*, REMAP 205ff as well as in detail Chapter 5.A.
537 *Lutz*, EJML 2018, 49f.
538 *Muzak* in *Mayer/Stöger* (eds), Kommentar zu EUV und AEUV (1.12.2012, rdb.at) Art 79 AEUV mn 2. Similarly *Kortländer* in *Schwarze/Becker/Hatje/Schoo* (eds), EU-Kommentar[4] (2019) Art 79 AEUV mn 4.
539 *Thym* in *Kluth/Heusch* Art 79 AEUV mn 1. See also *Kortländer* in *Schwarze/Becker/Hatje/Schoo* Art 79 AEUV mn 5.

cess of a change in legal status'[540] and thus at the end of each process there is either a 'long-term visa or residence permit' pursuant to Article 79(2)(a) TFEU or a 'removal and repatriation' pursuant to Article 79(2)(c).[541] Expanding on *Thym's* view, the EU legislator is urged to include in its policy all stages and circumstances of third-country nationals. The latter is also arguable upon closer analysis of the meaning of the term 'immigration policy' as this includes both regular and irregular migration as well as the entry and subsequent stay.[542] This is supported by the Article 63(3)(a) TEC in the version of the Treaty of Nice (now Article 79(2)(a) TFEU), which allowed for the adoption of 'measures on immigration policy' and thus to establish residence rights for third-country nationals.[543]

A combination of these two approaches is the most convincing to interpret this requirement under EU law. *Muzak* states that the term 'stage'[544] implies a temporal aspect which has to be viewed with respect to the constant political developments and allows for full harmonisation within the limitations of Article 79(4) and (5) TFEU.[545] In turn, *Thym* considers that EU immigration policy has to cover all third-country nationals on a personal and substantive level, regardless of their residency status.

III. Fair treatment of third-country nationals

Under Article 79(1) TFEU the EU common immigration policy shall aim at ensuring the fair treatment of third-country nationals residing legally in Member States – this aim accords with the competence provided in Article 79(2)(b) TFEU.[546] Furthermore, Article 67(2) TFEU stipulates that EU common policy on asylum, immigration and external border control shall be fair towards third-country nationals. By not limiting the personal scope of application to third-country nationals residing legally, the EU

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540 '*Prozess rechtlichen Statuswandels*': *Thym* in *Kluth/Heusch* Art 79 AEUV mn 2 with reference to *Thym*, Migrationsverwaltungsrecht (2010) 18–24.
541 See Chapter 2.D.I.–II.
542 *Bast*, ZAR 2012, 1; cf. also *Thym* in *Hofmann/Löhr* 195f with further references.
543 See Chapter 2.D.I.
544 Note that *Muzak* refers to the German version of the TFEU, i.e. '*Phase*'.
545 On Art 79(4) and (5) TFEU see Chapter 2.D.II.1.–2.
546 See above all *Bast*, Aufenthaltsrecht 143; for detail see below Chapter 2.D.II.

immigration policy thus has to be fair towards all third-country nationals, even those without a right to stay.[547]

Nonetheless, the notion of fair treatment is not sufficiently precise to allow for conclusions on its meaning or significance. For instance, *Bast* views the notion as an equitable principle that calls for a political search to balance the interests concerned, but without determining the content of the result.[548] *Rossi* goes furthest in his interpretation, noting that the most striking aspect is the vagueness of fair treatment under Article 79(1) TFEU, which certainly means more than granting those rights that are guaranteed by the fundamental rights in national law and under the ECHR and CFR.[549] As the fundamental rights under the CFR in principle form the yardstick for irregularly staying migrants,[550] it is questionable how in *Rossi's* opinion further rights can be derived if Article 79(1) TFEU is itself 'vague'. *Peyrl* takes a different standpoint by interpreting 'fair treatment' as a quasi-objective requirement subsuming thereunder the access to the labour market.[551] For *Peyrl*, fair treatment also encompasses access to the labour market, since denying third-country nationals access to the labour market without objective justification would contradict EU primary law as this would not constitute fair treatment.

Each of these different possible interpretations allow for the assertion that the EU legislator has to take into account all third-country nationals, i.e. also irregularly staying migrants.[552] In line with developing a common immigration policy at all stages, a balance must be found between the conflicting interests of the Member States or the EU and the groups of persons concerned. As the example of non-returnable persons clearly demonstrates, the EU ignores the residency situation of particular categories of migrants.[553] Moreover, as is readily apparent from the above, this does not accord with either of the stated purposes under EU primary law. Whether such a broad interpretation as proposed by *Rossi* or *Peyrl* can be derived from Article 79(1) TFEU cannot be conclusively clarified at this point as

547 Cf. *Peers*, EU Justice 449; coming to the same result *Kortländer* in *Schwarze/Becker/Hatje/Schoo* Art 79 AEUV mn 5.

548 *Bast*, Aufenthaltsrecht 143. See also *Thym*, CMLRev 2013, 722 Fn 66 with further references.

549 *Rossi* in *Calliess/Ruffert* Art 79 AEUV mn 6.

550 See *Hörich*, Abschiebungen 30–33.

551 *Peyrl*, Zuwanderung und Zugang zum Arbeitsmarkt von Drittstaatsangehörigen in Österreich (2018) 22.

552 Similarly *Peyrl*, Arbeitsmarkt 22.

553 See Chapter 2.B.II.2.b.

it requires a more in-depth discussion. Nonetheless, it hardly allows for a subjective right, but there are good reasons supporting the proposal for a principle of 'quasi-objectivity'.[554]

D. Primary law competences under Article 79(2) TFEU

Following the analysis of the purposes derived from the TFEU the spotlight now shifts to the question whether and, if so,[555] what competences the EU has in the field of irregular migration and regularisations.[556] The question of how the specified purpose is achieved has been discussed above.[557] The relevant competence is anchored in Article 79(2) TFEU. The EU and the Member States share competence in the principal area of freedom, security and justice.[558] This means that the Member States may exercise their competences as long as and to the extent that the EU has not legislated in that particular area:[559] EU legislation can prevent Member States from passing 'parallel rules'.[560] However, here the limitations under Article 79(4) and (5) TFEU as well as the principles of proportionality and subsidiarity are to be observed.[561]

The competences correspond in essence to Article 63(3) and (4) TEC introduced via the Treaty of Maastricht and amended via the Treaty of Amsterdam and the Treaty of Nice. Article III-267 of the proposed Treaty establishing a Constitution for Europe not only made linguistic changes but also expanded the content.[562] The Constitution never entered into force, but its Article III-267 is identical to Article 79(1) TFEU. The competences allow the EU to cover all immigration matters,[563] though neither

554 *Peyrl*, Arbeitsmarkt 22 referring to a *Quasi-Sachlichkeitsgebot*.
555 *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 29 refers here to the 'whether' in relation to the conferral of the residence permit and to the 'how' in relation to the scope of the status.
556 Cf. the question already posed by *Bast*, ZAR 2012, 1. See further also *Bast* in *Fischer-Lescano/Kocher/Nassibi*.
557 See above, Chapter 2.C.I.
558 Art 4(2)(j) TFEU.
559 *Bast*, Aufenthaltsrecht 144.
560 Cf. *Öhlinger/Potacs*, EU-Recht 16f.
561 See especially Chapter 2.D.II.1.–2. and Chapter 2.D.IV.
562 Cf. *Kortländer* in *Schwarze/Becker/Hatje/Schoo* Art 79 AEUV mn 1.
563 As expressed in the Final Report of the Working Group X Freedom, Security and Justice with regard to the former competences stipulated in Art 63(3) and (4) TEC in the version OJ 2001 C 80/1; *European Convention*, CONV 426/02

the competences nor the constitutional purposes provide details on how these are to be performed.[564]

As a final remark, the correct competence is decisive for the legality of EU legislative acts, otherwise the act may be annulled following judicial review under Article 263 TFEU. According to ECJ case law, this arises from the main aim of a measure.[565] It is also possible to culminate a number of competences, depending on the legislation.[566] The competences in Article 79(2) TFEU do not entail different legal consequences,[567] thus the EU legislator can avoid the annulment of a measure by merely selecting the relevant competences.

The following sections will first analyse the possible competences (I.–III.) before addressing the principles of proportionality and subsidiarity (IV.).

I. Conditions of entry and residence

Article 79(2)(a) TFEU states that the EU may adopt measures concerning 'the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits'. The provision concerns the core of EU immigration law,[568] though the competence is executed in a decentral manner by the national authorities.[569]

The provision does not distinguish whether the addressees of the rule reside in or outside of the EU or whether or not they have a residence

(2.12.2002) 5. Also in this sense *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 23 and *Kortländer* in *Schwarze/Becker/Hatje/Schoo* Art 79 AEUV mn 1.

564 Cf. *Bast*, Aufenthaltsrecht 145.

565 On identifying the 'correct' legal basis ECJ 6.11.2008, C-155/07, ECLI:EU:C:2008:605, *Parliament/Council*, para 35; ECJ 19.7.2012, C-130/10, ECLI:EU:C:2012:472, *Parliament/Council*, para 43; ECJ 6.5.2014, C-43/12, ECLI:EU:C:2014:298, *Commission/Parliament* and *Council*, para 30; in this sense also ECJ 17.3.1993, C-155/91, ECLI:EU:C:1993:98, *Commission/Council*, paras 19 and 21. See also the opinion of Advocate General Kokott 17.7.2014, C-81/13, ECLI:EU:C:2014:2114, *United Kingdom/Council*, para 49.

566 See also *Rossi* in *Calliess/Ruffert* Art 79 AEUV mn 10 and *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 29.

567 Cf. *Bast*, Aufenthaltsrecht 147.

568 *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 23.

569 Cf. *Bast*, Aufenthaltsrecht 146; similarly *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 34.

permit.[570] Consequently, this provides the basis for the EU to determine regularisations.[571] An EU measure could establish the lawful residence of irregularly staying migrants. It would be possible on the one hand to stipulate specific requirements for awarding residence permits but also, on the other hand, the substantive as well as formal requirements for the loss or revocation of the residence permit.[572]

The term 'residence permit' stipulated in primary law is of considerable significance for the group of persons analysed here, namely third-country nationals residing in a Member State.[573] It has been defined in EU secondary legislation, namely in Article 1(2)(a) Residence Permit Regulation,[574] which excludes visas from its scope. The period for which the permit is valid arises from a systematic interpretation of the terms 'short-stay' and 'long-term' used in EU primary law.[575] Article 79(2)(a) TFEU concerns the long-term visa, whereas Article 77(2)(a) TFEU refers to short-stay residence permits (for instance, visas under the Visa Regulation).[576] Prior to the Treaty of Lisbon, EU primary law drew a distinction based upon a three-month stay,[577] but this was repealed with the new Treaty. Nonetheless, the majority of scholars continue to use such 'benchmark'.[578]

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570 *Bast* in *Fischer-Lescano/Kocher/Nassibi* 88; cf. the wording of Art 79(2)(a) AEUV.

571 Expressly agreeing *Bast*, Aufenthaltsrecht 147; *Thym* in *Kluth/Heusch* Art 79 AEUV mn 10; *Schieber*, Komplementärer Schutz 311f. Affirming in principle, but not exploring the question, *Rossi* in *Calliess/Ruffert* Art 79 AEUV mn 11; *Kotzur* in *Geiger/Khan/Kotzur* (eds), EUV/AEUV Kommentar[6] (2017) Art 79 AEUV mn 6; *Weiß* in *Streinz* Art 79 AEUV mns 12f; *Hoppe* in *Lenz/Borchardt* (eds), EU-Verträge Kommentar[6] (2012) Art 79 AEUV mns 3f; *Muzak* in *Mayer/Stöger* Art 79 AEUV mn 6; *Progin-Theuerkauf* in *Van der Groeben/Schwarze/Hatje* (eds), Europäisches Unionsrecht: Band 2[7] (2015) Art 79 AEUV mn 15; *Peers*, EU Justice 326ff. Contrary view, *Menezes Queiroz*, Illegally Staying 170. The author comes to the conclusion – albeit without clear reasoning – that the EU does not have any competence to pass regularisations at EU level.

572 Cf. *Bast*, Aufenthaltsrecht 145 and *Thym* in *Kluth/Heusch* Art 79 AEUV mns 9–11. For instance, the procedural requirements in the Return Directive may serve as an illustration; cf. *Hörich*, Abschiebungen 71ff and Chapter 2.B.

573 See the wording of Art 79(2)(a) TFEU; cf. also *Muzak* in *Mayer/Stöger* Art 79 AEUV mn 6; for a differing opinion *Bast*, Aufenthaltsrecht 146.

574 See also Art 2(2)(c) Single Permit Directive.

575 Cf. *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 24.

576 In detail *Muzak* in *Mayer/Stöger* Art 77 AEUV mns 21ff and *Peyrl*, Arbeitsmarkt 19–21.

577 See Art 62(2)(b) TEC in the version OJ 2001 C 80/1.

578 *Muzak* in *Mayer/Stöger* Art 77 AEUV mns 14, 21 and Art 79 AEUV mn 1; *Hoppe* in *Lenz/Borchardt* Art 77 AEUV mn 9 assumes a strict 3-month limit; also *Weiß* in *Streinz* Art 79 AEUV mn 12, who views the 3-month limit as 'conveyed'; see

Accordingly, long-term stays under Article 79 TFEU are understood as those longer than three months whereas short-term applies to stays up to three months.

II. Status and free movement rights of legally resident third-country nationals

According to Article 79(2)(b) TFEU, the EU can regulate 'the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States'. The competence thereby encompasses the authority to define the status and rights of free movement of legally resident third-country nationals.[579] This aspect is linked to the purpose of ensuring fair treatment of third-country nationals.[580]

The competence does not appear at first to be decisive for a regularisation act. Closer analysis tells a different story, however: the nature of the status rights accompanying the residence permit is a key issue. On the one hand, third-country nationals granted such a right to stay under a regularisation framework could gain access to employment or social security benefits.[581] On the other hand, the EU legislator is afforded the possibility to design the right in such a way that – alongside the issuing Member State – it also has an effect across the entire EU and thus in all Member States.[582] In consequence, residence rights granted within a legislative framework on regularisation could not only include certain status rights but could also acquire an effect similar to the right to free movement throughout the EU which Article 21(1) TFEU grants to Union citizens.

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also *Kortländer* in *Schwarze/Becker/Hatje/Schoo* Art 79 AEUV mn 10 and *Rossi* in *Calliess/Ruffert* Art 79 AEUV mn 11. More cautiously, *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 24, who refers to a few months. *Bast*, Aufenthaltsrecht 146 also does not see a strict limit and affords the EU legislator flexibility.

579 Cf. *Muzak* in *Mayer/Stöger* Art 79 AEUV mns 13ff.

580 Cf. *Bast*, Aufenthaltsrecht 143 and see Chapter 2.C.III.

581 Cf. *Weiß* in *Streinz* Art 79 AEUV mn 15; *Muzak* in *Mayer/Stöger* Art 79 AEUV mn 13; *Kortländer* in *Schwarze/Becker/Hatje/Schoo* Art 79 AEUV mn 18; in depth *Bast*, Aufenthaltsrecht 147–152.

582 See *Bast*, Aufenthaltsrecht 146; *Muzak* in *Mayer/Stöger* Art 79 AEUV mns 14f; *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 31. For detail see Chapter 2.D.I.

1. Integration

Article 79(4) permits the EU to provide 'support and coordination'[583] and to promote the integration of third-country nationals: 'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States'. Measures on this basis may not comprehensively regulate the field of integration. According to *Kotzur*, Article 79(4) TFEU should secure a degree of variety of national measures in the field of integration, with the author emphasising the role of State sovereignty.[584] Nonetheless, *Thym* notes that certain aspects may be harmonised at EU level to the extent in so far as they do not concern integration on the whole.[585]

Kortländer understands the notion integration as the social security benefits, language and other development programmes aimed specifically at immigrants.[586] In his view a harmonisation of these aspects would contradict Article 79(4) TFEU. However, this interpretation pushes the boundaries of the possible meanings as clarification is lacking on the core content on integration.[587] The weightier argument is that harmonisation of individual aspects of integration must indeed be possible under the respective competences as these would otherwise be limited too greatly. Such an open concept therefore cannot allow for the conclusion whereby the competences are curtailed.

In my opinion, one may conclude that the EU legislator could equip residence rights with social security benefits (or free movement rights) in future EU regularisation legislation. Such rights would concern and regulate aspects surrounding integration without being affected by the limitations under Article 79(4) TFEU.

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583 Art 2(5) TFEU; cf. *Thym* in *Kluth/Heusch* Art 79 AEUV mn 22 and in *Schwarze/Becker/Hatje/Schoo* Art 79 AEUV mn 24.

584 Cf. *Kotzur* in *Geiger/Khan/Kotzur* Art 79 AEUV mn 11.

585 *Thym* in *Kluth/Heusch* Art 79 AEUV mn 24.

586 *Kortländer* in *Schwarze/Becker/Hatje/Schoo* Art 79 AEUV mn 19.

587 See just *Hailbronner/Arévalo* in *Hailbronner/Thym* (eds), EU Immigration and Asylum Law. A Commentary[2] (2016) Art 4 Family Reunification Directive mn 20.

2. Access to the labour market

Article 79(5) TFEU allows the Member States to retain the right to 'determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed'. Member States may therefore introduce quantitative restrictions on access to the labour market, such as quotas.[588] The wording 'in order to seek work' is, however, not ideal as the quotas on residence permits should apply to those in employment and not those seeking employment, which is to be understood as 'taking up employment for the first time'.[589] Article 79(5) TFEU is therefore aimed at economic migration.

The wording 'coming from third countries to their territory' is especially relevant for this study. It is clear that the competence retained by the Member States only applies to third-country nationals travelling (for the first time) from outside of the EU to a Member State, thereby entering the EU.[590] '[C]oming from third countries' therefore excludes the application to third-country nationals who travel from one Member State to another.

In this study, the persons concerned are already staying irregularly in a Member State.[591] There can be no objection on the basis of Article 79(5) TFEU if a regularisation at EU level does not grant access to the labour market – this is readily apparent from the wording 'to seek work, whether employed or self-employed'. However, it is unclear if the Member States could object under Article 79(5) TFEU should the EU introduce regularisations that grant third-country nationals access to the labour market alongside a right to stay.

On the one hand, one could argue that the Member States may also regulate the access to the labour market with regard to those persons who have already entered irregularly. Such national quotas that apply to third-country nationals entering lawfully could thus be circumvented by irregular entry. According to Article 79(5) TFEU, the Member States could

588 Cf. *Peyrl*, Arbeitsmarkt 16–18 and *Rossi* in *Calliess/Ruffert* Art 79 AEUV mn 34.

589 *Bast*, Aufenthaltsrecht 151 with reference to *Ter Steeg*, Einwanderungskonzept 458f.

590 See also *European Convention*, CONV 426/02, 2.12.2002, 5; further *Peyrl*, Arbeitsmarkt 17f; *Muzak* in *Mayer/Stöger* Art 79 AEUV mn 29; *Kortländer* in *Schwarze/Becker/Hatje/Schoo* Art 79 AEUV mn 6; *Peers*, Legislative Update: EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon, EJML 2008, 219 (244).

591 See Chapter 1.A.II.1.

thus apply quotas to third-country nationals entering irregularly who have not since resided lawfully and had access to the labour market.

On the other hand, there is the legitimate opinion that the wording 'from third countries […] in order to seek work, whether employed or self-employed' covers those persons who actually enter from a third country[592] for the purpose of entering into employment and not those who are already resident.[593] It is therefore irrelevant if the third-country national has entered regularly or irregularly since the TFEU does not make such specific reference.

This study proposes the following interpretation: Article 79(5) TFEU would not apply and could not be invoked by the Member States if EU legislation were to grant access to the labour market together with a right to stay. The main purpose underlying Article 79(5) TFEU is to allow for quotas of economic migrants in the sense of those taking up employment for the first time.[594] A possible Regularisation Directive would not aim foremost at economic migration, but rather at 'combatting' irregular stays.[595] In this respect, the Student and Researchers Directive is comparable secondary legislation as it aims at education, not economic migration.[596] The residence permit[597] for students also includes access to the labour market;[598] national quotas on admission are excluded.[599] The Student and Researchers Directive may therefore be compared with a future Regularisation Directive as neither are primarily concerned with economic migration.

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592 See *Peyrl*, Arbeitsmarkt 17f.

593 Also *Peers*, EJML 2008, 244. *Bast*, Aufenthaltsrecht 150 refers to *'ansässigen'* (resident) third-country nationals, which does not offer clarity as to whether lawful residency is required.

594 *Bast*, Aufenthaltsrecht 151 with reference to *Ter Steeg*, Einwanderungskonzept 458f.

595 See Chapter 5 on the further objectives.

596 Recitals 37 and 39 Students and Researchers Directive.

597 See Arts 11 and 17f Students and Researchers Directive.

598 Art 24 Students and Researchers Directive. According to Art 24(3) Students and Researchers Directive, the Member State shall determine the maximum number of hours per week, which shall not be less than 15 hours per week. As such, one could object that students do not qualify as workers under Art 45(1) TFEU. However, this is contrary to ECJ case law which provides that a person qualifies as a worker for the purposes of the TFEU even if they work less than ten hours per week; ECJ 4.2.2010, C-14/09, ECLI:EU:C:2010:57, *Hava Genc/Land Berlin*, paras 25f.

599 Recital 39 and Art 6 Students and Researchers Directive.

Each of these aspects leads to the assertion that a Regularisation Directive would prevent the Member States from imposing national quotas on third-country nationals regularised on the basis of an EU Regularisation Directive and limiting their (first) access to the labour market. The reservation according to Article 79(5) TFEU does not apply as the Regularisation Directive does not concern economic migration. The quantitative restrictions on access to the labour market via national quotas would thus violate EU primary law.

III. Illegal immigration and unauthorised residence

Article 79(2)(c) TFEU provides that the EU 'shall' adopt measures concerning 'illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation'. It therefore allows not only for preventative measures but also those to carry out return obligations.[600] This competence formed the basis for the Return Directive, for instance.[601]

The competence under Article 79(2)(c) TFEU falls within the broader policy objective to prevent and combat 'illegal immigration'.[602] 'Unauthorised residence' is understood as complementing 'residing legally in a Member State',[603] a distinction in primary law which is manifested in secondary law in the Return Directive. Article 79(2)(c) TFEU thus allows to enact rules regarding the residence of 'illegally staying third-country nationals'.[604] This competence may therefore not serve as a basis for a lawful stay and thus does not come into question for enacting regularisations.[605]

However, the EU legislator could certainly harmonise the issue of legal toleration,[606] for example as far as several successive tolerations reach a minimum duration.[607] For secondary law, the aforementioned postpone-

600 *Bast*, Aufenthaltsrecht 147; see also *Thym* in *Kluth/Heusch* Art 79 AEUV mn 15.
601 More precisely, the Return Directive was based on Art 63(3)(b) TEC in the version OJ 2001 C 80/1.
602 Cf. *Bast* in *Fischer-Lescano/Kocher/Nassibi* 77–79.
603 Art 79(2(b) and (c) TFEU; cf. *Bast*, Aufenthaltsrecht 147.
604 Art 3 No. 2 Return Directive.
605 Cf. *Thym* in *Kluth/Heusch* Art 79 AEUV mn 15 and *Bast*, Aufenthaltsrecht 146f.
606 *Schieber*, Komplementärer Schutz 312 refers to an '*Aussetzung der Abschiebung*' ('suspension of removal') in EU law.
607 Cf. *Bast*, Es gibt kein solidarisches Asylsystem in Europa, Verfassungsblog (21.10.2013), http://verfassungsblog.de/es-gibt-kein-solidarisches-asylsystem-in-e

ment of removal under Article 9 Return Directive could offer a possible link.[608] Toleration at Member State level could therefore serve as a model, which exists in different forms in both Austria and Germany and, under the respective national law, does not constitute lawful residence.[609] Article 79(2)(c) TFEU would exclude the grant of status rights to tolerated persons and to irregularly staying migrants on the basis of EU law.[610] The grant of free movement rights within the EU is already ruled out as the persons concerned do not even have a right to stay in a Member State.

IV. Proportionality and subsidiarity

Measures passed in accordance with Article 79(2) TFEU must adhere to the principles of proportionality and subsidiarity – general principles which apply to all EU legislative acts.[611] The principle of proportionality provides that EU legislative acts 'shall not exceed what is necessary to achieve the objects of the Treaties'.[612] In accordance with the principle of subsidiarity the EU shall only act in areas that do not fall within its exclusive competence if the objective of the proposed action 'can rather, by reason of the scale or effects of the proposed action, better be better achieved at Union level'.[613] The European Commission examines both principles in relation to its proposals for legislation.[614]

Problems do not arise with regard to the principle of proportionality, but the question remains whether a Regularisation Directive could breach the principle of subsidiarity. The ECJ examines whether in passing legislation 'the EU legislator was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better

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uropa/ (31.7.2022) as well as *Bast/Thym*, Streitgespräch zum rechtlichen Zustand des europäischen und deutschen Asylsystems, vorgänge 208 Issue 4/2014, 4 (8f).

608 See Chapter 2.B.I.

609 § 31(1a) No. 3 FPG and § 60a(3) AufenthG and in detail Chapter 4.A.I.3.b. and Chapter 4.A.I.2.b.

610 Cf. *Bast* in *Fischer-Lescano/Kocher/Nassibi* 78.

611 Art 5(3) and (4) TEU as well as Art 69 TFEU; cf. *Thym* in *Kluth/Heusch* Art 69 AEUV mns 1f and *Thym* in *Kluth/Heusch* Art 79 AEUV mn 9 with regard to competence referred to here.

612 Art 5(4) TEU.

613 Art 5(3) TEU.

614 Cf. Protocol (No 2) on the application of the principles of subsidiarity and proportionality, OJ 2008 C 115/206.

achieved at EU level'.[615] The principle of subsidiarity could potentially be breached if one were to argue that it is not necessary for the EU to act as sufficient regularisation measures have already been created at national level, as shown in Part II.[616] However, there are several objections to this argument.

Firstly, the return deficit reveals that the mandate to 'combat' irregular migration cannot be achieved to a sufficient degree by the Member States alone.

Secondly, the Member States indeed regulate regularisations in various different forms,[617] yet each regularisation is accompanied by the grant of a right to stay. In this way, the issuing Member State establishes through regularisations the lawful residence of formerly irregularly staying migrants.[618]

Thirdly, each of such residence permits issued by a Member State entitle third-country nationals subject to a visa[619] to move freely within the Schengen Area.[620]

It follows from the above that the regularisations under national law already have legal and factual effects on the other Member States. Determining the exact extent of the effects and consequences of such regularisations requires in-depth empirical research,[621] which cannot be undertaken within the scope of this study.

The 'pull factor' concerning future irregular migration is a further argument not only for the breach of the principle of subsidiarity but also, in principle, against any type of regularisation.[622] As the comparison in Part II will show, different regularisation systems already exist in the Member States. It is therefore initially unclear as to why the introduction of

615 ECJ 4.5.2016, C-547/14, ECLI:EU:C:2016:325, *Philip Morris*, para 218.

616 Some regularisations are even regulated at regional or local level; see Chapter 4.D.II.1.

617 See Chapter 4.

618 See just Art 1(2)(a) Residence Permit Regulation or Art 2(2)(c) Single Permit Directive. The procedure under Art 6(2) Return Directive applies if a residence permit issued by a Member State does not allow for a stay in the other Schengen States; cf. Fn 396.

619 See Annex I Visa Regulation.

620 According to Art 21 Schengen Agreement and Art 6(1)(b) SBC and in so far as the remaining requirements under Art 6(1) SBC are fulfilled.

621 In this sense, *Triandafyllidou/Vogel* in *Triandafyllidou* 298f and for a highly-convincing paper see *Kraler*, Journal of Immigrant and Refugee Studies 2019.

622 *Schieber*, Komplementärer Schutz 321f covers this under the heading '*Vermeidung irregulärer Migrationsbewegungen*' ('avoidance of irregular migration flows').

an EU legal framework for regularisation should lead to quantitatively 'more' irregular migration. In any case, the lack of reliable research does not clarify whether or not an EU Regularisation Directive would have such a 'pull-effect'.[623]

The 'pull-effect' argument has been invoked by States and politicians, yet without offering any evidence thereof.[624] Several authors are correct in highlighting that the situation is far more complex and requires consideration of many different factors which are difficult to control politically.[625]

It is therefore necessary to refer to a 2014 empirical study that used the Eurostat arrest statistics relating to irregularly staying migrants. *Wehinger* indeed comes to the conclusion that regularisation programmes have a limited effect on future irregular migration, yet he notes in the same breath that one must nonetheless be cautious in interpreting his result, in particular because of the low reliability of the data.[626] *Wehinger* states further that '[h]owever, the alternative, a large illegal population residing in the country, can be more costly than an amnesty: social costs from increased criminality, missing out on tax revenues, signalling the impotence of the state […] and worse job matching because of reduced mobility of

623 *Mimentza Martin*, Die sozialrechtliche Stellung von Ausländern mit fehlendem Aufenthaltsrecht: Deutschland und Spanien im Rechtsvergleich (2012) 149–252 for instance presents that not even social security benefits, which were the highest in the Basque region, have led to a 'pull-factor' regarding those irregularly staying migrants who lived in a different part of Spain.

624 Cf. *Parliamentary Assembly of the Council of Europe*, Regularisation programmes for irregular migrants. Report 11350 (6.7.2007), https://www.unhcr.org/4b9fac519.pdf (31.7.2022) A.7, A.13, A.16, B.4, B.28, B.29 and B.92; COM(2004) 412 final, 17; *Baldwin-Edwards/Kraler*, REGINE (January 2009) 43, 57, 83, 131; *Bausager/Møller/Arditti*s, Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated (11.3.2013), https://home-affairs.ec.europa.eu/system/files/2020-09/11032013_sudy_report_on_immigration_return-removal_en.pdf (31.7.2022) 82f.

625 *Baldwin-Edwards/Kraler*, REGINE (January 2009) 131 and 109; see also *Helbling/Leblang*, Controlling immigration? How regulations affect migration flows, European Journal of Political Research 2018, 1.

626 'Besides the quality of the data, one should be concerned by the possibility of influential omitted variables. It was not possible in the framework of this study to take into consideration exogenous shocks such as a deterioration of general circumstances in the sending countries. Besides that, clear data on enforcement measures are not available, and so enforcement could be controlled for only in a rough manner. Finally, apprehensions of illegal immigrants are not equal to illegal immigration'; *Wehinger*, International Journal of Migration and Border Studies 2014, 240f.

the illegal workforce'.[627] These negative effects of the EU return policy and the aforementioned deficit in the return of irregularly staying migrants could be lessened or lowered by an EU Regularisation Directive.[628]

As indicated above, further empirical research is necessary to take serious stock of the actual extent and effects of an EU legal framework for regularisation.[629] Subsequent policy decisions can thus be made on the basis of a correct factual basis ('evidence-based policymaking').[630] Just how many migrants each year may acquire a right to stay on the basis of a Regularisation Directive proposed in Chapter 5 will depend greatly on the requirements or on how many migrants are actually staying irregularly in the EU.[631]

In conclusion, an EU legal framework for regularisation would not violate the principle of subsidiarity. It can counteract the fragmentation of regularisations at national level illustrated in Chapter 4 and ensure a harmonised approach by the Member States.[632] EU rules could 'combat' irregular migration more effectively and reduce the number of migrants without a right to stay. The introduction of binding rules would indeed limit the Member States' broad discretion in this field, but in return the EU and the Member States could regain the credibility in EU return policy that actually functions.

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627 *Wehinger*, International Journal of Migration and Border Studies 2014, 241. See also *Rosenberger/Ataç/Schütze*, Nicht-Abschiebbarkeit: Soziale Rechte im Deportation Gap, Österreichische Gesellschaft für Europapolitik Policy Brief (12.6.2018).

628 See Introduction A.

629 Accurately, *Mitsilegas*, Measuring Irregular Migration: Implications for Law, Policy and Human Rights in *Bogusz/Cholewinski/Cygan/Szyszczak* (eds), Irregular Migration and Human Rights: Theoretical, European and International Perspectives (2004) 29 (30f, 38f); *Kovacheva/Vogel*, WP 4/2009, 2; *Triandafyllidou/Vogel* in *Triandafyllidou* 292 and more recently *González Beilfuss/Koopmans*, Legal pathways to regularisation of illegally staying migrants in EU Member States (2021), https://admigov.eu/upload/Deliverable_27_Legal_pathways_Gonzales.pdf (31.7.2022) 29f.

630 Cf. *Triandafyllidou/Vogel* in *Triandafyllidou* 298f. Furthermore, the high costs of such studies have not been overlooked; cf. *Vogel/Jandl*, Introduction to the Methodological Problem in *Kraler/Vogel* (eds), Report on Methodological Issues. Clandestino Project (November 2008) 5 (5).

631 Cf. *Triandafyllidou/Vogel* in *Triandafyllidou* 298 with further references; see also Introduction A.

632 In this sense see also *Schieber*, Komplementärer Schutz 333f.

E. Summary

This chapter has focused on the question whether EU primary law covers a regularisation policy. I first outlined the EU immigration policy with regard to irregular migration in general, whereby I understand immigration policy to comprise each EU policy rooted in primary law, specifically Article 79 TFEU. This covers both the entry as well as the residence of third-country nationals. Overall, the EU continues with the (restrictive) policy outlined in the introduction to this study.[633] The Commission states that it has strived since the 2015 Agenda on Migration to achieve a balanced migration policy that is fair, robust and realistic. However, this requires critical examination whether these objectives can also actually be achieved (or are even achievable) through the legal instruments in place.

The spotlight then panned to the Return Directive. In short, this Directive places the Member States in a position to choose between the return procedure or regularisation. Member States retain the discretion to grant a right to stay at each stage of the process or even after issuing the return decision. The Return Directive therefore leaves the Member States the possibility to regularise irregularly staying migrants. Nonetheless, in light of the ECJ case law and diverse scholarly opinions it is disputed whether there is an obligation to regularise under the Return Directive. I argue that Article 6(4) Return Directive provides two sets of circumstances in which the Member States are obliged to grant irregularly staying migrants a right to stay: where the return would violate the principle of non-refoulement under the ECHR and CFR, and where the non-returnability of the migrant concerned is permanent. In both sets of circumstances the discretion afforded to the Member States under the first sentence of Article 6(4) Return Directive is removed entirely as the alternative option to return is not enforceable.

Furthermore, I have also focused on the three relevant EU mandates in Article 79(1) TFEU, directing the most attention to the prevention of and enhanced measures regarding 'illegal immigration'. The following may thus be stated with regard to the question whether the EU may, based on the task to 'combat' irregular immigration, pass legislation regarding regularisation or whether such legislation must concern the prevention of irregular migration or return of irregularly staying migrants: passing such legislation must accord with the purpose to 'combat illegal immigration'. This interpretation is also favoured by the Council of the European Union,

633 See Introduction A.

which views regularisations as an instrument in the 'fight against illegal immigration'. Accordingly, in the 2008 European Pact on Immigration and Asylum the Council left the possibility open for the Member States to use case-by-case regularisations. The Member States should, however, refrain from so-called regularisation programmes. The discretion not to issue a return decision but to instead award a residence permit to an irregularly staying migrant was subsequently codified in the Return Directive.

The final step was an examination of the competences in primary law in which I conclude that Article 79(2)(a) and (b) TFEU grant the EU legislator extensive competence to enact regularisations. The substantive provisions, the procedure as well as the accompanying status and free movement rights could be regulated in EU legislation. Rights to stay granted under national law could be equipped with such rights. With Article 79(2)(c) TFEU as a foundation, EU law could create a type of tolerated status. An EU legal framework for regularisation would also be in line with the principle of subsidiarity. It can therefore be affirmed that EU primary law would cover an EU regularisation policy.