European Commission

European Migration Network

RESPONSES TO LONG-TERM IRREGULARLY STAYING MIGRANTS: PRACTICES AND CHALLENGES IN THE EU AND NORWAY

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Member States are required to deal with third-country nationals who no longer or never fulfilled the conditions of stay, who were denied a residence permit, or who have exhausted all legal options against the enforcement of their return decision.

The Return Directive (2008/115/EC)[1] sets the obligation for Member States to issue a return decision for third-country nationals once it has been established that they are not eligible for legal stay.[2] In practice, however, a certain share of third-country nationals issued with a return decision neither enjoy a legal stay nor are able to return. These situations may result in protracted or long-term situations of illegal stay and legal uncertainty, as well as deplorable living conditions.[3]

This inform summarises the results of the EMN study of the same title which aims to close existing research gaps regarding Member States' approaches to long-term irregularly staying migrants, in light of rapid changes in policies and practices and the lack of a recent, comprehensive EU-overview for this group.

KEY POINTS

- The status of third-country nationals who cannot be returned due to legal or practical obstacles varies within and across the Member States as it does not rely on a harmonisation at EU level and usually depends on individual circumstances. Migrants who abscond or who were never detected by the authorities have no written documentation of any sort. This creates a potentially confusing situation for both migrants and service providers to navigate.
- Services provided to long-term irregular migrants with some form of status/authorisation are limited compared to those provided to regular migrants, often discretionary, and difficult to access, especially concerning social protection benefits and employment. Services available to undetected migrants with no authorisation to stay are even more limited and essentially rely on the application of standards set out in international human rights law. Access to services may be limited still further by migrants' concerns about detection and apprehension.
- The main service providers for long-term irregular migrants are national authorities and municipalities, with non-governmental organisations (NGOs) providing complementary and/or autonomous services. Cooperation mechanisms for service provision between national and local authorities are mostly ad hoc, and do not have a focus on the issue of long-term irregular migrants, but rather irregular migrants more generally.
- In order to end irregular stay in general, not only focussing on long-term specifically, (voluntary) return is prioritised in the Member States, whereas regularisation is only marginally addressed in policy. Good practices identified in the study focused on encouraging return through return counselling and on discouraging illegal stay by restricting certain rights while balancing the

1 Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008L0115, last accessed on 10 June 2021. The Directive applies to all EU countries except Ireland, although the concepts covered by the study are also relevant there.

2 Return Directive, Article 6.

3 Refugee Law Initiative in cooperation with the Centre for International Criminal Justice, 'Undesirable and Unreturnable Migrants: Policy challenges around excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed', 2016, London: University of London, https://cicj.org/wp-content/uploads/2016/09/Undesirable-and-Unreturnable-Full-report.pdf, last accessed on 10 June 2021. This research excluded asylum seekers and other migrants suspected of serious criminality who cannot be removed.

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need to provide humane treatment for all persons, irrespective of their legal status.

- The COVID-19 pandemic has highlighted the situation of migrants who cannot be returned or who remain undetected by the authorities, due to the urgency in ensuring universal access to medical care. In a limited number of cases, labour market shortages in essential sectors due to border closures led to regularisation of workers with skills in shortage areas. The majority of Member States face cases where forced returns could not take place because of irregular migrants' refusal to undertake a PCR test or other medical examination required by their country of origin. The scale of this issue is however limited.

AIM AND SCOPE OF THE STUDY

This study aims to provide an overview of existing policies and practices in the EU Member States and Norway towards third-country nationals in a prolonged situation of irregular stay. The overall focus is on those third-country nationals subject to a return decision but whose return was not enforced or was postponed, and those without a return decision who are unknown to the authorities.

The study explores the responses and approaches by central and local authorities to end those situations and mitigate the social consequences for the third-country nationals affected. It examines access by these groups to mainstream services.

Method and analysis

The information used in this study came primarily from secondary sources provided by 25 EU Member States and Norway.[4] National contributions were based on desk analysis of existing legislation and policy documents, reports, academic literature, internet resources, media reports and information from national authorities. In some Member States, primary data collection was carried out through interviews with national stakeholders.

NATIONAL LEGAL AND POLICY FRAMEWORK

Categories of long-term irregular migrants at national level

While Member States do not distinguish between long-term and short-term irregular migrants in their definitions, they acknowledge that, in practice, different reasons can lead to prolonged irregular stay. This resulted in the identification of two main categories of such migrants across the Member States: (1) irregular migrants that cannot be returned for legal obstacles (such as medical reasons),[5] or practical obstacles (such as lack of travel documents).[6] Several Member States reported that there are (2) irregular migrants who remain unknown to authorities because they were never detected,[7] or they absconded during the asylum procedure or after having received a negative decision.[8]

Third-country nationals who cannot be returned for legal or practical reasons fall into three main categories in terms of their legal situation, or a combination in some cases: (1) issuance of a temporary authorisation or permit to stay;[9] (2) issuance of a certificate or other written confirmation to postpone return or extend the period for voluntary departure;[10] and (3) *de facto* suspension of return without any certification issued.[11] In those cases where there are practical obstacles to return, the first two categories are an option in a minority of Member States, and may be available to only a limited number of irregularly staying migrants.[12]

There are no official statistics on the number of irregularly staying migrants in the Member States and Norway. However, some Member States provide estimates using proxy data.[13] These are most accurate for 'non-returnable' irregular migrants, based on the number of issued authorisations to stay and on the number of returns decisions that were not implemented.[14] Additional estimates are provided on the numbers who absconded or those whose asylum applications were refused.[15]

4 AT, BE, BG, CY, CZ, DE, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SI, SK and NO

5 AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, IE, LT, LU, LV, NL, SE, SI, SK and NO; PL does not consider as (long-term) irregular migrants third-country nationals who cannot be returned due to legal obstacles.

6 AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, HR, IE, LT, LU, LV, NL, PL, SE, SI, SK and NO.

7 AT, BE, CZ, DE, EE, ES, FI, FR, HR, IE, LT, LU, LV, NL, PL, SE, SI, SK and NO.

8 AT, BE, CZ, DE, EE, ES, FI, FR, IE, LT, LU, LV, NL, SE, SI, SK and NO.

9 AT, BE, CY, CZ, DE, EE, FI, HR, HU, IT, LT, LU, LV, MT, NL, PL, SE, SI, SK and NO.

10 AT, BE, BG, CZ, DE, EE, FI, HR, NL, IE (within certain judicial review proceedings only, by written undertaking or Court injunction), IT, LT, LU, LV, PL, SE, SI, SK and NO.

11 CY, FR, HU, IE, LT, LU, NL, PT, SE and NO.

12 LT, FI, NL, SE. In Finland this is the case where obstacles to return are not due to fault of the returnee.

13 AT, EE, FI, FR, IE, IT, LU, NL, SE.

14 AT, EE, LU, FI and NO.

15 AT, FI, LU, SE.

Table 1.1 Type of authorisation to stay that a third-country national subject to a return decision may receive in countries that do/do not differentiate between legal and practical obstacles to return

Type of authorisation to stay or other response	Countries that do not differentiate between legal and practical obstacles to return		Countries that differentiate between legal and practical obstacles to return	
	Established by law	Established by practice	Established by law	Established by practice
Tolerated stay	AT, DE, EL, FR, LU, SI, SK		Legal obstacles: CZ, HR Practical obstacles: PL, HU	
Temporary residence permit	BE, CY, DE, EE, EL, ES,[16] FI, LU (for medical reasons)		Legal obstacles: HR, HU, IT, LT, LV, NL, PL, SE and NO Practical obstacles: LT, LV, NL	
Extension of short-stay visa			Legal obstacles: LV Practical obstacles: LV	
Written confirmation of postponement of return	BG, EE, EL, HR, LU, SK[17]	BE, SI[18]	Legal obstacles: IE,[19] IT, LT, LV, NL, PL, SE and NO Practical obstacles: IT, LT, SE, NO	Practical obstacles: IE[20]
Extension of voluntary departure period	BG, DE, EE, EL, FI, FR, HR, LU, SK,	AT, BE SI	Legal obstacles: CZ, IT, LT, LV, PL, PT, SE and NO Practical obstacles: LV, SE	Practical obstacles: CY
No written certification issued	ES, FR, LU (practical obstacles only)	CY, FI	Legal obstacles: HU, LT, NL, PT Practical obstacles: CY, HU, NL, PT, SE and NO	Legal obstacles: IE Practical obstacles: IE

Priorities, debates and plans at national level

Irregular migration remains a recurring topic in political, inter-institutional, legal, and public debates in about half of the Member States and Norway. Policy and legislative debates primarily focus on the need for authorities to increase and simplify the return of migrants without a legal status to their countries of origin.[21] Inter-institutional and public debates include discussions of irregular migration and asylum, as well as the availability of basic services for irregular migrants,[22] which in some cases have resulted in changes in service provision. At policy and public level, regularisation of irregularly staying migrants who cannot be removed has also been debated, as has their integration into society.

During the COVID-19 pandemic, the main discourse in the Member States and Norway on irregular migrants has focused on regularisation and service provision, particularly healthcare.

NATIONAL POLICIES AND APPROACHES TO LONG-TERM IRREGULARLY STAYING MIGRANTS

Rights and access to services for long-term irregular migrants

Access to services varies across different categories of irregular migrants. Overall, long-term irregularly staying migrants who remain unknown to migration authorities have more limited access to services and rights than those who cannot be returned for either legal or practical reasons and who may have been issued with one of several types of authorisation. The rights and services legally granted to this category of irregularly staying migrants are generally limited across the Member States, with those available largely stemming from international rights standards (e.g. emergency medical care, provision of compulsory education), which, in the majority of Member States, are enshrined in national and regional law. Emergency healthcare and compulsory education remain largely accessible for this group of migrants, yet, in practice, access remains challenging, often due to fear of being detected by the migration authorities or a lack of understanding of what services are available. Access to the labour market and social protection benefits - already minimal for irregular migrants with authorisation to stay - is not possible in almost all Member States, and only one-third

16 In Spain, no written confirmation of the postponement of the return is given and only in some exceptional cases is a temporary residence permit given.
17 The written confirmation of postponement of return is interconnected with the issuance of the authorisation to remain.
18 Certificate of permission issued by police.
19 Within certain judicial review proceedings only, by written undertaking or Court injunction.
20 In exceptional circumstances, by a written undertaking.
21 AT, BE, DE, ES, FR, IT, LU, SE, SK.
22 AT, DE, FI, FR, IT, LU, NL, SE.

of the Member States and Norway provide accommodation services, sometimes on a discretionary basis by NGOs.

In contrast to those irregular migrants unknown to the authorities, irregular migrants who cannot be returned, in some cases, have access to more services. In certain Member States, the temporary authorisation granted may be a temporary residence permit allowing access to services equal to beneficiaries of other forms of protection.[23] For migrants who have not been issued a certificate of postponement or suspension of their return, access to services and rights is typically the same as for those who remain unknown to authorities. This means access to compulsory education and emergency healthcare, granted in line with the provisions of the Return Directive (2008/115/EC), where applicable, and other international rights standards. However, access to accommodation, social protection benefits, employment, additional education, non-emergency health care and legal aid may also be available, but this varies across Member States, and is dependent on the individual's legal situation and the type of service.

Authorities and organisations delivering the services, and cooperation between authorities

For long-term irregular migrants, whether known or unknown to the authorities, national authorities and municipalities are responsible for service provision, with NGOs collaborating as service providers in several instances.[24] Nonetheless, municipalities and NGOs may provide autonomous additional services to complement the national services.

National authorities have measures in place to facilitate cooperation with regional and local authorities regarding the situation of long-term irregular migrants. However, these tend to address general issues such as information exchange and guidance on migration matters, although some provide monitoring and support to follow-up individual case management at regional or authority level.[25] There appears to be little systematic participation in horizontal cooperation networks of local and regional authorities. Where such cooperation was reported, it tended to be fragmented.

Good practices in granting access to services for long-term irregularly staying migrants

Several Member States highlighted good practices in service provision. National authorities consider those practices that facilitate dialogue between authorities and irregular migrants to be good practices.[26] This is notable in the area of healthcare, where the flexible application of regulations allows irregular migrants to access healthcare.[27] Good practices in the area of education included allowing the children of irregular migrants to access public schools.[28]

Another good practice is the exchange of information between national and local authorities.[29] By contrast, in some Member States, it is considered good practice to limit the degree of coordination between national and local authorities in order to build trust at local level.[30] Good practices were also reported in respect of flexibility in inter-institutional coordination when dealing with irregularly staying migrants.[31]

RESPONSES TO END LONG-TERM IRREGULAR STAY

The main policy priority reported by the Member States and Norway to address irregular stay was ensuring the return of irregularly staying migrants. Most prioritise voluntary return over other solutions, as this is considered the most cost-effective and humane approach, and thus offer incentives, such as counselling or return packages. As well as promoting return, nine Member States and Norway reported having specific measures to discourage irregular stay or encourage return.[32] These were mainly restrictive measures seeking to limit irregular migrants' access to public services. Member States also reported that their efforts to combat undeclared work by implementing measures targeting employers were also used to discourage migrants from staying irregularly on their territory.[33]

In contrast, regularisation was not seen as a policy priority for long-term irregular migrants. Only a few countries have regularisation policies specifically targeting long-term irregular migrants.[34] Conversely, the most notable types of regularisation, regardless of the length of irregular stay, were humanitarian regularisation (when respect for the *non-refoulement* principle amounts to a regularisation procedure for example);[35] medical regularisation (when medical emergencies or chronic conditions constitute a justification for regularisation);[36] employment-based regularisation (when sufficient vocational training or higher

23 For instance, CZ, DE EL, IT, SE.

24 BG, CY, DE, FR, LU, MT, PL, SI. In LU, only the National Reception Office will provide services if the removal cannot take place for technical or legal reasons but the third-country national is willing to return voluntarily.

25 BE, BG, CZ, DE, EE, FI, LV, NL, PL.

26 BE, DE, FR, LT, MT, NL, SE.

27 BE, LU, MT, NL.

28 CZ, DE, ES, FR, HR, IE, MT.

29 CZ, DE, EE, LV, NL.

30 NL.

31 DE, NL.

32 BG, DE, EE, IT, LT, LU, NL, SE, SK and NO

33 BG, DE, EE, FR, HR, IT, LU, LV, NL, SE and NO.

34 DE, FR, ES, MT.

35 BE, CY, DE, EE, ES (irregular migrants can be granted a residence permit on exceptional humanitarian grounds, through collaboration with the justice system, for international protection, or for being in a situation of gender-based violence or a victim of trafficking in human beings), FR, LU (a residence permit can be granted on exceptional humanitarian grounds), LV, PL, SI and NO.

36 BE, ES, FR, LV, LU (usually for persistent medical issues that cannot be treated in the country of origin) NL, SI and NO.

education is considered acceptable by the host country's standards);[37] and regularisation through the granting of a right of residence with an administrative court decision.[38]

Five Member States offer regularisation based on specific 'integration achievements' or 'integration efforts'.[39]

CHALLENGES AND SUGGESTED ACTIVITIES TO BE UNDERTAKEN AT EU LEVEL

Challenges in setting up policies to address the issue of long-term irregularly staying migrants

Most Member States and Norway identified challenges in their policies to address the issue of long-term irregularly staying migrants. Others reported no challenges,[40] for example due to the small number of (known) cases.[41]

Reported challenges related to the provision of services,[42] including accommodation,[43] healthcare,[44] access to social security and welfare,[45] labour market,[46] and education,[47] which differed across the various institutions involved. The difficulties in service provision reflected the fact that this group is not well quantified or understood,[48] and challenges arose in respect of tensions between service provision and its impact on the willingness of irregular migrants to return.[49] Other challenges related to the exchange of information and/or cooperation between national and local authorities on the issue of long-term irregularly staying migrants,[50] in some cases due to (the absence of) trust, and difficulties in the identification and detection of irregular migrants.[51] Member States also identified slow processing in the asylum system and general obstacles or limited incentives to the return of irregular migrants as challenges in addressing the issue of long-term irregularly staying migrants.

The impact of the COVID-19 pandemic created additional challenges for Member States addressing the issue of long-term irregular migrants. The main (practical) challenge was the implementation of return decisions due to restrictions imposed on travel (specifically air travel), which significantly slowed down or stopped return flights altogether.[52] The risk that irregular migrants may not feel secure in accessing healthcare during the pandemic due to fears of removal was also reported.[53]

Suggested activities to be undertaken at EU level

Finally, several Member States suggested activities that could be undertaken at EU level to tackle the issue of migrants staying in prolonged irregularity on the EU territory.[54] These were mainly focused on improvements to the effectiveness of return policies and systems,[55] and information exchange on irregular migrants between Member States.[56]

FULL STUDY PUBLICATION

European Migration Network, 'Responses to long-term irregularly staying migrants: practices and challenges in the EU and Norway', 2021, available at: https://ec.europa.eu/home-affairs/content/new-emn-study-responses-long-term-irregularly-staying-migrants_en

37 DE, ES (the person must have been working for at least six months or have a work contract, depending on the case), FR, IT, SI.
38 DE, HR.
39 DE, ES, FR, LU, MT.
40 BG, CY, CZ, FR, HR, LT.
41 CY, CZ, HR, LT.
42 AT, BE, DE, EE, FI, IE, LU, LV, MT, NL, PL, PT, SE, SK.
43 DE, EE, IE (refers to unsuccessful international protection applicants issued with deportation orders remaining in reception centres), LU, LV, NL, SE, SK.
44 BE, DE, LU, LV, MT, NL, PL, SE, SK and NO.
45 DE, FI, LU, LV, PL, SK.
46 DE, LU, MT.
47 DE, FI, LU, LV.
48 BE, EE.
49 BE, DE.
50 BE, DE, FI, LU, MT, NL, PL, SK.
51 BE, FI, LU.
52 AT, BE, DE, EE, FR, HR, LT, LU, LV, MT, PL, SE, SK.
53 IE.
54 AT, BE, EE, CZ, FI, HU, LT, LU, LV, MT, SE, SK and NO.
55 LT, SE, SK.
56 BE, LT.

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