

Kevin Fredy Hinterberger

Regularisations of Irregularly Staying Migrants in the EU

A Comparative Legal Analysis
of Austria, Germany and Spain



Nomos

Schriften zum Migrationsrecht

edited by

Prof. Dr. Jürgen Bast, Universität Gießen

Prof. Dr. Ulrike Davy, Universität Bielefeld

Prof. Dr. Anuscheh Farahat, Universität Erlangen-Nürnberg

Prof. Dr. Andreas Fischer-Lescano, Universität Kassel

Prof. Dr. Marie-Claire Foblets,
MPI für ethnologische Forschung, Halle

Prof. Dr. Thomas Groß, Universität Osnabrück

Dr. Konstanze Jüngling,
Akademie der Diözese Rottenburg-Stuttgart

Prof. Dr. Winfried Kluth, Universität Halle-Wittenberg

Prof. Dr. Nora Markard, Universität Münster

Prof. Dr. Daniel Thym, Universität Konstanz

Prof. Dr. Mattias Wendel, Universität Leipzig

Volume 43

Kevin Fredy Hinterberger

Regularisations of Irregularly Staying Migrants in the EU

A Comparative Legal Analysis
of Austria, Germany and Spain



Nomos



The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at <http://dnb.d-nb.de>

ISBN: HB (Nomos) 978-3-8487-7270-4 (Print)
ePDF (Nomos) 978-3-7489-1279-8 (ePDF)

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN: HB (Hart) 978-1-5099-4751-5 (Print)

Library of Congress Cataloging-in-Publication Data

Hinterberger, Kevin Fredy
Regularisations of Irregularly Staying Migrants in the EU
A Comparative Legal Analysis of Austria, Germany and Spain
Kevin Fredy Hinterberger
398 pp.

Includes bibliographic references.

ISBN 978-1-5099-4751-5 (hardcover Hart)

1st Edition 2023

© Kevin Fredy Hinterberger

Published by

Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:

Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

ISBN 978-3-8487-7270-4 (Print)

ISBN 978-3-7489-1279-8 (ePDF)

ISBN 978-1-5099-4751-5 (hardcover Hart)

DOI <https://doi.org/10.5771/9783748912798>



Onlineversion
Nomos eLibrary



This work is licensed under a Creative Commons Attribution 4.0 International License.

Preface

The following book is the revised and updated translation of my PhD thesis which was originally written in German and which I completed with distinction at the University of Vienna in May 2019. This English translation includes the legislation, case law and literature up to 31 July 2022. The update also looks at new European Court of Justice case law and the recent reform of the ‘roots’ (*arraigo*) regularisations in Spain (Royal Decree 629/2022).

First and foremost, I would like to thank *Jonathon Watson* for his careful and precise translation of this study as well as for the pleasant and productive cooperation during the translation process.

I would also like to express my gratitude to all those who supported me in completing the thesis, most importantly my PhD supervisor, Prof. *Theo Öhlinger* from the Department of Constitutional and Administrative Law at the University of Vienna. He believed in this study from the outset. Prof. *Jürgen Bast* and Prof. *Konrad Lachmayer* are also to be mentioned for the constructive remarks made in their respective evaluations of my thesis.

My thanks also extend to the many who have accompanied me from the inception of the project to its completion. The inspiration to pursue this research came during my volunteer work as a legal advisor and representative for irregularly staying migrants and asylum seekers at the NGO ‘Deserteurs-und Flüchtlingsberatung’ in Vienna. Prof. *Anuscheb Farahat*, whom I first met in 2015 at the Network Migration’s autumn conference, has continued to support me both as a colleague and friend in an incomparably great way. The same is true for *Philipp Janig* since ‘day one’ of my academic career (Jessup Moot Court). Associate Prof. *Félix Vacas Fernández* has served as an important academic point of contact in Madrid since my Erasmus semester in 2013.

Throughout the course of writing my thesis, I also had the privilege to undertake research at different institutions, contributing particularly to the comparative legal analysis of the Austrian, German and Spanish law. I would like to thank Prof. *Jürgen Bast* for welcoming me to his Chair for Public Law and European Law at the University of Giessen as a guest researcher from April to July 2016. From January to June 2017, I worked as a research assistant in the Department for Labour Market and Integration Policy at the Austrian Federal Chamber of Labour, where I have been employed since March 2019.

Preface

I am especially thankful to *Johannes Peyrl* for always being available for professional and personal discussions.

I was able to continue my work from July 2017 to June 2018 as a researcher at the Research Centre Human Rights at the University of Vienna, headed by Prof. *Manfred Nowak*. Through this period, I also spent time at the Instituto Universitario de Estudios sobre Migraciones at the University Pontificia Comillas in Madrid (September-December 2017) where Prof. *Cristina Gortázar Rotaache* supported me on many levels. Finally, I completed my research at the Centre for European Integration Research (EIF) at the University of Vienna from July 2018 to March 2019.

It would not have been possible to complete this study without the financial assistance from various bodies. Between January 2016 and March 2019, I received a scholarship from the Austrian Academy of Sciences (DOC) at the Department of Constitutional and Administrative Law at the University of Vienna. Additionally, I received a scholarship from the ‘Heinrich Graf Hardegg’sche Stiftung’ and the thesis was awarded the Theodor-Körner-Prize (2016) as well as the Dr. Alois Mock-Science Prize (2021). The English translation and publication was financed by a FWF Stand-Alone Publication grant and the University of Vienna has contributed to the publication through the Ars Iuris Vienna – Doctoral School.

I thank the editors for accepting the thesis in the series ‘Schriften zum Migrationsrecht’, and the publishers, Nomos as well as Hart Publishing for the excellent cooperation. At Nomos, I am especially grateful to *Matthias Knopik* and Prof. *Johannes Rux*, who both put their trust and energy into this – at times daring – translation project, and *Kristina Stoll* for the great editing work.

This thesis would have never been completed without my wonderful friends who take me the way I am (which is not always an easy task) and who I consider family: I would like to thank *Stefan Bermadinger* for the countless hours talking about life; *Raphaella Haberler* for her sharp and honest opinions; *Philipp Heiling*, my oldest friend; *David Lun* for ‘simply’ always being there in the good and bad times; *Max Märzinger* for his ever valuable contributions to my life; *Hanna Palmanshofer* for her support in difficult times and *Jorge Horacio Restrepo Moreno*, mi consejero colombo-español.

Finally, the thesis is dedicated to my mother, sister and brother, who have always believed in me and my work. I thank my mother who literally raised me in the spirit of the Notorious B.I.G. quote: ‘Stay far from timid, only make moves when your heart’s in it’.

Vienna, 13 January 2023

Kevin Fredy Hinterberger

Contents

Abbreviations	17
Introduction	25
A. The challenge at hand	25
B. Hypothesis and structure	33
C. Current research	35
D. Methodology	38
I. Critical-contextual approach	38
1. The starting point: functionalism	39
2. Adding the context and...	40
3. ...Critical approaches to functionalism	41
II. Critical-contextual comparison in this study	43
1. Content and choice of Member States	43
2. Integrated approach	50
3. Analysis from the perspective of irregularly staying migrants	51
III. Translation	53
Part I – Regularisations and irregular migration in the EU legal framework	55
Chapter 1 – Conceptualising regularisations	55
A. Definition	56
I. Overview of current definitions	56
II. Elements	58
1. Irregularly staying migrants	59
2. Granting a right to stay	64
a) Lawful	65
b) Temporary	65
c) Rights linked to the status	66
d) Consolidation	66
3. Decision	66
a) Individual	67
b) Decision from the administrative authorities or the courts	68

4. Satisfying the minimum requirements	69
III. Interim conclusion	69
B. Classification	70
I. Possible starting points	71
II. The basis: purpose of the regularisation	73
III. Purpose-based structure	76
1. Non-returnability	79
a) Status of toleration in residence law	80
b) Principle of non-refoulement under the ECHR and CFR or factual reasons	82
2. Social ties	83
3. Family unity	84
4. Vulnerability	85
a) Victim protection	85
b) Other emergency situations	86
5. Employment and training	86
6. Other national interests	87
IV. Delimitation	88
1. Temporary protection	88
2. Marriage and registered partnerships	88
V. Interim conclusion	89
Chapter 2 – EU competence concerning irregular migration and regularisations	91
A. Irregular migration under EU immigration policy	91
B. Return Directive	94
I. General structure and content	94
II. An obligation to regularise under the Return Directive?	99
1. Opponents of an obligation to regularise	100
2. Proponents of an obligation to regularise	102
a) Principle of non-refoulement under the ECHR and CFR	106
b) Permanently non-returnable	108
III. Interim conclusion	110
C. EU competences under Article 79(1) TFEU	111
I. Prevention and enhanced measures to combat irregular migration	111
II. Development of a common immigration policy aimed at ensuring, at all stages, the effective management of migration flows	115

III. Fair treatment of third-country nationals	116
D. Primary law competences under Article 79(2) TFEU	118
I. Conditions of entry and residence	119
II. Status and free movement rights of legally resident third-country nationals	121
1. Integration	122
2. Access to the labour market	123
III. Illegal immigration and unauthorised residence	125
IV. Proportionality and subsidiarity	126
E. Summary	130
 Part II – A comparison of Austrian, German and Spanish law	 133
 Chapter 3 – Context for the integrated comparison	 133
A. Austria	135
I. Historical development of the law on aliens	137
II. Legal status	144
1. (Un)lawful residence	145
2. Employment	146
3. Social benefits	147
4. Healthcare	149
III. General remarks on ‘residence permits for exceptional circumstances’	149
1. Overview	149
2. Administrative procedure	151
a) Application	152
b) Grant <i>ex officio</i>	153
c) General requirements for the grant of residence permits and grounds for refusal	154
d) End of the procedure	155
3. Consolidation of residence	156
4. Drawing distinctions	159
IV. Competences and authorities regarding aliens’ law	160
V. Judicial protection	161
1. Administrative jurisdiction	161
2. Constitutional jurisdiction	163
B. Germany	164
I. Historical development of residency law	164

II. Legal status of foreigners	172
1. (Un)lawful residence	172
2. Employment	174
3. Social benefits	175
4. Healthcare	177
III. General remarks on residence permits for humanitarian reasons	178
1. Overview	178
2. Administrative procedure	179
a) Application	180
b) General requirements for granting residence titles and grounds for denial	181
c) Restriction after an asylum process	182
3. Consolidation of residence	183
4. Drawing distinctions	184
IV. Competences and authorities in residence law	186
V. Judicial protection	187
1. Administrative jurisdiction	187
2. Constitutional jurisdiction	189
C. Spain	190
I. Historical development of the law on foreigners	192
II. Legal status of foreigners	200
1. (Un)lawful residence	201
2. Employment	202
3. Social benefits	203
4. Healthcare	204
III. General remarks on ‘temporary residence permits for exceptional circumstances’	206
1. Overview	206
2. Roots	208
3. Administrative procedure	211
a) Application	211
b) Grounds for refusal and rejection	212
4. Consolidation of residence	214
5. Drawing distinctions	215
IV. Competences and authorities regarding the law on foreigners	216
V. Judicial protection	218
1. Administrative jurisdiction	218
2. Constitutional jurisdiction	221

VI. Summary – The special status of regularisations in the laws concerning residency and foreigners	222
Chapter 4 – The purpose-based integrated comparison of regularisations	226
A. Non-returnability	227
I. Toleration	227
1. Spain: non-statutory toleration and irregularity	228
2. Germany: statutory toleration	231
a) Requirements	232
b) Status	238
c) Legal protection	241
d) Regularisation prospects	241
3. Austria: statutory toleration	242
a) Requirements	243
b) Status	246
c) Legal protection	247
d) Regularisation prospects	247
II. Non-refoulement under the ECHR and CFR or factual reasons	248
1. Austria: ‘special protection residence permit’	248
a) Requirements	248
b) Right to stay	249
2. Germany: ‘residence permit for banned deportation to a specific state’	249
a) Requirements	250
b) Right to stay	251
3. Spain: ‘temporary residence permit for humanitarian reasons’ where the visa application in the state of origin is impossible	253
a) Requirements	253
b) Right to stay	254
III. Interim conclusion	254
B. Social ties	259
I. Germany: ‘residence permit in the case of permanent integration’	259
1. Requirements	260
2. Right to stay	263
3. Family members: derivative right to stay	263

II. Germany: ‘residence permit for well-integrated juveniles and young adults’	264
1. Requirements	264
2. Right to stay	265
3. Family members: derivative right to stay	266
III. Austria: ‘residence permits for reasons of Article 8 ECHR’	267
1. Requirements	267
2. Right to stay	269
IV. Interim conclusion	269
C. Family unity	271
I. Spain: ‘residence permit for a child not born in Spain’	272
1. Requirements	273
2. Right to stay	274
II. Germany: ‘residence permit for persons who are enforceably required to leave the country, but whose departure is legally or factually impossible’	275
1. Requirements	276
2. Right to stay	278
III. Austria: ‘residence permits for reasons of Article 8 ECHR’	279
1. Requirements	279
2. Right to stay	281
IV. Austria: ‘Red-White-Red – Card plus’ for unaccompanied minor aliens in the care of foster parents or the child and youth service’	281
1. Requirements	282
2. Right to stay	283
V. Spain: ‘temporary residence permit for reasons of family roots’	283
1. Requirements	283
2. Right to stay	285
VI. Interim conclusion	286
D. Vulnerability	288
I. Victim protection	288
1. Austria: ‘special protection residence permit for victims of a crime’	289
a) Requirements	289

b) Right to stay	291
2. Germany: ‘residence permit for prosecution of criminal offences’	291
a) Requirements	292
b) Right to stay	294
3. Spain: ‘temporary residence permit for humanitarian reasons’ for victims of crimes	295
a) Requirements	295
b) Right to stay	297
4. Spain: ‘temporary residence permit and work permit for exceptional circumstances for foreign victims of human trafficking’	297
a) Identification of potential victims	298
b) Recovery and reflection period	299
c) Exemption from administrative penalties and ‘provisional residence permit and work permit’	301
d) Right to stay	303
5. Spain: ‘temporary residence permit and work permit for exceptional circumstances for foreign women who are victims of gender-based violence’	304
a) Report	305
b) Court protection order and ‘provisional residence permit and work permit’	306
c) Right to stay	307
II. Other cases of hardship	309
1. Germany: ‘granting residence in cases of hardship’	309
a) Requirements	309
b) Right to stay	311
2. Austria: ‘residence permit in particularly exceptional cases’	311
a) Requirements	312
b) Right to stay	314
3. Spain: ‘temporary residence permit for humanitarian reasons’ – sudden serious illness	314
a) Requirements	315
b) Right to stay	316

III. Interim conclusion	316
E. Employment and training	319
I. Spain: ‘temporary residence permit for reasons of social roots’	319
1. Requirements	321
2. Right to stay	324
II. Spain: ‘temporary residence permit for reasons of employment roots’	324
1. Requirements	325
2. Right to stay	327
III. Spain: ‘temporary residence permit for reasons of training roots’	327
1. Requirements	327
2. Right to stay	328
IV. Germany: ‘residence permit for the purpose of employment for qualified tolerated foreigners’	329
1. Requirements	330
2. Right to stay	337
V. Interim conclusion	337
F. Other national interests	340
I. Spain: ‘temporary residence permit for exceptional circumstances due to the collaboration with public authorities, or for reasons of national security or public interest’	340
1. Requirements	341
2. Right to stay	342
II. Spain: ‘temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks’	343
1. Requirements	344
2. Exemption from administrative penalties	346
3. ‘Provisional residence permit and work permit’	348
4. Right to stay	349
III. Interim conclusion	349
G. Summary – The differentiated regularisation systems	351

Part III – Outlook	355
Chapter 5 – An EU Regularisation Directive	355
A. ‘Immigration from within’	356
B. Underlying concept – holistic approach	359
I. First harmonisation phase	361
II. Second harmonisation phase	362
C. Content	362
I. Personal scope of application	363
II. Requirements for granting regularisations	363
III. Right to stay	365
IV. Procedural aspects	366
D. Expanding general EU migration law	366
Bibliography	369

Abbreviations

AEUV	Vertrag über die Arbeitsweise der Europäischen Union (Treaty on the Functioning of the European Union)
AJIL	American Journal of International Law
AöR	Archiv des öffentlichen Rechts
Art(s)	Article(s)
ASVG	Allgemeines Sozialversicherungsgesetz in the version BGBl I 108/2022 (Austria: General Social Security Act)
AsylbLG	Asylbewerberleistungsgesetz in the version of 10.12.2021 (BGBl I 5162) (Germany: Act on Benefits for Asylum Seekers)
AsylG (A)	Asylgesetz 2005 in the version BGBl I 83/2022 (Austria: Asylum Act)
AsylG (G)	Asylgesetz in the version of 9.7.2021 (BGBl I 2467) (Germany: Asylum Act)
ATC	Auto del Tribunal Constitucional (Decision of the Spanish Constitutional Court)
AufenthG	Aufenthaltsgesetz in the version of 23.5.2022 (BGBl I 760) (Germany: Residence Act)
AuslBG	Ausländerbeschäftigungsgesetz in the version BGBl I 106/2022 (Austria: Employment of Foreign Nationals Act)
AuslG 1990	Ausländergesetz in the version of 9.7.1990 (BGBl I 1354) (Germany: Foreigners Act 1990)
AVG	Allgemeines Verwaltungsverfahrensgesetz in the version BGBl I 58/2018 (Austria: General Administrative Procedure Act)
AVV-AufenthG	Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz in the version of 26.10.2009 (Germany: General Administrative Provisions on the Residence Act)
BeckOK	Beck Onlinekommentar
BeschV	Beschäftigungsverordnung in the version of 20.7.2022 (BGBl I 1325) (Germany: Order on the Employment of Foreigners)
BFA	Bundesamt für Fremdenwesen und Asyl (Austria: Federal Office for Immigration and Asylum)

Abbreviations

BFA-G	Bundesamt für Fremdenwesen und Asyl-Einrichtungsgesetz in the version BGBl I 56/2018 (Austria: Act establishing the Federal Office for Immigration and Asylum)
BFA-VG	Bundesamt für Fremdenwesen und Asyl-Verfahrensgesetz in the version BGBl I 83/2022 (Austria: Act on the Proceedings of the Federal Office for Immigration and Asylum)
BGBI	Bundesgesetzblatt (Austria and Germany: Federal Gazette)
BVerfGG	Bundesverfassungsgerichtsgesetz in the version of 20.11.2019 (BGBl I 1724) (Germany: Act on the Federal Constitutional Court)
B-VG	Bundes-Verfassungsgesetz in the version BGBl I 141/2022 (Austria: Federal Constitutional Law)
BlgNR	Beilage zu den Stenographischen Protokollen des Nationalrates (Austria: supplement to the stenographic records of the National Council)
BOE	Boletín Oficial del Estado (Spain: Official State Gazette)
BR-Drs	Bundesratsdrucksache (Germany: Official Document of the Federal Council)
BVerwG	Bundesverwaltungsgericht (Germany: Federal Administrative Court)
CE	Constitución Española, BOE 311 of 29.12.1978 in the version of 27.9.2011 (Spanish Constitution)
Cf.	Confer
CFR	Charter of Fundamental Rights of the European Union, OJ 2012 C 326/391
CMLRev	Common Market Law Review
CP	Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, BOE 281 of 24.11.1995 in the version of 29.7.2022 (Spanish Criminal Code)
DÖV	Die Öffentliche Verwaltung
DRdA	Das Recht der Arbeit
e.g.	for example
ECJ	European Court of Justice
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
edn	edition
ed(s)	editor(s)
EEA	European Economic Area
EJML	European Journal of Migration and Law

ELR	European Law Review
EMN	European Migration Network
Employers Sanctions Directive	Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009 L 168/24
ErläutRV	Erläuterungen zur Regierungsvorlage (Austria: Explanatory remarks to a government bill)
etc.	et cetera
EU	European Union
EuR	Zeitschrift Europarecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
f(f)	and the following page(s)
FABL	Die fremden- und asylrechtlichen Blätter
Family Reunification Directive	Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ 2003 L 251/12
FJ	fundamento jurídico (legal basis for the decision)
Fn	Footnote
FRA	European Union Agency for Fundamental Rights
FPG	Fremdenpolizeigesetz in the version BGBl I 206/2021 (Austria: Aliens' Police Act)
FrG	Fremdengesetz 1997, BGBl I 75/1997 (Austria: Aliens' Act)
FS	Festschrift (liber amicorum)
GC	Grand Chamber
GG	Grundgesetz für die Bundesrepublik Deutschland in the version of 28.6.2022 (BGBl I 968) (Basic Law of the Federal Republic of Germany)
GP	Gesetzgebungsperiode (legislative period)
GVV	Grundversorgungsvereinbarung, BGBl I 80/2004 (Austria: Basic Welfare Agreement)
HRLR	Human Rights Law Review
Human Trafficking Directive	Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ 2004 L 261/19
ICLQ	International & Comparative Law Quarterly
ICON	International Journal of Constitutional Law

Abbreviations

i.e.	that is
IJRL	International Journal of Refugee Law
InfAusLR	Informationsbrief Ausländerrecht
IntG	Integrationsgesetz (Austria: Integration Act)
IOM	International Organization for Migration
JRP	Journal für Rechtspolitik
JZ	Juristenzeitung
LEVD	Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito, BOE 101 of 28.4.2015 in the version of 23.2.2021 (Spain: Law 4/2015 on the standing of victims of crime)
LJCA	Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa, BOE 167 of 14.7.1998 in the version of 5.5.2021 (Spain: Law 29/1998 governing the jurisdiction of the administrative courts)
LODYLE	Ley Orgánica 4/2000 sobre derechos y libertades de los extranjeros en España y su integración social, BOE 10 of 12.1.2000 in the version of 23.2.2021 (Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration)
LOE	Ley Orgánica 7/1985, de 1 de julio, sobre derechos y libertades de los extranjeros en España, BOE 158 of 3.7.1985 (Organic Law 7/1985 on the rights and freedoms of foreigners in Spain)
LOMPIVG	Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, BOE 313 of 29.12.2004 in the version of 5.6.2021 (Spain: Organic Law 1/2004 on comprehensive measures concerning the protection against gender-based violence)
Long Term Residence Directive	Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004 L 16/44
LOTG	Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, BOE 239 of 5.10.1979 in the version of 17.10.2015 (Spain: Organic Law 2/1979 on the Constitutional Court)
LPAC	Ley 39/2015, de 1 de octubre, de Procedimiento Administrativo Común de las Administraciones Públicas, BOE 236 of 2.10.2015 in the version of 13.7.2022 (Spain: Law 39/2015 on the Common Administrative Procedure for Public Administration)
mn(s)	marginal number(s)

NAG	Niederlassungs- und Aufenthaltsgesetz in the version of BGBl I 83/2022 (Austria: Settlement and Residence Act)
NJW	Neue Juristische Wochenschrift
NN	unknown author
No(s).	Number(s)
NS-Ausländer-polizeiverordnung	Nationalsozialistische Ausländerpolizeiverordnung of 11.5.1938, Imperial Law Gazette I 1053/1938 (Austria and Germany: National Socialist Police Order on Foreigners)
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht-Rechtsprechungs-Report
NZS	Neue Zeitschrift für Sozialrecht
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal of the European Union
ÖJT	Österreichischer Juristentag
ÖJZ	Österreichische Juristen-Zeitung
ÖZPR	Österreichische Zeitschrift für Pfl egerecht
PERCO	Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants
Qualification Directive	Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011 L 337/9
Recommendation (EU) 2017/432	Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council, OJ 2017 L 66/15
REDYLE	Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009, BOE 103 of 30.4.2011 in the version of 27.7.2022 (Royal Decree 557/2011 approving the Regulation implementing Organic Law 4/2000 on the rights and freedoms of foreign nationals in Spain and their social integration, as recast by Organic Law 2/2009)
Refugee Convention	United Nations Convention of 28 July 1951 relating to the status of refugees and its New York Protocol of 31 January 1967

Abbreviations

Residence Permit Regulation	Council Regulation (EC) No. 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals, OJ 2002 L 157/1
Return Directive	Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ 2008 L 348/98
Return Handbook 2017	Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common ‘Return Handbook’ to be used by Member States’ competent authorities when carrying out return-related tasks, OJ 2017 L 339/83
Royal Decree 2393/2004	Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE 6 of 7.1.2005 in the version of 15.3.2014 (Royal Decree 2393/2004 approving the regulations of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration)
SBC	Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2016 L 77/1
Schengen Agreement	Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000 L 239/19
Sent.	Sentence
SGB II	Sozialgesetzbuch Zweites Buch in the version of 19.6.2022 (BGBl I 921) (Germany: Social Insurance Code II)
SGB V	Sozialgesetzbuch Fünftes Buch in the version of 28.6.2022 (BGBl I 969) (Germany: Social Insurance Code V)
SGB XII	Sozialgesetzbuch Zwölftes Buch in the version of 23.5.2022 (BGBl I 760) (Germany: Social Insurance Code XII)
Single Permit Directive	Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343/1
SIS	Schengen Information System

STC	Sentencia del Tribunal Constitucional (Decision of the Spanish Constitutional Court)
StGB (A)	Strafgesetzbuch in the version BGBl I 242/2021 (Austria: Criminal Code)
STS	Sentencia del Tribunal Supremo (Decision of the Spanish Supreme Court)
STSJ	Sentencia del Tribunal Superior de Justicia (Spain: Decision of the High Court of an Autonomous Community)
Students and Researchers Directive	Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, OJ 2016 L 132/21
TEC	Treaty Establishing the European Community, OJ 1992 C 191/1
Temporary Protection Directive	Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ 2001 L 212/12
TEU	Treaty on European Union, OJ 2008 C 115/15
TFEU	Treaty on the Functioning of the European Union, OJ 2012 C 326/01
Travel Document Regulation	Regulation (EU) 2016/1953 of the European Parliament and of the Council of 26 October 2016 on the establishment of a European travel document for the return of illegally staying third-country nationals, and repealing the Council Recommendation of 30 November 1994, OJ 2016 L 311/13
VfGG	Verfassungsgerichtshofgesetz in the version BGBl I 125/2022 (Austria: Constitutional Court Act)
VfGH	Verfassungsgerichtshof (Austria: Constitutional Court)
VGH	Verwaltungsgerichtshof (Germany: Higher Administrative Court)
Visa Regulation	Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2018 L 303/39
Vol	Volume

Abbreviations

VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer
VwGG	Verwaltungsgerichtshofgesetz in the version BGBl I 109/2021 (Austria: Administrative Court Act)
VwGH	Verwaltungsgerichtshof (Austria: Supreme Administrative Court)
VwGO	Verwaltungsgerichtsordnung in the version of 20.7.2022 (BGBl I 1325) (Germany: Administrative Court Code of Procedure)
VwGVG	Verwaltungsgerichtsverfahrensgesetz in the version BGBl I 109/2021 (Austria: Administrative Court Procedure Act)
VwVfG	Verwaltungsverfahrensgesetz in the version of 25.6.2021 (BGBl I 2154) (Germany: Administrative Procedure Act)
WP	Working Paper
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZAR	Zeitschrift für Ausländerrecht und Ausländerpolitik
ZEuP	Zeitschrift für Europäisches Privatrecht
ZEuS	Zeitschrift für europarechtliche Studien
ZfV	Zeitschrift für Verwaltung
ZVglRWiss	Zeitschrift für vergleichende Rechtswissenschaft

Introduction

A. The challenge at hand

‘Combating’ irregular migration,¹ which covers the ‘fight’ against both irregular entry and irregular stays, is one of the key challenges to migration management at EU level. The EU debates on this issue have often been intense, has exemplified by ‘the long summer of migration’² of 2015 and the closure of the ‘Balkan route’.³ However, the structural problems underlying the ‘fight’ against irregular migration are often not easy to grasp and as such are not addressed appropriately.⁴ This study focuses on one of the most pressing problems: the low return rate of irregularly staying migrants.⁵ More specifically, it examines the reasons for the present deficits in the EU’s return policy and proposes a legal solution that concentrates on

1 Art 79(1) TFEU. See Chapter 2.C.I. and cf. *Lutz*, Non-removable Returnees under Union Law: Status Quo and Possible Developments, EJML 2018, 50; *Menezes Queiroz*, Illegally Staying in the EU: An Analysis of Illegality in EU Migration Law (2018) 1ff and *EMN*, The effectiveness of return in EU Member States 2017 (15.2.2018), http://emn.ie/files/p_201802260500242017_emn_synthesis_return_23.02.2018.pdf (31.7.2022) 13.

2 I prefer the expression ‘long summer of migration’ rather than ‘refugee crisis’ (or similar) as refugee movements were a contributing factor to a historical and structural collapse of the EU border regime; cf. *Hess/Kasperek/Kron/Rodatz/Schwertl/Sontowski* (eds), *Der lange Sommer der Migration: Grenzregime III* (2016). In addition *Thym*, The “refugee crisis” as a challenge of legal design and institutional legitimacy, CMLRev 2016, 1545; *den Heijer/Rijpma/Spijkerboer*, Coercion, Prohibition and Great Expectations: The Continuing Failure of the Common European Asylum System, CMLRev 2016, 607; *Depenheuer/Grabenwarter* (eds), *Der Staat in der Flüchtlingskrise: Zwischen gutem Willen und geltendem Recht* (2017). For an analysis of the closure of the Balkan route see *Dérens/Rico*, *Auf der Balkanroute*, *Le Monde diplomatique* (English version) April 2016, 4.

3 One may also take into consideration asylum policy, securing Europe’s external borders, and legal migration; see COM(2015) 240 final.

4 Cf. *Desmond*, The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative?, HRLR 2016, 247 (248) or *Carrera/Parkin*, Protecting and Delivering Fundamental Rights of Irregular Migrants at Local and Regional Levels in the European Union (14.11.2011), <https://www.ceps.eu/ceps-publications/protecting-and-delivering-fundamental-rights-irregular-migrant-s-local-and-regional/> (31.7.2022) 1f.

5 Cf. *Menezes Queiroz*, *Illegally Staying* 4.

ending the irregularity of migrants. As the legal systems of the EU Member States feature various approaches, this study will analyse and compare the legislative approaches in Austria, Germany and Spain.⁶ These three Member States use, inter alia, differentiated systems of regularisation (i.e. the award of residency rights) to ‘combat’ the problem of irregularly staying migrants. For the purposes of this study, regularisation is understood as each legal decision that awards legal residency to irregularly staying migrants when particular minimum requirements are satisfied.⁷

Chapter 1 narrows the scope of persons to be analysed in the study. It defines the residency status as irregular when a migrant does not have (or no longer has) a right to stay in a territory because the legal requirements have not been met, such as for persons who have entered irregularly and stay as such. Alternatively, a stay may be deemed irregular where the legal requirements have been breached, such as by those individuals who have entered the Member State legally, yet continue to remain even after the period for their permitted stay has expired (a so-called ‘overstayer’⁸). In principle, the term ‘migrant’ covers all non-citizens, though immigration law distinguishes between privileged and non-privileged migrants. For the purposes of this study it will be shown that only nationals of third-countries and stateless persons are eligible as non-privileged migrants.⁹

Instances of irregular migration typically occur when a person enters a territory without a right to do so – be this as a right of entry or a right to stay – and/or remains. As national laws restrict the movement within the territory, ‘irregular migration is not an independent social phenomenon but exists in relation to state policies and is a social, political and legal construction’.¹⁰ Conceptionally speaking, irregular migration has two distinct aspects. Firstly, in accordance with international law, a state must have a defined territory, a population and an effective government,¹¹ thereby allowing for the control of migration within its territory. We are thus

6 See Introduction D.II.1. and Chapter 3 and Chapter 4.

7 See Chapter 1.A.

8 See *EMN*, Asylum and Migration Glossary 3.0 (October 2014), <https://www.emn.at/wp-content/uploads/2016/11/emn-glossary-en-version.pdf> (31.7.2022) 208.

9 See Chapter 1.A.II.1.

10 *Düvell*, Paths into Irregularity: The Legal and Political Construction of Irregular Migration, *EJML* 2011, 275 (276); cf. also *Tapinos*, Irregular Migration in *OECD* (ed), Combating the Illegal Employment of Foreign Workers (2000) 13.

11 Cf. *Jellinek*, *Allgemeine Staatslehre*³ (1914) 394ff and *Shaw*, *International Law*⁹ (2021) 179ff.

faced with a core aspect of state sovereignty.¹² Secondly, the concept of irregular migration is a political and social problem created via norms:¹³ irregularity arises through the norms created by the state.¹⁴ Accordingly, the concept underpinning irregular migration thus applies to every state that uses legal norms to regulate migration within its territory;¹⁵ all EU Member States satisfy such criteria. Furthermore, irregular migration also features a temporal aspect, as irregularity may end through deportation, when the migrant leaves the territory or through regularisations.¹⁶

The EU's political and legal efforts towards 'combatting' irregular migration aim at the effective return of irregularly staying migrants;¹⁷ the Return Directive serves as the EU's central piece of legislation in this respect.¹⁸ This Directive obliges Member States to issue a return decision to any third-country national staying illegally on their territory.¹⁹ However, a return decision does not automatically mean that the migrant in question is actually returned. Whereas the Member States do indeed issue return decisions, annually only approximately 40 % of all return decisions are actually enforced and, at less than 30 %, the return rate to African countries is even lower.²⁰ For example, of the 516,115 return decisions issued in 2015 in all EU Member States, only approximately 188,905 migrants returned

12 Chapter 1.A.II.1.

13 For an in-depth discussion see *Willen*, Toward a Critical Phenomenology of "Illegality": State Power, Criminalization, and Abjectivity among Undocumented Migrant Workers in Tel Aviv, Israel, *International Migration* 2007, 8; more recently *Morticelli*, Human Rights of Irregular Migrants in the European Union (2021) 26ff.

14 Cf. *Bluś*, Beyond the Walls of Paper. Undocumented Migrants, the Border and Human Rights, *EJML* 2013, 413 (424ff); *Koser*, *International Migration* (2007) 54f. See in particular *Carrera/Guild*, Addressing Irregular Migration, Facilitation and Human Trafficking: The EU's Approach in *Carrera/Guild* (eds), *Irregular Migration, Trafficking and Smuggling of Human Beings* (2016) 1 (3f); also *Klarman*, Aspekte migrationsspezifischer Illegalisierung im Unionsrecht in *Thym/Klarman* (eds), *Unionsbürgerschaft und Migration im aktuellen Europarecht* (2017) 127.

15 *Angenedt*, Irreguläre Migration als internationales Problem. SWP Study (December 2007), https://www.swp-berlin.org/fileadmin/contents/products/studien/2007_S33_adt_ks.pdf (31.7.2022) 11.

16 Cf. *Tapinos* in *OECD* 15.

17 See the Recommendation (EU) 2017/432.

18 See for an overview of the return-related EU legal instruments *Molnár*, The Interplay between the EU's Return Acquis and International Law (2021) 70f.

19 Art 6(1) Return Directive; see Chapter 2.B.I.

20 COM(2017) 558 final, 9 and COM(2017) 200 final, 2.

voluntarily or were deported (327,111).²¹ Following *Lutz*, one can therefore cautiously estimate that annually there are approximately 300,000 migrants who are non-returnable.²² It is therefore clear that the EU is experiencing a shortfall in the return of irregularly staying migrants.²³

The scale of the issue is readily apparent in the 2008 CLANDESTINO-Study,²⁴ which concluded that irregularly staying migrants comprise around 1 % of the European population; 1.9–3.8 million irregularly staying migrants were spread across the Member States.²⁵ The European Commission assumes that in 2017 approximately one million migrants were illegally present in the EU.²⁶ However, the accuracy of such numbers is to be questioned²⁷ as the definition of ‘third country nationals found to be illegally present’ only includes those ‘who are apprehended or otherwise come to the attention of national immigration authorities’.²⁸ As not all

21 *European Commission*, A stronger and more effective European return policy (12.9.2018), https://ec.europa.eu/info/sites/default/files/soteu2018-factsheet-return-s-policy_en.pdf (31.7.2022).

22 As expressed by *Lutz*, EJML 2018, 30.

23 Cf. *Lutz*, EJML 2018, 29f and *Farcy*, Unremovability under the Return Directive: An Empty Protection? in *de Bruycker/Cornelisse/Moraru* (eds), Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union (2020) 437 (437f).

24 Cf. *Kovacheva/Vogel*, The Size of the Irregular Foreign Resident Population in the European Union in 2002, 2005 and 2008: Aggregated Estimates. WP 4/2009 (2009), https://irregular-migration.net/wp-content/uploads/2021/06/WP4_Kovacheva-Vogel_2009_EuropeEstimate_Dec09.pdf (31.7.2022) 11; *European Commission*, Clandestino Project. Final Report (23.11.2009), <http://www.statewatch.org/news/2015/mar/eu-com-clandestino-final-report-november-2009.pdf> (31.7.2022) 106. On the factors to assess the data quality see *Vogel/Kovacheva*, Classification report: Quality assessment of estimates on stocks of irregular migrants. WP 1/2008 (2008). For criticism see *Lazaridis*, International Migration into Europe: From Subjects to Objects (2015) 10, who describes the statistics as ‘guesstimates’. See also *Singleton*, Migration and Asylum Data for Policy-making in the European Union: The problem with numbers. CEPS WP No. 89 (March 2016), <https://www.ceps.eu/system/files/LSE%2089%20AS%20Migration%20and%20Asylum%20Data.pdf> (31.7.2022).

25 Cf. *European Commission*, Clandestino (23.11.2009) 11f and 105f.

26 COM(2017) 558 final, 9.

27 Cf. *Wehinger*, Do amnesties pull in illegal immigrants? An analysis of European apprehension data, *International Journal of Migration and Border Studies* 2014, 231 (234–236) and for a critical analysis of the Eurostat statistics concerning asylum seekers see *Kleist*, Warum weit weniger Asylbewerber in Europa sind, als angenommen wird: Probleme mit Eurostats Asylzahlen, ZAR 2015, 294.

28 *Eurostat*, Enforcement of Immigration Legislation: Eurostat metadata (30.4.2015), http://ec.europa.eu/eurostat/cache/metadata/en/migr_eil_esms.htm (31.7.2021).

migrants ‘illegally present’ and, respectively, persons unknown to the national authorities, fall under this definition, one may presume that the numbers have remained at the same level as in 2008 (1.9–3.8 million).²⁹ Moreover, it is conceivable that the ‘long summer of migration 2015’ even contributed to an increase in the number of irregularly staying migrants. This may be explained primarily by the comparably high number of asylum applications in 2015 and 2016,³⁰ though indeed not all applications (will) have been successful.³¹ Furthermore, the number of persons staying irregularly in Austria in 2015 has been estimated as ranging between 95,000 and 254,000.³² As this corresponds to 1.1 and 2.9 % of Austria’s total population, the importance of this subject for society as a whole is clear.³³

Irregularly staying migrants may in fact reside in the EU, yet they are often precluded from those rights available to legal residents.³⁴ It is therefore

29 Cf. *Triandafyllidou/Vogel*, Irregular Migration in the European Union: Evidence, Facts and Myths in *Triandafyllidou* (ed), Irregular Migration: Myths and Realities (2010) 291 (298f).

30 *Eurostat*, Record number of over 1.2 million first time asylum seekers registered in 2015, news release 44/2016 (4.3.2016), <https://ec.europa.eu/eurostat/document/s/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> (31.7.2022); *Eurostat*, 1.2 million first time asylum seekers registered in 2016, news release No. 46/2017 (16.3.2017), <https://ec.europa.eu/eurostat/documents/2995521/7921609/3-16032017-BP-EN.pdf/e5fa98bb-5d9d-4297-9168-d07c67d1c9e1> (31.7.2022) and *Eurostat*, 650 000 first-time asylum seekers registered in 2017, news release No. 47/2018 (20.3.2018), <https://ec.europa.eu/eurostat/documents/2995521/8754388/3-20032018-AP-EN.pdf/50c2b5a5-3e6a-4732-82d0-1caf244549e3> (31.7.2022). Cf. *Farcy in de Bruycker/Cornelisse/Moraru* 437.

31 See also *Desmond*, HRLR 2016, 272.

32 One must again doubt the reliability of the data because the basis for these numbers is not readily apparent from the report; cf. *Migrationsrat für Österreich*, Bericht des Migrationsrats (2016) 20.

33 Cf. also *Dumon*, Effects of Undocumented Migration for Individuals concerned, *International Migration* 1983, 218 (227f).

34 Cf. *Boswell*, The Politics of Irregular Migration in *Azoulai/De Vries* (eds), EU Migration Law: Legal Complexities and Political Rationales (2014) 41 (41); *Lazaridis*, *International Migration* 22, 132; *Engbersen*, The Unanticipated Consequences of Panopticon Europe: Residence Strategies of Illegal Immigrants in *Guiraudon/Joppke* (eds), Controlling a New Migration World (2001) 222; with regard to regularisations see *Wehinger*, *International Journal of Migration and Border Studies* 2014, 241; *Hoffmann*, *Leben in der Illegalität – Exklusion durch Aufenthaltsrecht in Falge/Fischer-Lescano/Siebeking* (eds), *Gesundheit in der Illegalität: Rechte von Menschen ohne Aufenthaltspapiere* (2009) 13 (15).

undisputed that irregularly staying migrants are particularly vulnerable.³⁵ *Tobidipur* is thereby correct in asserting that the irregular residency does not release the political community from its responsibility and thus may not lead to a loss of rights.³⁶ Accordingly, the requirements to be satisfied by irregularly staying migrants in order to (re-)obtain legal residency are especially pertinent to this study.³⁷ This issue has been neglected by the European legislator.³⁸

In light of the shortfall in returns and the aforementioned numbers of irregularly staying migrants, the increase of the return rate and the decrease of the numbers of irregularly staying migrants are high on the EU's political agenda.³⁹ This is shown by various measures. In particular, the 2016 Regulation on the establishment of a European travel document for the return of illegally staying third-country nationals⁴⁰ aims to increase the rate of return by harmonising the format and technical specifications

35 Cf. *Raposo/Violante*, Access to Health Care by Migrants with Precarious Status During a Health Crisis: Some Insights from Portugal, Human Rights Review 2021; *Fox-Ruhs/Ruhs*, The Fundamental Rights of Irregular Migrant Workers in the EU: Understanding and reducing protection gaps (July 2022), [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/702670/IPOL_STU\(2022\)702670_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/702670/IPOL_STU(2022)702670_EN.pdf) (31.7.2022) 9, 55ff; *PERCO*, PERCO Position Paper on the Vulnerabilities of Migrants which are caused by the Lack of a Legal Status (8.5.2015), https://drk-wohlfahrt.de/uploads/tx_ffpublication/PERCO_Position_Paper_on_Vulnerabilities_along_the_migratory_trails_to_the_EU_and_to_the_Schengen_area_03.pdf (31.7.2022); *Cholewinski*, Control of Irregular Migration and EU Law and Policy: A Human Rights Deficit in *Peers/Rogers* (eds), EU Immigration and Asylum Law: Text and Commentary (2006) 899 (900f); *European Commission*, *Clandestino* (23.11.2009) 22; see already *Carlin*, Statement by the ICM Director James L. Cadin, International Migration 1983, 97 (97); *Böhning*, Regularising the Irregular, International Migration 1983, 159 (160). *Lazaridis*, International Migration 14, notes that irregularly staying migrants are often unable to make their voices heard.

36 *Tobidipur*, Grund- und Menschenrechte illegalisierter Migrantinnen und Migranten in *Fischer-Lescano/Kocher/Nassibi* (eds), Arbeit in der Illegalität: Die Rechte von Menschen ohne Aufenthaltspapiere (2012) 41 (44).

37 See Chapter 4.

38 Cf. *Thym*, EU migration policy and its constitutional rationale: A cosmopolitan outlook, CMLRev 2013, 709 (733f) and see Chapter 2 and Chapter 5.

39 Cf. *EMN*, Practical Measures to Reduce Irregular Migration. Synthesis Report (October 2012). For criticism see *Boswell* in *Azoulai/De Vries* 47f, who considers that the EU does not at all want to lower the number of irregularly staying migrants.

40 More commonly known as the Travel Document Regulation.

of travel documents for irregularly staying migrants.⁴¹ In addition, a new Entry/Exit System (EES) shall record the (cross-border) movements of migrants within the EU and shall contribute to the swift identification of irregularly staying migrants.⁴² The 2015 'EU Action Plan on return'⁴³ and the 2017 'Renewed Action Plan'⁴⁴ both contain further suggestions for improvements, for instance additional assistance for voluntary return which already constitutes 40 % of all returns. The recent proposal to reform the Return Directive also heads in this direction.⁴⁵ Nonetheless, on the whole the EU has made little headway with regard to the standards set out in the Return Directive.

The EU's efforts also focus on preventing illegal entry by migrants, for example through an isolationist policy in the form of strict entry requirements, such as visas.⁴⁶ These are expressed in various so-called '*non-entrée*' EU policies,⁴⁷ for example externalisation and extra-territorialisation.⁴⁸

41 Recital 3 Travel Document Regulation and COM(2015) 668 final, 2.

42 Regulation (EU) 2017/2226 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States, OJ 2017 L 327/20. Cf. *Klaus*, Überwachung von Reisen Drittstaatsangehöriger durch das Entry/Exit System (EES): Anfang vom Ende aller Overstays?, ZAR 2018, 246; *Cole/Quintel*, Data Retention under the Proposal for an EU Entry/Exit System (EES): Analysis of the impact on and limitations for the EES by Opinion 1/15 on the EU/Canada PNR Agreement of the Court of Justice of the European Union (October 2017), <http://orbi.lu.uni/bitstream/10993/35446/1/Legal%20Opinion.PDF> (31.7.2022) and *Jeandesboz/Rijpma/Bigo*, Smart Borders Revisited: An assessment of the Commission's revised Smart Borders proposal (October 2016), http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571381/IPOL_STU%282016%29571381_EN.pdf (31.7.2022).

43 COM(2015) 453 final, 3f.

44 COM(2017) 200 final.

45 COM(2018) 634 final; COM(2020) 609 final; SWD(2020) 207 final, 67ff and see Chapter 2.B.I. for details.

46 Cf. *Costello*, The Human Rights of Migrants and Refugees in European Law (2015) 3 and 231ff; *Gil-Bazo*, The Practice of Mediterranean States in the context of the European Union's Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited, IJRL 2006, 571 (593 and 599f).

47 Cf. *Hathaway*, The Emerging Politics of Non-Entrée, Journal of Refugee Studies 1992, 40 (40f) and *Gammeltoft-Hansen/Hathaway*, *Non-Refoulement* in a World of Cooperative Deterrence, University of Michigan Law and Economics Research Paper No. 14-016, 5ff.

48 See *Eisele*, The External Dimension of the EU's Migration Policy (2014); *Bröcker*, Die externen Dimensionen des EU-Asyl- und Flüchtlingsrechts im Lichte der Menschenrechte und des Völkerrechts (2010).

These terms describe the efforts towards shifting the border and migration controls as far as possible beyond its external borders^{49,50} The following study will not focus on irregular entry as the numbers of those migrants play a much lesser role than often portrayed.⁵¹ For example, the image of migrants attempting to scale the border fence in Ceuta and Melilla does not accurately depict the reality that the largest group of irregularly staying migrants in the EU are in fact ‘overstayers’ – those who enter legally on a visa but remain irregularly after their visa has expired.

As the aforementioned EU policies regarding irregular migration are not exhaustive, the following study will focus on regularisation. Member States already make extensive use of this legal instrument in order to ‘combat’ irregular migration and which represents an alternative to return. Regularisation ends the irregular stay by granting a right to stay.⁵² This domestic measure allows states to (again) manage this part of the population,⁵³ specifically in the context of immigration law.⁵⁴ Positive aspects include, for instance, population management, tackling illegal employment and increasing government revenue through taxation and social security payments.⁵⁵ Moreover, regularisations allow migrants access to welfare systems and the labour market due to their residency status.⁵⁶

49 Cf. in this regard Arts 67(2) and 77(1)(b), (c) as well as (2)(d) TFEU.

50 On external migration control see *Ryan/Mitsilegas* (eds), *Extraterritorial Immigration Control* (2010); *Gammeltoft-Hansen*, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (2011); *den Heijer*, *Europe and Extraterritorial Asylum* (2012); *Moreno-Lax*, *(Extraterritorial) Entry Controls and (Extraterritorial) Non-Refoulement in EU Law in Maes/Foblets/de Bruycker* (eds), *The External Dimensions of EU Asylum and Immigration Policy* (2011) 415.

51 Cf. *Triandafyllidou/Vogel* in *Triandafyllidou* 294.

52 See Chapter 1.A.II.2.

53 Cf. *Hampshire*, *The Politics of Immigration* (2013) and *Kraler*, *Regularization of Irregular Migrants and Social Policies: Comparative Perspectives*, *Journal of Immigrant and Refugee Studies* 2019, 94 (107–109 and 97).

54 Cf. *Trinidad García*, *Los inmigrantes irregulares en la Ley 4/2000 y en su reforma: una regularización que no cesa*, *Revista de Derecho Migratorio y Extranjería* 2002/1, 99 (100, 105).

55 COM(2004) 412 final, 10–12 and Chapter 2.D.IV. and Chapter 4.

56 The following is also to be emphasised from the migrants’ perspective: ‘On the whole, the beneficiaries of regularization interviewed for this study perceived regularization as a positive factor that enabled them to exercise a greater degree of control over different aspects of their life’; *Kraler*, *Journal of Immigrant and Refugee Studies* 2019, 107.

B. Hypothesis and structure

The study proceeds from the following hypothesis: EU regularisations supplementing the present return policy are more effective at 'combatting' irregular migration at EU level.

This hypothesis gives rise to three closely linked questions that each require further examination. (1) What are the regularisations in Austrian, German and Spanish immigration law? (2) How and to what extent could regularisations be used as an effective regulatory instrument to 'combat' irregular stays? (3) Does a harmonisation of regularisations at EU level offer any advantages over domestic rules? The aforementioned hypothesis and these three questions will be explored in more depth and examined in three parts comprising a total of five chapters.

Part I examines across two chapters the concepts underpinning irregular migration and regularisations as well as the EU regulatory framework. Chapter 1 focuses on the conceptual aspects of regularisations and provides the necessary definition and categories of regularisations for the analysis in Chapter 2 of the EU's competences regarding irregular migration and regularisation. The initial analysis concerns EU secondary law, namely the Return Directive, with the subsequent analysis of primary law clearly showing that the EU indeed has the necessary competence to legislate on regularisation at EU level. Both provide my own doctrinal clarifications of the concepts and notions in need of interpretation.

The second question, namely whether regularisations could be used as an effective regulatory instrument to 'combat' irregular stays, will be assessed using the standards under EU constitutional law.⁵⁷ As will be shown in Chapter 2, each EU legal act must fulfil a particular purpose. The fact that primary law requires a measure to at least be able to achieve a particular objective indicates that primary law itself demands that legal acts obtain a certain level of effectiveness.⁵⁸ In this study, administrative law is generally viewed in relation to its 'regulatory approach',⁵⁹ whereby

57 On the question concerning the effectiveness of the law see *Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee² (2006) Chapter 2 mns 20ff and Chapter 2.C. and Chapter 4.

58 See Chapter 2.C.I.

59 *Schmidt-Aßmann*, Verwaltungsrecht Chapter 1 mn 33.

the law is a 'suitable means of regulation'⁶⁰ that needs to be improved.⁶¹ As for every legal field, the fields of law analysed in this study are subject to particular (factual) limitations.⁶² In this respect, the resources of national authorities and the will to enforce legal requirements have foremost influence on the effectiveness of migration management. The design and features of the law are further key aspects in achieving the legislator's political and legal goals.⁶³

The two chapters in Part II examine and compare the regularisations in Austria, Germany and Spain,⁶⁴ thus answering the first question of the regularisations available in each of these legal systems. The comparison employs the critical-contextual approach.⁶⁵ Chapter 3 examines particular features of each national framework as far as is necessary for the comparison in Chapter 4, such as the development of the relevant national legislation. This approach thus avoids the risk of unnecessary repetitions in the course of the comparison. Unlike a comparison based on national reports, the integrated approach applied in Chapter 4 adopts the purposes of the regularisations themselves as the basis for the comparison.

To conclude, Part III (more precisely Chapter 5) presents a proposal for a future 'Regularisation Directive'. Hereby I collate the results of the earlier research and present the accompanying concept of 'migration from within'. The question whether harmonisation of regularisation at EU level offers any advantages over domestic rules will also be answered.

60 *Schmidt-Aßmann*, Verwaltungsrecht Chapter 1 mns 33f with further references; *Scharpf*, Politische Steuerung und Politische Institutionen, Politische Vierteljahresschrift 1989, 10. For criticism from a socio-scientific viewpoint see *Luhmann*, Politische Steuerung: Ein Diskussionsbeitrag, Politische Vierteljahresschrift 1989, 4.

61 On the current discussion regarding migration management see, for example, *Bast*, Aufenthaltsrecht und Migrationssteuerung (2011); *Thym*, Migrationssteuerung im Einklang mit den Menschenrechten – Anmerkungen zu den migrationspolitischen Diskursen der Gegenwart, ZAR 2018, 193; *Berlit*, Migration und ihre Folgen – Wie kann das Recht Zuwanderung und Integration in Gesellschaft, Arbeitsmarkt und Sozialordnung steuern? (Teil 1), ZAR 2018, 229; *Berlit*, Migration und ihre Folgen – Wie kann das Recht Zuwanderung und Integration in Gesellschaft, Arbeitsmarkt und Sozialordnung steuern? (Teil 2), ZAR 2018, 287.

62 In general, *Schmidt-Aßmann*, Verwaltungsrecht Chapter 1 mns 38f.

63 Cf. *Bast*, Illegale Migration und die Rechte von illegalen Migrantinnen und Migranten als Regelungsgegenstände des Europarechts in *Fischer-Lescano/Kocher/Nassibi* (eds), Arbeit in der Illegalität (2012) 71 (71ff with further references).

64 On the choice of these three Member States see Introduction D.II.1.

65 See Introduction D.I.–II.

C. Current research

This study closes several gaps in current research, most notably the absence of an up-to-date comparison of the regularisations in Austria, Germany and Spain. Closing these gaps, however, requires further explanation.

As far as could be ascertained, there has been no systematic examination of the residency status of irregularly staying migrants. Although contributions to a 2011 issue of the *European Journal of Migration and Law*⁶⁶ provide key insights on irregular migration from various different perspectives (primarily from the social and political sciences), these for the most part do not adopt the perspective of legal science. Part II closes the gap.

An effective comparison of the different national laws requires an in-depth discussion of the concept of ‘regularisation’. Existing research does feature such discussions, yet they are limited.⁶⁷ Chapter 1 therefore contains the first conceptual discussion of regularisations as a whole.

The last comparative analysis of regularisations in Europe is now over 20 years old.⁶⁸ With the exception of the REGINE-Study, which only gives a broad overview of the issue from the perspective of political science, there are no detailed legal comparisons of regularisations.⁶⁹ *Desmond* provides a short, but concise, comparison on the most common use of regularisa-

66 *Düvell*, The Pathways in and out of Irregular Migration in the EU: A Comparative Analysis, *EJML* 2011, 245; *Triandafyllidou/Ambrosini*, Irregular Immigration Control in Italy and Greece: Strong Fencing and Weak Gate-keeping serving the Labour Market, *EJML* 2011, 251; *Düvell*, *EJML* 2011, 275; *Kraler*, Fixing, Adjusting, Regulating, Protecting Human Rights – The Shifting Uses of Regularisations in the European Union, *EJML* 2011, 297; *Vollmer*, Policy Discourses on Irregular Migration in the EU – ‘Number Games’ and ‘Political Games’, *EJML* 2011, 317; *Raffaeli*, Criminalizing Irregular Immigration and the Returns Directive: An Analysis of the El Dridi Case, *EJML* 2011, 467.

67 See the overview in Chapter 1.A.I.

68 *De Bruycker* (ed), *Les regularisations des étrangers illégaux dans l’union européenne*. Regularisations of illegal immigrants in the European Union (2000). A summary of the study was published as *Apap/de Bruycker/Schmitter*, Regularisation of Illegal Aliens in the European Union. Summary Report of a Comparative Study, *EJML* 2000, 263; see Chapter 1.B.I.

69 *Baldwin-Edwards/Kraler*, REGINE Regularisations in Europe: Study on the practices in the area of regularization of illegally staying third-country nationals in the Member States of the EU. Final Report (January 2009), https://ec.europa.eu/migrant-integration/sites/default/files/2009-04/doc1_8193_345982803.pdf (31.7.2022) and Chapter 1.B. See also *Kraler*, *Journal of Immigrant and Refugee Studies* 2019.

tions, though the focus is on the EU and the United States.⁷⁰ *Schieber*, whose dissertation concerns non-returnable persons and their right to stay, must also be considered.⁷¹ Although there are overlaps with the study undertaken here, *Schieber* focuses mainly on the international protection, i.e. refugees and subsidiary protection, and the corresponding protective mechanisms.⁷² In short, *Schieber* analyses irregular migration from the perspective of asylum procedures. By contrast, Part II of this study examines all decisions in Austria, Germany and Spain which underpin a right to stay⁷³ and which concern irregularly staying migrants. *Schieber* does indeed compare national laws, including Germany and Austria, but her comparison also includes Belgium, Sweden and the United Kingdom, and favours national reports over the integrated approach used in this study.⁷⁴ Further research also concerns the ‘different national practices concerning granting of non-EU harmonised protection statuses’⁷⁵ – this is only covered in part in this study.⁷⁶ It can therefore be stated that the comparison of regularisations in Part II (Chapter 3 and Chapter 4) closes this gap in the current research.

Reference may also be made to several studies concerning non-returnees. Applying the ECJ’s definition, which will be discussed in greater detail below,⁷⁷ a person is non-returnable when ‘it is not, or has not been, possible to implement a return decision’.⁷⁸ Similar to *Schieber*, *Gosme* tackles the question of the ‘limbo spaces between illegal and legal stay’.⁷⁹ More recently, *Lutz* has examined ‘non-removable returnees’ and the corresponding shortfalls in enforcement, but only touches lightly upon regularisations.⁸⁰

70 *Desmond*, Regularization in the European Union and the United States. The Frequent Use of an Exceptional Measure in *Wiesbrock/Acosta Arcarazo* (eds), *Global Migration: Old Assumptions, New Dynamics*. Vol 1 (2015) 69.

71 *Schieber*, *Komplementärer Schutz: Die aufenthaltsrechtliche Stellung nicht rückführbarer Personen in der EU* (2013).

72 *Schieber*, *Komplementärer Schutz* 44ff.

73 See the definition in Chapter 1.A.II.3.

74 See Introduction D.II.2.

75 Cf. *EMN*, The different national practices concerning granting of non-EU harmonised protection statuses (December 2010).

76 Cf. *Kraler*, *EJML* 2011, 297.

77 See Chapter 2.B.II.

78 ECJ 5.6.2014, C-146/14, *ECLI:EU:C:2014:1320*, *Mahdi*, para 87.

79 Cf. *Gosme*, *Limbo spaces between illegal and legal stay: resulting from EU management of non-removable third country nationals*, Dissertation 2014, Sciences Po Paris, <https://spire.sciencespo.fr/hdl:/2441/30a6ff78696ja3eov65066e05/resources/2014iepp0037-gosme-charles-these.pdf> (31.7.2022).

80 *Lutz*, *EJML* 2018, 46–50.

The same applies vis-à-vis a 2018 study by *Menezes Queiroz* discussing, inter alia, the situation of ‘non-removable migrants’ and ‘access to legality in the EU’.⁸¹ *Farcy* adopts the same direction in an analysis of the guarantees prior to return and the access to rights by non-returnable migrants against the backdrop of the legal obstacles to deportation and the resulting consequences for non-returnables.⁸² Finally, the empirical and legal analysis of the ‘return procedures applicable to rejected asylum seekers in the EU and options for their regularisation’⁸³ undertaken by *Strban/Rataj/Šabič* is also to be mentioned as it covers several topics relevant to this study, albeit with some differences. Firstly, *Strban/Rataj/Šabič* focus only on rejected asylum seekers and their particular situation in the EU.⁸⁴ The category of persons covered is thus much narrower, though with much broader content as the attention is directed towards the return procedure. Secondly, *Strban/Rataj/Šabič* do not examine the different regularisations in detail, but give just a broad overview of the practices in 17 Member States.⁸⁵ Last but not least, a 2014 study on the detention of non-returnable migrants contains several examples of ‘best practices’.⁸⁶

Each of the aforementioned studies have the common feature that they do not make any specific suggestions regarding the problem of non-returnable migrants (and in this respect the low return rate). Chapter 5 addresses this gap in current research by first presenting the accompanying concept of ‘migration from within’, outlining the reasons why the existing EU migration policy requires a new direction with regard to irregularly staying migrants and that this can best be achieved through the introduction of a Regularisation Directive at EU level. Proceeding from this concept – and building on the comparison in Part II – I present my proposal for such a Directive.

81 *Menezes Queiroz*, *Illegally Staying* 81–116 and 153–181.

82 *Farcy* in *de Bruycker/Cornelisse/Moraru*.

83 *Strban/Rataj/Šabič*, *Return Procedures Applicable to Rejected Asylum-Seekers in the European Union and Options for their Regularisation*, *Refugee Survey Quarterly* 2018, 1.

84 *Strban/Rataj/Šabič*, *Refugee Survey Quarterly* 2018, 4.

85 The authors sent a questionnaire with 28 questions to national experts; cf. *Strban/Rataj/Šabič*, *Refugee Survey Quarterly* 2018, 4.

86 *Vanderbruggen/Phelps/Sebtaoui/Kovats/Pollet*, *Point of No Return: The Futile Detention of Unreturnable Migrants* (January 2014), https://detentionaction.org.uk/wp-content/uploads/2018/12/PONR_report.pdf (31.7.2022).

In summary, the following study will close several gaps in the current research, with the first ever comparative analysis of regularisations in Austria, Germany and Spain at the core.

D. Methodology

The aforementioned problem, hypothesis and the current research now serve as a foundation for the explanation of the methodology employed to answer the three questions central to this study. This section will first introduce the critical-contextual approach to the comparative legal analysis (I.)⁸⁷ before explaining the application of this approach in this study (II.) as well as particular features of this English language version (III.).

I. Critical-contextual approach

The study applies the critical-contextual method, which is a critical evolution of functionalism. A critical-contextual comparison can be best understood by picturing a three-piece Matryoshka doll. Using said picture, functionalism forms the basis and, consequently, the centre of the Matryoshka doll. Contextualism and the critical approaches to comparative law form the second and third pieces, respectively. A critical-contextual comparison draws upon all three methods/approaches and fuses them together. Following *Frankenberg*,⁸⁸ context-sensitive, critical and reflexive comparisons are 'thick' in nature.

87 A detailed description of the critical-contextual method has been published in *Hinterberger*, A Critical-Contextual Approach in Comparative Migration Law, *International Journal of Migration and Border Studies* 2023, forthcoming.

88 *Frankenberg*, *Comparative Law as Critique* (2019) 225ff; *Légrand*, *European Legal Systems are not Converging*, *ICLQ* 1996, 52 (56) and *Husa*, *A New Introduction to Comparative Law* (2015) 155 who refer in a similar vein to the work of *Geertz*, *Thick Description: Toward an Interpretive Theory of Culture* in *Geertz*, *The Interpretation of Cultures* (1973) 3.

1. The starting point: functionalism

The comparison of public law⁸⁹ applies various methods.⁹⁰ Functionalism forms the core of the three-piece Matryoshka doll and, thus, of a critical-contextual comparison. Functionalists compare norms, in their function as solutions to particular problems.⁹¹ This allows the focus on the question of the function (role and contribution) of the norm or institution within the respective legal system and society.⁹² According to the functional approach, different legal norms in different legal systems answer the question or solve the problem similarly or differently.⁹³ The so-called presumption of similarity is necessary to understand the functional method whereby it has to be noted that there is not one, but many functional methods.⁹⁴

The functional method is not without its criticisms.⁹⁵ One fundamental critique is that it may be difficult or even impossible to ascertain the function the law strives to perform.⁹⁶ It is correct that a legal provision, depending on the perspective, may fulfil different functions, yet it does not mean that the provision cannot be examined with regard to a specific function. I therefore believe that the chosen function and perspective has to be clearly identified and outlined to tackle this criticism.⁹⁷ Furthermore,

89 For detail on the particular features of a comparison of public law see *Bernhardt*, *Eigenheiten und Ziele der Rechtsvergleichung im öffentlichen Recht*, *ZaöRV* 1964, 431; *Krüger*, *Eigenart, Methode und Funktion der Rechtsvergleichung im öffentlichen Recht* in *FS Martin Kriele* (1997) 1393; *Bell*, *Comparing Public Law* in *Harding/Örücü* (eds), *Comparative Law in the 21st Century* (2002) 235 (240ff).

90 Cf. *Trantas*, *Die Anwendung der Rechtsvergleichung bei der Untersuchung des öffentlichen Rechts* (1998) 43–47 with further references; for the comparative methods specifically in constitutional law see *Jackson*, *Comparative Constitutional Law: Methodologies* in *Rosenfeld/Sajó* (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012) 54 and *Tushnet*, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009) 5ff.

91 *Kischel*, *Comparative Law* (2019) § 3 mns 3f.

92 *Ebert*, *Rechtsvergleichung* (1978) 29; *Sommermann*, *Bedeutung der Rechtsvergleichung für die Fortentwicklung des Staats- und Verwaltungsrechts in Europa*, *DÖV* 1999, 1017 (1023).

93 *Zweigert/Kötz*, *An Introduction to Comparative Law*³ (1998) 40; cf. *Kamba*, *Comparative Law: A Theoretical Framework*, *ICLQ* 1974, 485 (517).

94 *Michaels*, *The Functional Method of Comparative Law* in *Reimann/Zimmermann* (eds), *The Oxford Handbook of Comparative Law*² (2019) 346 (347).

95 For a useful overview see *Kischel*, *Comparative Law* § 3 mns 6ff and *Piek*, *Die Kritik an der funktionalen Rechtsvergleichung*, *ZEuP* 2013, 60 (62ff).

96 *Kischel*, *Comparative Law* § 3 mn 7.

97 See Introduction D.II.3.