THE RETURN DIRECTIVE 2008/115/EC AND THE CONCEPT OF COOPERATION

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ABSTRACT

The European Union's Directive 2008/115/EC and Member States implementation thereof, subject Third Country Nationals awaiting for return/removal from the European Union, and its subgroup of non-returnable Third Country Nationals, to conditions of cooperation in order to access human rights. This creates a tension in relation to the principle of non-discrimination in that all individuals, regardless of migration status, are to access their rights. Nevertheless, the concept of cooperation is about to be expanded in the European Union's regulations on migration. This thesis assesses the prevailing legal understandings of the concept, within the European Union and across its Member States, against the principle of non-discrimination. The conclusion of how these understandings fare is that it depends. It depends on what method of legal interpretation is used when interpreting the concept and against which general interest of the European Union it is being compared against; that of the prerogative to exercise border control or that of protecting fundamental rights.
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<thead>
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<tr>
<td>CFREU</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>ECHR/the Convention</td>
<td>European Convention of Human Rights</td>
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<td>ECJ</td>
<td>Former name of the CJEU</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EU</td>
<td>European Union</td>
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<td>FRA</td>
<td>Fundamental Rights Agency of the European Union</td>
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<tr>
<td>the Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
</tr>
<tr>
<td>MS</td>
<td>Member State of the EU</td>
</tr>
<tr>
<td>PPU</td>
<td>Procédure Préjudicielle d'Urgence - an urgent referral to the CJEU relating to the Area of Freedom, Security and Justice</td>
</tr>
<tr>
<td>TEU</td>
<td>Treaty on the European Union</td>
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<td>TCN</td>
<td>Third Country National/Non-EU citizen</td>
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CHAPTER 1

1.1 Introduction and Background

Directive 2008/115/EC\(^1\) (hereinafter the Return Directive) governs the common standards and procedures for the return/removal of Third Country Nationals (hereinafter TCNs) from the European Union (hereinafter the EU). A couple of issues stemming from the Return Directive are the absence of an established legal status of non-returnable TCNs, a subgroup of TCNs pending return/removal from the EU, and the usage of the concept of cooperation as a precondition of granting this subgroup with rights. The lack of a legal status is problematic since it directly amounts into human rights concerns due to the safeguarding of rights usually being coupled with the legal status of their bearer. The second problem enhances the first, since there are no explicit criteria of what constitutes the concept of cooperation, this renders non-returnable TCNs at risk of subjective interpretations of what rights they may enjoy during their stay.

Setting aside the Charter of Fundamental Rights of the European Union (hereinafter the CFREU, interchangeably with the Charter), with the impending accession of EU to the European Convention of Human Rights (hereinafter ECHR, interchangeably with the Convention), it is arguably imperative that the EU adhere to international human rights in approaching a common policy on both TCN awaiting return/removal and its subgroup of non-returnable TCNs. In pursuing the latter objective, the European Commission (hereinafter the Commission) tendered a study to be conducted among all Member States (hereinafter MSs), mapping out the legal situation for this subgroup\(^2\). The results from this study confirms that due to the absence of legislation addressing this subgroup specifically, the administrative practices of providing this group with rights varies widely. In some MSs they continue to hold the status of asylum seekers, whilst in others as irregular migrants. Furthermore, in the majority of the MSs studied, the concept of cooperation, in contradiction to the principle of unconditional human rights, serves as a prerequisite for this group to be granted temporary permission to reside during the return process, a so called postponement status\(^3\). Through a domino effect, this form of residential status, directly linked to the place of

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accommodation, appears to be the most important factor in accessing rights\textsuperscript{4}. Hence, the concept of cooperation is both \textit{de jure} and \textit{de facto}, the key to enjoying rights. However, as evident from the study, what this concept actually entails is not clear. These findings reaffirm the Commission’s commitment to a common and coherent policy on the rights TCNs awaiting the return/removal of from the EU, and its subgroup of non-returnable TCNs, who concludes that the concept of cooperation must to be defined\textsuperscript{5}.

Due to the large proportion of detentions of TCNs awaiting return/removal from the EU, arguably as a consequence of the lack of cooperation, much of the EU funded research primarily focus on the concept of cooperation in relation to the detention\textsuperscript{6}\textsuperscript{7}. Likewise, an ample of scholarly writings on this specific subgroup are concerned with the criminalisation and cohesive measures as a result of non-compliance with administrative decisions\textsuperscript{8} \textsuperscript{9} \textsuperscript{10} \textsuperscript{11}. Although this is one form of understanding the concept of cooperation, and duly accounted for in this thesis, the issue of it being a prerequisite for granting this subgroup with rights on EU-policy level, largely remain an untapped area of study that is necessary to explore before expanding the concept in the EU's joint migration policies.

1.2 Research Problem

It is apparent that there is a tension between the concept of cooperation, inasmuch as it places conditions upon the enjoyment of rights, and the principle of non-discrimination. Since the yet to be defined concept is extensively exercised across the MSs and is to endure in the EU’s migration policy, it appears futile to reject the concept altogether. Rather, one ought to adopt a pragmatic

\begin{itemize}
  \item \textsuperscript{4} P73, Ibid.
  \item \textsuperscript{5} P93, Ibid.
  \item \textsuperscript{6} \textit{Point of No Return - The futile detention of unreturnable migrants}, (2013) by Flemish Refugee Action, Detention Action, France terre d'asile, Mendedek and European Council on Refugees and Exiles, on behalf of the European Program for Integration and Migration and Network of European Foundations.
  \item \textsuperscript{7} \textit{Detention of third country nationals in return procedures}, (2011) by the Fundamental Rights Agency of the European Union.
\end{itemize}
stance and examine if there is any form of understanding of the concept that mitigates this tension. Likewise, instead of arguing for its' problems in hindsight of either a revised Return Directive, or the introduction of a new piece of legislation, one should at least attempt to forecast these beforehand. To put things bluntly, since the concept is here to stay, how can it coexist harmoniously with existing principles of human rights?

On that note, since the concept of cooperation affects a range of human rights (for example, the right to health), it would prove an insurmountable task to exhaust all possible conflicts with each human right individually. Therefore the congregation of human rights into the principle of non-discrimination, meaning that regardless of migration status and conditions of cooperation all individuals is to enjoy human rights\textsuperscript{12}, serves to concentrate this research. That is not to say that there are no restrictions upon human rights, but in the context of cooperation such restrictions are ill-defined. In addition to the concept's compatibility with the principle of non-discrimination, constraint by the principle of proportionality as being fundamental to the Court of Justice of the European Union (hereinafter the CJEU) and the European Court of Human Rights (hereinafter the ECtHR). Likewise, principles of legal interpretation will form a part of making this assessment. Likewise, the relationship between the EU and the ECHR is of uttermost importance. Not only because of the EU's future accession to the ECHR, but also because there is an overlap in the area of human rights law.

1.2.1 Aim

The overall aim is to contribute to the policy/legal development of the EU, by critically analyse and assess the concept of cooperation. The purpose is to avoid ambiguous interpretations of the concept prior to their occurrence and seek harmonisation between the concept and human rights in the anticipated accession of the EU to the ECHR. This aim is to be achieved by first, the examination current understandings of the concept within the EU and across its MSs and second, the evaluation of such by comparing these to the principles of non-discrimination, constrained or enhanced by principles of legal interpretations and legal restrictions, such as the principle of proportionality.

Since the problem of conditional rights in the form of the concept of cooperation is accentuated by the EU's accession to the ECHR, due to their overlap in areas of law and differences in interest and structures, the relationship between the two sources of law is to be examined.

\textsuperscript{12} A wide interpretation of Article 1, the ECHR.
1.2.2 Research Questions

1. How is the concept of cooperation in the context of Third Country Nationals awaiting return/removal from the European Union, and its subgroup of non-returnable Third Country Nationals, understood within the European Union and across its Member States?

2. In light of the principle of non-discrimination how do these understandings fare?

1.3 Method

Briefly put, a legal study seems apt for the purpose of this thesis. Since the concept of cooperation is found in vast and complex areas of migration law, and because the prevailing understandings of the concept within the EU and across its MSs is many and different, the construction of categories of understandings serves to focus this study. In constructing these categories, a brief review of existent legal framework is presented. This is performed before attempting to allocate the MSs' understandings into these categories. Due to the descriptive formulation of the first research question, a sensible path would be to use existent data, as par example presented in the aforementioned report tendered by the Commission\textsuperscript{13}. These quantitative findings provide the empirical material needed for any such categorisation, altogether forming the material facts needed to build a case to analyse in the second part of this thesis. Although the data is already collected and arranged in an orderly manner as per existent reports, by clustering the types of understandings into categories, the data is also made manageable for the second part of this thesis. Since this material is based on secondary sources, the method employed by those studies must be recognised in this thesis, with a mixture of methodologies deployed in, by and large all, the studies used. The methods used are questionnaires among national experts, other desk based research such as document analyses, interviews with relevant stakeholders, conferences and workshops\textsuperscript{14} \textsuperscript{15}. In order to secure the credibility of this material, cross referencing between similar studies is made\textsuperscript{16} \textsuperscript{17}.

\textsuperscript{13} HOME/2010/RFXX/PR/1001, (2013) Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated.

\textsuperscript{14} pp. 17-19, Ibid.


\textsuperscript{16} The different national practises concerning granting of non-EU harmonised protection statuses, (2010) the European Migration Network.

\textsuperscript{17} Detention of third country nationals in return procedures, (2011) Fundamental a Rights Agency of the European Union.
Based on the findings in answering the first question, an evaluation of how these types of understanding the concept fare is achieved by applying the principles of non-discrimination and proportionality in a legal method. Usually when adopting a legal approach there is material facts that the law is applied upon. In this study the material facts does not derive from a specific situation, case or occurrence that is observed by using primary sources. Rather, the material facts will be drawn from existent research that is presented when answering the first research question. Neither is this secondary material based on observations of occurrences de facto, meaning that the data used in this thesis is based on the different legislation across the EU and its MSs.

As to why a legal approach is to be deployed is twofold. Firstly, a legal analysis appears apt since the concept of cooperation will figure in a legal context. Whenever an ambiguous term is introduced in a legal setting, the judiciary is assigned the onerous task of providing it with meaning. In line with the doctrine of parliamentary supremacy, which arguably is applicable to the the legislative branches and judiciary of the EU, the judiciary is merely thought to interpret the law adopted by the legislature. In contrast to the doctrine, depending on what interpretative principle being applied by the courts, the meaning of the law might differ. Therefore, by positioning ourselves in the legal sphere, and thereby reversing this process, i.e. exhausting the possible meanings of the concept of cooperation that could be given by the courts. The understanding and evaluation of the concept depends on the principles, or methods, of legal interpretation, and constraints of the principles of non-discrimination and proportionality. This analysis ought to provide the second research question with an answer. This comports with the overall aim, to examine the concept before it is expanded within EU law/policy and prior to the EU’s accession to the ECHR.

Secondly, in an attempt to rebut the accusation that human rights researchers apply a "sloppy legal analysis" by using material that serves the purpose of reaching an already decided upon outcome that serves to score political points in favour of human rights, a legal methodology in answering the second research question ought to ensure a systematic and sound assessment of the current understandings within the EU and across its MSs. This ought to reduce the methodological deficit that some proclaim is oftentimes found in human rights research. In spite of employing a legal


method, depending on what interpretative approach is taken in applying the law, the material used may range from legal sources to other writings such as policy documents, reports and scholarly writings. As to why different interpretative approaches will be employed is to envisage how the outcome may or may not differ depending on the choice of interpretation.

1.4 Theory

As to the first part of this thesis, being a categorisation of the different types of understandings it is merely an preparatory exercise in compiling existing research and organising data with the aim of making it manageable for answering the second research question. Rather than attempting to prove or disprove a theory as to explain why these understandings exist, the application of the aforementioned legal principles upon prevailing categories in the final section serves to assess these. Due to the legal methodology employed, the theoretical framework for this thesis is the law. However, since a comprehensive adoption of the concept of cooperation in EU law/policy is still to be made, there is no explicit legal text that defines the concept and can be applied upon the prevailing understandings across the EU. Therefore, in order to assess the different understandings of the concept, the principles of non-discrimination, constrained by restrictions such as the principle of proportionality, enshrined in various sources of EU/CJEU and ECHR/ECtHR law, serves as the theory in this thesis. Although these courts are not formally bound by the doctrine of judicial precedent, the ratio decidendi of their judgements adds to body of precedent case law. Additionally, interpretative principles of international law, such as a textual or teleological approach, serves as a framework of how the concept might be interpreted. To illustrate, the mere application of the law upon the types of understanding of the concept of cooperation would not aid in assessing these since the way the law is applied, i.e. the principles of interpretation, ought to change how these are perceived. Therefore the interpretative principles, or rules, must be accounted for. As aforementioned above, different interpretative approaches determines what legal material is applicable. A wide interpretation might include less strictly legal sources, such as reports, than a textual approach that emphasises the wording of the Return Directive. To conclude; laws, principles and legal reasoning are what form the theory of this thesis.

1.5 Material

In answering the first research question, different categories of how the concept of cooperation is understood will be established. In doing so the ambition is to provide some form of review over the legal texts, scholarly writings and research undertaken by academic institutions, non-governmental organisations and think tanks, some of them funded by the EU, whilst others not. This mixed array of material might appear contradictory to the legal method and theory chosen for this thesis. There are two reasons behind this decision. Firstly, since no first hand study of the legal documents within the MSs is undertaken, secondary source material is relied upon. Whilst selected sources are deemed reliable, in addition to cross referencing between different studies, the material ought to benefit from existent critical analysis performed by others. Instead of only using extracts from all MSs’ primary legal material, the opinions formed by existent scientific writings adds both colour and input in the pursuit of providing an overview of the current understandings of the concept of cooperation within the EU and across its MSs. Secondly, the choice of material may be justified depending on the different legal interpretative approach taken. This will be explained in Chapter 3.1. Due to the limited research on the concept of cooperation in the specific context of the TCN awaiting return/removal from the EU, and its subgroup of non-returnable TCNs, it is necessary to use other writings where the concept is present in somewhat similar situations, such as TCN awaiting return/removal. Moreover, research conducted on behalf of the Commission\(^21\) provides the data necessary to study the current understandings of the concept across the EU and its MSs. As support, this data may be complemented with empirical material among the MSs from similar studies concerning the concept of cooperation in relation to the Return Directive\(^22\) \(^23\) \(^24\).

As to the second research question, since the legal text in the context of cooperation in relation to TCN awaiting return/removal from the EU, and its subgroup of non-returnable TCNs, has yet to be introduced, situations where the CJEU and the Charter, or the ECtHR and the Convention, have dealt with the concept of cooperation, or employed the principle of non-discrimination and


proportionality in an applicable manner, is to be used in order to assess the current understandings in relation to human rights. Since many of the EU's principles of law have developed through case law, cases are essential in performing such analysis, and even though some cases appear farfetched the legal line of reasoning deriving from these are fundamental to the area of law. Equally so, by applying different principles of interpretation, such as a purposive approach when the policy objectives behind the concept of cooperation could become relevant. On a separate, but related, note, the concept of cooperation is highly regulated when it concerns MSs' detentions of TCN awaiting return/removal from the EU. Hence, CJEU case law on this topic could serve as a source of information on how the concept of cooperation could be understood. Material outlining the relationship between EU and ECHR law will figure in order to fully comprehend the assessment of how the current understandings of the concept of cooperation fare in relation to the principle of non-discrimination and proportionality. When describing the different principles textbooks is of use. Finally, instead of analysing the case law used as when referencing at first hand, existent scholarly writings that reviews those judgements is used to fully comprehend and put the case law into context.

1.6 Delimitations

Due to the method of compiling and analysing existing writings/legal texts, and because this material stretches across several areas of migration law it is important to set boundaries in order to retain focus. The major delimitation is the analysis of the concept of cooperation in relation to either TCNs awaiting return/removal or its subgroup of non-returnable TCNs. Although the same individual might have different labels, such as irregular, victim of trafficking et cetera, and are addressed by corresponding legislation depending on their status, this study will focus on the status as a TCN in the process of return/removal, or the subgroup of non-returnable TCNs.

As to why an overview in brief of the EU and its different MSs' understandings of the concept of cooperation, as opposed to a comparative in depth study of a few selected MSs, i.e. a case study in more traditional sense, is found in the aim of this thesis; to develop and critically assess the EU's migration policy prior its accession to the ECHR. Without discussing the benefits and drawbacks with quantitative versus qualitative, or large-n versus small-n case studies, at length a short motivation behind the adopted approached this thesis ought to be declared. Surely, policy

development may derive from small case studies, but due to the dull and practical constraint of language barriers, the cases would be selected on flawed grounds. Assume that the criterion for selecting a case would be the accessibility of material depending on the researcher's language skills. This is not desirable since it would tamper with the safeguards of the somewhat objectivity that science proclaims to attain. Still, it needs to be acknowledged that by using findings from other studies of the MSs laws, instead of studying the laws at first hand, an additional filter has been added to the research process. Nevertheless, by adopting an approach that attempts to solve a legal puzzle based on material from all the EU's MSs, a general understanding of the concept of cooperation is obtained. Inevitably, this amounts to a trade-off and a somewhat shallow analysis of these understandings. To compensate for this loss and achieve a balance between the general and specific, the second part of this thesis seeks to examine the legal principles in depth by using primary sources in form of law.

Another limitation is the examination of the EU and its MSs understanding of the concept de jure, meaning that only the legal framework forms a part of the material to be analysed. The de facto, meaning the actual effects these laws have in practice, are not deemed necessary for the purpose, method and theory of this thesis. This is not to be confused with the reference of the MS de facto understanding of the concept of cooperation. Although these understandings are manifested in national legislation, and together with the Return Directive forms the body of law on the concept, for the purposes of this thesis the MSs implementation is the de facto material upon which the principle of non-discrimination is applied upon.

Since the ECHR is the principle instrument for protecting human rights within the European region, but the different understandings of the concept of cooperation stems from areas of EU law, the focus will primarily be concentrated on sources of EU law. Likewise, since the CJEU is authoritative in interpreting EU law, and in doing so mirrors some of the ECtHR’s principles, like the principle of non-discrimination and proportionality, cases from the former will be examined first to determine how the prevailing understandings of the concept fare in relation to human rights. Nevertheless, the overlap between the areas of law, together with the EU’s up and coming accession to the ECHR,

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will inevitably raise points related to the ECHR. In line with the overall aim, to assist in developing EU policy, potential issues and incompatibilities with the ECHR will therefore not be overlooked.

1.7 Chapter Outline
First and foremost, in order to make sense of the data related to prevailing understandings across the EU, the establishment of categories of understanding the concept of cooperation is to be made in Chapter 2. As aforementioned, this is based on the law, scholarly writings and research on the concept. This is followed by existing data on the current understandings of the concept of cooperation across the MSs. In addition to the categories of understanding the concept of cooperation de jure (see Chapter 2.1) and MSs de facto understandings/implementations (see Chapter 2.2) the future of the concept of cooperation in EU's migration policy (see Chapter 2.3) ought to be outlined. This complies with one of the aims of this thesis; to assess the concept's compatibility with the principle of non-discrimination prior to its expanded presence in EU policy and accession to the ECHR. In spite of that the proposed understandings are in a stage of development, and as an area of policy that has not yet been subject to much research, such evaluation should add value to this thesis. After presenting the aforementioned, and in answering the first research question, a summary of the findings will be presented. This is because some reflection upon these is needed, since the findings from answering the first research question forms the basis for the analysis in answering the second. Before the concluding assessment of how the various types of understandings fare in relation to the principle of non-discrimination and proportionality is made in the final chapter, the theoretical framework of the legal interpretations is presented in the beginning of Chapter 3. The application of these principles of interpretation in assessing the current understandings against the principle of non-discrimination, forms the bulk of the same chapter. Similar to a court case, a summary of the legal reasoning is presented towards the endow the analysis. This is needed for clarity, the tying up loose of ends and addressing issues effecting the relationship between the EU and ECHR. This last part of this Chapter will also depict the relationship between the EU/CJEU and the ECHR/ECtHR in order to exhaust any potential complementing or conflicting interest. Somewhat repetitive, in the final Chapter another, complete, summary of the findings is presented along with conclusions and thoughts for the future.
1.8 Definitions

Non-returnable TCNs

A non-returnable TCN is a TCN that is due to be returned/removed from the EU, but for reasons is unable to do so. Article 15(4) of the Return Directive stipulates that a TCN is non-returnable when reasonable prospects of return/removal cease to exists for legal or other considerations. Such reasons may be administrative, involving difficulties with obtaining necessary travel documentation, or the wellbeing of the TCN. In comparison to an ordinary TNC awaiting return/removal from the EU, the period of when the non-returnable TNC remain in the host state is much longer, and therefore the limited access to rights is arguably of greater concern. Oftentimes, but not always, is a non-returnable TNC also an irregular migrant. Although the distinction between these groups is sometimes muddled, such as the common feature of missing identity documents, for the clarity of this thesis these groups are treated separately. Hence, an irregular migrant is a TNC that is not involved in a process of being returned/removed from the EU. A toleration status/postponement status (see Chapter 2) issued to non-returnable TNCs is an indicator of the difference of these groups.

28 p12, (2013) Point of No Return - The futile detention of unreturnable migrants.

CHAPTER 2

2.1 Categories of Understandings within the European Union

Toleration/Postponement Status

Considered to be a derogation clause of the Return Directive, Article 9 allow MSs to postpone the return/removal of a TCN. Article 6(4) of the Return Directive also permits MSs to grant residence permit to TCNs for compassionate or humanitarian reasons. Both these forms is to tolerate the stay of the TCN in a MS. The basis for issuing a postponement status, or residence permit, is when the return/removal is considered impossible. When determining if a TCN is non-returnable, the level cooperation forms a part of such assessment. According to the Return Directive, an acceptable reason for issuing a postponement status is the lack of cooperation on the receiving state's part, such as not producing travel documents for the TCN (Article 9.2(b)). Hence, an implicit assumption is the concept of cooperation in the context of toleration is reduced to only involve the level of cooperation on the receiving state's part, and not that of the TCN.

Detention

Article 15(1) of the Return Directive stipulates that detention should be a last resort and as short as possible. Nevertheless Article 15.1(b) allows for the detention of TCNs on the basis of non-cooperative behaviour during the return/removal process, and for a period up to 6 months (Article 15.5) In addition, the period of detention might be prolonged by an additional 12 months if the TCN does not cooperate, effectively limiting the total period of detention to a maximum of 18 months. It is also curbed by that the TCN must be in the process of return/removal\textsuperscript{30}, meaning that if a TCN has been classified as non-returnable the TCN is no longer in such process and therefore shall not be detained\textsuperscript{31}. In the case of the Mahdi\textsuperscript{32}, the CJEU was asked if Mahdi's declaration of not wishing to return to Sudan whilst at an the Sudanese embassy constituted non-cooperative behaviour\textsuperscript{33}. Unfortunately the court was unable to provide clarity as to how to interpret the concept of cooperation, and argued that the examination of whether there was a causal link between Mahdi's declaration and the Sudanese embassy's failure to provide travel documentation was outside the

\textsuperscript{30} Article 15(1) 2008/115/EC.

\textsuperscript{31} Article 15(4), Ibid.

\textsuperscript{32} C-146/14 PPU, Mahdi v Administrativen sad Sofia-grad, Judgement of the Third Chamber of the CJEU on the 5 June 2014.

\textsuperscript{33} paragraph 31(4)(a), C-146/14 PPU, Mahdi v Administrativen sad Sofia-grad.
court's authority. Nevertheless, it can be concluded that MSs must establish such linkage in order to claim that non-cooperative behaviour have occurred. This is important since it emphasises the burden of proof upon the state when detaining or extending the detention of a TCN. Cyprus has recently lodged a request for a preliminary ruling to the CJEU, asking the court to explicitly clarify the concept of cooperation, again in relation to a TCN refusing to cooperate in obtaining travel documents. In line with the PPU procedure, the CJEU is given another opportunity to urgently clarify the concept of cooperation entails.

To conclude, in relation to detention, the concept of cooperation has a criminal connotation, with the purposes of penalising TCNs if they do not cooperate. Moreover, in theory, TCNs that have been assessed as non-returnable ought to be protected from detention, since detention is only lawful if a reasonable prospect to carry out the return/removal exists. By judging the subgroup by its name, there is no reasonable prospect.

**Voluntarily Return**

According to paragraph (10) of the Preamble of the Return Directive, MSs should promote what is referred to as voluntarily return. At this point this may be defined as a non-cohesive measure, in which the TCN formally complies with the return decision. Throughout the return process the TCN is expected to cooperate with the relevant authorities. Usually the concept of cooperation is vaguely defined, but in this context Article 7(3) of the Return Directive actually specifies some actions that indicated cooperation. This included regular reporting to the authorities, making an adequate financial deposit as a guarantee for the MS that the TCN definitely returns, submission of documents or obligation to stay at a specific place during the return process.

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34 paragraph 85, C-146/14 PPU, Mahdi v Administrativen sad Sofia-grad.


2.2 Current Understandings across the Member States

Toleration/Postponement Status

A TCN with an official postponement status is found to have additional rights in comparison to TCN without this status de jure\textsuperscript{37}. An official postponement status coupled with additional rights is found in twelve MSs, but only Germany, Lichtenstein, Switzerland and Romania issues this irrespectively of cooperation on behalf of the TCN\textsuperscript{38}. This prevents a conclusion that the Return Directive does not require the cooperation of TCN in order to issue a toleration/postponement status, since when the directive is implemented across the MSs, the majority of MSs ignore the grounds for the permissible derogation of not administrating the return/removal of a TCN being the lack of cooperation of the receiving state. Instead the MSs constructs an obligation for the TCN to cooperate in order to be tolerated.

Fifteen of the thirty one MS have no official postponement status at all, but in instances of non-cooperation beyond the TCN's control, the TCN have a de facto postponement status, meaning that they are neither irregular nor enjoying additional rights\textsuperscript{39}. In twenty three MSs, cooperation on behalf of the TCN is a prerequisite for issuing a de jure or de facto postponement status\textsuperscript{40}. Instead of a postponement status, a temporarily residence permit is issued in Finland, Iceland, Malta and Sweden\textsuperscript{41}. This permit is coupled with additional rights, such as to work, extended health care and education. Although, in all four states the permit is subject to the TCN being cooperative\textsuperscript{42}. Regardless of the form of toleration status awarded, the most common reason for issuing such is either the principle of non-refoulement\textsuperscript{43} or technical reasons, such as the lack of documentation\textsuperscript{44}. Only in some instances does MS tolerates the stay of the TCN on grounds that are based on wide


\textsuperscript{38} pp. 29-32, Table 3, Ibid.

\textsuperscript{39} pp. 29-32, Table 3, Ibid.

\textsuperscript{40} p52, Ibid.

\textsuperscript{41} p26, Ibid.

\textsuperscript{42} p27, Ibid.

\textsuperscript{43} the principle of non-refoulement entails that "no refugee should be returned to any country where he or she is likely to face the death penalty, torture or other inhuman or degrading treatment or punishment" as per Article 19(2) of the CFREU.

interpretations of Article 5(a) and (b) of the Return Directive. Examples are if a family member is detained or if children are attending school\textsuperscript{45}.

\textit{Detention}

In twenty MSs, a TCN who cooperates during the return/removal process will not be detained. Nevertheless, the criminalisation of migration, i.e. the intersection between criminal law and migration management, and both the number and length, of detentions is increasing\textsuperscript{46} \textsuperscript{47}. This is in stark contrast to the Return Directive's objective of detention being a last resort, and some scholars being of the opinion that both the objectives to punish/deter is outright illegal\textsuperscript{48}. As to the prerequisite of a TCN being in the return/removal process, the TCN should be released from detention if it turns out that such process is not feasible, but this does not appear to happen in the majority of MSs\textsuperscript{49}. Since the criteria for a TCN to be considered non-returnable is the lack of cooperation on behalf of the receiving state, it should not matter whether the TCN is cooperative or not as a ground for remaining detained. Furthermore, although protected by the Return a Directive\textsuperscript{50}, the right to procedural justice in the form of the right to be informed of the grounds of detention and the right to challenge the lawfulness of the detention through judicial review is oftentimes disregarded\textsuperscript{51}, rendering the restriction of rights beyond the scope of the Return Directive.

\textsuperscript{45} pp. 198-199, Ibid.


\textsuperscript{47} p36, (2011) \textit{Detention of third country nationals in return procedures}.


\textsuperscript{50} Article 12 and Article 13 of 2008/115/EC.

Voluntarily Return

In only eight MSs, a TCN who cooperates during the voluntarily return process are given additional rights, such as the right to work, financial assistance or accommodation\(^{52}\). Considering that the TCN is in a process of leaving the EU it is somewhat paradoxical that additional rights are provided during this period. Notable also, is the restrictiveness in adopting an incentive approach, awarding cooperative behaviour with the access to rights. Findings also reveal that TCNs who cooperate during the return process enjoy better treatment than those who do not\(^{53}\).

2.3 Proposed Understandings of the Concept within the European Union

The proposed understandings have been put forward by stakeholders from the MSs and EU organisations\(^{54}\), in an effort to clarify the muddled and widespread understandings of the concept. To summarise, the overall proposal is to follow the line of awarding TCNs, regardless of being in the process of return/removal or non-returnable, with additional rights if these cooperate. Although the wording cannot be taken literately, it is suggested that a TCN that refuses to comply with the return decision and does not cooperate ought not to receive additional rights\(^{55}\). After a period of time, if the TCN is considered to have been cooperative during this period and is classified as non-returnable, a residence permit ought to be issued. On the other hand, if the TCN is non-returnable and has not cooperated during the period leading up to such decision, the TCN is to be granted a postponement status instead. Addressed as important is the possibility to move between the two categories of being cooperative and non-cooperative. Sweden is singled out as an example of where a failed asylum seeker is given two options; to either participate in voluntarily return scheme, managed by the migration authorities, and retain the rights as an asylum seeker, or being the responsibility of the police, through forced removal, and having restricted access to rights. The concerns raised by the study's participants is that such model would not allow for the TCN to be reassessed as cooperative and therefore lacks incentive to cooperate\(^{56}\). Briefly summarised, the proposed understanding of the concept of cooperation resembles that of the incentive approach used in voluntarily return schemes.

\(^{52}\) p52, HOME/2010/RFXX/PR/1001, (2013) *Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated.*

\(^{53}\) p91, Ibid.

\(^{54}\) p93, Ibid.

\(^{55}\) p96, Ibid.

\(^{56}\) p96, Ibid.
2.4 Summary of Findings

A conclusion based on how the concept is understood within the EU and across its MSs is that three different categories of understandings exist; toleration, criminalisation and the incentive type. The discrepancy between EU law and MSs implementation of such (see detention) actually serves to enhance the different characteristics of each type. What these *de facto* understandings have in common is that they all subject TCN awaiting return/removal, and its subgroup of non-returnable TCN, to conditions in order to enjoy their human rights. Moreover, most understandings place the burden of cooperation upon the TCN. Although there is some variation within the toleration approach, with the Return Directive not addressing cooperation in relation to the toleration/postponement status at all, only a few MSs issues an official postponement regardless of cooperation from the TCN. If the toleration approach is at one end of the scale, the criminalisation of non-cooperative behaviour that appears both *de jure* and *de facto* (i.e. both the Return Directive and the MSs implementation of this) is at the other. The incentive approach is arguably a middle ground but considering the options offered to the TCN, is poses the question how much of a choice it actually is. Likewise, one can most likely assume that the voluntary return is rather involuntarily\(^57\).

CHAPTER 3

3.1 Interpretative principles of the Court of Justice of the European Union

Without being strictly bound by the doctrine of judicial precedent, consistency through case law is of utmost importance in EU law. Not only does this establish legal certainty, but as a relatively new area of law, it defines what the law is about. As with much international law the wording of the legal texts within the EU is constructed in a way that can be described as broad\textsuperscript{58}. This renders the courts interpretations sometimes more meaningful that the somewhat ambiguous terminology used in the legal texts themselves. Moreover, novel situations will continue to arise when the position of EU law needs to be defined or re-defined. In this pursuit, the courts relies on principles of interpretations, and sometimes, contradictory to the idea of consistency, even judicial activism to achieve a just or effective outcome. Rather than spelling out which approach has been used, the court commonly instead refers to the \textit{wording, context or purpose} when ruling. Based on Dederich's study of CJEU judgements the two most commonly deployed methods of interpretations is briefly outlined below\textsuperscript{59}. In addition, an analogous method of interpretation ought to complement the practice of judicial activism.

\textit{Textual Approach}

As the name implies a textual, or literal approach, emphasises the wordings of the law. In practice this means that the CJEU looks at the ordinary meaning of the word, which in turn will be determined by its semantic context. Perhaps needless to say, although it is frequently used due to the multilingual construction of EU law one meaning of one word is next to impossible, but the gist of it is that if the law is \textit{acte clair}, meaning that there is no ambiguity as to the meaning of the word, the textual approach is to prevail\textsuperscript{60}. A textual approach is limited as to what aids may be used in


interpreting the statute, since the law is to be found in the text. However, perhaps not too useful in a multilingual setting, an extrinsic aid that may be of assistance is the use of dictionaries 61.

Teleological Approach

Since much of EU legislation does not lend itself to uniform interpretations, one of the interpretative principles commonly associated with the CJEU is the teleological, or purposive, approach. This mean that in addition to the wording, the court will take into account the spirit, value and objectives of the law 62. This approach focuses on the dynamics in which the law operates by taking into account the context and purpose, but also the outcome of the law 63. By observing the effect of the law, the judiciary within the EU does arguably not merely apply the law but plays an active role in creating law. It has been observed that the CJEU resorts to a teleological approach when the law is silent in order to fill out the gaps 64. This creative practice provokes mixed opinions, with some holding it as essential to the legal development, especially within EU law, whilst others view it as a threat to legal certainty. This approach allows for several types of extrinsic aids of interpreting the law, such as the travaux du préparatoire, judgements from other courts, such as the ECtHR, and policy documents 65.

Analogous Interpretation

As per its definition, an analogous approach means when the facts from a previous case falls outside the ratio decidendi (the essential legal reasoning that forms the judgement) and therefore is not prima facie applicable to the present case at hand, but the court argues otherwise due to sufficient similarities between the cases. Therefore, the latter is treated in the same way as the former, and in doing so the court applies the law as it did before 66. Why this approach is linked to judicial activism

62 p281, Ibid.
63 p314, Ibid.
64 p344, Beck, G. (2013) The Legal Reasoning of the Court of Justice of the EU (Modern Studies in European Law)
66 in line with a textual interpretative approach, a dictionary might be used as an extrinsic aid in defining a concept, hence the explanation of an analogous approach is derived from Lamond, G. (2014) "Precedent and Analogy in Legal Reasoning", Zalta N. E. (editor), The Stanford Encyclopaedia of Philosophy, Spring Edition 2014.
is because the case at hand ought to have a certain outcome based on precedent cases, but by
distinguishing the case through an analogous approach the court treats it differently.

3.2 The Principle of Non-discrimination within the European Union

In contrast to the relatively strong protection against discrimination citizens of the EU enjoy, the
principle of non-discrimination is limited in its application to TCNs, especially those awaiting
return/removal from the EU and its subgroup of non-returnable TCNs. When asserting grounds of
discrimination a comparison between the individual claiming to have been discriminated against
and a comparator in a similar situation have to be made in order to prove that these have been
treated differently\(^{67}\). Grounds of discrimination may vary, but in relation to TCNs in the EU, the
grounds are religion or belief, disability, age, sexual orientation\(^{68}\), race and ethnic origin\(^{69}\). This is
enshrined in the Directive 2000/43/EC (also referred to as the Race Directive) and Directive
2000/43/EC (the Framework Directive), in which nationality is excluded as a ground of
discrimination. This means that a TCN cannot be compared to a citizen of the EU when it comes to
accessing rights if these have been withheld on grounds of the TCNs nationality. Hence, it appears
that one cannot claim that the condition of cooperation in order to enjoy rights is discriminatory
since it is prescribed by EU law, unless the court applied an analogous approach of interpretation. In
the area of EU migration law, the CJEU has applied an analogous approach to interpret the non-
discrimination article of the Charter as to cover Turkish migrant workers in Germany\(^{70}\).
Nevertheless, as appealing as such approach is, its applicability to this specific context is rather
farfetched. TCNs that lawfully reside within the EU cannot be used as a comparator to TCNs that
does not.

A group that also lacks permission to stay within the EU is asylum seekers. Although they enjoy a
defined legal status, coupled with specific legislation addressing their rights, including the right to
stay whilst seeking asylum, they share common features with TCNs awaiting return/removal and

Interights, London.

of 27 November 2000 on establishing a general framework for equal treatment in employment and occupation.

2000 on implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

\(^{70}\) p21, Groenendijk, K. (2011) Guild, E. and Minderhoud, P (editors) *The First Decade of EU Migration and Asylum
non-returnable TCNs. Firstly, a large proportion of the two latter groups where initially asylum seekers. Secondly, considering that some non-returnable TCNs continue to enjoy the legal status as an asylum seeker during the process of return/removal in some MSs (see findings under Toleration/Postponement Status, Chapter 2.2). Therefore if we accept that there is sufficient similarities between these groups asylum seekers may be used as a comparator when asserting grounds of discrimination. In effect this means that TCNs awaiting return/removal from the EU, and non-returnable TCNs, ought to enjoy the same protection from discrimination as asylum seekers. Seemingly of little comfort since this protection is relatively weak, but due to the absence of a legal status of this group it is a milestone in addressing their rights.

Another obstacle in claiming discrimination is the non-discrimination article of the CFREU, Article 21.2, since it implicitly preserves the discretion of the EU, in line with the legislative procedures stemming from the Treaty on the European Union (TEU) and TFEU, to adopt measures that in effect may discriminate on grounds of nationality provided that this measure fulfil the restrictions prescribed by the Charter's limitation clause, Article 52.1 (hereinafter referred to as Article 52 interchangeably with limitation article or limitation clause). The limitation clause states a restrictive measure must fulfil the following criteria; the measure must be prescribed by law, respect the essence of rights and freedoms, and subject to the principle of be proportionality, being necessary and genuinely meet the objectives of general interest of the EU, or to protect the rights and freedoms of others.

*Prescribed by Law*

Briefly put, the discriminatory element of subjecting TCNs awaiting return/removal and non-returnable TCNs to conditional rights is prescribed by law, that is the Return Directive. Although directives more or less allow for MSs to implement them as they see fit, provided that they adhere to its objectives. Since there is a certain degree of discrepancy between the Return Directive and the MSs implementation of such, this needs to be addressed in examining the first requirement of being prescribed by law.

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By adopting textual/literal approach there is scope to argue that the conditionality of rights depending on cooperation in relation to the toleration approach is not in line with the Return Directive and therefore note prescribed by law.

For example, the Return Directive allow MSs to postpone the return/removal of a TCN, and issue temporary residence permit to TCNs for compassionate or humanitarian reasons. This must be due to the lack of cooperation of the receiving state (Article 9.2(b)). In relation to MSs de facto understanding of the concept in relation to the toleration/postponement, this is not the case. Even by adopting a teleological line of reasoning, it would be difficult construct a solid argument that the cooperation of the TCN is lawful in awarding a postponement status.

Sticking with a textual approach, the lawfulness of the concept of cooperation in relation to detention its is fairly straightforward. Article 15.5(b) does indeed say that the period of detention may be extended due to lack of cooperation by the TCN concerned. A teleological approach would probably reach the same conclusion since the objective with the Return Directive is to return/remove the TCN from the EU.

In relation to the incentive approach, during the process of voluntarily return, the Return Directive lists TCNs obligations during such a process, and that these obligations may be interpreted as a form of cooperation by a textual method of interpretation. Deriving from the verb cooperate, the first entry in the Oxford Dictionary stipulates that cooperation means "work together towards the same end"\textsuperscript{73}. This would therefore probably rebut the interpretation of the set of obligations listed in the Return Directive being a form of cooperation. Nevertheless, the second entry in the dictionary defines cooperation as "help someone or comply with their requests"\textsuperscript{74}. This is precisely what the Return Directive asserts, and if a TCN does not fulfil those obligations there would be an absence of cooperation, hence the MSs' explicit request of TCNs to cooperate appears to be prescribed by law. Similarly, purposive reasoning would rely on the objective with the Return Directive, to return/remove a TCNs. If the MSs understands the obligations listed in the Return Directive as a form of cooperation that is being implemented through national law, this serves to fulfil the Directive's objective and is therefore prescribed by law.


\textsuperscript{74} Ibid.
To conclude, the measure of placing obligations of cooperation upon TCNs in order to access rights, which is what is arguably discriminatory in nature, appears to be prescribed by law. When it comes to detention, regardless of method of interpreting the Return Directive it definitely is. In relation to voluntarily return, yes, but in relation to issuing a toleration/postponement status there is nothing in the Directive that supports that the concept of cooperation ought to be a prerequisite for a non-returnable TCN to receive such status. Hence the MSs understanding of the concept is not prescribed by EU law.

Respect the Essence of Rights and Freedoms

The next requirement of the restrictive measure is for it to respect the essence of rights and freedoms. This has been interpreted by legal scholars as to preserve the human dignity. A definition of human dignity directly applicable to the concept of cooperation is not to be found through sources of EU law, and whilst a longer elaboration probably would digress from the scope of this thesis, it ought to suffice to say that the placing of conditions of cooperation upon rights deteriorates somewhat from human dignity.

In the case of Cimade, concerning the reception of asylum seekers, the CJEU held that the human dignity must be respected and protected, and that an asylum seeker may not be deprived of that protection, even for a temporary period of time. An argument building upon the reasoning of a analogous interpretative approach, could be formulated along the lines as; since an asylum seeker is a TCN without a permit to reside, like that of TCNs awaiting return/removal or non-returnable TCNs, the courts reasoning from Cimade ought to be directly applicable to this group as well.

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77 Case C-179/11, Cimade, Groupe d’information et de soutien des immigre’s (GISTI) v Ministre de l’Inte´rieur, de l’Outre-mer, des Collectivite’s territoriales et de l’Immigration, Judgement of the Forth Chamber of the CJEU On the 27 September 2012.


79 paragraph 56, Case C-179/11, Cimade, Groupe d’information et de soutien des immigre´s (GISTI) v Ministre de l’Inte´rieur, de l’Outre-mer, des Collectivite’s territoriales et de l’Immigration.
Hence, since we have established that there are sufficient similarities between asylum seekers and TCNs awaiting return/removal, and non-returnable TCNs, along with the conclusion that using the condition of cooperation as a prerequisite to access rights constitutes an infringement upon the human dignity, the balance favours the argument that the concept of cooperation does not respect the essence of rights and freedoms. This ought to be applicable to all three types of understanding the concept, both within the EU and across its MSs.

**Proportionality**

Another criteria is that restrictive measure must be proportionate. This is fundamental to the EU and a principle of general law, meaning that regardless of area of law the principle is applicable\(^{80}\). Some form of discrimination against TCNs is generally considered to be accepted\(^ {81}\). This is line with controlled migration policies. What is debatable is what, when, and how migrants' rights can be restricted. In order to assess if the discrimination of granting rights to TCNs awaiting return/removal, or non-returnable TCN, depending on their level of cooperation, is proportionate one must turn to the *test of proportionality*. As with most legal tests within the EU, these have been worked out along the way through reasoning in case law. A key preliminary ruling in CJEU’s development of the proportionality test in relation to human rights is the *Schmidberger* case\(^ {82}\). The case involved the blockade of a motorway caused by an environmentalist demonstration and the conflict of fundamental EU law was the right to freedom of expression and freedom of movement. Whilst the court stated that some rights are not absolute, and can be restricted as long as the restrictive measure meets the requirements set forth by Article 52 of the Charter, and does not impair upon the very substance of that right\(^ {83}\), the right to freedom of expression trumped that of movement. The reasoning forming the judgement was based on a balance between the *underlying interests* in order to assess the proportionality\(^ {84}\). What these underlying values are is embedded in further linguistic


\(^{82}\) Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, Judgement of the ECJ on the 12 June 2003.

\(^{83}\) paragraph 80, Ibid.

vagueness, but in essence one can say that the measure must be suitable and necessary to reach the objective. In deciding this, a utilitarian reasoning, listing the arguments for and against the infringement upon TCNs' dignity in returning/removing these is weighted against each other. A competent of the proportionality test is assessing the measures necessity. If the measure is necessary then it is difficult to argue that the measure is disproportionate.

**Necessity**

The requirement of the measure being necessary to genuinely meet the objectives of general interest of the EU requires another test, the necessity test. Briefly put, if there is another way of achieving the objective the measure at hand cannot be necessary. As to the common feature of all three types of understanding the concept of cooperation of requiring the TCN to cooperate, one must ask if the objective of returning/removing this group could be obtained without requiring their cooperation.

In relation to the tolerations/postponement status it would need to be assessed if the absence of TCNs' cooperation would affect the toleration/postponement. As per the findings in Chapter 2.2, there is a discrepancy between the Return Directive and MSs implementation of this since the directive states that the lack of cooperation of the receiving state may form a part of the assessment if a TCN is non-returnable. It does not explicitly say that the cooperation of the TCN cannot be a part of this assessment rendering a textual interpretation redundant. Nevertheless, MSs do evaluate the cooperation of the TCN when awarding this status. Returning to the question if this is necessary, it probably is not. When issuing a toleration/postponement status there is no reasonable prospect of return/removal. Assume that this is due to the TCN having been non-cooperative during the period leading up to this assessment. There appears to be make no difference to achieving the Return Directive's objectives of return/removal if the TCNs commence cooperation in order to be awarded a status to postpone the return/removal. On the other hand, assume that the TCN did not cooperate from the beginning, and continues not to cooperate during and post being awarded the status, this would render the TCN in an irregular situation, deprived of several more rights rising triggering other human rights law. Nevertheless, with the objectives of the Return Directive in mind, it appears that the concept of cooperation is not necessary in relation to toleration/postponement.

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In relation to detention, as this should be a means of last resort (15.1 Return Directive), it is less cares cut if cooperation is necessary to carry the return/removal. In the Mahdi case, the court held that detention cannot solely be justified due to the lack of identity documents\textsuperscript{87}, and if the lack of documentation depended on the absence of cooperation of the TCN the MS need to prove that this is what caused the demise of prospect of return/removal\textsuperscript{88}. Hence, it might be necessary to require TCN to cooperate during detention but it cannot form the sole basis for the actual act since it is an act of last resort to achieve the objectives of the return/removal.

As to the incentive approach during the voluntarily return process, a textual approach could argue that if there is no benefit towards cooperating if there is no incentive, so calling it an incentive approach is misleading. Again, if a TCN during an ongoing return process did not cooperate in order to be awarded access to additional rights, would the TCN not participate and undergo the voluntarily return? As the participation in the voluntarily return process is prerequisite for being in this category of understanding the concept of cooperation, it tacitly means that the TCN is returning. Hence, the cooperation during such process in order to access rights is not necessary for undertaking the actual return.

\textit{Fulfil a General Interest}

Article 3 of the TEU\textsuperscript{89} is what constitutes the general interest of the EU in this context, and thereby and justifies the discriminatory nature of the Return Directive and its implementation. Article 3.2 states that the EU is to adopt appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. By regulating the return/removal of TCN from the EU the Return Directive does carry out a general interest. Nevertheless, as per both the TEU and the Charter another general interest is to protect fundamental rights, forming a conflict of general interests. The conflict of general interests, with Article 3 of the TEU regulating migration and Article 2 protecting rights, is also referred to as value pluralism or norm collision\textsuperscript{90}. Since the values and objectives of the EU are many, this situation is undoubtably a regularly occurrence. First

\textsuperscript{87} paragraph 3, C-146/14 PPU, Mahdi v Administrativen sad Sofia-grad.

\textsuperscript{88} paragraph 4, C-146/14 PPU, Mahdi v Administrativen sad Sofia-grad.

\textsuperscript{89} see "Explanation on Article 52 - Scope and interpretation of rights and principles" under a Title VII - General provisions Governing the Interpretation and Application of the Charter, \textit{Explanations Relating to the Charter of Fundamental Rights} [2007] C-303/02.

\textsuperscript{90} p175, Beck, G. (2013) \textit{The Legal Reasoning of the Court of Justice of the EU (Modern Studies in European Law).}
and foremost, in addition to Article 3, Article 6(1) of the TEU holds that the Charter has the same value as the TEU, rendering the Charter as a primary source of law. This means that the situation of subjecting TCN to convictions of cooperation in order to enjoy rights, as both protected and sanctioned by the Charter through Article 21 and Article 52 respectively, is arguably a conflict of primary sources of law. In such conflict neither the rules of *lex superior*, *lex specialis* or *lex posteriori* commonly used to resolve such conflict is applicable. In an attempt to resolve the issue of balancing the upholding of rights, especially human dignity, and a genuine interest of the EU one must therefore turn to the case law of the CJEU. In the case of *U v Stadt Karlsruhe*\(^91\) the court clouded that the EU’s objective of protecting its external borders overruled that of the individual’s right (this case relates to the Passport Security Regulation\(^92\)). What is striking in this case is that the court did not perform neither test of necessity, nor of proportionality\(^93\) and therefore it cannot be assumed that the CJEU would rule that a secondary law (the Return Directive) would overrule a primary law (Article 3 of the TEU).

*Protect the Rights and Freedoms of Others*

When it comes to the practice of subjecting TCN awaiting return/removal and non-returnable TCNs to access rights depending on their level of cooperation, the requirement of protecting rights and freedoms of others is deemed irrelevant, since there appears to be no reasonable reason as to why the categoric circumcision of TCNs rights would achieve such objective.

### 3.2.1 Summary of Legal Analysis

This analysis confirms that depending on what interpretative principle is applied the outcome as to whether the measure restricting TCNs' access to rights fulfils the criteria according to Article 52 of the Charter. It also constructs an argument that depending on what interpretative approach applied, there is scope for the concept of cooperation being a discriminatory measure. Out of the criteria set forth by the limitation clause of the Charter (Article 52), the criterion of the restrictive measure (being the concept of cooperation, implicitly or explicitly sanctioned by the Return Directive) to

\(^91\) Case C-101/13, *U v Stadt Karlsruhe*, Judgement of the Forth Chamber of the CJEU on the 2 October 2014.


respect the essence of rights of freedoms appears to be somewhat compromised. A teleological approach may interpret the meaning of rights and freedoms as to respect human dignity. By arguing that TCN awaiting return/removal and non-returnable TCN ought to enjoy the same rights as asylum seekers, due to the common feature of neither group enjoy permit to reside, the former group is deemed a sufficient comparator to the latter.

The final conclusion is based on several parts. First, the CJEU held that the infringement upon asylum seekers rights constituted a violation of their human dignity in the case of Cimade. Second, based on the ruling in Cimade, and the conclusion that human dignity is to respect the essence of rights and freedoms, an analogous approach therefore holds that the restrictive measure of subjecting TCNs awaiting return/removal and non-returnable TCNs, to conditions of cooperation does not fulfil the criteria as per Article 52 of the Charter, and is discriminatory.

Briefly reiterating how the three different types of understanding the concept of cooperation fare, the toleration approach is the least compliant with the limitation article since it is neither prescribed by the Return Directive, nor held necessary to fulfil its objectives. Regardless of a textual or teleological approach of interpretation, the criminalisation of the concept of cooperation in relation to detention does corresponds somewhat with Article 52 since it at least is clearly prescribed by law. As to the incentive approach, this does not fulfil the necessity test and is therefore not proportionate.

In addition to establishing that some of the prevailing understandings of the concept of cooperation both de jure and de facto circumvents some of the criteria as per the limitation clause, along with this legal analysis a point of an unresolved issue has been addressed. That of the conflict between the two general interests; to regulate migration (as per Article 3 of the TEU) and to protect fundamental rights (Article 2 and 6 of the TEU). The position of fundamental rights, in the form of non-discrimination, in the hierarchy of law within the EU's legal order appears troublesome. As opposed to settle for a situation in which the differential treatment between TCN awaiting return/removal, including non-returnable TCNs, and EU citizens, in that the former are subject to conditions of cooperation, is justified by EU law in the form of the Return, Race and Framework Directive, and to some extent by Article 52 of the Charter, the the relationship between EU's Charter and the ECHR needs to be examined in order to evaluate if the principe of non-discrimination ought to cover non-returnable TCNs through the EU's accession to the ECHR. This may affect the the prevailing situation of Article 3 of the TEU taking precedence over the protection of rights in
Article 2 and 6 of the TEU, and the principle of non-discrimination as protected by the Charter, all being primary sources of EU law.

3.3 The European Union and the European Convention of Human Rights

Whilst the EU's accession to the ECHR is still in progress, to the delight of human rights' law scholars, the Convention is referred to as a general principle of EU law in Article 6.3 of the TEU. In effect this means that the CJEU may use the Convention as a supplement in ruling.

Strengthening the bond between the Convention and the Charter does also Article 52.3 of the Charter, by referring to the Convention, in that the rights found in both treaties shall correspond in their meaning. In effect this means that the CJEU should not digress from the ECtHR's interpretation of human rights, and why the ECtHR's understanding of the principle of non-discrimination in relation to the concept of cooperation and the groups of TCN awaiting return/removal an non-returnable TCNs, may be of importance. In addition, through case law, the CJEU has shown willingness to be bound by the ECtHRs jurisprudence, and use rulings from the latter as an extrinsic aid of interpreting EU law. Whilst speculations as to when and how the EU and its MSs will be bound by the ECHR flourish, Article 51 of the Charter stipulates that the Charter only applies to MSs when they implement EU law. This leads to the fairly unconventional conclusion that MSs also have to adhere to the ECHR when implementing EU law, such as the Return Directive.

3.3.1 The Principle of Non-discrimination and the European Convention of Human Rights

Instead of having a limitations clause, like that of Article 52 of the Charter, the criteria of restricting of rights are joint to the rights that are considered to be non-absolute. This simplifies what, when and how rights can be circumcised. Similar to the proportionality principle exercised by the CJEU, the ECtHR applies a margin of appreciation to MSs, provided that the measure restricting rights fulfil a similar set of criteria as Article 52 of the Charter. Since EU and its MSs will need to adhere to the Convention when implementing EU law, the ECtHR's stance on balancing the objectives with regulated migration and protecting the rights to non-discrimination of TCNs awaiting return/

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96 C-94/00, Roquettes Frères SA v Commission, Judgement of the ECJ on the 22 October 2002.
removal and non-returnable TCNs is important. When balancing fundamental interest, the most prominent difference between the EU and the Council of Europe (governing body of the ECHR) is the principles upon which these institutions were founded. Whilst the EU's primary function is to strengthen economic integration, the ECHR's is to protect fundamental rights. This means that when a conflict of general interest arise in the ECtHR they concern the balancing of rights. On the one hand, according to Article 1 in conjunction with Article 14 of the ECHR, any person within the jurisdiction of the contracting parties is to enjoy these without discrimination on grounds of nationality. This seemingly gives TCNs a greater protection from discrimination.

On the other hand, a case that would somewhat legitimise the EU's and its MSs' understanding of the concept of cooperation, is *Saadi v United Kingdom*[^97], in which the Grand Chamber of the ECtHR dealt with the detention of an asylum seeker who had *unauthorised entry*[^98]. The judgement has received critical response from human rights law scholars, accusing the ECtHR of applying lower standards concerning asylum seekers[^99]. This is due to the court awarding states a considerable margin of appreciation when holding that states possess an “undeniable right to control aliens’ entry into and residence in their country”[^100]. Moreover, in the past the ECtHR have even argued that necessity is not a requirement for assessing if immigration detention is proportionate[^101] (see the case of *Ammur v France*[^102]), supporting the uncertainty as to what protection TCNs awaiting return/removal and non-returnable TCN have. The ECtHRs careful observance of the EU’s and its MSs' prerogative of regulating migration have been accused of be reduced to only interpret violations of Article 3 and 5 of the Convention, falling short of preventing the discriminatory treatment of TCNs, including those with or without permission to remain[^103]. It has also been asserted that the Convention does not hold a constitutional status within the national legal order in many states, and

[^98]: paragraph 61-66, *Saadi v United Kingdom*.
[^100]: paragraph 64, *Saadi v United Kingdom*.
therefore cannot limit its parties sovereignty to the same extent as EU law104. Therefore, the CJEU's balancing between fundamental rights and objectives of pursuing a joint migration policy appears to be ultimate in deciding to what extent the concept of cooperation infringes upon TCNs right to non-discrimination105.


CHAPTER 4

4.1 Summary, Conclusions and Discussion

As to the first research question of how the concept of cooperation in the context of TCNs awaiting return/removal from the European Union, and its subgroup of non-returnable TCNs, is understood within the European Union and across its Member States, the findings have been presented in an analysis comprised of two parts. First, a review of how the concept is understood within the EU and second, across its MSs. Broadly speaking, the findings from Chapter 2 present several problems coupled with the concept of cooperation being a condition for TCNs awaiting return/removal and non-returnable TCNs, to access rights. One problem is that the Return a Directive to some extent sanction this. At least when it comes to the practice of prolonging detention on the basis of noncooperation, and of it being a prerequisite for accessing additional rights during a voluntarily return process. This amounts to the issue of whether the Return Directive is compatible with the EU's proclaimed commitment to non-discrimination, and human rights. This problem will be duly addressed a few paragraphs down.

Continuing with the MSs' different understandings of the concept, in order to examine these, three types of understandings have been established; the toleration, the criminalisation and the incentive approach. Through examining these, a third problem arose. There is some discrepancy between what the Return Directive actually covers in relation to the concept of cooperation, such as the immediate release of the TCN from detention in situation of the receiving state not cooperating, and the MSs implementation of this, such as the TCN continue to be detained due to the lack of cooperation on the TCN's part. Although all understandings are manifested de jure, on both a EU and national level, but may be summaries as concerns of a de facto deficit in MSs' implementation of the directive and adherence to its objective.

The findings from the first research question followed through to the second research question of how these prevailing understandings fare in relation to the principle of non-discrimination. In addition to barely cover TCN awaiting return/removal from the EU, and its subgroup of non-returnable TCNs, the principle of non-discrimination may be circumscribed in the form of Article 52 of the Charter. Therefore, the Return Directive's compatibility was assessed, simultaneously with the three different types of understanding the concept across the MSs, against this article. Concerning the latter, the MSs understanding of the concept in relation to the toleration/postponement status is problematic since it is not in line with the objectives of the Return Directive.
Due to clear legislation, including restrictions upon detention, the criminalisation aspect of the concept of cooperation in relation to detention fare reasonably well. The incentive approach turned out to depend on a large extent on the principle of legal interpretation used. A textual approach holds that complying with the obligations placed upon TCNs participating in the process of voluntarily return could be read as being cooperative and therefore prescribed by law. Nevertheless, when using a purposive approach of interpretation, the measure was found not to be necessary in achieving the objectives of returning TCNs and therefore failing the test of proportionality.

All of the above findings contribute to an increased understanding of the concept of cooperation. This has been addressed by the Commission as important before expanding the its presence in the EU's migration regulations. Hence, the aim of contributing to the development of this area of policy and law has been achieved. In addition to examining and assessing the prevailing understandings of the concept of cooperation within and across the EU and its MSs, this thesis set out to mitigate the tension between the concept of cooperation and the principle of non-discrimination. The aim has been partially met. In answering the second research question, an assessment was performed, somewhat disappointing in relation to non-discrimination. This is because neither the EU, nor the ECHR, explicitly rejects the discrimination of TCNs awaiting return/removal and its subgroup of non-returnable TCNs. Within the EU there is a conflict of general interest; that of the prerogative to exercise border control and to protect fundamental rights. The accession of the EU to the ECHR does not appear to resolve this conflict and even if it did, the ECtHR's protection of TCNs awaiting return/removal and non-returnable TCNs remains weak.

As it stands today, a readily available definition of the concept of cooperation is next to nonexistent, and this is problematic since the access to rights depends on understanding it. As to what the future holds for the concept of cooperation, even though it needs to be clearer what it entails, a too specific definition would be counterproductive in strengthening these group's access to rights. A list of detailed criteria of what it means to cooperate would not allow encompass individual needs. Hence, a balance needs to be struck between a vague and specific, or broad and narrow definition. An observation outside the scope of this thesis, is the common feature of an imbalance in power, position and stake between the MS and the TCN, that all types of understanding of the concept of cooperation share. This problems lends itself well for a different type of analysis that ought to be pursued in further examining the definition, function and future of the concept of cooperation in relation to human rights.
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