Global Exchange
on Migration & Diversity

Autumn Academy 2017

The challenge of responding to irregular immigration:

European, national and local policies addressing the arrival and stay of irregular migrants in the European Union

Nicola Delvino

COMPAS
CENTRE ON MIGRATION · POLICY & SOCIETY
UNIVERSITY OF OXFORD

Autumn Academy 2017

The challenge of responding to irregular immigration:

European, national and local policies addressing the arrival and stay of irregular migrants in the European Union.

Nicola Delvino

About the author

Nicola Delvino is a Senior Researcher at the Centre on Migration, Policy and Society (COMPAS), University of Oxford, and was at the time of writing a Research Associate of the Centre. He formerly researched and worked on migration and asylum policies for several Brussels-based NGOs, particularly at Amnesty International's European Institutions Office, and for the British Government at the British Embassy in Rome. He holds a Masters in Law from the University of Bari, and studied European Union Law in Brussels at the *Université Libre de Bruxelles* (ULB).

Acknowledgements

The author is particularly grateful to Sarah Spencer at the Global Exchange on Migration and Diversity, COMPAS, University of Oxford, for her guidance throughout the production of this paper. The author also acknowledges with thanks Michele LeVoy at the Platform for International Cooperation on Undocumented Migrants for her very valuable comments on this paper's initial outline.

Table of Contents

Introduction

The aim of this paper is to provide an overview of the most recent policy trends observed at international, European, national and sub-state governance level in relation to the arrival and presence in Europe of migrants with irregular immigration status. This paper aims to explain recent legal and policy developments on this issue, identify their main drivers and the direction of travel of current policy scenarios.

There are several dimensions of policies governing irregular immigration. On one side, *policies on irregular immigration* aim to prevent and reduce the unauthorised arrival of unwanted immigrants. On the other side, *policies on irregular migrants* address the treatment of irregular migrants once they have entered (or overstayed their stay permits) in breach of immigration rules. With regard to this second dimension, policy makers can develop different approaches depending on whether they decide to grant some form of accommodation to their irregular population and facilitate regularisations, or instead, focus on enforcing immigration rules, denying accommodating measures to encourage voluntary returns, and ultimately enforcing removals. These two policy approaches necessarily overlap, as strict enforcement cannot overlook European states' obligations vis-à-vis irregular migrants' fundamental (including social) rights, but at the same time tougher policies on the treatment of irregular migrants are often implemented to deter new irregular arrivals.[1] In this paper, both policies focusing on immigration law enforcement and deterrence, as well as policies aimed at regulating the treatment of irregular migrants vis-à-vis their social needs will be analysed.

This paper is divided into three sections:

- *Section 1* outlines the general policy and legal frameworks governing irregular migration at different level of governance (including the international, European Union (EU), national and sub-state/local level). By setting out the general state of play and evolution of those systems in general terms, this section serves as an introductory overview before specific topics related to immigration law enforcement and the treatment of irregular migrants are explored more in-depth in sections 2 and 3.

- *Section 2* provides a detailed analysis of policies and practices on specific aspects of immigration law enforcement. These include policies on the apprehension and return of

[1] The effectivity of the deterrent factor over irregular migration of strict policies is, however, highly disputed, as there is no clear evidence that tougher policies on irregular migration has ever reduced migration flows. See Carrera & Guild. (eds.) (2016), Irregular migration, trafficking and smuggling of human beings - Policy dilemmas in the EU, Brussels: Centre for European Policy Studies (CEPS), available at: www.ceps.eu/system/files/Irregular%20Migration,%20Trafficking%20and%20SmugglingwithCovers.pdf; Research carried out on this topic with regard to U.S. immigration policies and practices include Espenshade T. (1994), *Does the Threat of Border Apprehension Deter Undocumented US Immigration?*, in *Population and Development Review*, Vol. 20, pp. 871–892; Leerkes A., Engbersen G. and Van der Leun J. (2012), *Crime among irregular immigrants and the influence of internal border control*, in *Crime, Law and Social Change*, Vol. 12 No. 1, pp. 15-38; Leerkes A., Bachmeier J. and Leach M. (2013), *When the Border is 'Everywhere': State-level Variation in Migration Control and Changing Settlement Patterns of the Unauthorized Immigrant Population in the United States,* in *International Migration Review*, Vol. 47 No. 4, pp. 910–943. It is even argued that measures as the increased militarisation of the US-Mexican border against an increasing demand for cheap labour, may even have increased unauthorised stay by turning temporary migration into permanent settlement. See Massey D., Durand J. & Malone N. (2002), *Beyond Smoke and Mirrors: Mexican Immigration in an Era of Economic Integration*, New York: Russell Sage Foundation.

irregular migrants, immigration detention and criminalisation of irregular entries and stays in Europe.

- *Section 3* finally focuses on how European states have been regulating the treatment of irregular migrants in their territories in relation to their access to public services (including health care, education and accommodation services) and to protection and justice systems. It further analyses the initiatives of local authorities in Europe in relation to the presence of irregular migrants in their communities.

Setting the scene: irregular migrants in Europe

The number of migrants with irregular immigration status in Europe is unknown. The most recent attempt to estimate the stock of irregular migrants in the EU dates 2009, when it was estimated that there were between 1.9 and 3.8 million undocumented migrants in the Union.[2] This number compares, for the same year, to some 50 million irregular migrants globally,[3] and about 11.3 million in the U.S.[4]

Although the precise actual number of irregular migrants is impossible to assess, a variety of proxies might suggest that irregular immigration in the EU is on the rise.[5] Following a period (2008-2013) of decrease in *the number of people found to be irregularly present* in the EU-28, this number increased to 672,215 in 2014 and peaked to 2,154,675 people in 2015. In 2016 though, this number halved to slightly less than 1 million people.[6] Eurostat warns, however, that this data does not necessarily imply a growth in the number of irregular migrants, as it might be due to EU Member States' policy changes on immigration checks.[7] Eurostat also shows that this data highly varies for different States, as 89% of apprehensions in 2015 happened in only five Member States.[8] Similarly, *the number of people ordered to leave* in the EU-28 decreased from 2008 (603,360 people) to 2013 (430,450), then increased in 2014 and 2015 (533,395), to then decrease again in 2016 (493,785).[9] In addition, it is sensible to believe that increasing numbers of non-EU nationals have been losing their residence permits in Europe following the loss of regular employment, as several EU countries

[2] CLANDESTINO research project (2009), *Size and development of irregular migration to the EU - Comparative Policy Brief - Size of Irregular Migration,* available at http://irregular-migration.net/fileadmin/irregular-migration/dateien/4.Background_Information/4.2.Policy_Briefs_EN/ComparativePolicyBrief_SizeOfIrregularMigration_Clandestino_Nov09_2.pdf.

[3] United Nations Development Programme (2009), *Human Development Report 2009*, New York: United Nations Development Programme.

[4] Passel S. & Cohn D. (2015), *Unauthorized immigrant population stable for half a decade*, Washington DC: Pew Hispanic Center, available at: www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade.

[5] Orrenius P. M. & Zavodny M. (2016), *Irregular Immigration in the European Union,* in *European Policy Analysis*, Issue 2016:2, Stockholm: Swedish Institute for European Policy Studies (SIEPS), available at www.sieps.se/sites/default/files/2016_2_epa%20eng.pdf.

[6] Eurostat (2017), *Third country nationals found to be illegally present - annual data (rounded),* available at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eipre&lang=en [last accessed on 15 June 2017]

[7] Eurostat (2017), *Eurostat statistics explained - Statistics on enforcement of immigration legislation,* available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_enforcement_of_immigration_legislation#cite_ref-7 [last accessed on 15 June 2017]

[8] Greece, Hungary, Germany, France, Austria. By contrast, in Luxembourg, Malta, Latvia, Estonia, Slovenia, Sweden, Slovakia, Romania, Lithuania, Denmark, Ireland, Croatia and Cyprus the number of apprehensions were lower in 2015 than the previous years with less than five thousand cases in each of these countries. *Ibidem.*

[9] Eurostat (2017), *Third country nationals ordered to leave - annual data (rounded),* available at http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eiord&lang=en [last accessed on 15 June 2017]

in the last years have been experiencing a period of economic downturn. Moreover, the fact that Member States with a tradition of frequent regularisation programmes have not been carrying out any such scheme in the 2010s might have contributed to an increase in the size of Europe's irregular population from the 2000s.

Contextualising the scene: irregular migrants in the 'refugee crisis'

In the years of the so-called European 'refugee crisis' or 'Mediterranean migration crisis' of the mid-2010s, policies and data on irregular migration cannot be properly analysed without initially placing them in the context of the 'crisis' and juxtaposing them with data on asylum issues. The 'crisis' saw its peak in 2015 with around 1.8 million *irregular crossings of EU borders*[10] and the *arrival through the Mediterranean* of around one million asylum seekers and (irregular) migrants.[11] In 2016, these numbers decreased to 511,371 irregular border-crossings and 362,376 arrivals, but stayed high if compared to pre-crisis levels.[12] As these numbers have been accompanied by a strong increase in asylum applications lodged in the EU (which doubled from around 627,000 in 2014 to 1.3 million in both 2015 and 2016[13]), the strong migratory pressures of these years have often been described as a 'refugee' – *not an 'irregular migrant'* – crisis. The very high percentage of nationals coming from conflict zones and the concomitant rise in the number of asylum applications indeed shifted policy and media focus in Europe on asylum issues, which translated in policy discourses that treated irregular migrants only as *(rejected) asylum seekers,* rather than *per se*. In fact, the EU *rejection rate of asylum applications* decreased from 2014 (53%) to 2015 (47%), but the *absolute number of rejections* increased from 191,000 in 2014 to 296,000 in 2015.[14] It is reported that the EU has spurred some Member States to place increasing policy importance on the return of rejected asylum seekers, rather than any irregular migrant.[15] The European Commission estimated that with around 2.6 million asylum applications in 2015/2016 and considering a first instance recognition rate of 57%,[16] Member States might have more than 1 million rejected asylum seekers to return.[17]

---

[10] Detections of illegal border-crossing do not match the actual number of irregular entrants, as one single person can be accounted for more than once, as they might have carried out more than one irregular crossing. In 2015, many asylum seekers who initially entered Greece irregularly, then left the EU to enter (mainly) Macedonia and then cross irregularly EU borders passing through the Western Balkans. See Frontex (2017), *Risk Analysis for 2017*, available at http://frontex.europa.eu/assets/Publications/Risk_Analysis/Annual_Risk_Analysis_2017.pdf [last accessed on 15 June 2017]

[11] UNHCR (2015), *Over one million sea arrivals reach Europe in 2015*, 30 December, available at http://www.unhcr.org/news/latest/2015/12/5683d0b56/million-sea-arrivals-reach-europe-2015.html [last accessed on 15 June 2017]

[12] There were 282,933 detected irregular border-crossings in 2014 (104,060 in 2010), and 216,054 arrivals in 2014 (9,654 in 2010). See Frontex (2017), *op. cit.*; and UNHCR (2016), *Mediterranean Regional Overview – Evolution – Sea Arrivals*, available at http://data.unhcr.org/medportalviz/dist/ [last accessed on 15 June 2017]

[13] Eurostat (2017), *Eurostat statistics explained - Asylum statistics,* available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#cite_note-4 [last accessed on 15 June 2017]

[14] *Ibidem.*

[15] European Migration Network (2016a), *The Return of Rejected Asylum Seekers: Challenges and Good Practices,* available at: http://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies//emn-studies-00_synthesis_report_rejected_asylum_seekers_2016.pdf.

[16] The figure used by the European Commission was calculated on the first three quarters of 2016. By the end of 2016, the recognition rate increased to 61%. See Eurostat (2017), *Eurostat statistics explained - Asylum statistics,* available at http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics#cite_note-4 [last accessed on 15 June 2017].

[17] European Commission (2017), *Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - A renewed action plan*, COM(2017) 200 final, available at http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0200.

As we shall see throughout this paper, this strengthened policy focus on asylum policies resulted in an increasing *entanglement between policies on asylum and irregular immigration* and the *toughening of policy discourses against 'economic' (irregular) migrants* – whose effective removal is described by policy makers as a solution to the crisis.[18] It is noteworthy, however, that rejected asylum seekers are only one group amongst those that can be defined as irregular migrants (who also include irregular entrants with no asylum claims and people who over-stayed their visa). Only in some European countries rejected asylum seekers represent a high proportion of people issued with a return decision.[19] It is important to note, in fact, that it has long been recognised that visa over-stayers account for the majority of irregular migrants in Europe, and it is difficult to estimate whether this might no-longer be the case.[20]

Defining the scene: who is an irregular migrant?

With the term 'irregular migrant' (or migrant with irregular status) this paper indicates third country nationals who have entered a country without authorisation or remained beyond the limits imposed by their visa or residence permits. This last category embraces a wide variety of situations, including those of (previously regular) migrants who could not obtain the renewal of their residence permit before its expiration, or rejected asylum seekers after the negative conclusion of their asylum procedure. In the context of the EU, the term 'irregular migrant' is only used to refer to non-EU nationals, and not to situations of 'irregularity' that can characterise the presence of certain 'new' EU citizens in another EU Member State. In this paper, this terminology is preferred to alternative terms, *i.e.* 'illegal migrant'. The use of the term 'illegal' indeed carries unwanted negative connotations, stigmatises migrants as criminals, and can be legally inaccurate both because in many states irregular entry and stay is not a criminal offence, and even where it is so, it is the act of entering and staying without authorisation that is illegal, and not the perpetrators themselves. 'Irregular migrant' is finally the term increasingly favoured by international organisations, including the UN, the Council of Europe, and – within the EU – the European Parliament and the European Commission.[21] The term 'non-documented' or 'undocumented' is a valid alternative commonly used to describe irregular migrants, but it can occasionally result misleading for describing individuals who hold documents (*e.g.* a passport) but nonetheless lack authorisation to be in the country in which they are living.

---

[18] DeBono D. (2016), *Returning and deporting irregular migrants: not a solution to the 'refugee crisis',* in *Human Geography*, Vol. 9 - No. 2, 101-112, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808422##.

[19] EMN reports that '*within specific Member States (for which data are available), rejected asylum seekers make up either: a high proportion (over 60%) of all third- country nationals issued a return decision (IE, LU); less than 30% (LT); between 10 and 35% (FI, FR, HU, IT, PL) or less than 10% of all return decisions issued (BG, EE, LV)*'. See European Migration Network (2016a), *op. cit.*

[20] Andersson R. (2016), *Europe's failed 'fight' against irregular migration: ethnographic notes on a counterproductive industry,* in *Journal of Ethnic and Migration Studies*, Vol. 42 - Issue 7, 1055-1075 available at: www.tandfonline.com/doi/full/10.1080/1369183X.2016.1139446; Orrenius P. M. & Zavodny M. (2016), *op. cit.*

[21] OHCHR (2014), *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, Geneva: Office of the High Commissioner for Human Rights; Cholewinksi R. (2005), S*tudy on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights*, Strasbourg: Council of Europe; PICUM, *Why 'undocumented' or 'irregular'?,* Brussels: Platform for International Cooperation on Undocumented Migrants, available at http://picum.org/picum.org/uploads/file_/TerminologyLeaflet_reprint_FINAL.pdf [last accessed 10 July 2017].

Section 1

Legal and policy developments on irregular migration: trends at international, European, national and local level

Immigration is a policy issue that involves all levels of governance: national states keep their legal competences on deciding who can or cannot migrate into their territories, but migration has a global dimension and international human rights law is often applied to protect international migrants' rights. In Europe, the EU has assumed increasing powers over migration policies since the late 1990s when its Member States delegated competences on immigration to the Union. Finally, although local authorities do not hold competences on immigration normally, their proximity to the population and their competences in the socio-economic sphere necessarily involve them in the governance of migrants' presence. This first section of this paper aims to provide a general overview of the legal and policy frameworks governing the arrival and presence of irregular migrants in Europe and the main policy trends observed at international, European, national and local level. Issues and topics introduced in general terms in this section will be further explored in sections 2 and 3 of this paper.

The global level: international legal and policy developments on irregular migration

International human rights law

The international community has not adopted yet an international legal instrument specifically or comprehensively addressing the issue of irregular migration, at least not one that is widely agreed upon worldwide. Only international human rights law has so far been offering a legal framework to deal with the situation of irregular migrants at global level. Irregular migrants are indeed protected by the UN fundamental Human Rights conventions (ratified by all European States) that apply indistinctly to individuals irrespective of migratory status, including the International Convention on the Elimination of all Form of Racial Discrimination (1965), the International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of all Forms of Discrimination against Women (1979), the Convention on the Rights of the Child (1989), the Convention on the Rights of Persons with Disabilities (2006). The UN treaty bodies supervising the application and providing legal interpretation of these conventions have consistently reinforced that the principle of non-discrimination covers migrants in irregular situations, who are therefore protected by the aforementioned treaties.[22]

The international community, however, has long recognised the need of an instrument that regulates specifically the condition and protection of migrant workers, including those with

[22] *E.g.* Committee on the Elimination of Racial Discrimination (CERD), 23 February-12 March 2004, *General Recommendation No. 30 on discrimination against non-citizens. 64th session*, available at www2.ohchr.org/english/bodies/cerd/docs/cerd-gc30.doc.

irregular status, particularly since the economic downturn in the 1970's, which clearly showed the risks of abuse and discrimination that migrant workers face, especially if in an irregular situation. Two ILO Conventions have been adopted to lay down specific provisions on human and labour rights of migrant workers and the members of their families.[23] The ILO Convention No. 143 of 1975 in particular was the first instrument containing specific provisions on the prevention of irregular migration and clandestine movements, as well as rights aimed at protecting irregular migrants from exploitation at work.[24] However, the international community has not found agreement on an instrument that is widely accepted upon, considering that the major destination countries in Europe and North America have not ratified the UN Convention which specifically tackles these issues, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)*. The treaty was indeed adopted by the UN General Assembly in 1990, but entered into force only in 2003 after twenty ratifications. It became one of the nine UN core human rights treaties, but has not been ratified by any EU Member State.[25]

The ICRMW is a comprehensive instrument that applies to all migrant workers and members of their families without distinction[26] and covers the '*entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence*'.[27] The Convention provides for the rights applying to all migrant workers and members of their families irrespective of migratory status, but also establishes cooperation obligations for the orderly return of irregular migrants[28] and the fight against 'clandestine movements and employment of migrant workers in an irregular situation'.[29] It additionally provides obligations on eradicating situations of irregularity, through *e.g.* regularisations.[30] Although the text addresses both instances of law enforcement and protection vis-à-vis irregular migrants, its provisions on irregular migration are central in the reasons why European States refrained from adopting the ICRMW.

A study carried out by the International Organization for Migration (IOM) and commissioned by the European Parliament found that EU countries perceived the Convention's rules addressing the rights of irregular migrants and the prevention of irregular migration as one of the main obstacles to its ratification. The European concerns included arguments that the ICRMW's ratification would entail the obligation to grant too many rights to migrants with irregular status; it would infringe upon States' sovereignty in limiting their competence to decide upon entry and stay of migrants; legalise irregular workforces; counter the struggle against irregular immigration; and limit the possibilities of States to remove migrants who lose or leave the employment for which permission to enter was granted. In many cases, the study found that these arguments were based on Member States' misconceptions of the Convention, and that instead the ICRMW reflects a 'careful balance'

[23] ILO Convention on migration for employment No. 97 (1949); ILO Convention on migrant workers (supplemental provisions) No. 143 (1975).
[24] Cholewinski, R. (2012), *International Labour Migration*, in Opeskin P., Perruchoud R., Redpath-Cross J. (eds.), *Foundations of International Migration Law, CUP*, Cambridge, p. 288.
[25] At the time of writing (June 2017), the Convention was ratified by 51 UN countries, and none of them is an EU Member State. The list of States that ratified the Convention can be found at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en [last accessed 15 June 2017].
[26] Art. 1, para.1.
[27] Art. 1, para. 2.
[28] Art. 67.
[29] Art. 68.
[30] Art. 69.

between controlling migration and protecting irregular migrants' rights.[31] The European Parliament itself has repeatedly shown strong favour for the ICRMW and adopted a number of resolutions calling on Member States to ratify the Convention.[32]

The New York Declaration for Refugees and Migrants and the Global Compact on Safe, Regular and Orderly Migration

At UN political level on 19 September 2016 Heads of State and Government came together at a High Level Summit to discuss specifically, for the first time at the global level within the UN General Assembly, issues related to migration and refugees. The Summit marked a turning point as all 193 UN Member States unanimously adopted the 'New York Declaration for Refugees and Migrants'[33] which recognised the need for a comprehensive approach to human mobility and enhanced cooperation at the global level and provided a set of commitments, including on protecting the safety, dignity and human rights and fundamental freedoms of *all migrants, regardless of their migratory status*, and sharing responsibility on a global scale by *e.g.* supporting countries with heavy migratory pressures and strengthening global governance of migration. UN countries pledged to cooperate closely to, *inter alia*, *facilitate and ensure safe, orderly and regular migration, including return and readmission*. The Summit culminated with the commitment (included in Annexes to the New York Declaration) to set in motion a process of intergovernmental consultations and negotiations for the development of two *Global Compacts*: a "*Global Compact on Refugees*" and a "*Global Compact on Safe, Regular and Orderly Migration*".

The negotiations and consultations for the development of a Global Compact on Safe, Regular and Orderly Migration (the Global Compact) started in early 2017 and its adoption should happen at an intergovernmental conference on international migration in 2018. The Global Compact is set to: provide a range of principles, commitments and understandings among Member States regarding international migration in all its dimensions; make an important contribution to global governance and enhance coordination on international migration; present a framework for comprehensive international cooperation on migrants and human mobility; and deal with all aspects of international migration, including the humanitarian, developmental, human rights-related and other aspects of migration. The negotiations around the Global Compact currently represent the main intergovernmental political process at the global level on (*inter alia*) irregular migration. The Global Compact should indeed address issues such as the 'effective protection of the human rights and fundamental freedoms of migrants, including women and children, regardless of their migratory status'; 'international cooperation for border control'; 'combating trafficking in persons, smuggling of migrants and contemporary forms of slavery', 'identifying those who have been trafficked and considering providing assistance, including temporary or permanent residency, and work permits, as appropriate'; 'reduction of the incidence and impact of irregular migration'; 'consideration of policies to regularize the status of migrants'; 'return and readmission, and

[31] Touzenis K. & Sironi A. (2013), *Current challenges in the implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, available at: www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROI_ET(2013)433715_EN.pdf.

[32] *E.g.* European Parliament (2009), *Resolution on the situation of fundamental rights in the European Union 2004-2008*, P6_TA(2009)0019, 14 January 2009, §158, available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2009-0019&language=EN&ring=A6-2008-0479; European Parliament (2009), *Resolution on a Common Immigration Policy for Europe: Principles, actions and tools,* (2008/2331(INI)), P6_TA(2009)0257, 22 April 2009, § 38, available at http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2009-0257.

[33] UNGA, *New York Declaration for Refugees and Migrant*, [A/71/L.1], available at: https://www.iom.int/sites/default/files/our_work/ODG/GCM/NY_Declaration.pdf.

improving cooperation in this regard between countries of origin and destination'.[34]

Finally, it is noteworthy that the Global Compact is framed in the wider context of Target 10.7 of the 2030 Agenda for Sustainable Development.[35] The 2030 Agenda, adopted by world leaders on 1st January 2016, is the most far-reaching recent political document adopted by the 193 UN Member States, as it introduced the 17 'Sustainable Development Goals' (SDGs) which will guide the world's development in the next 15 years, and aims to end all forms of poverty, fight inequalities and tackle climate change. Differently from the previous 'Millennium Development Goals' (which did not address migration issues), the 2030 Agenda took into account migration and mentioned it in relation to five of its 17 SDGs.[36] In particular, at Goal 10, Target 7, UN Member States committed to cooperate internationally to '*facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies'.*

The European level: the EU's legal and policy developments on irregular migration

The EU legal framework on immigration: integrating regular migrants and combating irregular migration

The EU obtained legislative competences on immigration in 1999 with the entry into force of the Treaty of Amsterdam. Since the entry into force of the Lisbon treaty in 2009, the EU's legal basis on immigration is represented by Articles 79 and 80 of the Treaty on the Functioning of the EU (TFEU), which clarified that immigration policies and legislation on migration (both regular and irregular)[37] and integration[38] are a 'shared competence' of the Union and its Member States. The EU ordinary legislative procedure now applies to policies on both regular and irregular migration and the Court of Justice assumed full jurisdiction on immigration and asylum legislation.[39]

The EU's common immigration policy is based on a sound *disjunction between policies of inclusion for regular migrants and policies of exclusion for those with irregular immigration status*.[40] Such a disjunction is clearly reflected by Art. 79 TFEU which states that the EU "*shall develop a common immigration policy aimed at* [...]

- *the fair treatment of third-country nationals residing legally in Member States*, and
- *the prevention of, and enhanced measures to combat, illegal immigration*".

[34] UNGA, *New York Declaration for Refugees and Migrant - Annex II*, [A/71/L.1], pp. 24-25, available at: https://www.iom.int/sites/default/files/our_work/ODG/GCM/NY_Declaration.pdf.
[35] UNGA, *Transforming our world: the 2030 Agenda for Sustainable Development* [A/RES/70/1], available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.
[36] Bakewell O. (2015), *Migration makes the Sustainable Development Goals agenda – time to celebrate?,* News Opinion [online], 11 December, available at: www.oxfordmartin.ox.ac.uk/opinion/view/315.
[37] Article 79, para. 1, 2 and 3.
[38] Article 70, para. 4.
[39] European Parliament (2017), *Fact Sheets on the European Union – Immigration Policy*, available at http://www.europarl.europa.eu/ftu/pdf/en/FTU_5.12.3.pdf.
[40] Gilardoni G., D'Odorico M. and Carrillo D. (eds.) (2015), *KING - Knowledge for INtegration Governance - Evidence on migrants' integration in Europe*, Milan: Fondazione ISMU, available at: http://king.ismu.org/wp-content/uploads/KING_Report.pdf.

Accordingly, the Union has been setting up an EU legal framework on irregular immigration that focuses on preventing the arrival and enforcing the removal of irregular migrants. The EU has adopted some major pieces of legislation in this area whose core principle is that Member States cannot tolerate the presence of a migrant with irregular status, and should instead act for their swift removal. In particular:

- The Return Directive,[41] adopted in 2008, lays down the common standards and procedures to be applied in Member States for returning irregular migrants, including on the use of coercion, detention, re-entry bans and on the guarantees and rights of migrants involved in a removal procedure. The Directive (Art. 6) introduced *the core legal principle of the EU's policies on irregular migration, i.e. that Member States are obliged to ("shall") issue a return decision to any third-country national staying illegally on their territory* (unless they are willing to offer the individual a residence permit for humanitarian, compassionate, or other reasons). The Court of Justice of the European Union (CJEU) in 2015 emphasised that, in force of this Directive, a Member State cannot simply tolerate the presence of a migrant with irregular immigration status (by *e.g.* imposing a fine) rather than enforcing a removal or allowing for their regularisation.[42]

- The Facilitation Directive (Council Directive 2002/90/EC) provided a common definition of the crime of facilitating unauthorised entry, transit and residence. The directive was accompanied by a Framework Decision (2002/946/JHA) that required Member States to adopt criminal sanctions for such crime. In order to combat the facilitation of irregular migration (phenomena of trafficking and smuggling of people), in 2004 the EU also adopted Directive 2004/81/EC allowing for the issuance of residence permits 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, and cooperate with the competent authorities.

- The Employers Sanction Directive[43] (2009) prohibited the employment of migrants with irregular immigration status in the EU and imposed sanctions for employers who do so.

- The Carrier Sanctions Directive (2001/51/EC) required carrier personnel to control third country nationals' documentation at points of embarkation, and deny boarding to irregular migrants.

EU policy developments on irregular migration: combating 'illegal immigration'

In accordance with the legal basis of the Union's prerogatives on immigration, any EU policy development on irregular immigration has been based on the principle that unauthorised migration shall be prevented and combated. With the birth of a common immigration policy, the EU's multiannual policy programmes starting with the Tampere European Council Conclusions in 1999 have been asserting that the EU should "*ensure the integration into our societies of* [only] *those third country nationals who are lawfully resident in the Union*", and develop common policies on

[41] 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.
[42] Court of Justice of the European Union, C-38/14 *Zaizoune,* ECLI:EU:C:2015:260.
[43] 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.

asylum and immigration, that take into account "*the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes*".[44] Accordingly, irregular migrants have been excluded from any EU integration effort[45], seen as a *pull factor* for more irregular arrivals.

Instead, EU policies have only developed a control-oriented approach primarily aimed at:

- enforcing the *removal* of irregular migrants found on EU territory (policy developments specifically related to this issue are explored in-depth in section 2 of this paper)
- reinforcing the surveillance of the EU's external borders to *avoid irregular border crossings*
- imposing administrative and criminal *sanctions for third parties*, who – either as facilitators (smugglers or traffickers), employers, or carriers – have in some form facilitated the entry or stay of an irregular migrant

On the other side, it is amply noted that – with the exception of the Return Directive, which sets out a number of safeguards for migrants pending their removal process – EU policies and legislation have not been accompanied by measures addressing the second policy dimension of irregular migration, the one that deals with their treatment in the EU as holders of fundamental rights and persons in a condition of vulnerability that require measures of protection and inclusion.[46] Policy and academic literature has repeatedly criticised EU policies for missing the fundamental rights component (and a strategy towards its delivery) that should accompany policies of prevention and enforcement against irregular migration.[47] For instance, in its multiannual programme for the period 2010-2014 (known as the 'Stockholm Programme)[48], the Council made no mention of irregular migrants under the section on '*Proactive policies for migrants and their rights*', while it stressed the need for '*Effective policies to combat illegal immigration*'. The Council reiterated that '*The fight against trafficking in human beings and smuggling of persons, integrated border management and cooperation with countries of origin and of transit […] must remain a key priority*' and that *'An effective and sustainable return policy is an essential element of a well-managed migration system within the Union'*.

Following the Stockholm Programme, the EU's planning on migration policies has been framed by the European Commission's communication '*An open and secure Europe: making it happen'*[49] and

[44] Tampere Presidency Conclusions, *Presidency Conclusions of the Tampere European Council of 15-16 October 1999*, available at: https://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/en/EJN360.pdf.
[45] See Gilardoni G., D'Odorico M. and Carrillo D. (eds.) (2015), *op. cit.*
[46] Merlino M. & Parkin J. (2011), *Irregular Migration in Europe: EU policies and the Fundamental Rights Gap*, Brussels: Centre for European Policy Studies (CEPS).
[47] See Merlino M. & Parkin J. (2011), *op. cit*.; Carrera S. & Merlino M. (2010), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme,* in *CEPS Papers on Liberty and Security in Europe*, Brussels: Centre for European Policy Studies (CEPS); R. Cholewinski (2004), *European Union Policy on Irregular Migration*, in BoguszB., Cholewinski R., Cygan A. and Szyszcak E. (eds.), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff Publishers, p.182; Guild E., Carrera S. & Faure Atger A. (2009), *Challenges and Prospects for the EU's Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313 – April.
[48] Council of the European Union (2010), *The Stockholm Programme - An open and secure Europe serving and protecting the citizen,* 2010/C 115/01, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52010XG0504(01).
[49] European Commission (2014), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An open and secure Europe: making it*

the Council's 'Strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice' for the period 2014-2020.[50] The Commission emphasised that '*Preventing and reducing irregular migration is an essential part of any well-managed migration system'*, and the Council focused on addressing smuggling and trafficking in human beings more forcefully; establishing an effective common return policy; and enforcing readmission obligations in agreements with third countries. Interestingly, under the title '*A credible approach to irregular migration and return*' the guidelines also suggested focusing on Regional Protection Programmes and resettlement efforts – measures that apply to asylum seekers and refugees, not irregular migrants – showing a recent EU policy trend (that would quickly develop during the recent years of the 'refugee crisis') to link irregular migration to asylum policies (see more below).

In the most recent past, the main policy development on immigration at EU level has been represented by the publication, in May 2015, of the Commission's European Agenda on Migration.[51] The Agenda represents the main framework within which the European Commission has been promoting policy developments in response to the 'Mediterranean migration crisis'. The Agenda was meant to indicate both immediate actions in response to the human tragedies unfolding in the Mediterranean, but also '*the steps to be taken in the coming years to better manage migration in all its aspects'*. This second part of the Agenda – structured on four pillars of which the first is dedicated to irregular migration – serves as a programmatic document illustrating the European Commission's proposals for the medium and long term actions to better developing EU migration policies. The proposals are based on the declared assumption that 'the migration crisis in the Mediterranean has […] revealed much about the structural limitations of EU migration policy'.[52] However, with regard to irregular migration, the Agenda did not mark a significant break from the EU's long-standing fight against irregular migration, considering the Agenda's first pillar is dedicated to '*Reducing the incentives for irregular migration'* and is focused on '*the fight against smugglers and traffickers'*; '*return'*; and '*addressing the root causes of irregular and forced displacement in third countries'.*

A 'holistic approach to migration'- strengthening the links between irregular migration and asylum policies

As a consequence of the increasing numbers of people arriving irregularly at EU borders to seek asylum during the refugee crisis, EU policy makers have been frequently calling for the development of a '*holistic approach to migration*'[53] to address EU policies on migration *and* asylum jointly, and guide the EU's internal *and* external action on migration concertedly. This has led to an

---

happen, COM(2014) 154 final, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/basic-documents/docs/an_open_and_secure_europe_-_making_it_happen_en.pdf

[50] Council of the European Union (2014), *26/27 June 2014 - Conclusions*, EUCO 79/14, available at http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2079%202014%20INIT#page=2.

[51] European Commission (2015), *A European Agenda On Migration - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, [COM(2015) 240 final], available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf.

[52] *Ibidem*, p. 6.

[53] *E.g.* Avramopoulos D. (2015), *Remarks by Commissioner Avramopoulos at the end of the official visit to Malta,* 26 March, available at https://ec.europa.eu/commission/commissioners/2014-2019/avramopoulos/announcements/remarks-commissioner-avramopoulos-end-official-visit-malta_en; Avramopoulos D. (2016), *Remarks by First Vice-President Timmermans and Commissioner Avramopoulos to the European Parliament Plenary Session*, 12 May, available at: http://europa.eu/rapid/press-release_SPEECH-16-1726_en.htm.

unprecedented level of *entanglement between policies on irregular migration and policies on asylum*, which in the past had been kept clearly separate. With regard to *return policies*, a recent study of the European Migration Network (EMN) has found that a number of Member States have placed increasing policy importance on the return of, in particular, those who become irregular after the rejection of an asylum application. As seen above, even if in 2014-2015 the EU rate of rejected asylum applications decreased, the absolute number of rejections increased (from 191,000 in 2011 to 296,000 2015) with the increase in the total number of asylum applications lodged in the EU,[54] which led the Commission to suggest that '*addressing abuses of the asylum procedures'* is one solution to increase the return rate of irregular migrants. The Commission indeed presented the reform of the Common European Asylum System (CEAS) as an opportunity '*to ensure streamlined and efficient links between asylum and return procedures'*.[55] Accordingly, the proposals to reform the CEAS included measures to 'tackle irregular migration' and the Commission has *e.g.* proposed to expand the purpose of the Eurodac system (the EU database collecting the fingerprints of asylum seekers and meant to determine the Member State responsible for the assessment of an asylum application) to allow the storing and searching of data of third country nationals who, *not being asylum applicants*, are found irregularly staying in the EU, so that they can be identified for return and readmission purposes.[56] Similar to return policies, proposals addressing the 'root causes' of irregular migration (and prevent irregular arrivals) are also mingled with solutions that would normally fall within the sphere of asylum policies. And so the Council's 2014 Strategic guidelines in the Area of Freedom, Security and Justice, for instance, presented the strengthening of Regional Protection Programmes and resettlement efforts as measures to develop the Union's approach on irregular migration; while the European Agenda on Migration cited the humanitarian aid provided to refugees and Internally Displaced Persons as one of the EU's responses to reduce irregular migration.[57]

The external dimension of immigration policies: addressing the root causes of irregular migration, and fostering readmissions and returns

In the effort of developing a 'holistic approach to migration', EU policy makers have been increasingly focusing on the external dimension of irregular immigration policies, with the double aim of: 1) preventing unauthorised arrivals to Europe by addressing the 'root causes' of irregular migration and 2) increasing return rates by formally seeking third countries' cooperation on irregular migrants' readmissions.

Since 2005, the EU has been developing the 'Global Approach to Migration and Mobility' (GAMM), an overarching policy framework for the EU's external policy on migration and asylum. The framework has been used to guide policy dialogues and cooperation with non-EU countries on

[54] European Migration Network (2016a), *op. cit.*

[55] European Commission (2017), *Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - A renewed action plan*, COM(2017) 200 final, available at http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0200.

[56] The Commission announced that it '*will propose to extend the scope of Eurodac as a means to contribute to the fight against irregular migration by allowing the system to be used to facilitate the return of irregular migrants. In doing so, Eurodac will be used as a means to accelerate the identification and re-documentation of migrants and will enable a better assessment of the prospect of absconding, thus enhancing the effectiveness and speed of return and readmission procedures*'; see European Commission (2016), *Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and enhancing legal avenues to Europe*, COM(2016) 197 final, available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52016DC0197

[57] COM(2015) 240 final, p. 8.

migration. In 2011, a European Commission Communication structured the GAMM on four pillars, including one on '*Preventing and reducing irregular migration and trafficking in human beings*'. In line with the EU's internal policy focus on prevention of arrivals and facilitation of removals, the GAMM Communication recommended fostering capacity and skills-building for non-EU countries in preventing irregular migrants' departures to the EU, fighting trafficking and smuggling and strengthening integrated border management through Frontex' support. The Commission also suggested that '*readmission and return should be firmly embedded in the broader Global Approach*', and to link agreements on readmissions to visa facilitation deals. In this case, the Communication also suggested that '*the dialogue and cooperation with* [non-EU] *partners should strive to protect the human rights of all migrants throughout their migration process*'.[58]

The EU's external action on (irregular) migration assumed a more central role with the adoption of the European Agenda on Migration (2015), as the Commission sought to introduce a '*comprehensive approach to better manage migration and address its root causes, linking the internal dimension to work done with third countries'*.[59] The Agenda stressed the need to address the 'root causes of irregular and forced displacement in third countries' as one of the first actions the EU should take to reduce the incentives for irregular migration.[60] Half of the six key actions proposed under the Agenda's section dedicated to irregular migration concern the EU's external action (that is: addressing the root causes through development cooperation and humanitarian assistance; making migration a core issue for EU delegations; and stronger action so that third countries fulfil their obligations to readmit their nationals).[61]

As a follow up to the Agenda, in June 2016 the Commission launched a new Migration Partnership Framework with third countries to better manage the external aspects of migration, whose objective is to coordinate the EU and its Member States collective leverage to agree tailor-made approaches with third countries to jointly manage migration and further improve cooperation on return and readmission.[62] In particular, under the Migration Partnership Framework the EU has identified priority (non-EU country) partners along the migration routes with which to increase cooperation, in order to reach a number of long and short term objectives on migration policies. These *e.g.* include fighting trafficking and smuggling; increasing returns of irregular migrants (through the conclusion of readmission agreements); addressing the root causes of irregular migration; and improving opportunities in countries of origin through public and private investment, fostering sustainable development that allows people to create a future in their home country. Under the Partnership Framework, the EU has so far been working with authorities in Mali, Nigeria, Niger, Senegal, and Ethiopia and, by making use of different policy elements (development aid, trade, mobility, energy, security, or digital policy) has started negotiations on a readmission agreement with Nigeria, continued the technical dialogue on returns and readmission with Ethiopia, deployed European Migration Liaison Officers in all the five priority countries, and supported

[58] European Commission (2011) *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The Global Approach to Migration and Mobility*, COM/2011/0743 final, available at: eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52011DC0743

[59] European Commission (2017), *Commission calls for accelerated delivery under the Migration Partnership Framework and further actions along the Central Mediterranean Route*, [press release of 2 March 2017], available at: europa.eu/rapid/press-release_IP-17-402_en.htm

[60] COM(2015) 240 final, p. 7.

[61] COM(2015) 240 final, p. 10

[62] European Commission (2017), *Questions & Answers: Making return and readmission procedures more efficient* (fact sheet), 2 March 2017, available at: europa.eu/rapid/press-release_MEMO-17-351_en.htm

actions to combat migrant smuggling in Niger, including apprehending smugglers and seizing vehicles.[63]

One crucial component of the EU's external action for the return of irregular migrants is negotiating and concluding EU Readmission Agreements. These are agreements concluded by the EU with non-EU countries to facilitate the readmission of irregular migrants in a country of origin and transit to which persons who are expelled by the EU are returned. They are based on reciprocal obligations and concessions on, for instance, visa facilitations and other incentives (such as financial support or special trade conditions) in exchange for readmitting unauthorised migrants. So far 17 readmission agreements have been concluded by the EU and the Commission is negotiating new agreements, including with Belarus, Nigeria, Tunisia and Jordan.[64]

The lack of legal channels for labour migration

The European Agenda on Migration recognised that '*a clear and well implemented framework for legal pathways to entrance in the EU (both through an efficient asylum and visa system) will reduce push factors towards irregular stay and entry*'. EU policy makers have often claimed that opening more regular migration routes for non-EU nationals wishing to find work opportunities in the EU would reduce the numbers of irregular migrants by offering a legal alternative to perilous irregular migration journeys.[65] However, while the EU has promoted measures allowing legal avenues for refugees to reach Europe through EU resettlement and humanitarian schemes, it is notable that it has not offered a legal alternative to irregular migration for low or medium-skilled migrants seeking work opportunities in the EU.

The EU's legal framework on labour immigration channels, in particular, consists of:

- the so-called EU Blue Card Directive'[66] enabling third-country workers to take up *highly qualified* employment in the Member States
- The Recast Researcher and Students Directive[67] 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 (adopted in 2016 and to be transposed by May 2018)
- Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an *intra-corporate transfer*, allowing for easier branch relocations in the EU for managers, specialists and trainee employees of businesses and multinational corporations
- The Seasonal Workers Directive[68], allowing migrant seasonal workers to enter and temporarily legally stay in the EU for a maximum period of between five and nine months

[63] European Commission (2017), *Migration Partnership Framework - a new approach to better manage migration,* (fact sheet) available at: https://eeas.europa.eu/sites/eeas/files/factsheet_migration_partnership_framework_update13_12_2016_final.pdf
[64] European Commission (2017), *Questions & Answers: Making return and readmission procedures more efficient* (fact sheet), 2 March 2017, available at: europa.eu/rapid/press-release_MEMO-17-351_en.htm
[65] *E.g.* Juncker J.C., *My priorities*, available at: http://juncker.epp.eu/my-priorities
[66] Directive 2009/50/EC
[67] Directive (EU) 2016/801
[68] Directive (EU) 2014/36

to carry out an activity dependent on the passing of seasons, while retaining their principal place of residence in a third country.[69]

Apart from the Seasonal Workers Directive (which only allows for a temporary legal stay), the EU has restricted legal migration possibilities mainly to highly skilled workers (or students) only, leaving no real possibilities to medium or low-skilled third country nationals to migrate legally to the EU on employment grounds. It is commonly noted by international institutions, civil society and policy literature that the lack of legal channels for labour migration to the EU, combined with high demands for workers with lower skill levels, including in agriculture, construction, health, domestic work and service sector jobs in Europe, contributes to increasing both the levels of irregular immigration flows and the number of foreign workers falling into a condition of irregularity, informal employment and labour exploitation.[70]

The national level: the evolution of policies on irregular migration and irregular migrants in Europe

Immigration to European countries has seen different phases and features in the differing national contexts of North-Western, Southern, and Eastern Europe. As a consequence, the national approaches taken by European states to immigration can differ significantly (particularly prior to the entry into force of the Treaty of Amsterdam that transferred competences on migration to the EU). However, it is observed that European immigration policies are increasingly converging and that the EU has played a crucial role in generating convergence and determining the forms that it takes.[71] The European Migration Network (EMN) has identified common drivers of legislative changes amongst Member States in their policies on irregular migration, including:

- '*Accession to the EU and changes to EU legislation*'
- '*influxes of irregular migrants'*
- '*public opinion*'
- '*the opinion of NGOs and associations'* (in, for example, consideration of fundamental rights)
- '*the economic crisis'*

[69] European Parliament (2017), *Fact Sheets on the European Union – Immigration Policy*, available at http://www.europarl.europa.eu/ftu/pdf/en/FTU_5.12.3.pdf.

[70] *E.g.* UNESCO (2016), *Cities Welcoming Refugees and Migrants,* Paris: United Nations Educational, Scientific and Cultural Organization, available at http://unesdoc.unesco.org/images/0024/002465/246558e.pdf; United Nations News Center, *Europe should make 'mobility' central in migration policy, UN rights expert says,* available at http://www.un.org/apps/news/story.asp?NewsID=51163#.WUVtlBOGN-U; LeVoy M. (2013), *PICUM's Five Main Concerns,* intervention at *UN Migrant Workers Committee - Day of General Discussion on Labor Exploitation*, 7 April 2013, available at http://www.ohchr.org/Documents/HRBodies/CMW/Discussions/2014/MichelleLevoy.pdf; Triandafyllidou A. & Marchetti S. (2014), *Europe 2020: Addressing Low Skill Labour Migration at times of Fragile Recover - RSCAS Policy Papers 2014/05*, San Domenico di Fiesole: European University Institute, available at: http://cadmus.eui.eu/bitstream/handle/1814/31222/RSCAS_PP_2014_05.pdf?sequence=1; Orrenius P. M. & Zavodny M. (2016), *op. cit.*

[71] Geddes A. & Scholten P. (2016), *The Politics of Migration and Immigration in Europe*, London; Thousand Oaks: SAGE Publications; Mahnig H. (2000), *Country-Specific or Convergent? A typology of immigrant policies in Western Europe, in Journal of International Migration and Integration*, vol. 1, pp 177-204.

- *'global developments'*.[72]

Having already analysed the main policy developments at EU level, this section will briefly introduce only those aspects of immigration law that were not – at least directly – steered by EU policies (*e.g.* removals or immigration detention), and were instead mainly driven by national reforms, such as irregular migrants' criminalisation and access to services. The issues introduced in this section will be considered in more depth in sections 2 and 3 below.

The main national legislative framework establishing the conditions under which a third-country national may, enter, stay and settle in a Member State is usually represented by a principal Act (named Aliens Act, Residence Act of Immigration Law), sometimes complemented by specific laws on border control, returns and expulsions.[73] However, other areas of legislation, such as criminal law or legislation related to health care, education and social welfare, have increasingly been used by Member States as additional instruments to discourage and punish irregular entries and stays (see below).

The evolution of national policies

- *Between the 1970s and the 1990s: imposing restrictions on foreigners' entry and stay.*
  To understand the evolution of policies on irregular migration in European states, it is worth noting that the aim of controlling immigration (and thus fighting unwanted irregular immigration) has been a common feature of European national policies only after the 1970s in countries, like Germany, France or the UK[74] with a long tradition of immigration and a previous history of active recruitment policies for foreign workers, or open migration regimes for post-colonial citizens. Similarly, in the mid-1990s countries that passed from being territories of emigration to countries of immigration – particularly in Southern Europe – introduced regulations to restrict the possibilities of non-EU nationals to immigrate.[75] Since then, the trend in European countries with regard to irregular migrants has been one of increasingly restrictive policies,[76] and the fight against irregular migration has become a policy priority for the majority of EU Member States.[77] However, the imposition of conditions on the entry and stay of non-EU nationals did not stop irregular migrants' arrival to and stay in Europe.

- *Between the late 1990s and the 2000s, sharpening the fight against irregular entries and stays.*
  During this period, European states faced by increasing irregular immigration inflows adopted new laws and policies to toughen their fight against irregular migrants. In particular, a number of Member States implemented policies aimed at discouraging irregular entries and stays, by *criminalising irregular migrants* and *excluding them from public services*. With regard to *policies*

[72] EMN (2013), *Practical Measures to Reduce Irregular Migration*, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/0a_emn_synthesis_report_irregular_migration_publication_april_2013_en.pdf.
[73] *Ibidem*.
[74] In the UK, restrictions on immigration from former British colonies started already in 1962 with the Commonwealth Immigration Act, and were toughened in 1971 with the Immigration Act of that year. See Geddes A. & Scholten P. (2016), *op. cit.*
[75] De Haas H., Natter K., Vezzoli S. (2016), *Growing Restrictiveness or Changing Selection? The Nature and Evolution of Migration Policies*, Oxford: International Migration Institute, available at: https://www.imi.ox.ac.uk/publications/wp-96-14; Geddes A. & Scholten P. (2016), *op. cit.*; Triandafyllidou A. (2016) (ed.), *Irregular Migration in Europe: Myths and Realities*, New York: Routledge.
[76] De Haas H., Natter K., Vezzoli S. (2016), *op. cit.*
[77] EMN (2013), *op. cit.*

excluding irregular migrants from public services (and involving service providers in their identification), one main example was represented by the Dutch *Linking Act*[78], which already in 1998 provided that third-country nationals without a residence permit would be excluded from 'collective provisions' (with some exceptions for basic services). It required that service providers check the immigration status of any individual requesting a service to deny access to irregular migrants.[79] Similarly, in 2005, the *German Residence Act* imposed a duty on all public bodies, including service providers, to notify the competent immigration or police authorities when they obtain information about someone who is without a valid residence permit.[80] Italy's 2009's '*Security Package*'[81] amended the Italian Consolidated Law on Immigration to require that foreign nationals should exhibit a valid residence permit to request a public service (with the exclusion of compulsory education and certain health treatments) and to be issued with certificates of civil status, licenses, authorisations and so forth.[82]

As aforementioned, European countries also resorted to criminal law as a tool to intensify their fight against unwanted immigration. In particular, criminalising and sanctioning irregular migrants for their entry and/or stay has been a policy trend in European states since 1970s, but it rapidly expanded throughout the 2000s, as in the examples of, *inter alia,* the aforementioned German 2005 *Residence Act*, or the Italian 2009 *Security Package*[83] which established criminal sanctions for irregular entries and stays. As we shall see below, both irregular entries and stays today are sanctioned with fines and/or imprisonment by the majority of Member States. Together with the criminalisation of irregular migration *per se,* in the 2000s several Member States further exacerbated the criminalisation process, by *sanctioning people engaging with irregular migrants,* increasing penalties on smugglers, but also punishing behaviours beyond the traditional crimes of smuggling and trafficking. The European Union Agency for Fundamental Rights (FRA) *e.g.* reported in 2014 that in all but five EU Member States, national laws impose sanctions (both fines and imprisonment) on landlords renting properties to irregular migrants.[84] The French Government of Nicolas Sarkozy was accused of promoting a 'crime of solidarity' (*délit de solidarité*) because of a 2007 law[85] which imposed sanctions of up to five years imprisonment for any person providing direct or indirect assistance to irregular immigrants, without restricting the criminalisation to those who profited from the irregular migration.[86] In Spain, Organic Law 2/2009 raised penalties on serious immigration crimes, and introduced a number of new immigration offences including *e.g.* the crime of helping an irregular immigrant to remain in Spain irregularly, or consenting, as a dwelling owner, to his/her registration in the

[78] *Koppelingswet,* Law of 26 March 1998

[79] EMN (2012), *Practical measures for reducing irregular migration in The Netherlands*, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/nl_20120424_irregularmigration_en_version_final_en.pdf

[80] *Aufenthaltsgesetz,* Section 87, in force since 1 January 2005.

[81] Italian Law No. 94/2009.

[82] Italian Legislative Decree 286/1998 (*Testo Unico sull'Immigrazione*), Art. 6 par. 2.

[83] Italian Legislative Decree 286/1998 (*Testo Unico sull'Immigrazione*), Art. 10 *bis*.

[84] FRA (2014), *Criminalisation of Migrants in an Irregular Situation and of persons engaging with them,* p. 13, available at http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them

[85] French Law 2007-1631 of 20 November 2007

[86] Duarte de Carvalho J. M. (2016), *The Effectiveness of French Immigration Policy Under President Nicolas Sarkozy*, in *Parliamentary Affairs,* (2016) 69 (1): 53-72.

Municipal Register using a dwelling that is not his/her real address.[87]

- *Between the late 2000s and early 2010s, signs of trend reversals*.
  Although developments in the 2000s have determined a general situation of criminalisation and exclusion from services for irregular migrants, in the most recent past several European governments have begun to show a modest trend reversal towards processes of de-criminalisation and extension of irregular migrants' entitlements to social services, in some cases motivated by the negative impacts that the marginalisation and criminalisation of irregular migrants had on their fundamental rights, but also on public interests. In particular, instances of de-criminalisation could be observed in *e.g.* France, where irregular stay was decriminalised in 2012, or in Italy, where the parliament voted for the repeal of the crime of irregular entry and stay in 2014 (policies on criminalisation and de-criminalisation of irregular entry and stay will be explored in detail in *Part 2* of this paper). In France, the aforementioned legal provision nicknamed as 'crime of solidarity' was repealed in January 2013.

  Instances of *expansion* of irregular migrants' access to services can be observed in several Member States, particularly with regard to fundamental services, like health care and education. For instance, in 2009 and 2011, the aforementioned German Residence Act was amended to exclude medical[88] and educational institutions[89] from the obligation to report their patients and students with irregular status to the immigration authorities. The most salient example is though that of Sweden which in 2013 expanded irregular migrants' access to health care to the same level of access provided to asylum seekers. As for education services, in Spain and Italy national courts clarified irregular teen-agers' right to non-compulsory education and to receive a school diploma even after turning 18. Beyond a requirement to uphold international obligations on migrants' social rights, Member States indeed do recognise some access to services for irregular migrants also in view of very pragmatic reasons – such as ensuring public health and order – in the interest of the wider population. The uneven geography of entitlements is reported in the COMPAS study '*Outside and In: Legal Entitlements to Health Care and Education for Migrants with Irregular Status in Europe*' (Spencer and Hughes, 2015). It is further considered Section *3* of this paper.[90]

Regularisation programmes

Finally, it is worth noting that alongside efforts to return, criminalise and exclude irregular migrants, national governments in Europe have often had to come to terms with the fact that these policies were not always effective in discouraging the persistent unlawful stay of large numbers of irregular migrants. Therefore, European governments have frequently resorted to *ad-hoc* regularisation

[87] Jonjić T. & Mavrodi G. (2012), *Immigration in the EU: policies and politics in times of crisis 2007-2012*, San Domenico di Fiesole: European Union Democracy Observatory (EUDO), available at: www.eui.eu/Projects/EUDO/Documents/2012/Publications/EUDOReport5.pdf.

[88] General Administrative Provision of the Federal Department for the Interior, § 88.2 amending the German Residence Act, 2009 (*Allgemeine Verwaltungsvorschrift des Bundesinnenministeriums zum Aufenthaltsgesetz*)

[89] See German Federal Law Gazette I no. 59 of 25. November 2011, p. 2258

[90] Spencer S. & Hughes V. (2015a), *Outside and in: Legal Entitlements to Health Care and Education for Migrants with Irregular Status in Europe*, Oxford: COMPAS, available at: www.compas.ox.ac.uk/media/PR-2015-Outside_In_Mapping.pdf; The findings of the this study are also summarised in Spencer S. & Hughes V. (2015b), *Fundamental Rights for Irregular Migrants: Legal Entitlements to Healthcare and School Education Across the EU28*, in *European Human Rights Law Review*, Issue 6, 604-616; also see, Geddes A. (2003), *Migration and the Welfare State in Europe,* in S. Spencer (Ed), *The Politics of Migration: Managing Opportunity, Conflict and Change*, Oxford: Blackwell/Political Quarterly. *pp* 150-162

programmes[91] that allowed them to bring into the mainstream society irregular migrants who would otherwise live in an almost chronical situation of marginalisation. Regularisations are known to respond not only to humanitarian reasons, but also to the economic needs of Member States in need of legalising certain parts of their foreign workforce. Already in 2005, it was estimated that these programmes have allowed the regularisation of 3.5 million migrants in Europe.[92] Since the 1970s, 40 such amnesties were applied around the world, 15 of which by countries in Southern Europe, including Greece, Italy, Portugal and Spain.[93] Italy and Spain are normally indicated as the countries that have carried out the largest regularisation programmes in Europe (with numbers as high as approximately 600,000 in Italy in 2002 and approximately 500,000 in Spain in 2005), but Northern and Eastern European states have also carried out similar programmes (lastly, Poland in 2013).

It is worth noting, though, that in the most recent past *this practice has not been used for a relatively long period of time* by European countries (apart exceptions, as in the aforementioned Polish case). Italy and Spain, for instance, after both carrying out six amnesties since 1986,[94] have not carried out regularisation programmes since 2009 (Italy) and 2005 (Spain). It is possible to believe that both the refugee crisis (moving policy focus to asylum seekers) and the economic crisis (providing for less job opportunities in the formal sector for migrants) have played a major role in this recent trend reversal.

The local level: regions and cities counterbalancing marginalising policies

EU and national policies focused on combatting irregular migration aim to discourage the stay of irregular migrants through policies of exclusion from both the labour market and the provision of services of social assistance. Such an approach creates a condition of marginalisation and vulnerability, particularly for those who cannot be returned to their country of origin irrespective of their will (and whose '*non-removability*' is not formally recognised – a topic further explored below). Return policies have not always been a viable solution to avoid the creation, in European cities, of marginalised parts of the population with no formal access to labour income or social assistance. It is estimated that irregular migrants represent between 3% and 6% of the population

[91] A "regularisation programme" is defined "as a specific regularisation procedure which (1) does not form part of the regular migration policy framework, (2) runs for a limited period of time and (3) targets specific categories of non-nationals in an irregular situation"; see Baldwin-Edwards M. & Kraler A. (2009), *REGINE - Regularisations in Europe: Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU*, Vienna: International Centre for Migration Policy Development (ICMPD), available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/documents/policies/legal-migration/pdf/general/regine_report_january_2009_en.pdf.

[92] Papadopoulou A. (2005), *Regularization programmes: an effective instrument of migration policy?,* Geneva: Global Commission on International Migration, available at: www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/gmp/gmp33.pdf.

[93] Larramona G. & Sanso-Navarro M. (2016), *Do regularization programs for illegal immigrants have a magnet effect? Evidence from Spain*, in *The Manchester School*, Vol. 84 No. 2, pp. 296 – 311

[94] Mc Govern C. (2014), *Regularization programs within the European Union: an effective tool to manage irregular migration?,* Barcelona: United Nations University Institute on Globalization, Culture and Mobility (UNU-GCM), available at: https://gcm.unu.edu/publications/policy-reports/regularization-programs-within-the-european-union-an-effective-tool-to-manage-irregular-migration.html.

in cities like Ghent, Genoa and Rotterdam,[95] reaching numbers as high as 440,000 people in London.[96] Local authorities (regions and cities) in their proximity to the population cannot overlook the presence in their territories of irregular migrants, and their duties of care prompts them to give a response to irregular migrants' social and basic needs.

Local authorities in Europe have taken a variety of policy approaches to deal with the marginalising aspects of EU and national policies. Local responses to migrants with irregular immigration status are diversified and vary from:

- '*security frame' policies* adopted by municipalities aiming to discourage irregular migrants in their cities and push them to move to other areas, by *e.g.* increasing hurdles in registration procedures or imposing controls on public transport and private houses (*e.g.* Italian cities in Lombardy governed by representatives of the Northern League party during the 5th Berlusconi government).[97]
- '*human rights'* or *'humanitarian frame' policies*, based on the recognition that rejected asylum seekers or irregularly-staying migrants in general are particularly vulnerable individuals who are at greater risk of marginalisation because of their irregularity. Cities adopting this approach show an open stance towards their 'irregular population' and find ways to facilitate their access to fundamental services and/or obtain legal status.[98] An alternative version of this approach is represented by policies based on the concept of *deservingness*, which offer inclusive measures for specific groups of (irregular) migrants who are seen as deserving rights and services more than others (e.g. children,[99] irregular workers needed by the local economy, etc).[100]

Many local authorities have thus adopted local inclusionary practices and initiatives to mitigate to an extent the marginalising aspects of EU and national immigration rules, and avoid the risks that a part of their resident population is abandoned with no right to work or recourse to public assistance. These initiatives include:

- Practices ensuring access to mainstream or targeted *health care* and *education*
- Providing *shelters* for particularly vulnerable individuals and *food* for people in need irrespective of their migration status
- Addressing the underlying cause of irregular status through access to *legal counselling* to regularise their immigration status or secure support for *voluntary returns*.
- Cooperation with local law enforcement authorities to find practical *solutions to irregular migrants' underreporting of crime*.

---

[95] Dirk Gebhardt (2010), *Irregular migration and the role of local and regional authorities*, in Carrera S. & Merlino M. (eds.), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, Brussels: Centre for European Policy Studies (CEPS).

[96] GLA Economics (2009), *Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK*, London: Greater London Authority, available at https://www.london.gov.uk/sites/default/ files /gla_migrate_files_destination/irregular-migrants-report.pdf.

[97] Caponio T. (2014), *The legal and political dimension of local integration policy - KING Project – Social Science Unit Desk Research Paper n. 9/July 2014*, Milan: Fondazione ISMU, available at king.ismu.org/wp-content/uploads/Caponio_DeskResearch.pdf

[98] *Ibidem*.

[99] Spencer S. (2016), *Postcode Lottery for Europe's Undocumented Children: Unravelling an Uneven Geography of Entitlements in the European Union*, in *American Behavioral Scientist*, 60(13), 1613–1628.

[100] Caponio T. (2014), *op. cit*.

- Engaging in *public campaigns*, targeting irregular migrants to make them aware of their entitlements in the city and the wider local population to raise awareness of the problems being addressed by the municipality. [101]

It is noteworthy to specify that in some cases local practices aim to provide irregular residents with a general access to all the different services offered within a municipality, rather than address a specific area of service provision. Barcelona, for instance, facilitates registration of its irregular residents without fixed addresses in the local municipal census (*padrón municipal*), a condition that is made sufficient by national legislation to access public services. In 2016 Madrid's City Council, inspired by practices of U.S. cities, including New York or San Francisco, approved the creation of a Municipal ID card, that people with no other documentation (mainly irregular migrants) can obtain and use to identify themselves when requesting the provision of a municipal service, including education or health but also public transportation, municipal cultural and sport centres and even the local employment agency.[102]

Practices ensuring access to health care, education, shelters and initiatives addressing irregular migrants' access to crime-reporting will be illustrated (alongside relevant national policies) in specific sub-headings in the third part of this paper, where access to services and justice for irregular migrants is considered.

Why do cities adopt inclusive initiatives?

The drivers for inclusive policies include a range of motivations:

- The need to respond to a *legal duty*: domestic laws establishing municipal duties of care over all the residents in need as well as international human rights law require cities to provide inclusive measures or safety nets for vulnerable individuals, including irregular migrants.[103]
- *Humanitarian or ethical arguments,* particularly in cities that commit to ensure the respect of fundamental rights not only as a matter of law but also for an ethical and moral imperative and a political vision of the city as a place where the rights of everyone must be respected.
- The necessity to achieve the general *policy goals of the city*. These objectives are often of a very *pragmatic nature* and include the need to *ensure cohesion, public health* (by *e.g.* ensuring access to preventative health treatments) *and public order* (by *e.g.* developing practices that ensure irregular migrants feel safe in reporting crime to local police bodies, or providing emergency shelters to fight prostitution or street sleeping)

[101] Delvino N. (2017 forthcoming), European Cities and Migrants with Irregular Status – Municipal initiatives for the inclusion of irregular migrants in the provision of services, Oxford: COMPAS, published as part of City Initiative on Irregular Migrants in Europe (C-MISE)
[102] Ibidem.
[103] A case in point is that of British municipalities, where national legislation explicitly requires municipalities to provide a safety net for destitute children and families who are excluded from mainstream support (because of their irregular immigration status), but they are not recompensed by the UK national government for doing so. Price J. & Spencer S. (2015), Safeguarding children from destitution: local authority responses to families with 'no recourse to public funds', COMPAS, University of Oxford

- Reasons of *efficiency in the management of service provision*, including the need to keep accurate statistics, reducing pressure on emergency services and cost effectiveness.[104]

How do cities implement inclusive initiatives without breaching national rules?

Municipalities in Europe have to struggle between the need to respect national immigration rules (requiring exclusionary policies) and constitutional and international obligations on irregular migrants' human rights in the socio-economic sphere (which they may consider require more inclusive measures). Municipalities are therefore at the forefront of intricate political and legal contradictions: they should not be too inclusive of irregular migrants, but their duty of care, and the implications of exclusion, mean that they are obliged in practice to take account of their presence with inclusionary policies. Adopting an inclusive approach is not straightforward for cities if national policies are particularly restrictive, and cities have found innovative, sometimes informal, expedients to provide a service without breaching national rules.[105] The methods cities use to provide services to irregular migrants include:

- *Involving external actors* who are not bound by the duty to report irregular migrants to act as intermediaries between public authorities and migrants. These normally are (but not only) NGOs funded by local city councils to provide a service that the municipality would not be in a position to offer directly without being obliged to report irregular clients or exposing the City Council to political pressures.
- *Involving NGOs in the development and governance of policy and practices* in the area of service provisions (*e.g.* setting up roundtables where local authorities and civil society can identify practices of good governance to balance conflicting goals concerning irregular migrants).[106]
- *Engaging in strategic litigation before international or national courts* in order to find a judicial basis to their inclusive practices.[107]
- *Attaching entitlements to local residency, rather than immigration status*, thus providing some form of complementary urban citizenship. This local form of belonging is a pragmatic attempt to solve practical challenges for social cohesion and general well-being. A relevant example is given by the municipal ID cards released by local authorities (particularly in North

---

[104] Spencer S. (2013), *City Responses to Migrants with Irregular Status*, in *Integrating Cities Conference, Tampere (Finland) 9 - 10 September 2013*, available at: www.compas.ox.ac.uk/media/PB-2013-034-City_Responses_Irregular_Migrants.pdf; Delvino N. (2017), *op. cit.*

[105] See Spencer, S (2017) 'Multi-level governance of an intractable policy problem: migrants with irregular status in Europe.' Journal of Ethnic and Migration Studies. DOI :10.1080/1369183X.2017.1341708.

[106] For example, the City and Federal State of Berlin in 2010 established a roundtable to bring together authorities in the Berlin Senate (the executive body governing the City-State of Berlin), local NGOs providing medical assistance to irregular migrants in the city, and the local medical association. The roundtable served to moderate the debate about access to health care for irregular migrants, agree on appropriate schemes to achieve concrete access to care in the *status quo* offered by the national legislation, and agree on policies to improve healthcare for people without residential status or health insurance. See Delvino N. (2017), *op. cit*.

[107] For example, representatives of the City of Utrecht, with the help of a Dutch human rights law firm, realised that by following the national legislation in refusing a basic service (namely accommodation) to a particularly vulnerable individual, the city's conduct would have exposed national exclusionary policies to be the target of a complaint before the European Committee of Social Rights (ECSR). Supported by the same law firm, the individual to whom the service was refused lodged such a complaint, and thus the national government's policy was condemned by the ECSR for breaching The Netherlands' international obligations under the European Social Charter. The ECSR's judicial decision was eventually used by the City of Utrecht as a legal backing for the City's practices in contrast with national policy. See Delvino N. (2017), *op. cit.*

American cities, but also in Madrid since 2016[108]) to their migrant residents, including irregular migrants, to facilitate their access to local services.

- *Informal solutions including unofficial internal guidelines* that ensure that migrants are not concretely excluded from a service.[109]

Local initiatives stimulating changes at national and international level

The mentioned local practices are of a particular relevance because they show the practical (and sometimes unintended) consequences of national and European policies in the area of irregular migration in real life. At the same time, local policies have often been pivotal for policy reversal and changes at national level. For example, in Italy, municipal initiatives with regard to irregular children's access to nursery schools or kindergartens led the national government to state explicitly that no children should be asked to show residence permits to register to pre-schooling facilities.[110] In the Netherlands, international litigation strategies supported by municipalities like Utrecht in the area of shelter provision to irregular migrants led the Dutch state to revise its policy of refusing shelters to irregular children and families, albeit the issue remains unresolved.[111]

Burdened by the need to deal with the impacts of marginalising policies, local authorities also engage in international and European fora to express their concern on the social consequences stemming from national and European immigration rules and advocate for change at European and national level. In 2014, mayors at the Global Mayoral Forum on Mobility, Migration and Development signed the *Barcelona Declaration* demanding that '*legislation has a more realistic approach in order to minimize the generation of exclusion and of persons who are in an irregular situation regarding regulatory norms'*. It is in 2017, though, that a group of European cities for the first time formed an international working group, The City Initiative for Migrants with Irregular Status in Europe', with the specific objective of sharing learning and building evidence on the topic of municipal initiatives for the inclusion of irregular migrants; and developing a shared city perspective on ways in which irregular migrants could be mainstreamed in EU policies.[112]

[108] Costantini L. (2016), *Madrid crea un 'DNI municipal' para los inmigrantes irregulares*, El Paìs, 28 October, available from http://ccaa.elpais.com/ccaa/2016/10/28/madrid/1477636316_204766.html [last accessed 30 May 2017]; Calleja I. S. (2016), *Los beneficios que tendrán los inmigrantes «sin papeles» con el nuevo DNI de Carmena,* ABC Espana, 29 October, available from: www.abc.es/espana/madrid/abci-beneficios-tendran-inmigrantes-sin-papeles-nuevo-carmena-201610290249_noticia.html [last accessed 30 May 2017].

[109] For example, Athens' municipality has been offering a service of food distribution for people in need which is officially restricted to citizens or legal migrants, but food is provided more than necessary so that those with irregular status can be offered the 'left over'. Amsterdam police's senior management adopted informally a policy not to question the immigration status of foreigners reporting a crime or not to patrol the areas around a local information and counselling centre for irregular migrants. See Delvino N. (2017), *op. cit.*

[110] Delvino N. and Spencer S. (2014), *Irregular migrants in Italy: law and policy on entitlements to services*, Oxford: COMPAS, available at www.compas.ox.ac.uk/2014/pr-2014-irregular_migrants_italy.

[111] See Delvino (2017), *op. cit.*

[112] See http://www.compas.ox.ac.uk/project/city-initiative-on-irregular-migrants-in-europe-c-mis/.

Section 2

Law enforcement policies

Apprehending irregular migrants: detection practices and human rights challenges

Following a period of decrease (from 2008 to 2013), the number of apprehensions of irregularly staying third country nationals in the EU-28 increased to 672,215 in 2014 and tripled in 2015 to 2,154,675 people. In 2016 though, this number halved to slightly less than 1 million people.[113] While the increase may be related to the sharp increase in irregular arrivals, Eurostat reports that the it might be due to Member States' changes in policies and practices on the checks they perform to apprehend migrants.[114] The temporary reintroduction of controls at some intra-Schengen borders should be taken into consideration, as well as the fact that during the period where a 'wave-through' policy was adopted along the Western Balkans , irregularly transiting third country nationals could have been apprehended more than once in different countries.[115]

The apprehensions of third country nationals with an irregular status in the EU happen through a variety of different practices that depend on Member States' different geographical position (countries at the EU external borders *vs*. countries with EU internal borders); and on different national legislation. Some Member States require public authorities and service providers to report irregular migrants to immigration authorities, while other Member States impose, by contrast, specific firewalls between immigration authorities and service providers in fundamental areas of service provision. Immigration detection practices take a number of forms and may include: identity checks; workplace inspections; large-scale raids; searches in places of accommodation; and the policing of sites where migrants are likely to be present.[116]

At EU level, common efforts on apprehensions are only organised on an occasional basis in the form of 'Joint Operations' coordinated by those Member States that temporarily hold the Presidency of the EU. In October 2014, the Italian Presidency of the EU *e.g.* launched the *ad-hoc* Joint Police Operation '*Mos Maiorum*', which led to the apprehension of 19,234 irregular migrants (9,890 at the external EU borders and 9,344 within the EU territory) over a period of two weeks. [117]

---

[113] Eurostat (2017), *Third country nationals found to be illegally present - annual data (rounded),* available at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_eipre&lang=en [last accessed on 15 June 2017]

[114] Eurostat (2017), *Eurostat statistics explained - Statistics on enforcement of immigration legislation,* available at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_enforcement_of_immigration_legislation#cite_ref-7 [last accessed on 15 June 2017].

[115] Indeed, according to Eurostat, the three Member States recording the highest numbers of apprehensions in 2015 were the three countries that were mostly 'hit by the wave' of asylum seekers and migrants that transited through the Balkans in that year: Greece (911 470 apprehensions), Hungary (424 055) and Germany (376 435).

[116] FRA (2011a), *Fundamental Rights of Migrants in an Irregular Situation in the European Union,* Luxembourg: Publications Office of the European Union, available at: http://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union.

[117] In 2013, a previous operation ('*Perkunas*') launched by the Lithuanian Presidency led to the apprehension of 10,459 migrants. See Council of the European Union (2015), *Final report on joint operation "mos maiorum"*, 5474/15, document partially available at: data.consilium.europa.eu/doc/document/ST-5474-2015-INIT/en/pdf.

The European Commission's efforts on apprehensions focus on monitoring activities, and the promotion of a higher degree of information-sharing between Member States through existing databases, including the Integrated Return Management Application (IRMA), SIS, VIS and Eurodac. Moreover, the Commission has proposed setting up new information systems, such as the European Travel Information and Authorisation System and the Entry-Exit System (*Smart borders*), for the automatic identification of people who have overstayed their visas[118]. With the aim of providing consistency amongst Member States practices and ensure respect of fundamental rights, the Commission's Return Handbook has also provided guidelines on apprehensions (see below).[119]

Human rights concerns

Civil society and the FRA report that apprehensions practices often interfere disproportionately with the fundamental rights of irregular migrants.[120] In particular, apprehensions of migrants close to service providers (like schools or hospitals), together with duties on service providers to report their clients with irregular status, risk undermining irregular migrants' rights to access health care, education and the rights to security and physical integrity. The FRA has set out guidelines on apprehensions that Member States should follow to ensure the respect of fundamental rights. These principles were also endorsed as a guiding principles on apprehensions by the European Commission which clarified that '*Practices in Member States which respect these principles will not be considered by the Commission as an infringement of the obligation to issue return decisions'*.[121]

The guidelines recommend that irregular migrants are not apprehended at, or next to, medical facilities, schools, religious establishments, trade unions, or public premises where a third country national can lodge a claim for international protection. Migrants should not be apprehended when registering a birth, requesting a birth certificate, reporting a crime or requesting legal aid. At the same time, medical establishments, schools and civil registries should not be required to share migrants' personal data with immigration law enforcement authorities for eventual return purposes.[122]

---

[118] Moreover, the Commission has launched a study to examine the technical feasibility of a 'Repository of EU Residence Permits' to address the identification of irregular secondary movements, and will present a revised legislative proposal to create a centralised database of identity information of convicted third-country nationals to increase the effectiveness of the existing European Criminal Records System (ECRIS). For more information, see: European Commission (2017), *Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - A renewed action plan*, COM(2017) 200 final, available at http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0200.

[119] European Commission (2015), *Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks – Annex Return Handbook*, C(2015)6250, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf.

[120] PICUM (2015a), *PICUM position paper on EU Return Directive*, Brussels: Platform for International Cooperation on Undocumented Migrants (PICUM), available at: picum.org/picum.org/uploads/publication/Final_ReturnDirectiveEN.pdf.

[121] European Commission (2015), *Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks – Annex Return Handbook*, C(2015)6250, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf.

[122] FRA (2013), *Apprehension of migrants in an irregular situation – Fundamental Rights considerations*, available at http://fra.europa.eu/en/theme/asylum-migration-borders/practical-guidance#irregular-migrants.

Returning irregular migrants: policy developments and challenges to effective removal policies

The Return Directive[123] lays down the common standards and procedures to be applied in Member States for returning irregular migrants, including on the use of coercion, detention, re-entry bans and on the rights of migrants involved in a removal procedure. Art. 6 of the Directive provides Member States' obligation to issue a return decision to third-country nationals staying irregularly on their territory, which is the core principle of European policies and practices on irregular migration. The return of irregular migrants is considered as the backbone of EU policies on migration *and* asylum, as European authorities have repeatedly presented the increase in return rates as a solution to the current 'refugee crisis'. This approach is based on the declared assumption that the EU would not be able to ensure protection and reception for its refugees if it were unable to increase the numbers of returned irregular migrants.[124] Institutional concern on returns is exacerbated by increasing numbers of detected migrants in an irregular situation and poor performances of Member States in enforcing removals: the number of people ordered to leave in 2015 amounted to 533,395, compared to 470,080 in 2014, while the rate of effective returns to third countries dropped from 36.6% in 2014 to 36.4% in 2015. Moreover, if return to the Western Balkans is disregarded, the EU's return rate drops further to 27%. At the same time, according to the European Commission's estimates, the EU will soon have to return more than 1 million rejected asylum seekers.[125]

Challenges to removals

While official estimates on the number of migrants absconding during the return process are lacking, the EMN has identified a variety of challenges that Member States encounter in effectively returning an irregular migrant to a third country.[126] These include:

- Migrants' resistance to return in the form of physical resistance, self-injury (including hunger striking), absconding and the presentation of multiple asylum applications to prevent removal
- Significant challenges unrelated to migrants' behaviours that make return an unviable option including a lack of cooperation from the authorities of the countries of return; difficulties in the acquisition of travel and identity documents; medical obstacles rendering travel difficult or impossible; obstacles connected to the use of detention in return procedures; the fragile security situation in countries of origin; the risk of detention in the country of return and a related general risk of breaching the principle of *non-refoulement* (particularly for rejected asylum seekers).

[123] The UK and Ireland not bound by the Return Directive, while Denmark decided to implement it in its national law and Switzerland, Norway, Iceland and Liechtenstein are bound by it on the basis of their association agreements. 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.

[124] See Commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos, in European Commission (2017), *European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy*, press release of 2 March 2017, available at: http://europa.eu/rapid/press-release_IP-17-350_en.htm; See also DeBono D. (2016), *op. cit*.

[125] European Commission (2017), *Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union - A renewed action plan*, COM(2017) 200 final, available at http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0200.

[126] European Migration Network (2016a), *op. cit.*

- Difficulties can also relate to the returning state's shortcomings – such as administrative and organisational challenges, the state's inability to cover expenses for the implementation of the return or to establish contact with the authorities of the country of origin – or on the resistance of local population and politicians.

In some cases, these challenges persist for the long term, and 'non-removable migrants' might be left in an enduring legal limbo. Only some Member States might acknowledge the impossibility of immediate return through the granting of a temporary status, the suspension or revocation of return decisions and, in some circumstances, migrants' regularisation.[127]

Return policies in the framework of the European Agenda on Migration

Against this backdrop, the European Commission, at the request of Member States[128], showed an increasing focus on improving EU States' record and coordination on migrants' removal. In the policy framework of the European Agenda on Migration, the Commission presented a *Return Action Plan* in September 2015, followed by a '*Renewed' Action Plan* and a *set of recommendations* (March 2017) to Member States on how to make return procedures more effective.

- The first action plan proposed measures to '*enhance voluntary return, to strengthen the implementation of the Return Directive, to improve information sharing, to strengthen the role and mandate of Frontex in return operations, and to create an integrated system of return management'.*
- The renewed plan instead focused on increased financial support and the 'external dimension' of migration management, with measures aimed at stimulating cooperation from countries of origin and transit of migrants, including offering reintegration packages, efforts to secure Readmission Agreements, and proposals to employ EU collective leverage through tailor-made approaches with third countries in the framework of the Commission's Migration Partnership Framework.[129]

Both of the action plans are based on the assumption that the legislative framework offered by the Return Directive does not need reform. In the Commission's view, it is the Directive's '*inconsistent transposition in national legislations*' instead that had '*a negative impact on the effectiveness of the Union return policy*'[130] and has been allowing irregular migrants to '*avoid return by moving to*

[127] The impossibility of immediate return can be acknowledged through: the granting of a 'tolerated stay' or other temporary status (AT, CZ, DE, FI, HU, LT, MT, NL, PL, SI, SK, UK); the issuance of an order to suspend removal (BG, DE, EE, LT, LU); a revocation of the return decision (CY); the issuance of a document by the Police Administration (EL, HR, SI); the extension of the time limit for departure (NL, SK). In only two Member States (AT, HU), regularisation of a general character is possible. It is instead possible, on a case-by-case basis under specific circumstances in further ten countries (BE, DE, EE, ES, FR, MT, NL, SE, SI, UK). *Ibidem*.

[128] European Commission (2017), *European Agenda on Migration: Commission presents new measures for an efficient and credible EU return policy*, press release of 2 March 2017, available at: http://europa.eu/rapid/press-release_IP-17-350_en.htm.

[129] European Commission (2016), *Commission announces New Migration Partnership Framework: reinforced cooperation with third countries to better manage migration*, press release of 7 June 2016, available at: http://europa.eu/rapid/press-release_IP-16-2072_en.htm; European Commission (2017), *Commission calls for accelerated delivery under the Migration Partnership Framework and further actions along the Central Mediterranean Route*, press release of 2 March 2017, available at: http://europa.eu/rapid/press-release_IP-17-402_en.htm.

[130] European Commission (2017), *Commission Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017) 1600 final, Preamble (3), available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_commission_recommendation_on_making_returns_more_effective_en.pdf.

another State in the Schengen area'.[131] To tackle this problem, together with the first action plan, the Commission declared its intention to initiate infringement procedures against Member States that do not fully comply with the Return Directive and adopted a '*Return Handbook*' providing national authorities with common operational guidelines, best practices and recommendations on how to effectively carry out returns and in a harmonised way.

Return policies: focusing on voluntary departures or enforcing the removals?

In line with the Return Directive, Member States' return policies and strategies are based on a mixed system of incentives to encourage voluntary return (*e.g*. continued stay in reception facilities for rejected asylum seekers, provision of counselling, assisted voluntary return and reintegration packages), and disincentives to stay for irregular migrants who refuse to return voluntarily (e.g. removing rights to accommodation and social benefits), including the use of coercive measures and detention, allowed by the Return Directive as measures of last resort. At EU level, a comparison of the Commission's 2015 action plan on return with the Recommendations adopted together with the renewed action plan (2017) shows a shift from a focus on the incentives to return towards one on the disincentives to stay and the use of coercion.

- The Commission's first action plan (2015) proposed enhancing voluntary return as the first action to take to increase the effectiveness of the EU return system. In that plan, voluntary return is considered the preferred option at EU level, in line with the Return Directive, the jurisprudence of the Court of Justice of the EU (CJEU) and a trend showed by Member States' practices to prioritise voluntary return over enforcement. The Directive[132] indeed provides a general *obligation* on Member States to grant – before return is coercively enforced– a period between 7 to 30 days to allow migrants issued with a return decision to leave voluntarily. Voluntary departures are generally considered to be more cost-effective, and the share of voluntary returns out of the total number of returns in the EU has gradually increased from just 14% in 2009 to around 40% in 2013.[133]

  The jurisprudence of the CJEU has also made it harder to use detention and coercion in the first place by limiting national practices derogating the obligation to grant a period of voluntary departure. The Court has confirmed that the grounds for refusing such an opportunity, limiting the period, or imposing obligations during that period are exhaustive (*El Dridi* case), and that the exceptions from the rule have to be interpreted strictly, as the purpose of the period of voluntary departure period is to secure the fundamental rights of

[131] '*Diverging Member States' practices in the implementation of the Return Directive hamper the effectiveness of the EU return system, as irregular migrants can avoid return by moving to another State in the Schengen area. Statistical data suggest that certain Member States do not systematically issue return decisions to migrants in irregular situation apprehended on their territory or persons whose asylum applications were rejected*'. *Sic* European Commission (2015), *Communication from the Commission to the European Parliament and to the Council - EU Action Plan on return,* COM(2015) 453 final, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf.

[132] Art. 7

[133] European Commission (2015), *Communication from the Commission to the European Parliament and to the Council - EU Action Plan on return,* COM(2015) 453 final, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_from_the_ec_to_ep_and_council_-_eu_action_plan_on_return_en.pdf

the migrant (*Zh and O*).[134] It follows that Assisted Voluntary Return and Reintegration (AVRR) programmes feature prominently among the measures used by Member States to enhance returns, and that at least 21 Member States described AVRR as a key measure to incentivise return.[135] These schemes offer logistical, financial and/or material assistance, including counselling to irregular migrants wishing to return, plus (if reintegration measures are included) additional support - either cash, in kind or combined – aimed at helping them to lead an independent life in the country of return. According to the Commission, Member States that did not develop any AVRR schemes should do so by 1st June 2017.[136]

- On an opposite trend, the recent recommendations of the European Commission annexed to the renewed action plan on return (2017) show a reduced attention on voluntary departures[137] and an increased focus on enforcement, detention and measures to avoid risks of migrants' absconding. The Commission recommends Member States only to grant voluntary returns following a request by the third-country national[138]; to provide for the shortest possible period for voluntary departure; and to grant a period of more than seven days only when the irregular migrant actively cooperates in view of return. The Commission moreover recommends Member States to increase their detention capacity; to make use of detention for the maximum duration (18 months) allowed by the Return Directive; to use stricter criteria to assess the risks of absconding that justify a migrant's detention; to take into consideration forced returns and detention for unaccompanied minors; to consider the use of national sanctions for migrants obstructing the removal process; and to provide minor procedural guarantees against return decisions.[139]

Initiatives to overcome challenges to return unrelated to migrants' resistances

Beyond the incentives to leave and disincentives to stay for irregular migrants, the EU and its Member States also implement policies and practices aimed at overcoming the challenges that are unrelated to migrants' resistances to return.

---

[134] See cases: C-61/11 PPU *El Dridi* [2011] ECR I-3015; C-146/14 PPU *Mahdi* ECLI:EU:C:2014:1320; C-554/13 *Zh and O* ECLI:EU:C:2015:377. For more information see Peers S. (2015), *Irregular Migrants: Can Humane Treatment be Balanced against Efficient Removal?,* in *European Journal of Migration and Law*, Vol. 17 (2015), pp. 289–304

[135] AT, BE, BG, CY, CZ, DE, EE, FI, FR, HU, IE, LT, LU, LV, MT, NL, PL, SE, SI, SK, UK. See European Migration Network (2016a), *op. cit.*

[136] European Commission (2017), *Commission Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017) 1600 final, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_commission_recommendation_on_making_returns_more_effective_en.pdf.

[137] The 'Renewed' Action Plan, however, does not deny a preference of voluntary returns over enforcement, as provided by the Return Directive. Point I.3 encourages Member States to improve the dissemination of information on voluntary return programmes to irregular migrants, but the plan's main focus is rather on ensuring consistency among the reintegration packages offered by different Member States in order to avoid that third countries only cooperate with Member States that offer more generous reintegration packages.

[138] The Return Directive (Art. 7) states that 'Member States *may* provide in their national legislation that such a period [for voluntary departure] shall be granted only following an application by the third-country national concerned'

[139] The document *e.g.* recommends that Member States '*provide for the shortest possible deadline for lodging appeals against return decisions'; 'ensure that the automatic suspensive effect of appeals against return decisions is granted only when this is necessary'; 'avoid repetitive assessments of the risk of breach of the principle of non- refoulement'*. See European Commission (2017), *Commission Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017) 1600 final, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_commission_recommendation_on_making_returns_more_effective_en.pdf

- A significant trend is represented by the increasing effort being put in securing the cooperation of third countries. This happens mainly through the signature of readmission agreements (either at EU or national level) and the establishment of diplomatic relations focused on migration cooperation (including through the setup of diplomatic representations).[140] Some Member States offer aid packages to incentivise cooperation[141] or simply apply political pressure on third countries' authorities[142]. As aforementioned, the EU has so far concluded 17 readmission agreements, while the Commission recently launched the Migration Partnership Framework to coordinate the collective leverage of the Union and its Member States and agree tailor-made approaches with third countries to improve cooperation on return and readmission.
- To address the challenges related to the acquisition of travel and identity documents for returnees, Member States involve third country officials in identification interviews or language experts to detect migrants' nationality; they also implement practices based on the repetition of fingerprint capture attempts.[143] At EU level, the European Council recently adopted a regulation establishing a *uniform European travel document for the return of irregular migrants*,[144] hoping for its easier recognition by third countries and a reduction of administrative burdens.

Linking return policies with policies on asylum

Finally, it is worth noting the aforementioned trend to link policies on irregular migration with policies on asylum is particularly evident in the area of return policies, fed by the assumption that the EU could not be able to cope with the arrival of asylum seekers in the context of the 'refugee crisis', if it were unable to return those who are in Europe irregularly. Although irregular migrants are a wider category of people than that of the rejected asylum seekers, (and *e.g.* include individuals that over stayed their visa or failed to renew their residence permit), the recent EU policy proposals in the field of return tend specifically to target the 'abusers of the asylum systems'. Together with enforcing the Return Directive, the Commission's Action Plan (2017) proposes 'addressing abuses of the asylum procedures' as an action to increase the EU return rate and states that '*it is crucial that asylum and return procedures flawlessly work together*'. It proposes that the reform of the Common European Asylum System '*will also offer new opportunities to ensure streamlined and efficient links between asylum and return procedures*'. The rejection rate of asylum applications in some Member States can be relatively high and indeed many rejected asylum seekers will (have to) be returned. It is undeniable that a better communication between the authorities competent for asylum and for return will facilitate the return of rejected asylum seekers. However, it is worth noting that according to some academic analyses increasing the return rates of irregular migrants is not a solution to the refugee crisis.[145] It is indeed 'peculiar' to mingle two distinct areas of migration policies (policies on asylum and policies on the removal of irregular migration) and present the reform of one area (the Common European Asylum System) as a solution to address the flaws of the other (the return of irregular migrants). Irregular migrants, as such, are excluded from the reception system provided for asylum seekers and it is unclear how

[140] European Migration Network (2016a), *op. cit.*
[141] BE, CY, ES, FR, NL; *Ibidem.*
[142] BE, DE, FR, LT, NL, PL, SE; *Ibidem.*
[143] *Ibidem.*
[144] Regulation (EU) 2016/1953
[145] See DeBono D. (2016), *op. cit.*

increasing the return of people who are not in that system would reduce the burden created by increasing numbers of asylum applications.

Detaining irregular migrants: efficiency concerns and possible alternatives

Is detention an effective tool of migration management?

Detention of migrants is today a systematic migration management practice across the European Union. All Member States make use of detention to enforce returns[146] and according to EMN at least 64,334 irregular migrants were detained in 2015 in the EU.[147] However, data shows a gradual decrease in the number migrants placed in pre-removal detention, with 116,401 people detained in 2009[148] (the year preceding the deadline for transposition of the Return Directive), against 84,788 in 2013 and 81,221 in 2014[149]. A variety of factors could explain this trend, including Member States' reduced enthusiasm towards the efficiency of detention for the carrying out of returns. An EMN report on the use of detention in the EU found that although detention proves effective in preventing risks of absconding, '*the impact of detention and alternatives to detention on the ability of (Member) States to reach and execute prompt and fair return decisions may be rather insignificant (with other factors, e.g. whether the person to be returned is in possession of the required travel documents, playing a much greater role);*[150] EMN also reports a decrease in the detention capacity of several Member States, with *e.g.* the Netherlands reporting a general declining trend (65% drop since 2010) in the use of administrative detention due to amended legislation and Court decisions.[151]

Efficiency concerns also regard long periods of detention. Member States' policies vis-à-vis migrants' standards in detention differ significantly in terms of policies and practices on the maximum length of detention. Irregular migrants in Europe can be exceptionally detained for up to 18 months,[152] as allowed by the Return Directive that regulated immigration detention at EU level.[153] Before the Directive, pre-removal detention periods ranged from 32 days in France and Cyprus to unlimited duration in 9 Member States.[154] In 2016, detention for up to 18 months, as

[146] European Migration Network (2016a), *op. cit.*

[147] European Migration Network (2016b), *EMN inform - The Use of Detention in Return Procedures,* available at: www.emn.lv/wp-content/uploads/EMN_Inform_Detention-under-RD_26012016.pdf.

[148] European Migration Network (2014), *The use of detention and alternatives to detention in the context of immigration policies - Synthesis Report for the EMN Focussed Study 2014*, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf.

[149] European Migration Network (2016b), *op. cit.*

[150] The EMN also concluded that '*placing persons in an alternative to detention is less costly than placing them in a detention centre'* and that 'the *fundamental rights of persons in detention are at greater risk than they are for persons placed in alternatives to detention*'; European Migration Network (2014), *op. cit.*

[151] European Migration Network (2016b), *op. cit.*

[152] Art. 15 of the Return Directive provides that irregular migrants can be detained for an initial period of 6 months, which can be exceptionally extended for no more than 12 further months.

[153] When transposing the Return Directive, 11 Member States applied the maximum time limit of detention of 18 months and 10 other extended the maximum time limits in comparison with legislation in place before the Directive. See PICUM (2015a), *op. cit.*

[154] European Commission (2014), Communication from the Commission to the Council and The European Parliament on EU Return Policy, COM(2014) 199 final, available at:

allowed by EU law, was possible in at least 11 Member States,[155] 12 months in 5 other countries,[156] 60 days in Spain, 45 in France. The UK (not bound by the Return Directive) instead has no statutory limit to detention[157]. An interesting case, Italy, initially extended the maximum limit for detention to 18 months when transposing the Return Directive, but soon decided to bring this limit back down to 90 days in 2014[158] (a very recent reform added the possibility to extend this period for further 15 days in extraordinary cases).[159] The decision appeared to be based on evidence provided at national level which shows the high costs and low effectiveness of lengthy detention as a tool for migration management.[160] EMN reports that the average duration of detention in Europe is generally much shorter than the maximum allowed because, in general, Member States consider shorter detention periods sufficient to return a third-country national. The report notes, that in countries like France, longer detention period would only have a very limited impact, as 45% of removals of detained returnees were carried out during the first five days of detention.[161] Against these considerations, the *European Commission's recommendations on returns*[162] of March 2017 instead suggest that '*short periods of detention are precluding effective removals'* and invite Member States to provide in national legislation for (and make use of) the maximum period of detention of 18 months and to increase their detention capacity, even by derogating to certain safeguards, where necessary and for emergency situations, as allowed by EU law.[163]

The EU legal basis of immigration detention and the jurisprudence of the Court of Justice of the EU

At EU level, the Return Directive offers the legal basis for irregular migrants' pre-removal detention. Since its adoption, the Directive sparkled intense discussions over its impacts on both the effectivity of EU return policies, and the rights of those whose liberty is restricted under EU law.[164] Some argued that the Directive lowered standards for migrants in administrative detention,[165] others instead believe that the Directive – together with European case law – has 'constitutionalised' the rights of people in immigration detention and thus contributed to higher protection standards for the detainees.[166] What is certain is that either by increasing or decreasing irregular migrants' rights *vis-à-vis* immigration detention, the Directive (and the rich jurisprudence of the EU Court of Justice

---

www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com%282014%290199_/com_com%282014%290199_en.pdf.

[155] Namely BE, BG, CY, CZ, EE, HR, LT, LV, MT, NL, PL. European Migration Network (2016b), *op. cit.*

[156] FI, HU, SE, SK and SI. European Migration Network (2016b), *op. cit.*

[157] *Ibidem.*

[158] Italian Law n. 161 of 30 October 2014. According to this legislation, detention in Italy could be ordered for an initial maximum period of 60 days, which can be further prolonged by a judge for 30 additional days.

[159] Italian Decree-Law no. 13 of 17 February 2017

[160] PICUM (2015a), *op. cit.*

[161] European Migration Network (2016b), *op. cit.*

[162] European Commission (2017), *Commission Recommendation of 7.3.2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council*, C(2017) 1600 final, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_commission_recommendation_on_making_returns_more_effective_en.pdf

[163] Art. 18 of the Return Directive allows Member States, in case of emergencies, to derogate to: 1) the obligation to detain migrants in specialised facilities (and not prisons); and 2) the obligation to provide families with separate accommodation. It also allows for longer periods for judicial reviews.

[164] Baldaccini A. (2009), *The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive,* in *European Journal of Migration and Law,* Volume 11 (2009)

[165] *E.g. ibidem*.

[166] *E.g.* Cornelisse G. (2016), *The Constitutionalisation of Immigration Detention: Between EU Law and the European Convention on Human Rights - Global Detention Project Working Paper No. 15*, Geneva: Global Detention Project, available at: https://www.globaldetentionproject.org/wp-content/uploads/2016/11/cornelisse-gdp-paper.pdf.

that followed) has had a remarkable impact on Member States' policies on pre-removal detention, which differed significantly until 2010.[167] The Directive (art. 15) establishes that Member States *may* keep in detention a third-country national who is the subject of return procedures, but also imposes grounds and conditions under which EU States can do so. Therefore, a third country national can be kept in pre-removal detention '*unless other sufficient but less coercive measures can be applied effectively in a specific case*' in order to prepare their return and/or carry out the removal process, and only when: 1) there is a risk of absconding; or 2) the migrant hampers the preparation of return or the removal process. Accordingly, the Directive imposes the immediate termination of detention where a reasonable prospect of removal no longer exists, a circumstance that coupled with the above mentioned challenges to carry out removals might justify some EU States' tendency not to pursue detention for some nationalities or groups of irregular migrants. Considering the highly intrusive nature of detention into migrants' fundamental right to liberty, the Directive also provides for procedural guarantees[168] and limitations to the maximum duration of detention, which '*shall be for as short a period as possible*'; it frames detention conditions that should reflect the non-criminal nature of the measure and guarantee detainees' rights (Art. 16);[169] and provides specific conditions for the detention of minors and families (Art. 17).

The regulation in EU law of pre-removal detention paved the way to a rich jurisprudence of the Court of Justice of the EU, whose decisions in the last years had a significant impact on Member States policies over immigration detention.

- A particularly relevant case law line concerns the policy trend of detaining irregular migrants for purposes other than carrying out a removal. The CJEU for instance abolished the use of detention as a criminal sanction for the offence of irregular entry and stay in those Member States where this is given a criminal relevance (see more details in the section on criminalisation). In a line of jurisprudence started with the *El Dridi* judgement, the Court clarified on multiple occasions that the criminal imprisonment of an irregular migrant only based on their irregular entry or stay is incompatible with the Return Directive, because such a detention would indeed delay the removal of the person concerned, and thus jeopardise the sole legitimate objective pursued by the Directive.[170]
- In the same way, in *Kadzoev*[171] the Court ruled out the possibility of maintaining or extending detention for grounds of public order and public safety and using pre-removal detention under the Return Directive as a form of "light imprisonment". The Court suggested that the legitimate aim to protect society should rather be addressed by other pieces of legislation. Yet, EMN found that in 2014 Member States catalogued at least six different grounds on which they based their decisions to detain migrants, against only two (risk of absconding and avoidance or hampering of the removal process) provided by the

[167] Member States were required to transpose the provisions of the Directive by 24 December 2010
[168] *E.g.* Art. 15, para. 2 & 3, require that detention decisions are subject to judicial review.
[169] Including the possibility to establish contact with legal representatives, family members and consular authorities; the right to obtain emergency health care and essential treatment of illness; the possibility for relevant and competent national, international and non-governmental organisations and bodies to access the detention facilities to provide for information about rights and obligations of detainees. This provision also makes it obligatory to use specialised facilities for the administrative detention of third country nationals.
[170] CJEU, C-61/11, *El Dridi*, 28 April 2011; CJEU, C-329/11 *A. Achoughbabian v. Préfet du Val- de-Marne*, 6 December 2011; CJEU, C-430/11, *Sagor*, 6 December 2012; for more information see Peers S. (2015), *Op. Cit.*
[171] CJEU, *Kadzoev*, C-357/09, 30 November 2009.

Return Directive. These included constituting a threat to national security and public order (12 States) and the authorities' belief that he/she will commit a crime (6 States).[172]

Another CJEU's case worth mentioning – particularly in a period of increasing policy concern on the links between irregular migration and the asylum system – is the *Arslan* case, in which the Court clarified that national legislation can provide for maintaining the detention of third-country nationals detained for removal who subsequently applied for international protection, when it appears that the application was made solely to delay or jeopardise the enforcement of the return decision.[173]

Alternatives to detention

Finally, a topic of extreme relevance with regard to developments in the field of immigration detention is that of the alternatives to detention, the non-custodial measures that allow different degrees of freedom of movement, while requiring compliance with specified conditions in view of the removal from the territory. The Return Directive frames pre-removal detention as a measure of last-resort that States can use only '*unless other sufficient but less coercive measures can be applied effectively in a specific case*' (Art.15). The CJEU clarified that Member States are obliged to provide such alternatives, since the Directive establishes a removal system based on '*a gradation of the measures to be taken in order to enforce the return decision*'[174] and that "*Member States must carry out the removal using the least coercive measures possible. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him*".[175] The Directive (and the CJEU case law) therefore promoted an uttermost interest of civil society, academia and Member States on those less coercive measures that could ensure the objectives of the Directive while at same time limiting the intrusions in migrants' right to liberty. The EMN[176] study on this issue found that in 2014 the majority of European States (24 out of 26 involved in the study) had developed alternatives to detention, which included:

- *reporting obligations;*
- *residence requirements;*
- *the obligation to surrender identity or a travel document;*
- *release on bail;*
- *electronic monitoring;*
- *provision of a guarantor;*
- *and release to care workers or under a care plan*.

[172] European Migration Network (2014), *op. cit.*
[173] CJEU, *Arslan*, C-534/11, 30 May 2013
[174] '*The order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to a gradation of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility*'; CJEU, *El Dridi*, C-61/11, para 41
[175] *Ibid*. para 39
[176] European Migration Network (2014), *op. cit.*

In particular, reporting obligations (*e.g.* reporting to the police or immigration authorities at regular intervals) and residence requirements are the most used measures.[177] However, while alternatives to detention might be provided for under national law, in some countries, such as Italy[178] or Greece[179], they are not applied in practice. Malta provided for alternative measures under domestic law only in 2016.[180] In general, the EMN reports that '*in practice, the procedures concerning detention and alternatives to detention vary greatly among (Member) States. While existing information suggests that many (Member) States do not make the best use of such alternatives, little is known about the extent to which these are used*'. The FRA also stated that '*Although virtually all EU Member States provide for the possibility of alternatives to detention […], they are still too little applied and when they are, it is primarily in cases involving particularly vulnerable people. Several EU Member States do not yet collect statistics on alternatives to detention, which makes it difficult to assess the extent to which they are used in reality*'.[181] Both reports suggest that detention – rather than its alternatives – is still used on a much more systematic basis, even though alternatives to detention must be given preference, are less costly for the State and less intrusive of migrants' fundamental rights. These findings reveal a trend that goes against the many recommendations coming from civil society and international organisations[182] to make use of alternatives to detention in both removal and asylum processes, but also against the repeated reminders of both the CJEU[183] and the European Court of Human Rights,[184] which found in a number of cases that Member States had violated the European Convention on Human Rights through arbitrary detention where less coercive measures could have been used.

Criminalising irregular migration: trends and human rights concerns

In their fight against irregular immigration, EU Member States have been increasingly resorting to criminal law as a tool to sanction violations of immigration legislation. Academic literature coined the term '*crimmigration*' to describe the wider trend of developing multifaceted intersections between immigration and criminal law and the embedment of criminal enforcement authority within a civil regulatory regime,[185] including the development of practices of border management and immigration policing that evoke practices used by States to fight crime; and of political

[177] Provided in (at least) 23 Member States: AT, BE, BG, CY, CZ, DE, EE, ES, FI, FR, HR, HU, IE, LT, LV, NL, PL, PT, SE, SI, SK, UK, NO; European Migration Network (2014), *op. cit.*

[178] Mangiaracina A. (2016), *The Long Route Towards a Widespread European Culture of Alternatives to Immigration Detention,* in *European Journal of Migration and Law,* Volume 18, Issue 2, pp. 177 – 200

[179] European Migration Network (2014), *op. cit.*

[180] See ECRE (2016), *Malta's new migration strategy ends automatic detention*, (8 January 2016), available at https://www.ecre.org/maltas-new-migration-strategy-ends-automatic-detention/ [last accessed 10 July 2017]

[181] FRA (2015a), *Alternatives to detention for asylum seekers and people in return procedures*, available at: http://fra.europa.eu/en/news/2015/fra-publishes-paper-alternatives-detention

[182] For a list of calls and recommendations made by international organisations, see FRA (*ibidem*).

[183] See *e.g.* CJEU, C-61/11, *El Dridi*, 2011; *CJEU*, C-146/14 PPU *Mahdi*, 2014;

[184] ECtHR*, Louled Massoud v. Malta*, No. 24340/08, 27 July 2010; ECtHR*, Rahimi v. Greece*, No. 8687/08, 5 April 2011; ECtHR*, Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011; ECtHR*, Popov v. France*, Nos. 39472/07 and 39474/07, 19 January 2012.

[185] See Koulish R. (2016), *Sovereign Bias, Crimmigration, and Risk,* in Maria João Guia M. J., Koulish R., Mitsilegas V. (Eds), *Immigration Detention, Risk and Human Rights - Studies on Immigration and Crime*, Cham: Springer International Publishing Switzerland.

discourses that increasingly describe migrants as a criminal threat.[186] EU legislation has contributed to this trend[187] and the first piece of EU hard law to provide for a criminal sanction in the Area of Freedom, Security and Justice indeed was the so-called Employer Sanctions Directive.[188]

In particular, since the mid 1970's there has been a trend among European states (which culminated in the 2000s) towards treating third country nationals' entering (or staying) irregularly in their territories as criminal offenders, rather than violators of administrative rules.[189] Increasingly, EU countries have been introducing in their legislation criminal sanctions (or administrative offences mimicking criminal ones) for irregular entries and/or irregular stays, which can be punished with fines and/or imprisonment (from one month in Croatia up to 5 years in Bulgaria).

In particular, the FRA (2014)[190] found that irregular entries are punished by law in all but three[191] EU Member States. In particular, 17 Member States[192] punish irregular entry with imprisonment and/or a fine in addition to the coercive measures that may be taken to ensure the removal of the person from the territory of the state, while the other eight Member States punish it with a fine only.[193] Similarly to irregular entrants, 25 EU Member States punish (over) stayers, by imposing fines and/or imprisonment (10 countries)[194] or a fine only (15 countries)[195] for irregular stay. Only in Malta, Portugal and France, irregular *stay* is not punished, but a return procedure is initiated.

Judicial limitations to the possibility of imposing criminal imprisonment for irregular migrants

In spite of national policies in providing for the imprisonment of irregular migrants - as we have seen above - the possibility to use criminal imprisonment to sanction an irregular entry or stay has been ruled out by the jurisprudence of the CJEU, at least when irregular migrants are 'removable'. According to the Court, Member States may not apply criminal rules which are liable to undermine the application and effectiveness of the Return Directive, whose main objective is ensuring the swift return of irregular migrants to a third country.[196] In the Court's view, detention as a measure to

[186] Parkin J. (2013), *The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research,* in *CEPS Papers in Liberty and Security in Europe*, Brussels: Centre for European Policy Studies (CEPS) available at www.ceps.eu/publications/criminalisation-migration-europe-state-art-academic-literature-and-research.

[187] See Carrera S. & Merlino M. (2009), *Undocumented Immigrants and Rights in the EU. Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme?*, Brussels: Centre for European Policy Studies (CEPS)

[188] Directive 2009/52/EC.

[189] Parkin J. (2013), *op. cit.*

[190] FRA (2014), *op. cit*.

[191] Malta, Portugal and Spain do not punish irregular entry with a fine or imprisonment, but return procedures are immediately initiated. *Ibidem.*

[192] Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Romania, Sweden and the United Kingdom. *Ibidem.*

[193] Austria, the Czech Republic, Hungary, Italy, the Netherlands (only if foreigner is declared an "undesirable alien"), Poland, Slovakia and Slovenia. Depending on the Member State, the fine may be converted to a custodial sentence if the migrant cannot pay; *Ibidem.*

[194] Belgium, Croatia, Cyprus, Denmark, Estonia, Germany, Ireland, Luxembourg, the Netherlands, and the United Kingdom; *Ibidem.*

[195] Austria, Bulgaria, the Czech Republic, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Spain and Sweden; *Ibidem.*

[196] CJEU, Case C-61/11, *El Dridi*, 28 April 2011, paras. 55–59; CJEU, Case C-329/11 [2011] *Alexandre Achoughbabian v. Préfet du Val-de-Marne*, 6 December 2011, paras. 39 and 43; CJEU, Case C-430/11, *Sagor*, 6 December 2012 (concerning the imposition of a fine), para. 32. See FRA (2014), *op. cit.*

punish a migrant for their unlawful entry or stay would unnecessarily delay their removal, and for this reason under EU law it is not allowed to apply a custodial penalty to a migrant before a return decision is adopted and while it is implemented.[197] The Court clarified that criminal imprisonment cannot replace the administrative detention established by the Return Directive, if the only criminal ground for detention is the irregular entry or stay itself. Criminal imprisonment is however possible to sanction the violation of a re-entry ban.[198] Similarly, the CJEU did not exclude the possibility to impose a fine for irregular entry or stay,[199] or to resort to imprisonment *after* the return procedure is completed, *i.e.* when all the measures provided by the Return Directive to enforce the return have been applied but the person could not be removed.[200]

According to this jurisprudence, irregular migrants can therefore be detained only if they cannot be removed (and not instead of their removal). This, however, implies the risk that the persons to be detained for their irregular immigration status are those whose non-removability is due to deficiencies of receiving countries in issuing travel documents. The CJEU has not addressed this issue yet but, by stating that after the return process has been applied custodial penalties are only admitted if there is no 'justified ground for non-return', the Court suggested that if there is a justified ground for postponement of the return, as set out in the Directive, custodial penalties still cannot be applied.[201] More directly, it is at the national level that courts have been called to address this problematic aspect. For instance, a Dutch Court of Appeal stated that an irregular migrant cannot be punished because of their irregular stay if their impossibility to leave the Netherlands is no fault of their own. [202]

Criminalisation policies and human rights concerns

Besides the rulings of European Courts, international Human Rights institutions, academic literature, and NGOs have expressed human rights concerns to the tendency of criminalising irregular migrants. One of the main concerns expressed by Human Rights institutions regards the duties to report that often come alongside with the criminal relevance of irregular migration, and that require public officials, service providers, as well as private actors to report irregular migrants to immigration authorities. Both FRA[203] and the Commissioner for Human Rights of the Council of Europe,[204] denounced that these reporting obligations have strong implications on the social rights of irregular migrants as they undermine their access in practice to basic services, such as health care, education or accommodation. As we shall see in the third part of this paper, in certain national contexts such reporting duties can in practice nullify the entitlements of irregular migrants vis-à-vis basic welfare services. In Italy, a case in point, when irregular entry and stay became a crime in 2009, health professionals and civil society raised a strong opposition against the government's proposal to repeal the prohibition on medical staff to report patients with irregular

[197] CJEU, Case C-329/11 [2011] *Alexandre Achoughbabian v. Préfet du Val-de-Marne*, 6 December 2011
[198] CJEU, C-290/14, *Skerdjan Celaj*, 1 October 2015;
[199] CJEU, Case C-430/11, *Sagor*, 6 December 2012, para. 32. See FRA (2014), *op. cit.*
[200] CJEU, Case C-61/11, *El Dridi*, 28 April 2011, paras 52 and 609; CJEU, Case C-329/11 [2011] *Alexandre Achoughbabian v. Préfet du Val-de-Marne*, 6 December 2011, para. 46. See FRA (2014), *op. cit.*
[201] Peers S. (2015), *op. cit.*
[202] Nijmegen Court of Appeal, ECLI:NL:GHARN:2011:BP6259, 1 March 2011. See FRA (2014), *op. cit.*
[203] FRA (2011a), *op. cit.*; FRA (2014), *op. cit.*
[204] Commissioner for Human Rights of the Council of Europe (2010), *Issue Paper - Criminalisation of Migration in Europe: Human Rights Implications*, CommDH/IssuePaper(2010)1, available at: https://rm.coe.int/16806da917.

status, because of concerns that it would jeopardise the migrants' access to necessary health treatments. As a consequence, the Italian legislator had to drop its proposal.[205]

The FRA[206] and academic literature[207] also found that the criminalisation of irregular migrants together with certain police enforcement practices raise concerns also in terms of racial and ethnic profiling by police targeting irregular migrants via identity checks. It also raises concerns that it instils mistrust amongst irregular migrants towards law enforcement authorities, discouraging them to access protection and justice against crime for the fear of being prosecuted and deported. Local police bodies as Amsterdam's Police have acknowledged this risk and developed practices that reduce irregular migrants' fears of reaching out to authorities, and increase reporting of crime by victims with irregular immigration status (see below). Academic literature on criminology also criticised the development of 'crimmigration legislation' for its negative implications on the basic principles and safeguards underpinning criminal justice and legislation, because of the fundamentally non-criminal nature of migration offences and for the unprecedented criminalisation of offences that are essentially victimless.[208]

Recent trends towards of de-criminalisation

In spite of a steady increase in criminalising policies during the last 30 years, as aforementioned, a trend reversal towards a (slow) opposite process of de-criminalisation of irregular entries and/or stays can be observed in the recent past. In 2012, France repealed its provisions punishing irregular stay (but not-entry) inspired by the CJEU's jurisprudence in the *El Dridi* and *Achugbabian* cases[209]. A proposal in the Netherlands to consider all unauthorised stays a criminal offence was rejected in April 2014[210] and Belgium declared that plans to modify the Immigration Act, in accordance with CJEU jurisprudence, were being considered.[211] A particularly significant case is that of Italy, where only five years later the introduction of the crime of irregular entry and stay, the national parliament decided to abolish it, and delegated the government for the actual repeal and transformation of the crime into an administrative offence. Interestingly, the reason given for such a decision mainly was the acknowledgment that the crime had not deterred irregular arrivals to Italy, and that instead the criminalisation showed critical deficiencies related to the high costs of conducting criminal trials against individuals who often do not hold any documents and who might be expelled before the completion of the trial, thus proving an excessive burden on the Italian criminal justice system.[212] These rationales would therefore confirm an additional criticism moved

[205] Delvino N. & Spencer S. (2014), *op. cit.*
[206] FRA (2011a), *op. cit.*
[207] See Parkin J. (2013), *op. cit.*
[208] Zedner L. (2013), *Is the Criminal Law only for Citizens? A Problem at the Borders of Punishment*, in Aas K.F. & Bosworth M. (eds), *The Borders of Punishment: Criminal Justice, Citizenship and Social Exclusion*, Oxford: Oxford University Press; Aliverti A. (2012), *Making People Criminal: The Role of the Criminal Law in Immigration Enforcement*, in *Theoretical Criminology*, Vol. 16, No. 4, pp. 417–434.
[209] *Loi n° 2012-1560 du 31 décembre 2012 relative à la retenue pour vérification du droit au séjour et modifiant le délit d'aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées, JO, 1er janvier 2013, Article 8.*
[210] Spencer S. & Hughes V. (2015a), *op. cit.*; currently, in the Netherlands, irregular stay is a crime (punishable by up to 6 months imprisonment) only in the case of continued residence in the Netherlands of a third-country national declared by the Ministry of Justice an 'undesirable alien' for being repeatedly apprehended for irregular residence or being convicted of certain crimes.
[211] FRA (2014), *op. cit*., p. 5.
[212] The report of an experts' commission of the Italian Ministry of Justice (Commissione Fiorella per la revisione del sistema penale, *Report of 23 April 2013*) remarked that the crime of irregular migration '*is a totally inefficient and*

by part of the academic literature that has been arguing that there is no evidence that deterrence policies (and the symbolic message that they should convey) have been highly effective in reducing irregular migration.[213] It is to note, however, that at the time of writing the Italian Government has not yet intervened to implement the parliament's instructions and the crime is still virtually in force in Italy.

Section 3

Access to services and access to justice

Access to services for irregular migrants in Europe: general patterns

Irregular migrants' access to services and justice in the EU's policies: a sound exclusion

Framed on the principle that irregular migrants must be returned and should not be present on EU territory, EU legislation does not address access to measures of public assistance and services (including health care, education or housing) for irregular migrants, except for individuals who have been given a period for voluntary departure and for those whose removal was formally postponed (for whom the Return Directive *e.g.* states that they are entitled to 'emergency healthcare and essential treatment of illness'). Only with regard to the protection of victims of crime, EU law has recently shown an effort to include irregular migrants into measures that facilitate crime-reporting for irregular victims (see paragraph on the Victims Directive below). Irregular migrants are explicitly excluded from the development – proposed by the European Commission – of a European Pillar of Social Rights.[214] Access to services for irregular migrants in the EU is generally presented by policy makers as a pull-factor encouraging irregular migrants' stay in Europe and, as such, would not fit within the system of disincentives to stay set up by Member States. Instead, some recent actions (*e.g.* restricting access to rented housing) have been geared to hinder irregular migrants' possibilities to sustain their social needs, in an effort to incentivise voluntary return and detections. However, the counter argument is that irregular migrants in Europe are a reality, their return is not always possible, and their basic needs in relation to health, education or housing require States to allow them a certain level of access to services, such as emergency health care or basic education for children.

National policies: Member States' need to include irregular migrants against a pattern of exclusion

All EU Member States are bound to their international obligations deriving from the principal UN human rights instruments, and particularly the International Covenant on Economic, Social and

symbolic criminal provision, which establishes an irrational system of sanctions, as the primary penalty is a fine the individual will surely not be able to pay'; see Delvino N. & Spencer S. (2014), *op. cit.*

[213] See Parkin J. (2013), *op. cit.*; Aliverti A. (2012), *op. cit.*

[214] Preamble (15) of the European Commission's Recommendation on establishing a European Pillar of Social Rights, C(2017) 2600 final, states that: '*The principles enshrined in the European Pillar of Social Rights concern Union citizens and third country nationals with legal residence. Where a principle refers to workers, it concerns all persons in employment, regardless of their employment status, modality and duration*'

Cultural Rights (ICESCR)[215]. Moreover, under the Council of Europe system, the recent jurisprudence of the European Committee of Social Rights (ECSR) has extended the personal scope of application of the European Social Charter (the treaty supplementing the European Convention on Human Rights in the field of economic and social rights) to cover anyone, including irregular migrants, when certain fundamental rights are at stake.[216] The ECSR accordingly has repeatedly called on Member States to take measures that ensure some level of access to services for irregular migrants, including health care[217] and housing[218] (notwithstanding that the complaint procedure before the ECSR does not apply to all state parties to the European Social Charter, but only to those that accepted its relevant protocol).

Beyond a requirement to uphold international obligations on migrants' social rights, Member States do recognise some access to services for irregular migrants for very pragmatic reasons and in the interest of the wider population.[219] As we shall see in the next sections, these include crucial public interests, such as protecting public health and ensuring public order. Moreover, an irregular status is *per se* a condition that exposes migrants to a significant vulnerability, exacerbating their needs to receive welfare support. As they are not entitled to work legally in Europe, irregular migrants often do not have the means to pay for a housing or private health and education services, and end up living in precarious conditions.

Notwithstanding these considerations, the COMPAS study '*Outside and in: Legal Entitlements to Health Care and Education for Migrants with Irregular Status in Europe*' (Spencer & Hughes), which in 2015 mapped irregular migrants' entitlements to services across EU Member States, showed that, while there is considerable variation in legal entitlements to services, the over-riding pattern of national policies in relation to irregular migrants' access to welfare support stays one of exclusion, keeping access to public services at minimal levels. This exclusionary approach is true particularly for adults, while children of irregular migrants can enjoy wider access to services, such as education and health care, and often on the same basis as children who are nationals of the hosting country.[220] Even where irregular migrants (adults or children) are legally entitled to a wider access to services, they might face *practical barriers impeding their effective access*, which in practice nullifies their entitlements. A requirement on service providers to report users with an irregular immigration status, or requirements of bearing inaccessible costs for the fruition of a service are some examples of such obstacles.

However, the COMPAS study found that although the general approach of EU Member States is one of exclusion and that there has been recent instances of national legislations becoming more restrictive, some EU countries in recent years have been mitigating their exclusionary approach in

[215] Notably, the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). The status of ratification of UN human rights instruments can be seen at: http://www.ohchr.org/Documents /HRBodies/HRChart.xls

[216] See ECSR, *International Federation of Human Rights Leagues v. France*, Complaint No. 14/2003, merits, 8 September 2004.

[217] *Ibidem*.

[218] See ECSR, 20 October 2009, *DCI v. The Netherlands*, 47/2008; ECSR, *FEANTSA v. The Netherlands*, Complaint No. 86/2012; ECSR, *Conference of European Churches (CEC) v. The Netherlands*, Complaint No. 90/2013

[219] Spencer S. & Hughes V. (2015a), *op. cit.*; Geddes A. (2003), *op. cit.*

[220] Spencer S. & Hughes V. (2015a), *op. cit.;* Spencer S. (2016), *Postcode Lottery for Europe's Undocumented Children: Unravelling an Uneven Geography of Entitlements in the European Union*, in *American Behavioral Scientist*, 60(13), 1613–1628.

favour of an extension of irregular migrants' entitlements to both health care and education.[221] Moreover, as we will see in the sections below, regional and municipal authorities have adopted a number measures across Europe to limit the marginalisation of irregular migrants, and often allow a wider access to services than their national governments.

Amply based on the findings of the mentioned study by Spencer and Hughes, the next sections are dedicated to exploring current provisions for access to different services (health care, education and shelters) in European countries. EU and national policies on irregular migrants' access to justice will be described.

Access to health care

The issue of irregular migrants' entitlements to health care services in Europe is particularly illustrative of the pattern described above. They are generally kept to minimal levels: emergency health care is indeed the only minimum level of access recognised to irregular migrants throughout the 28 Member States of the EU. In six of them, it is also the *only* level of health care which irregular migrants can enjoy.[222] In further 12 EU countries, migrants can only access certain specialist services, but are likewise excluded from primary and secondary care[223]. Only in the remaining 10 Member States irregular migrants are entitled to some level of access to primary and secondary care services.[224]

Moreover, even where the law entitles irregular migrants with a wider access, often practical or legal obstacles make health care inaccessible in practice. For instance, in Germany a duty to report irregular migrants to immigration authorities upon the social security offices responsible for covering the expenses of primary and secondary care, makes these treatments practically inaccessible for those with irregular status without exposing them to deportation risks. Requirements to pay the full cost of treatments, as in Czech Republic, Ireland (including emergencies) and the UK (for secondary care), equally nullify in practice the accessibility to these medical services. The COMPAS study concluded that only in six countries entitlements to a level of primary and secondary care are relatively least restrictive: Belgium, France, Italy, the Netherlands, Portugal and Sweden. Irregular children *may* be entitled to a wider access to health care, and indeed in eight Member States they have the same entitlements as children who are nationals of those countries. By contrast, though, in five EU countries children, as adults, only have the right to obtain emergency health care.[225]

Recent national developments on irregular migrants' access to health care also provide a source for the study to conclude that, while there have been recent instances of further restrictions, the direction of travel of European states in this area is towards an extension of entitlements. The recent Spanish reform of the national health care system represents an example of national legislation becoming more restrictive: in 2012 Spain passed from a universal health care system that guaranteed the right to access free public health care to both Spanish citizens and those habitually residing in the country (irrespective of their residence status) to an insurance-based

[221] *Ibidem*.
[222] Bulgaria, Cyprus, Finland, Lithuania, Luxembourg and Slovakia; *ibidem*.
[223] Austria, Croatia, Denmark, Estonia, Greece, Hungary, Latvia, Malta, Poland, Romania, Slovenia and Spain; *ibidem*.
[224] Belgium, Czech Republic, France, Germany, Ireland, Italy, Netherlands, Portugal, Sweden and the UK; *ibidem*.
[225] Bulgaria, Finland, Lithuania, Luxembourg and Slovakia; *ibidem*.

system that created multiple categories of eligible patients.[226] As a result, irregular migrants' access to health care treatments was restricted to emergency, serious diseases, accident, maternity and child care[227] (as we shall see below, though, these restrictions were strongly mitigated by Spain's Autonomous Communities). However, less than three years after the reform, the Spanish Minister for Health Alfonso Alonso announced that access to primary health care for irregular migrants would be reinstated for the sake of public health and for the practical aim of avoiding a saturation of emergencies (the announcement however has not yet been followed by an action in this sense).[228]

By contrast, there are several examples of national measures extending access to health care for irregular migrants, including in Italy, where children's access to paediatric care was extended, or in the UK with regard to victims of domestic and sexual violence (2015) and patients needing HIV treatments (2012) with an irregular immigration status. The main example of extension of entitlements is however represented by Sweden's 2013 law on health and medical care for certain foreigners living in Sweden without necessary permits, which entitled irregular migrants to the same level of care provided to asylum seekers (access to acute care and health care 'that cannot be deferred', including dental care, maternity care, contraceptive counselling, abortion, and related medicines). Previously, adult irregular migrants were entitled to emergency care only.[229]

It is worth noting that FRA has recommended that migrants in an irregular situation should, as a minimum, be entitled to necessary healthcare services, which should include the possibility of seeing a general practitioner and receiving necessary medicines.[230] Significantly, FRA has also analysed the costs of providing regular access to healthcare for irregular migrants (including preventative care) and compared them with the costs incurred if these persons (not being provided with such access) end up using more expensive emergency healthcare facilities at a later stage. The study found that providing regular preventative care to irregular migrants generate savings for healthcare systems up to 69 % (for pre-natal care in Sweden – 48 % in Germany and Greece).[231]

Local initiatives on irregular migrants' access to health care

Regional and municipal authorities in Europe showed particular concern with regard to the social implications of excluding irregular migrants from medical treatments. For humanitarian reasons and for the sake of protecting public health, regions and municipalities have implemented a number of initiatives in this area, including policies aimed at:

[226] PICUM (2017), *Cities of rights: ensuring health care for undocumented residents*, Brussels: Platform for International cooperation on undocumented migrants, available at http://picum.org/picum.org/uploads/publication/CityOfRights_FINAL_WEB_EN.pdf.

[227] Adult migrants retained the right to obtain medicines at reduced or no cost. However, the ambiguity of the concepts of 'emergency' and 'serious disease' has given considerable discretionary power to health professionals. See Spencer S. & Hughes V. (2015a), *op. cit*

[228] *E.g.* El País (2015), *Alonso anuncia que devolverá la atención primaria a los sin papeles*, 31 March 2015, available from: https://politica.elpais.com/politica/2015/03/31/actualidad/1427788718_943883.html

[229] PICUM (2017), *op. cit.*

[230] FRA (2011a), *op. cit.,* p. 12.

[231] Similarly, the study suggests that for hypertension the cost savings after five years would be around 12 % in Germany, 13 % in Greece and 16 % in Sweden. See FRA (2015b), *Cost of exclusion from healthcare – The case of migrants in an irregular situation*, Luxembourg: Publications Office of the European Union, available at: http://fra.europa.eu/en/publication/2015/cost-exclusion-healthcare-case-migrants-irregular-situation

- *extending the level of access to health care for irregular migrants beyond national standards*: an illustrative example is the aforementioned reaction of Spain's Autonomous Communities to the central government reform that in 2012 restricted irregular migrants' access to the national health service. All the Spanish regions reacted by adopting regional laws reinstating wider access to healthcare services for irregular migrants in the region and Andalusia and Asturias provided them with equal access to health services as Spanish nationals. Similarly, six regions in Sweden provide irregular migrants with wider access to health care than that offered by national legislation, up to the same as level of citizens.[232] In Italy, the regions of Puglia and Tuscany received support by the Italian Constitutional Court against the national government for their regional laws extending irregular migrants' entitlements to health treatments beyond national standards.[233] At municipal level, *e.g.* the City of Florence (Italy), in cooperation with the Tuscan regional government, has been funding Caritas to manage a shelter where irregular migrants could receive long term post-hospitalisation treatments after emergencies.[234]

- *Eliminating practical barriers hindering irregular migrants' effective access to the health care services they are entitled to*. Several German cities, including Frankfurt, Düsseldorf or Munich, have established cooperation with (and provided funding to) local NGOs to provide medical services to irregular migrants and avoid that, because of national legislation imposing reporting duties of irregular migrants upon public authorities, irregular migrants do not receive medical treatments for not referring to public hospitals. To avoid that costs of care prevent irregular migrants from accessing national health services, the Dutch cities of Amsterdam, Eindhoven, Nijmegen and Utrecht have been funding NGOs that support uninsured migrants to sustain these costs. Similarly, to avoid the impossibility of irregular migrants registering in national health insurance systems so that they are unable to receive costly treatments, in Belgium, cities like Ghent, Liege or Molenbeek (Brussels) have modified procedures to facilitate irregular migrants' access to the coverage they are entitled to.[235]

Access to education

In 23 EU Member States children with irregular status are entitled to attend school. The entitlement may be explicit in law (in ten EU countries)[236] or an implicit right deriving from an entitlement of all children to attend school, from which those with irregular status are not excluded (as in the majority of cases). However, in five countries (Bulgaria, Finland, Hungary, Latvia and Lithuania) the law does not entitle irregular children to attend school[237], thus their access to education is in practice left to the discretion of schools. The COMPAS study notes that entitlements to education, whether explicit or implicit, can be for education up to 18 years, or exclude the 16-18 age group. They can include access to apprenticeships or to pre-school. There is further variation in whether an entitlement to schooling extends to an end-of-school certificate, or for instance to school meals. The study also notes that in countries where the right to attend school is implicit,

[232] Sörmland, Västmanland, Östergötland, Västerbotten, Västernorrland and Gävleborg; PICUM (2017), *op. cit.*
[233] Delvino N. & Spencer S. (2014), *op. cit*.
[234] Delvino N. (2017), *op. cit*.
[235] *Ibidem*.
[236] Belgium, Croatia, Czech Republic, France, Greece, Italy, the Netherlands, Romania, Spain and Sweden; Spencer S. & Hughes V. (2015a), *op. cit.*
[237] Except, as in Latvia, when children are in the returns procedure; *ibidem.*

local procedural requirements (such as a proof of address) can in practice, as in health care, restrict or deter access.

As for health care, the COMPAS study found that access to education for irregular children has seen a process of extension of entitlements during recent years. These extensions have been operated mainly through the intervention of national courts or local authorities, and often concerned access to non-compulsory education services. In 2007, for instance, the Spanish Constitutional Court ruled that irregular children up to the age of 18 have the right to non-compulsory education and related financial support, they have the right to receive a school diploma, obtain qualifications, access grants and financial assistance as Spanish nationals, and can access work experience placements or internships[238]. In the same year, the Italian Council of State stated that irregular migrants should be allowed to continue attending school in Italy after reaching the age of majority, and be admitted to high school final exams[239]. In Italy, the actions of municipalities like Turin (see below), led to a nation-wide practice endorsed by the Italian government in 2010 allowing irregular children into pre-schooling education facilities.[240] Since 2013, the Netherlands allows students with irregular status to take up apprenticeships.[241]

Local initiatives on irregular migrants' access to education

As for health care, municipalities have developed practices eliminating practical barriers that could nullify irregular children's effective access to schools. These include, for instance, initiatives that aim to avoid that enrolment procedures require official proofs of residence or registration in the municipal census. For example in Italy after legislation passed in 2009 requiring the exhibition of a valid residence permit to access public services, cities like Turin, Florence or Genoa instructed municipal staff not to request such documentation for enrolling children in pre-schooling facilities (nursery schools or kindergartens).[242] To avoid the exclusion from economic support measures for schooling expenses, like books, transportation or school meals, preventing destitute irregular children from attending school, the city of Amsterdam has funded a foundation which in turn has been providing financial help to families of irregular migrants for the expenses necessary for their children's education.[243]

Access to housing and shelters

A wide range of international Human Rights treaties explicitly recognise the right to housing for all persons (regardless of nationality or legal status), as one of the facets of the right to an 'adequate standard of living'.[244] However, unlike the rights to basic health care and education, it stays controversial whether the obligation to fulfil the right to housing also includes the duty of states to

[238] Spanish Constitutional Tribunal, STC 236/2007, 7 November 2007, appeal of unconstitutionality number 1707-2001, lodged by the Parliament of Navarre against Organic Law 8/2000, of 22 December, reforming Organic Law 4/2000; see *ibidem.*

[239] Italian Council of State, Decision No. 1734 of 2007. See Delvino N. & Spencer S. (2014), *op. cit.*

[240] *Ibidem.*

[241] Spencer S. & Hughes V. (2015a), *op. cit.*

[242] The move eventually prompted the Italian government to reinterpret national legislation and release guidelines stating that the requirement of exhibiting a residence permit would not apply for the enrolment of children in pre-schooling facilities; see Delvino N. & Spencer S. (2014), *op. cit.*

[243] Delvino N. (2017), *op. cit.*

[244] It is *e.g.* stipulated in the Universal Declaration of Human Rights (UDHR), Article 25(1), and the International Covenant of Economic, Social and Cultural Rights (ICESCR), Article 11(1).

provide irregular migrants with basic services, as adequate shelters for destitute individuals.[245] The general approach of national policies in Europe in relation to irregular migrants' access to housing services is indeed one of exclusion, which in this case is exacerbated by the fact that national legislations also restrict irregular migrants' possibilities to access the private housing market.

National policies restricting irregular migrants' access to private housing

Irregular migrants in Europe face significant challenges in accessing rented housing, as national legislation imposes strict limitations in several EU countries. FRA reported that in 2014 all but five EU Member States[246] had laws imposing penalties on landlords renting properties to irregular migrants, and that penalties could include fines and imprisonment.[247] A comparison with previous FRA research shows that the number of EU countries sanctioning rental agreements with irregular migrants has significantly increased in the last years.[248] Sometimes, renting to irregular migrants is explicitly punishable in the law, while in other cases it is prohibited under the general rules on facilitation of irregular stay. The United Kingdom, for instance, passed a law in May 2014 explicitly disqualifying irregular migrants from renting accommodation and imposing fines on landlords who knowingly rent to them. Sanctions are not only aimed at incentivising returns, but also at increasing detections of migrants in an irregular status. National legislation indeed often requires that landlords share the personal data of their tenants in an irregular status with immigration authorities, as in the case of Dutch law which explicitly provide that those who shelter irregular migrants must inform the authorities.[249] FRA and civil society organisations claim that imposing sanctions on landlords and requiring them to report their irregular tenants have increased migrants' vulnerability vis-à-vis abusive landlords who impose exploitative conditions; that it forces migrants to live in substandard and precarious conditions; and ultimately leads many to become homeless.[250]

Irregular migrants' access to public shelters

Irregular migrants in Europe are also generally prevented from accessing public shelters for homeless people. Requirements to have a residence permit and a source of income (usually social security) are generally conditions to be admitted in such shelters, and only rarely state-owned homeless shelters admit migrants in an irregular situation.[251] However, in a majority of EU Member States national legislation does not prevent in principle migrants in an irregular situation from

[245] FRA (2011a), *op. cit.*

[246] Of the remaining five Member States, Ireland does not punish facilitation of stay, and thus it does not punish landlords for renting accommodation to irregular migrants. However, in France and Malta, instead, a punishment is foreseen, but those who accommodate a close relative are excluded from punishments (although the Maltese exclusion is limited to no more than seven days). Italy punishes landlords for taking unfair advantage by profiting of irregular migrants' vulnerable situation, not for renting as such. Belgian law explicitly excludes from punishment assistance provided for humanitarian reasons, which might include providing accommodation. See FRA (2014), *op. cit.,* p. 13.

[247] FRA (2014), *op. cit.,* p. 13.

[248] In 2011, FRA found that landlords risked punishment for leasing to irregular migrants in 15 EU Member States. See FRA (2011a), *op. cit.*

[249] Article 4(40) of Law *Vreemdelingenbesluit* 2000.

[250] See FRA (2011a), *op. cit*.; FRA (2014), *op. cit*.; PICUM (2014), *Housing and Homelessness of Undocumented Migrants in Europe: Developing Strategies and Good Practices to Ensure Access to Housing and Shelter*, Brussels: Platform for International Cooperation on Undocumented Migrants, available at: http://picum.org/picum.org/uploads/publication/Annual%20Conference%202013%20%20report.%20HOUSING_EN_FINAL.pdf.

[251] See FRA (2011a), *op. cit.*

accessing housing facilities for homeless people.[252] Their access is generally dependent on the rules set by the organisations to which the administration of the shelters is assigned, but even in this case FRA reported that private facilities are often reluctant to accept irregular migrants because they fear that their public funding could be jeopardised or because they want to discourage police raids. At times, shelters can accept irregular migrants only upon the condition that they cooperate for their regularisation or an eventual return to their country of origin. By contrast, it is reported that irregular migrants are more often accepted in emergency and overnight shelters, which are often based on anonymity.[253] The issue of irregular migrants' admission to publicly-funded shelters is therefore highly fragmented and dependent on the stances of local authorities which play a key role in facilitating or hindering irregular migrants' access to locally-administered shelters (see below).

It is worth noting, finally, that under the framework of the Council of Europe, the European Committee of Social Rights (ECSR) has found that the right of irregular migrants to a shelter is covered by the European Social Charter (ESC)[254]. In particular, the ECSR addressed the issue of irregular migrants' access to shelters in the Netherlands in three different occasions, and held that '*States Parties are required […] to provide adequate shelter to children unlawfully present in their territory for as long as they are in their jurisdiction*'[255] and that '*shelter must be provided also to adult migrants in an irregular situation, even when they are requested to leave the country and even though they may not require that long-term accommodation in a more permanent housing be offered to them*'.[256] However, always in relation to the Dutch situation, the European Court of Human Rights instead recently stated that this right is not covered by the European Convention of Human Rights (ECHR) and denied that the ECHR (Art. 3) imposes a positive obligation on State Parties to provide emergency social assistance and shelters to rejected asylum seekers, when the latter are not prevented to return to their country of origin and the hosting state offers accommodation under the condition that the individual cooperates to their return.[257]

Local initiatives on irregular migrants' access to shelters

European municipalities have a primary interest in finding solutions to accommodate homeless irregular migrants for a variety of reasons including avoiding street-sleeping, irregular settlements and squatting; protecting the life of homeless migrants (particularly during the cold winters of Northern Europe); ensuring public safety and reassuring public opinion; protecting women against violence and trafficking; and respecting municipal duties of care and the fundamental right to a housing for all. In some cases, municipalities, like Genoa or Dublin, have simply relied on their legal duties of care towards vulnerable individuals to justify the accommodation of irregular migrants in municipal shelters.[258] But where national legislation strictly forbids this possibility, local initiatives mainly consist of providing funding to NGOs addressing the housing needs of irregular migrants. The Community of Madrid has been funding an NGO that mediates between (irregular) tenants and home owners and checks housing conditions, keeping the identity of the tenant anonymous to prevent discrimination and avoid landlords asking for documents that migrants cannot to produce.

[252] *Ibidem.*
[253] *Ibidem.*
[254] ECSR, *DCI v. The Netherlands*, Complaint No. 47/2008; ESCR, *FEANTSA v. The Netherlands*, Complaint No. 86/2012; ECSR, *CEC v. The Netherlands*, Complaint No. 90/2013.
[255] ECSR, *DCI v. The Netherlands*, Complaint No. 47/2008. Decision on the merits.
[256] ECSR, *CEC v. The Netherlands*, Complaint No. 90/2013. Decision on the merits.
[257] European Court of Human Rights, *Hunde v. The Netherlands*, Application No. 17931/16, Decision of 5 July 2016.
[258] Delvino N. (2017), *op. cit*.

Very often municipal authorities simply fund NGOs to manage shelters hosting irregular migrants. The City of Gothenburg addresses the administrative barriers hindering irregular women's access to state-funded emergency shelters, by reimbursing non-profit shelters for providing a protected space for all women escaping violence. Similarly, the Municipality of Utrecht has been providing funding to NGOs to manage a shelter providing women and children in an irregular condition with stable accommodation (as well as financial, legal and medical assistance) and two more shelters, one for irregular adults, and an 'emergency shelter' for rejected asylum seekers.[259] In 2012-2013, slightly fewer than 40 NGOs were actively offering shelter to irregular migrants in Dutch municipalities.[260]

Access to justice

An irregular immigration status exposes an individual to a high risk of becoming a victim of exploitation and crime, and at the same time entails specific barriers for migrants to access the justice systems of Member States to obtain protection and redress. Beyond the cultural and linguistic barriers faced by any foreigner, irregular migrants face specific obstacles related to the fear of being arrested and deported when reaching out to authorities to seek protection and justice. This condition is exacerbated by the immigration detection practices of some Member States and by national laws that, by criminalising irregular migration itself, create confusion and uncertainty for both migrants and police officers over what would happen when an irregular migrant reports a crime. Moreover, migrants with irregular status may be denied the right to be party to criminal proceedings because they could be deported before legal action has got under way, or before the matter has been resolved. All this provokes mistrust towards law enforcement authorities, high levels of underreporting of crime from migrant communities, impunity of perpetrators, and subsequently a general increase in crime. In this sense, the presence of irregular migrants brings about significant challenges for states' interests in fighting crime, as ensuring that irregular migrants trust law enforcement authorities and access justice is in the authorities' interests. Both the FRA[261] and the European Commission[262] invited Member States to introduce possibilities for victims and witnesses with irregular status to report crime without risking to be apprehended.

The FRA and the Commission suggest the adoption of practices that *e.g.* include:

- introducing possibilities for anonymous, or semi-anonymous, or other effective reporting facilities;
- offering victims and witnesses of serious crimes the possibility to turn to the police via third parties;
- defining conditions under which victims or witnesses of crime could be granted residence permits;
- delinking the immigration status of victims of violence from the main permit holder if the latter is the perpetrator.[263]

[259] *Ibidem*.
[260] PICUM (2014), *op. cit.*
[261] FRA (2013), *op. cit*.
[262] European Commission (2015), *Commission Recommendation of 1.10.2015 establishing a common "Return Handbook" to be used by Member States' competent authorities when carrying out return related tasks – Annex Return Handbook*, C(2015)6250, available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/return_handbook_en.pdf.
[263] *Ibidem* and FRA (2013), *op. cit*.

Special residence permits for victims of (certain) crimes

A wider recognition of the need to address irregular migrants' fears of deportation when reporting a crime is given by the laws, adopted by several Member States, allowing the issuance of temporary residence permits for victims of certain crimes (or the suspension of deportation orders for the duration of criminal proceedings), a measure particularly relevant for those victims who might have a regular status which however is dependent on the status of the person they want to denounce. In 2011, Spain removed the obligation for police to automatically open a deportation file for women with irregular immigration status who contacted them to report episodes of gender-based violence and permitting them (and their children) to get a provisional permit. Since 2014, France grants residence permits for both men and women victims of spousal violence and human trafficking.[264] Italy provides special permits for victims of criminal organisations[265] and victims of domestic violence.[266] Since 2015, Greece allows victims (and in some cases witnesses) of a wide range of crimes – including trafficking, sexual violence, racist violence, labour exploitation, child labour and domestic violence – to obtain a residence permit on humanitarian grounds.[267] In the UK, the Destitution Domestic Violence concession (DDV) enables victims of domestic violence to apply for temporary leave and ultimately permanent residence status, but applies to victims who had a regular (spouse or partner) permit when the crime was committed.[268]

Under EU law, Member States may issue a residence permit to victims of trafficking who cooperate with the authorities,[269] or to minor workers, or workers who were subject to particularly exploitative working conditions, in order to facilitate the lodging of complaints against their employers[270] (see below). Notwithstanding national efforts to provide irregular migrants with a secure access to justice for certain crimes, these measures do not cover any kind of crime and still leave many victims fearful of reaching out to police.

The Victims Directive

A landmark piece of legislation in relation to irregular migrant's access to justice in the EU was represented by *Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime* (Victims Directive), which Member States[271] had to transpose by

[264] Today's legislation in France is the result of a process started already in 2003, when the French Immigration Act provided that women who separated from a violent spouse could have their residence card *renewed* at the full discretion of Prefects. On 9 July 2010, the Law on Violence Against Women established a protection order, issued by a judge, that obliged prefects to provide a temporary resident card to women (whether married or not) experiencing violence, *regardless of their immigration status*. See PICUM (2015b), *Guide to the EU victims' directive: advancing access to protection, services and justice for undocumented migrants*, Brussels: Platform for International Cooperation on Undocumented Migrants (PICUM), available at: http://picum.org/picum.org/uploads/publication/VictimsDirective_EN.pdf.

[265] Article 18, Legislative Decree No. 286 of 25 July 1998; for more information, see Delvino N. & Spencer S. (2014), *op. cit.*

[266] Art. 18 bis, Legislative Decree No. 286 of 25 July 1998. *Ibidem*.

[267] Law 4332/2015, see See PICUM (2015b), *op. cit.*

[268] UK Visas and Immigration (2013), *Apply for Destitution Domestic Violence (DDV) concession*, [online] available at: https://www.gov.uk/government/publications/application-for-benefits-for-visa-holder-domestic-violence [last accessed on 10 July 2017].

[269] Directive 2004/81/EC.

[270] Employer Sanctions Directive (2009/52/EC), Article 13.

[271] with the exception of Denmark.

November 2015. The rights set out in the Directive indeed apply to *all* victims of crime, *irrespective of their residence status.*[272] The Directive applies for any offence rising to the level of crime and therefore constitutes a cross-cutting tool for the protection of (irregular) victims. It provides victims with a wide range of entitlements, including *e.g.* the right to be informed of their rights and their case in a way they understand; to make a complaint in a language they understand;[273] and the right to free interpretation and translation of essential information in criminal proceedings.[274]

Of particular relevance for migrants with irregular status, all victims are given the right to participate in criminal proceedings to the extent permitted by national law,[275] and the right to access support services and specialist support services,[276] which Member States are required to provide in a free and confidential way. These services as a minimum shall include shelters for victims in need of a safe place to avoid the repetition of a crime and targeted, integrated support for victims with special needs. Considering the barriers irregular migrants face in accessing shelters and public services, the latter right has particular significance for victims with irregular status (in the UK, for instance, 389 women were for instance denied safe accommodation in the UK in 2014 for not qualifying for public assistance).[277] It is an extremely rare example, in the EU legislative landscape, of an entitlement to a service applying to irregular migrants.[278] The approach taken by the Directive follows a trend initiated at national and local level, where authorities have felt the need to provide irregular victims of crime with access to accommodation, as showed by the experience of the Spanish legislation on gender-based violence which provides undocumented women with an immediate right to access shelters for victims of domestic violence. As seen, at the local level cities like Utrecht or Gothenburg have implemented specific initiatives to ensure that undocumented women overcome administrative barriers and access emergency shelters. Yet, FRA reports that only in 19 EU Member States police and victim support services are available to victims of crime irrespective of their nationality, country of origin or legal status; and that special measures can be in place only for certain categories of (irregular) victims, such as victims of trafficking.[279]

---

[272] Art. 1 states that: 'The rights set out in this Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status'. The official guidance note accompanying the Directive specifies that "The application of the Directive in a non-discriminatory manner also applies to a victim's residence status. Member States should ensure that rights set out in this Directive are not made conditional on the victim having legal residence status on their territory […]. Thus, third country nationals and stateless persons who have been victims of crime on EU territory should benefit from these rights. This may be of particular importance in the context of […], crime against irregular migrant women and girls who are particularly exposed to various forms of gender-based violence (such as physical violence, sexual exploitation and abuse, female genital mutilation, forced marriages and so-called 'honour crimes') and trafficking in human beings'. See European Commission (2013), *DG JUSTICE guidance document related to the transposition and implementation of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.*

[273] Articles 3, 4, 5, 6 & 7, and Recitals 26 & 34.

[274] Article 7.

[275] Articles 10, 13 & 14, and Recitals 34 & 47.

[276] Articles 8 and 9. These services should include: information, advice and support on the rights of victims, including accessing national compensation schemes; information about or referral to relevant special support services; emotional and psychological support; advice on financial and practical issues arising from the crime; and, advice on the risk and prevention of repeat victimisation, intimidation and retaliation.

[277] See PICUM (2015b), *op. cit.*; Women's Aid (2015), *Women's Aid Annual Survey 2014,* available at: https://www.womensaid.org.uk/research-and-publications/annual-survey-2015/annual-survey-2014/.

[278] Given the high level of underreporting among irregular migrants, it is particularly important to note that all victims of crimes, whether or not they have reported the crime to the police, have the right to support services.

[279] See, FRA (2015c), *Victims of crime in the EU: the extent and nature of support for victims*, Luxembourg: Publications Office of the European Union, available at: http://fra.europa.eu/en/publication/2014/victims-crime-eu-extent-and-nature-support-victims.

The Victims Directive, however, does not provide for the possibility to issue special permits for crime victims, nor openly ensures that undocumented migrants reporting a crime will not be apprehended and deported.[280]

Gender-based violence and the 'Istanbul Convention'

Legislators across Europe have dedicated an increased attention to specific categories of crime to which irregular migrants are particularly vulnerable: gender-based violence against irregular migrant women and labour exploitation (and trafficking) of migrant workers with irregular status.

Irregular migrant women are significantly exposed to the risk of gender-based and domestic violence and, at the same time, they are deterred from seeking authorities' help. Lack of an independent residence status increases the likelihood of facing violence or exploitation by intimate partners or employers, and research has shown that threats of deportation, loss of residence status and custody of children are used intentionally by perpetrators to prevent victims from seeking help.[281] This is true also for women with regular status, whose residence status though is dependent on that of an abusive partner whom they fear to denounce. PICUM reports that the majority of undocumented women in Europe arrive with regular, but highly dependent, migration status and become undocumented for reasons outside their control.[282] Moreover, undocumented women escaping violence risk not being accepted by state-funded shelters in several Member States. Although in a fragmented way, this precarious condition was acknowledged by authorities at different level of governance in Europe: from cities (as in the above-mentioned cases of Utrecht and Gothenburg) to national legislators (as in the examples seen above of Member States issuing temporary residence permits for victims of crime including spousal or domestic violence). However, until recently most Council of Europe Member States required spouses or partners to remain married or in a relationship for a period ranging from one to three years for the spouse or partner to be granted an autonomous residence status.[283]

The most relevant recent development in this area is therefore represented by the *Council of Europe Convention on preventing and combating violence against women and domestic violence* (better known as the Istanbul Convention) which entered into force in August 2014 and was signed by all EU Member States. The convention applies to *all women regardless of migration status* (Art. 4) and deals specifically with the situation of victim women on dependent visas. It requires States to grant them autonomous residence permits in the event of a dissolution of marriage or relationship, irrespective of the latter's duration. It also sets that expulsion proceedings may be suspended for the sake of obtaining such a residence permit. The parties to the treaty shall issue a residence permit in any other situation where authorities believe that the victim's stay is necessary owing to their personal situation or for the purpose of investigations or criminal proceedings,[284] a provision that may fit well the situation of victims who were in an irregular status when the violence occurred.

---

[280] Recital 10 of the Directive specifies that: "*Reporting a crime and participating in criminal proceedings do not create any rights regarding the residence status of the victim*"

[281] Council of Europe (2011), *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS 2010*, available at: https://rm.coe.int/16800d383a.

[282] PICUM (2015b), *op. cit.*

[283] Council of Europe (2011), *op. cit.*

[284] Article 59 (3).

Victims of labour exploitation

An irregular condition exposes migrant workers to the abuses of exploitative employers and supervisors who migrants fear to report because of the risks of losing their job and being deported.[285] Also in this case, perpetrators of labour and criminal law violations on the workplace use the threat of deportation to intimidate irregular migrants from seeking justice. Moreover, violations are difficult to prove for migrants working in undocumented and informal economies. This leads to widespread impunity for violations against workers with irregular immigration status, particularly in the fields of domestic work and agriculture, where informal economy is widespread and controls and inspections are lacking.

EU law has dealt with situations of severe labour exploitation or trafficking, but left a gap in addressing irregular migrants' access to justice for minor violations. The *Employers Sanctions Directive* criminalises some forms of illegal employment of irregular migrants,[286] and provides for Member States' possibility to grant, on a case-by-case basis, permits of limited duration to the third-country nationals involved. However this possibility is limited to situations where workers were minors, or subject to particularly exploitative working conditions resorting to a criminal offence.[287] Moreover, the permits are only valid for the duration of relevant proceedings, meaning that in many cases access to justice for irregular victims remains only theoretical. Yet, less than half of EU Member States[288] have introduced the possibility to issue residence permits under the Directive, and research shows that even where legislation is in place, it is only rarely applied.[289]

The European Commission reported that, although "*access to justice and facilitation of complaints constitute the core of the [Employers Sanctions] directive […] it is this part of the directive that could raise concerns because Member States' transposition efforts have often resulted in weak or non-existing mechanisms to facilitate the enforcement of the irregular migrants' rights*".[290] The Commission also stressed on how such a situation is counterproductive for the fight against illegal employment.[291] A FRA study shows that, instead, police across the EU – under pressure to reduce

[285] In a study conducted by FRA on the issue, 58 % of the interviewed respondents indicated that workers did not come forward to report exploitations because they feared having to leave the country where they were working, and 46 % did not do so because they feared losing their job. FRA thus concludes that workers' irregular situation was the cause preventing victims from having real and practical access to justice. See FRA (2015d), *Severe Labour Exploitation: Workers Moving Within or Into the European Union – States' Obligations and Victims' Rights,* Luxembourg: Publications Office of the European Union, available at: http://fra.europa.eu/en/publication/2015/severe-labour-exploitation-workers-moving-within-or-european-union.

[286] Article 9.

[287] Article 13.

[288] Those that have done so include Germany, Greece, Hungary, Italy, Luxembourg, Slovakia, Slovenia, Spain and Sweden. See FRA (2015d), *op. cit.,* p. 79

[289] FRA reported that in 2013, the residence permits issued on the basis of national provisions implementing Article 13 (4) of the Employer Sanctions Directive were only 28 in Italy and 4 in Germany, while the residence of one victim in Slovakia was 'tolerated'. In all these cases, the victim's residence was conditional on their willingness to cooperate with law enforcement authorities. No other residence permits issued in favour of victims of severe labour exploitation in the sense of the Employer Sanctions Directive were identified by FRA in all the other Member States. *Ibidem*

[290] European Commission (2014), *Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, COM(2014) 286 final, available at: http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-286-EN-F1-1.Pdf.

[291] The Commission concludes: '*In general, the lack of specific mechanisms in many Member States to remedy the difficulties that irregular migrants may face in having access to justice and enforcing their rights may be*

irregular migration and increase returns – tend to see irregular migrants found in situations of severe exploitation as 'illegal workers' first and not treated as victims, resulting in the detention and expulsion of victims and, consequently, impunity for the exploiters.[292] Often prosecutions only aim at finding situations of trafficking and disregard other violations, meaning that "no appropriate second line of defence of the victim's rights is pursued or available to respond to severe labour exploitation".[293]

FRA reported that "*access to justice is the absolute exception for exploited workers, as criminal, civil, labour and administrative proceedings largely remain out of reach*".[294] This is due to a variety of factors and mainly to the lack of real regularisation possibilities for migrant victims. While such possibility is allowed in some cases, the strict conditions imposed by EU and national legislation (*e.g.* cooperating with authorities) to the issuance of special residence permits narrow significantly the effectiveness of such measures in allowing access to justice and fighting impunity on the workplace. The result is that as long as they are not offered a safe option of regularising their status, access to justice for this category of migrants often remains theoretical. Human Rights organisations also denounce a two-tier justice system, where only the most serious violations are prosecuted, while victims of less severe violations are not offered any means to fight their fear of reporting abusive employers and are instead the target of law enforcement authorities for repatriation purposes.[295] All this, makes FRA conclude that Member States should put in place effective mechanisms allowing irregular victims of labour exploitation to obtain residence permits that allows them to stay, work and thus pursue justice and effective remedies in the country where they have been exploited.[296]

Victims of trafficking

With regard to trafficking, Member States are required under EU law to allow for a reflection period during which the victim cannot be expelled, and to issue a residence permit for victims if they cooperate with the authorities.[297] In some cases, these permits are not released on the trafficked person's request, but on the authorities' initiative. Where proceedings against the traffickers are not envisaged or the victim has not cooperated with any investigation, there is no requirement to grant a residence permit. EU law also requires that assistance and support measures must be provided before, during and after the conclusion of criminal proceedings.[298]

Research shows that the fight against trafficking has attracted more attention than the one against severe labour exploitation.[299] However, while around a third of all Member States do make use of

---

counterproductive to the fight against illegal employment'; *Ibidem*; FRA strongly supported this view; see FRA (2015d), *op. cit.*

[292] See FRA (2015d), *op. cit.*

[293] *Ibidem.*

[294] *Ibidem.*

[295] FRA (2011b), *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Luxembourg: Publications Office of the European Union, available at: http://fra.europa.eu/en/publication/2012/migrants-irregular-situation-employed-domestic-work-fundamental-rights-challenges

[296] FRA (2015d), *op. cit.*

[297] Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking or who have been the subject of an action to facilitate irregular immigration *(*Articles 6 and 8)

[298] Article 11 of Directive 2011/36/EU (the 'Anti-Trafficking Directive')

[299] See FRA (2015d), *op. cit.*

special residence permits for trafficking victims,[300] others do not make any use of this measure, with 19 Member States in 2013 releasing only less than 6 such residence permits each.[301]

Local initiatives on irregular migrants' access to protection

Similar to the North-American experience of 'sanctuary cities',[302] local authorities in Europe have felt the need to instil trust towards law enforcement authorities in migrant communities to avoid groups in society not reporting a crime for fear of being apprehended. The experience of the city of Amsterdam is illustrative, where the local police created a policy of their own initiative, known as *'free in, free out',* according to which they have been regularly approaching migrant communities to inform individuals with irregular immigration status of their right to report a crime in a safe way.[303] Accordingly, police officers have been instructed not to investigate and pursue people reporting a crime for their irregular status, unless they committed a crime themselves.[304] The experience of Amsterdam, born as an informal practice, subsequently inspired law enforcement authorities throughout the Netherlands, and this policy was rolled out across the country in 2016 in the context of the transposition into Dutch law of the EU Victims Directive.[305]

[300] FRA reports that in 2013, special residence permits for trafficking victims were issued '*in a third of all EU Member States, namely Belgium (79), the Czech Republic (23), France (38), Germany (83), Greece (38), the Netherlands (212), Spain (81) and Sweden (19). By far the most permits were issued in Italy; however, the precise number is not clear. A total of 147 residence permits were issued in Italy for victims of trafficking as a measure of 'social protection'. In addition, 1.277 residence permits were issued for 'humanitarian reasons' (recipients included but were not limited to victims of trafficking)*'. See FRA (2015d), *op. cit.*

[301] *Ibidem*.

[302] See *e.g.* Cuison Villazor R. (2009), "Sanctuary Cities" and Local Citizenship, in Fordham Urban Law Journal, Vol. 37 (2), 573- 589, available at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2338&context=ulj.

[303] PICUM (2015b), *op. cit.*

[304] Delvino N. (2017), *op. cit.*

[305] The principle was explicitly approved in an explanatory note accompanying amendments to Dutch criminal law adopted for the transposition into Dutch law of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime; see PICUM (2015b), *op. cit.*

Conclusions

From this overview of recent policy trends at the global, European, national and local level in Europe there are four observations that can be made.

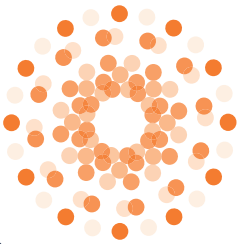
First, there is no simple response to the challenges brought by the arrival and presence of unwanted immigration, as the two dimensions of *irregular migration policies* (focusing on law enforcement) and *policies on irregular migrants* (dealing with their treatment and access to services) overlap constantly. Finding a balance between conflicting instances is an extremely complex exercise for policy makers at different levels of governance. This is one of the main reasons why the international community has not been able to find global agreement over the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. It is also why the negotiations for a *Global Compact on Safe, Regular and Orderly Migration* offer an exceptional opportunity to bring together countries of origin and destination of migrants to develop a shared vision on (irregular) immigration governance at global level.

Second, policies on irregular immigration cannot focus exclusively on fighting the arrival and discouraging the stay of irregular migrants, at least because it can prove inefficient and unrealistic. The EU has developed a policy approach based almost exclusively on combating and preventing irregular immigration in line with its legal basis, but this has not proven to work as irregular arrivals appear to be on the rise; while Member States encounter a variety of challenges in enforcing removals of those who have been detected. Encouraging voluntary returns has proven more cost-effective and indeed the share of voluntary departures out of the total number of returns has significantly increased. Member States' reduced enthusiasm towards the efficiency of detention, and the recent instances of de-penalisation of the crime of irregular entry and stay observed in Europe can be considered as testimonies of earlier policies that have not been proving efficient. Moreover, such an approach can have dire social consequences and create tensions between different levels of governance when the task of dealing with those consequences shift to the lower level. The several initiatives of local authorities to offer a service to irregular migrants have often been in opposition to national policies, and cities demand that the higher levels of governance adopt a more realistic approach and take better into consideration the social impacts of exclusionary decisions.

Third, institutions at all levels of governance cannot overlook the persistent presence of irregular migrants, their social needs, and their fundamental rights. In line with EU policies that exclude irregularly staying migrants from any European integration effort, national approaches towards irregular immigrants have developed around the principle that these migrants must be excluded from most public assistance, and their access to public services should be restricted to minimal levels. However, this approach has shown its limitations as international (and constitutional) human rights law protects the fundamental entitlements of migrants, regardless of status, including their social rights. The FRA has pointed this out on a number of occasions, including with regard to the impacts that criminalising policies have on irregular migrants' fundamental rights to access basic services, like health care or education. Similar concerns have been expressed in relation to the apprehension and detection practices of EU Member States, as recognised by the European Commission too. The European Committee of Social Rights equally asserted that irregular migrants should be provided with services, including shelters, when certain fundamental rights are at stake. Beyond legal duties and human rights considerations, excluding a part of the population from the possibility to request help from public authorities also has negative implications on the interests of

the whole population. The experiences of regions and cities showed how institutions need to instil trust towards authorities in irregular migrants (including *e.g.* health care providers or law enforcement authorities) for the sake of public health, public order, public security, social cohesion and even efficiency.

Finally, against a backdrop of general exclusions of irregular migrants, recent trends indicate a growing awareness in national policies on the positive aspects of more inclusive approaches. Following a period of increasing exclusion from public services and criminalisation of irregular entry and stay observed particularly in the 1990s and 2000s (with occasional instances of openness operated through regularisation programmes), policy trends in the 2010s showed some initial openings from Member States towards irregularly residing migrants. At European level, this trend is limited to irregular victims of crime whose access to services of protection and to the possibility to safely report a crime was recently regulated by the Victims Directive. At national level, instances of de-criminalisation of irregular entry and stays, and the expansions of irregular migrants' access to certain health and education services during the 2010s (as well as national measures to ensure access to justice for victims of certain crimes) are testimonies of a recent trend reversal with regard to the exclusion of irregular migrants that was operated in the previous decades. The need for more inclusive policies is exacerbated by growing numbers of irregular migrants who cannot be removed (to whom some Member States recognise some form of status as 'non-removable'); the lack of legal migration channels; and reduced chances to regularise than in the past. Once again, it is at the local level that authorities have most strongly felt the need to include irregular migrants and shown the most open stances towards them. In some cases, the policies of local authorities have been pivotal for changes at national level (or in simply mitigating the marginalising aspects of central policies), and offered an example for policy making at higher levels. Further analyses of local policies and practices in this area might indeed offer the chance to envision future trends of national and European policies on irregular migrants.



Global Exchange
on Migration & Diversity

The Global Exchange on Migration and Diversity is an ambitious initiative at the Centre on Migration, Policy and Society (COMPAS) opening up opportunities for knowledge exchange and longer term collaboration between those working in the migration field.