



# The Criminalisation of Irregular Migration in the European Union

Mark Provera

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## Abstract

This paper offers an academic examination of the legal regimes surrounding the criminalisation of irregular migrants in the EU and of acts of solidarity with irregular migrants, such as assisting irregular migrants to enter or remain in the EU, and other behaviour that is motivated by humanitarian instincts.

The research analyses EU law and its relationship with national provisions regarding the criminalisation of irregular migration and of acts of solidarity vis-à-vis irregular migrants. A comparative analysis was made of the laws of the UK, France and Italy, supplemented by an analysis of the laws of Germany, the Netherlands and Spain. By considering the role of public trust in fostering compliance with the law, the paper explores the impact of criminalisation measures on institutions' authority to compel individuals to comply with the law (institutional legitimacy).

The study finds that certain indicators question institutional legitimacy and reveals the varied nature and extent of penalties imposed by different member states. The paper concludes that there is an important role for public trust in immigration law compliance, not just in measures directed towards irregular migrants but also towards those acting in solidarity with irregular migrants.

This paper was prepared in the context of the **FIDUCIA** project, which is a research project that will shed light on a number of distinctively 'new European' criminal behaviours that have emerged in the last decade as a consequence of technological developments and the increased mobility of populations across Europe. For more information visit: [www.fiduciaproject.eu](http://www.fiduciaproject.eu)



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## Executive Summary

### Subject Matter

This paper comparatively analyses the legal regimes surrounding the criminalisation of irregular migrants and of those acting in solidarity with irregular migrants in the United Kingdom, France and Italy. The research was supplemented by an examination of laws in Germany, the Netherlands and Spain. The paper examines European Union law and the interrelationship between European Union law and national provisions surrounding irregular migration.

The focus of the research is on irregular migration, which is taken to mean irregular entry and irregular stay, and solidarity, which refers to assisting a person to irregularly enter or stay on the territory of a Member State and includes behaviour that may be described as humanitarian. Criminalisation includes detention, discourse and criminal law measures directed towards irregular migrants as well as identifying penalties which may be grounded in civil law. Criminalisation of migration means the adoption of criminal law characteristics in immigration enforcement and the adoption of immigration consequences for criminal law infractions.

### Method of Analysis

The analysis consisted of two elements: firstly, desk-research was undertaken concentrating on the laws, policies and practices that both directly and indirectly criminalise irregular migrants at both the EU and Member State level. Secondly, a workshop was conducted with 21 local and regional government representatives, civil society experts and leading academics to discuss the issue of criminalisation of irregular migration. A follow-up questionnaire was sent to participants seeking information on specific research questions on the consequences of criminalising migrants and those acting in solidarity with them in their Member State. The results of the questionnaire were tabulated and progressively integrated into the paper.

### Key Findings

The analysis of EU law and the comparative analysis of select Member State legislation reveals a significant ambiguity surrounding exceptions for humanitarian behaviour. The research also finds that, in general, penalties for those assisting irregular migrants are more severe at law than those contemplated for irregular migrants who breach laws surrounding irregular entry and stay (leaving to one side removal from the territory as a consequence for a breach of the law). The nature and extent of penalties differs between the select Member States. The research highlights the interrelationship between EU law and Member State criminalisation measures.

The analysis of institutional legitimacy (the authority of institutions to command compliance with the law) revealed that there are several indicators which question institutional legitimacy of both the European Union and Member States in the migration context:

- the use of criminal law in a selective manner to pursue immigration outcomes (chiefly, removal) when administrative law measures are seen not to provide a desirable outcome from a state's perspective, as well as under-prosecution of migration offences, challenges the compatibility of such measures with the rule of law;

- the use of detention as an efficient means for managing repatriation of irregular migrants is challenged by data surrounding removal rates, multiple instances of detention, and a lack of strong correlation between extended periods of detention and repatriation rates;
- the emergence of collateral consequences of criminalisation measures challenges the legality of measures when assessed against international, supranational and regional human rights obligations; and
- the resistance against national policy by local and regional governments, by the public and by non-government organisations directly assisting irregular migrants where national policy does not meet local needs and goals as well as a lack of moral alignment with the values asserted by the state.

The paper reveals that additional research is required to address knowledge gaps in the assessment of institutional legitimacy.

In considering how to reconcile criminal law and morality in the migration context, the research notes the challenges of doing so where administrative measures (such as detention) have qualities more akin to criminal measures and where discourse maintains a social stigma around certain behaviours.

## **Conclusions**

The research concludes that public trust has an important role to play in immigration law compliance when directed towards irregular migrants through the use of fair and respectful treatment and processes as well as compliance with human rights obligations. Public trust also has an important role to play when directed towards those acting in solidarity with irregular migrants given the severity of the penalties contemplated in the select Member States' legislation and evidence of resistance to national measures. The research also concludes that an understanding of the *substance* of consequences of criminalisation measures upon individuals, rather than only their legal *form* (as either criminal or administrative law), is essential in any attempt to reconcile criminal or administrative measures and morality.

# The Criminalisation of Irregular Migration in the European Union

Mark Provera\*

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## 1. Introduction

In addition to the clear trend over the last 30 years of irregular migrants being the subject of criminalisation measures in an attempt to control irregular migration, there has also been a corresponding criminalisation of the behaviour of individuals who are in solidarity with migrants. The combined effect of these measures has been to place irregular migrants in an increasingly isolated legal and social space in order to coerce behaviour (chiefly, departure or removal from the EU territory). These measures are predicated on the belief that not only can irregular migration be controlled but that it can also be *perfectly* controlled – that is, that the law can be used in an instrumental fashion, removed from normative considerations that generally underpin criminal law provisions (that is, that the law embodies the ‘right thing’ to do). The realities, however, raise questions about the application of the law in this way. Further consequences touching the lives of irregular migrants have also emerged. But the impacts have not been limited to irregular migrants – the citizenry and regular migrants’ lives have also been affected through the criminalisation of acts of solidarity. Further, resistance to criminalisation measures has been manifested *by* citizens and from *within* governments.

If compliance with the law is the ultimate goal, then there must be a high level of institutional legitimacy (that is, the authority of institutions to command compliance with the law). The concern about applying the law as it has been cast in relation to the criminalisation of irregular migrants and those in solidarity with them is that institutional legitimacy, an important factor in ensuring compliance, may be being undermined by diminished normative legitimacy (that is, the fulfilment of objective, quantifiable standards) and diminished empirical legitimacy (that is, the experience of those governed is that the authority asserted is legitimate).

Accordingly, this paper examines whether criminalisation of irregular migrants and those that act in solidarity with them may be eroding institutional legitimacy at the European Union and national levels. After outlining the material and personal scope, the paper will encapsulate the theoretical framework which underpins the FIDUCIA project<sup>1</sup> and the methodology adopted. The paper will then identify some of the intentional policy goals at the EU and national levels for the adoption of criminalisation measures, before proceeding to consider normative legitimacy by reference to the application of those measures and the emergence of other consequences upon the lives of irregular migrants as well as upon those of the citizenry and regular migrants. Lastly, the empirical legitimacy of criminalisation measures is explored by reference to the spaces of contestation and resistance before positing what may be the cumulative effect on public trust not only for irregular migrants and those in solidarity with them but for the European citizenry more generally.

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<sup>1</sup> Hough, M, and Sato, M, *Report on compliance with the law: how normative and instrumental compliance interact*, (July 2013) FIDUCIA Deliverable 5.1.

## 2. Scope

In order to achieve a holistic and nuanced understanding of the effect of criminalisation measures on public trust, it has proven necessary to examine simultaneously measures directed towards irregular migrants *and* those in solidarity with them. Such an approach recognises the intended coercive effect of law-makers to control irregular migrants from two angles. Criminalisation measures directed towards *irregular migrants* place them in a legally isolated space which attempts to diminish their agency<sup>2</sup> and their ability to assert their rights. This effect is compounded by measures which criminalise the behaviour of those in *solidarity* with irregular migrants which both makes the assertion of rights more difficult and attempts to place irregular migrants in a socially isolated space (such as access to health care, accommodation, employment, food or education which may otherwise be supported by a legal right, diminished by criminalisation measures, but which may still be asserted with the assistance of, or interaction with, others/the citizenry). Indeed, research has shown the importance of social networks in the lives of irregular migrants.<sup>3</sup> Accordingly, the cumulative effect of both legal and social isolation may well have the intention of coercing irregular migrants to leave the territory (that is, to make their stay on the territory so uncomfortable as to motivate their return to their country of origin or, at least, to outside the EU territory – a tool of immigration enforcement). Accordingly, criminalisation measures directed towards irregular migrants and those in solidarity with them have a complementary and symbiotic effect on the agency and assertion of rights of irregular migrants such that their joint examination is warranted.

## 3. Definitions

### 3.1 Criminalisation

Criminalisation is a term that is well developed in the United States context which has seen some of the most repressive characteristics of the criminal law and immigration law (chiefly an administrative law domain) cross-pollinate (or, in Legomsky's terms, be "asymmetrically incorporated")<sup>4</sup> and which has been both the subject of a number of academic writings,<sup>5</sup> including the emergence of "over-criminalisation" of migration.<sup>6</sup> In the US context, "criminalisation" of immigration control has been primarily directed towards removal and encompasses a number of characteristics: the integration of criminal law "processes, categories and techniques" into immigration control; the integration of immigration law into the sphere of criminal law (such as the expulsion of migrants convicted of particular crimes);<sup>7</sup> the prioritisation of resources towards deportation of migrants akin to a criminal enforcement approach; the adoption of criminal law enforcement strategies (such as preventative detention and plea bargaining); and the concurrent use of state and federal actors (such as enforcement officials and the judiciary).<sup>8</sup> The distinction in the United States between criminal and administrative law spheres also has a corresponding effect on the Constitutional protections offered to the person the object of a measure.<sup>9</sup> Accordingly, the development of the term in the United States

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<sup>2</sup> See further about the agency of individuals in a forced migration context, see Turton, D, *Who is a Forced Migrant?* In de Wet, C, (ed.) *Development-induced Displacement*, 2006, Berghahn Books, New York, pp. 13-36.

<sup>3</sup> PICUM, *Book of Solidarity Project*, 2002-2003, DG Employment and Social Affairs.

<sup>4</sup> Legomsky, S. H., *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms* (2007) 64 *Washington & Lee Law Review* 469.

<sup>5</sup> Legomsky, op. cit.; Stumpf, J, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power* (2006) 56 *American University Law Review* 367; Miller, T A, *Blurring the Boundaries Between Immigration and Crime Control After September 11<sup>th</sup>* (2005) 25 *Boston College Third World Law Journal* 81; Kanstroom, D, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11<sup>th</sup> "Pale of Law"* (2004) 29 *North Carolina Journal of International Law and Commercial Regulation* 639; Miller, T A, *Citizenship and Severity: Recent Immigration Reforms and the New Penology* (2003) 17 *Georgetown Immigration Law Journal* 611.

<sup>6</sup> Chacón, J M, *Overcriminalizing Immigration* (2012) 102(3) *Journal of Criminal Law and Criminology* 613.

<sup>7</sup> Legomsky, op. cit.; Miller (2003) (Op. cit.), pp. 617-618.

<sup>8</sup> Legomsky, op. cit.

<sup>9</sup> Stumpf, op. cit., pp. 390-391.

has centred around the degree of Constitutional legal protection (or not) to which a person is entitled based on whether the matter falls within the administrative or criminal law sphere.

Although human rights guarantees (including procedural justice guarantees) both internationally and in Europe are not entirely free of a statist agenda,<sup>10</sup> criminalisation in a European context embraces a much broader understanding which has included “repressive action of police forces, and then of judicial proceedings” because a person has “contravened to [*sic*] one or more norms of the administrative, civil or criminal code”,<sup>11</sup> as well as discourse,<sup>12</sup> the use of immigration detention<sup>13</sup> and, importantly, is inclusive of the criminalisation of those persons acting in solidarity with irregular migrants.<sup>14</sup> This broader conceptualisation is, for example, reflected in the research of the European Union’s Fundamental Rights Agency which has rather looked first at the existence of penalties for *both* migrants and those acting in solidarity with them and *then* identified whether those penalties emanate from the civil or criminal law spheres.<sup>15</sup> The advantage of taking an approach that looks at penalties as opposed to their legal source recognises the cumulative effect that a concurrent civil and criminal measure can have on the assessment of its proportionality (that is, the deportation for a particular crime might involve the application of both civil and criminal law but its combined effect might constitute a disproportionate penalty on the person concerned or even double jeopardy). Further, such an approach also recognises that civil law measures may have purposes more akin to criminal sanctions but which may only be implied: such as deterrence and punishment. The approach is also sympathetic to the different geneses of criminal and administrative law amongst the Member States. However, the civil/criminal distinction remains relevant for at least three reasons: firstly, criminal law sanctions can have an impact on discourse and public perceptions concerning irregular migrants and the conflation of irregular migration and criminal activity;<sup>16</sup> secondly, the civil/criminal distinction may be used by states to take a narrow construction of non-penalisation provisions in international agreements whereby civil law measures are used but which may have an equivalent, or worse, effect on their objects than criminal law sanctions;<sup>17</sup> and thirdly, the standard of (evidential) proof differs between criminal and civil law sanctions.

This paper takes as its starting point the scope set by an earlier deliverable of the FIDUCIA Project to encompass criminal law, discourse and detention<sup>18</sup> yet further nuances this understanding by identifying the penalties that may be applied to migrants or those in solidarity with them. As procedural justice is at the heart of trust-based methods for compliance,<sup>19</sup> this paper will at least focus on the criminal provisions and

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<sup>10</sup> Costello, C, *Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law* (2012) 19(1) *Indiana Journal of Global Legal Studies* 257, pp. 261-263, 282

<sup>11</sup> Pallida, S, (ed.) *Introduction*, *Racial Criminalization of Migrants in the 21<sup>st</sup> Century* (2011), Farnham, Ashgate, pp.12-13

<sup>12</sup> Maneri, M, *Media Discourse on Immigration: Control Practices and the Language We Live in* in Pallida, S, (ed.), *Racial Criminalization of Migrants in the 21<sup>st</sup> Century* (2011), Farnham, Ashgate.

<sup>13</sup> Rahola, F, *The Detention Machine* in Palidda, S, (ed.), *Racial Criminalization of Migrants in the 21<sup>st</sup> Century* (2011), Farnham, Ashgate

<sup>14</sup> Guild, E, *Criminalisation of Migration in Europe: Human Rights Implications*, Council of Europe Issues Paper, 4 February 2010, CommDH/IssuePaper(2010)1, Strasbourg

<sup>15</sup> European Union Agency for Fundamental Rights, *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014), Vienna

<sup>16</sup> Parkin, J, *The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research* (2013), CEPS Paper in Liberty and Security in Europe No. 61, Centre for European Policy Studies, Brussels, October

<sup>17</sup> Schloenhardt, A, and Hickson, H, *Non-Criminalization of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol Against the Smuggling of Migrants by Land, Sea, and Air* (2013) 25(1) *International Journal of Refugee Law* 39; see generally concerning the use of criminal provisions in the European Union in the context of human trafficking and smuggling, Guild, E, and Minderhoud, P, (eds.) *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling Human Beings* (2006), Leiden, Martinus Nijhoff

<sup>18</sup> Parkin, op. cit.

<sup>19</sup> Hough and Sato, op. cit.

identify any procedural challenges to the migrant resulting from the classification of the measure as criminal or civil.

### 3.2 Irregular Migration

Consistent with the personal scope of the preceding deliverable under the FIDUCIA project,<sup>20</sup> this paper will primarily focus on irregular migration.

Notwithstanding the multiplicity of ways in which a person may irregularly migrate,<sup>21</sup> for the purposes of this paper “irregular migration” will encompass two modes: irregular entry and irregular stay (consistent with the articulation contained in the Facilitation Directive).<sup>22</sup> This distinction will also be sustained in an analysis of the criminalisation of those persons in solidarity with irregular migrants (that is, in the facilitation of an irregular migrant to enter and/or stay on EU territory). It is reflective of situations where migrants may enter territory with prior authorisation, but later become irregular (for example, those who overstay their visas) or who enter without prior authorisation but later become regular (for example, asylum seekers who are granted a right to remain pending the examination of their application for international protection) as well as those whose neither entry nor stay is in accordance with Member State law.

In addition to acts which might constitute irregular migration, the paper also includes the status ascribed to individuals as an “irregular migrant”. As a starting point, the term “irregular migrant” is analogous to “third country nationals staying illegally” on the territory of an EU Member State as contemplated under the Return Directive<sup>23</sup> and the Employer Sanctions Directive<sup>24</sup> (Articles 3(1) and 2(a) and (b) respectively). This approach is consistent with the characterisation contained in the Facilitation Directive, which contemplates “a person who is not a national of a Member State” to enter, transit across or reside in the territory of a Member State “in breach of the laws of the State concerned” on the entry, transit or residence of aliens (Article 1). Accordingly, notwithstanding the emergence of EU law in relation to return and facilitation of entry and stay, the determination of whether a person is irregular remains dependent on national provisions but, as Guild notes, Member State provisions are not necessarily clear.<sup>25</sup>

The definition contained in the Return Directive warrants further consideration on two fronts. Firstly, in an EU context, “illegal” is used in the sense that a person’s presence on a Member State’s territory is contrary to law, but a distinction must be made between behaviour which is “illegal” (denoting criminality with a normative underpinning) and “unlawful” (contrary to law consistent with an administrative breach) which, as Parkin notes, can have profound discursive effects.<sup>26</sup>

Secondly, the definition under the Returns Directive contemplates irregularity in fairly binary terms. However, the term “irregular migration” represents, at times, overlapping spheres of migration behaviour which may include migrant smuggling, human trafficking, asylum seeking, and the seeking of temporary protection – that is, each form of migration may overlap at various points with a common ground of

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<sup>20</sup> Parkin, op. cit.

<sup>21</sup> Düvell, F, *Paths into Irregularity: The Legal and Political Construction of Irregular Migration*, (2011) 13 European Journal of Migration and Law 275; Anderson, B, *Us and Them? The Dangerous Politics of Immigration Control* (2013) Oxford, Oxford University Press

<sup>22</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (“the Facilitation Directive”)

<sup>23</sup> 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 (“the Return Directive”)

<sup>24</sup> 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 (“the Employer Sanctions Directive”)

<sup>25</sup> Guild, E, *Who Is An Irregular Migrant?* in Bogusz, B, Cholewinski, R, Cygan, A, and Szyszczak, E, *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (2004) Leiden, Martinus Nijhoff, pp.3-28; pp. 15-16

<sup>26</sup> Parkin, op. cit.



“irregularity” either at the time of entry or at a later time.<sup>27</sup> Just as those categories of migration are not mutually exclusive (for example, those subjected to human smuggling might also seek asylum), those categories are also not binary in terms of the regularity or irregularity of entry or presence.

### 3.3 Solidarity

Solidarity includes the identification of two elements: *the identity* of the person or entity acting in solidarity with the irregular migrant; and *the act of solidarity* itself.

For the purpose of this paper, the *identity* of the person or entity acting in solidarity includes individuals, both incorporated and unincorporated entities as well as government entities (such as regional and municipal governments).

*Acts of solidarity* include behaviour which assists irregular migrants either to enter or remain in the EU (which the Facilitation Directive describes as “facilitation”). Such behaviour includes providing, or assisting migrants to access, basic rights such as health care, accommodation, education, transport as well as necessities such as food and clothing. It is behaviour which might be considered humanitarian – that is, the individual or entity might consider their act to be “good” yet is otherwise subject to sanction. The EU Facilitation Directive and the laws of some Member States do contemplate “humanitarian assistance” as an exception to sanction with “financial gain” or “gain” as a determinative element warranting sanction – all three terms may be open to interpretation. In light of the FIDUCIA project’s objectives of using trust-based methods for compliance which are conventionally directed towards the citizenry and regular migrant population, the criminalisation of acts of solidarity presents a very relevant object of research for the FIDUCIA project.

For the purpose of this paper an examination of human trafficking is not included as this topic is being addressed under the work package of another FIDUCIA partner.

It is acknowledged that greater clarity is needed concerning at what point acts of solidarity (such as humanitarian assistance or assisting irregular entry and stay) become acts of criminality (such as people smuggling and human trafficking).

## 4. Methodology

The research has been the subject of two elements: firstly, the formation of a clear research agenda involving desk research involving an analysis of the laws, policies and practices that both directly and indirectly criminalise irregular migrants at both the EU and national level.

The second element involved a workshop with 21 local and regional government representatives, civil society experts and leading academics to discuss the issue of criminalisation of irregular migrants in their respective Member States and measures at the EU level. The outcome of this workshop clarified the research direction and a follow up questionnaire was prepared and sent to participants seeking information on specific research questions on the consequences of criminalising migrants and those in solidarity with them in their Member State. The questions focused on two parts: the criminalisation of migrants and the criminalisation of third parties. In relation to migrants, specific information was sought about the existence of crimes or penalties against migrants, the circumstances in which migrants would be apprehended or detained, the deterrent effect of apprehension and detention on irregular migrants, and the side-effects of a migrant criminalising regime. In relation to the criminalisation of third parties, specific information was sought regarding penalties on landlords and employers, the existence of duties to report, and any deterrence impact that these measures might have on third parties. The results were tabulated and, framed by a clear research agenda from the first stage, have greatly enhanced the understanding of the measures and consequences of criminalising irregular migrants and those in solidarity with them. These interviews and questionnaire

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<sup>27</sup> Triandafyllidou, A, and Maroukis, T, *Migrant Smuggling – Irregular Migration from Asia and Africa to Europe* (2012) Basingstoke, Palgrave McMillan

responses will be progressively integrated to feed further this and subsequent FIDUCIA research deliverables.

An in depth study of three Member States (the United Kingdom, France and Italy) was undertaken. These three countries were chosen in light of the fact that firstly, France and Italy had recently amended legislation removing custodial sentences for irregular stay and some insight was sought into the policy rationales behind those decisions; secondly, the United Kingdom was chosen to provide a partial counterpoint due to it being a common law jurisdiction as well as it not being bound by the Return Directive,<sup>28</sup> the Employer Sanctions Directive<sup>29</sup> and the Schengen Borders Code.<sup>30</sup> However, the United Kingdom is still bound by the Facilitation Directive,<sup>31</sup> the Framework Decision on unauthorised transit<sup>32</sup> the Carrier Sanctions Directive,<sup>33</sup> the Reception Conditions Directive I<sup>34</sup> and the Procedures Directive I.<sup>35</sup> A more general examination of three additional Member States (the Netherlands, Germany and Spain) was undertaken to assist with the further substantiation of issues emerging from the analysis of the three primary Member States.

The annexure to this paper contains a table of legislation comparing the six jurisdictions chosen. The information was initially sourced from research published by the FRA<sup>36</sup> and was then cross-checked against the legislation of the respective Member States and the information provided by respondents in response to the questionnaire. The annexure aims to assist not only with a horizontal comparative analysis of the offences, their elements and their consequences across the selected Member States, but also provides a vertical analysis to compare the severity of consequences as between irregular migrants and those in solidarity with them.

## 5. Institutional Legitimacy and Irregular Migration

The theoretical framework of the FIDUCIA project as set out by Hough and Sato<sup>37</sup> under an earlier FIDUCIA deliverable identifies two modes of compliance with the law – instrumental compliance (based on the notion of reward and punishment) and normative compliance (that the law embodies the “right thing”). The FIDUCIA project is concerned with normative *compliance*.

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<sup>28</sup> Recital 26 of the Return Directive

<sup>29</sup> Recital 38 of the Employer Sanctions Directive

<sup>30</sup> Regulation EC No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

<sup>31</sup> Recital 7 of the Facilitation Directive

<sup>32</sup> Recital 7 of Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (“the Framework Decision”)

<sup>33</sup> Recital 7 of Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (“the Carrier Sanctions Directive”)

<sup>34</sup> Recital 19 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the Reception of Asylum Seekers (“the Reception Conditions Directive I”) noting that the United Kingdom is not bound by its legislative successor – see Recital 33 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (“the Reception Conditions Directive II”)

<sup>35</sup> Recital 32 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (“Procedures Directive I”) noting that the United Kingdom is not bound by its legislative successor – see Recital 58 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (“the Procedures Directive II”)

<sup>36</sup> European Union Agency for Fundamental Rights, *Criminalisation of migrants in an irregular situation and of persons engaging with them* (2014), Vienna

<sup>37</sup> Hough and Sato, *op. cit.*

In order to engender normative compliance, procedural justice plays an integral part – that is, through a process that is fair and respectful of those who engage with it, trust in justice is fostered and compliance with the law occurs.

Fairness in the justice system (as but one subset of compliance theory) in turn feeds institutional legitimacy (that is, the authority of institutions to command compliance). Institutional legitimacy is assessed in terms of *normative legitimacy* (objectively against criteria) and *empirical legitimacy* (subjectively, the experience of those governed). The combination of both normative and empirical legitimacy is triangulated (that is, a full understanding of institutional legitimacy cannot be had without assessing both its normative and empirical legitimacy).

The elements of normative legitimacy aim to assess the law against certain criteria using objective evidence such as efficiency, accountability, legality, ethical and moral standards and the rule of law.<sup>38</sup> In the migration context, efficiency may be analogous to effectiveness. Czaika and de Haas note that there has been considerable academic debate as to the extent to which States have the capacity to control migration.<sup>39</sup> However, Czaika and de Haas have identified discursive, implementation and efficacy gaps in previous attempts to measure migration policy effectiveness and have developed a methodology for more accurately determining the influence of policy on migration flow by disaggregating terms such as “policy”, “effectiveness”, “effect” and more specifically identifying migration classes.<sup>40</sup> Accordingly, for the purposes of this paper, the empirical evidence identified herein merely raises questions about the application of these measures and their effectiveness and which, in turn, raises questions about the impact of these measures on normative legitimacy. Coming to definitive conclusions could well be the subject of more detailed research.

Elements of empirical legitimacy seek to understand the experience of the governed of whether the institution is legitimate; the legality of the measure concerned; and the moral alignment or shared moral values between the person and the institution.<sup>41</sup>

In terms of assessing legality, normative legitimacy and ethical and moral standards, it is submitted that these are assessed by reference to fundamental rights norms contained in the EU Charter, the European Convention on Human Rights (“ECHR”), the European Social Charter as well as the principle of proportionality as a general principle of EU law (and which is legislatively embodied in, for example, the EU secondary legislation concerning detention such as the Return Directive and Reception Conditions Directive II).

It will firstly be submitted that criminalisation measures directed towards irregular migrants and those in solidarity with them may be undermining *normative legitimacy* on account of being used in an instrumental and arbitrary manner and that the measures have had questionable compliance with legality and the rule of law. It will secondly be submitted that *empirical legitimacy* may be evidenced as being undermined by the spaces of contestation and resistance not only by the citizen public but also by local and regional governments which have expressly resisted and contested national measures to criminalise irregular migrants and those in solidarity with them.

## 6. Identification of criminalisation measures and comparative analysis of select Member States

### 6.1 European Union Measures

As has already been explored under a previous deliverable, there is a relationship between EU law and policy in the field of migration and its effect on compelling its Member States to adopt “a restrictive stance in the

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<sup>38</sup> Ibid., pp. 6-8.

<sup>39</sup> Czaika, M, and de Haas, H, (2013a) *The effectiveness of immigration policies* (2013) 39(3) Population and Development Review 487; 487-488; de Haas, H, and Czaika, M, (2013b) *Measuring Migration Policies: Some Conceptual and Methodological Reflections* (2013) 1(2) Migration and Citizenship 40, pp. 40-41.

<sup>40</sup> Ibid.

<sup>41</sup> Hough and Sato, op. cit., p. 8.

criminal law” which has, at times, been bi-directional and mutually reinforcing as between the EU and national levels.<sup>42</sup> Indeed, it has been suggested that the challenges facing EU policy-making in this area have “incentivized” frontier Member States to adopt a restrictive approach.<sup>43</sup>

In the EU context, there appears to be an underlying assumption that immigration can not only be controlled but that it can be *perfectly* controlled, chiefly through an instrumental use of the law. The realities suggest, however, that although EU policy may influence migratory movements, it cannot control them,<sup>44</sup> rather merely displacing migrants to take other routes.<sup>45</sup> Indeed, de Haas has demonstrated the existence of migration between North Africa and Europe is not new.<sup>46</sup> Castles notes, amongst other things, that the failure of EU policy in relation migration is based on the assumption that it can be “turned on and off like a tap”<sup>47</sup> through the use of regulation when historical experience should inform otherwise and through the failure to address the much broader and complex dynamics that influence migration. Also bearing upon the ability of states to perfectly control migration are the consequences of human rights obligations to all those under their jurisdiction.<sup>48</sup> Yet Carrera and Merlino note that the Stockholm Programme and the Commission’s Action Plan implementing it were devoid of references to the rights of irregular migrants (or irregular migrants as right holders) with the exception of unaccompanied minors.<sup>49</sup>

Accordingly, if migration is not being controlled by not addressing the much broader and complex dynamics that influence it, then it raises questions as to the role of criminal law in immigration enforcement and against those who assist irregular migrants, particularly if it produces adverse consequences on both the irregular migrant and citizen or regular migrant populations – consequences which may be disproportionate to the objective sought to be achieved. One explanation may be that, as Sklansky has observed, the criminal law is being used instrumentally in an *ad hoc* manner – that is, there are *indicia* that criminal law is being used selectively (as opposed to systematically) based on practical considerations because of its effectiveness in securing immigration enforcement objectives when non-criminal law measures are not as advantageous to states (rather than its normative underpinning or because the action is inherently ‘wrong’).<sup>50</sup> Sklansky’s position is a useful prism through which to understand the role of criminal law in the migration enforcement sphere as regards the interchangeability of laws based on pragmatism but it must be tempered against the particularities of the European context: firstly, Member States differ as regards prosecutorial discretion and criminal legal traditions; secondly, that the concept of criminalisation in Europe extends to those in solidarity with irregular migrants; and thirdly, that the two chief regional human rights instruments (the EU Charter and the ECHR) provide fundamental rights to all within a Member State’s jurisdiction with only very limited exceptions based on immigration status.

What is clear is that Member States, although at liberty to introduce or maintain criminal sanctions on account of irregular entry or stay, have been constrained supranationally about the extent of those measures when they undermine the operation of EU law (notably, the Return Directive and its guarantees). However Spena makes the powerful point that EU law neither proscribes irregular entry *per se* nor prohibits Member States from adopting criminalisation measures, noting that the EU litmus test for the legitimacy of Member

<sup>42</sup> Parkin, op. cit.

<sup>43</sup> Richey, M, *The North African Revolutions: A Chance to Rethink European Externalization of the Handling of Non-EU Migrant Inflows* (2013) 9(4) Foreign Policy Analysis 409

<sup>44</sup> Richey, op. cit.; Guild, E, and Carrera, S, *EU Borders and Their Controls: Preventing unwanted movement of people in Europe?* CEPS Essay No. 6, November 2013, Centre for European Policy Studies, Brussels

<sup>45</sup> Spijkerboer, T, *The Human Costs of Border Control* (2007) 9 European Journal of Migration and Law 127

<sup>46</sup> de Haas, H, *The myth of invasion – Irregular migration from West Africa to the Maghreb and the European Union*, (2007), International Migration Institute, University of Oxford ([www.imi.ox.ac.uk/pdfs/Irregular%20migration%20from%20West%20Africa%20-%20Hein%20de%20Haas.pdf](http://www.imi.ox.ac.uk/pdfs/Irregular%20migration%20from%20West%20Africa%20-%20Hein%20de%20Haas.pdf)).

<sup>47</sup> Castles, S, *Why migration policies fail*, (2010) 29(2) Ethnic and Racial Studies 205, p. 208.

<sup>48</sup> Hollifield, J F, *The politics of international migration: how can we “bring the state back in”* in Brettell, C B, and Hollifield, JF (eds), *Migration Theory: Talking Across Disciplines*, (2000) New York and London: Routledge

<sup>49</sup> Carrera, S, and Merlino, M (eds), *Assessing EU Policy on Irregular Migration under the Stockholm Programme*, October 2010, CEPS Liberty and Security in Europe paper, Centre for European Policy Studies, Brussels

<sup>50</sup> Sklansky, D, *Crime, Immigration and Ad Hoc Instrumentalism*, (2012) 15(2) New Criminal Law Review 157.

State criminal sanctions has been whether such national measures interfere with expedited return (the real object of the Return Directive).<sup>51</sup> Accordingly, Spina notes the interrelationship between Member State and EU legitimacy.<sup>52</sup>

In the case of those acting in solidarity with irregular migrants, where EU secondary legislation has contemplated criminal sanction by Member States, there appears to be a greater margin of appreciation given to Member States. Yet even in that instance Member State discretion is not completely unfettered – it must still be in line with fundamental human rights obligations to both those in solidarity with irregular migrants as well as to the irregular migrants themselves (as those in solidarity play an important role for irregular migrants to have access to and exercise their rights). However, as the EU has also introduced secondary legislation criminalising facilitation with a degree of ambiguity for humanitarian exceptions, its institutional legitimacy may also be subject to erosion.

### 6.1.1 Relevant EU Legislation – Entry

#### *EU Legislation Concerning the Entry of Migrants*

Although there are no provisions for the adoption of criminal law sanctions against those individuals who enter the territory of the Union without prior authorisation, there are criminalisation consequences for migrants resulting from EU secondary legislation.

The Schengen Borders Code (“SBC”)<sup>53</sup> governs entry into the territory of a Member State. Sanctions are contemplated for persons who have crossed an external border of a Member State for unauthorised crossing at places other than at border crossing points or during the specified opening hours<sup>54</sup> – sanctions are not contemplated for unauthorised crossing *per se*. However, the failure to fulfil the entry requirements of the SBC can result in the refusal at the border.<sup>55</sup> Two consequences may flow from this: firstly, the individual may be deemed an “illegally staying third country national” under the Return Directive,<sup>56</sup> subjecting the person to an entry ban (in the circumstances where no voluntary departure period was granted or, if granted, the person has not departed within the voluntary departure period)<sup>57</sup> – and possible detention pending removal;<sup>58</sup> secondly, the Member State may decide not to apply the Return Directive to the refused person<sup>59</sup> and commence the return or removal process immediately which may include detaining the person. The holding of a valid visa (that is, prior authorisation) does not, of itself, guarantee entry into the Member State where the other requirements of the SBC have not been fulfilled (for example, the holding of sufficient resources).<sup>60</sup> This aspect was made visible (but with questionable legality) in the course of the Franco-Italian Affair which saw French authorities prevent the entry into France of third country nationals who had been issued residence permits in Italy on account of their lack of “sufficient resources”.<sup>61</sup>

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<sup>51</sup> Spina, A, *Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law* (2014) 8 Criminal Law and Philosophy 635, p. 639.

<sup>52</sup> *Ibid*

<sup>53</sup> Regulation EC No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)

<sup>54</sup> Article 4(3) of the Schengen Borders Code

<sup>55</sup> Article 5 provides for the conditions of entry of third-country nationals into the Schengen area, Article 13 provides under which circumstances a third country national may be refused entry into the Schengen area

<sup>56</sup> See Articles 6(1) and 3(1) and (2) of 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 (“the Return Directive”)

<sup>57</sup> Article 11 of the Return Directive

<sup>58</sup> Article 16 of the Return Directive

<sup>59</sup> Article 2(2)(a) of the Return Directive

<sup>60</sup> See Article 5 of the Schengen Borders Code

<sup>61</sup> Carrera, S, Guild, E, Merlino, M, Parkin, J, *A Race against Solidarity: The Schengen Regime and the Franco-Italian Affair*, April 2011, CEPS Liberty and Security in Europe paper, Centre for European Policy Studies, Brussels

In relation to asylum seekers, as discussed previously, there is an implicit preference for asylum seekers to arrive ‘regularly’ and then seek asylum<sup>62</sup> under a system that insists on a territorial notion of asylum but provides limited means of providing authorised access to the territory.<sup>63</sup> This is manifested by the differential treatment afforded to asylum seekers on account of *where* they make their application for international protection – that is, there is a distinction in treatment between border and other applicants. This distinction resulted in the possibility of Member States to severely derogate from guarantees rights to which border applicants might otherwise be entitled<sup>64</sup> and which have since been removed under the second generation asylum legislation (noting, however, that the UK is still bound by the first generation asylum legislation as discussed earlier). However, the second generation asylum legislation still maintains a number of distinctions based on whether the person is a border applicant or not,<sup>65</sup> indeed providing for the admissibility and *substance* of applications to be decided at border or transit zones.<sup>66</sup> Despite the removal of some express distinctions between border and other applicants for asylum, the ground of detention introduced in the Reception Conditions Directive II affects border applicants as it contemplates the detention of an asylum seeker “in order to decide, in the context of a procedure, on the applicant’s right to enter the territory”.<sup>67</sup> Concern has been expressed that a narrow interpretation of that ground of detention provides implicit permission for Member States to detain asylum seekers at the border systematically *throughout* the period that their asylum application is being determined.<sup>68</sup> The inference to draw from such distinctions are that border applicants are considered an immigration control failure and measures such as detention are a response to that perceived failure.

The terminology contained in the secondary legislation maintains a criminalising discourse. In the Return Directive, the recitals refer to “the fight against illegal immigration”<sup>69</sup> when the Directive itself provides no criminal sanction for the irregular entry or presence on EU territory. Indeed, as Guild notes, the adoption of such terminology may be used to more easily justify the use of coercive force on migrants to carry out the removal process – a process which is not a result of an outcome of the criminal justice system but which is carried out under administrative law.<sup>70</sup>

In relation to detention under both the Return Directive and the Reception Conditions Directive, both pieces of secondary legislation contemplate detention in prisons which arguably has a reinforcing effect on the perceived criminality of third country nationals in a return situation as well as asylum seekers. Under the

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<sup>62</sup> Provera, M, *The Detention of Asylum Seekers in the European Union and Australia: A Comparative Analysis*, (2013), Oisterwijk, Wolf Legal Publishers, P.312

<sup>63</sup> Guild, E, and Moreno-Lax, V, *Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR*, September 2013, No. 59, CEPS Paper in Liberty and Security in Europe

<sup>64</sup> See Articles 35 and 24(1)(b) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (“the Procedures Directive I”); see also Article 14(8) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (“the Reception Conditions Directive I”)

<sup>65</sup> See for, example, Articles 4(2)(b), 46(7) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (“the Procedures Directive II”); Articles 10(5) and 11(6) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (“the Reception Conditions Directive II)

<sup>66</sup> Article 43 of the Procedures Directive II

<sup>67</sup> Article 8(3)(c) of the Reception Conditions Directive II

<sup>68</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008)*, 13 March 2009; UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum seekers*, April 2011; ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Reception Conditions Directive*, April 2009, Brussels; ECRE, *Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Reception Conditions Directive (COM(2011) 320 final)*, September 2011, Brussels

<sup>69</sup> Recital 1 of the Return Directive

<sup>70</sup> Guild (2010), op. cit.

Return Directive, detention is to take place in “specialised detention facilities”.<sup>71</sup> However, that provision is undermined by the qualification “as a rule” and with the express permission under the Directive for Member states to resort to prison accommodation where specialised detention facilities cannot be provided.<sup>72</sup> Although third country nationals are to be kept separate from ordinary prisoners, derogation is possible in “exceptional circumstances”.<sup>73</sup> A similar formulation can be found in the Reception Conditions Directive II.<sup>74</sup> The use of penal incarceration facilities for administrative detention is an example of criminalisation through the imposition of criminal consequences for immigration infractions and the use of the same actors governing, in this situation, the detention of both irregular migrants and convicted criminals.

Although the Anti-Trafficking Directive provides for the non-penalisation of the acts committed by a person as a direct result of their being trafficked,<sup>75</sup> the Directive is silent on whether this applies to breaches of immigration law – the Directive only contemplates exclusion from prosecution for *criminal* acts related to their being trafficked, not to breaches of administrative law (upon which migration law is predominantly based).

### *EU Legislation Concerning Those in Solidarity with Irregular Migrants*

Unlike the EU secondary legislation directly affecting migrants, the secondary legislation in relation to those in solidarity with irregular migrants compels Member States to make provision for criminal sanctions for those that assist irregular migrants to enter the territory. The secondary legislation contemplating such penalties include: the Facilitation Directive;<sup>76</sup> the Framework Decision on facilitating unauthorised transit,<sup>77</sup> entry and residence, and the Carrier Sanctions Directive.<sup>78</sup>

The Facilitation Directive requires Member States to implement effective, proportionate and dissuasive sanctions against those who instigate, participate or attempt to assist a person who is not a national of a Member State to enter or transit across the territory of a Member State.<sup>79</sup> An exception, based on humanitarian assistance to the person concerned, is contemplated<sup>80</sup> but this provision is discretionary towards Member States rather than mandatory. Further, “humanitarian assistance” is not defined under the Directive.

The Framework Decision supports the Facilitation Directive and compels Member States to provide for effective, proportionate and dissuasive criminal penalties against those transgressors of the Facilitation Directive.<sup>81</sup> Extradition is expressly contemplated. In *addition to* the criminal penalties which Member States are compelled to provide, the Framework Decision also permits Member States: firstly, to confiscate the means of transport connected with the offence; secondly, to prohibit the person practising directly or indirectly the occupational activity through which the offence was committed; and, thirdly, deportation.<sup>82</sup>

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<sup>71</sup> Article 16(1) of the Return Directive

<sup>72</sup> Note, however, the CJEU’s decision in Cases C-473/13 and C-514/13 *Adala Bero v Regierungspräsidium Kassel; Ettayebi Bouzalmate v Kreisverwaltung Kleve*, Judgment, Grand Chamber, 17 July 2014 (discussed below)

<sup>73</sup> Article 18(1) of the Return Directive. Note, however, the CJEU’s decision in Case C474/13 *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, Judgment, Grand Chamber, 17 July 2014 (discussed below)

<sup>74</sup> Article 10(1) of the Reception Conditions Directive II

<sup>75</sup> Article 8 of Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (“The Anti-Trafficking Directive”)

<sup>76</sup> Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (“the Facilitation Directive”)

<sup>77</sup> Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (“the Framework Decision”)

<sup>78</sup> Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (“the Carrier Sanctions Directive”)

<sup>79</sup> Articles 1(1)(a), 2 and 3 of the Facilitation Directive

<sup>80</sup> Article 1(2) of the Facilitation Directive

<sup>81</sup> Article 1(1) of the Framework Decision

<sup>82</sup> Article 1(2) of the Framework Decision

Accordingly, the Framework decision provides an example of criminalisation through expressly permitting Member States to adopt immigration-related consequences for criminal activity. The Framework Decision also extends its reach beyond natural persons to include sanctions on legal persons (such as entities, organisations and corporations).<sup>83</sup>

The Carrier Sanctions Directive compels Member States to provide for sanctions against carriers and to ensure the carrier's responsibility (either directly or financially) for returning third country nationals who have been refused entry into a Member State.<sup>84</sup> Accordingly, carriers (as private entities) have been co-opted into immigration control (a public function) with penalty consequences for transporting those passengers that are refused entry at the border. Accordingly, as was noted by a study conducted for the European Parliament, asylum seekers are greatly affected by the operation of the Directive because their need to flee and seek refuge cannot overcome documentary shortcomings (such as prior authorisation to enter – especially given the list of countries which are required to have visas to travel to Europe,<sup>85</sup> even if transiting<sup>86</sup>) and the consequent risk that carriers face of penalty and responsibility for their return.<sup>87</sup>

The terminology adopted in each of the Directives and the Framework decision refers to “illegal immigration”, further compounding the discursive effect between criminality and irregular immigration status.

### 6.1.2 *Relevant EU Legislation – Irregular Stay*

#### *EU Legislation Concerning the Stay of Irregular Migrants*

The Return Directive applies to those persons who no longer fulfil the requirements of the SBC or the laws governing the stay or residence in the Member State concerned.<sup>88</sup> The Return Directive does contain a few significant guarantees for those that fall under its scope – namely, the right to appeal a return decision,<sup>89</sup> the maintenance of family unity, essential healthcare and treatment of illness, access to basic education for minors, and the taking into account of special needs of vulnerable persons<sup>90</sup> for those under the voluntary departure period or whose removal has been postponed. Under the Procedures Directive, asylum seekers have a right to remain pending the determination of their application.<sup>91</sup> Although the Return Directive provides that asylum seekers should not be regarded as staying illegally on the territory of a Member State until a negative decision on the application or a decision ending his or her right of stay as an asylum seeker has entered into force, that provision is only made in the recitals to the Directive, not the body.<sup>92</sup> The choice of locating that provision in the recitals, with limited legal force, rather than the body of the text does nothing to compel Member States to refrain from associating the presence of asylum seekers during the

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<sup>83</sup> Article 2 of the Framework Decision

<sup>84</sup> Article 3 of the Carrier Sanctions Directive

<sup>85</sup> Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement

<sup>86</sup> See, in relation to Air Transit Visas (“ATVs”), Articles 2 and 3 of, and Annexure to, Joint Action of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union on airport transit arrangements (96/197/JHA)

<sup>87</sup> European Parliament, *Analysis of the external dimension of the EU's asylum and immigration policies – summary and recommendations for the European Parliament*, 8 June 2006, DGExPo/B/PolDep/ETUDE/2006\_11

<sup>88</sup> Articles 2(1), 3(1) and (2) of the Return Directive

<sup>89</sup> Article 13 of the Return Directive

<sup>90</sup> Article 14 of the Return Directive

<sup>91</sup> Article 9(1) of the Procedures Directive II

<sup>92</sup> Recital 9 of the Return Directive



determination of his or her claim with an “illegal” presence. Indeed, it has been necessary for the Court of Justice to bring clarity to the status of asylum seekers detained under the Returns Directive.<sup>93</sup>

### *EU Legislation Concerning Those in Solidarity with Irregularly Staying Migrants*

The Facilitation Directive,<sup>94</sup> supported by the Framework Decision,<sup>95</sup> both compels Member States to provide criminal sanctions for those who intentionally assist irregular migrants, for financial gain, to reside in the territory of a Member State contrary to that Member State's laws on the residence of aliens. As “financial gain” is an element of the proscribed behaviour, humanitarian behaviour would normally be regarded as outside sanction but certain behaviours such as the renting of accommodation by landlords to irregular migrants are putatively caught by these provisions. Unlike for those assisting with the entry and transit of irregular migrants, there is no humanitarian exception relating to assistance for irregular residence. The Framework Decision contemplates criminal penalties in an identical manner to those who have assisted with entry or transit. The Framework Decision is also said to operate without prejudice to the non-penalisation and non-*refoulement* provisions of the Geneva Convention and its Protocol.<sup>96</sup>

The Employer Sanctions Directive prohibits the employment of “illegally staying third country nationals.”<sup>97</sup> The Directive requires Member States to co-opt employers into the immigration control regime by requiring that employers are presented with, and take copies of, the person's residence permit and to advise relevant national authorities of the employment of a third country national.<sup>98</sup> The Directive contemplates financial penalties on the transgressing employer<sup>99</sup> with criminal penalties for continued or persistent breach or the simultaneous employment of a “significant number” of “illegally staying” third country nationals, as well as in circumstances such as exploitative work conditions or the employment of a minor.<sup>100</sup> Other punishments can include the exclusion from public benefits or subsidies for a period of up to five years.<sup>101</sup> Legal liability is not limited to natural persons but is also extended to legal persons as well.<sup>102</sup> Employment is broadly defined and does not expressly contemplate remuneration, thereby potentially also covering voluntary work.<sup>103</sup>

### **6.1.3 The Judicial Delineation of the Relationship between EU Law and Member State Measures**

Member States are subject to a framework of supranational accountability through the applicability of the EU Charter, general principles of EU law, secondary legislation and the decisions of the Court of Justice (noting, however, the position of the United Kingdom which is not bound by the Return Directive, Employer Sanction Directive and the SBC). The Court of Justice has played a significant role in delineating the relationship between EU secondary legislation in relation to immigration control and Member States' criminal law provisions in three areas: firstly, in relation to the application of criminal law sanctions in the context of the return of third country nationals under the Return Directive; secondly, in relation to limits on

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<sup>93</sup> Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, Judgment, 30 November 2009; Case C-534/11 *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie*, Judgment, 30 May 2013

<sup>94</sup> Articles 1(1)(b) and 2 of the Facilitation Directive

<sup>95</sup> Article 1 of the Framework Decision.

<sup>96</sup> Article 6 of the Framework Decision.

<sup>97</sup> Article 3 of 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 (“the Employer Sanctions Directive”).

<sup>98</sup> Article 4 of the Employer Sanctions Directive.

<sup>99</sup> Article 5 of the Employer Sanctions Directive.

<sup>100</sup> Articles 9 and 10 of the Employer Sanctions Directive.

<sup>101</sup> Article 7 of the Employer Sanctions Directive.

<sup>102</sup> Article 11 of the Employer Sanctions Directive.

<sup>103</sup> Article 2(c) of the Employer Sanctions Directive.

the use of detention; and thirdly, on the use of prison facilities in the context of those persons detained in a removal context. An emerging delineation in the realm of social rights may be evidenced in a recent Opinion of Advocate-General Bot.<sup>104</sup>

Returns Directive: In relation to the delineation of Member State criminal law provisions and their interaction with the Return Directive, the Court held that the imposition of any *penal* sanction (that is, the Court expressly referred to criminal sanctions, not just “measures” which could undermine the effectiveness of the Directive) imposed for irregular stay must be in accordance with fundamental rights, and those of the ECHR in particular.<sup>105</sup>

The Court has been clear and consistent in holding that, although criminal law sanctions may be applied to those in a return situation, they must not be such as to undermine the effectiveness of the operation of the Directive (that is, to hamper or delay the removal procedure) consistent with the principle of sincere cooperation.<sup>106</sup> Although the matters adjudicated before the Court have concerned criminal law measures adopted by Member States, the Court has always maintained that that *any* measure (criminal or civil) which impedes or delays removal (and thus undermines the effectiveness of the Directive) will be incompatible with EU law. Indeed, the Court has not been concerned about the use of criminal sanctions *per se* (it has always acknowledged the competence of Member States in this regard) but rather the *type* of sanction, ruling that fines may be imposed (which do not impede the effectiveness of the Directive) rather than custodial sentences (which do impede the effectiveness of the Directive).<sup>107</sup> However, the Court has also indicated that nothing in the Directive precludes the issuance of an expulsion order and entry ban *in substitution for* a fine where this can be enforced immediately.<sup>108</sup> One wonders whether this may incentivise Member States to impose high fines for irregular entry or stay so as to compel irregular migrants to choose expulsion option on account of any impecuniousness. Such an outcome would lead to the guarantees under the Return Directive being undermined.

A possible contributing factor to the adoption of criminal law sanctions in a return context stems from the Directive itself which permits Member States to exclude from the Directive’s personal scope those persons who “are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures” (which will be explored later in the discussion on measures in select Member States).<sup>109</sup> The Court has made clear that Member States cannot avoid the scope of the Directive merely by imposing a criminal sanction on the basis of immigration status *only* – to do so would undermine the Directive entirely.<sup>110</sup> It would appear, then, that Member States are at liberty to apply the Directive in circumstances where an immigration consequence is being imposed *in addition to* a criminal sanction (that is, a sanction which is otherwise unrelated to immigration status). In this regard, the Directive implicitly permits the criminalisation of migration enforcement by contemplating Member States’ use of an immigration consequence resulting from a criminal law infraction *unrelated to* immigration status.

Consistent with the Court’s view that the effectiveness of the Directive should not be undermined and that the return should be carried out as soon as possible, the Court has also indicated that the timing of any custodial sentence must not be before a return decision is adopted nor while the return decision is being

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<sup>104</sup> Case C-311/13 *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Opinion, Advocate General Bot, 12 June 2014.

<sup>105</sup> Case C-329/11 *Alexandre Achughbalian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 48 and 49.

<sup>106</sup> Case C-430/11 *Md Sagor*, Judgment, 6 December 2012, para 32; Case C-329/11 *Alexandre Achughbalian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 39 and 43; Case C-61/11 PPU *Hassen El Dridi (alias Soufi Karim)* [2011] ECR nyr, Judgment, 28 April 2011, paras 55-59.

<sup>107</sup> Case C-430/11 *Md Sagor*, Judgment, 6 December 2012, para 34.

<sup>108</sup> Case C-430/11 *Md Sagor*, Judgment, 6 December 2012, paras 35-37.

<sup>109</sup> Article 2(2)(b) of the Return Directive.

<sup>110</sup> Case C-329/11 *Alexandre Achughbalian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, para 41.

implemented.<sup>111</sup> If the person has not been removed after the imposition of coercive measures under Article 8 of the Return Directive, then measures (including criminal measures) may be imposed at that point.<sup>112</sup> Further, the Court was not persuaded that because a Member State rarely imposed penalties solely for the offence of illegal stay (that is, unconnected to another criminal offence) *in practice* that the effectiveness of the Directive was not undermined by *the law*.<sup>113</sup>

Detention: The Court of Justice has also taken an approach towards the interpretation of the detention provisions of the Return Directive which has followed the terms of the Directive closely. This was seen in the interpretation of an absolute limit of 18 months' detention under the Directive.<sup>114</sup> Despite the suggestion under the Return Directive that other grounds for detention may be read into the secondary legislation as a basis for detention (Article 15(1)), the Court was clear in stating that no other grounds could be read into the legislation<sup>115</sup> and that detention under the Return Directive was distinct from detention under the EU asylum secondary legislation.<sup>116</sup> However, the Court was silent on whether that time limit included aggregated periods of detention. The judicial silence on this issue presents serious challenges for irregular migrants who are released from detention without any accompanying lawful immigration status and who may be placed repeatedly in detention for periods which aggregate to more than the 18 month limit permissible under the Return Directive.

However, the Court's decision in *MG and NR*,<sup>117</sup> which held that any breach of the right to be heard on the decision to extend a detention decision is not invalid where the outcome of the administrative procedure would not have been any different, amounted to a complete rejection of Advocate General Wathelet's Opinion.<sup>118</sup> The decision sits uneasily with procedural justice theory, which emphasises a fair and respectful process to foster compliance with the law.

Use of Prisons for Persons Detained in a Return Situation: The Court has also strictly interpreted the Return Directive's contemplation for the use of prisons when specialised detention facilities were "unavailable" to Member States. In *Bero* the Court held that "unavailable" under the Return Directive was not to be interpreted as the unavailability of specialised detention facilities in one particular federated state but must be interpreted as the Member State as a whole, regardless of its constitutional or administrative structure.<sup>119</sup> Further, in *Pham*, the Court held that the wishes of a third country national to be detained in prison accommodation together with ordinary prisoners could not be taken into account and that the Member State

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<sup>111</sup> Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 44-45.

<sup>112</sup> Case C-61/11 PPU *Hassen El Dridi (alias Soufi Karim)* [2011] ECR nyr, Judgment, 28 April 2011, paras 52 and 60; Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 46.

<sup>113</sup> Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 39-40.

<sup>114</sup> Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, Judgment, 30 November 2009, para 57.

<sup>115</sup> Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, Judgment, 30 November 2009, paras 68-71.

<sup>116</sup> Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, Judgment, 30 November 2009, para 57. However, it is worth noting the new ground under the Reception Conditions Directive II under 8(3)(d) which covers a situation where a person detained under the Return Directive makes an application for asylum, the Member State concerned can keep the person in detention where it can objectively demonstrate that the purpose for making the application was "merely in order to delay or frustrate the enforcement of the return decision".

<sup>117</sup> Case C-383/13 PPU *M.G. and N.R. v Staatssecretaris van Veiligheid en Justitie*, Judgment, 10 September 2013

<sup>118</sup> Case C-383/13 PPU *M.G. and N.R. v Staatssecretaris van Veiligheid en Justitie*, Opinion of A-G Wathelet, 23 August 2013.

<sup>119</sup> Cases C-473/13 and C-514/13 *Adala Bero v Regierungspräsidium Kassel; Ettayebi Bouzalmate v Kreisverwaltung Kleve*, Judgment, Grand Chamber, 17 July 2014, paras 28-31

could not use the consent of the person detained to avoid its obligations under the Return Directive to detain third country nationals in a return situation separately from ordinary prisoners.<sup>120</sup>

Social Rights: Although social rights of irregular migrants have not received a great deal of judicial attention by the Court of Justice, Advocate-General Bot indicated his view that, consistent with the general principal of equal treatment and non-discrimination contained in the relevant secondary legislation, irregular migrants are entitled to receive the guarantee of unpaid wages when their employer becomes insolvent.<sup>121</sup>

## 6.2 Select Member States – Legislation and Policy Rationales

### *General Observations*

As a general observation and from a juridical perspective, the penalties imposed on those assisting persons to irregularly enter and stay are more severe than for the actual person who has irregularly entered or stayed on the territory. One explanation may be that certain persons that assist irregular migrants (namely, citizens of the host country), cannot be subject to the additional measure of expulsion, in contrast to an irregular migrant who has irregularly entered or remains. This observation is qualified, however, on two counts: firstly, the severity of the contemplated penalties may also cover behaviour including people smuggling and human trafficking; secondly, further research is needed to examine the penalties actually imposed upon those successfully prosecuted for assisting irregular migrants. The legislative provisions of the select Member States are contained in the Annexure.

### 6.2.1 *Select Member State Legislation*

#### *Member State Legislation Concerning Irregular Entry of Migrants*

Although the SBC does not contemplate penalisation for irregular entry *per se*, France, Italy and Germany penalise irregular entry. The Netherlands penalises where there has been a breach of the SBC. The United Kingdom (which is not bound by the SBC) also penalises irregular entry. In the case of France, the punishment is a term of imprisonment *and* a fine, whereas in the United Kingdom, there is discretion to apply a fine or a term of imprisonment or both. In Germany the punishment is either a fine *or* imprisonment. Spain, on the other hand, does not punish irregular entry.

Of those Member States that do impose a prison sentence, the United Kingdom provides for both the most severe custodial sentence (not more than two years on indictment) and the most lenient (not more than six months on summary conviction) along with the Netherlands (also not exceeding six months). Both France and Germany contemplate prison sentences of one year. In terms of fines, Italy provides for the most severe fines with a maximum of EUR10,000 followed by the United Kingdom (GBP5,000 maximum), the Netherlands (EUR4,050) and France (EUR3,750, fixed).<sup>122</sup>

#### *Member State Legislation Concerning Irregular Stay of Migrants*

As indicated above, the Return Directive, although contemplating the return of “illegally staying third-country nationals” does not actually contemplate criminal sanctions for those under its scope. The Court of Justice has not precluded the imposition of penalisation measures provided that they do not undermine the object of the Return Directive (that is, departure or removal). Both France and the Netherlands do not penalise irregular stay *per se*. In the case of France, the provisions on the punishment of irregular stay (both fines and imprisonment) were repealed by the law of 31 December 2012 in order to comply with the CJEU

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<sup>120</sup> Case C474/13 *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, Judgment, Grand Chamber, 17 July 2014, paras 19-23.

<sup>121</sup> Case C-311/13 *O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen*, Opinion, Advocate General Bot, 12 June 2014.

<sup>122</sup> See the Annexure attached hereto.

decision in *Archughbabian*,<sup>123</sup> whilst Italy has decriminalised irregular stay (and initial entry), reverting to an administrative penalty.<sup>124</sup> In the Netherlands, the position is a little more complex. Although irregular stay is not punished *per se*, a person can become subject to a criminal conviction if they are declared an “undesirable alien” or are subject to an entry ban and have not complied with an order to leave the Netherlands. Accordingly only France does not punish irregular stay. Of those Member States that do punish irregular stay, a fine and a custodial sentence is possible in the United Kingdom (which is not bound by the Return Directive), whilst in Germany and the Netherlands, punishment is either a fine or a custodial sentence. Both Italy and Spain do not provide for custodial sentences, only fines.

In terms of the severity, Germany provides for the longest custodial sentence at one year, with the Netherlands and the United Kingdom contemplating sentences of six months (no more than six months in the case of the United Kingdom). The maximum fines contemplated range from GBP5000 (United Kingdom) to EUR 10,000 (Italy and Spain).<sup>125</sup>

### *Member State Legislation Concerning the Facilitation of Irregular Entry*

The EU Facilitation Directive and Framework Decision contemplate criminal sanctions for those that assist persons to irregularly enter with an exemption for those offering humanitarian assistance but which Member States are not compelled to apply. All selected Member States punish assisting the irregular entry of persons. Only the United Kingdom and Germany contemplate the assistance with an element of financial gain, although an ambiguity exists in the German legislation which suggests that financial gain (or the promise thereof) may not be taken into account if the accused repeatedly assisted persons to enter irregularly or if the accused’s transgression benefited several foreigners. In the United Kingdom, the element of gain is present only in relation to those assisting asylum seekers. In France, Italy, the Netherlands and Spain, financial gain for assisting with irregular entry is not an element of the offence.

Italy, the Netherlands and Germany provide no express exemptions for those assisting persons to irregularly enter. In the United Kingdom, the exemption is limited to those persons acting on behalf of an *organisation* to assist refugees and does not charge for its services which suggests that this section does not cover *individuals* acting in a personal capacity. Spain also provides an exemption for those transporting asylum seekers so long as they have presented their asylum request without delay and which is admissible for processing. In France, the recently introduced exemption decriminalising solidarity<sup>126</sup> is, *prima facie*, much broader – it contemplates specific family members and those providing legal advice, food services, accommodation and medical care “or any other assistance to preserve the dignity or physical integrity of the person”.<sup>127</sup>

All selected Member States except Spain (which only provides for a custodial sentence) contemplate both fines and custodial sentences. The United Kingdom provides the possibility of either a fine or custodial sentence or both (if a summary offence), whilst France and Italy provide for both a fine and a custodial sentence. In the Netherlands and Germany, it is either a fine or a custodial sentence. The Netherlands provides for the most severe fine at EUR81,000 followed by France (EUR30,000), Italy (EUR 15,000

<sup>123</sup> Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011; See the *Exposé des Motifs*: [www.legifrance.gouv.fr/affichLoiPubliee.do?jsessionid=1A086BE418596ED3F4A27A222F25AAE7.tpdjo15v\\_1?idDocument=JORFDOLE000026425454&type=expose&typeLoi=&legislature=14](http://www.legifrance.gouv.fr/affichLoiPubliee.do?jsessionid=1A086BE418596ED3F4A27A222F25AAE7.tpdjo15v_1?idDocument=JORFDOLE000026425454&type=expose&typeLoi=&legislature=14)

<sup>124</sup> See PICUM, *PICUM Bulletin – 27 January 2014*, [www.picum.org/de/nachrichten/bulletin/42771/#news\\_42777](http://www.picum.org/de/nachrichten/bulletin/42771/#news_42777), citing, *Il Sole 24 Ore*, *Dietrofront sull’immigrazione clandestine: non sarà più reato, torna illecito amministrativo*, 21 January 2014, [www.ilsole24ore.com/art/servizio/2014-01-21/dietrofront-immigrazione-clandestina-non-e-piu-reato-torna-illecito-amministrativo--123307.shtml?uuid=ABZ8y9q](http://www.ilsole24ore.com/art/servizio/2014-01-21/dietrofront-immigrazione-clandestina-non-e-piu-reato-torna-illecito-amministrativo--123307.shtml?uuid=ABZ8y9q); *La Stampa*, *L’immigrazione clandestine sarà reato soltanto se recidiva*, 21 January 2014 ([www.lastampa.it/2014/01/21/italia/politica/immigrazione-clandestina-sar-reato-soltanto-se-recidiva-8Qxws0eLlMN5ZCS815qs5N/pagina.html](http://www.lastampa.it/2014/01/21/italia/politica/immigrazione-clandestina-sar-reato-soltanto-se-recidiva-8Qxws0eLlMN5ZCS815qs5N/pagina.html)).

<sup>125</sup> See the Annexure attached hereto.

<sup>126</sup> Loi No. 2012-1450 of 31 December 2012 amending L.622-4 of the CESEDA ([www.legifrance.gouv.fr/affichTexte.do?jsessionid=1A086BE418596ED3F4A27A222F25AAE7.tpdjo15v\\_1?cidTexte=JORFTEXT000026871211&categorieLien=id](http://www.legifrance.gouv.fr/affichTexte.do?jsessionid=1A086BE418596ED3F4A27A222F25AAE7.tpdjo15v_1?cidTexte=JORFTEXT000026871211&categorieLien=id)).

<sup>127</sup> L.622-4 of the CESEDA.

increasing to EUR25,000 in cases of particular gravity) and the United Kingdom (GBP 5000). The United Kingdom provides for the most severe custodial sentence (on indictment) of 14 years (but six months if dealt with summarily), whilst France and Germany both provide for five year sentences and Italy and Spain ranging from one to five years and four to eight years, respectively.<sup>128</sup>

### *Member State Legislation Concerning the Assistance of Irregular Stay*

The EU Facilitation Directive and the Framework Decision both contemplate the criminalisation of assisting irregular stay but do not include a humanitarian exception even though “financial gain” is an element of the proscribed behaviour (which might normally act as a means of excluding humanitarian behaviour from the scope of criminal sanction). Assisting irregular stay is punishable in all selected Member States. In Italy, Spain, the Netherlands and Germany, financial gain or profit is an element of the offence (in the case of Italy it is construed as an “unfair profit” suggesting a somewhat higher threshold).

Express exemptions apply in France and Spain (the same as with assisting irregular entry) as well as Italy (humanitarian assistance for foreigners in need) and Germany. However, in the United Kingdom and the Netherlands, no express exemptions are contemplated.

All selected Member States provide for fines (ranging from not more than GBP5000 in the case of the UK, to EUR10,000 to 100,000 in Spain). Spain is the only Member State that does not provide for a custodial sentence for assisting irregular stay. As with assisting irregular entry, the United Kingdom provides the most severe maximum custodial sentence (on indictment) of 14 years imprisonment (but no more than six months on a summary conviction). France and Germany contemplate custodial sentences of five years, with Italy and the Netherlands four years. France and Italy impose both a fine and a custodial sentence whereas the Netherlands and Germany provide either a fine or a custodial sentence. In the United Kingdom either a fine or a custodial sentence or both may be imposed.<sup>129</sup>

### *Employment of Irregular Migrants*

The EU Employer Sanctions Directive prohibits the employment of “illegally staying third country nationals” with financial and criminal sanctions contemplated. All Member States outlaw the employment of irregular migrants resulting in either prison sentences or very severe fines ranging from EUR5000 per person employed (Italy) to EUR500,000 (Germany). Custodial sentences range from six months (summary offence if characterised as ‘facilitation’) in the United Kingdom (which is not bound by the Employer Sanctions Directive) whilst France and Spain contemplate custodial sentences of up to five years.<sup>130</sup>

### *Duties to Report Irregular Migrants*

Public servants in Italy and Germany are under an obligation to report the presence of an irregular migrant. In the United Kingdom and the Netherlands information must be forwarded to the Minister or Secretary of State when the Minister or Secretary of State requests it. Questionnaire respondents noted that, in practice in the Netherlands, arrangements exist between municipal and national authorities that municipal information cannot be used to secure the arrest of irregular migrants. Germany and Italy contain legislative exemptions from duties to report exist for medical professionals, whereas this exception is more informal in the Netherlands based on information from PICUM.<sup>131</sup> In the United Kingdom, changes to health care may affect the detection of irregular migrants through the proposed scheme to base entitlement to healthcare based on a charge linked to immigration permission or to persons described by the Secretary of State.<sup>132</sup> Questionnaire respondents also indicated that the United Kingdom also requires schools and education providers to inform the authorities about those individuals under the points-based scheme who do not comply with study

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<sup>128</sup> See the Annexure attached hereto.

<sup>129</sup> See the Annexure attached hereto.

<sup>130</sup> Ibid.

<sup>131</sup> PICUM, *Country Brief- The Netherlands*, p. 8 and note 37 (<http://picum.org/picum.org/uploads/publication/The%20Netherlands%20Workshop%20Brief%20EN.pdf>).

<sup>132</sup> See sections 38 and 39 of the *Immigration Act 2014* (UK).

requirements or are absent. In Spain, questionnaire respondents indicated that detection of irregular status comes to light through the information provided to the civil registry for those seeking to enter into marriage.

### *Landlords*

On a broad construction of what constitutes ‘facilitation’, landlords may come under the scope of the Facilitation Directive and the Framework Decision. Recently introduced legislation in the United Kingdom has deprived irregular migrants from the right to rent accommodation, with both obligations on landlords to check the immigration status and fines of up to GBP3000 imposed on landlords for each offence. In Italy, it is illegal for landlords to rent property to irregular migrants in cases where the landlord extracts an “unfair profit” from the individual, suggesting a somewhat higher threshold. In such cases, this can lead to imprisonment for up to six months and the possible confiscation of the property. In the remaining selected Member States, landlords may be exposed to prosecution based on the facilitation of stay provisions in those Member States.<sup>133</sup>

### *Other Measures*

In the United Kingdom, the *Immigration Act 2014* introduces other measures which directly affect the ability of irregular migrants to access particular services in a not dissimilar way to the Netherlands’ approach (see below). Measures include the denial and revocation of driving licences to irregular migrants, health care charges based on immigration status, and duties placed on banks and building societies to check the immigration status of those wishing to open bank accounts together with the prohibition on opening bank accounts for irregular migrants.<sup>134</sup>

### **6.2.2 Select Member States’ Policy Rationales**

As regards policy rationales, one can evidence that there are distinct tranches. Firstly, there is the perception that the use of criminal law in the use of enforcement is more efficient than administrative measures (Italy); and secondly, that the use of criminal law in combination with policies of exclusion and identification (Netherlands and UK) leading to a kind of ‘civil death’ for irregular migrants that might motivate them to return to their country of origin.

Although the **United Kingdom** has included a criminal sanction for irregular entry and stay effective since 1 January 1973, data gathered by the Migration Observatory at the University of Oxford show that the period of the late 1990s saw a substantial increase to the criminal statute books concerning immigration offences.<sup>135</sup> Aliverti notes that there are several interrelated rationales explaining the increase and reliance on the criminal law in the immigration sphere in the United Kingdom: firstly, as a means of overcoming a lack of confidence in the immigration system as a result of Home Office inabilities to reduce the number of outstanding asylum claims; secondly, due to wanting to back immigration enforcement with criminal law as a means of eradicating immigration “abuse”; and thirdly, to develop an immigration enforcement agenda through immigration crimes based on the level of “harm” they created.<sup>136</sup> Although criminal sanctions have the traditional goal of “public protection” and “doing good”, these are aspects which Aliverti notes are absent from immigration enforcement when invariably the victim (the irregular migrant) is also the person whom

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<sup>133</sup> See the Annexure attached hereto.

<sup>134</sup> See Part 3 Chapter 2 of the *Immigration Act 2014* (UK); see also the article by Prime Minister David Cameron, *David Cameron: We’re building an immigration system that puts Britain first*, 28 July 2014 (<http://www.telegraph.co.uk/news/uknews/immigration/10995875/David-Cameron-Were-building-an-immigration-system-that-puts-Britain-first.html>).

<sup>135</sup> Aliverti, A, *Briefing – Immigration Offences: Trends in Legislation and Criminal and Civil Enforcement*, (9 July 2013), The Migration Observatory, University of Oxford (<http://www.migrationobservatory.ox.ac.uk/briefings/immigration-offences-trends-legislation-and-criminal-and-civil-enforcement>).

<sup>136</sup> Aliverti, A, *Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-related Offences*, (2012) 21 *Social and Legal Studies* 21.

the State wishes to exclude and when the State is a source of harm by its use of legal barriers and its construction of illegality which in turn creates a demand for migrant exploitation.<sup>137</sup>

During the second reading speech in the House of Commons on the recently commenced *Immigration Act 2014*, which introduced obligations on landlords to check the immigration status of potential tenants, prohibiting landlords from renting accommodation to irregular migrants and punishing those landlords that do, the Secretary of State for the Home Department stated that “the Government also want to ensure that illegal immigrants cannot hide in private rented housing”.<sup>138</sup> After referring to the provisions preventing irregular migrants from opening bank accounts, access health care, work, rental properties, and drivers’ licences, Mrs May stated, “We will do everything we can to make it harder for illegal migrants to establish a settled life in the UK when they have no right to be here”.<sup>139</sup>

In **Italy**, the chief objects of its criminalisation provisions have been firstly, to improve the expulsion regime over an administrative-based system and secondly, to avoid the operation of the Return Directive. The Bossi-Fini law in 2002 identified the “countering the danger of a real invasion to Europe” as the object of stricter immigration enforcement controls (including forced removal at the border) as a means of stopping the expulsion procedure from being undermined.<sup>140</sup> This approach was further augmented by the two “Security Packages” in 2008 and 2009, whereby the 2008 Security Package made irregular immigration status an aggravating circumstance of a crime (but which was subsequently struck down by the Constitutional Court as being inconsistent with Articles 3 (principle of equality) and 25(2) (punishment based on conduct not on personal qualities) of the Italian constitution).<sup>141</sup> The 2008 Security Package also introduced measures criminalising solidarity and attached immigration consequences (expulsion) where a person (including an EU citizen) has been sentenced to more than two years’ imprisonment for committing a crime.<sup>142</sup> The criminalisation of irregular entry and stay was introduced in the 2009 Security Package. The significance of the introduction of criminal sanctions for irregular status was expressly to avoid the application of the Return Directive (and its associated guarantees, *inter alia*, of a voluntary period for departure)<sup>143</sup> presumably through a narrow interpretation of Article (2)(2)(b) of the Directive which gives Member States the discretion not to apply the Return Directive in circumstances where the removal resulted from a crime (as discussed above).<sup>144</sup> The 2009 Security Package also introduced the possibility for expulsion as a substitute sentence where the person had been convicted for the crime of irregular entry or stay. Di Martino *et al* are of the view that the real purpose of the substitution provisions (in combination with accelerated procedures) was to facilitate removal.<sup>145</sup> Since the CJEU decision in *Archughbabian*,<sup>146</sup> the Italian government recently

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<sup>137</sup> Ibid at pp. 515-516.

<sup>138</sup> Hansard, House of Commons, 22 October 2013, Column 164 (<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131022/debtext/131022-0001.htm>).

<sup>139</sup> Hansard, House of Commons, Column 166 (<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131022/debtext/131022-0001.htm>).

<sup>140</sup> Di Martino, A; Biondi Dal Monte, F; Boiano, I; Raffaelli, R, *The criminalization of irregular migration: law and practice in Italy*, (2013), Pisa, Pisa University Press, p. 9.

<sup>141</sup> Judgment 249/2010, Constitutional Court, 5 July 2010, Massima Numero 38420

<sup>142</sup> Indeed, Fekete notes that the Italian Interior Minister at the time, Roberto Maroni, suggested that “anyone helping an ‘illegal immigrant’ with a job or an apartment should be criminalized and that property let to ‘illegal immigrants’ should be confiscated”: cited in Fekete, L, *Europe: crimes of solidarity*, 2009, Race and Class 50(4) 83-97 at P.86

<sup>143</sup> See the speech of the Italian Interior Minister at the time, Roberto Maroni on 15 October 2008 ([http://leg16.camera.it/470?stenog=/\\_dati/leg16/lavori/stenbic/30/2008/1015&pagina=s020#Maroni%20Roberto%204%202](http://leg16.camera.it/470?stenog=/_dati/leg16/lavori/stenbic/30/2008/1015&pagina=s020#Maroni%20Roberto%204%202), p. 6).

<sup>144</sup> See further, Favilli, C, *The Implementation of the Return Directive in Italy* in Zwaan, K, *The Returns Directive: Central Themse, Problem Issues and Implementation in Selected Member States*, (2011) Nijmegen, Wolf Legal Publishing, in particular, pp. 72-74.

<sup>145</sup> Di Martino *et al*, op. cit., pp. 41, 83-84.

<sup>146</sup> Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011.



decriminalised irregular stay and initial entry, maintaining a range of substantial fines.<sup>147</sup> However, it remains to be seen whether the practice of substituting expulsion for the payment of the fine continues and thereby continues to attempt to operate outside the application of the Return Directive.<sup>148</sup>

In **France**, the crime of solidarity for assisting irregular migrants can be traced back to 1938, with further incomplete transpositions of the Schengen Agreement and the Facilitation Directive occurring in 1994 and 2003 respectively (which did not include the “for profit” formulations contained therein or in the UN Protocol Against the Smuggling of Migrants by Land Sea or Air). Indeed, the territorial application of the punishment provisions extended beyond French territory to acts committed on all Schengen territory and the territories of the state parties to the UN Protocol. Smaller immunities did appear in 1996.<sup>149</sup> In 2005, the current formulation appeared as L622-1 in CESEDA.<sup>150</sup> Allsopp notes that, under President Sarkozy, solidarity (in a particular, non-universal sense) was reframed as a product of immigration control and may be seen a means of conflict prevention to deter citizens from resisting removal procedures of migrants in the context of “*immigration choisie*” and quota-driven deportations.<sup>151</sup> A country report for France produced under the CLANDESTINO Project noted that criticisms of “*immigration choisie*” centred around the more prohibitive aspects as regards irregular migrants, including the establishment of a specialised immigration police force and the use of quotas for expulsion and migration with concerns about the effectiveness of professional quotas.<sup>152</sup> In 2012, the French government repealed the offence of irregular stay in order to comply with the CJEU’s decision in *Archughbabian*<sup>153</sup> and broadened the humanitarian exception to facilitation of irregular entry or stay in light of the ECtHR judgment in *Mallah*.<sup>154</sup>

In the **Netherlands** a dual strategy of both exclusion and identification has been adopted<sup>155</sup> which manifested itself following the 1991 Zeevalking Commission and the adoption of the *Linking Act* in 1996 which linked databases containing information on immigration status to municipal records and the *Benefit Entitlement (Residence Status) Act* in 1998. Through excluding irregular migrants from education, employment, accommodation and welfare assistance, the idea is to place pressure on migrants to leave the Netherlands

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<sup>147</sup> See PICUM, *PICUM Bulletin – 27 January 2014*, [www.picum.org/de/nachrichten/bulletin/42771/#news\\_42777](http://www.picum.org/de/nachrichten/bulletin/42771/#news_42777), citing, *Il Sole 24 Ore*, *Dietrofront sull’immigrazione clandestine: non sarà più reato, torna illecito amministrativo*, 21 January 2014 ([www.ilsole24ore.com/art/servizio/2014-01-21/dietrofront-immigrazione-clandestina-non-e-piu-reato-torna-illecito-amministrativo--123307.shtml?uuiid=ABZ8y9q](http://www.ilsole24ore.com/art/servizio/2014-01-21/dietrofront-immigrazione-clandestina-non-e-piu-reato-torna-illecito-amministrativo--123307.shtml?uuiid=ABZ8y9q)), *La Stampa*, *L’immigrazione clandestine sarà reato soltanto se recidiva*, 21 January 2014 ([www.lastampa.it/2014/01/21/italia/politica/immigrazione-clandestina-sar-reato-soltanto-se-recidiva-8Qxws0eLtMN5ZCS815qs5N/pagina.html](http://www.lastampa.it/2014/01/21/italia/politica/immigrazione-clandestina-sar-reato-soltanto-se-recidiva-8Qxws0eLtMN5ZCS815qs5N/pagina.html)).

<sup>148</sup> See Rafaelli, R, *Case Note: The Achughbabian Case. Impact of the Return Directive on National criminal Legislation*, *Diritto Penale Contemporaneo* (<http://www.penalecontemporaneo.it/upload/Nota%20En%20Achughbabian.pdf>), p. 9, noting the operation of Article 16 of the *Testo Unico sull’Immigrazione*

<sup>149</sup> Allsopp, J, *Contesting fraternité – Vulnerable migrants and the politics of protection in contemporary France*, July 2012, Working Paper Series No. 82, Refugees Studies Centre, Oxford, p. 14

<sup>150</sup> Fédération International des Ligues des Droits de l’Homme (FIDH) and l’Organisation Mondiale Contre la Torture (OMCT), *Délit de Solidarité – Stigmatisation, répression et intimidation de défenseurs des droits de migrants*, June 2009, [www.fidh.org/IMG/pdf/obsfra11062009.pdf](http://www.fidh.org/IMG/pdf/obsfra11062009.pdf); Allsopp, op. cit.

<sup>151</sup> Allsopp, op. cit.

<sup>152</sup> Courau, H, *Undocumented Migration – Counting the Uncountable. Data and Trends Across Europe. Country Report France*, (2009), CLANDESTINO, FP6, European Commission, DG Research, pp. 56-57.

<sup>153</sup> Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011; see the Exposé des Motifs [http://www.legifrance.gouv.fr/affichLoiPubliee.do?sessionid=1A086BE418596ED3F4A27A222F25AAE7.tpdjo15v\\_1?idDocument=JORFDOLE000026425454&type=expose&typeLoi=&legislature=14](http://www.legifrance.gouv.fr/affichLoiPubliee.do?sessionid=1A086BE418596ED3F4A27A222F25AAE7.tpdjo15v_1?idDocument=JORFDOLE000026425454&type=expose&typeLoi=&legislature=14)

<sup>154</sup> Application 29681/08 *Mallah v France*, Judgment 10 November 2011

<sup>155</sup> Broeders, D, *Breaking Down Anonymity – Digital Surveillance of Irregular Migrants in Germany and the Netherlands*, (2009), Amsterdam, Amsterdam University Press, pp. 191-192; Leerkes, A, Engbersen, G, and van der Leun, J, *Crime among irregular immigrants and the influence of internal border control* (2012) 58 *Crime Law Society Change* 15

and, combined with identification and documentation, to reduce their anonymity in the community.<sup>156</sup> The Netherlands considers “the most important pathway out of irregularity is return” and for which the migrant is deemed to hold ultimate responsibility.<sup>157</sup> Law and policy has been directed towards the issuance of return decisions for irregularly staying third country nationals (whom are given 0 or 28 days to voluntarily depart the Netherlands)- if given 0 days to depart the Netherlands, an entry ban is also issued. “Light entry bans” prohibit re-entry for up to 5 years whereas “heavy entry bans” (usually for those with criminal convictions, those who have lost their regular immigration status because of such crimes, or who are believed to present a threat to public order or national security) are issued for up to 20 years.<sup>158</sup> Breach of the entry ban constitutes a crime. It is also possible to be declared an “undesirable alien”.<sup>159</sup>

The Dutch Government sees detention as an essential tool in ensuring the effective return of irregular migrants.<sup>160</sup> Research reveals that an additional reason for the use of immigration detention in the Netherlands is to pressure irregular migrants to depart the Netherlands and to induce cooperation with the mechanics of expulsion.<sup>161</sup>

Amnesty International notes that the use of the criminal law to penalise irregular stay was contemplated in 2002 but the then Minister of Justice, Piet Hein Donner, withdrew such plans in 2005 on the basis that it would not deter irregular migrants and over concerns that such measures would lead to pushing irregular migrants into crime to survive, with adverse consequences for society.<sup>162</sup> The reiteration in the Netherlands by the current Rutte government for the criminalisation of irregular stay in 2011 was predicated three bases: on making irregular stay in the Netherlands unattractive; to deter irregular migrants; and to facilitate forced removal of irregular migrants.<sup>163</sup> The Bill was withdrawn in April 2014 after the Minister for Security and Justice reached a political compromise with his PvdA colleagues (who had been uncomfortable about supporting such a measure)<sup>164</sup> for the reduction of tax on middle income earners in return for dropping the proposed bill.<sup>165</sup>

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<sup>156</sup> Diepenhorst, D, *Practical Measures for Reducing Irregular Migration in the Netherlands*, European Migration Network, April 2012 [www.ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_network/reports/docs/emn-studies/irregular-migration/nl\\_20120424\\_irregularmigration\\_en\\_version\\_final\\_en.pdf](http://www.ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/nl_20120424_irregularmigration_en_version_final_en.pdf), p. 17; See also van der Leun, J and Ilies, M, *Undocumented Migration – Counting the Uncountable. Data and Trends Across Europe. Country Report The Netherlands* (2009) CLANDESTINO, FP6, European Commission, DG Research, p. 12.

<sup>157</sup> Diepenhorst, op. cit., p. 18.

<sup>158</sup> Leerkes, A, Boersema, E, *Het lot van het inreisverbod*, (2014), Memorandum 2014-2, Wetenschappelijk Onderzoeken Documentatiecentrum (WODC), Ministerie van Veiligheid en Justitie, The Hague, [www.wodc.nl/images/mem2014-2-volledige-tekst\\_tcm44-555776.pdf](http://www.wodc.nl/images/mem2014-2-volledige-tekst_tcm44-555776.pdf)

<sup>159</sup> See further, van Breugel, I, *Being A Criminal: On the Penalisation of Irregular Residence in the Netherlands* (2012) 2(2) Oxford Monitor of Forced Migration 32, p.34.

<sup>160</sup> Ibid, p. 56.

<sup>161</sup> Leerkes, A and Broeders, D, *A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention*, (2010) 50 British Journal of Criminology 830; see also Kox, M, *Leaving Detention? A study on the influence of immigration detention on migrants' decision-making processes regarding return* (2011), International Organisation for Migration (IOM), The Hague, [www.schipholwakes.nl/Migrantengevangenis%20Mieke%20Kox%20IOM.pdf](http://www.schipholwakes.nl/Migrantengevangenis%20Mieke%20Kox%20IOM.pdf), pp. 10-11.

<sup>162</sup> Kamerstukken II, 2004-2005, 29 537, No 23, P.4 cited in Amnesty International The Netherlands, *The Detention of Asylum Seekers and Irregular Migrants*, (2008), EUR35/02/2008, Amsterdam at pp. 29 and 89 [http://www.amnesty.nl/sites/default/files/public/rap\\_nederland\\_vreemdelingendetentie\\_0.pdf](http://www.amnesty.nl/sites/default/files/public/rap_nederland_vreemdelingendetentie_0.pdf)

<sup>163</sup> Diepenhorst, op. cit., p. 27.

<sup>164</sup> NRC, *VVD: stafbaastelling illegaliteit is ons geen kabinetscrisis waard*, 8 May 2013, <http://www.nrc.nl/nieuws/2013/05/08/vvd-straftbaastelling-illegaliteit-is-ons-geen-kabinetscrisis-waard/>; Volkskrant, *Bussemaker heft alle vertrouwen in Samsom: 'Het komt goed'* 5 May 2013, <http://www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/3436595/2013/05/05/Bussemaker-heeft-alle-vertrouwen-in-Samsom-Het-komt-goed.dhtml>

<sup>165</sup> De Verdieping Trouw, *Wetsvoorstel van tafel: geen cel of boete voor illegaliteit*, 1 April 2014, <http://www.trouw.nl/tr/nl/4500/Politiek/article/detail/3626238/2014/04/01/Wetsvoorstel-van-tafel-geen-cel-of-boete-voor-illegaliteit.dhtml>

## 7. The Use of Criminal Law, Prosecution and Detention

As indicated earlier, institutional legitimacy is assessed by carrying out an assessment of both normative and empirical legitimacy. One element of the assessment of normative legitimacy is the efficiency of the law to do as it purports, to achieve its policy goals. In the migration context, ‘efficiency’ may be analogous to ‘policy effectiveness’. However, there is great difficulty in assessing the effectiveness of immigration policies, particularly those which have criminalising elements. Czaika and de Haas point out that with multiple and competing stakeholders and motives (such as constituencies, non-government organisations and government agencies), “official” policy rationales may mask or be silent about implicit or collateral objectives.<sup>166</sup> Accordingly, it is not immediately possible to identify the ‘real’ or totality of policy objectives. Further, without disaggregating both the purported consequences on, and classes of, migrants, it may be simplistic to ascribe certain outcomes to certain measures. Indeed, what constitutes “effective”? How to determine “policy effectiveness” or “policy failure” is highly variable depending on the perspective of the stakeholder – has a policy succeeded if it is mostly *effective* or if it simply has an *effect*? A fundamental question arises: from whose perspective is the policy a success or failure – the state, parts of the electorate, non-government organisations, private detention service providers or the migrant him or herself?

In looking at the effectiveness of migration policies (that is, by testing outcomes against policy rationales), it is acknowledged that these are pressing questions that demand robust empirical research that could be used to assess the appropriateness of trust-based policy in the context of irregular migration. The aim is not to address these systematically here. For the purpose of this paper, several characteristics are identified which raise questions as to the application and effectiveness of migration policies containing criminalising elements and, accordingly, how these might inform institutional legitimacy. Of particular interest is the prosecution of migration crimes – both their application and the rates of prosecution. Despite penalisation provisions applying *prima facie* to all irregular migrants and those in solidarity with them, the choice and number of prosecutions, as well as any correlation between prosecution and enforcement, may be telling as to whether the criminal provisions undermine normative legitimacy by being applied selectively and minimally. In this way, some view can be formed as to whether the law is being used instrumentally as opposed to normatively and whether the application of the law reveals “*ad hoc* instrumentalism”.<sup>167</sup>

In the **United Kingdom**, with an estimated population of irregular migrants of 618,000,<sup>168</sup> the proportion of arrests which involved irregular migration status appear to be quite low. Operation Nexus (later Operation Terminus), whose object was foreign criminals in the United Kingdom, was a joint operation by the Metropolitan Police Service and the United Kingdom Border Authority (UKBA). In the first five weeks of the program, 25,968 persons were arrested, with 6,988 persons identified as foreign nationals (27%). Of those 6,988, only 155 were immediately detained for immigration matters and, of those 155 persons, 25% were removed from the UK.<sup>169</sup> Accordingly, only 5.5% of foreign nationals arrested were deported on the basis of immigration matters, representing only 0.15% of all persons arrested in that five week period.

Consistent with prosecutorial discretion of crimes in common law countries when in “the public interest to do so”,<sup>170</sup> the United Kingdom’s stated policy in the prosecution of immigration crime is to reserve criminal law for the most serious offences,<sup>171</sup> with removal being the most common enforcement action. Evidencing this approach and based on data gathered by the Migration Observatory at the University of Oxford, 30,763

<sup>166</sup> Czaika and de Haas (2013a), op. cit., and de Haas and Czaika (2013b), op. cit.

<sup>167</sup> Sklansky, op. cit.

<sup>168</sup> Vollmer, B, *Briefing - Irregular Migration in the UK: Definitions, Pathways and Scale* (2011), Migration Observatory, University of Oxford, <http://migrationobservatory.ox.ac.uk/briefings/irregular-migration-uk-definitions-pathways-and-scale>

<sup>169</sup> Metropolitan Police, *Operation Nexus Launches*, 10 November 2012, <http://content.met.police.uk/News/Operation-Nexus-launches/1400012909227/1257246745756>

<sup>170</sup> Aliverti (2012), op. cit.

<sup>171</sup> United Kingdom Home Office, UK Border Agency, *Protecting Our Border, Protecting the Public*, February 2010, <http://webarchive.nationalarchives.gov.uk/20100303205641/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/crime-strategy/protecting-border.pdf?view=Binary; Pp26-28>

persons were removed from the United Kingdom in 2011 either by force or by refusal at the border and subsequently removed.<sup>172</sup> Removal is clearly the predominant objective when compared to prosecutions - 553 persons were subject to proceedings in magistrates' courts and 503 persons were subject to proceedings in Crown courts, with 559 persons convicted with immigration offences.<sup>173</sup> However, the gathered data revealed that 47% of those convictions stem from *facilitation* offences (that is, not directly involving the prosecution of a person whose immigration status is irregular).<sup>174</sup>

In relation to criminal prosecutions of employers of irregular migrants, the level of prosecutions and convictions (four prosecutions, three convictions in Crown Courts, four prosecutions and two convictions in Magistrates' courts) is relatively low compared to the number of civil penalties imposed on employers (1111 from January to September 2011).<sup>175</sup>

Research conducted by Aliverti reveals that, in the United Kingdom, the use of criminal law in the immigration context is disconnected from punishment but rather is used as an enforcement tool when removal is not possible<sup>176</sup> – that is, it is used when administrative measures are ineffective. Decisions to prosecute are based on the likelihood of removal, whether the person's country of origin has a bilateral agreement with the United Kingdom, the availability of resources, the identity of the decision-maker and policy priorities at UKBA which Aliverti concludes “reveals the pragmatic and arbitrary use of criminal powers for immigration enforcement”.<sup>177</sup> Prosecution of mostly petty immigration crime, with relatives and friends generally facilitating irregular migration (as opposed to organised criminal gangs) and reactive (rather proactive) policing is disjointed from a policy where prosecution is reserved for those causing the most serious harm.<sup>178</sup>

In **Italy**, the use of criminal law as a more effective means of enforcing removal and attempting to avoid the scope of the Returns Directive was an express intention when the legislation was introduced (see discussion above). Unlike in common law countries, Article 112 of the Italian Constitution compels the prosecution of all crimes. Statistics assessed by Di Martino, *et al*, (2013) reveal that in 2009, 7157 crimes were tried under Article 10 *bis* of Legge 286/90, involving 7126 defendants.<sup>179</sup> 5323 criminal trials were commenced whilst 1834 were dismissed (due to procedural or substantive reasons).<sup>180</sup> Extraordinarily, only 26 convictions resulted. Through their research the authors could not find any rational basis for this discrepancy other than perhaps administrative removal had been effected during the course of the criminal trial or that criminal trials do not result in a conviction because the person has been removed.<sup>181</sup> Spina also comes to the conclusion that criminalisation measures in Italy have been used to pursue pragmatic, non-penal aims and that there is a significant gap between the measures imposed and their normative basis.<sup>182</sup>

In **France**, prosecution for crimes of solidarity has been well documented - prosecutions have been directed towards those who have directly assisted irregular migrants as well as a way of dealing with civil disobedience as regards the deportation and treatment of irregular migrants.<sup>183</sup> The French model of

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<sup>172</sup> Aliverti, A, *Briefing – Immigration Offences: Trends in Legislation and Criminal and Civil Enforcement*, (2013), The Migration Observatory, University of Oxford, <http://www.migrationobservatory.ox.ac.uk/briefings/immigration-offences-trends-legislation-and-criminal-and-civil-enforcement>

<sup>173</sup> *Ibid*

<sup>174</sup> *Ibid*

<sup>175</sup> *Ibid*

<sup>176</sup> Aliverti (2012), *op. cit.*

<sup>177</sup> *Ibid*, P.521

<sup>178</sup> *Ibid*, P.521-523

<sup>179</sup> Di Martino *et al*, *op. cit.*, pp. 87-88.

<sup>180</sup> *Ibid*

<sup>181</sup> *Ibid*

<sup>182</sup> Spina, *op. cit.*

<sup>183</sup> FIDH, *Délit de Solidarité – Stigmatisation, répression et intimidation de défenseurs des droits de migrants*, June 2009, [www.fidh.org/IMG/pdf/obsfra11062009.pdf](http://www.fidh.org/IMG/pdf/obsfra11062009.pdf)

prosecution and enforcement is based on quotas. At the introduction of the 2008 amendments to the CESEDA, a quota of 28,000 expulsions was set with a corresponding quota of 5,500 prosecutions for ‘*aidants*’ (those assisting irregular migrants).<sup>184</sup>

In **the Netherlands**, a report by the Ministry of Security and Justice’s Wetenschappelijk Onderzoek- en Documentatiecentrum (“WODC”) has highlighted significant shortcomings in the application and prosecution of criminal sanctions in the form of (light and heavy) entry bans for irregularly staying third country nationals in the 2012-2013 period.<sup>185</sup> The report reveals a relatively small number of light (approximately 8,000) and heavy (approximately 1000) entry bans were used compared to the number of return decisions issued (24,000).<sup>186</sup> The report also reveals that once the 28 day voluntary departure period had expired, only 451 were arrested for non-compliance.<sup>187</sup>

Of the approximately 8000 persons who had received a light entry ban, the authors noted that only 467 were apprehended.<sup>188</sup> The resulting fine for breach of the entry ban in those 467 cases was imposed in 21 cases and only nine were noted in registrations of the Public Prosecutor Service.<sup>189</sup> The authors could not establish whether the fines were actually paid, noting that even though police might refer light entry ban transgressions for prosecution, “the public prosecutor does not always recognise or register certain cases involving violations of the light entry ban” and gained the impression that fines are never or rarely imposed and do not result in imprisonment.<sup>190</sup>

The authors identify several reasons why light entry ban violations are seldom punished: firstly, stakeholder consultation revealed that many thought that the use of criminal sanctions did not “offer[ ] any added value compared to instruments already available via administrative law, such as immigration detention”;<sup>191</sup> secondly, criminal sanctions for entry ban violations had little support from stakeholders because of the perception that it does not constitute a ‘real’ crime “and is considered less harmful than crimes such as theft and violence, and should therefore receive less priority”;<sup>192</sup> thirdly, entry bans are used in stages by the civil servants imposing them and are subject to practical constraints (that is, in the context of airports, priority is given to *expediting return* rather than carrying out the full procedure involved with imposing an entry ban). Further, the authors draw the inference from the data that the issuance of a return decision is a stronger motivation for voluntary return when coupled with the *threat* but not the *imposition* of an entry ban – it was noted that once an entry ban has been issued, it has very little effect on motivating voluntary departure due to those subject to an entry ban being “unimpressed by the criminal sanctions that may follow”.<sup>193</sup>

As regards heavy entry bans, the authors of the WODC report noted that there was a sheer lack of endeavour to detect those persons subject to such a ban – the usual path for a heavy entry ban being issued was through police interaction as a result of criminal behaviour – leading the authors to conclude that the “criminalisation of the heavy entry ban therefore seems a bit redundant, as prosecution is generally also possible on the basis of other crimes”.<sup>194</sup> Punishment is usually by way of imprisonment with the imposition of fines being rare.

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<sup>184</sup> Allsopp, J, *Contesting fraternité: Vulnerable migrants and the politics of protection in contemporary France*, July 2012, Working Paper Series No.82, Refugee Studies Centre, Oxford Department of International Development, P.15

<sup>185</sup> Leerkes and Boersma, (2014), op. cit.; the Netherlands’ Minister for Security and Justice introduced the report on 31 July 2014 by letter to the Parliament, Kamerstukken II, 2013-2014, 33512, No, 14, <https://zoek.officielebekendmakingen.nl/kst-33512-14.html>

<sup>186</sup> Leerkes and Boersma, (2014), op. cit., p. 56.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid, P.57.

<sup>194</sup> Ibid, P.57.

If the purpose of **detention** is to facilitate removal and/or coerce departure of irregular migrants, then such a purpose might be consistent with short periods of detention with high rates of removal and very limited (if any) instances of repeated detention. However, certain data raise questions as to the accuracy of that purpose and the legitimacy of detention. In **Spain**, the Ombudsman noted that, although detention is to be used to ensure effective repatriation, 52.49% of those detained in immigration detention centres in 2013 were removed – from which the Ombudsman drew the inference that 47.51% were not removed.<sup>195</sup> In the **United Kingdom**, data compiled by the Oxford Migration Observatory noted that, at the two detention centres examined (Brook House and Campsfield House) in the 2008-2009 period, 57% of persons detained in the Brook House detention centre left the United Kingdom but that a substantial proportion (43%) remained (21% released, 16% transferred to another detention centre and 6% transferred to a prison or into police custody).<sup>196</sup> For those at Campsfield House, an accurate figure of those given removal orders was unclear due to 42.7% apparently being given removal orders but 18% of such orders being unsuccessful – yet 21.2% were given temporary admission or bail and 35.7% transferred to other facilities.<sup>197</sup> In **the Netherlands**, Amnesty International has noted that, in 2012, 50.5% of those were held for three months or longer and that 29% of those detained in 2010 had been detained two or three times.<sup>198</sup> In **Italy**, data analysed by Medici per i Diritti Umani noted that only 50.54% of persons in immigration detention were repatriated and that extending the detention period from six (in 2010) to eighteen months (in 2011) only resulted in a 2.3% increase in the repatriation rate.<sup>199</sup> Accordingly, the legitimacy of Union law through the Return Directive may well be called into question given that the Directive provides for an 18 month maximum period of detention and is silent about aggregated periods of detention for those who have been detained multiple times. Further, as noted earlier, the Court of Justice remained silent about aggregated periods of detention under the Return Directive in *Kadzoev*.<sup>200</sup> The International Detention Coalition has identified research which shows a lack of correlation between immigration detention policies and decisions by irregular migrants to enter a destination state.<sup>201</sup>

Amongst the participants who were contacted as part of this research, almost all responses to questions of whether penalisation provisions imposed on irregular migrants and those in solidarity with them had any deterrent effect was that such provisions did not.

Accordingly, we see that the selected Member States have used criminal law in an instrumental manner which appears disjointed from normative underpinning. The examples show the use of criminal law for practical reasons – to overcome administrative law obstacles to removal. The underprosecution of immigration offences reveals a high level of selectivity and arbitrariness which calls into question the measures' compatibility with the rule of law. The inference to draw from these examples is that normative legitimacy may be being undermined because the objective data raises questions as to compliance with the rule of law, the predominance of pragmatic reasons for its application and the absence of normative underpinnings for the transgression contemplated. The United Kingdom, not bound by the Return Directive, provides an example of the internal choice of administrative or criminal law based on practical and arbitrary considerations. The Italian example shows the use of criminal law also for pragmatic reasons, but the choice is between national criminal law and the proper implementation of the Returns Directive in accordance with Union law. Conversely, the Netherlands' example of entry ban underprosecution may partially be attributed

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<sup>195</sup> Defensor del Pueblo, *Informe Anual 2013 – Mecanismo Nacional de Prevencion de la Tortura*, (2013), Madrid [www.defensordelpueblo.es/es/Mnp/InformesAnuales/InformeAnual\\_MNP\\_2013.pdf](http://www.defensordelpueblo.es/es/Mnp/InformesAnuales/InformeAnual_MNP_2013.pdf), P.72, para 37.

<sup>196</sup> Bosworth, M, *Immigration Detention: Policy Challenges*, (2011), Migration Observatory, University of Oxford, [www.migrationobservatory.ox.ac.uk/sites/files/migobs/Immigration%20Detention%20Policy%20Primer.pdf](http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/Immigration%20Detention%20Policy%20Primer.pdf), p. 6.

<sup>197</sup> *Ibid.*

<sup>198</sup> Amnesty International, *Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf*, (2013), Amsterdam, [www.amnesty.nl/sites/default/files/public/ai-13-36-rap-reemdelingendetentie-lr.pdf](http://www.amnesty.nl/sites/default/files/public/ai-13-36-rap-reemdelingendetentie-lr.pdf), pp. 9-10.

<sup>199</sup> Medici per i Diritti Umani, *The CIE Archipelago – Inquiry into the Italian Centres for Identification and Expulsion*, (2013), [www.mediciperidirittiumani.org/pdf/CIE\\_Archipelago\\_eng.pdf](http://www.mediciperidirittiumani.org/pdf/CIE_Archipelago_eng.pdf), p. 28.

<sup>200</sup> Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, Judgment, 30 November 2009.

<sup>201</sup> Corlett, D, with Mitchell, G, Van Hove, J, Bowring, L, and Wright, K, *Captured Children* (2012), International Detention Coalition, Melbourne, P.34 particularly at No.70.

to the practical reasons that it hinders the overall objective of expediting return and that, in the case of heavy entry bans, detection is usually by secondary means (that is, in connection with another suspected and unrelated transgression rather than active investigation). Further, the significant rates of those not repatriated from immigration detention (Spain, United Kingdom, the Netherlands), rates of repeated detention (the Netherlands) and repatriation rates which do not appear to correspond with increased periods of detention (Italy) raise questions as to the legitimacy of national and Union measures surrounding detention.

## 8. Other Consequences

In applying measures which criminalise irregular migrants and those in solidarity with them, such measures may be having other consequences which may not have been sufficiently taken into account by policy makers. In response to direct questions to the group of questionnaire respondents about other consequences stemming from criminalisation measures, certain themes emerged: firstly, that such measures are leading the marginalisation of irregular migrants with a possible increase in their propensity to engage in crime; secondly, that marginalisation leads to both increased vulnerability to exploitation of irregular migrants and impunity for crimes; and thirdly, that there is an increased risk of racial profiling. Lastly, the impact of immigration detention on the mental health of detainees and the legality of measures taken by Member States will be examined.

The distinction between measures which exclude or diminish the access of irregular migrants to fundamental rights and measures which criminalise irregular migrants is worth clarifying. Although rarely conceptualised by states as such, irregular migrants are right holders under international and regional human rights instruments along with each other person under a state's jurisdiction.<sup>202</sup> This is based on the principles of equality before the law and non-discrimination.<sup>203</sup> The denial of fundamental rights of irregular migrants may occur *de facto* through particular measures adopted rather than expressly *de jure*. In combination with duties to report crimes, the role of measures which criminalise both irregular migrants and those in solidarity with them have a reinforcing effect on disabling irregular migrants from accessing their rights. This occurs: firstly, through criminalisation measures and obligations to report acting as a disincentive for irregular migrants to access their fundamental rights through state services for fear of detection, sanction and removal; secondly, as a result of such measures, irregular migrants then rely on social networks,<sup>204</sup> such as citizens or regular migrants, to access their rights (for example, through the provision of health care beyond emergency healthcare and accommodation). By criminalising those who act in solidarity with them, irregular migrants are placed in a socially and legally isolated space where their rights are rendered inaccessible (at least as a question of fact) either in the irregular migrant's individual capacity or with the assistance of others.

Accordingly, questionnaire respondents were of the view that measures which criminalise both migrants and those acting in solidarity with them is leading to the **marginalisation** of irregular migrants in society,<sup>205</sup> as well as confusion amongst service-providers and those wanting to assist irregular migrants about the extent (if any) of assistance they can legally provide to irregular migrants. Concerns over the increased

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<sup>202</sup> See in relation to the ICCPR, Office of the High Commissioner for Human Rights, Human Rights Committee, *General Comment No. 15*, Adopted 11 April 1986, HRI/GEN/1/Rev.9 (Vol. 1); in relation to the ICESCR, Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 20 – Non-discrimination in economic, social and cultural rights (art.2, para. 2, of the International Covenant on Economic, Social and Cultural Rights*, 2 July 2009, E/C.12/GC/20, particularly para 30.

<sup>203</sup> See further, LeVoy, M, and Geddie, E, *Irregular Migration: Challenges, Limits and Remedies* (2010) 28(4) Refugee Survey Quarterly 87; European Union Agency for Fundamental Rights, *Fundamental Rights of migrants in an irregular situation in the European Union: Comparative Report*, (2011), Vienna.

<sup>204</sup> The importance of social networks in the lives of irregular migrants was highlighted by the PICUM *Book of Solidarity Project* (2002-2003), DG Employment and Social Affairs; in the Netherlands' context see van der Leun, J and Ilies, M, *Undocumented Migration – Counting the Uncountable. Data and Trends Across Europe. Country Report The Netherlands* (2009) CLANDESTINO, FP6, European Commission, DG Research, p. 10

<sup>205</sup> In the Netherlands' context about the links between criminalisation measures and marginalisation of irregular migrants, see Leerkes, A, Engbersen, G, and van der Leun, J, *Crime among irregular immigrants and the influence of internal border control* (2012) 58 Crime Law Society Change 15 at note 39 and preceding text

vulnerability and exploitation of irregular migrants resulting from criminalisation measures were a strong and common response of the workshop participants. As noted under an earlier deliverable, other EU-funded projects have revealed that migrants can be compelled to resort to “informal, shadow and niche activities” through the use of criminal legislation and over-policing.<sup>206</sup> Indeed, as discussed above, one of the chief reasons for the Netherlands’ government not proceeding with the criminalisation of irregular stay *simpliciter* in the mid-2000s is that such measures would lead to marginalisation. In the United Kingdom, the targeting of landlords who provide accommodation to irregular migrants has, for example, led to concerns that such measures will lead to, *inter alia*, poor housing conditions and homelessness among particular migrant groups.<sup>207</sup> Such measures which have the indirect effect of disabling right holders from accessing their rights calls into question the legality of such measures in light of international and regional human rights obligations – raising questions about the normative legitimacy of such measures and the institutions that give rise to and enforce them.

Further, research of the FRA has highlighted that migrants’ real or perceived fears of detection can lead to **impunity for the crimes** of others due to a reluctance to engage with authorities.<sup>208</sup> This may be exacerbated by obligations to report irregular migrants. Impunity for crimes impacts the totality of society as perpetrators are never brought to justice and both the victim and society suffer as a result – a substantial spill over effect. In this way, institutional legitimacy may be undermined where a victimless crime<sup>209</sup> attributed on account of *status*<sup>210</sup> indirectly leads to the impunity of crimes which involve both a victim and a substantive wrong.

Questionnaire responses from the workshop participants indicated that **racial profiling** is affecting not just the irregular migrant population but the citizenry and regular migrant population. Chacón has identified the conflation of immigration enforcement to a criminal challenge as a factor which motivates and gives implicit approval for racial profiling in the United States.<sup>211</sup> Racial profiling is an aspect which will be further developed in the forthcoming FIDUCIA deliverable on the criminalisation of Roma in Europe. As noted in FIDUCIA Deliverable 8.1,<sup>212</sup> this concern is supported in research about the use of racial and ethnic profiling by police targeting of irregular migrants.<sup>213</sup> The FRA’s EU-MIDIS report revealed quantifiable distinctions in treatment between those from minority backgrounds and the majority of the population.<sup>214</sup> It has manifested itself in the targeting of foreigners as ‘easy targets’ to demonstrate improved police performance

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<sup>206</sup> Düvell, op. cit., p. 293; see also Kallas, K, Fangen, K, and Sarin, T, (2011), *EU Policy Report*, EUMARGINS Project, October.

<sup>207</sup> Migrant Rights Network, *Immigration Bill briefing for House of Lords: The implications of landlord checks for migrants in the UK*, February 2014, [www.migrantsrights.org.uk/files/publications/MRN\\_briefing-landlord\\_checks-House\\_of\\_Lords-Feb\\_2014.pdf](http://www.migrantsrights.org.uk/files/publications/MRN_briefing-landlord_checks-House_of_Lords-Feb_2014.pdf)

<sup>208</sup> FRA (2014), op. cit., pp. 6-7.

<sup>209</sup> Guild, E, *Criminalisation of Migration in Europe: Human Rights Implications*, Council of Europe Issues Paper, 4 February 2010, CommDH/IssuePaper(2010)1, Strasbourg, P.8, where the exception of trafficking in human beings is made (trafficking in human beings is being considered as part of another FIDUCIA Project work package). However, Alverti raises questions as to the role of the state in perpetuating the conditions which drive exploitation whilst at the same time adopting a harm reduction agenda against the very persons it does not want in its jurisdiction: see Aliverti, (2012), op. cit., pp. 515-516.

<sup>210</sup> Concerning the argument that immigration ‘crimes’ are based on socio-political status (“crimes on persons”) rather than any inherent normative wrongdoing that conventionally underpins criminal law, see Spina, A, *Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law* (2014) 8 Criminal Law and Philosophy 635

<sup>211</sup> Chacón, op. cit.

<sup>212</sup> Vaccari, E, Allodi, M D, Maffei, S, and Guille, L, *WP8 Criminalization of migration and ethnic minorities - Statistical review and summary*, 30 May 2013, FIDUCIA Project, WP8.1, pp. 25-27.

<sup>213</sup> European Union Agency for Fundamental Rights, *Fundamental Rights of migrants in an irregular situation in the European Union: Comparative Report*, (2011), Vienna, P.40

<sup>214</sup> European Union Agency for Fundamental Rights, *EU-MIDIS – European Union Minorities and Discrimination Survey – Data in Focus Report – Police Stops and Minorities*, (2010a), Vienna; European Union Agency for Fundamental Rights, *Towards More Effective Policing – Understanding and Preventing Discriminatory Ethnic Profiling: A Guide*, (2010b), Luxembourg



as regards successful stops and arrests.<sup>215</sup> The immigrant ‘spot checks’ used as part of the United Kingdom’s “Go Home” campaign raised concerns for the Equality and Human Rights Commission about unlawful discrimination.<sup>216</sup> As noted in FIDUCIA Deliverable 8.1, the likelihood of being stopped by police on foot in Italy was ten times higher for foreigners than for Italian nationals.<sup>217</sup>

The adverse impact on the **mental health** of individuals caused by immigration detention has been well documented<sup>218</sup> as well as being a factor which can exacerbate pre-existing mental health conditions in persons, particularly those who have experienced torture or inhuman and degrading treatment.<sup>219</sup> The circumstances of asylum seekers, detained during the determination of their claim, warrants particular consideration due to the impact that detention can have on their lives even after a positive determination of their claim. Research has revealed that detention has a long-term impact on the lives of refugees after release.<sup>220</sup> Detention, in those circumstances, may well be having social and budget implications beyond the detention period as states then have to rectify the harm caused by immigration detention once a beneficiary of international protection is released from detention and is permitted to join the community. Further, given pre-existing vulnerabilities and the exacerbation of mental health issues that detention can cause, it may well be that those detained in a return situation are not in any position to consider the range of options before them and, accordingly, expecting that a measure such as detention will coerce voluntary repatriation may well be optimistic or even futile.<sup>221</sup> Indeed, research conducted by the International Organisation for Migration (“IOM”) has shown that detention has no bearing on the willingness of immigration detainees to depart the host country (in that case, the Netherlands) and that other factors play a much more significant role.<sup>222</sup>

In terms of the **legality** of measures and their impact on normative legitimacy, Member States have, at times, acted contrary to the law – that is, contrary to both established human rights norms and to European Union secondary legislation. The Court of Justice has been clear that any penal sanction imposed on account of irregular migration must be in accordance with fundamental rights, particularly those of the ECHR.<sup>223</sup> It is

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<sup>215</sup> Muchielli, L, and Nevanen, S, *Delinquency, Victimisation, Criminalisation and Penal Treatment of Foreigners in France* in Pallida, S, (ed), *Racial Criminalisation of Migrants in the 21<sup>st</sup> Century*, (2011) Farnham, Ashgate

<sup>216</sup> *Immigrant spot checks: Equality watchdog investigates*, BBC News, 3 August 2013, [www.bbc.com/news/uk-23552088](http://www.bbc.com/news/uk-23552088)

<sup>217</sup> Vaccari *et al*, *op. cit.*, p. 27.

<sup>218</sup> Pobjant, K, Hassan, R, and Katona, C, *Mental health implications of detaining asylum seekers: systematic review* (2009) 194 *British Journal of Psychiatry* 306; Ichikawa, M, Nakahara, S, Wakai, S, *Effect of post migration detention on mental health among Afghan asylum seekers in Japan* (2006) 40 *Australian and New Zealand Journal of Psychiatry* 341; Keller, A S, Rosenfeld, B, Trinh-Shevrin C, et al, *Mental health of detained asylum seekers* (2003) 362 *The Lancet* 1721; Steel, Z, and Silove, D M, *The mental health implications of detaining asylum seekers* (2001) 175 *Medical Journal of Australia* 596; Pougourides, C, *A second exile: the mental health implications of the detention of asylum seekers in the UK* (1997) 21 *Psychiatric Bulletin* 673

<sup>219</sup> Mares, S, and Jureidini, J, *Psychiatric assessment of children and families in immigration detention – clinical, administrative, and ethical issues* (2004) 28 *Australian and New Zealand Journal of Public Health* 520; Sultan, A, and O’Sullivan, K, *Psychological disturbances in asylum seekers held in long term detention: a participant observer account* (2001) *Medical Journal of Australia* 593

<sup>220</sup> Steel, Z, Silove, D M, Momartin, S, Alzuhairi, B, Suslijk, I, *Impact of immigration detention and temporary protection on the mental health of refugees* (2006) 188 *British Journal of Psychiatry* 58

<sup>221</sup> Indeed, a report from the Netherlands’ Ministry of Security and Justice on the operation of the immigration detention regime in the Netherlands points to a correlation between the health of a detained person and their willingness to leave: see Alphen, B van, Molleman, T, Leerkes, A, Hoek, J van, *Van bejegining tot vertrek – Een onderzoek naar de werking van vreemdelingenbewaring*, (2014), onderzoek en beleid 308, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Ministerie van Veiligheid en Justitie, The Hague, P.150

<sup>222</sup> Kox, M, *Leaving Detention? A study on the influence of immigration detention on migrants’ decision-making processes regarding return* (2011), International Organisation for Migration (IOM), The Hague, [www.schipholwakes.nl/Migrantengevangenis%20Mieke%20Kox%20IOM.pdf](http://www.schipholwakes.nl/Migrantengevangenis%20Mieke%20Kox%20IOM.pdf)

<sup>223</sup> Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 48 and 49.

not intended to catalogue such transgressions here but merely to illustrate that the examples of criminalisation (as defined to include immigration detention) raise questions of normative legitimacy. Examples include where conditions of detention amounting to inhuman or degrading treatment,<sup>224</sup> and a failure to consider the best interests of an unaccompanied minor and whether there were less intrusive means other than detention to effect deportation.<sup>225</sup> At the CJEU level, reference has already been made to the incompatibility of criminal incarceration with the Returns Directive,<sup>226</sup> the use of prison facilities to detain those subject to the Return Directive<sup>227</sup> and the detention of a third country national subject to the Return Directive in a prison with regular prisoners.<sup>228</sup> From a social rights perspective, the positive obligations of State Parties towards minors in light of their extreme vulnerability has been found lacking in an immigration detention context.<sup>229</sup> Accordingly, the disjunction in the legality of actions taken by states in the context of detention raises questions about the institutional legitimacy of the originators of those measures.

Accordingly, it can be seen that other consequences may flow from criminalisation measures directed towards irregular migrants. These examples raise questions concerning the normative legitimacy of criminalisation measures due to questionable compliance with human rights obligations (that is, with the legality of the measures). Criminalisation measures can have a compounding effect on measures of exclusion, resulting in further disabling irregular migrants from the exercise of their rights, contrary to international human rights law. Further, if marginalisation leads to impunity for crimes, both the victim and society as a whole suffer as a result. Similarly, racial and ethnic profiling resulting from criminalisation measures and attempted enforcement clearly contravenes non-discrimination norms which affect the citizenry as well as migrant populations. The adverse impact on the mental health of individuals caused by immigration detention raises questions as to compliance with international human rights obligations states have towards those whose vulnerability is further amplified by the control that states exercise over them and who are entirely dependent on the state for their needs. Lastly, the legality of measures taken by Member States in connection with immigration detention has already been subject to judicial disapprobation in individual cases and which raises questions about the legitimacy of institutions.

## 9. Spaces of Contestation and Resistance

Empirical legitimacy concerns the experience of the governed as to whether the institution is legitimate, the legality of the measure concerned, and the moral alignment or shared moral values between the person and the institution. Spaces of contestation and resistance give an insight into the empirical assessment of legitimacy. By contesting and resisting measures which criminalise both irregular migrants and those in solidarity with them, the inference to be drawn is that the governed (not only the citizenry but also the irregular migrant) experience a disjunction between the institution's assertion of legitimacy and their experience of the institution's exercise of authority – that is, a lack of moral alignment between values of the individual and the measures asserted by the state. Spaces of contestation and resistance may also evidence a lack of consent on the citizenry's part to the assertion of authority by the institution. Further, spaces of

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<sup>224</sup> See, for example, *MSS v Belgium and Greece* No. 30696/09 Judgment Grand Chamber, 21 January 2011, paras 223-234; *R.U. v Greece*, No. 2237/08. Judgment, 7 June 2011, paras 62-64; *S.D. v Greece*, No. 53541/07, Judgment, 11 June 2009, paras 49-54; *Tabesh v Greece*, No. 8256/07, Judgment, 26 November 2009, paras 38-44; *A.A. v Greece*, No. 12186/08, Judgment, 22 July 2010, paras 57-65; *Riad and Idiab v Belgium*, Nos. 29787/03 and 29810/03, Judgment, 24 January 2008, paras 104-111

<sup>225</sup> *Rahimi v Greece*, No. 8687/08, Judgment, 5 April 2011 paras 109-110

<sup>226</sup> Case C-430/11 *Md Sagor*, Judgment, 6 December 2012; Case C-61/11 *PPU Hassen El Dridi (alias Soufi Karim)* [2011] ECR nyr, Judgment, 28 April 2011; Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011

<sup>227</sup> Cases C-473/13 and C-514/13 *Adala Bero v Regierungspräsidium Kassel; Ettayebi Bouzalmate v Kreisverwaltung Kleve*, Judgment, Grand Chamber, 17 July 2014

<sup>228</sup> Case C474/13 *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, Judgment, Grand Chamber, 17 July 2014

<sup>229</sup> *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No. 13178/03, Judgment, 12 October 2006; *Muskhadzhiyeva & ors v Belgium*, No. 41442/07, Judgment, 19 January 2010

contestation and resistance exist not only horizontally between governing institutions and the governed, but also vertically *within* levels of government. Indeed, as was discussed earlier, the WODC report from the Netherlands' Ministry of Security and Justice revealed that stakeholders had little support for criminal sanctions for entry ban violations because they were not considered a 'real' crime.<sup>230</sup>

In this light, key examples highlight the disjunctions between the assertion of institutional legitimacy and the experience of it, as well as a lack of consent to be subjected to that authority. Firstly, the examination proceeds with regional level initiatives that sit in contradistinction to national policies in both the Netherlands and Spain; secondly, the emergence of public resistance to measures proposed or implemented by States against irregular migrants; thirdly, the role that civil society and professionals have taken to assist irregular migrants overcome the exclusionary obstacles put in place by national policy; and fourthly, the importance of fair and respectful processes for institutions to be seen as legitimate, as emphasised in the FIDUCIA theoretical framework.<sup>231</sup>

### 9.1 Resistance at the Local and Regional Government Level

The consequences of national policies criminalising irregular migrants is most directly felt at the local and regional government level. Local and regional governments are the authorities dealing directly with issues of policing, public order and public health. Local and regional authorities have a key role to play in the providing access to fundamental rights,<sup>232</sup> as has been acknowledged by the Committee of the Regions<sup>233</sup> and the Council of Europe's Congress of Local and Regional Authorities.<sup>234</sup>

Local and regional governments have developed (formal or informal) strategies for dealing with the direct consequences of national policy by, in some instances, having to navigate and/or counter government policies or measures.<sup>235</sup> Such initiatives contest the idea that national policy is both necessary and uniform across all levels of government, contributing to a counter-discourse based on policy realities and a disjunction of *national* policy from *local* needs and goals.

The disjunction between **the Netherlands'** national policy and local government implementation has been noted in research conducted as part of the CLANDESTINO Project.<sup>236</sup> Faced with some of the consequences of the Dutch national policies towards irregular migration (including public order and homelessness), the Utrecht municipality has developed strategies which attempt to deal with underlying issues leading to irregular migration and obstacles to return. Based on information provided from responses to the questionnaires and discussion at the practitioner and expert workshop, Utrecht municipality has contested Dutch national policy by *firstly*, providing accommodation for rejected asylum seekers contrary to Dutch national policy which releases rejected asylum seekers from accommodation centers in order to coerce their departure from the Netherlands. On the basis of public order and the prevention of crime, shelter is provided for rejected asylum seekers unless the national authorities can demonstrate to the mayor that the rejected asylum seeker has accommodation if expelled from the shelter – thereby placing the onus of proof on the government. If the mayor is unsatisfied that the rejected asylum seeker has alternative accommodation, then

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<sup>230</sup> Leerkes and Boersma (2014), op. cit., P.56

<sup>231</sup> Hough and Sato, op. cit.

<sup>232</sup> Gebhardt, D, *Irregular migration and the role of local and regional authorities* in Carrera, S, and Merlino, M (eds), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, CEPS Liberty and Security in Europe Series, Centre for European Policy Studies, Brussels, P.15

<sup>233</sup> Committee of the Regions, Draft Opinion, *Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union*, CdR 406/2010, 11/12 October 2011, para 14

<sup>234</sup> The Congress of Local and Regional Authorities, *The role of local and regional authorities in the implementation of human rights*, 18<sup>th</sup> Session, CG(18)6, 1 March 2010

<sup>235</sup> See, for example, Signona, N, and Hughes, V, (2010) *Being Children and Undocumented in the UK: A Background Paper*, ESRC Centre on Migration, Policy and Society, Working Paper No. 78, University of Oxford, P.35

<sup>236</sup> van der Leun, J and Ilies, M, *Undocumented Migration – Counting the Uncountable. Data and Trends Across Europe. Country Report The Netherlands* (2009) CLANDESTINO, FP6, European Commission, DG Research, pp. 12-13.

the mayor can prohibit police from executing the national decision to expel the person from the shelter. The municipality also provides emergency shelter for up to 100 rejected asylum seekers. *Secondly*, by providing a medical shelter for irregular migrants to administer medical and psychiatric treatment to migrants suffering from mental illness firstly, on the basis of human rights considerations and secondly, on the basis of the risk presented to themselves and those surrounding them – a move which initially created tension with national government policy. *Thirdly*, by distributing leaflets (in conjunction with the city of Amsterdam) entitled “*Without Documents, Not Without Rights*” setting out the rights of irregular migrants, including housing, medical, work, education and legal advice. This is in contradistinction to the Dutch national policy of exclusion and identification as a way of coercing departure.

Although **Spanish** law requires that all inhabitants be registered regardless of immigration status, information was furnished from the questionnaire responses and workshop of Barcelona city council’s expressly inclusive approach that actively promotes registration of its inhabitants even in circumstances where the person concerned has no fixed abode which allows access to mainstream healthcare and municipal services (such as emergency shelter and language services) – thereby also reducing the need for costly specialised programs. Barcelona city council has also taken an innovative measure to tackle the challenges of intercultural diversity and to foster interaction with individuals through its Anti-Rumours Campaign<sup>237</sup> - an ambitious project of targeting all citizens of Barcelona (including migrant groups) through face-to-face and multi-media interaction, building a network engaging 220 associations and institutions and training 900 volunteer ‘anti-rumour’ agents from a range of educational and employment profiles, supported by a wide variety of data, manuals and resources. The campaign may be seen as a challenge to the legitimacy of institutions whose measures result in migrants (and, indeed, the population in general) experiencing the adverse consequences of national policy and discourse. The campaign highlights the impact of discursive (and counter-discursive) elements on social cohesion. It may be seen as a manifestation of a lack of consent to perpetuate discourse and to implement measures which criminalise and have an adverse bearing upon migrants, including irregular migrants

These examples in the Netherlands and Spain may be seen as *indicia* of where the legitimacy of national laws have failed because they do not correspond with local needs and local goals, as well as sitting with the local experience of irregular migration. Further, they may evidence a disjunction of moral alignment between the citizenry and institutions.

## 9.2 Public Resistance

The mobilisation of city councils and regional parliaments was also an objective of the “Let’s Save Hospitality” (*Salvemos la Hospitalidad*) campaign in **Spain** initiated by the organisation Andalusia Acoge in combination with 12 other organisations.<sup>238</sup> The campaign successfully saw, in November 2013, the withdrawal of a proposed Spanish law which sought to amend Article 318*bis* of the *Código Penal* by broadening the scope of the anti-trafficking and smuggling provisions to potentially include solidarity and humanitarian aid in broad terms at the discretion of the prosecutor.

Public resistance was also evidenced against the use of mobile billboards circulating between 22 July and 22 August 2013<sup>239</sup> in six London boroughs with ethnically diverse settled populations as part of Operation Vaken – a **United Kingdom** government scheme designed to encourage voluntary return of irregular migrants as part of immigration enforcement action (which included immigration spot checks, raising concerns from the Equality and Human Rights Commission about ethnic profiling).<sup>240</sup> The text of the billboards contained the text “GO HOME OR FACE ARREST”. The term “go home” in the United

<sup>237</sup> See, <http://bcnantirumors.cat/>; see also [http://ec.europa.eu/ewsi/en/practice/details.cfm?ID\\_ITEMS=28379](http://ec.europa.eu/ewsi/en/practice/details.cfm?ID_ITEMS=28379)

<sup>238</sup> See, <http://www.salvemoslahospitalidad.org/>

<sup>239</sup> Although the Advertising Standard Authority notes that the posters were used between 22 and 28 July 2013, see [http://www.asa.org.uk/Rulings/Adjudications/2013/10/Home-Office/SHP\\_ADJ\\_237331.aspx#.U\\_Sy28WSz-l](http://www.asa.org.uk/Rulings/Adjudications/2013/10/Home-Office/SHP_ADJ_237331.aspx#.U_Sy28WSz-l)

<sup>240</sup> *Immigrant spot checks: Equality watchdog investigates*, BBC News, 3 August 2013, <http://www.bbc.com/news/uk-23552088>

Kingdom is said to carry particular racist connotations from the 1970s and 1980s.<sup>241</sup> The mobile billboard campaign attracted 224 complaints to the Advertising Standards Authority,<sup>242</sup> including criticism from a council leader<sup>243</sup> and Redbridge London Borough Council,<sup>244</sup> from within the Liberal Democrat coalition government,<sup>245</sup> bishops,<sup>246</sup> various non-government organisations such as Show Racism the Red Card<sup>247</sup> and Liberty,<sup>248</sup> and including a legal challenge on the basis of a breach of the Equality Act 2010.<sup>249</sup> The Advertising Standards Authority subsequently found that the use of the words “GO HOME” in the campaign did not breach advertising standards, but banned the advertising for being misleading as to the number of arrests claimed to have been “made last week in your area”.<sup>250</sup> The Home Secretary, Theresa May, indicated that the ‘Go Home vans’ would not be used again.<sup>251</sup> The Home Office evaluation characterised Operation Vaken as successful, notwithstanding that 11 voluntary departures occurred as a result of the mobile billboards.<sup>252</sup>

Allsopp has highlighted the tensions between universalist and particularist (that is, state-centric) notions of solidarity in the context of the debates on the *delit de solidarité* in **France**, identifying the support for persons who have been charged with the crime of solidarity, opposition to the introduction of the 2009 law (including a national protest in 2009) and resistance not only by organisations but also by concerned citizens and non-citizens which might be characterised as “civil disobedience”<sup>253</sup>. Allsopp gives some insight into the lack of moral alignment between national policy and individuals own values of ‘right and wrong’, citing the example of a French border policeman, Roland Gatti, who spoke out against the expulsion orders the police were to execute, noting that, on the night prior to the deportation being executed, he would give notice to families.<sup>254</sup> Fekete also highlights examples not only of solidarity *groups* protesting against airlines who are used to transport forced removals, but also of the reaction of *individual* passengers against the treatment and

<sup>241</sup> ‘Go home or face arrest’ vans debate: Green and Khan; 9 October 2013, <http://www.bbc.com/news/uk-politics-24462260> at 1:44; see also Sparrow, A, ‘Go home’ campaign against illegal immigrants could go nationwide, The Guardian, 29 July 2013, <http://www.theguardian.com/uk-news/2013/jul/29/go-home-campaign-illegal-immigrants>. In the Scottish context see, UK Border Agency posters branded ‘racist’, BBC News, 30 August 2013, <http://www.bbc.com/news/uk-scotland-glasgow-west-23897533>

<sup>242</sup> Advertising Standards Authority Adjudication on Home Office, Complaint A13-237331, 9 October 2013, [http://www.asa.org.uk/Rulings/Adjudications/2013/10/Home-Office/SHP\\_ADJ\\_237331.aspx#.U\\_Sy28WSz-l](http://www.asa.org.uk/Rulings/Adjudications/2013/10/Home-Office/SHP_ADJ_237331.aspx#.U_Sy28WSz-l)

<sup>243</sup> Council ‘horrified over scheme for immigrants to go’, BBC News, 23 July 2013, <http://www.bbc.com/news/uk-england-london-23419848>

<sup>244</sup> Bridge, T, Council joins attack on Government immigration vans, 29 July 2013, <http://www.localgov.co.uk/Council-joins-attack-on-Government-immigration-vans/28386>

<sup>245</sup> [http://www.huffingtonpost.co.uk/2013/07/28/cable-immigration\\_n\\_3666286.html?utm\\_hp\\_ref=uk](http://www.huffingtonpost.co.uk/2013/07/28/cable-immigration_n_3666286.html?utm_hp_ref=uk)  
<http://www.theguardian.com/uk-news/2013/jul/25/coalition-row-adverts-illegal-immigrants>

<sup>246</sup> Ekklesia, Bishops condemn Home Office ‘go home’ campaign, 12 August 2013, <http://www.ekkleisia.co.uk/node/18785>

<sup>247</sup> Show Racism the Red Card calls on government to abandon ‘Go Home’ campaign <http://www.srtrc.org/news/news-and-events?news=4520>

<sup>248</sup> Sankey, I, “Go home” vans: Nasty, racist and likely unlawful, Liberty, 1 August 2013, <https://www.liberty-human-rights.org.uk/news/latest-news/go-home-vans-nasty-racist-and-likely-unlawful#overlay-context=>

<sup>249</sup> Deighton, Pierce, Glynn, Home Office Agree Never to Run Van Adverts Telling Migrants to Go Home Again Without Consulting, Press Release, 12 August 2013,

[http://www.migrantsrights.org.uk/files/news/DPG\\_press\\_release\\_12\\_08\\_2013.pdf](http://www.migrantsrights.org.uk/files/news/DPG_press_release_12_08_2013.pdf)

<sup>250</sup> Advertising Standards Authority Adjudication on Home Office, Complaint A13-237331, 9 October 2013, [http://www.asa.org.uk/Rulings/Adjudications/2013/10/Home-Office/SHP\\_ADJ\\_237331.aspx#.U\\_Sy28WSz-l](http://www.asa.org.uk/Rulings/Adjudications/2013/10/Home-Office/SHP_ADJ_237331.aspx#.U_Sy28WSz-l)

<sup>251</sup> Wintour, P, ‘Go home’ billboard vans not a success, says Theresa May, The Guardian, 22 October 2013, <http://www.theguardian.com/politics/2013/oct/22/go-home-billboards-pulled>

<sup>252</sup> United Kingdom Home Office, Operation, Vaken – Evaluation Report – October 2013, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/254411/Operation\\_Vaken\\_Evaluation\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254411/Operation_Vaken_Evaluation_Report.pdf), P.3

<sup>253</sup> Allsopp, op. cit.

<sup>254</sup> Ibid, pp. 17-18

mishandling of forcibly removed persons on aircraft in the **United Kingdom, Belgium and France**.<sup>255</sup> Indeed, the coordination of multiple organisations and political parties opposing the introduction of the *delit de solidarité* in France in 2009 was also a characteristic of that campaign of opposition.<sup>256</sup>

### 9.3 The Presence of Non-Government Services and Professionals

In response to diminished means for irregular migrants to access social rights, a number of organisations have emerged to respond directly to those needs. Although it is not intended to provide a catalogue of organisations which assist irregular migrants, a select few will be highlighted as a way of evidencing a counter-strategy towards national policies which may exclude or be having adverse consequences on irregular migrants. What is important here is not the mere presence of NGOs but that, firstly, such organisations provide the very services that national governments ought to provide or, that these organisations provide parallel services to public services but with greater accessibility and reduced risk of detection; and secondly, that the work and mission of such NGOs is in defiance of national government policy. In some jurisdictions, such NGOs may be at risk of prosecution for assisting irregular migrants.

Due to policies which severely limit access to medical services by irregular migrants, and due to concerns about detection, organisations have emerged composed of volunteer doctors and medical professionals providing almost parallel medical services to state-run schemes. NAGA provides medical and legal assistance to irregular migrants, Roma, Sinti, asylum seekers and victims of torture in Milan, **Italy**.<sup>257</sup> NAGA expressly states that it does not operate as an alternative or competitor to public health services but exists as a response to a direct problem caused by state bodies.<sup>258</sup> In **Germany**, Medibüro indicates that although medical staff are prohibited by law from reporting irregular migrants to authorities, access to standard medical assistance requires the involvement of the social security office which is under a reporting obligation, effectively resulting in the denial of health care due to fear of being identified and deported.<sup>259</sup> Accordingly, Medibüro, on the basis of strict confidentiality with the irregular migrant, responds to this need with a network of general practitioners and other medical professionals who provide their services free of charge. Medibüro states that its basis for action is opposition to social exclusion and the access of the right to health care independent of legal status.<sup>260</sup> Similarly, in the **United Kingdom**, the organisation Doctors of the World run a clinic in London for vulnerable migrants to overcome barriers to accessing health care.<sup>261</sup>

In the **United Kingdom**, the issue of employer checks on employees' migration status and their impact has been the focus of awareness campaigns that have seen the Migrants' Rights Network collaborate with both the Unite the Union to develop a mapping report on those impacts,<sup>262</sup> as well as the Trade Union Congress to develop a negotiator's guide on how to manage employer checks.<sup>263</sup>

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<sup>255</sup> Fekete, L, *Europe: crimes of solidarity* (2009) 50(4) Race and Class 83, pp. 92-94.

<sup>256</sup> Allsopp, op. cit., P.15

<sup>257</sup> NAGA, *Ambulatorio Medico*, <http://www.naga.it/index.php/ambulatorio-medico.html>

<sup>258</sup> NAGA, *Il Naga*, [http://www.naga.it/index.php/Chi\\_Siamo.html](http://www.naga.it/index.php/Chi_Siamo.html)

<sup>259</sup> Medibüro, *Leben in der Illegalitaet*, [http://www.medibuero.de/de/Leben\\_in\\_der\\_Illegalitaet.html](http://www.medibuero.de/de/Leben_in_der_Illegalitaet.html); Medibüro, *Gesundheitsversorgung*, [http://www.medibuero.de/de/Leben\\_in\\_der\\_Illegalitaet/Gesundheitsversorgung.html](http://www.medibuero.de/de/Leben_in_der_Illegalitaet/Gesundheitsversorgung.html), Medibüro, *Aufruf*, <http://www.medibuero.de/de/Aufruf.html>

<sup>260</sup> Medibüro, *Who We Are*, <http://www.medibuero.de/en/Who%20we%20are/Our%20aims.html>

<sup>261</sup> Doctors of the World, *London Clinic*, <http://doctorsoftheworld.org.uk/pages/london-clinic>, Doctors of the World, *About Us*, <http://doctorsoftheworld.org.uk/pages/what-we-do>

<sup>262</sup> Migrants Rights Network, *Papers Please – The Impact of the Civil Penalty Regime on the Employment Rights of Migrants in the UK*, November 2008, [http://www.migrantsrights.org.uk/files/publications/papers\\_please.pdf](http://www.migrantsrights.org.uk/files/publications/papers_please.pdf)

<sup>263</sup> Trade Union Congress, *Immigration Document Checks and Workplace Raids – a negotiator's guide*, April 2010, <http://www.migrantsrights.org.uk/files/publications/MRN-trade-union-guide.pdf>

## 9.4 Fair and Respectful Processes

Information was provided in the questionnaire about Stichting Haven International Partnership (SHIP),<sup>264</sup> based in Amsterdam but operating in the Amsterdam, The Hague, Utrecht and Rotterdam areas of **the Netherlands**. SHIP is said to adopt an approach of respectful guidance of North African and Middle Eastern irregular migrants using native Arabic, Berber or French speakers to assist with voluntary return to the person's country of origin.

Research from the WODC in **the Netherlands** has highlighted that, in a detention context, the greater the detained person's perception of detention as legitimate, the more willing a detained person was to cooperate with their departure from the Netherlands. The authors noted:

“The more immigrants perceive the outcome of detention (repatriation) as *legitimate*, the more willing they are to cooperate with their return. Put differently: if an immigrant considers it just that he or she is detained in order to be returned, the immigrant will show a greater willingness to cooperate with departure. In the interviews, a majority of the immigrants said that they do not consider it just to be detained. They especially viewed the deprivations linked to detention (such as the lack of freedom and autonomy) as unjust. According to both staff members and immigrants, this perception tends to fuel the so-called ‘system fighting’, part of which is an active resistance to their deportation.

It emerges from the quantitative research that how the return readiness develops depends particularly on the *outcome justice* of the detention, that is, the normative acceptance of the fact that the immigrant is required to leave the Netherlands.”<sup>265</sup>

Research undertaken as part of the International Detention Coalition's *Community Assessment and Placement* model has highlighted the importance of fair processes - noting that negative asylum decisions are more likely to be complied with by rejected asylum seekers if the refugee status determination process is fair.<sup>266</sup> In the European context, fair process may be analogous to effective remedies under Article 47 of the EU Charter and Article 13 of the ECHR whilst incorporating respectful dealings and treatment of individuals.

## 10. Conclusions

The research and findings conducted as part of this paper are based on Deliverables 8.1 to 8.5 and which will form the basis of the Policy Proposals that are contemplated in Work Package 13 of the FIDUCIA Project.

The theoretical framework of the FIDUCIA Project aims to assess institutional legitimacy through the dual lenses of normative and empirical legitimacy and also as a means of identifying ways in which compliance with the law can be engendered.

Measures which criminalise migrants and those in solidarity with them present a particular challenge for an assessment of institutional legitimacy through normative compliance as the research has revealed a propensity for states to use criminal law *instrumentally* in the migration context. The instrumental approach adopted seems disconnected from a normative underpinning and is rather used for pragmatic reasons and in an arbitrary manner. Further, the instrumental use of the law in the migration context is contestable because it is based on the assumption that migration can be controlled – a premise which itself is vigorously contested in both academic and policy-making spheres.

Normative legitimacy, which looks at the objective use of the law, is inclusive of quantifiable measures such as efficiency, legality and the rule of law. In a migration context, efficiency may be analogised to

<sup>264</sup> SHIP Foundation, <http://shipfoundation.nl/>

<sup>265</sup> Alphen, B van, Molleman, T, Leerkes, A, Hoek, J van, *Van bejegining tot vertrek – Een onderzoek naar de werking van vreemdelingenbewaring*, (2014), onderzoek en beleid 308, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Ministerie van Veiligheid en Justitie, The Hague, P.150

<sup>266</sup> Sampson, R, and Bowring, L, *There are alternatives: A handbook for preventing unnecessary immigration detention*, 2011, Immigration Detention Coalition, Melbourne, P.17

effectiveness but which presents a number of methodological problems as regards assessment. In order to advance trust-based methods of compliance in the migration context, this is certainly an area that could greatly benefit from further empirical research.

An assessment of the normative legitimacy revealed that institutional legitimacy may be undermined due to the legality of measures: firstly, through their *application* for pragmatic reasons, in a somewhat arbitrary manner and disconnected from normative underpinning which raises questions about compliance with the rule of law and secondly, the other *consequences* resulting from such measures raise questions about legal compliance – that is, compliance with international, supranational and regional human rights obligations.

Empirical legitimacy, which seeks to examine the experience of those governed in a subjective sense, is inclusive of *indicia* such as the legality of the measure, moral alignment between governor and the governed and shared moral values between the individual and the institution. The research reveals that empirical legitimacy may be undermined where there is a disjunction between national and local or regional needs, goals, priorities and experiences such that empirical legitimacy *within* governments is contested. Resistance and contestation from local and regional governments, organisations and individuals are *indicia* that there is misalignment of the moral values between national policies and those governed. This may also be evidenced by the presence of organisations and individuals who provide support and services to irregular migrants (in sectors where the state would normally be expected to operate) in defiance of national policy. Fair and respectful processes are also shown to have role to play in fostering compliance with the law.

Accordingly, on the basis of normative and empirical legitimacy assessments undertaken, it can be concluded that there is a basis for questioning the legitimacy of institutions which criminalise irregular migrants and those that act in solidarity with them.

The FIDUCIA Project’s theoretical framework also explores the relationship between criminal law and morality, distinguishing crimes which are inherently wrong and carry some “normative charge” (*mala in se*) from regulatory or administrative penalties which do not carry any normative charge or stigma (*mala prohibita*).

In striking this balance between law and morality, Hough and Sato suggest a synthesis of positions between the Hart-Devlin debate. Hart’s position was that criminal law should not be based solely on the moral views of the majority and that the criminal law should not intervene where no public harm was done or no rights were breached and that popular. Devlin’s position was that the legitimacy of the justice system required some level of connection between law and morality. Hough and Sato advance the synthesis of these two positions as follows:

- “1. Any extension of the criminal law needs to be justified primarily by reference to the need to preserve human rights;
2. Any narrowing of the criminal law needs to be justified by reference to the fact that the laws in question do nothing to secure or protect human rights;
3. Provided that these two conditions are met, it makes sense to maximise the degree of correspondence between the law and morality by ensuring that as far as possible behaviour proscribed by the criminal law carries a social stigma”<sup>267</sup>

The challenge for viewing the criminalisation of irregular migration and those in solidarity with them through this theoretical lens results from the use of not only criminal law but also administrative law measures to criminalise migrants.

Migration law is conventionally based on administrative law and has regulatory or administrative penalties at its disposal to ensure enforcement – such penalties can be characterised as *mala prohibita* and, as Hough and Sato point out, do not carry a “normative charge”.<sup>268</sup> However, as indicated throughout this paper, the cross-pollination of criminal consequences for immigration infractions and immigration consequences for criminal

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<sup>267</sup> Hough and Sato, op. cit., P.11

<sup>268</sup> Hough and Sato, op. cit., P.9



infractions to ensure compliance (as put forward by Legomsky)<sup>269</sup> has resulted in measures grounded in administrative law but which have assumed characteristics more akin to criminal sanction (such as detention or having the objects of punishment and deterrence). With the exception of trafficking in human beings (which is the subject of another FIDUCIA Project work package), irregular entry and stay may be considered victimless behaviour. As such, both administrative and criminal law sanctions may be equally devoid of a “normative charge” (which is a characteristic of conventional regulatory or administrative penalties whereas criminal penalties do carry such a normative charge and social stigma).

Accordingly, the latter part of the theoretical framework may not reach its full potential in situations where measures are based in administrative law but with characteristics akin to criminal law sanctions (such as immigration detention). It is submitted that, as regards criminalisation of migration and those that act in solidarity with irregular migrants, the distinction between regulatory offences and criminal offences is irrelevant where the consequences on the individual are largely identical. In the migration context, an understanding of the *substance* of consequences of criminalisation measures upon individuals, rather than only their legal *form* (as either criminal or administrative law), is essential in any attempt to reconcile criminal or administrative measures and morality. Care should be taken to ensure that, in proposing a synthesis of the Hart-Devlin debate as advanced by the theoretical framework, states are not incentivised to transfer criminal law measures to the administrative sphere but with similarly deleterious consequences on human rights and with a discourse that maintains social stigma around the behaviour. Similarly, care should be exercised to ensure that states do not embark on a course of moral engineering to create social stigma, thereby engendering public trust and support for criminalisation measures against irregular migrants and those that act in solidarity with them that are otherwise inconsistent with universal human rights norms.

The role of public trust in fostering compliance with migration law does present a paradox. This largely stems from the fact that the individuals whose trust a state wishes to engender (irregular migrants) are also the very individuals a state does not want in its jurisdiction. This is not to say that public trust has no relevance in the field of migration law compliance. On the contrary – the examples show that fair and respectful treatment and process have an important role to play in policy execution and compliance with human rights obligations. Further, it demonstrates that public trust also plays an important role for seeking the compliance of those who act in solidarity with irregular migrants – namely citizens and regular migrants - particularly given the severity of the measures against those facilitating irregular migration and the presence of resistance to criminalising measure.

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<sup>269</sup> Legomsky, op. cit.

## Annex. Selected Member State Legislation

This table contains the relevant provisions of the select Member States' legislation dealing with the penalisation of: irregular entry and stay; facilitation of irregular entry and stay; employment of irregular migrants; renting accommodation to irregular migrants; and duties to report irregular migrants. This annexure forms the basis of the comparative analysis in section 6.1.2.

### Irregular Entry

Behaviour	UK	France	Italy	NL	Germany	Spain
<b>Irregular Entry</b>	(1) Entry without leave; (2) Enter with leave by deception. Sections 24(1)(a) and 24A(1) <i>Immigration Act 1971</i>	Yes, Article L621-2 CESEDA	Yes, Article 10 bis Legge 286/90	Yes, if breach of Schengen Borders Code: Article 108 of the Vreemdelingen Wet 2000; Article 23 Wetboek van Strafrecht (Criminal Code)	Yes, Sections 14(1) and 95 para 1, no. 3 Aufenthaltsgesetz	No
<i>Penalty</i>						
Fine	(1) Summary conviction, GBP5000 (2) Summary conviction - GBP5000; Indictment – fine	EUR3,750	EUR5000-10000	EUR4050	Yes (amount unspecified)	No
Imprisonment	(1) Not more than 6 months (2) Summary conviction – not more than 6 months; Indictment – not more than 2 years	12 months	No	Not exceeding 6 months	One year	No
Both fine and imprisonment?	Possible. Sections 24(1) and 24A(3) <i>Immigration Act 1971</i> ; section 37 <i>Criminal Justice Act 1982</i>	Both	N/A	Either	Either	N/A

**Irregular Stay**

Behaviour	UK	France	Italy	NL	Germany	Spain
<b>Irregular Stay</b>	(1) Remain beyond time limited by leave; (2) Fail to observe condition of leave. Sections 24(1)(b)(i) & 24A(1)(b)(ii) <i>Immigration Act 1971</i>	No	Yes, Article 10 bis Legge 286/90	Yes, if person declared an “undesirable alien” or subject to an entry ban. Articles 66a and 67 Vreemdelingen Wet 2000; Articles 23 & 197 Wetboek van Strafrecht (Criminal Code)	Yes, Sections 95 para 1, nos. 1 and 2 Aufenthaltsgesetz	Yes, Article 53a Ley Orgánica Extranjería
<i>Penalty</i>						
Fine	(1) &(2) Summary conviction, GBP5000	No	EUR5000-10000	EUR8100	Yes (amount unspecified)	EUR501-10000 Article 55 Ley Orgánica Extranjería
Imprisonment	(1) & (2) Not more than 6 months	No	No	6 months	One year	No
Both fine and imprisonment?	Possible. Section 24(1) & section 37 <i>Criminal Justice Act 1982</i>	N/A	N/A	Either	Either	N/A

## Solidarity

Behaviour	UK	France	Italy	NL	Germany	Spain
<b>Assist Irregular Entry</b>	(1) Assisting illegal immigration (2) Facilitation of entry of asylum seekers into the United Kingdom Sections 25 and 25A <i>Immigration Act 1971</i> ; Section 37 <i>Criminal Justice Act 1982</i>	Yes, Article L622-1 CESEDA	Yes, Article 12 para 1 Legge 286/90	Yes, Articles 23 and 197a(1) <i>Wetboek van Strafrecht (Criminal Code)</i>	Yes, Section 96 para 1, nos. 1 and 2 <i>Aufenthaltsgesetz</i>	Yes, Article 318 bis <i>Codigo Penal</i>
Financial Gain/Profit element?	Only in the case of asylum seekers (section 25A <i>Immigration Act 1971</i> )	No	No	No	Yes, but may not be taken into account if done repeatedly or for the benefit of several foreigners	No
Express exceptions?	Only in the case of those persons acting <u>on behalf of an organisation</u> to assist refugees and does not charge for its services – section 25A(3) <i>Immigration Act 1971</i>	Yes – family members (specified); those persons or entities who provide legal advice, food services, accommodation and medical care to ensure a dignified and decent conditions of life or any other assistance to preserve the dignity or physical integrity of the person (Article L622-4 CESEDA)	No	No	No	Yes, for the transportation of asylum seekers who have presented an asylum request without delay and which is admissible for processing Article 54(3) <i>Ley Orgánica Extranjería</i> ; also ‘necessity exception’ - Article 20(5) <i>Codigo Penal</i>
<i>Penalty</i>						
Fine	(1) Summary offence – not more than GBP5000; if on indictment – fine (unspecified); (2) unspecified	EUR30,000	EUR15,000 per person (EUR25,000 in cases of particular gravity)	EUR81,000	Yes (amount unspecified)	None
Imprisonment	(1) Summary – not more than 6 months; indictable - not more than 14 years; (2) unspecified	5 years	From 1 to 5 years; (increased by in cases of particular gravity Article 12, para 3, 3 bis, 3 ter)	4 years	5 years.	4 to 8 years
Both fine and imprisonment?	Possible in case of (1).	Both	Both	Either	Either	N/A

**Solidarity**

Behaviour	UK	France	Italy	NL	Germany	Spain
<b>Assist Irregular Stay</b>	Yes, assisting illegal immigration, Section 25 <i>Immigration Act 1971</i> ; Section 37 <i>Criminal Justice Act 1982</i>	Yes, Article L622-1 CESEDA	Yes, Article 12 para 1 Legge 286/90	Yes, Articles 23 and 197a(2) Wetboek van Strafrecht (Criminal Code)	Yes, Section 96 para 1, no. 2 Aufenthaltsgesetz	Yes, Article 54(1)(b) Ley Orgánica Extranjería
Financial Gain/Profit element?	No	No	If an “unfair profit” (own translation) is derived by the landlord (“ingiusto profitto”)	Yes	Yes	Yes
Express exceptions?	No	Yes – family members (specified); those persons or entities who provide legal advice, food services, accommodation and medical care to ensure a dignified and decent conditions of life or any other assistance to preserve the dignity or physical integrity of the person (Article L622-4 CESEDA)	Yes, Article 12(2) (relief efforts and humanitarian assistance for those foreigners in need)	No	Yes, for certain professions or volunteers (pharmacists, doctors, midwives, lawyers etc) - Vor 95.1.4 Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz	Yes, for the transportation of asylum seekers who have presented an asylum request without delay and which is admissible for processing; - Article 54(3) Ley Orgánica Extranjería; also ‘necessity exception’ - Article 20(5) Código Penal
<i>Penalty</i>						
Fine	Summary offence – not more than GBP5000; if on indictment – fine (unspecified);	EUR30000	EUR15494 per person	EUR81,000	Yes (amount unspecified)	EUR10001-100000
Imprisonment	Summary – not more than 6 months; indictable - not more than 14 years	5 years	Up to 4 years	4 years	5 years	None
Both fine and imprisonment?	Possible	Both	Both	Either	Either	N/A

Behaviour	UK	France	Italy	NL	Germany	Spain
<b>Employment of Irregular Migrants</b>	(1) Section 15 <i>Asylum and Immigration Act 2006</i> (civil penalty); (2) section 21 <i>Asylum and Immigration Act 2006</i> (criminal penalty); (3) ‘facilitation’ under section 25 <i>Immigration Act 1971</i>	Yes, Articles L 8211-1; 8251-1 and 8251-2 Labour Law	Yes, Article 22 para 12 of Legge 286/98; aggravating circumstances Article 22 para 12 bis of Legge 286/98	197b Wetboek van Strafrecht (Criminal Code)	Yes, section 404 (2) No. 3 SGB III (German Social Code) and sections 10 and 11 Gesetz zur Bekämpfung der Schwarzarbeit und illegalen Beschäftigung (SchwarzArbG)	Yes, Article 312(2) for those who employ “foreign citizens without work permits under conditions that negatively affect, suppress or restrict the rights they are recognised by the legal provisions, collective bargaining agreements or individual contracts”
<i>Penalties</i>	(1) maximum penalty GBP10000 ( <i>The Immigration (Employment of Adults Subject to Immigration Control)(Maximum Penalty) Order 2008</i> ); (2) GBP5000 fine or imprisonment not exceeding 12 months or both (summary); fine or imprisonment not exceeding 2 years (3) as outlined above	For 8251-1: prison sentence for 5 years, fine of EUR 15,000 increasing to prison sentence of 10 years and EUR100,000 if committed by organised gang; fine is applied for each foreign national involved (Article L 8256-2 Labour Law) + other sanctions (Article L 8256-3 to 5 Labour Law)	Imprisonment for 6 months to 3 years and fine of EUR5000 per person employed; increases by one third to one half in aggravated circumstances	Imprisonment for not more than one year or a fine of EUR81,000	For breach of Section 10 SchwarzArbG: Imprisonment for up to three years of a fine  For a breach of Section 11 SchwarzArbG: Imprisonment for up to one year or a fine	Imprisonment of 2 to 5 years; and a fine
<b>Duties to report irregular migrants to authorities</b>	Where Secretary of State suspects offence committed under <i>Immigration Act 1971</i> and requests information from the public body for the purpose of ascertaining the whereabouts of the person – section 129 <i>Nationality Immigration and Asylum Act 2002</i>		Public servants obliged to report criminal offences, including those of irregular migration Articles 361 and 362 Codice Penale; Medical professionals exempted from reporting Article 35 para 5 Legge	Yes, section 107(7) <i>Vreemdelingen Wet 2000</i> – administrative bodies are required to do so if requested by the Minister for the implementation of the Act	Yes, all public bodies except schools and other educational and care establishments Section 87(1) and (2) <i>Aufenthalts-gesetz</i>  Exemptions for certain professions including	No

			286/1998		medical professionals – section 88(2) Aufenthaltsgesetz; section 203 Strafgesetzbuch (StGB); and 88.2.3 and 88.2.4.0 of the Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz	
<b>Landlords</b>	Sections 20-23 <i>Immigration Act 2014</i>	Exposure to prosecution under facilitation provisions	Article 12 para 5 Legge 286/1998 in cases where there is an “unfair profit” (own translation) (“ingiusto profitto”)	Exposure to prosecution under facilitation provision	Exposure to prosecution under facilitation provisions	Exposure to prosecution under facilitation provisions
<i>Penalties</i>	Not in excess of GBP3000 – section 25(4) <i>Immigration Act 2014</i>	EUR30000 and 5 years’ imprisonment	Imprisonment of 6 months to 3 years and possible confiscation of property	EUR81000 or 4 years’ imprisonment	Fine or five years’ imprisonment	EUR10001-100000
<b>Other</b>	Driving licences, bank accounts, health care charges – <i>Immigration Act 2014</i>					



## QUESTIONNAIRE

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### ON THE CONSEQUENCES OF CRIMINALISING MIGRANTS

The Centre for European Policy Studies (CEPS) is currently conducting a study within the framework of the EU-funded research project FIDUCIA (*'New European Crimes and Trust-Based Policy'*).

The study seeks to examine the implementation of policies and practices which criminalise undocumented migrants in Europe. It aims to identify the consequences of such policies, including their 'policy effectiveness' and to assess their impact on legitimacy and trust in justice institutions (police and the courts).

In order to help us gather the information necessary for this research, we are asking selected experts in EU member states to complete this short questionnaire, which comprises a total of 18 questions.

We would be very grateful if you would respond to the questions, providing your **observations and concrete examples** where possible.

Confidentiality of responses will be respected at all times- answers will not be quoted directly and responses will remain anonymous.

We remain at your disposal should you require any further clarification concerning the scope and nature of the study.

For more information on the project please visit: <http://www.fiduciaproject.eu/>

**Thank you very much for your contribution to this research**

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## Section 1: Irregularity as a crime

**Q.1. Is entry/residence as an undocumented person designated a crime in your member state?**

- Yes
- No
- Don't know

Please add further information if possible:

**Q.2. If yes, what are the penalties for irregular entry/stay?**

Please explain the standard penalties for punishing irregular status in your member state, if known:

**Q.3. According to your knowledge, how often are irregular migrants arrested for the crime of irregular entry/stay?**

- Regularly
- Sometimes
- Seldom
- Never

Please give any further observations and examples here:

**Q.4. According to your knowledge, how regularly are irregular migrants charged and prosecuted for the crime of irregular entry/stay?**

- Regularly
- Sometimes
- Seldom
- Never

Please give any further observations and examples here:

**Q.5. According to your knowledge, what are the most common means by which law enforcement/border authorities identify and detain irregular migrants?**

(e.g. randomised identity checks in public spaces? Raids in places of employment, raids in places of residence?)

**Q.6. According to your knowledge, does the threat or arrest/detention have any “deterrence effect” on irregular migration.**

(e.g. does it affect the decision to enter and reside in a particular member state? Does the threat of arrest/detention affect decisions regarding return?)

**Q.7. What would you deem are some of the side-effects of criminalising irregular entry/stay? What are the most relevant unintended consequences of criminalisation?**

(for instance, as regards access to employment, social services, social marginalisation or public attitudes to migrants. Please supplement your observations with concrete examples where possible.)

## Section 2: Criminalisation of third parties

### Employers' sanctions

**Q.8. Does your member state levy penalties on employers found to be hiring undocumented migrant workers?**

Yes

No

I don't know

Can you provide any further information, for instance what kind of penalties (fines/prison sentences?)

**Q.9. According to your knowledge, are employer sanctions regularly enforced? How regular would you estimate enforcement?**

Regularly

Sometimes

Seldom

Never

Please give any further observations and examples here:

## **Penalties on landlords**

**Q.10. Does your member state levy penalties on landlords/housing agents found to be renting/sheltering undocumented migrant workers?**

Yes

No

I don't know

Can you provide any further information/observations? Can you give concrete examples?

**Q.11. According to your knowledge, are penalties on landlords regularly enforced? How regular would you estimate enforcement?**

Regularly

Sometimes

Seldom

Never

Please give any further observations and examples here:

**Q.12. Are any other third parties penalised for facilitating irregular migration in your member state?**

Please give any observations and examples here:

## **Duties to report**

**Q.13. Are duties to report the presence of irregular migrants imposed on third parties in your member states (e.g. medical professionals, schools, local authorities)**

Please give any observations and examples here:

**Q.14. If yes, are duties to report enforced and/or respected by those professionals targeted?**

Please provide your observations and examples here:

**Q.15. According to your knowledge, does the criminalisation of third parties/duties to report have any "deterrence effect" on irregular migration.**

(e.g. does it affect the decision to enter and reside in a particular member state? Does the threat of arrest/detention affect decisions regarding return?)

**Q.16. What would you deem are some of the side-effects of criminalising third parties/imposing duties to report? What are the most relevant unintended consequences?**

(for instance, as regards access to employment, social services, social marginalisation or public attitudes to migrants. Please supplement your observations with concrete examples where possible.)

**Section 3: Alternatives to criminalisation**

We are interested in the strategies employed by local and regional authorities and civil society organisations to counter/circumvent criminalising policies.

**Q.17. Can you provide any examples from your national context of measures by civil society/local and regional authorities to circumvent criminalising policies and practices?**

Please expand below (examples could include programmes by local authorities to offer services to irregular migrants on an unofficial basis, such as healthcare):

**Q.18. Can you provide any examples from your national context of measures by civil society/local and regional authorities to implement alternatives to criminalisation?**

Please expand below (e.g. could include campaigns by NGOs to change national legislation):

We may wish to contact you for further information or to request clarification of certain details provided in this questionnaire. For follow-up purposes, we would be grateful if you could indicate your contact details below:

Name

Email address

Organisation

Telephone number

If you have further comments on this questionnaire or the topics under study, please enter them below:

**Thank you very much for completing this questionnaire!**



## ABOUT CEPS

Founded in Brussels in 1983, the Centre for European Policy Studies (CEPS) is widely recognised as the most experienced and authoritative think tank operating in the European Union today. CEPS acts as a leading forum for debate on EU affairs, distinguished by its strong in-house research capacity, complemented by an extensive network of partner institutes throughout the world.

### Goals

- Carry out state-of-the-art policy research leading to innovative solutions to the challenges facing Europe today,
- Maintain the highest standards of academic excellence and unqualified independence
- Act as a forum for discussion among all stakeholders in the European policy process, and
- Provide a regular flow of authoritative publications offering policy analysis and recommendations,

### Assets

- Multidisciplinary, multinational & multicultural research team of knowledgeable analysts,
- Participation in several research networks, comprising other highly reputable research institutes from throughout Europe, to complement and consolidate CEPS' research expertise and to extend its outreach,
- An extensive membership base of some 132 Corporate Members and 118 Institutional Members, which provide expertise and practical experience and act as a sounding board for the feasibility of CEPS policy proposals.

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Financial Institutions and Markets  
Energy and Climate Change  
EU Foreign, Security and Neighbourhood Policy  
Justice and Home Affairs  
Politics and Institutions  
Regulatory Affairs  
Agricultural and Rural Policy

### **Independent Research Institutes managed by CEPS**

European Capital Markets Institute (ECMI)  
European Credit Research Institute (ECRI)

### **Research Networks organised by CEPS**

European Climate Platform (ECP)  
European Network for Better Regulation (ENBR)  
European Network of Economic Policy  
Research Institutes (ENEPRI)  
European Policy Institutes Network (EPIN)