The Criminalisation of Irregular Migration in the European Union

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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
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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.
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\(^1\) 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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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 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. 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 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”) and which has been both the subject of a number of academic writings, including the emergence of “over-criminalisation” of migration. 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); 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). 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. Accordingly, the development of the term in the United States

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8 Legomsky, op. cit.
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,\(^{10}\) 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”,\(^{11}\) as well as discourse,\(^{12}\) the use of immigration detention\(^{13}\) and, importantly, is inclusive of the criminalisation of those persons acting in solidarity with irregular migrants.\(^{14}\) 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.\(^{15}\) 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;\(^{16}\) 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;\(^{17}\) 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\(^{18}\) 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,\(^{19}\) this paper will at least focus on the criminal provisions and

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


18 Parkin, op. cit.

19 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, this paper will primarily focus on irregular migration.

Notwithstanding the multiplicity of ways in which a person may irregularly migrate, 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). 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 and the Employer Sanctions Directive (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.

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.

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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20 Parkin, op. cit.


26 Parkin, op. cit.
“irregularity” either at the time of entry or at a later time. 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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27 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, the Employer Sanctions Directive and the Schengen Borders Code. However, the United Kingdom is still bound by the Facilitation Directive, the Framework Decision on unauthorised transit the Carrier Sanctions Directive, the Reception Conditions Directive I and the Procedures Directive I. 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 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 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.

28 Recital 26 of the Return Directive
29 Recital 38 of the Employer Sanctions Directive
31 Recital 7 of the Facilitation Directive
32 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”)
36 European Union Agency for Fundamental Rights, Criminalisation of migrants in an irregular situation and of persons engaging with them (2014), Vienna
37 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. 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. 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. 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.

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

38 Ibid., pp. 6-8.
40 Ibid.
41 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.\textsuperscript{42} 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.\textsuperscript{43}

In the EU context, there appears to be an underlying assumption that immigration cannot only be controlled but that it can be \textit{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,\textsuperscript{44} rather merely displacing migrants to take other routes.\textsuperscript{45} Indeed, de Haas has demonstrated the existence of migration between North Africa and Europe is not new.\textsuperscript{46} 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”\textsuperscript{47} 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.\textsuperscript{48} 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.\textsuperscript{49}

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 \textit{ad hoc} manner – that is, there are \textit{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’).\textsuperscript{50} 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 prescribes irregular entry \textit{per se} nor prohibits Member States from adopting criminalisation measures, noting that the EU \textit{litmus} test for the legitimacy of Member

\textsuperscript{42} Parkin, op. cit.
\textsuperscript{43} Richey, M, \textit{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
\textsuperscript{44} Richey, op. cit.; Guild, E, and Carrera, S, \textit{EU Borders and Their Controls: Preventing unwanted movement of people in Europe? CEPS Essay No. 6, November 2013, Centre for European Policy Studies, Brussels
\textsuperscript{45} Spijkerboer, T, \textit{The Human Costs of Border Control (2007) 9 European Journal of Migration and Law 127
\textsuperscript{46} de Haas, H, \textit{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%20Western%20Africa%20to%20Europe%20%20Hein%20.&%20de%20Haas.pdf).
\textsuperscript{49} Carrera, S, and Merlino, M (eds), \textit{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
State criminal sanctions has been whether such national measures interfere with expedited return (the real object of the Return Directive). Accordingly, Spena notes the interrelationship between Member State and EU legitimacy.

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”)

The Schengen Borders Code (“SBC”) 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 – 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. Two consequences may flow from this: firstly, the individual may deemed an “illegally staying third country national” under the Return Directive, 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) – and possible detention pending removal; secondly, the Member State may decide not to apply the Return Directive to the refused person 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).

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”.

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52 Ibid
54 Article 4(3) of the Schengen Borders Code
55 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
56 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”)
57 Article 11 of the Return Directive
58 Article 16 of the Return Directive
59 Article 2(2)(a) of the Return Directive
60 See Article 5 of the Schengen Borders Code
In relation to asylum seekers, as discussed previously, there is an implicit preference for asylum seekers to arrive ‘regularly’ and then seek asylum under a system that insists on a territorial notion of asylum but provides limited means of providing authorised access to the territory. 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 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, indeed providing for the admissibility and substance of applications to be decided at border or transit zones. 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”. 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. 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’ 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.

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

63 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
66 Article 43 of the Procedures Directive II
67 Article 8(3)(c) of the Reception Conditions Directive II
69 Recital 1 of the Return Directive
70 Guild (2010), op. cit.
Return Directive, detention is to take place in “specialised detention facilities”. 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. Although third country nationals are to be kept separate from ordinary prisoners, derogation is possible in “exceptional circumstances”. A similar formulation can be found in the Reception Conditions Directive II. 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, 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; the Framework Decision on facilitating unauthorised transit, entry and residence, and the Carrier Sanctions Directive.

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. An exception, based on humanitarian assistance to the person concerned, is contemplated 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. 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.

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71 Article 16(1) of the Return Directive
72 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)
73 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)
74 Article 10(1) of the Reception Conditions Directive II
77 Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence (“the Framework Decision”)
79 Articles 1(1)(a), 2 and 3 of the Facilitation Directive
80 Article 1(2) of the Facilitation Directive
81 Article 1(1) of the Framework Decision
82 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).\(^8\)

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.\(^4\) 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,\(^5\) even if transiting\(^6\)) and the consequent risk that carriers face of penalty and responsibility for their return.\(^7\)

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.\(^8\) The Return Directive does contain a few significant guarantees for those that fall under its scope – namely, the right to appeal a return decision,\(^9\) 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\(^10\) 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.\(^11\) 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.\(^12\) 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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83 Article 2 of the Framework Decision  
84 Article 3 of the Carrier Sanctions Directive  
85 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  
86 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)  
88 Articles 2(1), 3(1) and (2) of the Return Directive  
89 Article 13 of the Return Directive  
90 Article 14 of the Return Directive  
91 Article 9(1) of the Procedures Directive II  
92 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.93

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

The Facilitation Directive,94 supported by the Framework Decision,95 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 States 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.96

The Employer Sanctions Directive prohibits the employment of “illegally staying third country nationals.”97 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.98 The Directive contemplates financial penalties on the transgressing employer99 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.100 Other punishments can include the exclusion from public benefits or subsidies for a period of up to five years.101 Legal liability is not limited to natural persons but is also extended to legal persons as well.102 Employment is broadly defined and does not expressly contemplate remuneration, thereby potentially also covering voluntary work.103

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 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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93 Case C-357/09 PPU Said Shamlovič Kadowez (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
94 Articles 1(1)(b) and 2 of the Facilitation Directive
95 Article 1 of the Framework Decision.
96 Article 6 of the Framework Decision.
98 Article 4 of the Employer Sanctions Directive.
99 Article 5 of the Employer Sanctions Directive.
100 Articles 9 and 10 of the Employer Sanctions Directive.
101 Article 7 of the Employer Sanctions Directive.
102 Article 11 of the Employer Sanctions Directive.
103 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.\(^{104}\)

**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.\(^{105}\)

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.\(^{106}\) 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).\(^{107}\) 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.\(^{108}\) 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).\(^{109}\) 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.\(^{110}\) 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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104 Case C-311/13 O. Tümèr v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen, Opinion, Advocate General Bot, 12 June 2014.

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


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

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


110 Case C-329/11 Alexandre Achughbabian v Préfet du Val-de-Marne, Judgment, Grand Chamber, 6 December 2011, para 41.
implemented. 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. 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.

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. 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 and that detention under the Return Directive was distinct from detention under the EU asylum secondary legislation. 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, 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. 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. 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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111 Case C-329/11 Alexandre Achughbabian v Préfet du Val-de-Marne, Judgment, Grand Chamber, 6 December 2011, paras 44-45.
112 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.
113 Case C-329/11 Alexandre Achughbabian v Préfet du Val-de-Marne, Judgment, Grand Chamber, 6 December 2011, paras 39-40.
116 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”.
117 Case C-383/13 PPU M.G. and N.R. v Staatssecretaris van Veiligheid en Justitie, Judgment, 10 September 2013
119 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.\textsuperscript{120}

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.\textsuperscript{121}

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 \textit{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 \textit{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 \textit{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).\textsuperscript{122}

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 \textit{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

\textsuperscript{120} Case C474/13 Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik, Judgment, Grand Chamber, 17 July 2014, paras 19-23.

\textsuperscript{121} Case C-311/13 O. Tümer v Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen, Opinion, Advocate General Bot, 12 June 2014.

\textsuperscript{122} See the Annexure attached hereto.
decision in Archughbabian, whilst Italy has decriminalised irregular stay (and initial entry), reverting to an administrative penalty. 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).

**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 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”.

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)

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123 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.tpajo15v_1?idDocument=JORFDLOE000026425454&type=expose&typeLoi=&legislature=14](www.legifrance.gouv.fr/affichLoiPubliee.do;jsessionid=1A086BE418596ED3F4A27A222F25AAE7.tpajo15v_1?idDocument=JORFDLOE000026425454&type=expose&typeLoi=&legislature=14)


125 See the Annexure attached hereto.


127 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.\textsuperscript{128}

**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.\textsuperscript{129}

**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.\textsuperscript{130}

**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.\textsuperscript{131} 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.\textsuperscript{132} 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

\textsuperscript{128} See the Annexure attached hereto.

\textsuperscript{129} See the Annexure attached hereto.

\textsuperscript{130} Ibid.


\textsuperscript{132} 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.133

**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.134

**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.135 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.136 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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133 See the Annexure attached hereto.

134 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).


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.\footnote{Ibid at pp. 515-516.}

During the second reading speech in the House of Commons on the recently commenced \textit{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”.\footnote{Hansard, House of Commons, 22 October 2013, Column 164 (http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131022/debtext/131022-0001.htm).} 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”.\footnote{Hansard, House of Commons, Column 166 (http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131022/debtext/131022-0001.htm).}

In \textbf{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.\footnote{Di Martino, A; Biondi Dal Monte, F; Boiano, I; Raffaelli, R, \textit{The criminalization of irregular migration: law and practice in Italy}, (2013), Pisa, Pisa University Press, p. 9.} 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).\footnote{Judgment 249/2010, Constitutional Court, 5 July 2010, Massima Numero 38420} 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.\footnote{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, \textit{Europe: crimes of solidarity}, 2009, Race and Class 50(4) 83-97 at P.86} 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, \textit{inter alia}, of a voluntary period for departure)\footnote{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, p. 6).} 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).\footnote{See further, Favilli, C, \textit{The Implementation of the Return Directive in Italy} in Zwaan, K, \textit{The Returns Directive: Central Themse, Problem Issues and Implementation in Selected Member States}, (2011) Nijmegen, Wolf Legal Publishing, in particular, pp. 72-74.} 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 \textit{et al} are of the view that the real purpose of the substitution provisions (in combination with accelerated procedures) was to facilitate removal.\footnote{Di Martino \textit{et al}, op. cit., pp. 41, 83-84.} Since the CJEU decision in \textit{Archughbabian},\footnote{Case C-329/11. \textit{Alexandre Achughbabian v Préfet du Val-de-Marne}, Judgment, Grand Chamber, 6 December 2011.} the Italian government recently
decriminalised irregular stay and initial entry, maintaining a range of substantial fines. 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.

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. In 2005, the current formulation appeared as L622-1 in CESEDA. 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. 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. In 2012, the French government repealed the offence of irregular stay in order to comply with the CJEU’s decision in Achughbabian and broadened the humanitarian exception to facilitation of irregular entry or stay in light of the ECtHR judgment in Mallah.

In the Netherlands a dual strategy of both exclusion and identification has been adopted 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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151 Allsopp, op. cit.


153 Case C-329/11 Alexandre Achughbabian v Préfet du Val-de-Marne, Judgment, Grand Chamber, 6 December 2011; see the Expôsé des Motifs http://www.legifrance.gouv.fr/affichLioiPubblicee.do;jsessionid=1A086BE418596E D3F4A27A222F25AAE7.tpdjol15v 1?idDocument=JORFDOLE0000026425454&type=expose&typeLioi=&legislature=14

154 Application 29681/08 Mallah v France, Judgment 10 November 2011

and, combined with identification and documentation, to reduce their anonymity in the community.\textsuperscript{156} The Netherlands considers “the most important pathway out of irregularity is return” and for which the migrant is deemed to hold ultimate responsibility.\textsuperscript{157} 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.\textsuperscript{158} Breach of the entry ban constitutes a crime. It is also possible to be declared an “undesirable alien”.\textsuperscript{159}

The Dutch Government sees detention as an essential tool in ensuring the effective return of irregular migrants.\textsuperscript{160} 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.\textsuperscript{161}

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.\textsuperscript{162} The reagitation 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.\textsuperscript{163} 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)\textsuperscript{164} for the reduction of tax on middle income earners in return for dropping the proposed bill.\textsuperscript{165}


\textsuperscript{157}Diepenhorst, op. cit., p. 18.


\textsuperscript{159}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.

\textsuperscript{160}Ibid, p. 56.


\textsuperscript{163}Diepenhorst, op. cit., p. 27.


\textsuperscript{165}De Verdieping Trouw, Wetsvoorstel van tafel: geen cel of boete voor illegaleit, 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. 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”.

In the United Kingdom, with an estimated population of irregular migrants of 618,000, 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. 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”, the United Kingdom’s stated policy in the prosecution of immigration crime is to reserve criminal law for the most serious offences, 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

166 Czaika and de Haas (2013a), op. cit., and de Haas and Czaika (2013b), op. cit.
167 Sklansky, op. cit.
170 Aliverti (2012), op. cit.
persons were removed from the United Kingdom in 2011 either by force or by refusal at the border and subsequently removed.\textsuperscript{172} 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.\textsuperscript{173} However, the gathered data revealed that 47% of those convictions stem from \textit{facilitation} offences (that is, not directly involving the prosecution of a person whose immigration status is irregular).\textsuperscript{174}

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).\textsuperscript{175}

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\textsuperscript{176} — 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”.\textsuperscript{177} 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.\textsuperscript{178}

In \textit{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, \textit{et al}, (2013) reveal that in 2009, 7157 crimes were tried under Article 10 bis of Legge 286/90, involving 7126 defendants.\textsuperscript{179} 5323 criminal trials were commenced whilst 1834 were dismissed (due to procedural or substantive reasons).\textsuperscript{180} 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.\textsuperscript{181} Spena 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.\textsuperscript{182}

In \textit{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.\textsuperscript{183} The French model of

\begin{itemize}
\item \textsuperscript{173} Ibid
\item \textsuperscript{174} Ibid
\item \textsuperscript{175} Ibid
\item Aliverti (2012), op. cit.
\item \textsuperscript{176} Ibid, P.521
\item \textsuperscript{177} Ibid, P.521-523
\item Di Martino \textit{et al}, op. cit., pp. 87-88.
\item \textsuperscript{179} Ibid
\item \textsuperscript{180} Ibid
\item \textsuperscript{181} Spena, op. cit.
\end{itemize}
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). 184

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. 185 186 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). 187 The report also reveals that once the 28 day voluntary departure period had expired, only 451 were arrested for non-compliance. 188

Of the approximately 8000 persons who had received a light entry ban, the authors noted that only 467 were apprehended. 189 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. 190 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. 191

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”; 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”; 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”. 192

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”. 193 Punishment is usually by way of imprisonment with the imposition of fines being rare.

186 Leerkes and Boersma, (2014), op. cit., p. 56.
187 Ibid.
188 Ibid.
189 Ibid.
190 Ibid.
191 Ibid.
192 Ibid.
193 Ibid, P.57.
194 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.\(^{195}\) 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).\(^ {196}\) 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.\(^ {197}\) 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.\(^ {198}\) 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.\(^ {199}\) 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.\(^ {200}\)

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.\(^ {201}\)

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

\(^{195}\) Defensor del Pueblo, Informe Anual 2013 – Mecanismo Nacional de Prevencion de la Tortura, (2013), Madrid
\(^{196}\) Ibid.
\(^{201}\) 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.202 This is based on the principles of equality before the law and non-discrimination.203 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,204 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,205 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

202 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.


204 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

205 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. 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. 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. 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 attributed on account of *status* 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. 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, this concern is supported in research about the use of racial and ethnic profiling by police targeting of irregular migrants. The FRA’s EU-MIDIS report revealed quantifiable distinctions in treatment between those from minority backgrounds and the majority of the population. It has manifested itself in the targeting of foreigners as ‘easy targets’ to demonstrate improved police performance.

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209 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 Alverti, (2012), op. cit., pp. 515-516.
210 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 Spena, A, *Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law* (2014) 8 Criminal Law and Philosophy 635
211 Chacón, op. cit.
as regards successful stops and arrests.\textsuperscript{215} 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.\textsuperscript{216} 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.\textsuperscript{217}

The adverse impact on the mental health of individuals caused by immigration detention has been well documented\textsuperscript{218} 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.\textsuperscript{219} 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.\textsuperscript{220} 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.\textsuperscript{221} 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.\textsuperscript{222}

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.\textsuperscript{223} It is

\begin{footnotes}
\item \textsuperscript{215} 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 21st Century, (2011) Farnham, Ashgate
\item \textsuperscript{216} Immigrant spot checks: Equality watchdog investigates, BBC News, 3 August 2013, www.bbc.com/news/uk-23552088
\item \textsuperscript{217} Vaccari et al, op. cit., p. 27.
\item \textsuperscript{221} 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 bejeginning tot vertrek – Een onderzoek naar de werking van vreemdelingenbevordering, (2014), onderzoek en beleid 308, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Ministerie van Veiligheid en Justitie, The Hague, P.150
\item \textsuperscript{222} 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
\item \textsuperscript{223} Case C-329/11 Alexandre Achughbhabian v Préfet du Val-de-Marne, Judgment, Grand Chamber, 6 December 2011, paras 48 and 49.
\end{footnotes}
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, 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. At the CJEU level, reference has already been made to the incompatibility of criminal incarceration with the Returns Directive, the use of prison facilities to detain those subject to the Return Directive, and the detention of a third country national subject to the Return Directive in a prison with regular prisoners. 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. 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 disapproval 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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225 Rahimi v Greece, No. 8687/08, Judgment, 5 April 2011 paras 109-110
226 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 Prévôt du Val-de-Marne, Judgment, Grand Chamber, 6 December 2011
227 Cases C-473/13 and C-514/13 Adala Bero v Regierungspräsidium Kassel; Ettayebi Bouzalmate v Kreisverwaltung Kleve, Judgment, Grand Chamber, 17 July 2014
228 Case C474/13 Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik, Judgment, Grand Chamber, 17 July 2014
229 Mubilanzila Mayeka and Kaniki Mitunga v Belgium, No. 13178/03, Judgment, 12 October 2006; Muskhadzhiev & 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.230

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.231

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,232 as has been acknowledged by the Committee of the Regions233 and the Council of Europe’s Congress of Local and Regional Authorities.234

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.235 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.236 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

230 Leerkes and Boersma (2014), op. cit., P.56
231 Hough and Sato, op. cit.
232 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
234 The Congress of Local and Regional Authorities, The role of local and regional authorities in the implementation of human rights, 18th Session, CG(18)6, 1 March 2010
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 though its Anti-Rumour Campaign - 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. The campaign successfully saw, in November 2013, the withdrawal of a proposed Spanish law which sought to amend Article 318bis of the Codigo 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 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).

The text of the billboards contained the text “GO HOME OR FACE ARREST”. The term “go home” in the United

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238 See, http://www.salvemoslahospitalidad.org/
239 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
Kingdom is said to carry particular racist connotations from the 1970s and 1980s.\textsuperscript{241} The mobile billboard campaign attracted 224 complaints to the Advertising Standards Authority,\textsuperscript{242} including criticism from a council leader\textsuperscript{243} and Redbridge London Borough Council,\textsuperscript{244} from within the Liberal Democrat coalition government,\textsuperscript{245} bishops,\textsuperscript{246} various non-government organisations such as Show Racism the Red Card\textsuperscript{247} and Liberty,\textsuperscript{248} and including a legal challenge on the basis of a breach of the Equality Act 2010.\textsuperscript{249} 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”.\textsuperscript{250} The Home Secretary, Theresa May, indicated that the ‘Go Home vans’ would not be used again.\textsuperscript{251} The Home Office evaluation characterised Operation Vaken as successful, notwithstanding that 11 voluntary departures occurred as a result of the mobile billboards.\textsuperscript{252}

Allsopp has highlighted the tensions between universalist and particularist (that is, state-centric) notions of solidarity in the context of the debates on the \textit{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”\textsuperscript{253}. 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 no tice to

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\textsuperscript{245} \url{http://www.huffingtonpost.co.uk/2013/07/28/cable-immigration_n_3666286.html?utm_hp_ref=uk}

\textsuperscript{246} Ekklesia, \textit{Bishops condemn Home Office ‘go home’ campaign}, 12 August 2013, \url{http://www.ekklesia.co.uk/node/18785}

\textsuperscript{247} \textit{Show Racism the Red Card calls on government to abandon ‘Go Home’ campaign} \url{http://www.srtrc.org/news/news-and-events?news=4520}


\textsuperscript{253} Allsopp, op. cit.

\textsuperscript{254} Ibid, pp. 17-18
mishandling of forcibly removed persons on aircraft in the United Kingdom, Belgium and France. 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.

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. 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. 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. 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. 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.

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, as well as the Trade Union Congress to develop a negotiator’s guide on how to manage employer checks.

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256 Allsopp, op. cit., P.15
260 Medibüro, Who We Are, http://www.medibueno.de/en/Who%20we%20are/Our%20aims.html
9.4 Fair and Respectful Processes

Information was provided in the questionnaire about Stichting Haven International Partnership (SHIP), 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.”

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. 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

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264 SHIP Foundation, http://shipfoundation.nl/
266 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.”

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”. However, as indicated throughout this paper, the cross-pollination of criminal consequences for immigration infractions and immigration consequences for criminal

267 Hough and Sato, op. cit., P.11
268 Hough and Sato, op. cit., P.9
infractions to ensure compliance (as put forward by Legomsky)\textsuperscript{269} 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 \textit{substance} of consequences of criminalisation measures upon individuals, rather than only their legal \textit{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.

\textsuperscript{269} 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**

<table>
<thead>
<tr>
<th>Behaviour</th>
<th>UK</th>
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<th>Italy</th>
<th>NL</th>
<th>Germany</th>
<th>Spain</th>
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<tbody>
<tr>
<td>Irregular Entry</td>
<td>(1) Entry without leave; (2) Enter with leave by deception. Sections 24(1)(a) and 24A(1) Immigration Act 1971</td>
<td>Yes, Article L621-2 CESEDA</td>
<td>Yes, Article 10 bis Legge 286/90</td>
<td>Yes, if breach of Schengen Borders Code: Article 108 of the Vreemdelingen Wet 2000; Article 23 Wetboek van Strafrecht (Criminal Code)</td>
<td>Yes, Sections 14(1) and 95 para 1, no. 3 Aufenthaltgesetz</td>
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**Penalty**

<table>
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<th>Behaviour</th>
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<tbody>
<tr>
<td>Fine</td>
<td>(1) Summary conviction, GBP5000 (2) Summary conviction - GBP5000; Indictment – fine</td>
<td>EUR3,750</td>
<td>EUR5000-10000</td>
<td>EUR4050</td>
<td>Yes (amount unspecified)</td>
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<tr>
<td>Imprisonment</td>
<td>(1) Not more than 6 months (2) Summary conviction – not more than 6 months; Indictment – not more than 2 years</td>
<td>12 months</td>
<td>No</td>
<td>Not exceeding 6 months</td>
<td>One year</td>
<td>No</td>
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<tr>
<td>Both fine and imprisonment?</td>
<td>Possible, Sections 24(1) and 24A(3 Immigration Act 1971; section 37 Criminal Justice Act 1982</td>
<td>Both</td>
<td>N/A</td>
<td>Either</td>
<td>Either</td>
<td>N/A</td>
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**Irregular Stay**

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<th>Spain</th>
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<tbody>
<tr>
<td>Irregular Stay</td>
<td>(1) Remain beyond time limited by leave; (2) Fail to observe condition of leave. Sections 24(1)(b)(i) &amp; 24A(1)(b)(ii) Immigration Act 1971</td>
<td>No</td>
<td>Yes, Article 10 bis Legge 286/90</td>
<td>Yes, if person declared an “undesirable alien” or subject to an entry ban. Articles 66a and 67 Vreemdelingen Wet 2000; Articles 23 &amp; 197 Wetboek van Strafrecht (Criminal Code)</td>
<td>Yes, Sections 95 para 1, nos. 1 and 2 Aufenthaltsgesetz</td>
<td>Yes, Article 53a Ley Orgánica Extranjeria</td>
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**Penalty**

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<th>No</th>
<th>EUR5000-10000</th>
<th>EUR8100</th>
<th>Yes (amount unspecified) EUR501-10000 Article 55 Ley Orgánica Extranjeria</th>
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<tr>
<td>Imprisonment</td>
<td>(1) &amp; (2) Not more than 6 months</td>
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<td>No</td>
<td>6 months</td>
<td>One year</td>
</tr>
<tr>
<td>Both fine and imprisonment?</td>
<td>Possible, Section 24(1) &amp; section 37 Criminal Justice Act 1982</td>
<td>N/A</td>
<td>N/A</td>
<td>Either</td>
<td>Either</td>
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## Solidarity

<table>
<thead>
<tr>
<th>Behaviour</th>
<th>UK</th>
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<th>Italy</th>
<th>NL</th>
<th>Germany</th>
<th>Spain</th>
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<tbody>
<tr>
<td><strong>Assist Irregular Entry</strong></td>
<td>(1) Assisting illegal immigration</td>
<td>Yes, Article L622-1 CESEDA</td>
<td>Yes, Article 12 para 1 Legge 286/90</td>
<td>Yes, Articles 23 and 197a(1) Wetboek van Strafrecht (Criminal Code)</td>
<td>Yes, Section 96 para 1, nos. 1 and 2 Aufenthaltsgesetz</td>
<td>Yes, Article 318 bis Código Penal</td>
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<tr>
<td></td>
<td>(2) Facilitation of entry of asylum seekers into the United Kingdom Sections 25 and 25A Immigration Act 1971 Section 37 Criminal Justice Act 1982</td>
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<tr>
<td><strong>Financial Gain/Profit element?</strong></td>
<td>Only in the case of asylum seekers (section 25A Immigration Act 1971)</td>
<td>No</td>
<td>No</td>
<td>Yes, but may not be taken into account if done repeatedly or for the benefit of several foreigners</td>
<td>No</td>
<td></td>
</tr>
<tr>
<td><strong>Express exceptions?</strong></td>
<td>Only in the case of those persons acting on behalf of an organisation to assist refugees and does not charge for its services – section 25A(3) Immigration Act 1971</td>
<td>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)</td>
<td>No</td>
<td>No</td>
<td>No</td>
<td>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</td>
</tr>
</tbody>
</table>

### Penalty

<table>
<thead>
<tr>
<th>Behaviour</th>
<th>UK</th>
<th>France</th>
<th>Italy</th>
<th>NL</th>
<th>Germany</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fine</strong></td>
<td>(1) Summary offence – not more than GBP5000; if on indictment – fine (unspecified); (2) unspecified</td>
<td>EUR30,000</td>
<td>EUR15,000 per person (EUR25,000 in cases of particular gravity)</td>
<td>EUR81,000 (amount unspecified)</td>
<td>None</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(1) Summary – not more than 6 months; indictable - not more than 14 years; (2) unspecified</td>
<td>5 years</td>
<td>From 1 to 5 years; (increased by in cases of particular gravity Article 12, para 3, 3 bis, 3 ter)</td>
<td>4 years</td>
<td>5 years</td>
<td>4 to 8 years</td>
</tr>
<tr>
<td><strong>Imprisonment</strong></td>
<td>Both</td>
<td>Both</td>
<td>Either</td>
<td>Either</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td><strong>Both fine and imprisonment?</strong></td>
<td>Possible in case of (1).</td>
<td>Both</td>
<td>Either</td>
<td>Either</td>
<td>N/A</td>
<td></td>
</tr>
</tbody>
</table>
### Solidarity

<table>
<thead>
<tr>
<th>Behaviour</th>
<th>UK</th>
<th>France</th>
<th>Italy</th>
<th>NL</th>
<th>Germany</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assist Irregular Stay</td>
<td>Yes, assisting illegal immigration, Section 25 Immigration Act 1971; Section 37 Criminal Justice Act 1982</td>
<td>Yes, Article L622-1 CESEDA</td>
<td>Yes, Article 12 para 1 Legge 286/90</td>
<td>Yes, Articles 23 and 197a(2) Wetboek van Strafrecht (Criminal Code)</td>
<td>Yes, Section 96 para 1, no. 2 Aufenthalts-gesetz</td>
<td>Yes, Article 54(1)(b) Ley Orgánica Extranjeria</td>
</tr>
<tr>
<td>Financial Gain/Profit element?</td>
<td>No</td>
<td>No</td>
<td>If an &quot;unfair profit&quot; (own translation) is derived by the landlord (&quot;ingiusto profitto&quot;)</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Express exceptions?</td>
<td>No</td>
<td>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)</td>
<td>No</td>
<td>Yes, for certain professions or volunteers (pharmacists, doctors, midwives, lawyers etc) - Vor 95.1.4 Allgemeine Verwaltungsvorschrift zum Aufenthalts-gesetz</td>
<td>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 Extranjeria; also ‘necessity exception’ - Article 20(5) Código Penal</td>
<td></td>
</tr>
</tbody>
</table>

### Penalty

<p>| 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 |</p>
<table>
<thead>
<tr>
<th>Behaviour</th>
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<th>France</th>
<th>Italy</th>
<th>NL</th>
<th>Germany</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employment of Irregular Migrants</td>
<td>(1) Section 15 <em>Asylum and Immigration Act</em> 2006 (civil penalty); (2) section 21 <em>Asylum and Immigration Act</em> 2006 (criminal penalty); (3) ‘facilitation’ under section 25 <em>Immigration Act</em> 1971</td>
<td>Yes, Articles L 8211-1; 8251-1 and 8251-2 <em>Labour Law</em></td>
<td>Yes, Article 22 para 12 of Legge 286/98; aggravating circumstances Article 22 para 12 bis of Legge 286/98</td>
<td>197b Wetboek van Strafrecht (Criminal Code)</td>
<td>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)</td>
<td>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”</td>
</tr>
<tr>
<td>Penalties</td>
<td>(1) maximum penalty GBP10000 (<em>The Immigration (Employment of Adults Subject to Immigration Control)(Maximunm Penalty) Order 2008</em>); (2) GBP5000 fine or imprisonment not exceeding 12 months or both (summary); fine or imprisonment not exceeding 2 years (3) as outlined above</td>
<td>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 <em>Labour Law</em>) + other sanctions (Article L 8256-3 to 5 <em>Labour Law</em>)</td>
<td>Imprisonment for 6 months to 3 years and fine of EUR5000 per person employed; increases by one third to one half in aggravated circumstances</td>
<td>Imprisonment for not more than one year or a fine of EUR81,000</td>
<td>For breach of Section 10 SchwarzArbG: Imprisonment for up to three years of a fine</td>
<td>Imprisonment of 2 to 5 years; and a fine</td>
</tr>
<tr>
<td>Duties to report irregular migrants to authorities</td>
<td>Where Secretary of State suspects offence committed under <em>Immigration Act</em> 1971 and requests information from the public body for the purpose of ascertaining the whereabouts of the person – section 129 <em>Nationality Immigration and Asylum Act</em> 2002</td>
<td>Public servants obliged to report criminal offences, including those of irregular migration Articles 361 and 362 <em>Codice Penale</em>; Medical professionals exempted from reporting Article 35 para 5 <em>Legge</em></td>
<td>Yes, section 107(7) Vreemdelingen Wet 2000 – administrative bodies are required to do so if requested by the Minister for the implementation of the Act</td>
<td>Yes, all public bodies except schools and other educational and care establishments Section 87(1) and (2) Aufenthaltsgesetz</td>
<td>Exemptions for certain professions including</td>
<td>No</td>
</tr>
<tr>
<td>Landlords</td>
<td>Sections 20-23 Immigration Act 2014</td>
<td>Exposure to prosecution under facilitation provisions</td>
<td>Article 12 para 5 Legge 286/1998 in cases where there is an “unfair profit” (own translation) (“ingiusto profitto”)</td>
<td>Exposure to prosecution under facilitation provision</td>
<td>Exposure to prosecution under facilitation provisions</td>
<td>Exposure to prosecution under facilitation provisions</td>
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</tr>
<tr>
<td>Penalties</td>
<td>Not in excess of GBP3000 – section 25(4) Immigration Act 2014</td>
<td>EUR30000 and 5 years’ imprisonment</td>
<td>Imprisonment of 6 months to 3 years and possible confiscation of property</td>
<td>EUR81000 or 4 years’ imprisonment</td>
<td>Fine or five years’ imprisonment</td>
<td>EUR10001-100000</td>
</tr>
<tr>
<td>Other</td>
<td>Driving licences, bank accounts, health care charges – Immigration Act 2014</td>
<td>286/1998</td>
<td>medical professionals – section 88(2) Aufenthalts- gesetz; section 203 Strafgesetzbuch (StGB); and 88.2.3 and 88.2.4.0 of the Allgemeine Verwaltungs- vorschrift zum Aufenthalts- gesetz</td>
<td></td>
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</table>
QUESTIONNAIRE

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.
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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