

STUDY

Requested by the LIBE committee



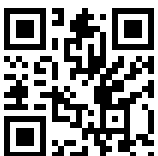
# The Fundamental Rights of Irregular Migrant Workers in the EU

---

Understanding and reducing  
protection gaps



EN



Policy Department for Citizens' Rights and Constitutional Affairs  
Directorate-General for Internal Policies  
PE 702.670 - July 2022



# The Fundamental Rights of Irregular Migrant Workers in the EU

---

Understanding and reducing protection gaps

## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, aims to inform policy debates about how to protect more effectively the fundamental rights of irregular migrant workers in the EU. It analyses the *nature* and *causes* of the gaps between the fundamental rights protections enshrined in EU legal standards and the rights realised by irregular migrants working in EU Member States in practice, and it discusses strategies for how these 'protection gaps' can be reduced.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

## **AUTHORS**

Dr. Clare Fox-Ruhs, Independent Consultant – Rights and Public Policy

Prof. Martin Ruhs, Migration Policy Centre (MPC), European University Institute

## **ADMINISTRATOR RESPONSIBLE**

Anna-Sabine REIDER

## **EDITORIAL ASSISTANT**

Ewelina MIAZGA

## **LINGUISTIC VERSIONS**

Original: EN

## **ABOUT THE EDITOR**

Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:

Policy Department for Citizens' Rights and Constitutional Affairs

European Parliament

B-1047 Brussels

Email: [poldep-citizens@europarl.europa.eu](mailto:poldep-citizens@europarl.europa.eu)

Manuscript completed in July 2022

© European Union, 2022

This document is available on the internet at:

<http://www.europarl.europa.eu/supporting-analyses>

## **DISCLAIMER AND COPYRIGHT**

The opinions expressed in this document are the sole responsibility of the authors and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the European Parliament is given prior notice and sent a copy.

© Cover image used under licence from Adobe Stock.com

# CONTENTS

<b>LIST OF ABBREVIATIONS</b>	<b>5</b>
<b>LIST OF BOXES</b>	<b>6</b>
<b>LIST OF FIGURES</b>	<b>6</b>
<b>LIST OF TABLES</b>	<b>6</b>
<b>1. INTRODUCTION</b>	<b>9</b>
1.1. Aims and Approach	9
1.2. Structure	10
1.3. Definitions, terminology, and types of irregularity in migrant labour markets	11
1.4. Estimates of irregular migrants in the EU	13
<b>2. RIGHTS ON PAPER: EU MEMBER STATES' (COMMON) COMMITMENTS TO GUARANTEE THE FUNDAMENTAL RIGHTS OF IRREGULAR MIGRANT WORKERS</b>	<b>15</b>
2.1. The Scope of the Charter of Fundamental Rights of the European Union vis-à-vis Irregular Migrant Workers	16
2.1.1. Explanatory Notes to the Charter	18
2.1.2. Relevant EU Directives on Labour Standards and Immigration	18
2.1.3. Case Law of the European Court of Justice, European Court of Human Rights and the Committee on Social Rights	21
2.1.4. Protections and Ambiguities of EU Charter Rights for Irregular Migrant Workers	23
2.2. The Rights of Irregular Migrant Workers under International Human Rights Standards	24
2.3. The EU Charter as an Inclusive Fundamental Rights Standard	27
<b>3. PROTECTION GAPS: NATIONAL LAWS, POLICIES AND PRACTICES IN EU MEMBER STATES</b>	<b>28</b>
3.1. Labour Rights Abuses of Irregular Migrant Workers in the EU	29
3.2. Enabling Irregular Migrants to Assert their Labour Rights: Measures by Member States	31
3.2.1. Rights Protections Provided by National Labour Laws to Irregular Migrant Workers and the Scope for Legal Redress	31
3.2.2. Role of Member States in Promoting the Right to Organise and to Collective Action	38
3.2.3. Labour Inspectorates and Effective Protection	40
3.2.4. The Scope of National Human Rights Institutions	43
3.2.5. Rights Protections Offered to Irregular Migrants at Municipal and Regional Government Levels	44
3.3. Irregular Migrant Workers and Access to Preventive Healthcare	46
3.3.1. Overview of the Right to Access Healthcare on Paper in EU Member States	47
3.3.2. Conditions and Barriers to Realising Healthcare Rights in Practice	48

3.3.3. Effects of Crises on Access to Healthcare Rights	50
3.3.4. Interventions by Regions and Cities in Healthcare Delivery to Irregular Migrants	51
3.4. A Changing Gap? Covid-19 and Regularisation Programmes	52
3.4.1. A Case Study of Regularisation in Covid-era Italy	53
<b>4. EXPLAINING THE GAP: ECONOMIC, POLITICAL AND POLICY DYNAMICS IN EU MEMBER STATES</b>	<b>55</b>
4.1. Economic dynamics of irregular migrant labour markets	56
4.1.1. Migrant workers' motivations and sources of vulnerability	56
4.1.2. Employer demand for (irregular) migrant labour	58
4.1.3. Socio-economic institutions and irregular migrant labour markets	61
4.1.4. Changes during recent crises	62
4.2. Political dynamics of irregular migration and rights for irregular migrant workers	63
4.2.1. Regulating labour immigration: Admission and rights of migrant workers	63
4.2.2. Public attitudes as soft feasibility constraints	67
<b>5. POLICY CONSIDERATIONS AND RECOMMENDATIONS</b>	<b>72</b>
5.1. The central policy challenge: how to respond to tensions between protecting fundamental rights of irregular migrants and enforcing immigration laws	73
5.2. Firewalls	74
5.3. Temporary 'redress' work permit	75
5.4. A new EU Directive	77
5.5. Regularisation	78
5.6. Reducing knowledge gaps	79
5.7. Policy recommendations	79
<b>REFERENCES</b>	<b>81</b>

## LIST OF ABBREVIATIONS

<b>CHARTER</b>	Charter of Fundamental Rights of the European Union
<b>COE</b>	Council of Europe
<b>ECHR</b>	European Convention on Human Rights
<b>ECtHR</b>	European Court of Human Rights
<b>ECJ</b>	European Court of Justice
<b>EEA</b>	European Economic Area
<b>EMN</b>	European Migration Network
<b>ENNHRI</b>	European Network of National Human Rights Institutions
<b>ESC</b>	European Social Charter
<b>FRA</b>	Fundamental Rights Agency
<b>ICERD</b>	International Convention on the Elimination of Racial Discrimination
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>ILO</b>	International Labour Organisation
<b>IOM</b>	International Organisation for Migration
<b>NHRI</b>	National Human Rights Institution
<b>OECD</b>	Organisation for Economic Cooperation and Development
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>UN</b>	United Nations
<b>UNCERD</b>	UN Committee on the Elimination of Racial Discrimination
<b>UNCESCR</b>	UN Committee on Economic, Social and Cultural Rights
<b>UNMWC</b>	UN Migrant Workers Convention

## LIST OF BOXES

Box 1:	Example of state enforcement measures that prioritise immigration controls over labour protections, Slovakia	41
BOX 2:	Example of state enforcement measures that prioritise immigration controls over labour protections, Germany	42
BOX 3:	The role of regions and cities in providing healthcare to irregular migrants: Germany	51
BOX 4:	The role of regions and cities in providing healthcare to irregular migrants: Spain	52
BOX 5:	The role of regions and cities in providing healthcare to irregular migrants: Finland	52

## LIST OF FIGURES

Figure 1:	Range for the estimated number of irregular migrants living in Europe*, 2014-2017	14
-----------	-----------------------------------------------------------------------------------	----

## LIST OF TABLES

Table 1:	Healthcare rights of irregular migrants in EU Member States, relative to the rights of migrants with permission to stay and/or work	48
----------	-------------------------------------------------------------------------------------------------------------------------------------	----



## EXECUTIVE SUMMARY

### Scope and Aims of Study

There are large gaps between the rights of all individuals and workers as articulated in the Charter of Fundamental Rights of the European Union and the experiences of irregular migrants working across Member States. This Study analyses the **nature** and **causes** of these **protection gaps**, and it discusses strategies for how they can be **reduced**.

Efforts to reduce the protection gaps for irregular migrant workers face **two fundamental challenges**. First, how and to what extent can “the law” be used to protect people who live and work “outside the law”? Second, how can irregular migrants access and realise their fundamental rights in a meaningful way when their irregular residence status makes them liable to deportation? These two questions, which relate to the limits of legal protection and the tension between the promotion of rights and immigration control policies, are at the heart of policy debates about the rights of irregular migrant workers.

### Key Findings

#### *Shortcomings of EU Laws on the Rights of Irregular Migrant Workers*

As a benchmark for fundamental rights protection in the EU, the Charter of Fundamental Rights is not sufficiently clear about its scope vis-à-vis the labour rights of irregular migrant workers. EU Directives on labour standards similarly offer ambiguous protection for irregular migrant workers owing to the extent to which they are circumscribed by the parameters of national labour laws. The Employer Sanctions Directive, whilst marking an important development in the explicit protection of irregular migrants’ rights, has nonetheless had the effect of tightening the relationship between fundamental rights protections and immigration controls, thereby undermining the protective value, in rights terms, of this recent EU initiative.

#### *Rights Protection Gaps in the Laws of EU Member States*

Despite the development of revised and new national laws to transpose the Employer Sanctions Directive and otherwise improve fundamental rights standards for irregular migrant workers, significant rights protection gaps remain in all EU Member States. The formulation of national labour laws, the interaction of labour laws with immigration laws, and legal doctrines of “illegality” and “immoral contracts”, all limit the scope of national fundamental rights protections and, in particular, labour justice guarantees, for irregular migrant workers. The tensions that arise in national policy-making in terms of balancing fundamental rights duties and implementing national labour and immigration laws contribute to reluctance among irregular migrants to assert their rights because of fear of deportation.

Labour migration can generate a range of multi-faceted costs and vulnerabilities for migrants, especially – although not only – for irregular migrant workers. To understand the conditions of irregular labour migrants, however, we need to go beyond costs and ‘adverse effects’ to consider the range of benefits irregular migrant labour markets can create for different groups including employers, labour market intermediaries, host country consumers, and for migrants themselves. The employment of irregular migrants can also serve particular economic and political functions for host states.

#### *Reducing the Gaps 1: welfare rights and services*

**Sub-national actors** at municipal and regional government levels in a limited number of EU Member States have filled some of the gaps in fundamental rights protections for irregular migrant workers.

Initiatives have been most successful in the areas of social welfare such as health, social assistance and housing and, typically require effective partnerships with NGOs. Sub-national actors cannot, however, be expected to play an effective role with regard to strengthening the labour rights protections for irregular migrant workers. Given the centralised nature of labour laws, sub-national actors lack devolved powers to take independent steps to promote labour justice for migrants working illegally. At best, EU cities have financially supported NGOs to assist migrants with crucial labour, immigration and human rights law advice.

**“Firewalls”** which prevent service providers from reporting the irregular migration status of service-users to the relevant authorities, can increase irregular migrants' access to basic social rights. Firewalls are, however, a less effective tool for protecting irregular migrants' labour rights. Labour justice procedures require interaction with law enforcement agencies (such as the courts, police and labour inspectorates) whose mandates, developed at national level, typically impose duties to report irregular migration. In many cases, labour exploitation is directly related to the irregular migration status of the worker. A firewall designed to prevent law enforcement authorities from reporting irregular migration to immigration enforcement authorities could be viewed as contrary to the public interest by potentially undermining efforts to target the causes of labour exploitation and by restricting the ability of the state to pursue employer sanctions.

### ***Reducing the Gaps 2: labour rights and justice***

To encourage irregular migrant workers in exploitative employment situations to assert their labour rights in legal proceedings, they must be assured that, should they be successful in their claims against their employers, they will have the opportunity to reside and work legally in the host country, at least for a limited duration. It is essential to provide a meaningful incentive for irregular and exploited migrants to come forward without undermining the host country's immigration controls. These twin goals could be achieved by creating a special temporary **'redress work permit'** specifically for irregular migrant workers who have come forward to claim their labour rights and whose employment conditions were found, by the relevant judicial authority, to constitute a significant breach of their fundamental rights.

For labour justice measures to be effective and trusted by irregular migrant workers, it is critical to support **NGOs, trade unions and/or National Human Rights Institutions to act as intermediaries** between irregular migrants and law enforcement authorities in complaints processes. There are already encouraging practices in this regard in certain Member States and these could be developed further through increased financial support.

In order to clarify the scope of EU laws in protecting the labour rights of irregular migrant workers in the EU, consideration should be given to the development of a **new EU Directive specifically on labour protections for irregular migrant workers** in the EU. Based on the Charter and existing labour rights Directives, such a new Directive should make clear the full range of labour rights standards that apply in equal measure to irregular migrants as to those residing and working legally in the EU.

## 1. INTRODUCTION

There is a large gap between the rights of all individuals and workers as articulated in the Charter of Fundamental Rights of the European Union and the experiences of irregular migrants working across EU Member States.<sup>1</sup> While irregular migrant workers play an important role in a wide range of sectors and occupations in many EU countries' labour markets, their employment conditions are often characterised by vulnerability and exploitation.<sup>2</sup> Irregular migrant workers enjoy considerably fewer rights (both in law and practice) compared to those of regular migrant workers, mobile EU workers, and citizen workers. Although there are considerable variations across countries and sectors, research has shown that vulnerability and exploitability can be important factors driving employer demand for irregular migrant labour, with important consequences not only for migrants but also for domestic workers seeking employment in similar jobs, the structure of particular labour markets, and the wider host economy and society.<sup>3</sup>

Providing more effective protection of the fundamental rights of irregular migrant workers raises a number of key challenges and policy dilemmas. Two issues, in particular, stand out: First, how and to what extent can "the law" be used to protect people who live and work "outside the law"? Second, how can irregular migrants access and realise their fundamental rights in a meaningful way when their irregular residence status makes them liable to deportation? These two questions, which relate to the limits of the law and the tension between the protection of rights and immigration control policies, are at the heart of policy debates about the rights of irregular migrant workers, and they are, therefore, two key themes that are discussed in the analysis throughout this report.

The rights and experiences of irregular migrant workers, and the policy options available for responding to the underlying policy dilemmas, can be shaped powerfully by changing economic, social, and political factors. In particular, Europe's recent crises – the financial and economic crisis during 2007-09, the refugee protection crisis in 2015-16, and the ongoing Covid-19 pandemic – have created new domestic and international pressures which have had important impacts, mostly negative but at times positive, on irregular migrant workers in many European countries. In order to develop new strategies for better protecting the fundamental rights of irregular migrant workers, it is therefore critical to consider the effects of these crises, their related economic, social and political contexts, and the consequences for existing protection regimes.

### 1.1. Aims and Approach

This study aims to inform policy debates about how to protect more effectively the fundamental rights of irregular migrant workers in the EU. To this end, the study analyses the *nature* and *causes* of the gaps between the fundamental rights protections enshrined in EU legal standards and the rights realised by irregular migrants working in EU Member States in practice, and it discusses strategies for how these 'protection gaps' can be *reduced*. The analysis pays particular attention to the effects of the ongoing Covid-19 pandemic and other recent crises for both the rights of irregular migrant workers and the search for more effective protection strategies. Our discussion of the 'way forward' provides possible elements and ideas for reforming relevant European legislation. This includes recommendations on how to strengthen existing protection frameworks as well as reflections on the need for a new EU legal standard specifically aimed at protecting the rights of irregular migrant workers.

---

<sup>1</sup> Fundamental Rights Agency 2011 and 2021; Costello and Freedland 2014.

<sup>2</sup> Spencer and Triandafyllidou 2020.

<sup>3</sup> Ruhs and Anderson 2010a.

Our approach is based on two obvious but critical starting points. First, any discussion of gaps in fundamental rights protections needs to be clear about the scope and limits of the relevant standards. In other words, what are the relevant legal rights standards for protecting irregular migrant workers in the EU, and how well do they function as a benchmark? What legal commitments have EU Member States made in this policy area? As we show in this report, answering these questions is by no means straightforward and, therefore, requires discussion and clarification.

Second, to improve protections for irregular migrant workers in the EU, we need to gain a better understanding of *why* existing fundamental rights standards are not realised in practice. This explanation needs to go beyond what we might think of as 'first-level constraints', associated with legal barriers and institutional tensions at the national level, and engage also in a systematic analysis of the broader economic, social and political dynamics associated with (irregular) migrant labour markets, and migration more generally, in EU member states. This includes consideration of migrant workers' motivations and the sources of their vulnerability in host countries' labour markets (e.g. why do some migrants choose to work illegally in EU countries and what is the impact of irregular status on their outcomes and experiences?); employers' recruitment and employment decisions (e.g. why do some employers choose to employ migrants illegally?); the prevailing institutional framework shaping the employment of regular and irregular migrant labour in host countries (e.g. how do national labour markets and welfare regimes as well as legal migration policies shape the numbers, condition and effects of irregular migrant workers?); public attitudes to (irregular) migrants and migration (incl. legalisation) policies; and the broader host country politics and policies on labour immigration. These economic, social and political factors can and do play an important role in shaping the employment and experiences of both irregular and regular migrant workers in the EU, and the political feasibility and effectiveness of different strategies for improving migrant rights protections.<sup>4</sup>

## 1.2. Structure

Reflecting the aim and starting points of this study, the material is organised in four main parts. The remainder of this introductory section discusses the important role of definitions and terminology in discussions of "irregular migrant workers". We clarify the different types of illegality in migrant labour markets and provide a brief overview of the latest available estimates of the numbers of irregular migrants in the EU.

Sections 2 and 3 evaluate the *nature of the gap* in protection of the fundamental rights of irregular migrants. Based on a review of the EU Charter, relevant EU directives and international legal instruments, section 2 discusses critically what these legal standards mean for the commitments of EU Member States vis-à-vis the rights of irregular migrant workers. Section 3 then draws on existing data and research as well as an analysis of national laws and regulations to identify the key disparities in EU Member States' policies for protecting the fundamental rights of irregular migrant workers in the areas of labour rights and justice as well as healthcare. Using illustrative examples from across EU Member States, it considers trends in 'protection gaps' over time and explores the impact on rights protections associated with national frameworks of legality/illegality. It evaluates the effectiveness of structures and practices (including at regional and city levels) to alleviate tensions between rights protections and immigration controls, including the effects of measures (notably regularisation initiatives) introduced in response to the Covid-19 pandemic.

Section 4 of the study is dedicated to helping *explain gaps in protection* for irregular migrant workers in the EU, with a particular focus on the economic, social and political context. The analysis begins by

---

<sup>4</sup> Ruhs and Anderson 2010a.

exploring the economic dynamics of (irregular) migrant labour markets including the factors influencing the incentives and labour market behaviour of migrants and employers, the nature of employer demand for (irregular) migrant labour as well as the broader institutions shaping individuals' decisions and employment relationships, including how these may have changed during the recent crises. Following consideration of these economic dynamics, we discuss key features of the policy and political context in host countries. This includes current policy approaches to regulating labour immigration, public attitudes to (irregular) labour migrants and a consideration of the broader politics of immigration. A key aim of this section is to identify and understand the nature of political feasibility constraints in this policy area.

In light of the foregoing, the concluding Section 5 discusses and evaluates a range of measures that may be taken to *narrow the gap* between EU standards and domestic outcomes and practices regarding fundamental rights protections for irregular migrant workers in the EU. This includes discussion of: the scope and limits of the idea of using 'firewalls' to prevent providers of public services and labour inspectorates from sharing information about workers' irregular migration status with migration enforcement agencies; a new type of temporary work permit specifically for irregular migrant workers whose fundamental rights have been found to have been violated; and the role of broader but targeted legalisation programmes. We conclude with a discussion of the role of the EU, including consideration of the need for revised or additional EU protection frameworks as well as the added value of further data and research.

### 1.3. Definitions, terminology, and types of irregularity in migrant labour markets

We define *migrants* as persons who reside in a country other than their country of birth and who do not have citizenship of their current country of residence. *Migrant workers* are migrants who are employed, or seeking employment, in the host country's labour market. In line with standard practice, our usage of 'migrant workers' excludes business visitors. While the term migrants sometimes assumes a residence of at least one year, our analysis is meant to include what are sometimes known as short-term migrants, i.e. those who have been in the host country for less than one year but typically for more than three months.

In line with EU terminology and the focus of this report, we limit and use the term migrants (and migrant workers) to refer specifically to people (workers) who are not citizens of a country belonging to the European Economic Area (EEA), a group of European countries that includes all EU Member States plus Iceland, Liechtenstein, and Norway. Under the EU's rules for free movement of workers, EEA citizens enjoy the unrestricted right to move and take up employment in another EEA Member State and – if they qualify as 'workers' – equal access to the host country's welfare state. We also exclude from our analysis Swiss citizens working in EEA countries. Although Switzerland is not part of the EEA, it follows most of the EU rules on free movement. According to the terminology preferred by the EU, EU citizens who reside and work in an EU country other than their own are referred to as 'mobile EU workers' rather than as 'migrant workers'.<sup>5</sup> While mobile EU workers can and do also experience exploitation and violations of their rights<sup>6</sup>, they are not the subject of this study. In 2020, there were about 23 million migrants in the EU (equivalent to just over 5 percent of the EU population) and an

<sup>5</sup> Although we find this distinction problematic (e.g. Ruhs 2018), we use it to be consistent with EU terminology.

<sup>6</sup> See, for example, van Ostaijen et al. 2017.

additional 13.5 million 'mobile EU citizens' (i.e. people living in one EU Member State with citizenship of another Member State).<sup>7</sup>

We also follow EU terminology in using the term 'irregular' rather than 'illegal' or 'undocumented' when describing the status of migrants who are residing and employed outside of the host country's immigration and employment laws. The usage of these different terms varies considerably across countries and regions of the world, and there are advantages and disadvantages associated with each of them<sup>8</sup>. 'Illegal' and 'undocumented' are much more commonly used outside Europe, although most international organisations including the United Nations also favour 'irregular'. The term 'undocumented' is problematic because migrants can and often do have documents (e.g. fake visas and work permits, somebody else's social security number, etc.). The term 'illegal migrant' is problematic as it has the highly undesirable connotation that a person can be illegal. However, when describing migration and employment *processes* rather than people, the use of the term illegality does have the advantage of indicating that the phenomenon exists only in the context of the host state's existing laws and regulations. We thus find it helpful to use both 'irregular' and 'illegal' when talking about migration and employment but we stick to 'irregular' when referring to migrants.

In this report, we use the term *irregular* migrant workers to refer to two groups of people. The first group are migrant workers who do not have the legal right to reside, and therefore also no legal right to work, in the host country. Migrant workers in this group have either entered the host country illegally and never obtained a legal right to residence, or they have entered legally and overstayed their temporary residence permits. Although there are variations in the relative importance of these two different pathways to irregular residence status across countries, in many European countries legal entry and overstaying of temporary visas is more common than irregular entry and crossing of borders.<sup>9</sup>

A second group of irregular migrant workers includes those migrants who have the legal right to residence but are working in violation of the employment restrictions attached to their legal immigration status. This second group includes migrant workers who have the legal right to reside but are *prohibited* from any work in the host country. For example, in many European countries asylum seekers are not allowed to engage in employment while they are waiting to hear about the outcome of their applications for protection. It also includes migrant workers who are legally resident with a *restricted* right to work in particular sectors and/or for a limited numbers of hours but who are, in practice, working in other sectors (e.g. a migrant legally admitted under a temporary labour immigration programme to work in the care sector but now working in hospitality) or for more hours than allowed (e.g. a migrant on a student visa who works beyond the maximum number of hours allowed by the residence permit for foreign students).

As these distinctions make clear, there are different types of irregularity in migrant labour markets that relate to the migrants' right to *residence* and right to *work*. A third dimension of irregularity relates to the *formality* of employment, i.e. on whether or not migrants and their employers pay the taxes and social insurance contributions required by the host country's tax regulations. Arguably, as informal employment situations can and do involve both domestic and migrant workers, it is not appropriate to use the criterion of informal working, on its own, to describe a migrant worker who is otherwise legally resident with the right to work as an 'irregular' migrant worker.

---

<sup>7</sup> Eurostat, [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration\\_and\\_migrant\\_population\\_statistics#Migrant\\_population:\\_23\\_million\\_non-EU\\_citizens\\_living\\_in\\_the\\_EU\\_on\\_1\\_January\\_2020](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Migration_and_migrant_population_statistics#Migrant_population:_23_million_non-EU_citizens_living_in_the_EU_on_1_January_2020)

<sup>8</sup> See, for example, the discussion in Anderson and Ruhs 2010b.

<sup>9</sup> European Commission 2020a.

It is important to recognise that legal migration status is not a static but dynamic concept.<sup>10</sup> A migrant's status can and often does change over time as some states provide opportunities – or even impose – status change, e.g. through legalization programmes that provide irregular migrant workers with opportunities to legalise their migration and employment status; or through EU enlargement when the status of existing migrants from the enlargement country suddenly changes from irregular or regular migrant to EU citizen. Migrants can sometimes play an active role in changing their status, e.g. through choosing to participate in legalisation programmes or by acquiring different types of status where possible, e.g. through marriage to a citizen or permanent resident of then host country. It is not uncommon for some migrants to move in and out of irregularity over time.<sup>11</sup>

The choice of definitions and terminology matters not only for public perceptions and the framing of public debates about irregular migrant workers, but also for the measurement of the scale of the issue as well as the analysis of its causes and consequences. For example, estimates of the number of irregular migrant workers in a particular country obviously depend on how narrowly or broadly migrants and irregularity are defined. Similarly, the effects of irregular migrant workers depend on who they are and what criteria are used to identify them in the analysis. In other words, different definitions and terminological choices have different implications for how we perceive and respond to the policy challenge. In this sense, the choice of any particular definition and terminology always includes a political dimension that can be challenged and, therefore, always needs to be clarified and discussed.

#### 1.4. Estimates of irregular migrants in the EU

Estimating the number of irregular migrants involves numerous methodological challenges and constraints imposed by limitations of the available data.<sup>12</sup> As a consequence, all estimates come with considerable uncertainty and caveats, and they are influenced critically by how and how well these methodological challenges and data limitations have been addressed. Making and comparing estimates of irregular migrants across countries can raise particularly difficult issues, especially if the methodology used is more appropriate and reliable for making estimates in some countries than in others.

The most recent available estimates of the number of irregular migrants in Europe were made by the Pew Research Centre, a well-established and non-partisan 'fact tank' in the United States. These estimates were published in 2019 and they refer to the years 2014-2017. The Pew estimates were the first estimates of irregular migrants in Europe as a whole after more than a decade. Previous Europe-wide estimates were for the year 2008, published by the EU-funded *Clandestino* project.<sup>13</sup> A recent round of the EU's HorizonEurope research funding programme included a call for projects that provide new estimates of irregular migrants in European countries, with results expected around 2025.

As shown in Figure 1 below, the Pew estimates suggest that there were between 2.9 and 3.8 million irregular migrants in Europe (defined here as all EEA Member states plus Switzerland). This constitutes less than 1 percent of the total population of these countries, and about 15 percent of non-EU migrants who are legally resident. The change over time of the range of estimates provided by Pew suggests that the number of irregular migrants in Europe may have increased during the peak of Europe's refugee protection crisis in 2015-16, when large numbers of asylum seekers and other migrants entered

---

<sup>10</sup> Compare the discussion in Ruhs and Anderson 2010b.

<sup>11</sup> See, for example, Sigona et al. 2021.

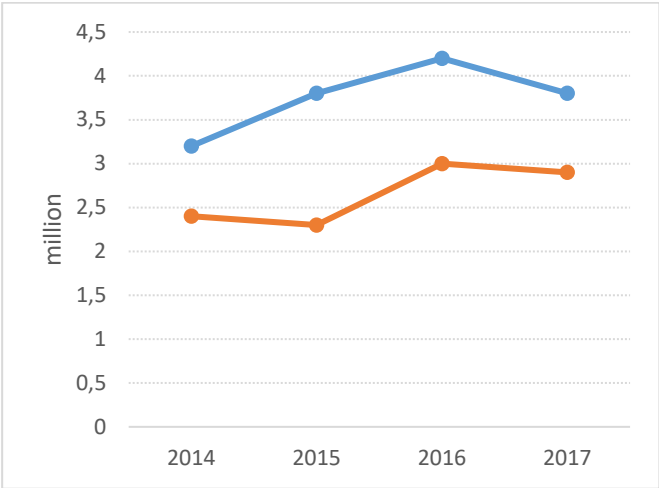
<sup>12</sup> See, for example, Jandl 2011.

<sup>13</sup> See <https://irregular-migration.net>

and applied for protection in EU countries (many unsuccessfully), and that there may have been a small decline in 2017.

The number of irregular migrants in 2008, as estimated by *Clandestino* for EU countries only –was between 1.9 million to 3.8 million. In comparison, The Pew estimates for EU countries in 2017 was 2.8 million to 3.7 million. Importantly, irregular migrants in the UK were estimated to account for a third of the EU total in 2014-2017 (Germany and Italy were the other EU countries with the largest estimates). As a consequence, the exit of the UK from the EU in 2020 was associated with a significant decline in the EU's population of irregular migrants.

Figure 1: Range for the estimated number of irregular migrants living in Europe\*, 2014-2017



\*Countries include all EEA countries plus Switzerland. Blue and orange lines represent high and low estimates, respectively.

Source: Pew Research Centre 2019, Appendix C

Although there are, to the best of our knowledge, no estimates for the number of irregular migrant workers, we can assume that a large share of irregular migrants in the EU is working to sustain their livelihoods (often without or highly limited access to welfare protections in their host countries), although these shares are likely to vary across EU countries. We also know from a large body of case studies of irregular migrant workers in particular European countries and sectors that they include a highly diverse group from many different countries. Most (although not all) of their employment is concentrated in lower-wages occupations where they frequently work in a range of jobs in agriculture and food processing, care and health services as well as construction.<sup>14</sup>

<sup>14</sup> See, for example, Spencer and Triandafyllidou 2020.



## 2. RIGHTS ON PAPER: EU MEMBER STATES' (COMMON) COMMITMENTS TO GUARANTEE THE FUNDAMENTAL RIGHTS OF IRREGULAR MIGRANT WORKERS

### KEY FINDINGS

The core 'benchmark' for the potential rights of irregular migrant workers in the EU is the Charter of Fundamental Rights of the European Union – the single most explicit fundamental rights standard that is uniformly endorsed by all EU Member States, has the force of law, and which essentially constitutes the minimum rights standard for the Union.

While there are reasonable grounds for adopting an inclusive interpretation of the Charter on Fundamental Rights in a way which would see irregular migrant workers covered by the rights protections offered to "everyone" and to "every worker", related laws and policies have created doubts about the application of the Charter's labour and social rights to irregular migrant workers. Doubts derive in particular from the texts of EU Directives on labour standards and immigration which have potentially restrictive or limiting effects in providing labour and socio-economic rights protections to irregular migrants in the EU.

The EU Directives do not encourage an inclusive interpretation of the Charter but rather reinforce only the core fundamental rights of irregular migrant workers that arise from common constitutional traditions of Member States and the jurisprudence of the European Convention on Human Rights. In providing strong legitimation of Member's States common objectives to control illegal immigration and by acknowledging the high degree of national competence in this area, the Directives may serve as potential justifications for limiting the scope of the Charter's labour and socio-economic guarantees in respect of irregular migrant workers.

Only very few EU countries have ratified the ILO's conventions dealing with the rights of irregular migrant workers, and no EU country has ratified the UN's 1990 Convention on the Rights of All Migrant Workers and their Families. As a consequence, these international legal instruments for the protection of rights of (irregular) migrant workers have had limited influence on laws and policies in EU Member States.

In order to assess the gaps in fundamental rights protection experienced by irregular migrant workers in the European Union, we first need to establish the benchmark of protection to which Member States have committed themselves and against which we can measure irregular migrant workers' experiences. At national, European Union and international levels, Member States are bound by various rights standards, each of which generates different guarantees for irregular migrant workers in terms both of the substance of the rights and their enforceability, including justiciability. Our analysis begins with the Charter of Fundamental Rights of the European Union– the single most explicit fundamental rights standard that is uniformly endorsed by all EU Member States, has the force of law, and which essentially constitutes the minimum rights standard for the Union. Based on the interpretative notes accompanying the Charter as well as a review of EU Directives and case law of the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR) and decisions of the Council of Europe's Committee on Social Rights (CSR), we consider how we might interpret the scope of Charter rights and specifically the likely application of such rights to irregular migrants in the EU. We then consider other international rights standards which EU Member States have endorsed (signed or ratified) with a view to comparing the standard-setting functions of the various instruments vis-à-vis the protection of the rights of irregular migrant workers.

## 2.1. The Scope of the Charter of Fundamental Rights of the European Union vis-à-vis Irregular Migrant Workers

The Charter is an affirmation of European Union principles and values. It draws on, and attempts to encapsulate, the core fundamental rights standards of the Treaties establishing the Union, the Council of Europe, international human rights/treaty organisations and of the national constitutional heritages of Member States. As such, the Charter guarantees protection of a broad range of both civil and political, as well as economic, social and labour rights. The majority of these rights is guaranteed, in accordance with the terms of the Charter, to “everyone”. Such universal rights include, inter alia: the rights to life (A.1), liberty (A.6), family life (A.7), education (A.14), work (A.15) property (A.17), non-discrimination (A.21), preventive healthcare (A.47) and to an effective remedy (A.47); freedoms from torture, inhuman or degrading treatment (A.4) and from slavery or forced labour (A.5); and freedoms of conscience (A.10), expression (A.11) and association (A.12). A smaller number of rights, including the rights to collective bargaining (A.28), fair and just working conditions (A.31) and protection against unjustified dismissal (A.30), is designated to “workers”, while social security rights and employment conditions equivalent to Union citizens, are reserved to the more narrow category of “persons residing and moving legally within the Union”. Finally, to “every citizen of the Union”, the Charter additionally upholds a range of political participation rights (such as the right to vote (A.39) and stand for municipal elections (A.40) and guarantees freedom of movement for the purposes of employment and residence (A.15.2 and A.45).

Three well-rehearsed points about the *general* scope of the Charter are important to bear in mind when considering the (potential/likely) application of Charter rights to irregular migrant workers. Although the Charter is legally binding on Member States and acts as a human rights standard with which EU primary and secondary laws (Directives and Regulations) must comply, its legal effect only extends to the aspects of Charter rights that are within the competences of the European Union.<sup>15</sup> The Charter itself is emphatic that the rights guaranteed therein do not confer on the Union any new competences

<sup>15</sup> ECJ case law has clearly established this point, e.g. (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 Annibaldi [1997] ECR I-7493). For discussion, see Lenaerts 2012.

beyond those established in the treaties.<sup>16</sup> Notwithstanding the parameters set by the Charter, Member States retain critical roles in determining the scope and particulars of certain rights, including in the areas of health, social security, labour laws and immigration. In consequence, there is likely to be substantial variation in social and labour rights in practice across EU member states. Variation is likely to be greater still in respect of the operation of Charter rights that explicitly stray beyond EU competences, such as the right to organise or strike.<sup>17</sup>

Second, a critical source of interpretation of Charter rights is the Convention for the Protection of Human Rights and Fundamental Freedoms and the associated jurisprudence of the European Court of Human Rights. The Charter specifies (Article 52.3) that where any of its rights overlap with those already guaranteed under the Convention for the Protection of Human Rights and Fundamental Freedoms, the latter will determine the minimum meaning and interpretation to be afforded to the relevant Charter rights. Interpretations of Charter rights will also take account of the jurisprudence of the European Social Charter as well as other associated international human rights standards which Member States have signed and ratified. A further interpretative touchstone, albeit substantially less precise in its ambit,<sup>18</sup> is what the Charter has defined (A.52.4) as the “constitutional traditions common to Member States” and which underlie certain Charter rights.

A final general point is that Charter rights are not absolute. Article 52.1 foresees circumstances which may justify limitations on certain rights but such limitations must be both necessary and proportionate, and invoked only to “...*genuinely meet objectives of general interest recognized by the Union, or the need to protect the rights and freedoms of others.*” Once more, the Convention (ECHR) and the jurisprudence of the European Court of Human Rights is instructive in determining the lawful exercise of limitations in relation to corresponding Charter and Convention rights. Although the Charter does not expressly distinguish between derogable and non-derogable rights, the case law of the ECtHR would indicate that certain core Charter rights, such as the right to dignity (which is “inviolable”), the right to life, freedom from torture, inhuman and degrading treatment, and the prohibition against slavery and forced labour, must enjoy the highest standard of protection.<sup>19</sup> The objectives of general interest recognised by the Union have been interpreted by the ECJ to span a wide range, including such objectives as the common organisation of the market, public health and matters of justice and security.<sup>20</sup> As the Fundamental Rights Agency (FRA) has pointed out, concerns relating purely to the national economy have been considered inadequate to qualify as a satisfying objective.<sup>21</sup>

Within the context of these general parameters and caveats, what fundamental Charter rights can we reasonably interpret as applying, on paper, to irregular migrants in the EU? It might seem settled – even beyond doubt – that, with the exception of Charter provisions that are explicitly limited to “persons

<sup>16</sup> C/ref European Court of Justice judgment of 17 February 1998, C-249/96 Grant [1998] ECR I-621.

<sup>17</sup> A153(5) TFEU precludes Community law on freedom of association and explicitly also excludes pay and the right to strike from Community competences. For discussion and background for exclusions see Davies 2005 192-194. See also the interpretative notes to the Charter which explain that “...the modalities and limits for the exercise of collective action, including strike action, come under national laws and practices.”

<sup>18</sup> See European Law Institute on the need for research on the scope of what constitutes the “constitutional traditions common to Member States”, accessed on 24<sup>th</sup> January 2022 at: <https://europeanlawinstitute.eu/projects-publications/current-projects/current-projects/cct-in-europe/>

<sup>19</sup> See Explanations Relating to the Charter of Fundamental Rights, (2007/C303/02) and also discussion in FRA 2020a, p70. The FRA also considers non-derogable or absolute Charter rights to include: internal freedom of thought, conscience and religion (Article 10(1) of the Charter) the presumption of innocence and right of defence (Article 48 of the Charter), the principle of legality (Article 49(1) of the Charter) and the right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50 of the Charter).

<sup>20</sup> Ibid, 178, for details of the relevant case-law of the ECJ.

<sup>21</sup> FRA 2020a, 70.

residing and moving legally within the Union” and to “citizens of the Union”, the remainder of the Charter rights guaranteed to “everyone” and “every worker” will apply without limitations. Given that, on the face of it, the Charter already differentiates rights according to groups with particular legal statuses, and taking into account the Charter prohibition against discrimination, it might indeed seem reasonable to assume, that the terms “everyone” and “every worker” are fully inclusive. In light however of the importance of establishing clearly the EU ‘fundamental rights standard’ in respect of irregular migrant workers so as to assess protection gaps in practice, it is worth probing this assumption a little further. To that end, we will therefore briefly consider the evidence from EU Directives, relevant case law from the ECJ and ECtHR, and the interpretative notes accompanying the Charter that would support this inclusive interpretation of the Charter.

### 2.1.1. Explanatory Notes to the Charter

The Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) constitute a non-legally binding interpretative guide developed under the authority of the Praesidium – the same body that drafted the Charter. On the face of the Explanations there is no explicit exclusion of irregular migrant workers from any of the Charter rights that apply to ‘everyone’ and ‘every worker’; as such, the Explanations favour a default interpretation that irregular migrants are included. Certainly, by reinforcing the ‘absolute’ character of certain core fundamental rights, (i.e. the protection of human dignity, freedom from slavery, freedom from cruel, inhuman and degrading treatment etc.) the Explanations leave no room for doubt about the fully inclusive nature of this category of rights. Where doubt lingers however is in the application of the Charter’s labour and social security rights to irregular migrant workers.

The first doubt about the scope of these latter rights arises in the context of the notes on Article 28, the right to collective bargaining and action, where it is stated that “...*the modalities and limits for the exercise of collective action, including strike action, come under national laws and practices.*” While this interpretation is in line with Article 153(5) of the TFEU, it unequivocally leaves the determination of the scope and application of collective action rights to Member States and thus the potential for the exclusion of irregular migrant workers. The second doubt relates to the labour rights guaranteed in Articles 30, 31, and 32, and the A.35 guarantee of the right to access health care where the notes trace the source of these Charter rights to the European Social Charter and/or to relevant EU Directives. Reference to the Social Charter seeds some doubt that the Charter rights might, following the terms of the Social Charter, apply only to those lawfully in the territory and thereby exclude irregular migrant workers.<sup>22</sup> As we shall now detail, the references in the Explanations to EU Directives have the further effect of the narrowing the interpretation of Charter labour rights and limiting such rights to workers with legitimate employment contracts/contractual relationships in Member States.

### 2.1.2. Relevant EU Directives on Labour Standards and Immigration

EU Directives are the primary vehicle for setting in motion the transposition of Treaty laws (including that of the Charter) into the laws of Member States. It is significant therefore that, of the existing Directives which give effect to the Charter’s labour rights (in Articles 30, 31 and 32), many are either restrictive or ambiguous in their scope and application to irregular migrant workers. In the cases, for example, of Directive 94/33/EC on the protection of young people at work, Directive 2001/23/EC on safeguarding employees rights in the event of transfer of undertakings, Directive 2002/74/EC on the

---

<sup>22</sup> The Appendix to the Charter (A.38.1) limits the personal scope of the ESC rights to “...*foreigners only insofar as they are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned.*”

protection of employees in the event of insolvency, and Directive 2019/1152(EU) on transparent and predictable working conditions in the EU, protection of an individual worker's rights rests on the establishment of a contract of employment or employment relationship that is recognised and upheld by the laws of the relevant member state.<sup>23</sup> Irregular migrant workers, many of whom cannot establish a contractual relationship with an employer, not least one that would be recognised as such in the laws of Member States, are therefore, by definition, automatically outside of the scope of these Directives and their attendant rights and protections.<sup>24</sup> This is particularly the case for migrants who are recruited through intermediaries.

The drafting of these central labour rights Directives in such terms does not readily indicate an intention on behalf of EU institutions to encourage an inclusive interpretation of the Charter rights of "all workers". Even in the case of a relatively recent Directive – Directive 2019/1152(EU) on Transparent and Predictable Working Conditions in the EU – which provides explicit scope for an employment relationship to be legitimated not only by "the law" of Member States but also by "collective agreements or practice", it fails to go sufficiently far in scope such that it might be considered to comprehensively protect the rights and interests of irregular migrant workers in the EU.

Directive 89/391/EEC (measures to encourage improvements in the safety and health of workers at work),<sup>25</sup> is, on the other hand, an example of a standard that explicitly *excludes* an important category of irregular migrant workers – namely domestic workers. The fact that this general exclusion of domestic workers from EU health and safety requirements has endured, notwithstanding the critique in more recent years from the European Parliament's Committee on Women's Rights and Gender Equality,<sup>26</sup> indicates something of the deep underlying tension between EU laws and national laws in the area of labour rights.<sup>27</sup> A less pointed example, but one which nonetheless highlights differentiated labour rights between categories of 'workers', can be found in Directive 2003/88/EC which amends and updates the prior working time Directive. In paragraph 5, Directive 2003/88/EC distinguishes, in the context of rest periods, between certain minimum working standards for "all workers" and higher thresholds of standards for "Community workers".<sup>28</sup> This implies that, even in circumstances where certain labour rights guaranteed by the Charter could be construed as applying to irregular migrant workers, we cannot assume that they will apply in measure equal to those of EU citizens.

If Directives relating to EU labour rights exclude or restrict their application to irregular migrant workers, those Directives which provide specific protections to irregular migrants (including workers) in situations of 'reception' in host members states, 'return' to countries of origin, and in the context of labour exploitation by employers, appear, on the face of it, to limit these protections to 'core' fundamental rights – typically classic civil and political liberties which are common to the "constitutional traditions" of Member States. Between the Receptions Directive<sup>29</sup> 2013/33/EU, the

<sup>23</sup> Article 2 Directive 94/33/EC, Article 1 and 2 Directive 2002/74/EC, A.2(d) of Directive 2001/23/EC and Article 1(2) of Directive EU 2019/1152.

<sup>24</sup> It is suggested that this remains the case notwithstanding the ECJ ruling in *Tümer* (Case C-311/13, [2014], EU:C:2014:2337) where, in the case of the application of the insolvency Directive, the court held that the Directive should not be read as excluding or permitting the exclusion of workers on grounds of illegal residence in the Member State. The implications of this judgment for the interpretation of the scope of the Charter vis-à-vis migrant workers are discussed in section 2.1.3.

<sup>25</sup> Article 3(a).

<sup>26</sup> Committee on Women's Rights and Gender Equality, 2016.

<sup>27</sup> See Scheiwe 2021.

<sup>28</sup> Para (5) states: "All workers should have adequate rest periods. The concept of "rest" must be expressed in units of time, i.e. in days, hours and/or fractions thereof. Community workers must be granted minimum daily, weekly and annual periods of rest and adequate breaks. It is also necessary in this context to place a maximum limit on weekly working hours."

<sup>29</sup> Paragraph 35 of the Receptions Directive provides: "This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive

Returns Directive<sup>30</sup> and the Employer Sanctions Directive 2009/52/EC,<sup>31</sup> Member States are, inter alia, required to seek to ensure compliance with the right to human dignity, freedom from cruel, inhuman or degrading treatment, due process rights, the principle of the best interests of the child and, in the case of the Receptions Directive only, the right to respect for family life. The socio-economic and labour rights guarantees in the Charter do not find expression in these Directives. Indeed relevant Charter rights are not invoked in the context of the Article 6 provision in the Employer Sanctions Directive which entitles irregular migrants to recover back pay for work that is subject to outstanding remuneration from employers. We might therefore understand the rationale for Article 6 provisions to arise from a commitment to uphold the private property rights of all individuals – a right which is common to the “constitutional traditions of member states”.<sup>32</sup>

A markedly different attitude to fundamental rights characterises key EU Directives which deal with the treatment of categories of migrants and migrant workers who are *legally* residing and working in Member States. The Seasonal Workers Directive 2014/36/EU, the Single Permit Directive 2011/98/EU, and the Qualifications Directive 2011/95/EU (recast) all make *explicit* migrants' entitlements to a broad range of labour and socio-economic rights under the Charter.<sup>33</sup> Recognising “*the specially vulnerable position of third-country national seasonal workers*”, the Seasonal Workers Directive (para 43) goes so far as to require Member States to ensure *equal treatment* of such workers with EU citizens in regards to pay and collective agreements. These rights and other labour rights relating to terms and conditions of employment, health and safety, collective action rights and social security benefits are provided for under Chapter IV of the Directive.<sup>34</sup> Limitations to such rights, specifically exemptions on equal treatment in all aspects of social security, education and training, and tax, are provided in Article 23.2 and justified in view of “*the temporary nature of the stay of seasonal workers*”.<sup>35</sup> The Directive further requires Member States through Articles 24 and 25 to ensure mechanisms that serve the protection of rights through monitoring processes, regular labour inspections, and effective complaints procedures. Similar, but more extensive, rights protections are provided to long-staying third-country nationals in the Single Permit Directive which, in recognising such migrants' rights to equal treatment with citizens in regard to, inter alia, working conditions, collective action rights and access to public services, speaks of the objective of “*..narrowing the rights gap between citizens of the Union and third-country nationals legally working in a member state*”.<sup>36</sup>

In sum, we can conclude that on the matter of the application of labour (and socio-economic) rights recognised in the Charter to irregular migrant workers, EU Directives leave decisions on the scope of

---

seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.

<sup>30</sup> In Article 8 (4), the Directive requires only that national legislation on the implementation of coercive removals should comply with the Charter rights promoting human dignity (A.1) and physical integrity (A.3). Mental integrity provided by Article 3 of the Charter is notably not mentioned. Otherwise, the Directive makes only general reference to its fundamental rights and international human rights obligations (Article 1) and affirms that the best interests of the child and the respect for family life should be primary considerations (Para 22) in the removal process.

<sup>31</sup> The only Charter rights to which the Employers Sanctions Directive refers explicitly are due process rights including the right to an effective remedy (a.47) and equality before the law (a.20)) and non-discrimination rights under article 21. It additionally invokes the freedom of employers to operate a business in Article 16 and the principle of proportionality in criminal offences.

<sup>32</sup> In relation to the Charter right to property provided for in Article 17, the explanations to the Charter state: This is a fundamental right common to all national constitutions. It has been recognised on numerous occasions by the case-law of the Court of Justice, initially in the Hauer judgment (13 December 1979, [1979] ECR 3727).

<sup>33</sup> See, for example, para 16, Directive 2011/95/EU.

<sup>34</sup> E.g. A.25 (protection against dismissal as a result of complaints).

<sup>35</sup> See paragraph 46, Directive.

<sup>36</sup> See paragraph 19, Directive.

such charter rights to Member States. The EU Directives discussed above do not encourage an inclusive interpretation of the Charter but rather reinforce only the core fundamental rights of irregular migrant workers that arise from common constitutional traditions of Member states and the jurisprudence of the European Convention on Human Rights. It can be further remarked that, in the context of the discussed Directives relating to irregular migrants, the strong legitimization of Member's States common objectives to control illegal immigration and the acknowledgement of the high degree of national competence in this area, serve as potential justifications for limiting the scope of the Charter's labour and socio-economic guarantees in respect of irregular migrant workers. We turn now to consider the extent to which case law and proceedings of the ECHR, the ECJ and the Economic and Social Committee can shed more light on the scope of the Directives and Charter rights to irregular migrant workers.

### 2.1.3. Case Law of the European Court of Justice, European Court of Human Rights and the Committee on Social Rights

In the case law of the ECJ, the European Court of Human Rights and in national courts, judicial interpretation of the scope of the Charter, vis-à-vis irregular migrant workers is relatively thin on the ground.<sup>37</sup> This is of little surprise given what we know of the obstacles facing such workers who wish to enforce their fundamental rights through the law. While the most substantial volume of Charter-relevant case-law concerns asylum determinations and returns, several principles of importance to the fundamental rights of irregular migrant workers in the EU have emerged from rulings primarily of the ECtHR but also from the ECJ.

A landmark ruling in the case of *Siliadin v. France*<sup>38</sup> established that the labour exploitation and grievous mistreatment of irregular migrant workers (in this instance, the abuse of a domestic worker minor) can be so egregious as to constitute a breach of Article 4 of the Convention prohibiting slavery and forced labour. Not only does the case confirm the full and unreserved application of the equivalent Charter rights to irregular migrant workers but it establishes a general principle that, irregular migrants have legally enforceable labour rights under the Charter in the case of violations which would amount to an infringement of 'core' fundamental rights including, inter alia, the protection of human dignity (Article 1) and the prohibition of torture, cruel, inhuman or degrading treatment (Article 4). The point was subsequently reinforced in *Rantsev v. Cyprus and Russia*.<sup>39</sup>

The case of *Gaygusuz v. Austria* asserts the non-discriminatory basis of property rights deriving from contributory and non-contributory social insurance entitlements.<sup>40</sup> While the case in question concerned the equal treatment of pensionable entitlements of a Turkish national with *regular* immigration status and the right to work in Austria, it is arguable that similar social security or financial entitlements may, given the right circumstances, be considered to apply also to irregular migrant workers in the EU. The move to protect the rights of irregular migrant workers to back pay in the Employer Sanctions Directive might be considered a step which would support a generous interpretation of property rights (i.e. to include earned social security benefits) as guaranteed to everyone under the Charter.

The ECJ case of *Tümer*<sup>41</sup> concerns the application of the Insolvency Directive to a migrant whose regular immigration status had lapsed subsequent to his divorce. In a very significant ruling, the Court held

<sup>37</sup> Council of Europe/European Court of Human Rights 2021.

<sup>38</sup> *Siliadin v. France* (2006) 43 EHRR 16.

<sup>39</sup> *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1. For further discussion, see Mantouvalou, 2006 and 2014, and Fudge and Strauss 2014.

<sup>40</sup> *Gaygusuz v Austria* (1997) 23EHRR 364.

<sup>41</sup> Case C-311/13, *Tümer*, [2014], EU:C:2014:2337.

that the terms of the insolvency Directive cannot be read as a blanket exclusion of those without legal residence in Member States nor can illegal residence serve automatically as a legitimate basis for exclusion. While this judgment encourages an expansive interpretation of the insolvency Directive in its application to irregular migrant workers,<sup>42</sup> (and could potentially imply a similarly generous treatment of the scope of other labour rights Directives) it does not overcome the fact that the application of the Directive will turn on whether individuals are treated as “employees” under labour and civil national laws relating to employment relationships and employment contracts. In the particular case at hand, the applicant’s lapsed legal residence status was considered not to undermine his status as an employee and associated employment relationship as defined under Dutch civil law. Olivier De Schutter (2016) has suggested that, in arriving at its judgment, the Court may have been persuaded by the argumentation of the Advocate General that, excluding those with irregular residence status could have the effect of undermining labour standards/social policy in the EU and thereby erode core Union objectives associated with economic and social prosperity and solidarity. Given that such intention could not be attributed to the Union, the argument followed that EU institutions had drafted the Directive envisaging its broad application. If, in future, this line of reasoning were to carry weight with broader EU legal and political opinion, it could potentially influence judgments on what might be considered an “*objective of general interest recognised by the Union*” for the purposes of limiting Charter rights, as discussed earlier.

The Grand Chamber decision of the ECtHR in the case of *Khlaifia and others v. Italy*,<sup>43</sup> adds further weight to the limits to which policy and legal objectives of the Union, including relevant contextual circumstances, can be taken into account when determining the application of limitations on Convention rights (and their Charter equivalents). Here the Court concluded that immigration objectives and border controls (such as feature dominantly in EU Directives and policy documents) cannot exempt Member States from their duties to uphold the core fundamental rights of irregular migrants/migrant workers under the ECHR and Charter. Of disappointment to some commentators,<sup>44</sup> the Court did however take account of the unanticipated surge of asylum applications with which Italy was confronted in the context of the ‘Arab Spring’ and weighed up these circumstances in determining that the treatment of Tunisian asylum-seekers by the Italian authorities had not amounted to a breach of the Article 3 ECHR prohibition of cruel, inhuman and degrading treatment.

A final principle arising from the relevant case law is that, while it has been established that the Charter protects irregular migrant workers in regard to discrimination in access to their ‘core’ fundamental rights, non-discrimination protections cannot be relied on to support irregular migrant workers’ entitlements to socio-economic rights which are already subject to eligibility restrictions and conditions for EU citizens. The point was expressed clearly in the case of *Bah v UK* (2011). The judgment confirms that non-discrimination protections apply only to the extent of the applicability of EU laws. In aspects of Charter rights to healthcare and social security entitlements which fall exclusively within the competence of Member States, differentiated treatment of irregular migrants workers may not be the subject of a legal challenge on grounds of Charter protections against discrimination.<sup>45</sup> Similarly, access

---

<sup>42</sup> See e.g. PICUM (2020;14) suggests that this case of the ECJ encourages an inclusive interpretation of the Directive. Cites also Steve Peers to support: <http://eulawanalysis.blogspot.com/2014/11/irregular-migrants-and-eu-employment-law.html>

<sup>43</sup> *Khlaifia and others v. Italy*, Application no. 16483/12, Council of Europe: European Court of Human Rights, 15 December 2016.

<sup>44</sup> See Discussion in Goldenziel 2018. See also discussions in European Law Institute 2017.

<sup>45</sup> In this respect, De Schutter 2016, 52, has noted that while “nationality” is considered a “suspect” ground for discriminating in regard to an individual’s access to rights under international human rights law, discriminatory treatments based on immigration status have generally been more accommodated.



to legal aid, for the purposes of challenging Charter violations, is not an absolute right even for EU citizens<sup>46</sup> and, therefore, despite its relationship to core fundamental rights, judicial interpretation of the applicability of this right to irregular migrant workers in the EU is far from clear.

It is interesting, on this last point, to reflect on the decisions of the Committee on Social Rights in regard to the scope of the European Social Charter (ESC) in offering a certain level of socio-economic rights protection to irregular migrants. Despite the fact that the ESC does not apply to irregular migrants, the Committee has nonetheless interpreted the Charter to offer such rights protection in circumstances where, failure to do so would result in an infringement of core fundamental rights under the European Convention on Human Rights (its sister treaty). In the complaints of *FIDH v. France*,<sup>47</sup> *Defence for Children International v Belgium*<sup>48</sup> and *Conference of European Churches (CEC) v. Netherlands* (action taken under the collective complaints mechanism in the Addition Protocol of the ESC), the Committee took the view that, notwithstanding the *prima facie* exclusion of irregular migrants from the ambit of the ESC in the *ratione personae*,<sup>49</sup> the Charter must nonetheless be construed, in keeping with its spirit and purpose, to provide basic socio-economic rights to everyone where such rights are necessary to uphold basic entitlements such as human dignity and the right to life as protected under the European Convention on Human Rights.<sup>50</sup> In *FIDH v. France* the Committee held that the denial of all but emergency or life-saving health care to irregular migrant children was a violation of the 'core' ECHR right to human dignity. Similar reasoning was applied in *Conference of European Churches (CEC) v. Netherlands*, in respect of irregular migrants' access to health and basic social welfare, including accommodation, as well as in *Defence for Children International v. Belgium* in respect of healthcare, including psychological services.<sup>51</sup> Given the symbiotic relationship between the Charter of Fundamental Rights and the ECHR, the Committee's expansive reading of the ESC in relation to the ECHR, constitutes an important footprint in the European rights landscape which is of high relevance to subsequent Charter interpretation.

#### 2.1.4. Protections and Ambiguities of EU Charter Rights for Irregular Migrant Workers

We have demonstrated that, notwithstanding the potentially restrictive or limiting effects of EU Directives in providing labour and socio-economic rights protections to irregular migrants in the EU, there are nonetheless reasonable grounds for adopting an inclusive interpretation of the Charter on Fundamental Rights in a way which would see irregular migrant workers covered by the rights protections offered to "everyone" and to "every worker." Our conclusions in favour of an inclusive interpretation rest on three dimensions: (1) the absence, in the Charter and in the associated Explanations, of any express *exclusion* of irregular migrant workers (such as exists in the Appendix to the ESC); (2) the overall thrust of the case law of the ECHR and notably the expansive interpretation of

<sup>46</sup> C/ref ECHR judgment of 9 October 1979, *Airey*, Series A, Volume 32,

<sup>47</sup> *International Federation of Human Rights League (FIDH) v France*, Complaint No.141 2003, no.31, 8 December. For some discussion of the case see O'Conneide 2014.

<sup>48</sup> *Defence for Children International v Belgium*, Complaint No.691 2011, Dec. on the merits, 23, October 2012.

<sup>49</sup> See n.24.

<sup>50</sup> See Council of Europe 2018, 130: "The restriction of the personal scope [i.e. of Appendix, Para 1] should not be read in such a way as to deprive migrants in an irregular situation of the protection of their most basic rights enshrined in the Charter, not to impair their fundamental rights, such as the right to life or to physical integrity or human dignity."

<sup>51</sup> As cited in De Schutter 2016, 79, the Committee reasoned: "...in certain cases and under certain circumstances, the provisions of the Charter may be applied to migrants in an irregular situation. The application of the Charter to migrants in an irregular situation is justified solely where excluding them from the protection afforded by the Charter would have serious detrimental consequences for their fundamental rights and would place the foreigners in question in an unacceptable situation regarding the enjoyment of these rights, as compared with the situation of nationals or foreigners in a regular situation."

the insolvency Directive in the ECJ ruling in the *Tümer* case; (3) the fact that excluding migrant workers from essential labour and socio-economic rights could be tantamount to a violation of core fundamental Charter/ECHR rights and thereby run contrary not only to the rights standards themselves but also be detrimental to the overall goals and purpose of the European Union.

An inclusive interpretation does not however remedy the objective weaknesses of the Charter as a fundamental rights "standard" for the treatment of irregular migrant workers in the EU. As we have seen in the terms of key EU Directive relevant to labour standards, the scope of labour rights protections for irregular migrants will depend ultimately on the specification of employment and civil laws at the Member State level. Ambiguity in the Charter rights standard on the scope of labour and socio-economic rights arguably encourages the potential for substantial variation in the practice of EU Member States. Such ambiguity combined with strong national competences in the area of immigration, as well as immigration control as a common EU policy objective, also potentially legitimate discriminatory treatment of irregular migrant workers in regard to rights protections relative to those afforded to EU citizens and migrants with regular legal statuses.

## 2.2. The Rights of Irregular Migrant Workers under International Human Rights Standards

EU Member States have additionally pledged their commitment to fundamental human rights via the various treaties of the United Nations and International Labour Organisation. Notwithstanding their limited justiciability relative to the EU Charter and ECHR, these international rights instruments (most of which have a history that long predates the EU Charter) are also relevant in establishing a standard for the treatment of irregular migrant workers in the EU. Among international instruments, we can distinguish between standards that are considered universally applicable and therefore protect "everyone", with standards that are designated for particular groups such as women, children and migrants. Having already shown that, in respect of irregular migrant workers, the guarantees of the EU Charter are strongest in respect of core fundamental rights (of the civil and political tradition), we now consider in particular those international rights standards that might consolidate the ambiguous protections of labour and socio-economic rights offered by EU instruments.

At the pinnacle of international standards which explicitly protect the rights of irregular migrant workers, sit the ILO Convention 143 and the UN Migrant Worker Convention 1990. Drafted in 1975 and building on the 1949 ILO Migration for Employment Convention No.97, the ILO Migrant Workers (Supplementary Provisions) Convention (No.143) was the first of its kind to specify fundamental rights protections for irregular migrant workers. It has been ratified by five EU Member States: Cyprus, Italy Portugal, Slovenia and Sweden. In something of a similar vein to the Employer Sanctions Directive 2009/52/EC, the Convention has the dual objectives of both promoting the rights of migrant workers, and controlling irregular migration including, what are described as, its associated "*negative social and human consequences*".<sup>52</sup> To further the second of these objectives, the Convention requires state parties to take steps to apprehend irregular immigration, (A.2) – monitor its processes (A.2), and detect and sanction practices of illegal and exploitative recruitment and employment (A.6). In respect of the rights of irregular migrant workers, the Convention takes a targeted approach; it calls on states to ensure respect for *the basic human rights of all migrants*" (Article 1) and, in the case of migrants who are outside of the law and whose status cannot be regularised, it requires equal treatment (*vis-à-vis* nationals), in the areas of pay, social security and related benefits (Article 9). The latter rights are justified on the basis of "past employment" in the host country (i.e. as 'acquired' rights), and should be supported by a

---

<sup>52</sup> Preamble to the Convention. See Ruhs 2013 for contextual background to Convention 143.

dispute resolution procedure in the event of a contested claim. Other rights in Part II of the Convention, which include equal treatment in respect of certain additional labour rights, collective action and social security rights, are reserved for migrants with regular status.

In more recent years, and following significant lobbying and anticipation, the ILO also concluded the Domestic Workers Convention 2011 (No.189). By contrast to Convention 143 however, and despite the high volume of domestic work estimated to be carried out by irregular migrant workers, Convention 189 makes no explicit reference to the immigration status of domestic workers in defining the scope of its provisions. Domestic workers are simply defined in Article 1 as “*any person engaged in domestic work within an employment relationship*” and Article 2 specifies the scope of the Convention as applying to “*all domestic workers.*” As with EU standards that are not express in their application to irregular migrants, there is some concern that irregular migrant domestic workers may be excluded from the fairly extensive civil and labour rights protections of the Convention by failing to satisfy national legal requirements of “an employment relationship” or by falling into one of the exemption categories provided in Article 2(2).<sup>53</sup> To counter this concern the ILO’s 2011 *Note on the Dignity and Rights of Migrant Workers in an Irregular Situation*, confirms that the Domestic Workers Convention was drafted with the intention of providing broad coverage to all domestic workers. To this end, it states (2011, 5): “*Similar to other ILO instruments, the new Convention and Recommendation on domestic workers do not distinguish between workers on the basis of immigration status.*” To date, Convention 189 has been ratified by 8 of the 27 EU Member States: Belgium, Finland, Germany, Ireland, Italy, Malta, Portugal and Sweden.

The 1990 UN Convention on Migrant Workers and their Families goes farthest of all international treaties in providing explicit and wide-ranging fundamental rights protections for irregular migrant workers. Despite however the extensive span of rights that it affords to irregular migrant workers (going beyond the full array of civil and political rights to offer protections for labour and social security rights),<sup>54</sup> the Convention has not been ratified by a single EU member state.<sup>55</sup> While it therefore sets an internationally recognised minimal rights threshold for irregular migrant workers,<sup>56</sup> its influence on EU law and policy is limited. It is also interesting to note that, notwithstanding the wide-ranging rights protections afforded to irregular migrant workers under the Convention, the right to healthcare under article 28 is limited to essential or emergency situations. The terms of this right compare unfavourably with the more expansive right of “everyone” to access *preventative* health care under the EU Charter, and this perhaps hints at the greater socio-economic capacity of EU Member States relative to that of State Parties to UN treaties where there is greater socio-economic diversity.

An established heritage in standard setting in the fields, inter alia, of socio-economic and labour rights, may be found in the 1948 Universal Declaration of Human Rights (UDHR) of the United Nations, its 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and its 1965 International Convention on the Elimination of Racial Discrimination (ICERD). Unlike the 1990 Convention on Migrant

<sup>53</sup> Under Article 2(2) ratifying Members may exclude from the scope of the Convention, wholly or partly “(a) categories of workers who are otherwise provided with at least equivalent protection; (b) limited categories of workers in respect of which special problems of a substantial nature arise.”

<sup>54</sup> See Part III of the Convention. A.25 is particularly significant in guaranteeing equal treatment with nationals of the country of employment in terms of pay and conditions, including holiday and leave entitlements, health and safety regulations, and security of contract. It also provides that irregular status should not be a ground for relieving employers of “any legal or contractual obligations, nor shall their obligations be limited in any manner, by reason of such irregularity.”

<sup>55</sup> See Ruhs 2013 for a discussion of potential reasons for states’ decisions against ratification.

<sup>56</sup> Note that Part IV of the Convention provides a further layer of rights protections for migrant workers in regular situations.

Workers or the ILO Conventions 143 and 189, these UN standards have been universally endorsed by EU Member States. In effect, they offer many of the same rights protections as provided in the EU Charter/ECHR and the international standards for migrant workers, such as a full complement of civil, political, socio-economic and labour rights.<sup>57</sup> All rights are guaranteed “without *distinction of any kind*” and subject only to limitations as required by the demands of “*the general welfare in a democratic society*.” These instruments are however characterised by the subtle, but arguably politically charged difference, that they are either implicit as to their application to irregular migrants,<sup>58</sup> or, such as in the case in the ICERD, include clauses which have allowed states to interpret the scope of the standard restrictively in the case of those without legal permission to enter/reside or work in the territory of a State Party.<sup>59</sup>

Undoubtedly owing to the political salience of migration issues in recent years and increasing concern about the exploitation and abuse of irregular migrant workers (particularly in developed nations), the Committees which oversee the implementation of the ICESCR and the ICERD have seen fit to each issue General Comments clarifying the applicability of their respective human rights standards to irregular migrant/migrant workers. In respect of the ICERD, clarification was prompted by a reported increase in racist behavior towards asylum-seekers and irregular migrants in the regular reporting cycle of state parties, and by the practice among some state parties of relying on A.1(2) to treat discrimination on the grounds of immigration status as beyond the scope of the ICERD. The ICERD Committee’s 2004 General Comment No.30 on Discrimination against Non-Citizens argued that a blanket exclusion of non-citizens and irregular migrants would be contrary to the spirit and purpose of the ICERD and undermine the fundamental protections of other international human rights treaties. The Committee (2004, 2) concluded that: “*differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.*”

In a similar fashion, General Comment 20, (2009) of the Committee on the ICESCR has emphasized that non-citizenship should not preclude enjoyment of the Convention rights. It states in paragraph 2 that: “*Non-discrimination and equality are fundamental components of international human rights law and essential to the exercise and enjoyment of economic, social and cultural rights*”. It continues in paragraph 30 to affirm that: “*The ground of nationality should not bar access to Covenant rights.... The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.*” It is also worth quoting at length the Committee views, in paragraph 13, on the circumstances in which differential treatment would not be considered discriminatory:

*“Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to*

<sup>57</sup> ICESCR guarantees, inter alia: the right to work (A.6); the right of everyone to the enjoyment of just and favourable conditions of work, including fair wages, health and safety, adequate rest (A.7); the right to collective action and to join and form trade unions (A.8) and the right of everyone to social security in Article 9. A.12 suggest remedial healthcare... “in the event of sickness” – not preventative beyond duties on authorities to manage public health and disease control etc. The UDHR provides: Article 22 recognises, that “as a member of society” everyone has the right to social security and specifically the economic, social and cultural rights “indispensable for his dignity and free development of his personality.” A.23 guarantees the right to work, to fair and favourable conditions of work, including remuneration which ensures.. “an existence worthy of human dignity”, the right to equal pay for equal work and the right to join a trade union. A.25 the right to an adequate standard of health care and general standard of living.

<sup>58</sup> For e.g. Article 1 of the UDHR which proclaims that “All human beings are born free and equal in dignity and rights” implies universal coverage despite any express inclusion of irregular migrants.

<sup>59</sup> See Fennelly and Murphy 2021 for discussion of the political context informing article 1(2) of the CERD.

*whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects. A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party's disposition in an effort to address and eliminate the discrimination, as a matter of priority."*

### **2.3. The EU Charter as an Inclusive Fundamental Rights Standard**

The fundamental rights commitments that EU member states have made via international treaties supports an expansive interpretation of the application of the EU Charter to irregular migrant workers in the EU. Some, although not many, EU Member States have gone so far as to ratify ILO standards which expressly provide labour and core socio-economic rights protections to irregular migrant workers. All EU Member States have ratified UN instruments which have been interpreted by their respective supervisory Committees to extend protections to irregular migrant workers. In substantive rights terms, it is not obvious that the UN standards necessarily raise the bar of rights protections in all areas relative to the EU Charter (certainly the EU Charter provides more expansive healthcare rights) but the UN standards arguably offer more clarity about their applicability to irregular migrant workers. With some confidence, we can therefore take an expansive interpretation of the Charter vis-à-vis irregular migrant workers and use it as the benchmark by which we will now assess relevant national laws and the experiences, in practice, of irregular migrants in exercising their fundamental rights in EU countries.

The foregoing has also indicated that, whether at EU or international level, EU Member States face the same obstacles that derive from tensions in reconciling fundamental rights protections for irregular migrant workers with immigration controls and law and order considerations. This is evident from the failure among some major migrant-receiving countries (including most EU Member States) to ratify instruments that explicitly guarantee the rights of irregular migrants, by the formulation of the ICERD to include a clause which excludes differentiation on citizenship grounds as a source of racial discrimination, and by the purposeful ambiguities in regard to the scope of the EU Charter vis-a-vis irregular migrant workers. Analysis of some of the economic and political reasons for this tension will be discussed in section 4 of this study.

### 3. PROTECTION GAPS: NATIONAL LAWS, POLICIES AND PRACTICES IN EU MEMBER STATES

#### KEY FINDINGS

Although difficult to measure systematically, exploitation of irregular migrant workers occurs in all EU Member States. There are, however, important variations across countries and migrants with different characteristics (including, for example, gender and ethnicity).

In practice, EU Member States countenance an inescapable tension: how to realise or give substantive meaning to the rights of irregular migrant workers and, at the same time, enforce immigration laws on entry, stay and work - some, or all of which, irregular migrant workers have, by definition, broken. National legal traditions and EU laws have, in part, shaped the ways in which different EU member states have responded to the tension. In some instances, legal rules and competing policy objectives have curtailed the ability of states to effectively protect the rights of irregular migrant workers. National transpositions of the EU Employer Sanctions Directive have perpetuated and, in some cases, aggravated the tension between protecting irregular migrants' rights and enforcing immigration controls.

In upholding national labour laws, labour inspectorates often face conflicts when under a duty to enforce labour irregularities that derive from breach of immigration laws by migrant workers. Trade unions, and other independent third parties, can play a crucial role in supporting irregular migrants by providing them with information on labour inspectorate functions and, in countries where it is permitted, to act as an intermediary between migrants and inspectors.

Labour justice has not been a focus of national human rights institutions (NHRIs) who have tended to concentrate instead on immigration issues related to immigration detention, asylum, border controls, return processes and, more recently, migrants' access to services. NHRIs can play a greater role in labour justice for irregular migrant workers.

Despite considerable interest in how local and regional state actors can guarantee minimum rights standards for irregular migrant workers and improve public service outcomes for affected communities, recent research on the policies and practices of Europe's 95 largest cities has shown that only a minority of cities has developed explicit policies that seek, in part, to address "protection gaps" in national legislative and policy frameworks relating to the rights of irregular migrants. Sub-national actors have had greatest success in guaranteeing the rights of irregular migrants to healthcare, housing and social assistance, and, in these areas, have contributed to reforms at national law level.

In most EU countries, irregular migrants have, on paper, the right of access to emergency and basic healthcare services. Despite these legal rights, high costs, bureaucratic hurdles and reporting duties that expose the irregular status of migrant workers can be important obstacles for accessing healthcare in practice. In over a third of EU Member States, health authorities are subject to legal duties to report irregular migration to the authorities.

The effects of crises on irregular migrants' access to health care depends on the type of crisis: while the economic crisis in the late 2000s reduced access, Covid19 was in many countries associated with improved access of irregular migrants to certain types of health care.

In response to Covid-19, some Member States have taken measures to temporarily regularise the status of irregular migrants. Regularisation can help enable migrants to realise their rights and reduce protection gaps but it is not a panacea to the problem of exploitation of migrant labour.

We consider now the rights protection gaps which arise from the discrepancies between the fundamental rights standards that EU Member States have guaranteed to irregular migrant workers in principle (discussed above in section 2), and the rights enjoyed in practice by irregular migrants on the basis of national laws, policies and initiatives of the EU 27. Given the particular interests and concerns of the LIBE Committee and associated terms of reference for this study, the analysis here will focus on protection gaps in the areas of labour justice and access to healthcare. We will consider changes in protection gaps associated, in particular, with the effects of the economic crisis of the late 2000s and the ongoing Covid-19 pandemic, including the consequences of both for processes of regularisation and/or temporary protection initiatives.

### ***Methodology and Source Materials***

Our analysis in this section is based exclusively on a review of the existing literature produced by national governments, intergovernmental organisations, NGOs, academic sources and media reporting. Among our main data sources are the relevant comparative reports of the EU Fundamental Rights Agency, the European Migration Network, the European Platform for Undeclared Work and the Council of Europe. We have also reviewed comparative materials deriving from the reporting processes of the UN Committee on Economic, Social and Cultural Rights and Reports of the Special Rapporteur on Slavery, and materials from the European Network of National Human Rights Institutions. We also considered reports from NGOs including, PICUM, Amnesty International, Human Rights Watch, in addition to smaller organisations operating at national levels. Case law reports and analyses, along with significant academic materials further inform some of the data at member state levels.

It is not our intention to offer a comprehensive assessment of the state of laws, policies and practices relating to irregular labour migration, but rather to identify some of the key trends and patterns in protection gaps in the areas of labour justice and healthcare in EU Member States. Illustrative country case studies, including examples of policies and practices at both central, regional and local government levels, have been selected to present a cross-section of experiences.<sup>60</sup> As with all studies of migration irregularity, the data relied on here suffers from inherent limitations associated with the undisclosed and often hidden nature of irregular labour migration.

## **3.1. Labour Rights Abuses of Irregular Migrant Workers in the EU**

The existence of labour exploitation of irregular migrant workers in the EU is beyond dispute. The cumulative evidence from government bodies, international organisations, academic research, NGOs and the media, indicates that this is an issue that affects all 27 EU Member States. At the same time, it is important to recognise that there is a spectrum of rights violations that irregular migrant workers experience in the EU, and that experiences can vary considerably. As we discuss in more detail in section 4 of this study, there are important cross-country variations in the types of irregularity that emerge in migrant labour markets as well as in the scale, conditions and effects of exploitation. Employment conditions and experiences also vary across groups of irregular migrant workers with different characteristics, e.g. between men and women, migrants with different ethnicity, migrants employed across different sectors, etc.

The available evidence suggests that, typically, irregular migrant workers are exploited in the areas of pay, working conditions, holiday and leave entitlements, security of contract/job security and lack of

---

<sup>60</sup> The explanations on the Charter state that the terms 'Member States', contained in Article 51(1) of the Charter, should be interpreted broadly so as to include not only the central authority, but also regional bodies, local bodies, and public organisations when they are 'implementing Union law'.

compensation for accidents and injuries at work.<sup>61</sup> Irregular migrants are routinely paid at levels below statutory minimum or collectively agreed wages and in many cases have wages withheld or receive payments for only a fraction of hours worked. Dirty and dangerous tasks can be systematically reserved for irregular migrants and often in contravention of national health and safety guidelines.<sup>62</sup> Irregular migrants are frequently denied adequate periods of rest, holiday and special leave entitlements and can face dismissal without reason or compensation. In cases where migrants are accommodated as part of their employment, living conditions are typically sub-standard, overcrowded and often lacking sufficient sanitation.<sup>63</sup> Payments for living costs may be automatically deducted from wages without any prior agreement with the migrant. Those who find employment through agencies or third parties may, for long periods, work simply in order to pay back the 'debts' associated with illegal placement or facilitation fees. The reliance on agencies and middle-men produces a chain of relationships which may often obscure liability and responsibility for abuse of migrant workers' rights.

Viewed against the standards of the EU Charter, these experiences of labour exploitation amount to violations of Articles 30, 32, 33.2 Charter rights. In their most extreme form and/or where workplace abuses also involve human trafficking, such treatment of irregular migrant workers can further infringe core fundamental rights such as the right to human dignity (Article 1) the prohibition of torture and inhuman or degrading treatment (Article 4) and the prohibition of slavery and forced labour (Article 5). Case law from national courts, the European Court of Human Rights and the European Court of Justice amply demonstrates the gravity of such violations and their breadth across labour market sectors such as agriculture, construction, catering/entertainment, cleaning, personal services and caring/domestic care.

It is important to emphasise that irregular migrant workers are not alone in experiencing such treatment at the hands of employers in EU Member States. It is well documented that some migrants who are employed on *regular* permits have been exploited in similar ways relating to pay and working conditions. This is true even of some EU citizens who exercise their rights to free movement and labour within the Union.<sup>64</sup> Indeed it is also a reality for a significant number of nationals of member states who labour in the informal economy.<sup>65</sup> Domestic workers of all kinds, may share the particular vulnerabilities that come of employment in private, unregulated households where they may be isolated and further removed from the potential for public scrutiny or group resistance/action.<sup>66</sup> Some regular migrant workers who, according to the laws and policies of EU member states, ought to be entitled to occupational-based social security benefits, find themselves denied their rights in practice.

What distinguishes irregular migrant workers from other groups of exploited workers in the EU and what places them at compounded risk of fundamental rights violations, is their *illegal*, and in many cases, *criminal* status in countries of employment.<sup>67</sup> Being on the wrong side of the law ultimately hampers the *capacity* of the law (as it has been constructed in most EU countries) to offer comprehensive rights protection to irregular migrants, and it affects the *willingness* of irregular migrants to report or denounce labour exploitation to the appropriate national authorities. Calling out

---

<sup>61</sup> For an overview of the treatment of irregular migrant workers in the EU see FRA 2011, 2015 and 2021.

<sup>62</sup> See Anderson 2000 on the experiences of irregular migrant domestic workers.

<sup>63</sup> See, for example, Medici per i Diritti, 2021 on the dire living conditions of migrant agricultural labourers in Italy.

<sup>64</sup> See for example Barnard 2014, and also Scott et al. 2012.

<sup>65</sup> van Nierop et al 2021.

<sup>66</sup> See, for example, Anderson and Shutes 2014.

<sup>67</sup> Admittedly, EU citizens working undeclared in the informal economy are also often classified as working illegally and potentially criminally in contravention of national tax laws but they do not contend with the "double illegality" associated with irregular immigration status.



abuse consequently comes with the risk of heavy fines for breaching immigration rules, criminalisation, potential detention and deportation. Such set of circumstances is likely to undermine the rights of irregular migrants, including their rights under Article 47 of the EU Charter to an effective remedy before a tribunal in relation to violations of their Charter rights.

### 3.2. Enabling Irregular Migrants to Assert their Labour Rights: Measures by Member States

It is undoubtedly a policy dilemma for all EU Member States to effectively reconcile the joint objectives of ensuring fundamental rights protection for everyone in the European Union and controlling immigration. In the eyes of the law, irregular migrant workers who have suffered abuse at the hands of unscrupulous employers and recruitment agencies are at once victims and perpetrators of crime or illegality. In the context of this challenge, we now examine and evaluate the ways in which EU Member States have sought to discharge their duties to uphold the labour and core fundamental rights of irregular migrant workers by enabling such workers to assert and enjoy their rights.<sup>68</sup> We review member state measures on the following five dimensions: (1) rights protections provided by national labour laws to irregular migrant workers and scope for legal redress; (2) efforts to uphold the rights of irregular migrants to organise and take collective industrial action; (3) the effectiveness of labour inspectorates to defend the rights and interests of irregular migrants; (4) the scope of national human rights institutions in protecting irregular migrants' rights; and (5) rights protections for irregular migrants offered at municipal and regional government levels.

#### 3.2.1. Rights Protections Provided by National Labour Laws to Irregular Migrant Workers and the Scope for Legal Redress

Articulating or stating the labour rights of irregular migrant workers is a common first step towards realising rights in practice. It sends a message about the individual as a rights-holder possessed of certain claims vis-à-vis the state and others, and it focuses attention on the duties owed by others in fulfilment of the given rights. However in committing themselves to a path of fundamental rights guarantees for irregular migrant workers, EU Member States countenance an inescapable tension: how to realise or give substantive meaning to the rights of irregular migrant workers and, at the same time, enforce immigration laws on entry, stay and work - some or all of which irregular migrant workers have, by definition, broken.

Three main approaches characterise how EU Member States have responded to the tension of upholding the fundamental rights of irregular migrant workers and enforcing immigration laws. The first comprises an explicit articulation of a comprehensive range of labour rights for all irregular migrant workers alongside the simultaneous enforcement of immigration rules. The second approach has been to guarantee a limited range of labour rights only for irregular migrants who are deemed to have made reasonable efforts to comply with immigration rules. A third approach has been to specify a core range of labour rights for all irregular migrant workers within a broader context of enforcing immigration rules. As we shall discuss, national legal traditions (of the common and civil law) and EU laws have, to

---

<sup>68</sup> Although entry restrictions and forced return processes may be viewed by member states as important means of safeguarding irregular migrant workers against labour exploitation, our concern here is with assessing state measures that enable irregular migrant workers to *assert* their labour rights. We take the view that rights are "claims" that individuals have vis-à-vis the state and should be considered differently from state action (such as, for example, returns practices) that may be motivated by a subjective view of what is in the migrant's 'best interests'. A construction of rights as "claims" respects the individual agency of irregular migrant workers.

varying degrees, shaped the ways in which different EU Member States have responded to the tension as a matter of national law and policy.

### ***Comprehensive Labour Rights alongside Immigration Law Enforcement***

Among the EU 27 countries, the French Labour Code (*Code du Travail*) is a well cited exception of a national law that is explicit in the application of general labour rights to irregular migrants workers.<sup>69</sup> In the tradition of claim rights,<sup>70</sup> Article L8252-1 is drafted in terms which enable the irregular migrant to demand of either the labour inspectorates, the relevant industrial tribunals or the National Health Insurance Body, that his or her labour rights are enforced. The relevant labour rights are those equivalent to the rights enjoyed by French nationals and, in line with national and EU standards, include: rights to pay; working time limits; health and safety regulations; rest, holiday and pre and postnatal entitlements; social insurance benefits; and redundancy and unfair dismissal protections. On the back of measures taken in order to transpose the requirements of the EU Employer Sanction Directive, the *Code du Travail* has been amended to include, inter alia, a presumption of a minimum of three months employment for the purposes of pursuing back pay (where employment duration is disputed) and a standard three months minimum of severance pay for loss of employment.

Case law points to the use of labour rights protections in practice by irregular migrant workers in France. In 2019, acting on behalf of 25 irregular Malian construction workers, the French *Defenseur des Droits* brought a case of labour exploitation before the French Labour Court.<sup>71</sup> The court found that, over a period of four months, the foreign national construction workers had been required to work in dangerous conditions, without pay and were routinely assigned the most difficult and degrading work. The employer went into bankruptcy and all workers lost employment. It is notable that despite several claims for back pay, loss of employment and earnings, the case was won on a finding by the court of labour abuse which constituted systemic discrimination on grounds of race and ethnicity.<sup>72</sup> Following intervention by the French labour inspectorate, the facts of the case also gave rise to criminal proceedings and resulted in the conviction of the employer on the offence of "undeclared labour".

While this particular case illustrates labour justice in action for irregular migrants in France, we do not know how the proceedings affected the plaintiffs' immigration status and ability to remain in France. On paper, French laws reflect what Elaine Dewhurst (2014, 219) has described as the '*protection with consequences approach*', in the sense that irregular migrants working in France who have the benefit of explicit and comprehensive labour rights and who take measures to enforce those rights, do so at the risk of deportation. The same labour legislation which articulates the labour rights of irregular migrant workers also requires that, in cases of rights violations, sanctioned employers shall bear the costs of sending all monies owed (including compensation due) to the claimant's country or origin. The designated timeframes for compensation payments explicitly take account of the removal process of irregular migrants, including periods in immigration detention.<sup>73</sup>

### ***Limited Rights for Limited Categories of Irregular Migrants***

In direct contrast to the French approach of guaranteeing to irregular migrants, labour rights equivalent to those of French citizens, Ireland has adopted a more circumspect stance and has also

<sup>69</sup> See Code du Travail, Chapitre II, Droits du Salarié Étrangers, accessed at: [https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006072050/LEGISCTA000006178279?init=true&page=1&query=L.8252-1&searchField=ALL&tab\\_selection=all&anchor=LEGIARTI000022265919#LEGIARTI000022265919](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006072050/LEGISCTA000006178279?init=true&page=1&query=L.8252-1&searchField=ALL&tab_selection=all&anchor=LEGIARTI000022265919#LEGIARTI000022265919)

<sup>70</sup> See Weale 1983.

<sup>71</sup> See case No. 17/10051, Paris, 17 Dec. 2019: [https://juridique.defenseurdesdroits.fr/doc\\_num.php?explnum\\_id=19434](https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19434)

<sup>72</sup> European Commission 2021a, 84-85.

<sup>73</sup> Code du Travail, Chapitre II, Droits du Salarié Étrangers L8252-4

opted out of the EU Employer Sanctions Directive. Until 2014, Irish law contained no express statutory provisions to safeguard the labour rights of, or ensure labour justice, for irregular migrant workers. Pursuant however to the Employment Permits (Amendment) Act 2014, statutory provision was made to grant foreign nationals without a valid employment permit, the right to recover outstanding wages from employers through civil proceedings in the District, Circuit or High Courts, depending on the value of the sum owed.<sup>74</sup> The right was drafted in terms which limited its application to foreign national whom the court deemed had taken “*all steps as were reasonably open to comply*” with work permit regulations.<sup>75</sup>

The motivation for the 2014 legislative amendment to provide irregular migrants with the right to pursue back payments from employers (what was in effect the common law remedy of *quantum meruit*), can be directly linked to a landmark High Court judgment of 2012. In the judicial review case of *Hussein v. Labour Court*, the High Court overturned an Irish Labour Court award of compensation to an irregular Pakistani restaurant worker who had successfully claimed labour rights violations in breach of the national employment legislation, including the Working Time Act 1997 and the Minimum Wage Act 2000.<sup>76</sup> Relying on the common law doctrine of illegality, the High Court concluded that the labour court, in awarding compensation to the irregular migrant (Mr. Younis) had acted beyond its jurisdiction. The contract of employment between Mr. Younis and Mr. Hussein (the restaurant owner) was declared invalid owing to the irregular immigration status of Mr. Younis. Without a valid contract, Mr. Younis could not lay claim to any employment rights or protections under Irish law, nor did he have the *locus standi* to bring proceedings against the employer in a labour court.

The effect of this High Court ruling was to leave irregular migrant workers in Ireland without any clear legal remedy in cases of labour exploitation.<sup>77</sup> The 2014 legislation was quickly introduced to fill the gap and, in the words of one senior Irish Government Minister, “*to make sure that employers cannot benefit, at the cost of the employee and his/her employment rights, from situations where employment contacts cannot be enforce because an overseas employee does not hold an employment permit.*”<sup>78</sup> Although the High Court decision was subsequently overturned by the Irish Supreme Court (and Mr Younis awarded damages), the appeal succeeded on a technicality and the effect of the common law illegality doctrine on the fundamental rights of irregular migrants was not revisited. Indeed, the High Court reasoning has been subsequently endorsed (although distinguished) in a recent 2020 Labour Court case (*TA Hotels Limited v. Vireschwarsingh Khoosye*) involving a Mauritian national who was attempting to claim statutory redundancy entitlements despite a lapsed student visa which had resulted in his illegal employment. The Labour Court confirmed that, in the realm of labour rights, the only legal avenue open to irregular migrant workers was the route of civil court proceedings for outstanding wages, under the 2014 Act.

Judgments of Irish courts over the last ten years indicate that Irish law is significantly hampered in its ability to extend national labour laws and regulations to irregular migrant workers by the common law doctrine of illegality. Cyprus which, like Ireland, also inherited the British common law system is likely to face similar challenges in regard to enforcing national employment laws in respect of irregular migrants. However, the matter remains to be addressed by the courts.<sup>79</sup> In the Irish context, Amnesty

<sup>74</sup> See section 4 which amends the Work Permits Act 2003 with sections 2B and 2C.

<sup>75</sup> See amending paragraph 2B(3).

<sup>76</sup> *Hussein v Labour Court* [2012] IEHC 364.

<sup>77</sup> See, e.g. Dewhurst 2014 and Amnesty International 2014 for some discussion of background to this reform and in particular the significance of the case of *Hussein*.

<sup>78</sup> Cited in Amnesty International 2014, 25.

<sup>79</sup> For discussion of Cyprus, see Pavlou 2021.

International (2014) has ventured the opinion that irregular migrants, faced with the limited scope of civil court proceedings for back pay, could claim a breach of the right to an effective remedy for violation of EU Charter rights (A.47) and the equivalent provisions of the European Convention on Human Right. There is also potential scope, as Alan Bogg and Tonia Novitz (2014), have observed in the common law context of the UK, that migrants may be able to challenge abusive treatment and the absence of an effective remedy on grounds of discrimination. Allegations, they warn, would have to be considered distinct from and not “parasitic on the employment contract” in order to qualify as statutory torts.<sup>80</sup>

### **Core labour rights for all Irregular Migrants alongside Immigration Law Enforcement**

Until relatively recently (prior to the transposition of the EU Employer Sanctions Directive which we shall shortly discuss), the approach of the remaining EU Member States to protecting the rights of irregular migrant workers has been fairly ambiguous. In the absence of express exclusions on grounds of immigration status, labour rights have tended to be *implicitly* regarded as applying to irregular migrants. Oftentimes these labour protections have been implied on the basis of constitutional or statutory non-discrimination clauses, some of which (including, for example, laws in Belgium, Bulgaria, Finland, the Netherlands and Portugal<sup>81</sup>) specifically reference nationality as a prohibited ground on which the state can legitimately discriminate.<sup>82</sup> In few EU countries however has the application of generic national labour laws to irregular migrants been put to the test in court proceedings. An outlying example in this respect is the 2004 ruling of the Greek Supreme Court which considered claims to underpayment and unpaid wages of Albanian irregular workers and therein confirmed the equal applicability of Greek labour laws irrespective of workers' immigration status. Similarly, the ECJ ruling in the *Tümer* case<sup>83</sup> on the transposition of the EU Insolvency Directive into Dutch law has resulted in an explicit policy from the Government of the Netherlands that irregular migrants who are owed compensation in cases of employer insolvency can exercise their rights under Dutch civil law to recover monies from the Employee Insurance Schemes Implementing Body.<sup>84</sup>

Given that the majority of EU countries operate civil law legal systems, they do not (relative to the common law countries discussed) face the same intractable problems of contract illegality acting as a bar to the protection of irregular migrant workers' fundamental rights. That said, even in civil law countries, the illegal character of the contract, can be problematic for enforcing certain types of labour rights.<sup>85</sup> In Sweden, for example, the principle of *pactum turpe* or “immoral contract” which would render an employment contract with an irregular migrant null and void, appears to have been circumnavigated to allow the delivery of labour rights protections relating to pay and conditions pursuant to public law duties.<sup>86</sup> Contractual illegality however continues to be an obstacle for protecting against dismissal from employment. It remains the case in Sweden that an irregular migrant

<sup>80</sup> Bogg and Novitz 2014, 367.

<sup>81</sup> For example, despite the fact that the Portuguese Constitution (Article 59.1) guarantees core labour rights without discrimination on grounds of citizenship or place of origin, the Labour Code in Portugal provides *equal treatment* only for foreign workers who are lawfully employed in the state in full conformity with immigration and contractual requirements (See Law No.7/2009 of 12 February, Articles 4 and 5 of Chapter II, “Application of Labour Law.” For text in English see: [https://www.macedovitorino.com/xms/files/Labour\\_Code\\_Com\\_CAPA.pdf](https://www.macedovitorino.com/xms/files/Labour_Code_Com_CAPA.pdf)

<sup>82</sup> See De Schutter 2016, 89-90.

<sup>83</sup> Case C-311/13, *Tümer*, [2014], EU:C:2014:2337

<sup>84</sup> For discussion see PICUM 2020, 31.

<sup>85</sup> See Pavlou 2021 for a discussion of the illegality doctrine, especially in Spain, Sweden and Cyprus see. See also ILO, 1999 which notes that, in Belgium, where the legislation on employment injury compensation is not governed by law of contract but by public policy, the illegality of contract between the employer and irregular migrant worker does not undermine the employment relationship for the purpose of claiming compensation.

<sup>86</sup> For a legal analysis of the Swedish case see Inghammar 2010 and also Selberg 2014.

worker cannot be reinstated in *illegal* employment, regardless of the unfairness or illegality of the grounds of dismissal.<sup>87</sup> Admittedly, the lack of documented legal challenges taken by irregular migrant workers makes it difficult to assess the operation of these rights protections in practice.

### **Right to Back Pay and the Employer Sanctions Directive**

The introduction of the EU Employers Sanctions Directive 2009/52/EC along with Member States' steps to transpose the Directive have arguably been the most significant developments of recent times in moving national laws towards an *explicit* articulation of *core* labour rights protections for irregular migrant workers. Simultaneous with promoting labour justice, the Directive has however substantially strengthened immigration law enforcement measures. In labour rights terms, the focus of the Directive has been on the recovery of outstanding wages, including compensation for insurance contributions, as stipulated in Section 6. A commonly cited figure of the 2017 EMN Report puts at 20 the number of EU Member States who currently make provision for back pay.<sup>88</sup> Despite its frequent use as a reference,<sup>89</sup> this particular EMN report did not contain contributions from national contact points in Denmark, Lithuania, Poland, Portugal or Romania. With the exception of Denmark, these four remaining countries are all known to have taken steps to implement, inter alia, section 6 of the Directive, which brings to 24 the total number of countries who provide rights to recover back pay from employers.<sup>90</sup> Denmark and Ireland exercised their rights to opt out of the Directive.

Owing to the overall intended aims of the Sanctions Directive, the recovery of back payments has been envisaged against the context of immigration control. Return of irregular migrants is in fact a key underlying premise of the Employer Sanctions Directive which identifies its core objective as being "*to counteract illegal immigration by acting against the employment pull factor.*"<sup>91</sup> Accordingly, many member states (e.g. Poland and Portugal) have pointedly legislated for back pay in their immigration rather than labour laws. The Employer Sanctions Directive has further tightened the link between rights protection and deportation, by requiring Member States to legislate to ensure that offending employers pay for the costs of both the return of irregular migrants and any costs associated with the transfer of outstanding wages overseas.

In terms of the effectiveness of rights protections, questions have been raised, including by the European Commission, over the viability and adequacy of mechanisms in place at national levels to make a reality of back payment provisions.<sup>92</sup> The FRA reports that not a single EU Member State has a centralized data system with information on labour justice complaints taken by or on behalf of irregular migrants and that while data may be recorded by individual courts, inspectorates and trade unions, it is mostly not disaggregated by immigration status.<sup>93</sup> The data that can be accessed indicates that few actions for back pay have been pursued by irregular migrants since the transposition of the Directive. Relevant data provided by the Austrian authorities, for example, reports that out of the 38 successful cases of compensation for outstanding wages over the period 2017-2019, four or five cases resulted in non-payment due to employers declaring bankruptcy or having absconded. Such a situation makes something of a fiction of the rights of irregular migrant workers in cases of employer insolvency (as

<sup>87</sup> Ibid. of contracts which breach public law duties.

<sup>88</sup> EMN Synthesis Report 2017.

<sup>89</sup> Cited for example in European Commission 2021b, 11; also in FRA 2021, 15.

<sup>90</sup> For Poland's transposition see

[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=92272&p\\_country=POL&p\\_count=1531&p\\_classification=17&p\\_classcount=40](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=92272&p_country=POL&p_count=1531&p_classification=17&p_classcount=40) and discussion in "Country Factsheet: Poland 2012" EMN, European Commission.

<sup>91</sup> Directive 2009/52/EC, paragraph 36.

<sup>92</sup> European Commission 2021b.

<sup>93</sup> FRA 2021, 15.

derived from interpretations of the ECJ judgment in the *Tümer* case), and it raises the question of the extent to which national governments are under a duty to make available state funds to compensate migrants in such circumstances. Austria is not among the ten EU Member States who currently operate state compensation funds for irregular migrant workers who cannot otherwise recover back payments from employers.<sup>94</sup>

### **Crimes of Labour Exploitation and the Protection of Rights**

What appears to be a further positive 'rights protection' development across Member States is the enhanced range of criminal offences that has been introduced in the course of national transpositions of Article 9 of the Employer Sanctions Directive. According to data gathered for the FRA's 2015 report on Severe Labour Exploitation, all 25 EU member states who signed up to the Directive have made it a criminal offence under national legislation for employers to knowingly employ irregular migrant workers on at least one of the five grounds in Article 9(1)(a)-(e).<sup>95</sup> 20 EU Member States have elaborated national laws which explicitly criminalise irregular migrant employment in the A9(1)(c) category of "particularly exploitative conditions", while 6 countries considered that such aggravated offence was sufficiently captured by legislation governing the trafficking of human beings.<sup>96</sup>

There is considerable doubt however about the extent to which these measures have improved or are likely to lead to improvements in rights protection in practice for irregular migrants. Italy and Sweden are examples of two EU Member States that created new criminal offences on the back of the Directive; in the case of Italy, employment under "exploitative conditions" was added as an aggravating factor to the existing criminal offence of employing irregular migrants under the so-called 'Rosarno Laws',<sup>97</sup> while in Sweden a new criminal offence of human exploitation (*människoexploatering*) was added, in 2018 to the Swedish penal code.<sup>98</sup> Amnesty International has been strongly critical of the narrow, and ultimately limiting, definition of "extremely exploitative conditions" adopted under the Italian Rosarno Laws and of what they regard as the unreasonable requirement that irregular migrants fully co-operate in criminal proceedings in order to be eligible for a six month (renewable) temporary protection permit.<sup>99</sup> Sjodin's legal analysis of Sweden's new laws has also questioned the benefits for irregular migrants, pointing out that the higher burden of proof in the criminal law may make it difficult for plaintiffs (who often lack documentation linking their status to the employer) to establish sufficient evidence of "human exploitation" and that unsuccessful criminal proceedings may rule out the ability of applicants to pursue a civil law action. Summing up some of his concerns, Sjodin concludes:

*"The difference between labour law and the crime of human exploitation is that the latter focuses on the perpetrator and not the subject of the exploitation, i.e. the person who has performed the work. His or her situation is in many cases not bettered by the fact that someone is sentenced to imprisonment."*<sup>100</sup>

<sup>94</sup> FRA 2021, 21, identifies the existence of state compensation funds to compensate irregular migrants for back pay in Belgium, Czech Republic, Finland, France, Germany, Malta, the Netherlands, Portugal, Romania and Spain.

<sup>95</sup> FRA 2015, Annex 3.

<sup>96</sup> FRA 2021, 35, citing FRA 2015, noted that six EU Member States (Belgium, Estonia, Finland, the Netherlands, Romania and Sweden) considered that their national legislation on trafficking in human beings covered Article 9 (1) (c) of the directive.

<sup>97</sup> Legislative Decree No.109

<sup>98</sup> See Brottsbalken SFS 1962:700.

<sup>99</sup> Amnesty International 2014, 11-12. The report notes that the requirement to co-operate in proceedings was not stipulated by the Employer Sanctions Directive and runs contrary to accepted standards of treatment for victims of trafficking and abuse.

<sup>100</sup> Sjodin 2021, 545.

A review of relevant case law by the FRA shows that while in 18 EU Member States, irregular migrants have taken up proceedings on grounds of labour exploitation and/or trafficking, in general terms, the number of cases is low.<sup>101</sup> The FRA further found that no such cases had been documented in the Czech Republic, Bulgaria, Hungary, Lithuania, Poland, Romania, Slovenia or Slovakia.<sup>102</sup> This is despite reports of extreme labour exploitation in these countries.<sup>103</sup> In respect of Slovakia for example, a 2018 research report has drawn attention to the absence of a precise definition of “labour exploitation” in Slovakian laws, and it provides evidence to suggest that irregular migrants detected in the process of labour inspections are not typically regarded as victims of labour exploitation but rather as workers without valid residence permits and due for deportation.<sup>104</sup>

### **Obstacles to Labour Justice in EU Member States**

We have shown that the EU has had a powerful influence on the mode in which the core labour rights of irregular migrant workers have been articulated in national laws. Legal traditions at the national level and associated rules also play a major role in determining the rights that irregular migrants can claim and enforce in member states. The analysis has made clear that immigration laws as well as legal principles of particularly common law but also civil law countries, generate frameworks of “illegality” which are in tension with many national law measures aimed at defending the fundamental rights of irregular migrant workers. These effects constitute obvious structural- and individual-level obstacles to justice. Above all, if exercising rights results in a virtually guaranteed one-way ticket back home, few migrants will be inclined to take action, preferring, where possible to change employment and forego their rights.<sup>105</sup>

According to a 2020 report on access to justice by PICUM, it is not standard practice in any of the 15 EU Member States within its study for judges or court employees in civil courts and employment tribunals to alert immigration authorities of labour rights claims (including proceedings for back pay) by irregular migrant workers.<sup>106</sup> It is conceded that such reporting may happen on occasion in practice and Germany is an example of an EU Member State which explicitly imposes a duty on court or tribunal officials to report irregular labour migration to the relevant authorities, including in proceedings relating to back pay.<sup>107</sup> It is also understood that in countries, such as Ireland, Germany and Sweden where irregular employment is a criminal offence both for the migrant *and* the employer, irregular migrant workers are more hesitant to bring legal proceedings.<sup>108</sup> Indeed, the documented chilling effect of the criminal status of irregular labour migration was among the reasons for Amnesty International’s long-standing (and ultimately successful) campaign calling for redesignation of “illegal entry and stay” from a criminal to an administrative offence in Italy.<sup>109</sup>

We cannot of course attribute all labour justice obstacles to tensions between labour rights protections and illegality issues. There are many other well-documented reasons for why irregular migrants may be reluctant or ill-equipped to seek redress (legal or otherwise) in cases where their labour rights have

<sup>101</sup> FRA 2021, 36.

<sup>102</sup> Ibid at 36, see figure 5.

<sup>103</sup> See, for example, Keryk 2018.

<sup>104</sup> Chudzickova and Bargerova 2018.

<sup>105</sup> See, for example, Stubik 2014.

<sup>106</sup> PICUM 2020, 22.

<sup>107</sup> See FRA 2011 and Twigg et al 2021. PICUM 2020 suggests that this duty is not adhered to in practice in Germany.

<sup>108</sup> FRA 2021.

<sup>109</sup> Amnesty International 2014. The report noted that in April 2014 the Italian Parliament adopted Law 67/2014, delegating the government to abrogate the crime of ‘illegal entry and stay’, turning it into an administrative offence.

been violated.<sup>110</sup> Such reasons, which are a mixture of structural and individual level factors, include: a lack of awareness of national laws and fundamental rights; language difficulties; bureaucratic stipulations; costs and duration of legal action; and lack of confidence in the fairness of proceedings.<sup>111</sup> As we will discuss in section 4, there can also be important economic dynamics and incentives, most obviously the perceived over-riding need to continue working in the host country, that can discourage irregular migrant workers from seeking redress in cases of violations of their rights in and beyond the labour market. The Employer Sanctions Directive has sought to address certain structural barriers to justice by requiring Member States to: confront the problem of liability avoidance that can arise from the sub-contracting employment chains in irregular migrant recruitment;<sup>112</sup> to enable interested third parties (typically trade unions and national human rights institutions ) to join, or act on behalf of irregular migrants in legal proceedings; and, in cases of criminal proceedings against an employer, to make available temporary protection permits for affected migrants for the duration of labour justice proceedings. As we shall later discuss, these measures have been adopted to varying degrees across EU Member States.

While, it is to a certain extent inescapable, the tension between protecting the rights of irregular migrant workers and enforcing immigration laws, there is nonetheless a range of measures that states can take to render more meaningful migrants' fundamental rights that are guaranteed on paper. We look now at three key mechanisms: state efforts to support the right to organise and trade union initiatives for irregular migrants; labour inspectorates; and national human rights institutions.

### 3.2.2. Role of Member States in Promoting the Right to Organise and to Collective Action

The value of solidaristic action of workers needs no introduction, so embedded is it in the social rights and labour structures of European states and societies. Drawing on the resources of trade unions and established frameworks of industrial action may be of potentially significant benefit to irregular migrant workers in their attempts to realise their core labour rights.<sup>113</sup> The state has thus an important facilitating role to play in upholding the fundamental rights of irregular migrant workers to organise and engage in collective action.

The rights to organise and take industrial action are guaranteed in the constitutions and national laws of all 27 EU member states. In the absence of legislation or case law to the contrary, the working assumption is that these rights apply in equal measure to irregular migrants as to citizens. Running counter to this assumption however was the case of Spanish immigration legislation introduced in 2000<sup>114</sup> which restricted the rights of irregular migrants in Spain to, inter alia, freedom of assembly and association, the right to unionise and the right to strike. In a ruling of 2007, and drawing on arguments based on the importance of safeguarding human dignity, Spain's Constitutional Court upheld the entitlement of irregular migrants to defend their fundamental and labour rights through industrial action.<sup>115</sup> Effective from 2009, the Spanish Parliament subsequently passed legislation to remedy the

<sup>110</sup> For a discussion of the reasons impeding labour justice initiative by migrants in Czech Republic, Hungary, Poland, Romania and Slovakia, see Ed. Stubik 2014 "Unprotected: Migrants Workers in an Irregular Situation in Central Europe."

<sup>111</sup> See FRA 2011 and PICUM 2020.

<sup>112</sup> Article 8 of the Directive. See, for example, the transposition of such measures in the relevant laws of the Czech Republic (see FRA 2021, 21), in the 2012 amendments to Romania's labour laws (see: OHCHR, "Relevant Information on the Protection of Human Rights of Migrants in Romania") and in Italy (FRA 2021).

<sup>113</sup> See, for example, PICUM 2005.

<sup>114</sup> Organic Law 8/2000, of 22 December 2000, on the reform of Organic Law 4/2000, of 11 January 2000, on the rights and freedoms of foreigners in Spain and their social integration.

<sup>115</sup> See Rodriguez and Rubio-Mariá 2011 for a detailed discussion of the reasoning of the Constitutional Court.



labour rights of irregular migrants and provide treatment equal to citizens in regard to the right to join trade unions and take collective action.

The assumption that irregular migrants have rights to organise and take collective action is inbuilt in Article 13 of the Employer Sanctions Directive which calls on signatories to the Directive to make provision to enable trade unions to act as intermediaries between irregular migrants and employers in the bringing of complaints, and also as representatives on behalf of migrants in judicial and administrative proceedings. The majority of Member States, with the exception of Italy, Finland, Slovenia and Malta, have given effect to these measures of the Directive,<sup>116</sup> and union involvement has been identified as a critical factor in making effective the rights protections of the Directive.<sup>117</sup> States have taken measures, in accordance with Article 13(3) of the Directive, to ensure that in providing support services, trade unions do not fall foul of the offence of “facilitating” irregular migration and that they may operate without any requirement to report irregular migrants to the authorities.

The involvement of trade unions as key actors in enforcing the labour rights of irregular migrant workers is therefore one of the few feasible and effective mechanisms by which irregular migrants can exercise their rights in a way that is relatively insulated from immigration controls. Being neither agents of law enforcement nor of the state but with a legitimate mandate to defend the interest of workers, trade unions may operate as an important buffer between action to safeguard labour justice and measures to maintain the integrity of immigration laws and policies. Union membership or incorporation has been critical to the ability of irregular migrants to exercise their rights of protest, strike action and lock-in or occupation in a way that provides them with relative protection against possible police arrest, detention and deportation. The numerically large and politically visible industrial actions taken between 2008-2010 by irregular migrant workers in Paris with the support of French Union CGT, are an important illustrative example of the effective exercise of labour rights in the EU.<sup>118</sup> In more recent years however, organised demonstrations and occupations of symbolic public buildings in France have led to the detention of migrant workers for identity and immigration checks by the police.<sup>119</sup>

Much as there is potential for a constructive and mutually beneficial alliance between irregular migrant workers and trade unions, certain practical and complex structural obstacles need to be addressed and resolved. Besides the obvious difficulties associated with ensuring that migrants are aware of and can access trade union support, a significant challenge for irregular migrant workers in seeking such support is to overcome the fear of employer reactions which may result in loss of employment (and associated housing) or further criminal reprisals. The 2013 case of *Chowdury and others v. Greece*,<sup>120</sup> where private armed guards opened fire and injured 30 of 42 irregular Bangladeshi agricultural workers protesting against severe labour exploitation graphically illustrates the threat to life that can come of workers’ attempts to organise. In this case the Greek government was held liable for failing to enact laws that would adequately protect individuals against trafficking and forced labour. In a similar vein, newspapers reported the murder, on 3<sup>rd</sup> June 2020, of a Pakistani agricultural worker who had been employed in Italy for five years and who, according to police reports, was stabbed to death in central

<sup>116</sup> FRA 2021, 14. See Amnesty International 2014 for a critical review of Italy’s failure to allow representative and support from third parties.

<sup>117</sup> FRA 2021.

<sup>118</sup> See Kahmann 2015. At its peak, industrial action involved almost 7000 workers and was a significant development in the relationship between established French trade unions and the “sans papiers” movement. See discussion also in Selberg 2014.

<sup>119</sup> <https://www.lefigaro.fr/flash-actu/occupation-du-pantheon-21-sans-papiers-places-en-retention-20190713>

<sup>120</sup> *Chowdury and others v. Greece*, Application No.218841/15, 30 March 2017.

Sicily for protesting against gangmasters who were withholding half of the earned wages of farm workers.<sup>121</sup> Intimidation and sanctioning by employers of migrant workers who complain about employment conditions is not a phenomenon reserved to irregular migrants but can equally affect migrants on regular work permits.<sup>122</sup> Increased knowledge of such intimidation and violence raises the onus on states to enhance their efforts to provide an environment in which workers can safely organise and defend their labour rights.

On the part of unions, there are natural limits to the extent to which they may help deliver labour justice for migrant workers in an irregular situation. It has been the experience of trade unions in Sweden for example, that while unions have had some success in mediating between employers and irregular migrants to recover payment of outstanding wages, they have not met with any success at reinstating individuals in employment.<sup>123</sup> This is essentially the 'illegality bind'; unions cannot condone, let alone endorse, irregular employment and simultaneously maintain a commitment to the integrity of labour standards and regulations which they themselves have, in many countries, been central in developing.<sup>124</sup> In the spirit both of pragmatism and compassion, trade unions have found limited ways to manage these dilemmas<sup>125</sup> and the current stance of the European Trade Union Congress (ETUC) is generally one of positive embrace of the rights of irregular migrant workers.

### 3.2.3. Labour Inspectorates and Effective Protection

Labour inspectorates would seem to be a crucial tool in the repertoire of state instruments for defending, among other things, the labour rights of irregular migrant workers. The mandate of inspectorates is typically to monitor labour practices, uphold labour standards and make recommendations for improvements in law and policy. In the context of what we might consider as a rights protection role, conflict arises when irregular employment – either in the sense of undeclared work or employment outside of immigration law – is itself a breach of labour standards. Conflict is pronounced when the labour inspectorate has the duty to take action to enforce that irregularity not only vis-à-vis the employer but also vis-à-vis the offending employee. In addition to fines or other sanctions, enforcement action might include referral of the offences to the police and/or immigration authorities.

The extent to which inspection is a function of law enforcement is governed by the national laws of Member States. Whether or not employment of a foreign national without the required immigration permissions is an infringement of national labour laws, immigration laws or both, will thus determine the actions of the inspectorate. In the Czech Republic, for example, the State Labour Inspection Office has a duty to enforce the Employment Act which covers both undeclared employment and employment that contravenes immigration laws.<sup>126</sup> Indeed only in five EU countries - namely, Sweden, Spain, Greece, Bulgaria and Austria – do labour inspectorates not report irregular immigration status as a matter of either law or practice.<sup>127</sup> Even amongst these five countries however, labour inspectorates are known to engage in the detection of irregular migrant workers via routine residence

<sup>121</sup> See Guardian article "Brutal Deaths of Exploited Migrants Shine a Spotlight on Italy's Farms": <https://www.theguardian.com/global-development/2020/jul/13/brutal-deaths-of-exploited-migrants-shine-a-spotlight-on-italys-farms>

<sup>122</sup> See discussion in De Schutter 2016, 94 and 98, of the case *17 complainants v Eamonn Murphy t/a Kilnaleck Mushrooms* 2006.

<sup>123</sup> See Mešic 2017, especially pages 312-315.

<sup>124</sup> See, e.g. Marino, Penninx and Roosblad 2015 and Meardi, Simms and Adam 2019.

<sup>125</sup> See discussion in Selberg 2014.

<sup>126</sup> European Platform Tackling Undeclared Work 2021, 58.

<sup>127</sup> FRA 2021, 28.

status checks on all third country nationals (as is the practice in Austria, Spain and Greece<sup>128</sup>) or, as is the case in Sweden, in the course of joint agency inspections aimed at identifying victims of trafficking, irregular labour migration and labour exploitation.<sup>129</sup>

According to research by PICUM, inspection bodies in 13 of 15 EU Member States are competent to receive complaints from irregular migrant workers regarding issues such as outstanding or underpaid wages, working hours or labour conditions.<sup>130</sup> At their most effective, inspectorates can provide remedies on the basis of out of court mediation between the irregular migrant worker and employer in cases where violation of workers' labour rights has been identified or claimed in the course of the inspection. In this respect, the ILO has drawn attention to the 'good practice' of the Belgian Labour Inspectorate which has the power to issue on-the-spot payments, in order to compensate migrant workers for unpaid wages.<sup>131</sup> Calculation of the amount owed to the worker is carried out by the labour inspectors from the Social Legislation Inspectorate and in cases of dispute this figure is settled (in accordance with the terms of the Employer Sanctions Directive) at a minimum of three months of pay at the statutory minimum wage.<sup>132</sup> In countries where the inspectorates lack authority to negotiate a settlement, they may refer the case to the relevant legislative body, in which instance evidence from the inspection provides a robust basis for subsequent proceedings taken by or on behalf of migrant workers.<sup>133</sup>

Irregular migrant workers are not always the immediate beneficiaries of labour inspections as illustrated in the following two case studies from Slovakia and Germany (see Boxes 1 and 2 below). It would appear that in neither case were the apprehended migrants treated, even simultaneously, as potential victims of crime. In the Slovakian context it was observed that victim status is only regarded as applicable in the case of human trafficking for the purposes of labour exploitation.<sup>134</sup>

Box 1: Example of state enforcement measures that prioritise immigration controls over labour protections, Slovakia

"In October 2017, 62 migrant workers from Ukraine (27), Serbia (23), Macedonia (8) and Bosnia and Herzegovina (4) were detained by the Foreign Police. They worked for and were found in a Korean company operating in the town of Šála as a subcontractor for several other companies producing electronics. The police received information from the Nitra Labour Inspectorate on illicit work in the said company. All workers were deported for residing unlawfully in the territory of the Slovak Republic. The reports said nothing about the conditions in which they worked. It was only mentioned that they had no contracts with the said company since they were employed by a temporary employment agency."

Source: Excerpt from Chudzickova A. H. and Bargerova Z., 2018, pages 11-12

<sup>128</sup> EMN 2017.

<sup>129</sup> European Platform Tackling Undeclared Work 2021, 45.

<sup>130</sup> PICUM 2020, 32. The countries listed were: Belgium, Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom.

<sup>131</sup> ILO 2021.

<sup>132</sup> Ibid. 6.

<sup>133</sup> See Stubik 2014 where it is noted that data from inspections has provided useful for court proceedings taken by irregular migrants workers in central European countries. See also discussion in PICUM 2020

<sup>134</sup> Chudzickova and Bargerova 2018, 13.

BOX 2: Example of state enforcement measures that prioritise immigration controls over labour protections, Germany

"In August 2019, the German Customs Authority's Financial Control of Undeclared Work Unit (FKS) carried out checks in a Berlin-based company which was allegedly employing over 120 people from Albania, Kosovo and Serbia irregularly. The employer was suspected of human trafficking for labour exploitation, of having forged student enrolment documents to obtain for the workers short-term working visas for students, and of paying less than one third of the minimum wage in the construction sector and requiring the workers to work extreme over-time. Despite the investigation into trafficking in human beings, the people identified during the workplace inspection were not provided any of their rights as potential or presumed victims. They were made homeless by the control, and only provided accommodation for a few days. Their passports were confiscated, and they were prevented from leaving the country for weeks, forcing them to miss doctor appointments and university exams in their country of origin. They were issued 2-year entry bans, and no action has been taken to remedy the labour abuses they experienced."

Source: Excerpt from PICUM 2020, p. 29.

From a rights perspective, the effectiveness of labour inspectorates cannot of course be judged exclusively on what they may deliver for irregular migrant workers in the immediate term but should also be evaluated in terms of their *protective function* in the sense that they may be effective in deterring employers from future exploitative practices. Needless to say that the protective value of inspectorates will depend on the quality and quantity of inspections as well as the deterrent effect of appropriate employer sanctions such that they can be viewed as a credible liability for employers. Existing data on inspections across EU Member States is not confidence-inspiring with the European Commission (2021) recently concluding that: "*The number of inspections carried out in the current system is unlikely to dissuade employers from hiring irregular migrants.*"<sup>135</sup> This is in line with earlier recommendations of the FRA calling on many Member States to increase their overall rates and frequency of inspections.<sup>136</sup>

Survey data supplied by Member States to the European Commission are incomplete in regard to the numbers of inspections carried out in the years 2019 and 2020 and which yielded findings of irregular migrant employment.<sup>137</sup> It appears from the rates of non-responses from Member States that Covid restrictions had a major impact on the numbers of inspections conducted in 2020. The same data showed that, over the period 2019-2020 inclusive, only a fraction of businesses was inspected although this varied across Member States. The European Commission reports that inspections were least comprehensive in Bulgaria, Estonia, France, Latvia, the Netherlands and Sweden where less than 1% of employers in all sectors were subject to checks. In around half of EU Member States, inspections covered between 1-10% of employers, while the range of inspections was greatest in Slovenia and Slovakia where it was reported that over 30% of all employers underwent inspections. Despite the significantly higher rate of reported inspection in Slovakia, a recent report by Caritas Slovakia noted the almost entire absence of labour inspections in rural areas where many irregular migrants are employed in forestry and agricultural industries and often on a seasonal basis.<sup>138</sup> The absence of inspections in many Member States from the onset of the Covid pandemic would imply that irregular

<sup>135</sup> European Commission 2021b, 15.

<sup>136</sup> FRA 2018.

<sup>137</sup> European Commission 2021b, 15-16. See also 27-28, Tables 3 and 4.

<sup>138</sup> Caritas Slovakia 2019, 35.

migrants were less well protected over this period and hence more likely to be subject to exploitation given the absence of the regulating and deterrent effect of inspections.

Irregular migrants themselves can contribute to the protective dimension of labour inspectorates by coming forward to report abuses or make complaints. According to PICUM, complaints can be received directly from migrant workers or their representatives in at least 13 EU Member States<sup>139</sup> and we can add further cases to this total given what we know about the positive practices in this regard from many Central and Eastern European Member States which were not included in the PICUM study.<sup>140</sup> We can say with some confidence that complaints to labour inspectorates would increase if more “safe reporting channels” were made available to irregular migrants workers.<sup>141</sup> Mechanisms, commonly referred to as ‘firewalls’, that protect the anonymity of the complainant or which guarantee not to share personal data with other law enforcement agencies are likely to encourage such reporting. In this regard, the policy of the Netherlands which provides for a “free in, free out” promise for the reporting of crime to law enforcement agencies is something that could potentially raise irregular migrant workers’ confidence in the integrity of reporting processes.<sup>142</sup>

NGOs and trade unions have a crucial role to play in supporting irregular migrant workers by providing them with information on labour inspectorate functions and, in countries where it is permitted, to act as an intermediary between the migrant and the inspectors. Overall however it would appear that incentives to report abusive employers are relatively modest. In Belgium, for example, a limited concession to irregular migrant whistleblowers, is the guarantee of a dignified return procedure, without the need for immigration detention.<sup>143</sup>

### 3.2.4. The Scope of National Human Rights Institutions

National human rights institutions (NHRIs) are key actors in monitoring and upholding the human rights commitments of Member States agreed at national, European and international levels. The scope of NHRIs vary from traditional ombudsman-type services composed primarily of the processing of individual complaints and strategic litigation, through to inspections and public inquiry functions, as well as to more wide-ranging activities in research and policy development. A gold standard for national human rights institutions has been established at the level of the United Nations by the Paris Principles which, among other things, require NHRIs to “*promote and ensure harmonization of national legislation with the international human rights standards to which the state is a party*”, to be independent of government (including financial independence) and to be established on a statutory basis.<sup>144</sup> In all but 5 EU members states (Czech Republic, Estonia, Italy, Malta and Romania) NHRIs are either fully (16 countries) or partially (6 countries) Paris Principles compliant.<sup>145</sup> As part of the Paris principles accreditation process NHRIs are peer reviewed and subject to five-yearly assessments which include evaluation by civil society organisations.

In the context of EU Member State efforts to promote the fundamental rights of irregular migrant workers, NHRIs should be important allies. Most have mandates to combat all forms of discrimination with particular attention to racial discrimination. Unlike labour inspectorates or trade unions whose assistance to irregular migrant worker (as we have just discussed) is often compromised by laws or by

<sup>139</sup> PICUM 2020. The report only reviewed the practices of 15 EU countries, excluding most Eastern European member states.

<sup>140</sup> See Stubik 2014

<sup>141</sup> See EMN 2021, 24-25 on safe reporting channels in Austria, Belgium, France, Luxembourg, Poland and Slovakia.

<sup>142</sup> See European Commission 2021b.

<sup>143</sup> van Nierop 2021, 46.

<sup>144</sup> United Nations General Assembly 1993.

<sup>145</sup> FRA 2020b, 10.

competing interests, NHRIs have in many ways the 'luxury' and privilege of being exclusively concerned with human rights protection and promotion. Typically NHRIs are very well networked with the key national non-governmental organisations, academics and legal practitioners operating in the broad field of human rights, social justice and civil and political liberties.

In the particular area of labour justice for irregular migrants the role of NHRIs has however been limited. For many NHRIs attention has focused on scrutinising service provision for irregular migrants, while others are concentrated on issues of immigration detention, asylum, border controls and return processes.<sup>146</sup> A 2019 report of the European Network of National Human Rights Institutions on Migrants' Access to Economic and Social Rights found that the greatest challenges facing NHRIs working in the migration field were underfunding and, in some cases, the effect of public and political attitudes to migration issues at the national level which impeded their work (also see our discussion in section 4).<sup>147</sup> There is clearly scope for exploring the ways in which, particularly those NHRIs who have the capacity to receive individual complaints, including from irregular migrants, may contribute to better fundamental rights (particular labour rights) outcomes for irregular migrant workers.<sup>148</sup>

### 3.2.5. Rights Protections Offered to Irregular Migrants at Municipal and Regional Government Levels

Thus far, we have critically discussed the key measures taken by Member States at the level of central government to uphold the fundamental rights of irregular migrant workers. It is clear however that Member States' duties in respect of fundamental Charter rights do not begin and end with central government actors but extend also to regional and local state authorities within each Member State.<sup>149</sup> What remains to be considered therefore is whether and how the policies and practices of sub-national state actors (with varying levels of devolved administrative, fiscal and legal competences across EU Member States) are capable of filling the 'protection gaps' in laws, policies and practices developed at central government levels. This has been a long-standing issue and area of research. The "sanctuary cities" phenomenon in the United States, where individual US states provide enhanced rights protections for irregular and other migrants independent of certain constraints of US federal laws on immigration control and enforcement, has animated parallel debates in Europe and elsewhere, and prompted more research on the scope of sub-national governance for promoting migrants' rights.<sup>150</sup>

Despite considerable interest in how local and regional state actors might exercise their discretions to guarantee minimum rights standards for irregular migrant workers and improve public service outcomes for affected communities in Europe,<sup>151</sup> evidence suggests that only a minority of municipal and regional authorities in EU Member States have developed explicit policies that seek, in part, to address "protection gaps" in national legislative and policy frameworks relating to the rights of irregular migrants. Recent research by Kaufmann et al (2021, 1) which claims to provide the first "systematic collection and descriptive analysis of urban policy in support of irregular migrants in Europe's 95 largest cities", finds that 69 of the 95 cities included in the study (just over 70%) have no official policies to integrate irregular migrants in standard welfare services or to otherwise enable their access to such services. This includes the French, Greek, Portugese and Eastern European cities covered in the study. Amongst the 26 European cities which were identified as having formal local policies for basic

---

<sup>146</sup> Kämpf 2018.

<sup>147</sup> ENNHRI 2019.

<sup>148</sup> ENNHRI 2020,

<sup>149</sup> European Union 2007. See "explanation on Article 51 – Field of Application".

<sup>150</sup> On "sanctuary cities" see, for example, Collingwood and Gonzalez O'Brien 2019.

<sup>151</sup> See Spencer and Delvino 2019.

rights provisions for irregular migrants, the same research found a clustering of support in cities in Germany, Spain, Italy, Sweden and the Netherlands.<sup>152</sup> Of these 26 cities, 24 offer support in the form of access to services in the areas of healthcare, social welfare, housing and/or legal advice (either de facto or migrant-specific support), while only 5 cities provide such services through mainstream channels on the same basis as for persons with legal permission to reside/stay. Four of the latter five cities are located in Spain where municipal authorities may exercise their devolved powers to enable irregular migrants to register for state social welfare services (under the *Padrón* municipal registration system) without satisfying onerous residence and/or legal requirements. The study by Kaufman et al. (2021) includes an online appendix with short portraits of all 26 cities that have formulated urban policies in support of irregular migrants.<sup>153</sup>

A lack of devolved administrative and legislative competence appears to be a key reason for why local and regional policy actors fail to do more to remedy deficits in protection frameworks for irregular migrants.<sup>154</sup> Cities or regions with enhanced devolved powers in the area of social welfare may, on grounds of local need, duties or discretions, provide services to irregular migrants in excess of what is prescribed in national laws and policy. When it comes however to the regulation and enforcement of labour standards, including the operation of labour inspectorates and opportunities for legal redress, sub-national authorities lack discretion and are subject to national standards and legislation in this area.<sup>155</sup> This is the case even in EU Member States with federal systems such as that of Germany where, although the Basic Law stipulates that labour laws, civil laws and freedom of association are concurrent competences of State and Federal authorities, such laws are in practice governed entirely by federal legislation.<sup>156</sup> Similarly decentralised labour inspectorates in countries such as Germany and Spain may have discretion over their administrative structures, organisation and funding arrangements but their fundamental scope and regulatory framework are nonetheless determined at central government level<sup>157</sup> in line with ILO guidelines.<sup>158</sup> *National* labour laws and the way in which they interact with national immigration laws thus ultimately determine the parameters of labour justice on paper for irregular migrant workers in EU Member States, notwithstanding the role of local and regional political actors in shaping such national legislation.

It should be noted that the exercise of local or regional discretion in the provision of basic welfare services to irregular migrants could, in certain cases, also result in more rather than less restrictive access to welfare services than mandated at the federal level (e.g. Varsanyi 2011). Furthermore, where local provision does have the effect of delivering social rights protections for irregular migrants that exceed those provided for in national laws and policies, it is not without risks and costs for local authorities. For example, in countries such as Italy and the Netherlands, provision of 'enhanced' services to irregular migrants at city and/or regional levels has brought sub-national actors into conflict with their respective central governments, leading to litigation in domestic courts. While arbitration has often resulted in favour of the devolved government actors and in certain cases has prompted positive

<sup>152</sup> These findings are largely consistent with prior research on European cities. See, e.g. Delvino 2018 and Delvino and Spencer 2020.

<sup>153</sup> See <https://www.cambridge.org/core/journals/british-journal-of-political-science/article/sanctuary-cities-in-europe-a-policy-survey-of-urban-policies-in-support-of-irregular-migrants/A795A814BDAD20F9CC4ED7466453694#supplementary-materials>

<sup>154</sup> See, e.g. Delvino 2018 and Kaufmann et al 2021.

<sup>155</sup> See, for example, EPSU 2012.

<sup>156</sup> ILO 2001.

<sup>157</sup> EPSU 2012.

<sup>158</sup> See ILO Labour Inspection Convention, 1947 (No. 81).

strengthening of the fundamental rights of irregular migrants at the level of national laws,<sup>159</sup> conflict between the various tiers of government can have important political ramifications. In the Netherlands for example, confrontation between the central and municipal governments in regard to the latter's "Bed, Bath and Bread" provision to irregular migrants threatened to rupture the coalition government.<sup>160</sup> There are moreover obvious financial costs of extending public services to irregular migrants in urban centres with large irregular migrant populations, and the terms and conditions of central government funding may constrain the actions of local service providers. Kaufmann et al (2021) found a positive correlation between GDP per capita and formal city policies for irregular migrants which suggests that more affluent cities have greater capacity to support such migrants.

In order to mitigate the risks of political and legal tensions arising between national and sub-national levels of government in regard to the treatment of irregular migrants, local and regional authorities have often indirectly promoted migrants' rights by funding non-governmental organisations to provide core services to this population. While there may be legitimate critiques of "parallel structures" that sit outside of mainstream social services and are used exclusively for the support for irregular migrants,<sup>161</sup> there are also practical gains of this approach for migrants themselves. Trust in non-governmental actors is often higher among irregular migrants and, since contact with NGOs does not present the same reporting risks that arise from contact with state actors, the involvements of third parties is likely to encourage migrants to exercise their rights. Moreover, given the institutional limitations of sub-regional government actors to promote labour justice for irregular migrants, the funding of NGOs to provide sound legal advice and potentially to act as intermediaries in legal or whistleblowing actions against employers, is a valuable and pragmatic step by which local and regional government actors may discharge their duties vis-à-vis the Charter and other international human right standards.

Under the steerage of the Centre on Migration Policy and Society at the University of Oxford, the "City Initiative on Migrants with Irregular Status in Europe" (C-MISE) has, since 2017, aimed at sharing best practices and facilitating policy learning on the role of European cities in promoting the rights of irregular migrants.<sup>162</sup> Drawing on the experiences of 50 cities in 18 European countries, the project profiles the central role of collaborative public and voluntary sector/NGO partnerships in realising fundamental rights for irregular migrants in practice.<sup>163</sup> The initiative also demonstrates the ability of cities to lead national policy developments in the area of migration and rights by detailing how cities have served as important 'testing grounds' for new policy initiatives that have subsequently been implemented at the national level. An example of the latter is the national implementation of the "free in, free out" policy initiative begun by the Amsterdam police which enables irregular migrants to report crime without the risk of detection by state immigration authorities.<sup>164</sup>

### 3.3. Irregular Migrant Workers and Access to Preventive Healthcare

With the focus of European states on public health in a way that has not been witnessed in generations, it seems timely to consider the experiences of irregular migrant workers in accessing health care in EU

---

<sup>159</sup> See, for example, Pannia 2022 and Delvino and Spencer 2014 for discussions of Italian Constitutional Court rulings which upheld inclusive regional government policies on healthcare, accommodation and social assistance for irregular migrants and ruled on the unconstitutionality of national government laws which restricted access to what the court considered to constitute fundamental and inviolable rights.

<sup>160</sup> See discussion in Spencer 2020.

<sup>161</sup> See Buckel 2011.

<sup>162</sup> See website: <https://cmise.web.ox.ac.uk/home>

<sup>163</sup> For discussion, see Spencer and Delvino 2019.

<sup>164</sup> Ibid.



Member States and the effects, if any of the Covid-19 pandemic on their right to health. Despite privatisation of some aspects of healthcare in certain EU Member States, healthcare is essentially a public provision and a public 'good.' Consequently, the case of healthcare rights differs from that of labour rights because, in the former, the state is the primary *provider* (as opposed to simply regulator and enforcer) of the right. This has obvious implications for the ability of irregular migrants to exercise the right to healthcare in practice given their preference to avoid direct interaction with the state on account of their illegal status.

### 3.3.1. Overview of the Right to Access Healthcare on Paper in EU Member States

Article 35 of the EU Charter of Fundamental Rights guarantees to everyone the "*right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices.*" It further provides that "*a high standard of health protection*" is required of states in implementing Union policies. To uphold this right in respect of irregular migrants, Member States are thus obliged to ensure a health service that goes beyond the provision of emergency treatment and ensures, at a minimum, that irregular migrants have access to basic or *primary* medical care, including the treatment of common illnesses, access to standard checks and testing, and opportunities for inoculation against disease.

The results of a 2021 survey of all EU Member States by the European Migration Network indicate that in all but two EU countries, irregular migrants have, on paper, the right of access to emergency and basic healthcare services. Only in Bulgaria and Slovakia is irregular migrants' access to healthcare limited to emergency treatments which is typically defined to include medical attention in childbirth.<sup>165</sup> Fewer than half of EU countries permit migrants access to specialised or secondary healthcare services, and where access is granted this is mostly on a discretionary basis and may be subject to wide variation at regional levels or even local practices within countries. The results of the EMN survey are displayed below in Table 1 and the nature of irregular migrants' rights is shown in comparison to the rights of migrants with legal status (permission to reside or work) in the Member State.

---

<sup>165</sup> See FRA 2011, 81 for scope of emergency services in EU countries.

Table 1: Healthcare rights of irregular migrants in EU Member States, relative to the rights of migrants with permission to stay and/or work

General	Mandatory	Discretionary	No
<b>Healthcare</b>			
Emergency healthcare	<b>Less:</b> FI, FR, T, MT, SI, <b>Same:</b> AT, BE, BG, CY, CZ, DE, EE, ES, HR, HU, IE, LT, LV, NL, PL, PT, SK and NO <b>More:</b>	<b>Less:</b> LU, SE <b>Same:</b> <b>More:</b>	
Basic medical care	<b>Less:</b> BE, FR, IT <b>Same:</b> ES, NL, SE (for children) <b>More:</b>	<b>Less:</b> DE, <sup>262</sup> FI, IE, LU, MT, SI and NO <b>Same:</b> <b>More:</b>	AT, BG, CY, EE, HU, LT, LV, PL, SK
Specialised care	<b>Less:</b> FR, IT, LT <b>Same:</b> ES, NL <b>More:</b>	<b>Less:</b> DE, <sup>263</sup> FI, IE, LU, MT and NO <b>Same:</b> BE <b>More:</b>	AT, BG, CY, EE, HU, LV, PL, SE, SI, SK
Other healthcare services	<b>Less:</b> SE (childbirth care, abortion, maternity care, prevention of spread of contagious diseases) <b>Same:</b> <b>More:</b>	<b>Less:</b> IT, MT (any other necessary healthcare service provided at the discretion of the Medical Officer), NL (no regular healthcare insurance but care providers can appeal for reimbursement) and NO (maternity care) <b>Same:</b> <b>More:</b>	AT, BE, BG, CY, EE, HU, LT, LU, LV, PL, SI, SK

Source: European Migration Network Study, July 2021

In comparing the healthcare rights of irregular migrant workers to the rights of those with legal permission to remain/work, the EMN intends to highlight the ‘positive’ effect of return orders on the rights of migrants.<sup>166</sup> Once subject to return proceedings, migrants who previously were categorized as “irregular” or “illegal” are typically assigned a new ‘legal’ status which opens up access to basic services including health services. In Luxembourg, for example, migrants who cannot be returned because of medical conditions are granted conditional access to treatment for the particular condition.<sup>167</sup> In such situations, the differentiated treatment of regular and irregular migrants underlines the role that illegality plays in the determination of the scope of fundamental rights and it is suggestive of the concerns of many Member States that healthcare rights should not become a “pull factor” in encouraging irregular labour migration.

### 3.3.2. Conditions and Barriers to Realising Healthcare Rights in Practice

#### Costs

Healthcare rights on paper do not of course equate to healthcare rights in practice, particularly where access to the medical service involves costs that are unaffordable to the ‘average’ irregular migrant worker. We cannot therefore meaningfully speak of the “right of access” when access is effectively barred on grounds of unaffordability. Consequently, free services or services that are highly subsidised are critical to enable migrants to realise their rights to healthcare.

A 2020 comparative report by the Center for Reproductive Rights on access to affordable maternal healthcare for irregular migrant women in the EU found that 11 of 27 EU Member States provide irregular migrant women with access to maternal healthcare throughout their pregnancies at no charge or for a state subsidised fee (Belgium, Estonia, France, Germany, Greece, Italy, the Netherlands,

<sup>166</sup> EMN 2021, 7.

<sup>167</sup> Ibid., 21.

Portugal, Romania, Spain and Sweden).<sup>168</sup> In the 16 remaining EU countries healthcare is considered unaffordable, however in 5 of these countries (Bulgaria, Cyprus, Denmark, Ireland and Slovenia) services for childbirth or obstetric emergencies is offered without cost or at a subsidised rate.<sup>169</sup> The findings of this report concur largely with those of the 2011 FRA report on irregular migration and indicate that there has been little change, in the sense of little improvement in the maternity healthcare rights of irregular women over time. The FRA 2011 study also indicates that the same EU countries which charge irregular migrants for maternity services also charge for emergency healthcare, and in some cases, migrants must show proof of ability to pay *prior* to receiving the treatment.<sup>170</sup> In some countries, payment or the amount of payment is determined on a discretionary basis (e.g. Ireland) and in Luxembourg, costs of healthcare may be recoverable from a state fund which explicitly includes irregular, uninsured migrants as potential beneficiaries.<sup>171</sup>

It is notable that in Scandinavian countries with highly developed healthcare systems and comprehensive public health insurance programmes, irregular migrants have had limited access to the range of healthcare services owing to the application of fees. Such laws and policies have, in recent years, been the subject of critique by the UN Committee on Economic, Social and Cultural Rights. In its 2021 Concluding Observations on its report on Finland, the Committee called on the Finnish Government to ensure that both “in law and practice” irregular migrants have equal access as citizens to preventive, curative and palliative health services.<sup>172</sup> Denmark was similarly criticized for restricting access to free healthcare for women and children in an irregular migration situation<sup>173</sup> and concern was expressed about limited healthcare rights for irregular migrants in Sweden.<sup>174</sup>

### **Bureaucracy and Reporting**

Beyond the matter of costs, irregular migrant workers are, in practice, often barred from realising their rights to healthcare in many EU countries, owing to the difficulties of meeting administrative requirements for accessing medical service and/or because of the operation of laws and policies which cause medical service providers to report cases of irregular migration to immigration or law enforcement authorities. For example, it is common practice in many EU countries (i.e. in Italy, Ireland and Spain) that individuals, including irregular migrant workers, must be in possession of a health card or social security number in order to access healthcare.<sup>175</sup> Administrative procedures for accessing health cards typically include proof of identity (normally, a valid passport) and details of permanent residence or a regular address. Some irregular migrants will be unable to meet these requirements and other may be nervous about registering with the state for fear that it will lead to their detection and deportation.

In circumstances where migrants succeed in obtaining the administration documentation necessary for accessing medical services or where such documentation is not required (e.g. in France and the Netherlands<sup>176</sup>), the fear of being flagged up to immigration authorities as a result of using such public services may be reason enough for many migrants to avoid healthcare settings other than in

<sup>168</sup> Center for Reproductive Rights 2020, 18. According to FRA 2011, 76, Sweden and Greece offer services at subsidised fees.

<sup>169</sup> Center for Reproductive Rights 2020, 19 and 33.

<sup>170</sup> FRA 2011, 74-75. Countries who charge for emergency care include: Austria, Bulgaria, Czech Republic, Denmark, Finland, Greece, Hungary, Ireland, Latvia, Poland and Sweden.

<sup>171</sup> *Ibid.* 76.

<sup>172</sup> UNCESCR 2021, para. 42. (E/c.12/FIN/CO/7).

<sup>173</sup> UNCESCR 2020, para.63.E/C.12/DNK/CO/6.

<sup>174</sup> UNCESCR 2016, para. 32 E/C.12/SWE/CO/6.

<sup>175</sup> On Spain see Pace 2011, on Italy see Sanfelici 2021, and Ireland see Polakowski and Quinn 2022.

<sup>176</sup> EMN 2021, 76.

emergencies. Avoiding medical checks and essential treatment can obviously have detrimental consequences for the health of individuals and their families. It can result in substantially higher costs for the host country both in terms of public health and the costs of emergency or life-saving treatment that may have been prevented had routine healthcare been encouraged.<sup>177</sup>

Irregular Migrants' fear of detection and deportation is particularly well grounded in EU countries where health authorities are subject to legal duties to report irregular migration to the authorities. Such reporting duties operate, other than in certain emergency healthcare settings, in Austria, Belgium, Bulgaria, Germany, Estonia, Croatia, Hungary, Lithuania, Latvia and Malta.<sup>178</sup> In Germany, such reporting requirements undermine the rights of irregular migrants to otherwise relatively extensive and mostly free access to emergency and maternity healthcare services and, on a discretionary basis, to certain primary and secondary care. The UN Committee on Economic, Social and Cultural Rights has therefore called on Germany to repeal section 87(2) of the Residence Act (*Aufenthaltsgesetz*)<sup>179</sup> and instate a firewall to ensure that irregular migrants can realise their rights to healthcare.<sup>180</sup>

### 3.3.3. Effects of Crises on Access to Healthcare Rights

Irregular migrants' right to healthcare has been substantially affected by two recent crises of the last two decades: the aftermath of the economic crisis of the late 2000s and the ongoing public health crisis associated with the Covid-19 pandemic. In times of economic crisis, public services including national health systems, are often among the first victims of austerity measures. As we will discuss further in Section 4 of this report, where services come under pressure and are widely perceived to be poorly serving domestic populations, there tends to be reduced political support for public services that serve the needs of 'outsiders', particularly those without legal permission to enter and/or work in the host country.

In the aftermath of the recent global financial crisis, reduced healthcare services for irregular migrants have been widely documented in a number of EU Member States including Spain, Greece and Cyprus.<sup>181</sup> An emergency measure by the Spanish Government in 2012 to withdraw the right to healthcare for irregular migrants has been heavily criticised and led to some of Spain's autonomous regions breaking away from central Government policy to offer regional health cards to affected populations.<sup>182</sup> In mid 2010s the Government of the Netherland took a decision to cease funding translation and interpreting services for migrants in health care-settings which has been lamented by the UN Committee on Economic, Social and Cultural Rights in particular for its potential effect on obtaining informed consent from foreign nationals in respect of medical treatment.<sup>183</sup>

In contrast to the economic crisis, the Covid-19 pandemic has had the reverse effect and, in certain EU Member States and in particular aspects of healthcare, has resulted in increased access for irregular migrants. The OECD reports that access to Covid testing and to emergency healthcare for migrants, including those in an irregular situation, has been made available free of charge in Belgium, Finland, France, Germany, Hungary, Luxembourg, Portugal and Spain.<sup>184</sup> The EMN adds Estonia and Italy to the list of EU countries offering free Covid testing and treatment and notes that Italy has also offered Covid-

---

<sup>177</sup> See FRA 2015.

<sup>178</sup> EMN 2021, 23.

<sup>179</sup> [https://www.gesetze-im-internet.de/englisch\\_aufenthg/](https://www.gesetze-im-internet.de/englisch_aufenthg/)

<sup>180</sup> UNCESCR 2018, para 26 and 27, (E/C.12/DEU/CO/6).

<sup>181</sup> UNCESCR 2018 (E/C.12/ESP/CO/6), 2016 (E/C.12/CYP/CO/6) and 2015 (E/C.12/GRC/CO/2).

<sup>182</sup> See discussion in Hellgren 2015.

<sup>183</sup> UNCESCR 2017, para 36 and 37 (E/C.12/NLD/CO/6).

<sup>184</sup> OECD 2020, 7-8.

19 vaccinations to irregular migrants.<sup>185</sup> Portugal however, which had been much lauded in the media for its measure to grant migrants and asylum-seekers full access to health and social services under a temporary six month initiative,<sup>186</sup> excluded irregular migrants from this enhanced protection.<sup>187</sup>

In other positive developments, duties to report irregular migration to national law enforcement authorities have been temporarily suspended in some member states in order to encourage irregular migrants to access these health services. In Ireland, for example, the Department of Employment Affairs and Social Protection declared a temporary suspension of data sharing between government departments about irregular immigrants and the same message was echoed by the Irish Justice Department stating that it would not proactively seek out information on immigration status of individuals coming forward for medical or social supports.<sup>188</sup>

### 3.3.4. Interventions by Regions and Cities in Healthcare Delivery to Irregular Migrants

As discussed above (S.3.2.4.), it is a growing and significant phenomenon across the EU that regions, cities and municipalities demonstrate a willingness and creativity to step in and fill some of the protection gaps in irregular migrants' rights that have ensued from national states' laws and policies developed at the level of central government. Such initiatives at decentralised levels of government are most typical in the area of service provision – particularly that of healthcare - where regional and local authorities have administrative and oftentimes legislative competence.<sup>189</sup> Decentralised action can be understood as a type of problem-solving response to issues of perceived local need and pressures. In other instances, action may be ideologically or politically motivated such as where there are large discrepancies between central government and provinces or regions within countries.

The following three case studies, in Germany, Spain and Finland, provide illustrative examples of the ways in which regions and cities have taken positive steps to remedy some of the deficits in state measures to protect the healthcare rights of irregular migrants. Such steps have enjoyed success in plugging protection gaps created by reporting requirements, costs of healthcare and central government austerity measures as just discussed.

#### BOX 3: The role of regions and cities in providing healthcare to irregular migrants: Germany

Since 1998, 14 German cities have been involved in providing healthcare, information and support services to irregular migrants through what is known as the “Clearing House” system. Irregular migrants who are reluctant to access medical services because of the operation of immigration reporting duties on service providers, may be referred by the Clearing House to a doctor for free-of-charge treatment. Emergency funds are made available from city budgets to finance these medical costs. Over the period 2012-2018, the Hamburg Clearing House reported that pregnant irregular migrant women constituted one third of all clients.

Source: EMN 2021.

<sup>185</sup> EMN 2021, 25.

<sup>186</sup> See Newsweek Article “Portugal’s Covid-19 Strategy to Treat Immigrants like Citizens is Working”, Da Silva 06/08/20 at <https://www.newsweek.com/portugal-protecting-public-health-amid-coronavirus-pandemic-means-protecting-migrant-health-too-1506817>

<sup>187</sup> Santinho et al. 2020.

<sup>188</sup> Dept. of Justice of Ireland 2021.

<sup>189</sup> See Kaufmann et al 2021.

## BOX 4: The role of regions and cities in providing healthcare to irregular migrants: Spain

Concerned with the effect on irregular migrant populations in Spain of the 2012 central Government austerity measure to withdraw the right to healthcare, some of Spain's regions and cities took initiatives to develop protection measures of their own. Catalonia introduced its own health card which it made available to irregular migrants, and the city of Barcelona created universal access to all municipal services including those involved in the delivery of healthcare services. The city of Cartagena in the Murcia Region declared access to health care for all migrants, regular and irregular. Meanwhile, Getxo in the Basque Country introduced a minimum income for all residents regardless of immigration status in addition to universal healthcare access.

Source: CoE 2019, Hellgren 2015

## BOX 5: The role of regions and cities in providing healthcare to irregular migrants: Finland

The Finnish cities of Helsinki, Espoo and Turku have made available a range of healthcare services to irregular migrants at the same cost as to Finnish citizens. The most extensive services are offered in Helsinki but, since 2017, the cities of Espoo and Turku have decided to offer services to pregnant undocumented migrant women and children. The cities of Helsinki and four other Finnish cities operate a partnership with a charity "Global Clinic" which makes available, free-of-charge, some basic health services and maternity care services for irregular migrant women.

Source: Finnish Institute for Health and Welfare<sup>190</sup> and Global Clinic<sup>191</sup>

### 3.4. A Changing Gap? Covid-19 and Regularisation Programmes

Developments during the ongoing Covid-19 pandemic illustrate how the experiences of irregular migrant workers can be shaped powerfully by changing economic, social, and political factors. In some European countries, Covid-19 had some predictable negative effects on migrants with irregular status through, for example, loss of employment without access to social protection and, more fundamentally, restricted access to vaccination programmes.<sup>192</sup> At the same time, in some EU countries the Covid-19 pandemic led to policy measures that strengthened the rights of some irregular migrant workers, at least temporarily. We have thus far mentioned examples such as the temporary introduction of 'firewalls' to encourage irregular migrants to access basic services without risk of being reported to immigration authorities, as well as the expansion of emergency and preventive healthcare services. Further, in many EU countries, governments extended short- and long-term residence and work permits of migrant workers.<sup>193</sup>

COVID-19 has shone a light on the fact that migrants, including those employed irregularly, play an important role in the provision of essential services in many European countries and contribute to institutional resilience. As a consequence, migrants doing essential work, including those typically considered lower-skilled workers such as care assistants and food processors, have in many countries been declared "key workers", whose employment requires protection and in some cases even

<sup>190</sup> See <https://thl.fi/en/web/migration-and-cultural-diversity/immigrants-health-and-wellbeing/health-services-for-undocumented-migrants>

<sup>191</sup> See <https://www.globalclinic.fi/en/>

<sup>192</sup> PICUM, <https://picum.org/covid-19-undocumented-migrants-europe/> (accessed on 28 Nov 2021)

<sup>193</sup> Twigg et al 2021, 11-12.

expansion. The fact that many “essential workers” are migrants, often employed in lower-skilled jobs and sometimes irregularly, has also received *public* attention, as evidenced, for example, by the widespread ‘clapping for carers’ across European countries. While it remains unclear whether and how Covid-19 will have lasting effects on public attitudes toward migrants (see the discussion in section 4), the health crisis clearly has the potential to increase the importance that societies attach to what is typically regarded as lower-skilled work in essential jobs, and this may have consequences for migrants working regularly or irregularly in these jobs.<sup>194</sup>

Partly as a reflection of this renewed sense of appreciation of the work performed by irregular migrant workers, a number of EU countries recently introduced new regularisation programmes for certain categories of migrants working without immigration permissions.<sup>195</sup> While regularisation might seem like a panacea for resolving the tension between the promotion of irregular migrants’ rights and upholding immigration laws, it can however create “protection gaps” of a different sort – between those who benefit and those who remain outside of the scope of schemes. We will draw on the recent and high-profile example of regularisation initiatives in Italy to illustrate this point.

### 3.4.1. A Case Study of Regularisation in Covid-era Italy

Italy’s covid-era regularisation scheme for irregular workers was introduced in May 2020 by Minister for Agriculture, Teresa Bellanova, as part of the “*Decreto Rilancio*” or “Relaunch Decree” – Italy’s economic pathway for responding to the pandemic.<sup>196</sup> As a former trade union leader and farmworker, Bellanova had been a well-known advocate for the labour rights of workers and particularly those in agriculture. Her initiative, “*l’emersione dei rapporti di lavoro*” or “formalisation of job relationships” was introduced in the context of major labour shortages due to Covid-related travel restrictions affecting the movement of East European workers and also of African migrant workers who typically travel between farms within Italy.<sup>197</sup> So severe was the shortage that the National Confederation of Agricultural Producers threatened the loss of 40% of agricultural produce with detrimental effects for the Italian economy given Italy’s standing as Europe’s third largest agricultural sector in terms of revenue generation.<sup>198</sup>

#### *Details of the Scheme*

The scheme was limited to agriculture, fisheries and livestock, and the domestic and care sectors. It contained two streams: one provided a six-month job-seeking permit (renewable for a further 6 months) for those whose work permits expired on or after 31<sup>st</sup> October 2019 and could prove previous employment in the relevant sectors in Italy. A second pathway was via an employer sponsorship scheme for those in Italy before March 2020 and with proof that someone was willing to hire them. The window for application for both schemes lasted from June 1<sup>st</sup> to August 15<sup>th</sup>, 2020 over which period the schemes generated 207,542 applications under the employer sponsorship system (85% of which were in the domestic and care work field and 15% in agricultural) and 12,986 applications for a

<sup>194</sup> Anderson et al. 2021.

<sup>195</sup> See, for example, OSCE 2021 reporting of the scheme in France for accelerated naturalisation (after two years of residence rather than five) for those who were ‘frontline workers’ during the pandemic. See also details of the regularization programme opened by the Irish Government.

<sup>196</sup> *Decreto Rilancio*, <https://www.gazzettaufficiale.it/showNewsDetail?id=2674&provenienza=home>

<sup>197</sup> See: Guardian article “Covid-19 Crisis Stokes European Tensions over Migrant Labour, 11 May 2020, <https://www.theguardian.com/world/2020/may/11/covid-19-crisis-stokes-european-tensions-over-migrant-labour>

<sup>198</sup> Hsiao-Hung Pai, 6 May 2020, *Italy’s all too revealing call for regularizing migrant labour*, Open Democracy.

residence permit for the purpose of seeking employment.<sup>199</sup> The figures represent about one third of the estimated eligible irregular migrant population in Italy.<sup>200</sup>

Italy's Agricultural Minister reportedly pushed for the introduction of the scheme not only to respond to labour shortages but to help prevent the spread of Covid-19 by giving irregular migrants the legal status that could enable them to improve their labour conditions, leave overcrowded and unsanitary accommodation (by entering into formal tenancy agreements) and be more willing to avail of public health services.<sup>201</sup> Despite these seemingly well-intentioned motivations, the initiative has been subject to criticism on a number of grounds.<sup>202</sup> It has been criticised for being too narrow in scope and excluding sectors such as construction and catering where irregular migrants are represented in significant numbers. The employer sponsorship stream is said to be structurally deficient given the grip of the *caporalato* system over recruitment in the agricultural sector in Italy which means that many irregular migrants have no contract of employment with farm owners but only with *caporali* or middlemen. Cases of fraud and exploitation have been reported by Human Rights Watch and Caritas where sponsorship offers are being 'sold' for between EUR 4,000-7,000 by *caporali* and unscrupulous employers.<sup>203</sup> Ten out of eighteen prospective applicants for the employer sponsorship programme interviewed by Human Rights Watch explained that they, and not their employer, had to pay the EUR 500 application fee and in the case of three applicants this meant they were unable to make the application.<sup>204</sup>

As with many regularisation programmes that have been reviewed before, the recent Italian initiative begs the same questions about the future prospect and rights of migrants who are made temporarily regular. This scheme, like many before it, provides no certainty of renewal at the end of the six month period. Once the permit has expired it is unclear if migrants will find themselves back in a position of irregularity or, worse, facing a return order having been refused a permit extension.

This Italian case study shows that regularisation programmes are not a magic wand, nor is it the case that once regularised, migrant will not be free from labour exploitation or discriminatory treatment in regard to access to public services. What it does mean is that regularised migrants will have a legal standing in the host country which puts them in a stronger position to accumulate and enforce their rights. Protection gaps can therefore be narrowed by regularisation but they will not be automatically closed.

---

<sup>199</sup> See data from the Italian Interior Ministry: [https://www.interno.gov.it/sites/default/files/2020-08/dlci\\_-\\_analisi\\_dati\\_emersione\\_15082020\\_ore\\_24.pdf](https://www.interno.gov.it/sites/default/files/2020-08/dlci_-_analisi_dati_emersione_15082020_ore_24.pdf)

<sup>200</sup> Palumbo and Corrado 2021.

<sup>201</sup> European Commission, 2020a.

<sup>202</sup> See Palumbo and Corrado 2021 for a review.

<sup>203</sup> Human Rights Watch 2020. <https://www.hrw.org/news/2020/12/18/italy-flawed-migrant-regularization-program>

<sup>204</sup> Ibid.



## 4. EXPLAINING THE GAP: ECONOMIC, POLITICAL AND POLICY DYNAMICS IN EU MEMBER STATES

### KEY FINDINGS

Irregular migrants' liability to deportation makes them vulnerable to exploitation. Illegal migration status can affect the employment conditions of migrants not only through employer discrimination but also by influencing the behaviour and constraints of migrants in the labour market. To what extent these potential vulnerabilities become actual realities, varies across migrants with different characteristics (e.g. gender and ethnicity) and also across different institutional contexts.

The aims and realities of policy-making on *legal* labour immigration in EU countries provide an important context for European policies and debates about the employment and rights of *irregular* migrant workers. Exploitation of migrant workers is not limited to those working illegally and also occurs under legal labour immigration programmes, especially under temporary labour migration programmes in low-wage sectors and occupations.

There can be important path dependencies in the recruitment and employment choices that employers make in particular sectors. Sectors and occupations that use regular or irregular migrant workers in significant numbers often become more reliant on their labour over time. Migrants' immigration status (e.g. irregular status or regular temporary status) can become an important factor influencing employer demand for their labour.

Compared to regular migrant workers, the numbers and employment conditions of irregular migrants are more influenced by employers and labour market intermediaries and less by the host state. From the perspective of the host country and resident workers, this can lead to 'unwanted' labour market competition and the danger that employment conditions of local workers are undermined by the employment of irregular migrant workers in exploitative conditions.

Covid19 has shone a light on the role of migrant workers, including irregular migrant workers in low-wage jobs, in providing 'essential' goods and services. There is an urgent need for more research on how migrants shape the resilience of European economies and societies to external shocks such as Covid-19.

The rights of irregular migrant workers, and irregular migration more generally, are not just legal and economic issues but also deeply political concerns that raise fundamental questions about state sovereignty and capacity to control immigration, and about how liberal-democratic countries should respond to these policy challenges. Public attitudes in host countries constitute an important political feasibility constraint on policy-making vis-à-vis regular and irregular migration and migrants. Research suggests that voters prefer skilled over lower-skilled migrants, are strongly opposed to irregularity in immigration and employment, and prefer policies that facilitate 'control'. There is little to no systematic research on Europeans' attitudes toward irregular migrant workers. Research from the US suggests that (American) voters are more supportive of legalisation than granting rights to irregular migrants (with few exceptions, such as access to healthcare).

The conditions and experiences of irregular migrant workers in and beyond the labour market, including their rights in practice, are shaped in powerful ways by the economic dynamics of both irregular and regular labour migration as well as the politics of immigration and related public policies in host countries. Understanding the basic features of these dynamics, politics and policies – including the important interactions between regular and irregular labour migration – is of critical importance to the search for more effective policies for protecting the fundamental rights of irregular migrant workers.

We divide and structure our discussion of these issues into two parts: the *economic* dynamics of irregular migrant labour markets (section 4.1), and the *political* and *policy* dynamics of irregular migration and rights for irregular migrant workers (section 4.2). Where relevant, we include discussion of the economics and politics of regular labour migration and employment of migrants, as important context and necessary background for understanding and discussing experiences and outcomes of irregular migrant workers.

## 4.1. Economic dynamics of irregular migrant labour markets

In public and policy debates, irregular migrant workers are frequently perceived and discussed in terms of two contradictory stereotypes: as 'vulnerable victims' of unscrupulous employers and recruiters or as 'manipulative abusers' of the host country's immigration and employment laws as well as welfare policies.<sup>205</sup> In practice, these stereotypes are too limiting and therefore not helpful in understanding migrants' motivations, constraints, and decision-making processes as well as the various ways in which migrants interact with the host country's immigration and employment laws. They are also inadequate to capture the diversity of migrants' experiences and wide range of different pathways in and out of regularity. For example, the narrow lens of 'migrants as victims' obscures the fact that migrants may consider irregular migration and working as the best of their limited options, and that migrants typically have and exercise a degree of choice over their migration and employment in the host country. At the same time, the image of irregular migrants as abusers of laws and policies ignores the many economic, social and political constraints that migrants with irregular migration status face and the powerful structures and interests that make them vulnerable to exploitation. Therefore, to understand why protection gaps for irregular migrant workers emerge and persist, we need to consider both 'agency' and 'structure' in irregular migrant labour markets, that is, the motivations and interests of the key actors involved (especially migrants, employers and intermediaries; and the state) as well as the institutional/policy structures and prevailing socio-economic inequalities that constrain and shape their behaviour.

### 4.1.1. Migrant workers' motivations and sources of vulnerability

There are very large economic inequalities between European and other high-income countries on the one hand, and lower-income countries outside the EU on the other. The wages of workers in European labour markets are typically multiples of the wages that can be earned for similar work in low-income countries. As a consequence, workers in poor countries have large economic incentives to migrate to European and other high-income regions of the world. According to the World Bank, one of the most effective ways of raising household incomes and reducing poverty of workers in low-income countries is to give them jobs in rich countries.<sup>206</sup> The United Nations Development Programme considers labour emigration to high-income countries as a powerful way of promoting not only the economic welfare but also the broader human development (including health and education) of migrants and their

---

<sup>205</sup> Anderson 2008; Anderson and Ruhs 2010a.

<sup>206</sup> See, for example, McKenzie and Gibson 2010; Gibson and McKenzie 2011.

families.<sup>207</sup> In addition to benefitting individuals and their families, the remittances and other transfers that migrants make to their home countries do not only reduce poverty but also can, under certain circumstances, encourage the development of low-income countries.<sup>208</sup>

Given these inequalities and incentives to migrate, it is not surprising that large numbers of workers in lower-income countries wish to migrate to Europe and that some have decided to migrate and/or work outside existing legal frameworks. As the labour migration pathways for low-skilled workers to come and work legally in EU countries are very restricted,<sup>209</sup> a degree of irregular labour migration is a natural consequence. Many low-income countries have been asking European countries to expand their legal labour migration pathways, especially for lower skilled workers – see, for example, the long-standing and ongoing discussions between EU and African countries about the need to provide enhanced legal pathways as part of more effective migration policy cooperation.<sup>210</sup> Labour migration can, and often does, generate a range of multi-faceted costs and vulnerabilities for migrants, especially – as we discuss below – for those engaging in irregular migration and working. However, to understand the conditions and outcomes of irregular migrant workers in European labour markets, we need to consider not only the much talked about costs and dangers that migrants face but also the various benefits they (and their families) may and often derive from irregular migration and employment in Europe.

When thinking about the effects of (irregular) migration and work for migrants themselves, it is important to recognise that migrants' outcomes are multi-dimensional, in the sense that they include not only economic consequences but also a range of other effects (e.g. on physical and mental health, family life, etc.) including security of residence and access to rights. Migrants' decisions to migrate and work abroad, legally or illegally, typically involve trade-offs between these different dimensions. Depending on their individual situations and circumstances, different groups of migrants may evaluate these trade-offs and make decisions in different ways (and migrants' perceptions and ways of dealing with these trade-offs may change over time). For example, in some cases some migrants may temporarily 'sacrifice' their security of residence and access to some rights for the opportunity to improve their economic situation.

Irregular migration status and the associated risk of deportation can put migrants in a vulnerable position in the host country's labour market.<sup>211</sup> Some employers may offer irregular migrant workers lower wages and sub-standard working conditions because they take advantage of migrants' deportability or as a way of offsetting the risk associated with employing migrants without permission to reside and/or work in the host country. To avoid the risk of detection, irregular migrants may be more likely to be allocated jobs that have a low risk of apprehension and these costs are likely to be lower-skilled ones.<sup>212</sup> Importantly, deportability can also impact on the employment conditions and outcomes of irregular migrants through changes in migrants' behaviour in the labour market rather than through employer discrimination.<sup>213</sup> For example, irregular migrant workers may be prepared to work for lower wages, inferior employment conditions and put in greater efforts than workers with the legal right to residence and work.<sup>214</sup> They may also be less likely to quit their jobs in response to

---

<sup>207</sup> UNDP 2009.

<sup>208</sup> See, for example, Clemens 2011.

<sup>209</sup> Ruhs 2013.

<sup>210</sup> Lücke et al. 2019; African Union and European Union 2022.

<sup>211</sup> See, for example, De Genova 2002.

<sup>212</sup> Taylor 1992.

<sup>213</sup> Kossoudji and Cobb-Clark 2002.

<sup>214</sup> Stark 2007.

declining wages,<sup>215</sup> e.g. during an economic downturn. The fear of deportation could also lower the incentives of migrants to acquire skills and human capital that are specific to the host country such as language skills.<sup>216</sup> Irregular status can be expected to reduce the social networks migrants can access and, as a consequence, they may have reduced access to good jobs.<sup>217</sup> More generally, irregular status can constrain migrants' choice of employment in the host country and thereby reduce their ability to take up jobs that maximise their earnings based on their skills.<sup>218</sup>

Beyond the labour market, irregular status can make it difficult or, in some cases impossible, for migrants to access certain types of public services and social protection – although these effects vary both across countries with different welfare regimes and policy approaches to the inclusion or exclusion of irregular migrants, and also within countries across different regions and local areas.<sup>219</sup> Not having regular residence and work status can and, in practice, often does make it difficult for irregular migrants to open bank accounts and access decent housing. Where housing is tied to employment (i.e. provided by the employer) additional dependencies and vulnerabilities arise, as the potential loss of a job would be closely associated with loss of housing. The choices of irregular migrants may also be constrained by a range of other actors to whom irregular migrants may be financially indebted after arriving in the host country, often including agents and/or friends or family who helped facilitate and finance migration and access to work in the host country.

It is clear, then, that irregular residence and employment status creates a wide range of potential vulnerabilities for migrant workers, in and beyond the labour market. Whether and to what extent these potential vulnerabilities become actual realities varies across migrant groups with different characteristics and also across different institutional contexts (discussed later in this section). For example, female and male migrants are often vulnerable to different types of exploitation.<sup>220</sup> Similarly, migrants with different ethnic and cultural backgrounds, can face different degrees of discrimination and exploitation in host countries.<sup>221</sup> Paying attention to the role of individual characteristics in shaping the vulnerability of particular groups of irregular migrants is of critical importance in the design of policies meant to increase protections.

#### 4.1.2. Employer demand for (irregular) migrant labour

Why do some employers recruit and employ migrants without permission to stay and/or work in the host country, and why do they sometimes offer conditions of employment that do not comply with the host country's existing laws and regulations? To address this question, we first need to discuss the nature of employer demand for migrant labour, and then consider the specific role of migrants' legal status in shaping this demand.

What role migrant workers can and should play in reducing labour shortages is typically a highly contested question, especially (but not only) in occupations characterised by relatively low wages and poor employment conditions.<sup>222</sup> Employers frequently argue that migrant workers are "needed to do the work that local workers cannot or will not do". Critical voices, including some trade unions,

---

<sup>215</sup> Hotchkiss and Quispe-Agnoli 2013.

<sup>216</sup> Chiswick 1984.

<sup>217</sup> Massey 1987.

<sup>218</sup> Calavita 1992.

<sup>219</sup> See, for example, Piccoli and Wanner 2022.

<sup>220</sup> Hennebry and McLaughlin 2017.

<sup>221</sup> Magazzini 2021; De Genova 2017.

<sup>222</sup> See Ruhs and Anderson 2010c.

frequently reply that such arguments are little more than calls for increasing the supply of cheap and exploitable labour, to help employers avoid having to raise wages and improve conditions.

Resolving these debates, which we see play out across European labour markets, is not always straightforward. There is no universally accepted definition of a labour or skills “shortage”, nor is there one “optimal” policy response. Employers’ calls for more migrant workers often reflect a demand for workers to do the work at *prevailing* wages and employment conditions. In contrast, in a basic textbook model of the labour market, a shortage of labour leads to rising wages which will reduce labour demand, increase domestic labour supply, and thus reduce or eliminate the shortage. In practice, some employers may be reluctant to raise wages and, in some cases, there may be genuine obstacles to doing so.

In theory, employers may have a range of options for responding to perceived staff shortages.<sup>223</sup> These alternative responses could include: (i) raising wages and/or improving working conditions to attract more domestic workers; (ii) reducing the labour intensity of the production process through e.g. mechanisation or computerisation; (iii) moving production to countries with lower labour costs; (iv) switching to producing/providing less labour-intensive goods and services; and (v) employing more migrant workers (legally or illegally). Of course, not all of these alternatives will be available to employers in all sectors and occupations. There may be technological limits, for example, to mechanisation and it does not make sense to think about relocating certain services, such as hospitals and restaurants, to other countries with lower labour costs. Nevertheless, in many sectors employers will have multiple options to consider. The choices employers make will naturally depend, at least in part, on the relative cost of the feasible alternatives available. If there is an abundant supply of low-cost migrant labour, employers may not consider some of the alternative options. Research has shown, for example, that large inflows of migrant workers can encourage some manufacturing industries to become more labour intensive in their production processes.<sup>224</sup>

In some sectors and occupations, especially those involving lower-waged work, some employers can develop a preference for employing migrant over domestic workers.<sup>225</sup> This preference could be based on a range of reasons including a perception that migrants are better skilled and suited for the work than local workers, and that they can provide better access to networks of other workers that can be hired at short notice. Employer preference for migrant workers could also be fuelled by the restrictions attached to particular types of migration status which can provide employers with an additional means of control over their workers.<sup>226</sup> For example, the vast majority of temporary labour migration programmes for low-skilled jobs limit the legal employment of the admitted migrants to the employer specified on the work permit. Research has shown that some employers of temporary migrant workers appreciate the fact that they have workers that are tied to them in this particular way.<sup>227</sup> The broader point here is that migrants’ immigration status can become an important factor influencing employer demand for their labour.

How do irregular migrant workers fit into these broader dynamics of employer demand for migrant labour? Some employers with a demand for migrant labour may turn to employing irregular migrant workers because there are no legal channels for recruiting migrants. At the same time, others may consider it preferable to recruit irregular migrant workers even when there are legal opportunities for

---

<sup>223</sup> The discussion here draws on Anderson and Ruhs 2010b.

<sup>224</sup> Lewis 2011.

<sup>225</sup> See Anderson and Ruhs 2010b.

<sup>226</sup> Anderson 2010.

<sup>227</sup> Ruhs and Anderson 2010b.

accessing and hiring workers from abroad. Again, employers' preferred strategies for responding to perceived staff shortages will depend, at least in part, on the expected net benefits associated with the different options available, including the alternatives to employing migrant workers.

Employing irregular migrant workers can create risks as well as perceived benefits for employers. On the one hand, there is the obvious risk of detection and the associated financial and other costs including, in some countries, potential criminal charges. Employers' assessments of these risks and potential costs will depend on both, the perceived probability of detection (which is partly dependent on the state's enforcement activities) and the actual level and types of sanctions involved (e.g. civil penalties, criminal sanctions, etc). Just like migrants, different employers may perceive these risks and potential costs in different ways, with some employers likely to take more risks than others.<sup>228</sup>

On the other hand, some unscrupulous employers may use the deportability of irregular migrant workers as an additional means of control that enables them to lower wages and working conditions, and to avoid the costs associated with complying with the bureaucratic requirements associated with the legal recruitment of migrant workers (where this option is available). Some irregular migrant workers may be perceived as possessing a better "work ethic" and as willing to accept inferior employment conditions than domestic workers and migrants legally employed on work permits.

Importantly, to 'use' irregular migration status to their perceived benefit in these ways, employers need to know about the migration status and right to work of the migrants they employ. This will not always be the case. For example, if migrant workers use fake work permits and/or national insurance numbers, employers may not be aware that they are employing migrants illegally. The question of whether and how employers can be expected to assess and verify the legal migration status of their workers is a highly contested question that is usually at the heart of debates about the desirability and effectiveness of using 'employer sanctions' to combat irregular employment of migrants.

There can be important path dependencies in the recruitment and employment choices that employers make in particular sectors. Sectors and occupations that use regular or irregular migrant workers in significant numbers often become more reliant on their labour over time. This is partly because employing significant numbers of migrant workers can encourage employers to adjust their business practices and make future plans based on the assumption of continued supply of particular types of migrant labour. This can make it hard for some employers to consider seriously potential ways of reducing their reliance on migrant labour even when there is a political demand to do so.

Labour market intermediaries, such as regular (legal) employment agencies that provide short-term labour to different businesses as well as gang-masters operating outside the law, can play an important role in fuelling and sustaining employers' use of regular and irregular migrant labour in particular sectors. In this sense, the demand for particular types of migrant labour is partly driven by the scale and characteristics of supply.<sup>229</sup> Where employment agencies or other labour market intermediaries are involved, the business that is the final 'user' of the labour may not necessarily be aware of the nationality or the immigration status of their workers.

Employers' preferred responses to perceived staff shortages may or may not be in the best interests of other groups or of the host economy and society as a whole. To give an obvious example, employing migrants irregularly at conditions that are lower than mandated by the host country's employment laws undermines the employment prospects and conditions of domestic workers seeking jobs in similar occupations and sector as migrants. Similarly, while it may be in the short-term interest of some

---

<sup>228</sup> Ibid.

<sup>229</sup> Anderson and Ruhs 2010b.

employers to gain access to particular types of migrant workers who can be employed at low cost to maintain current provision of particular services (e.g. social care), it may not be in the best national interest of the host country to have a particular sector of the economy (such as social care) become structurally dependent on an abundant supply of low-cost migrant workers who can be employed in precarious jobs.<sup>230</sup>

#### 4.1.3. Socio-economic institutions and irregular migrant labour markets

The decisions of migrants, employers and other actors in the labour market are not made in an institutional vacuum. Instead, migrants' and employers' choices are critically influenced and constrained by the prevailing institutional context.<sup>231</sup> This context obviously includes the characteristics of existing migration and enforcement. For example, migrants' and employers' assessments and incentives to engage in employment relationships that are outside the host country's immigration and labour laws will obviously be influenced by the scale and characteristics of legal labour migration pathways and the nature and degree of state enforcement against different types of illegality in migration and employment of migrant labour. These legal migration and enforcement policies vary significantly across different European countries.<sup>232</sup>

Importantly, the institutional context shaping the behaviour and decision-making of migrants and employers is also powerfully shaped by a range of wider socio-economic policies and institutions, especially the prevailing labour market regulations and welfare state regime. European economies and societies differ considerably in terms of their regulations of national labour markets and welfare systems.<sup>233</sup> Cross-country differences in these national institutions play an important role in influencing the scale, types, and effects of irregularity that emerge in the residence and employment of migrants. For example, research has shown that the degree and types of labour market regulation can affect the size of low-wage labour markets<sup>234</sup>, the demand for migrant labour<sup>235</sup>, and the 'functions' of irregular employment of migrants for employers, migrants, and the state<sup>236</sup>.

The impacts of irregular migration status on migrants themselves, and the extent to which the conditions of irregular migrants differ from migrants employed legally in similar jobs, varies significantly across different institutional contexts. For example, in flexible labour markets with limited regulation of employment conditions and relatively little enforcement against the illegal working of migrants, the vulnerabilities and outcomes of irregular migrant workers may not differ greatly from those of migrants legally employed on temporary work permits. In such contexts, the effects of legalisation for the conditions of migrants may be relatively limited as the primary causes of exploitation and vulnerability could lie with the characteristics of these broader institutions (e.g. limited protections of labour rights for all workers, not just migrants) rather than with 'illegal migration status' per se. Existing research on the impacts of legalisation on the labour market outcomes for migrants has shown that these effects are highly context specific and not always significant.<sup>237</sup>

<sup>230</sup> See, for example, the discussion in Migration Advisory Committee (MAC) 2014.

<sup>231</sup> Anderson and Ruhs 2010b.

<sup>232</sup> See, for example, Delvino 2020; Helbling and Kalkum 2018.

<sup>233</sup> See, for example, Hall and Soskice 2001; and Schröder 2009.

<sup>234</sup> McKnight et al 2016.

<sup>235</sup> Afonso and Devitt 2016; Ruhs and Anderson 2010a.

<sup>236</sup> Anderson and Ruhs 2010b.

<sup>237</sup> Fasani 2015; Ruhs 2017; Ruhs and Wadsworth 2018.

#### 4.1.4. Changes during recent crises

The crises European countries have experienced in recent years – most notably the financial and economic crisis that began in 2008, the refugee protection crisis in 2015-16, and the ongoing Covid19 pandemic – have affected but, arguably, not fundamentally changed the economic dynamics of irregular migrant labour markets in Europe. Data limitations in relation to irregular migrants make it difficult to establish and show systematically what has happened to their employment and conditions during crises. There are, however, reasons for why the effects of crises on irregular migrant labour markets may differ, at least in some aspects, from the impacts on the employment of migrants with legal residence and work status in the host country. Perhaps to a greater extent than for regular migrant workers, crises can be associated with contradictory economic pressures and implications for the employment of irregular migrant workers.

For example, the global economic downturn of 2008-09 clearly led to a massive economic contraction and declining labour demand in Europe (and elsewhere). As the inflows, outflows, and employment of irregular migrants can be expected to be highly sensitive to the economic cycle, the employment of irregular migrant workers is likely to have declined during that period. However, there are also reasons to suggest that the general decline in employment may not have necessarily and automatically led to a disproportionate (or even proportionate) decline in demand for all types of migrant workers. For example, some sectors where migrants are employed, such as household services (where we see significant degrees of illegal employment of migrants across European countries), may still be growing and experience an increase in labour demand.<sup>238</sup> Furthermore, if the pre-crisis demand for migrants was highly specific to the characteristics of the (irregular) migrant labour supply, with job designs that only or primarily migrants were prepared to accept (e.g. certain types of employment in agriculture), it cannot be assumed that unemployed domestic workers would be willing or able to do these jobs during times of economic downturn. Furthermore, some employers, including those in labour-intensive occupations offering precarious conditions, may have felt the need to lower wages and employment conditions even further as a way of coping with the changed economic environment, thus further disincentivising domestic workers – but not necessarily irregular migrants – from doing these jobs.

The refugee protection crisis of 2015-16 was also associated with diverse and contradictory implications for irregular migrant labour markets. On the one hand, large numbers of asylum seekers and other migrants arrived and were granted protection in Europe, meaning that there was a large increase in the supply of migrants who could be legally employed in European labour markets. Importantly, this increased supply included considerable numbers of lower-skilled workers whose legal opportunities for labour migration to EU countries would normally be highly restricted. This increase in the employment availability of migrants who could be legally employed, including in lower-waged sectors, may have reduced employer demand and employment opportunities for irregular migrant workers. At the same time, however, the supply of migrants potentially working illegally also increased as considerable numbers of asylum seekers were unsuccessful in their applications for protection in Europe (in 2021, over 60% of first instance decisions were negative<sup>239</sup>) and return rates of migrants who have received return orders have been quite low (under 50% in many European countries) over the past few years, for a range of reasons.<sup>240</sup>

---

<sup>238</sup> Chaloff et al. 2012.

<sup>239</sup> See [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum\\_statistics&oldid=558844](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics&oldid=558844)

<sup>240</sup> Lücke et al 2020.



Covid-19 has been a public health crisis associated with significant adverse economic impacts for both citizens and migrants. However, the economic contractions that occurred during the pandemic, especially during lock-down periods, were unevenly spread across different sectors and countries.<sup>241</sup> Furthermore, as we will discuss in more detail in the next section, Covid19 has shone a light on the role of migrant workers, including irregular migrant workers, in providing essential goods and services whose production/provision needs to be maintained during crises. It is possible, although by no means certain, that these developments open up opportunities for irregular migrant workers in these essential sectors to improve their conditions and rights in host countries.<sup>242</sup>

## 4.2. Political dynamics of irregular migration and rights for irregular migrant workers

The rights of irregular migrant workers, and irregular migration more generally, are not just legal and economic issues. They are also deeply political concerns that raise fundamental questions about state sovereignty and capacity to control immigration, and about how liberal-democratic countries should respond to these policy challenges. How to regulate immigration and the rights of migrants have become highly politicised policy issues in many European countries, meaning that they are highly salient in public debates and political discourse, and have often polarised the electorate and political party systems.<sup>243</sup> The large and mostly unanticipated flows of asylum seekers and other migrants to European countries in 2015-16 have fueled this politicisation of migration issues in recent years. Widespread concerns about similar crises in the future mean that ‘controlling immigration’ will continue to play a central role in European politics for the foreseeable future.

Consideration of the political dynamics of (irregular) labour migration must therefore play a central role in any discussion about the reasons for existing protection gaps for irregular migrant workers, and about whether and how these gaps can be reduced in the future. Engaging with the politics of irregular labour migration and rights of migrant workers also brings to the fore a core and inescapable dilemma that is at the heart of public and policy debates about the rights of irregular migrants: On the one hand, basic principles of human rights, equality and inclusion in liberal-democratic countries – as also reflected in the EU Charter – demand the protection of the fundamental rights for irregular migrant workers in EU Member States. On the other hand, EU Member States’ right to control immigration means that irregular migrants can be liable to deportation.<sup>244</sup>

### 4.2.1. Regulating labour immigration: Admission and rights of migrant workers

The aims and realities of policy-making on *legal* labour immigration in EU countries provide an important context for policies and debates about the employment and rights of *irregular* migrant workers. The regulation of labour immigration from outside the European Economic Area (EEA) is primarily a national competence of Member States, with very limited common EU policy-making in this policy area. Most labour immigration policies towards non-EEA workers are unilateral policies that are designed and “made” in Member States. While some EU countries have bilateral migration policy agreements with selected lower-income countries (e.g. Spain and Morocco for seasonal workers in

<sup>241</sup> See, for example, Battistini and Stoevsky 2021.

<sup>242</sup> See Anderson et al. 2021.

<sup>243</sup> See, for example, Hutter and Kriesi 2021.

<sup>244</sup> Compare Song and Bloemraad 2022.

Spanish agriculture), most of the regulatory power in such agreements typically remains with the European host country.<sup>245</sup>

Just as public debates about irregular migration frequently invoke the narrow and misleading stereotypes of irregular migrants as “victims” or “abusers of immigration laws”, public discourse about the role of the state in controlling labour immigration has also been plagued by distorted perceptions about state capacity in this policy area. Some commentators, especially those arguing for progressive policies toward migrants, start with the assumption that states have little or even no control over labour immigration which, it is sometimes argued, “will happen anyway”. Based on this thinking, all states can do is respond and adjust to immigration rather than actively regulate its scale and the conditions under which it occurs. At the same time, many others, especially those arguing against labour immigration, frequently make the opposite assumption; namely, that states have close to full control over their borders.

In reality, European and other high-income states neither have full control over their borders, nor are they without control. Rather than perceiving of a binary of ‘no’ or ‘full’ control, it is more helpful to think about a spectrum of control and state capacity to regulate labour immigration. As discussed by a long-standing body of research on migration, states’ capacity to regulate labour immigration varies across countries, depending on a range of factors including, for example, the complexity and strength of the host country’s bureaucracy, and its geographic characteristics including proximity to lower-income countries that experience significant labour outflows.<sup>246</sup> In liberal democratic countries, policy-making on labour immigration is also influenced by a ‘liberal constraint’, (i.e. by basic rights and values enshrined in domestic constitutions and protected by domestic courts) as well as by states’ commitments to supra-national agreement on the rights of migrant workers.<sup>247</sup> As we discussed in chapter 2, EU Member States’ commitments to global rights standards for migrant workers have been relatively weak in practice. As the experiences of recent years have shown, the liberal constraints from domestic sources have been more flexible than some had previously assumed. Many European countries adopted immigration policies in response to the refugee protection crisis 2015-16, such as increased externalisation of migration controls and apparent tolerance of “pushbacks”<sup>248</sup>, that involve measures and rights restrictions that few would have considered realistic or likely in previous years.

All EU countries have policies for the legal admission of migrant workers from outside the EU, and for the prevention or reduction of irregular migration and employment of migrant workers. Unlike policies on asylum and refugee protection or family reunification, policy-making on labour immigration is typically based on a consequentialist rather than rights-based approach that is focused on regulating the immigration and employment of migrant workers in a way that maximises the net-benefits for host economies and societies.<sup>249</sup> Most labour immigration policies are guided by two simultaneous objectives: to maximise the economic benefits from immigration for the host country; and to protect the employment prospects of domestic workers, especially of those in low-income jobs. The importance of the second, distributional objective varies across countries and over time, also depending on the economic conditions in the host country. As a consequence of viewing labour immigration in this instrumental way, public and policy debates about the admission and rights of migrant workers tend to be primarily focused on the costs and benefits for the host economy as a whole and for different groups among host country residents. In most EU Member States, the interests of

---

<sup>245</sup> Bauböck and Ruhs 2021.

<sup>246</sup> Massey 1993.

<sup>247</sup> See, for example, Hollifield 2000.

<sup>248</sup> Council of Europe 2019b.

<sup>249</sup> Ruhs 2013.

migrants and their countries of origin are typically given relatively little importance in the design of labour immigration policies, with few exceptions.

This cost-benefit approach toward regulating the admission and employment of workers from outside the EU is very different from the rights-based approach to the governance of intra-EU labour mobility. Under the EU's rules for the free movement of workers, EU citizens can move and take up employment in any other EU country without any restrictions *and* – as long as they are 'workers' – enjoy full and equal access to the host country's welfare state. There is a very large difference between the labour and social rights granted to 'mobile EU workers' and 'migrant workers' from outside the EU. The difference in terminology, which we adopt to reflect common practice rather than because we agree with it, also signals the very different policy approaches to regulating the cross-border movement and employment of these two groups of workers.<sup>250</sup>

The key features of legal labour immigration policies of EU Member States are similar to those of other high-income countries.<sup>251</sup> First, almost all labour immigration programmes in EU countries are temporary labour migration programmes (TLMPs), in the sense that they grant migrants temporary residence and work permits upon arrival. While some programmes allow migrants admitted under TLMPs to upgrade to permanent residence status after a few years of employment in the host country – a regulated process that is often based on certain conditions and criteria – others are strictly temporary and require migrants to return to their home countries when their temporary work permits expire. Second, and of particular importance in the context of this report, most EU countries have labour immigration policies that are much more open to admitting, and grant significantly more rights to, skilled than low-skilled workers from non-EU countries. This policy preference for skilled migrant workers is largely based on a widespread assessment that high-skilled labour migrants are, on average, more beneficial to European host economies and societies than lower-skilled migrants, and that a large share of domestic labour shortages and vacancies in low-skilled jobs can be filled with mobile EU workers (especially from the more recent EU Member States).

Under most labour immigration programmes, the admission of migrant workers, for high- and especially lower-skilled jobs, is typically governed by regulatory mechanisms that aim (not always successfully) to link labour immigration to labour shortages and the perceived "needs" of the host country's labour market and economy more generally. This typically includes a 'labour market test' which requires employers to show that they have tried and been unsuccessful in their search for EEA workers to fill the vacancy before a migrant worker from outside the EU can be admitted. While such tests are meant to ensure that EU workers are given preferential access to jobs in EU Member States, their effective implementation has proven challenging in practice.<sup>252</sup>

'Shortage occupation lists' are another policy tool that many EU countries use to link the admission of new migrant workers to the perceived needs of the domestic labour market. These are lists of jobs that the government deems to be in "shortage" and for which there are fewer restrictions on the admission of migrant workers from outside the EU. In many countries, employers seeking to recruit non-EU workers to fill vacancies on the domestic shortage occupation list are exempted from the labour market test requirement. In practice, across EU Member States, governments' decisions on which jobs to include in domestic shortage occupation lists are based on varying levels of evidence and analysis, and they are often highly contested, especially by employers and trade unions.

---

<sup>250</sup> For more discussion of this distinction, see Ruhs 2018.

<sup>251</sup> Ruhs 2013.

<sup>252</sup> See, for example, Ruhs 2014.

Most TLMPs, except those for admitting highly skilled migrant workers, restrict a range of rights of migrant workers. These almost always include the right to free choice of employment in the host country's labour market. From the host country's perspective, a fundamental rationale of TLMPs is to help reduce labour and skills shortages in specific occupations and/or sectors. If the admitted migrants were free to take up employment in any occupation or sector, TLMPs would not be able to meet one of their fundamental objectives. Some countries (such as Ireland) have introduced policies that allow temporary migrant workers to switch employers freely within certain sectors or occupations after some time (e.g. one year after admission under the TLMP). However, even when the initial tie between worker and specific employer is lifted, the restriction on employment to the occupations or sectors perceived to be in 'shortage' typically remains. Most TLMPs also restrict migrants' access to welfare benefits, especially to targeted and non-contributory benefits such as social housing and social assistance. Again, the extent to which access to welfare is constrained varies across countries but there are at least some restrictions in most countries.

It is important to recognise that the rights migrant workers are granted under most TLMPs in European and other high-income countries often fall short of international standards including those stipulated in the UN's '1990 Convention on The Rights of All Migrant Workers and Members of Their Families' and also in the more recent (and non-binding) Global Compact on Migration (GCM). GCM's policy recommendations on labour migration are very far away from current realities of policy-making in European and other high-income countries.<sup>253</sup> The fact that some of the rights standards set out in these and other global instruments for the protection of migrant workers clash with the rights restrictions typically involved in high-income countries' TLMPs is a major reason for why so few countries have ratified or implemented them.

Because irregular migration and work occur outside the legal frameworks and regulations of the host country, the in-flows and employment of irregular migrants cannot be regulated in the same way as those of legally admitted migrant workers. As a consequence, while employing irregular migrants can create benefits for host country employers, it does not necessarily create benefits (and often creates costs) for certain other groups and for the wider economy and society of the host country. For example, irregular labour migrants are not necessarily employed in sectors and occupations where employers have first tried to recruit domestic or other EEA workers and/or where there is deemed to be a shortage of EEA workers. Compared to regular migrant workers, the numbers and employment conditions of irregular migrant workers are more influenced by employers and labour market intermediaries and less by the state. From the perspective of the host country and resident workers, this can lead to 'unwanted' labour market competition and the danger that employment conditions of local workers are undermined by the employment of irregular migrant workers in exploitative conditions.

It is, therefore, not surprising that all EU countries have stated aims, and most also policies, to reduce irregular migration and the employment of irregular migrant workers. These policies include a range of measures that aim to prevent irregular border crossings and overstaying of temporary visas as well as work-place controls including sanctions of employers who are found to employ migrant workers illegally. The types of policies used, the degree to which they are enforced, and their effectiveness vary across countries and over time. Research has also shown that there can be times and circumstances when certain types of illegality in the employment of migrant workers is tolerated by the host state because it is perceived to be beneficial not only to employers but also to other groups and the wider economy. Moreover, an overt policy that encourages a switch to legal labour immigration and

---

<sup>253</sup> Martin and Ruhs 2019.

employment may be problematic from a political perspective.<sup>254</sup> Arguably, the apparent tolerance of migrants working illegally and/or informally in the care sector (including in private homes) in many European countries provides an illustrative example of this point.

#### 4.2.2. Public attitudes as soft feasibility constraints

Having reviewed how and why EU Member States regulate labour immigration, we now discuss some of the political feasibility constraints around protecting the rights of irregular migrant workers. More specifically, we focus on public attitudes and policy preferences vis-a-vis irregular migration and irregular migrant workers. Public attitudes can be considered as a type of “soft” (rather than “hard”) feasibility constraint on policy-making in liberal democracies. As commonly understood in existing research and policy debates, a ‘feasible’ policy is one that can be brought about and is likely to be relatively stable over time.<sup>255</sup> A soft feasibility constraint renders certain policies ‘comparatively less feasible’<sup>256</sup> rather than ruling them out completely as a ‘hard constraint’ would do. Importantly, soft constraints have probabilistic and dynamic elements in the sense that they can, at least to some extent, potentially change over time.

Despite the “softness” of this constraint, a failure to take seriously and understand the nature and characteristics of public attitudes can have very damaging effects on migrants’ rights in practice, for at least three reasons.<sup>257</sup> First, policies that ignore public attitudes as political feasibility constraints may not be sustainable, e.g. if the policies go against the public’s fundamental beliefs and values. Second and of particular relevance to the EU context, any feasible trans-national policy approach needs to pay attention to potential differences in people’s fundamental attitudes and beliefs across countries. Third, and perhaps most obviously, there are important interactions between voters and political parties on immigration. Rapidly rising numbers of migrants and the perception that migration is ‘out-of-control’ can raise support for populist right-wing parties<sup>258</sup> which, in turn, may affect the policy positions of mainstream parties and the extent to which they respond to public opinion on immigration.<sup>259</sup> In other words, advocating and/or implementing policies toward irregular migrant workers that ignore the soft feasibility constraint of public attitudes can easily lead to a political backlash that may not only reverse the policy change but potentially also undermine the previously existing protections for irregular migrant workers.

#### ***Attitudes toward migrants and migration policies***

There is a substantial body of research on the characteristics and determinants of attitudes to migrants and immigration<sup>260</sup> and a much smaller but rapidly growing literature on public preferences for different types of migration policies.<sup>261</sup> While much of this literature has focused on attitudes to migrants in general, more recent analyses has focused on specific groups, especially asylum seekers and refugees.<sup>262</sup> In comparison, work on attitudes toward irregular migrants and public preferences for policies for addressing irregular migration has remained relatively limited.

<sup>254</sup> For a broader discussion of this issue, see e.g. Joppke 1998.

<sup>255</sup> Cohen 2009.

<sup>256</sup> Gilabert and Lawford-Smith 2012.

<sup>257</sup> Compare Ruhs 2022.

<sup>258</sup> For recent examples in the context of Europeans’ attitudes to asylum seekers and refugees, see e.g. Dinas et al., 2019; Steinmayr 2021; Rudolph and Wagner 2022.

<sup>259</sup> Vrânceanu 2019.

<sup>260</sup> For a review, see e.g. Hainmueller and Hopkins 2014.

<sup>261</sup> For example, Bansak et al. 2017; Jeannet et al 2021.

<sup>262</sup> For example, Hager and Veit 2019; Hangartner et al 2019.

We focus on three findings from existing research that are relevant to our focus on irregular migrant workers. First, Europeans' attitudes toward low-skilled migrants tend to be more negative than toward higher skilled migrants.<sup>263</sup> This preference appears to be driven primarily by concerns that lower-skilled migrants are less beneficial to the host country's economy rather than by individuals' concerns about labour market competition, although research on this issue is evolving. This finding is relevant to irregular migrants because they tend to be concentrated (although not exclusively) in low-skilled employment in the host country (even though they may not actually have a low level of skills).

Second, the available research suggests that the public views irregularity in migration and the employment of migrants very negatively. For example, in a 2011 survey of the British public's attitudes toward immigration<sup>264</sup>, irregular migrants were the least favoured group of migrants. Even among respondents who said that they would like to see overall immigration kept the same or increased, well over half (61%) said that they would like to see illegal immigration reduced, which suggests a broad consensus. Similarly, research on attitudes toward immigration in the US found that a migrant's 'previous unauthorized entry' has a strong negative impact on the likelihood that the migrant will be preferred for admission by the public.<sup>265</sup> Another study of attitudes toward immigration policy in the United States showed that, compared to attitudes toward legal immigration policy, there is a "much greater prevalence of *categorical* assessments of illegal immigration policy, much of it rooted in rigid moralistic convictions about the importance of the strict adherence to rules and law".<sup>266</sup>

A third finding is that the public tends to prefer migration policies that provide a degree of control. For example, a recent study of public preferences for asylum and refugee policies in eight European countries found that Europeans prefer policies that provide refugee protection but, at the same time, also impose control through limits or conditions.<sup>267</sup> The authors argue that the use of limits and conditions enables individuals to resolve conflicting humanitarian and perceived national interest logics in refugee protection policy. A follow-up study showed that the use of policy controls is particularly important for generating support for providing refugee protection among people with low political trust.<sup>268</sup> Although irregular migration is different from asylum and refugee protection, the two are often linked in the public imagination. Among all the different types of migration, irregular migration is usually associated with the least degree of state control which, the evidence suggests, is likely to have a negative impact on public attitudes.

### **Attitudes towards the rights of migrants**

To the best of our knowledge, there has been no systematic research on how European publics think about granting different types of rights to migrants with irregular migration status. While existing studies make clear that voters in many countries tend to have very negative views about irregular migration and employment of migrants, this does not necessarily mean that the public would oppose fundamental rights protections for irregular migrant workers. Although more research is clearly needed in this area, it is likely that public support for extending rights to irregular migrant workers varies across different types of rights. In particular, where protecting rights is perceived to help protect the interests of the host country's residents, there may be public support for protecting rather than denying rights. Examples may include fundamental labour rights (as migrants employed under conditions that do not

---

<sup>263</sup> Naumann et al 2018; for the US, see Hainmueller and Hiscox 2010.

<sup>264</sup> Blinder et al. 2011.

<sup>265</sup> Hainmueller and Hopkins 2015.

<sup>266</sup> Wright et al. 2016, 229-30, *emphasis added*.

<sup>267</sup> Jeannet et al. 2021.

<sup>268</sup> Jeannet et al. 2020.

respect fundamental labour rights can have adverse effects on the employment prospects and conditions of domestic workers) and access to health care (because denying irregular migrants access to health care can have negative wider public health effects, especially although not only during a pandemic).

The suggestion that public support for granting rights protections to irregular migrant workers may vary across different types of rights is also likely to apply when it comes to migrants' access to welfare rights and services. We know from existing research that, in European countries that host large numbers of migrant workers, the principle most commonly preferred by the public for regulating migrants' access to national welfare programmes involves 'contribution' and 'reciprocity'.<sup>269</sup> In other words, according to this principle migrants should be given access to social rights after they have made a prior 'contribution' to the host economy and society through, e.g. employment and paying taxes for some time. However, recent contributions to the long-standing research literature on the characteristics and sources of 'welfare chauvinism' (i.e. the view that migrants should be excluded from 'national welfare' programmes) suggest that public preferences vis-a-vis extending social rights to migrants may vary across different types of welfare programmes.

For example, in their study of public attitudes to granting migrants access to welfare programmes in Denmark, Germany, and the UK in 2019, Eick and Larsen (2021) find that public attitudes are less restrictive towards granting migrants access to public (welfare) *services* (such as health and education) than to welfare *benefits* (such as cash benefits). The authors suggest four mechanisms that may influence public preferences in this policy area and that may explain the preference for giving access to services than benefits: a lower level of transferability across borders (e.g. unlike cash-benefits, access to health services may not be easily transferred to people in other countries); different types of imagined reciprocity (understood as links between benefit 'givers' and 'receivers'); a lower potential for cheating; and higher imagined positive externalities (such as positive effects on broader societal goals and outcomes e.g. public health and security).

Although Eick and Larsen's study was about access to welfare for migrants in general (rather than irregular migrant workers in particular), their research suggests the possibility that the public may also make a similar differentiation when it comes to providing welfare rights for irregular migrant workers. If, as seems plausible, a key determinant of the perceived welfare deservingness of migrants is the perceived potential for cheating, public attitudes to extending welfare rights to irregular migrants can be expected to be significantly more restrictive than attitudes towards regular migrant workers. At the same time, irregular migrant workers may, at least by part of the public, be perceived as making a 'contribution' through their employment and, as we argued above, public attitudes may be more positive where there are specific public interest concerns (positive externalities) such as in the case of migrants' access to basic health care.

Legalisation – which can take on different forms in terms of, for example, granting legalised migrants temporary residence or permanent residence status with a path to citizenship – is an important tool for expanding migrants' legal rights in the host country.<sup>270</sup> There is a dearth of research on public attitudes toward legalisation of irregular migrants in Europe. Most of what we know from existing research comes from studies conducted in the context of the US which has long had a much larger population of irregular migrants than the EU. Recent surveys suggest that a majority of Americans favour some form of legalisation of irregular migrants or at least for certain sub-groups especially those brought to

---

<sup>269</sup> See Reeskens and Van Oorschot 2012; Martensson et al. 2021.

<sup>270</sup> See, for example, Song and Bloemraad 2022.

the US as children.<sup>271</sup> Support for legalisation is influenced by the attributes of irregular migrants. A recent study found that migrants' attributes that raise Americans' support for legalisation include higher education and English language skills as well as more years spent and greater work history in the US.<sup>272</sup> In other words, there is greater support for legalising migrants that are thought to be more deserving because of their past and imagined potential future economic contributions.

Interestingly, the (limited) available evidence suggests that American public support for granting irregular migrants access to rights may be considerably lower than public support for legalisation. For example, a study of public attitudes to legalisation and extending rights to irregular migrants in California found that seventy percent of respondents supported legalisation but a large majority was opposed to granting irregular migrants access to a range of different welfare services and benefits.<sup>273</sup> Public support was found to be highest for access to emergency healthcare which 43 percent of respondents supported. Commenting on the difference between support for legalisation and welfare rights for irregular migrants, the authors suggest that "the difference is consistent with the idea that legal status and access to benefits are distinct facets of societal membership in the minds of voters, or evoke distinct notions of 'deservingness' ".<sup>274</sup>

### ***Covid-19: A change in public support for (some) migrants' rights?***

Recent research suggests that attitudes to migrants and immigration have been remarkably stable over time, including during times of major economic and political shocks.<sup>275</sup> As the authors of this research point out, this finding is consistent with the hypothesis that the main determinants of attitudes to immigration are childhood and young adulthood socialisation and stable predispositions rather than information or contextual factors. Emerging analyses of the effects of Covid-19 on attitudes to immigration appear to support this view. A recent paper on Europeans' attitudes to immigration during the years of the Covid pandemic found little systematic change.<sup>276</sup>

The relative stability in views towards immigration and migrants as a group may hide variation in attitudes toward specific sub-groups of migrants, including those with irregular status. We are not aware of research that has looked at whether and how attitudes toward irregular migrants have changed during Covid19. In theory, there may be different effects. On the one hand, if the stability thesis is correct, there may not have been much change. On the other hand, it is possible that, during a crisis such as Covid19, particular groups of migrants, and especially irregular migrants, are perceived as a greater threat to the host country's population and society, and this changing perception may be reflected in attitudes becoming more negative towards these groups.<sup>277</sup>

The opposite effect is also possible, at least for some (irregular) migrants: Covid19 has shone a light on the contribution of migrant workers (and in many countries also irregular migrant workers) to the resilience of the provision of essential goods and services, e.g. in agriculture and food processing as well as in health and social care. What used to be termed "low-skilled (migrant) workers" are now frequently referred to as "essential workers" whose labour supply must be protected or even expanded.<sup>278</sup> It is possible, although by no means certain, that public attitudes toward migrants

<sup>271</sup> Pew Research Centre 2020.

<sup>272</sup> Wright et al. 2016.

<sup>273</sup> Bloemraad et al. 2016.

<sup>274</sup> Bloemraad et al. 2016, 1665.

<sup>275</sup> Kustov et al. 2021.

<sup>276</sup> Dennison et al. 2021.

<sup>277</sup> See, for example, Esses and Hamilton 2021.

<sup>278</sup> See Anderson et al. 2021.



employed in essential jobs (including those without regular status) could become more positive because of the 'essential' nature of their work.<sup>279</sup> As discussed earlier in this report, a number of European countries have implemented temporary legalisation programmes and/or granted better rights protections to irregular workers deemed to be doing essential work during the pandemic. Emerging research on attitudes towards migrants in essential jobs in the UK suggests that migrants doing essential work are viewed more positively by the British public<sup>280</sup> and that there is greater support for giving them access to health and welfare rights compared to migrants in other (non-essential) occupations.<sup>281</sup> We still lack evidence, however, on whether and to what extent these more positive views of migrants in essential jobs would also apply to irregular migrant workers.

---

<sup>279</sup> Drazanova 2020.

<sup>280</sup> Fernández-Reino 2021.

<sup>281</sup> Broadhead and Ruiz 2021.

## 5. POLICY CONSIDERATIONS AND RECOMMENDATIONS

### KEY FINDINGS

Any policies aimed at reducing the protection gap need to address the underlying tension between protecting the fundamental rights of irregular migrant workers and the operation of immigration laws. In this context, one important measure that is much discussed is the extension of 'firewalls' that prevent providers of public services from reporting the (irregular) migration status of the migrants they encounter to immigration enforcement authorities. Firewalls are likely to be more effective where irregular migrants' access to fundamental rights (e.g. access to healthcare and education) does not directly engage law enforcement authorities, and where the institution of a firewall is construed as supporting rather than undermining broader public interests. For this reason, we do not think it is realistic to expect firewalls to play a major role in improving labour rights protections for irregular migrant workers.

Irregular migrants need to be able to safely report labour exploitation and exercise their labour rights without fear of deportation. We therefore propose creating a special temporary work permit – call it a 'redress work permit' – specifically for irregular migrant workers who have come forward to claim their rights and whose employment conditions, while working illegally, were found to constitute a significant breach of their fundamental rights. Such a redress work permit could be included in European laws either by amending the current Employer Sanctions Directive, or as part of a new EU Directive on Labour Standards for Irregular Migrant Workers in the EU (see below).

Independent, third parties (including NGOs and NHRIs) can play an important role as intermediaries between irregular migrants and law enforcement authorities such as labour inspectorates and courts in the process of bringing complaints. The European Network of National Human Rights Institutions and the European Human Rights Commissioner need to work collaboratively to tackle challenges related to labour justice for irregular migrant workers

There is a need to clarify the scope of EU laws in protecting the labour rights of irregular migrant workers in the EU. Consideration should be given to the development of a new EU Directive specifically on labour protections for irregular migrant workers in the EU. Such a Directive should make clear the full range of labour rights standards (as provided for in existing Directives and associated Regulations) that ought to apply in equal measure to irregular migrants as to those residing and working legally in the EU.

The discussion of the potential policy options for reducing the gaps in fundamental rights protection for irregular migrant workers in the EU should also include consideration of regularisation programmes. Using the law to protect people who are working outside the law (irregular migrant workers) will always be a major challenge. Public attitudes may be more favourable to targeted regularisation than to providing irregular migrant workers with more extensive rights protections. The Covid-19 pandemic may create the political space and a window of opportunity for targeted regularisation programmes for irregular migrants working in "essential" sectors and occupations.

There are gaps in the available evidence that limit our understanding of the conditions of irregular migrant workers and hamper development of more effective protection policies. In particular, there is a need for more research on: the use of back-payment measures in the EU; public attitudes and preferences vis-à-vis rights protections for irregular migrant workers and regularisation programmes; and on variations of the conditions of irregular migrant workers across European countries.

## 5.1. The central policy challenge: how to respond to tensions between protecting fundamental rights of irregular migrants and enforcing immigration laws

A key theme throughout this study, discussed in both the legal and institutional analysis of protection gaps in section 3 as well as in the discussion of the economic and political context in section 4, is that there is an underlying tension between policy measures that aim to provide more effective protections of the fundamental rights of irregular migrant workers on the one hand, and states' laws to regulate immigration and reduce the employment of irregular migrants on the other. The tension has both legal and political dimensions. The analysis in section 3 made clear that immigration laws, as well as legal principles of particularly common law but also civil law countries, generate frameworks of "illegality" which are in tension with many national laws aimed at promoting the fundamental rights of irregular migrant workers. These effects constitute obvious structural and individual level obstacles to justice. Where protection and opportunities for redress (e.g. back-pay of wages) are structurally linked to subsequent deportation, most irregular migrants (with few exceptions) will be unwilling to assert their rights because they do not wish to return home. As a consequence, the available legal protections are, to all intents and purposes, theoretical and not realisable by irregular migrant workers in a meaningful way in practice. Moreover, even in circumstances where irregular migrants may be prepared to face the risk of deportation, the illegality of their employment may nullify or risk nullifying many labour rights which, in ordinary 'legal' contexts, they would otherwise enjoy as a matter of national laws.

The political dimension of the tension is grounded in the types of political feasibility constraints and basic economic dynamics of irregular migrant labour markets that we discussed in section 4. Although public attitudes and preferences can be considered as "soft" rather than "hard" constraints, the available evidence suggests that people have deep-seated beliefs and opposition to illegality in labour migration and the employment of migrants, meaning that these beliefs and preferences for control, and how they interact with voting and electoral outcomes, do constrain feasible policy-making in important ways. As also discussed in section 4, global inequalities and the fundamental economic dynamics of migrant labour markets in high-income countries mean that irregular migrant workers will always weigh up the consequences of greater rights protections in the host country (e.g. in the form of gaining redress to rights violations) against the often negative effects of a forced return to their home countries.

Given the deeply embedded and structural nature of the tension between fundamental rights and immigration enforcement, it is a long-standing rather than new issue/conundrum that has attracted a considerable amount of attention in both research and policy debates. Matthew Gibney (2009), for example, referred to the tension as a "rights trap":

"Many precarious residents face what might be called a "rights trap": in order to claim rights and state protections, unlawful migrants must bring themselves to the attention of state authorities (they must, for example, call upon the police or judicial authorities). In this case fundamental human rights are neutered not directly by government inaction or inability but as an indirect result of migration control practices. The state's right to deport undermines the conditions necessary for the realization of human rights for all those on its territory." (Gibney 2009, p.39).

It is also important to recognise that this tension is not unique to the situation of irregular migrant workers. Similar issues arise in the case of trafficked persons where 'rescue' is often directly followed by

deportation<sup>282</sup> and, in slightly different form, also in the case of migrant workers legally employed on temporary work permits. As we discussed in section 4, TLMPs typically tie migrants to the job and employer specified on the work permit. Migrants experiencing exploitation may be reluctant to make their case known to the authorities because of a concern about loss of employment and also, by extension, a potential loss of residence status in the host country. One important way in which migrants may be able to deal with exploitative working conditions without having to leave the host country is by changing employers. It is not obvious or clear that this is necessarily easier for migrants employed on temporary work permits than for irregular migrant workers. As discussed in section 4, some (although not all) TLMPs allow a change of employer but typically only via a new work permit application.

Although neither the political nor legal dimensions of the tension associated with the 'illegality' of irregular migrant labour can be fully overcome, steps can nonetheless be taken to improve rights protections in practice for this group of workers in the EU. To that end, we now draw on the analysis in this report to discuss key areas for potential policy development. We conclude with recommendations for the European Parliament and other stakeholders.

## 5.2. Firewalls

A common suggestion for improving fundamental rights protections for irregular migrants is to create 'firewalls' between state institutions that protect rights and provide services to irregular migrants on the one hand, and immigration enforcement agencies tasked to detect and, eventually, help deport irregular migrants on the other.<sup>283</sup> The basic idea is to prevent service providers and rights protection agencies from reporting the (irregular) migration status of the migrants they encounter to immigration enforcement authorities. If irregular migrants are aware of and trust this firewall, the argument goes, they will be less reluctant to make use of the rights protections and services available to them.

As discussed in section 3 of this study, such firewalls have already been put in place in some countries, especially in the context of the provision of basic services such as emergency healthcare. What is clear from this earlier analysis is that firewalls are more readily implementable, and more likely to meet their objectives, in some settings than in others. In the context of accessing social welfare services, such as healthcare, education, housing and basic social assistance, firewalls between service providers and immigration enforcement authorities have often been considered, particularly at regional and municipal government levels, as a rational and proportional policy response in order to meet the basic needs of local populations. In such cases, the public interest in meeting needs and upholding fundamental rights is considered to outweigh immigration enforcement considerations in at least the immediate term. De facto firewalls are also known to operate in, for example, the context of the exercise of freedom of assembly and organisation, where irregular migrants have been able to avail of established industrial relations frameworks to exercise their rights without risk of detection, detention and deportation by law enforcement agencies.

A different set of dynamics arises however when irregular migrants are asserting their fundamental rights to fair working conditions and labour justice. In such scenarios, migrants are likely to directly confront law enforcement agencies such as labour inspectorates, police and courts. It might at first sight seem reasonable, in the interests of fundamental rights protection, to require law enforcement agencies to address labour exploitation allegations without disclosing or pursuing associated immigration irregularities as, for example, was recently recommended by the European Economic and

---

<sup>282</sup> See, for example, Blambeck 2014, <https://academic.oup.com/sp/article-abstract/21/3/382/2259052?redirectedFrom=PDF>

<sup>283</sup> See, for example, Carens 2013; Crépeau and Hastie 2015; Gibney 2009; Hermansson et al. 2020.

Social Committee (EEAC).<sup>284</sup> Our review of national laws and policies in relation to labour inspectorates suggests, however, that in many countries this is currently not a realistic proposition (and it could indeed be counterproductive). The problem arises because irregular labour migration is, in many cases, inextricably linked to labour exploitation. A firewall designed to prevent law enforcement authorities (i.e. inspectorates, police and courts) from reporting irregular migration to immigration enforcement authorities may not only directly contravene the legal mandates of the former bodies, but it could also be viewed as contrary to the public interest by potentially undermining efforts to target the causes of labour exploitation and by restricting the ability of the state to pursue employer sanctions. This can be contrasted with discrete firewalls, such as the 'free in, free out' policy of the Amsterdam police (discussed in Chapter 3), where the encouraged anonymous reporting by irregular migrants of general crime might have no bearing whatsoever on irregular migrant labour, thereby allowing the Amsterdam police to favour the objective of serious crime control over immigration control.

It is apparent that the tensions associated with protecting rights in contexts of illegality make the operation of firewalls difficult. One possible way around this tension would be to use independent, third parties to act as intermediaries between irregular migrants and law enforcement authorities such as labour inspectorates and courts in the process of bringing complaints. Trade unions could play this role but preferably the service may be performed by NGOs, or NHRIs who are likely to experience fewer conflicts of interest. As noted in section 3, there are already encouraging practices in this regard in certain member states and these could be developed further on the basis of increased financial support from governments.

A second reason that may undermine the effectiveness of firewalls, especially with regard to labour rights, is the relatively low trust that irregular migrants may have in the host state and its institutions. Knowing that their employment in the host country is illegal in itself, migrants may be inhibited to pursue their rights and have little confidence that labour inspectorates or courts/judicial staff will abide by guarantees of privacy or anonymity and non-reporting where such exist. This is another factor in favour of involving neutral third parties with whom migrants may have a more trusting relationship in cases where the migrant is considering official complaint action against an employer.

Finally, even if effective firewalls that prevent the sharing of information with immigration enforcement agencies were more widespread across EU Member States, legal proceedings and any successful redress obtained (e.g. back-paying of wages) would, in all likelihood, lead to the loss of employment for the irregular migrant worker. Without employment, some workers may find it difficult to remain in the host country unless they are successful in finding an alternative employer who will recruit them despite their irregular migration status. From the perspective of the migrant, the potential adverse consequences of a successful (or unsuccessful) rights claim on future employment opportunities may therefore act as a deterrent to bringing a complaint. For all these reasons, we consider that firewalls can play a helpful and important role when it comes to irregular migrants' access to basic welfare services, but they are arguably more limited in making labour rights protections more meaningful and realisable for irregular migrant workers.

### 5.3. Temporary 'redress' work permit

If firewalls are limited in their ability to address and prevent labour exploitation of irregular migrant workers, what other policy could work better to help protect the fundamental labour rights of irregular migrant workers? The key to answering this question, we argue, is to find a way to break, or weaken considerably, the structural link that currently exists in most countries between irregular migrant

---

<sup>284</sup> EEAC 2022.

workers' pursuit of labour rights claims and their subsequent deportation. In other words, we need to reconcile the prerogative of EU Member States to control immigration with their duties to uphold the fundamental rights of irregular migrant workers. In this spirit, the EU's Employer Sanctions Directive requires Member States to consider granting, on a case-by-case basis, temporary residence permits to irregular migrants who are pursuing criminal charges against an employer for labour exploitation in certain aggravated circumstances. Such permits are envisaged to last only until the conclusion of legal proceedings and, if the migrant is simultaneously taking an action for back-pay, then until the conclusion of the same. This, in our assessment, is inadequate, not least because, despite the aggravated nature of labour abuse experienced by the irregular migrant, deportation is nevertheless likely to follow the (successful or unsuccessful) conclusion of legal proceedings.

To enable and encourage irregular migrant workers in exploitative employment situations to come forward and assert their labour rights in legal proceedings, they must have an assurance that, should they be successful in their legal claims against their employers, they will be given the opportunity to reside and work legally in the host country, at least for a limited duration. This must be done in a way that provides a meaningful and secure incentive for irregular and exploited migrants to come forward but, at the same time, does not undermine in a significant way the host country's immigration controls and policies for reducing the employment of irregular migrant workers. These twin goals could be achieved by creating a special temporary work permit – call it a 'redress work permit' – specifically for irregular migrant workers who have come forward to claim their labour rights and whose employment conditions while working illegally were found to constitute a significant breach of their fundamental rights. This proposal is consistent with (although more specific than) a recommendation arising from a recent Opinion by the EESC on the Commission's 2021 report on the effectiveness of the Employer Sanction Directive. The EESC recommends to the Commission and Member States "that migrants who work with the authorities to combat employers of illegally staying third-country workers be granted access to regular residence and work permits as a means of motivating them to engage actively with the authorities of the host country".<sup>285</sup> The redress permit that we propose could feature in a revised EU Employer Sanction Directive.

In order to reserve the redress work permit for those who have suffered serious human rights violations (but who fall outside of national legal definitions of trafficking), significant breach could involve any treatment which infringes the EU Charter right to human dignity (Article 1), or its prohibitions against inhuman or degrading treatment (Article 4), and against slavery and forced labour (Article 5), or the most proximate offences to these infringements which exist in the laws of member states. In the interests of equity, the redress work permit should be available on an equal basis to migrants on temporary work permits who have suffered similar labour exploitation.

The duration of such a temporary work permit needs to be long enough to provide migrants with a meaningful opportunity to make financial gains and savings from employment in the host country (taking into account the often high costs associated with recruitment agencies or middlemen) but, we argue, it cannot be so long as to create entitlements to long-term residence. We suggest a 2-year work permit that is non-renewable and offers no path to permanent residence. However, there could and, we argue, should be an opportunity for migrants with such 2-year 'redress' permits to apply to switch into other 'regular' work permit categories by which we mean the work permits available to all non-EU workers with the relevant skills. If migrants on the special redress permits are successful in obtaining such regular permits, the relevant rules (and any opportunities for upgrading to permanent residence) will apply. States should be encouraged to look particularly favourably on applicants who have been

---

<sup>285</sup> EESC 2022, 4.

resident, and potentially working under exploitative conditions, in the host country for considerable periods of time.

There are, of course, many aspects and details of the conditions and rights attached to such a temporary 'redress' work permit that would need to be discussed and clarified. For example, would legal employment of redress permit holders be restricted to specific jobs? If so, which ones? Given that the previously irregular and now regularised migrant workers may have skills that do not easily match those deemed to be in shortage in the host economy, and as their numbers are likely to be quite small at any given time, it may make sense not to restrict legal employment of the holders of redress work permits to specific sectors or jobs. As regards access to welfare and social protection, the rules that apply to regular work permit holders could apply also to redress work permit holders.

How will the creation of such a temporary redress work permit change irregular migrants' incentives to claim their fundamental labour rights protections in the host country? The prospect of an opportunity to regularise their status via a 2-year work permit can be reasonably expected to encourage some (although clearly not all) irregular migrant workers who feel they are exploited to come forward. The most likely group to be incentivised to do so are irregular migrant workers who experience a high degree of exploitation and who perceive limited or no opportunities to change employers as a way of escaping this exploitation. To further enhance migrants' incentives, states should consider extending the redress permit to irregular migrant workers who come to the attention of the immigration authorities as a direct consequence of the reporting actions of the original migrant complainant (e.g. as a result of subsequent labour inspections in shared workplaces) and who have suffered similar human rights violations in the workplace. Such affected parties should be invited to join the original migrant complainant in joint legal proceedings. Extending the redress permits in this way would reassure migrants concerned about any potential negative effects of their own redress actions on the circumstances of fellow irregular migrant workers.

What would be the impact of creating a redress work permit on migration controls and state policies to combat irregular labour migration? In particular, will this new permit act as a "pull factor" – a common concern about any regularisation programme – and attract more irregular labour migration to the host country? We argue that this is unlikely to be the case, given the limited and specific circumstances under which the redress permit can be accessed (i.e. only after proven violation of fundamental rights while working illegally or on a temporary work permit in the host country) and also its temporary nature (2 years, non-renewable). By encouraging more irregular migrants who experience high degrees of exploitation to come forward, the existence of a redress work permit may assist the host country to identify and sanction more employers of irregular migrant workers, thus helping rather than hindering efforts to reduce the employment of irregular migrant labour.

#### **5.4. A new EU Directive**

As the regulation of labour migration and labour rights is primarily a competence of EU Member States, most of the policies discussed above will require policy reforms and innovation at the national level. Despite the extent of national competences, this study has however clearly demonstrated that the EU has played a major role in influencing the fundamental rights systems in place in all 27 EU Member States for the protection of irregular migrant workers. The Charter of Fundamental Rights has been a guiding standard for national laws and policies, in the area of core rights in particular. Rulings from the European Court of Justice, and specifically the *Tümer* case, have had important ramifications for migrant rights beyond the respondent Member State. The Employer Sanctions Directive made visible - in many cases, for the first time - the rights of irregular migrant workers in national legislation.

At the same time however, the EU is implicated in perpetuating and reinforcing the tension between measures to uphold the labour and core fundamental rights of irregular migrant workers and immigration laws. The Employer Sanctions Directive has coupled more tightly the exercise of labour justice with deportation measures. Even in cases of severe labour abuse it has failed to provide a sufficiently protective framework that could offer some restitution for those who have been seriously exploited in often under-regulated workplaces, and who have demonstrated bravery in coming out of the shadows to claim their rights and help create dignity at work in the EU. If the Employer Sanctions Directive epitomises the necessary compromise for securing explicit rights protections for irregular migrant workers, then a frank discussion is in order and more research needed to establish the extent to which the protective elements of the Directive go beyond a comforting paper exercise and actually reduce protection gaps for irregular migrant workers in practice.

The EU has also contributed to ongoing ambiguity on the scope of existing labour rights protections and their applicability to irregular migrant workers. As discussed in detail in section 2, while the Charter rights for “workers” in Articles 27, 28, 30 and 31 could be read expansively to be inclusive of irregular migrant workers, the Charter does not make explicit reference to irregular migrants nor does it expressly prohibit immigration irregularity as a legitimate ground for reduced labour rights protections. Similarly, EU Directives on labour standards defer to national employment and labour laws to specify the scope of “employment contracts” and “employment relationships” subject to the Directive, thereby leaving open the possibility of the exclusion of irregular migrants from the relevant employment protections. While the EU cannot, by law, exceed the boundaries of its competences, it can offer clarification in policy areas where the line between labour law and human rights law may be blurred, such as on the scope of the rights of irregular migrants to human dignity in work in the EU.

In order to clarify the scope of EU laws in protecting the labour rights of irregular migrant workers in the EU, consideration should be given to the development of a new EU Directive specifically on labour protections for irregular migrant workers in the EU. Such a Directive should make clear the full range of labour rights standards (as provided for in existing Directives and associated Regulations) that ought to apply in equal measure to irregular migrants as to those residing and working legally in the EU. The designated Directive would also be a suitable alternative vehicle – relative to a revised Employer Sanctions Directive (as discussed above) – to legislate for the temporary redress permit for irregular migrant workers recommended above and also to address barriers in accessing legal aid for migrants who have suffered labour exploitation amounting to criminal exploitation and well as those pursuing civil actions.

## 5.5. Regularisation

The discussion of the potential policy options for reducing the gaps in fundamental rights protection for irregular migrant workers in the EU should also include consideration of regularisation/legalisation programmes. At the end of the day, as our discussion in section 3 has shown, using the law to protect people who are working outside the law (irregular migrant workers) will always be a major challenge. Although regularisation does not necessarily and automatically lead to improved outcomes for all legalised migrants (see section 4), it does generally lead to better access to basic rights protections. Furthermore, as also discussed in section 4, the research evidence from the United States suggests that public support for legalisation programmes (suitably designed) tends to be significantly greater than support for extending rights to irregular migrant workers.

Of course, regularisation programmes need to be carefully designed and use specific and reasoned criteria to determine who, among the population of irregular migrant workers in the host country, should be eligible. Policy debates and decisions about the design of regularisation programmes should



be informed by the substantial research literature on past experiences and effects of different types of regularisation programmes in European countries and in other parts of the world.<sup>286</sup> It is possible, although by no means certain, that the increased public concern with societal resilience and the protection of the provision of essential goods and services during the Covid19 pandemic, has opened a window of opportunity (possibly a temporary one) for strengthening the rights of migrant workers employed in what are deemed to be “essential jobs”. This may include public and potentially also political support for targeted regularisation programmes of irregular migrant workers doing essential work. Care must be taken, as earlier discussed in the context of recent experiences of regularisation programmes in Italy, to ensure that programmes effectively serve the interests of migrants and go beyond stop-gap economic measures.

## 5.6. Reducing knowledge gaps

A number of knowledge gaps hamper the more effective protection of the fundamental rights of irregular migrant workers in the EU. For example, there is an urgent need for more research on the specific question of the use of back payment measures by irregular migrant workers in the 25 EU Member States that have signed up to the Employer Sanctions Directive. We know from the recent 2021 report of the FRA that there are major data gaps in this area; there is no disaggregated central data on complaints taken by irregular migrant workers and there is little primary qualitative research that could provide insight on the attitudes of irregular migrant workers to the back pay initiatives at national levels. Given the recent circumspet review by the European Commission of the Employer Sanctions Directive (2021), this research is much needed.

There are also gaps in our understanding of the nature and characteristics of the feasibility constraints on policy-making aimed at improving protections for irregular migrant workers. For example, we need more research on public preferences for extending rights protections to irregular migrant workers in the EU, public attitudes toward different types of regularisation programmes, and on how these preferences and attitudes vary across European countries and individuals, and how they may have changed because of Covid-19.

A third knowledge gap relates to the variations and determinants of the conditions of irregular migrant workers in the EU. For example, to assess critically the scope and desirability of a common EU policy approach, we need to understand better whether and how the conditions of irregular migrant workers vary across European countries with different socio-economic institutions, i.e. with different types of labour market regulations and welfare policies.

## 5.7. Policy recommendations

### RECOMMENDATION 1 - INTRODUCE A “REDRESS” WORK PERMIT:

- **Member States** should provide a temporary “redress” work permit to irregular migrant workers who have come forward to access their legal labour protections and whose employment conditions, while working illegally, were found to constitute a significant breach of their fundamental rights,.
- The **European Parliament** should encourage and support the European Commission to make provision for a redress work permit by either amending the current Employer Sanctions Directive, or as part of a new EU Directive on Labour Standards for Irregular Migrant Workers in the EU (as below).

<sup>286</sup> See, for example, Brick 2011.

**RECOMMENDATION 2 - SUPPORT THIRD-PARTY LABOUR RIGHTS ADVOCATES:**

- **Member States** should take financial and, if necessary, legislative steps to support NGOs, national human rights institutions, and trade unions to act as intermediaries between irregular migrants and law enforcement authorities, and to provide irregular migrants with legal advice and representation.
- The **European Parliament** should encourage and support the **European Commission** to help fund the work of third-party advocates on labour rights in these roles.
- **The European Parliament** and the **European Commission** should support and rally the **European Network of National Human Rights Institutions** (along with its working group on asylum and migration) and the **European Human Rights Commissioner** to work collaboratively to tackle these challenges.

**RECOMMENDATION 3 - IMPLEMENT FIREWALLS IN PROVISION OF BASIC SOCIAL WELFARE SERVICES:**

- **Member states** should implement 'firewalls' in the provision of basic social welfare services to irregular migrants, i.e. service providers should not be required or allowed to report the irregular migration status of service recipients to immigration law enforcement agencies.
- The **European Parliament** should express support for such firewall policies in the provision of basic social welfare services and encourage Member States to implement them.

**RECOMMENDATION 4 - INTRODUCE A NEW EU DIRECTIVE:**

- The **European Parliament** should encourage and support the **European Commission** in proposing a new EU Directive on labour protections for irregular migrant workers in the EU, to identify and clarify the labour rights of irregular migrant workers under EU law.

**RECOMMENDATION 5 - COMMISSION NEW RESEARCH:**

- The **European Parliament** and **European Commission** should encourage and support new research on: the use of back-payment measures in the EU; public attitudes and preferences vis-à-vis rights protections for irregular migrant workers and regularisation programmes; and on variations of the conditions of irregular migrant workers across European countries.

## REFERENCES

- Afonso, A. and C. Devitt. 2016. "Comparative political economy and international migration". *Socio-Economic Review* 14(3): 591–613.
- African Union and European Union. 2022 *6th European Union - African Union Summit: A Joint Vision for 2030*. [https://www.consilium.europa.eu/media/54412/final\\_declaration-en.pdf](https://www.consilium.europa.eu/media/54412/final_declaration-en.pdf)
- Amnesty International. 2014a. *Written Submissions on Behalf of Amnesty International Acting as Amicus Curiae in the Supreme Court Judicial Review of Hussein v. Labour Court*. Dublin: Amnesty International.
- Amnesty International. 2014b. *Exploited Labour Two Years On: The 'Rosarno Law' Fails to Protect Migrants Exploited in the Agriculture Sector in Italy*. London: Amnesty International.
- Anderson, B. 2010. "Migration, immigration controls and the fashioning of precarious workers." *Work, Employment and Society* 24(2): 300-317.
- Anderson, B. 2008. "Illegal Immigrant: Villain or Victim?" COMPAS Working Paper Series WP-08064, Oxford.
- Anderson, B. 2000. *Doing the Dirty Work? The Global Politics of Domestic Labour*. New York: Zed Books.
- Anderson, B. and M. Ruhs. 2010a. "Researching illegality and labour migration." *Population, Space and Place* 16 (3): 175-79.
- Anderson, B. and M. Ruhs. 2010b. "Migrant workers: who needs them? A framework for the analysis of shortages, immigration and public policy", Chapter 2 in *Who Needs Migrant Workers?*, edited by M. Ruhs and B. Anderson, Oxford University Press.
- Anderson, B., Poeschel, F. and M. Ruhs. 2021. "Rethinking labour migration: Covid-19, essential work, and systemic resilience", *Comparative Migration Studies* 9(45).
- Anderson, B. and I. Schutes, eds. 2014. *Migration and Care Labour: Theory, Policy and Politics*. Palgrave Macmillan.
- Bansak, K., Hainmueller, J. and D. Hangartner. 2016a. "How economic, humanitarian, and religious concerns shape European attitudes toward asylum seekers." *Science* 354 (6309): 217–222.
- Bansak, K., Hainmueller, J., & Hangartner, D. 2017. "Europeans support a proportional allocation of asylum seekers." *Nature, Human Behaviour*, 1, 0133.
- Barnard, C. 2014. "Enforcement of Employment Rights by Migrant Workers in the UK: The Case of EU-8 Nationals." In *Migrants at Work: Immigration and Vulnerability in Labour Law*, ed. C. Costello and M. Freedland, 193-215. Oxford: Oxford University Press.
- Battistini, N. and G. Stoevsky. 2021. "The impact of containment measures across sectors and countries during the Covid-19 pandemic". ECB Economic Bulletin, Issue 2/2021.
- Bauböck, R. and M. Ruhs. 2021. "The elusive triple win: can temporary labour migration dilemmas be settled through fair representation?." Working Paper, EUI RSC, 2021/60, Migration Policy Centre.
- Blinder, S. 2015. "Imagined immigration: The impact of different meanings of 'immigrants' in public opinion and policy debates in Britain." *Political Studies* 63 (1): 80–100.

- Blinder, S., Ruhs, M., and C. Vargas-Silva. 2011. *Thinking Behind the Numbers*. Migration Observatory. University of Oxford.
- Bloemraad, I., Fabiana, S. and K. Voss. 2016. "Rights, Economics, or Family? Frame Resonance, Political Ideology, and the Immigrant Rights Movement." *Social Forces* 94 (4): 1647–74.
- Bogg, A. and T. Novitz. 2014. "Links between Individual Employment Law and Collective Labour Law: Their Implications for Migrant Workers." In *Migrants at Work: Immigration and Vulnerability in Labour Law*, ed. C. Costello and M. Freedland, 361-380. Oxford: Oxford University Press.
- Böhmelt, T. 2019. "How public opinion steers national immigration policies." *Migration Studies*, mnz039, <https://academic.oup.com/migration/articleabstract/9/3/1461/5556382?redirectedFrom=fulltext>
- Brick, K. 2011. Regularizations in the European Union. Migration. Policy Institute.
- Broadhead, J. and I. Ruiz. 2021. "Public attitudes to labour migrants in the pandemic: health and welfare." Migration Observatory briefing, COMPAS, University of Oxford.
- Buckel, S. 2011. "Urban Governance and irreguläre Migration: Städtische Politik als Handlungsraum Konfliktfeld irreguläre Migration." In *Die Zukunft der Europäischen Stadt*. Wiesbaden: VS Verlag für Sozialwissenschaften eds. O. Frey and F. Koch, 246-262.
- Calavita, K. 1992. *Inside the State: The Bracero Program, Immigration and the INS*. New York: Routledge.
- Carens, J. 2013. *The Ethics of Immigration*. Oxford University Press
- Caritas Slovakia. 2019. Migration and Development in Slovakia. Slovakia: Caritas.
- Center for Reproductive Rights. 2020. *Perilous Pregnancies: Barriers in Access to Affordable Maternal Health Care for Undocumented Migrant Women in the European Union*. Geneva: Center for Reproductive Rights.
- Chaloff, J., Dumont, J-C., and T. Liebig. 2012. "The impact of the economic crisis on migration and labour market outcomes of immigrants in OECD countries". CESifo DICE Report 1/2012
- Chiswick, B. 1984. "Illegal aliens in the United States labor market: An analysis of occupational attainment and earnings." *International Migration Review* 18: 714–32.
- Chudzickova A. H. and Z. Bargerova. 2018. *Victims of Labour Exploitation or "Illegal" Migrants? Ukrainian Workers' Labour Rights Protections in Slovakia*. Slovakia: CVEK.
- Clemens, M. 2011. "Economics and Emigration: Trillion-Dollar Bills on the Sidewalk?" *Journal of Economic Perspectives* 25 (3): 83-106.
- Cohen, G. 2009. *Why Not Socialism?* Princeton: Princeton University Press.
- Collingwood, L. and Gonzalez O'Brien, B. 2019. *Sanctuary Cities: The Politics of Refuge*. Oxford and New York: Oxford University Press.
- Committee on Women's Rights and Gender Equality of the European Parliament. 2016. Report on Women Domestic Workers and Carers in the EU (2015/2094(INI)). Strasbourg: European Parliament.
- Costello, C. and M. Freedland, eds. (2014) *Migrants at Work. Immigration and Vulnerability in Labour Law*. Oxford University Press.

- Council of Europe/European Court of Human Rights. 2021. *Guide on the Case-law of the European Convention on Human Rights – Immigration*. Council of Europe/European Court of Human Rights: Strasbourg.
- Council of Europe. 2019a. *Urban Citizenship and Undocumented Migration: Policy Briefing*. Council of Europe.
- Council of Europe. 2019b. *Pushback policies and practice in Council of Europe member states*. Report Doc. 14909
- Council of Europe. 2018. *Digest of the Case Law of the European Committee of Social Rights*. Strasbourg: Council of Europe.
- Crépeau, F. and Hastie, B. 2015. "The case for 'Firewall' Protections for Irregular Migrants: Safeguarding Fundamental Rights". *European Journal of Migration and Law* 2-3: 157-183.
- Darling, J. and Bauder, H. (eds) 2019. *Sanctuary Cities and Urban Struggles: Rescaling Migration, Citizenship, and Rights*. Manchester: Manchester University Press.
- Davies, A. C. L. 2005. "Should the EU Have the Power to Set Minimum Standards for Collective Labour Rights in the Member States?". In *Labour Rights as Human Rights*, ed. P. Alston, 177-203. Oxford: Oxford University Press.
- De Genova, N. 2017. "The 'migrant crisis' as racial crisis: Do Black Lives Matter in Europe?". *Ethnic and Racial Studies* 41: 1765–82.
- De Genova, N. 2002. "Migrant 'illegality' and deportability in everyday life." *Annual Review of Anthropology* 31: 419–47.
- De Schutter, O. 2016. *Links Between Migration and Discrimination: A Legal Analysis of the Situation in EU Member States*. Brussels: European Commission.
- Delvino, N. 2018. *The European Union and Migrants with Irregular Status: Opportunities and Similarities in EU Law and Policy for European Local Authorities Providing Assistance to Irregular Migrants*. Compass: University of Oxford.
- Delvino, N. 2020. "European Union and National Responses to Migrants with Irregular Status: Is the Fortress Slowly Crumbling?" In *Migrants with Irregular Status in Europe*. Evolving Conceptual and Policy Challenges, ed. S. Spencer, and A. Triandafyllidou, IMISCOE: Springer Open.
- Delvino, N. and Spencer, S. 2019. *Migrants with Irregular Status in Europe: Guidance for Municipalities*. Oxford: COMPAS.
- Dennison, J. and A. Geddes. 2019. "A Rising Tide? The Salience of Immigration and the Rise of Anti-Immigration Political Parties in Western Europe." *The Political Quarterly* 90(1): 107-116.
- Dennison, J., Kustov, A. and A. Geddes. 2021. "Public Attitudes to Immigration in the Aftermath of COVID-19." Available at SSRN: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3884912](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3884912)
- Department of Justice, Ireland. 2021. *COVID 19: Information Regarding the Justice Sector Covid-19 Plans, Update 13 Nov 2021*. Department of Justice, Ireland. Accessed at: [https://www.justice.ie/en/JELR/Pages/Information\\_regarding\\_the\\_Justice\\_Sector\\_COVID-19\\_plans](https://www.justice.ie/en/JELR/Pages/Information_regarding_the_Justice_Sector_COVID-19_plans)
- Dewhurst, E. 2014. "The Right of Irregular Migrants to Back Pay: The Spectrum of Protection in International, Regional, and National Legal Systems." In *Migrants at Work: Immigration and*

*Vulnerability in Labour Law* ed. C. Costello and M. Freedland, 216-238. Oxford: Oxford University Press.

- Dinas, E., Matakos, K., Xefferis, D. and D. Hangartner. 2019. "Waking up the golden dawn: does exposure to the refugee crisis increase support for extreme-right parties?" *Political Analysis* 27(2): 244-254.
- Dražanová, L. 2020. Public attitudes to migrant workers: A (lasting) impact of Covid-19?, commentary no. 3 of the MigResHub at the Migration Policy Centre. RSCAS, European University Institute <https://cadmus.eui.eu/handle/1814/70322>.
- European Economic and Social Committee (EEAC). 2020. Opinion - Sanctions against employers of illegally staying third-country nationals. SOC/705. Rapporteur: Carlos Manuel Trinade.
- Eick, G.M. and C.A. Larsen. 2022. "Welfare chauvinism across benefits and services." *Journal of European Social Policy* 32(1): 19-32.
- EMN. 2021. Responses to Long-Term Irregularly Staying Migrants: Practices and Challenges in the EU and Norway. Brussels: European Migration Network.
- EMN. 2017. *Illegal Employment of Third-Country Nationals in the European Union: EMN Synthesis Report*. Brussels: European Migration Network.
- EMN. 2012. *Country Factsheet: Poland 2012*. Brussels: European Migration Network.
- ENNHRI. 2019. *Migrants' Access to Economic and Social Rights: Good practices and challenges of National Human Rights Institutions*. Brussels: European Network of National Human Rights Institutions.
- ENNHRI. 2020. "Human Rights must be at the Centre of the implementation of the Global Compact on Migration in Europe". Written Contribution from the ENNHRI to the Regional Review of the Global Compact on Migration. <https://ennhri.org/wp-content/uploads/2020/11/Submission-Human-rights-must-be-at-the-centre-of-the-implementation-of-the-Global-Compact-on-Migration-in-Europe.pdf>
- EPSU (European Federation of Public Service Unions). 2012. *A Mapping Report on Labour Inspection Services in 15 European Countries*. Brussels: EPSU.
- Esses, V. M., and L.K. Hamilton. 2021. "Xenophobia and anti-immigrant attitudes in the time of COVID-19." *Group Processes and Intergroup Relations* 24(2): 253–259.
- ETUC. 2019. Resolution on avenues of work for the ETUC in migration and asylum fields (2019-2023), <https://www.etuc.org/en/document/etuc-resolution-avenues-work-etuc-migration-and-asylum-fields-2019-2023>
- European Commission. 2020a. Irregular migration and return policy. Available from: [https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy\\_en](https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy_en)
- European Commission. 2020b. Italian Government Adopts Targeted Regularisation for Foreign Workers", Policy Briefing. Brussels: European Commission.
- European Commission. 2021a. *European Equality Law Review: European Network of Legal Experts in Gender Equality and Non-Discrimination*. Vol 1. Brussels: European Commission.
- European Commission. 2021b. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on

the Application of Directive 2009/52/EC 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Brussels 29/09/2021 COM (2021) 592 final.

- European Law Institute. 2017. *Detention of Asylum Seekers and Irregular Migrants and the Rule of Law*. Brussels
- European Union. 2007. "Explanations Relating to the Charter of Fundamental Rights." *Official Journal of the European Union* C303/02.
- Fasani, F. 2015. "Understanding the role of immigrants' legal status: Evidence from policy experiments." *CESifo Economic Studies* 61(3–4): 722–63.
- Fennelly, D. and Murphy, C. 2021. "Racial Discrimination and Nationality and Migration Exceptions: Reconciling CERD and the Race Equality Directive". *Netherlands Quarterly of Human Rights* 39(4): 308-328.
- Fernández-Reino, M. 2021. Public attitudes to labour migrants in the pandemic: occupations and nationality. Migration Observatory briefing, COMPAS, University of Oxford
- FRA. 2021. *Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive*. Luxembourg: European Union Agency for Fundamental Rights.
- FRA. 2020a. *Applying the Charter of Fundamental Rights of the European Union in Law and Policymaking at National Level: Guidance*. Luxembourg: European Union Agency for Fundamental Rights.
- FRA. 2020b. *Strong and Effective National Human Right Institutions – Challenges, Promising Practices and Opportunities*. Luxembourg: European Union Agency for Fundamental Rights.
- FRA. 2015. *Cost of Exclusion from Healthcare – the Case of Migrants in an Irregular Situation*. Luxembourg: European Union Agency for Fundamental Rights.
- FRA. 2015. *Severe Labour Exploitation: Workers Moving into or Within the European Union*. Luxembourg: European Union Agency for Fundamental Rights.
- FRA. 2011. *Fundamental Rights of Migrants in an Irregular Situation in the European Union*. Luxembourg: European Union Agency for Fundamental Rights.
- Fudge, J. and K. Strauss, 2014. "Migrants, Unfree Labour, and the Legal Construction of Domestic Servitude: Migrant Domestic Workers in the UK", in *Migrants at Work: Immigration and Vulnerability in Labour Law*, ed. C. Costello and M. Freedland, 160-179. Oxford: Oxford University Press.
- Gibson, J. and D. McKenzie. 2011. "Australia's Pacific Seasonal Worker Pilot Scheme: Development Impacts in the First Two Years". University of Waikato.
- Gilabert, P. and H. Lawford-Smith. 2012. "Political Feasibility: A Conceptual Exploration." *Political Studies* 60: 809-825.
- Goldenziel, J. 2018. "Khlaifia and Others v. Italy." *American Journal of International Law* 112(2): 274-280
- Hager, A. and S. Veit. 2019. "Attitudes Toward Asylum Seekers: Evidence from Germany." *Public Opinion Quarterly* 83(2): 412-422.
- Hainmueller, J. and D. Hopkins. 2014. "Public attitudes toward immigration." *Annual Review of Political Science* 17(1): 225–249.

- Hainmueller, J. and D. Hopkins. 2015. "The Hidden American Immigration Consensus: A Conjoint Analysis of Attitudes toward Immigrants." *American Journal of Political Science*, 59: 529-548. <https://doi.org/10.1111/ajps.12138>
- Hainmueller, J. and M. Hiscox. 2010. "Attitudes toward Highly Skilled and Low-skilled Immigration: Evidence from a Survey Experiment." *American Political Science Review* 104(1): 61-84.
- Hall, P. and D. Soskice. 2001. *Varieties of Capitalism*. Oxford: Oxford University Press.
- Hangartner, D., Dinas, E., Marbach, M., Matakos, K. and D. Xefteris. 2019. "Does Exposure to the Refugee Crisis Make Natives More Hostile?" *American Political Science Review* 113 (2): 442–455.
- Hermansson, L., Lundberg, A., Gruber, S. et al. 2020. "Firewalls: A necessary tool to enable social rights for undocumented migrants in social work." *International Social Work*. doi:10.1177/0020872820924454
- Helbling, M. and D. Kalkum. 2018. "Migration Policy Trends in OECD Countries." *Journal of European Public Policy* 25(12): 1779-1797.
- Hellgren, Z. 2015. "Markets, Regimes and the Role of Stakeholders: Explaining Precariousness of Migrant/Domestic Care Workers in Different Institutional Frameworks." *Social Politics* 22(2): 220-242.
- Hennebry, J., Grass, W. and J. McLaughlin. 2017. Women migrant workers' journey through the margins: labour, migration and trafficking. UN Entity for Gender Equality and Empowerment of Women (UN Women).
- Hollifield, J. 2000. "The Politics of International Migration: How Can we 'Bring the State Back In?'," in *Migration Theory: Talking Across Disciplines*, ed. C.B. Brettell and J.F. Hollifield, 137-86. New York: Routledge.
- Hotchkiss, J. and M. Quispe-Agnoli. 2013. "The expected impact of state immigration legislation on labor market outcomes". *Journal of Policy Analysis and Management* 32(1): 34–59.
- Human Rights Watch. 2020. "Italy: Flawed Migrant Regularization Program." <https://www.hrw.org/news/2020/12/18/italy-flawed-migrant-regularization-program>
- Hutter, S. and H. Kriesi. 2021. "Politicising immigration in times of crisis." *Journal of Ethnic and Migration Studies* 48(2): 341-365.
- ILO. 1999. *Report III 1B on Migrant Workers*. International Labour Conference proceedings. Geneva: ILO.
- ILO. 2001. *National Labour Law Profile: Federal Republic of Germany*. Geneva: ILO.
- ILO. 2011. *Note on the Dignity and Rights of Migrant Workers in an Irregular Situation*, submission to the Fundamental Rights Agency Annual Conference 2011. Geneva: ILO.
- ILO. 2021. *Access to Protection and Remedy for Human Trafficking Victims for the Purpose of Labour Exploitation: The Role of Labour Inspectors in Belgium and the Netherlands*. Research Brief. Geneva: ILO.
- Inghammar, A. 2010. "The Employment Contract Revisited. Undocumented Migrant Workers and the Intersection between International Standards, Immigration Policy and Employment Law." *European Journal of Migration and Law* 12(2): 193-214.



- Jandl, M. 2011. "Methods, Approaches and Data Sources for Estimating Stocks of Irregular Migrants." *International Migration* 49: 53-77.
- Jeannet, A.-M., Ademmer, E., Ruhs, M. and T. Stöhr. 2020. "A need for control? Political trust and public preferences for asylum and refugee policy". Working Paper, EUI RSCAS, 2020/01.
- Jeannet, A.-M., Heidland, T. and M. Ruhs. 2021). "What asylum and refugee policies do Europeans want? Evidence from a cross-national conjoint experiments." *European Union Politics* 22(3): 353-376.
- Joppke, C. 1998. "Why Liberal States Accept Unwanted Immigration", *World Politics* 50(2): 266-93
- Kahmann, M. 2015. "When the Strike Encounters the Sans Papiers Movement: The Discovery of a Workers Repertoire of Actions for Irregular Migrant Protest in France". *Transfer* 21(4): 413-428.
- Kämpf, A. 2018. *National Human Rights Institutions and their Work on Migrants' Human Rights: Results of a Survey among NHRIs*. Berlin: German Institute of Human Rights.
- Kaufmann, D., Räss, N, Stebel D. and F. Sager. 2021. "Sanctuary Cities in Europe? A Policy Survey of Urban Policies in Support of Irregular Migrants." *British Journal of Political Science* 1-10. doi:10.1017/S0007123421000326
- Keryk, M. 2018. Working in Poland Violations of the Rights of Ukrainian Migrants in the Construction and Service Sectors. Poland: StrongLab.
- Kossoudji, S. and D. Cobb-Clark 2002. "Coming out of the shadows: Learning about legal status and wages from the legalized population." *Journal of Labor Economics* 20(3): 598–628.
- Kustov, A., Laaker, D., and C. Reller. 2021. "The Stability of Immigration Attitudes: Evidence and Implications." *The Journal of Politics*. <https://doi.org/10.1086/715061>
- Lenaerts, K. 2012. "Explaining the Limits of the EU Charter of Fundamental Rights". *European Constitutional Law Review* 8(3): 375-403.
- Lewis, E. 2011. "Immigration, Skill Mix, and Capital-Skill Complementarity." *Quarterly Journal of Economics* 126 (2): 1029-1069.
- Lücke, M., Ruhs, M. and M. Barslund. 2019. *Rethinking EU migration and asylum policies: Managing immigration jointly with countries of origin and transit*. MEDAM Assessment Report 2019, Kiel Institute for the World Economy.
- Lücke, M, Sundberg, O., Jegen, L, and F. Zanker. 2020. *European and African perspectives on asylum and migration policy: Seeking common ground*. MEDAM Assessment Report 2020, Kiel Institute for the World Economy.
- Lücke, M., Ruhs, M. et al. 2021. *EU-Turkey: Toward sustainable cooperation in migration management and refugee protection*. MEDAM Assessment Report 2021, Kiel Institute for the World Economy.
- Magazzini, T. 2021. 'Antidiscrimination meets integration policies: exploring new diversity-related challenges in Europe' *Social Sciences* 10(6): 221.
- Mantouvalou, V. 2006. "Servitude and Forced Labour in the 21<sup>st</sup> Century: The Human Rights of Domestic Workers." *Industrial Law Journal* 35: 395.
- Mantouvalou, V. 2014. "Organizing against Abuse and Exclusion: The Associational Rights of Undocumented Workers." In *Migrants at Work: Immigration and Vulnerability in Labour Law*, ed. C. Costello and R. Freedland, 381-398. Oxford: Oxford University Press.

- Marino, S., Penninx, R. and J. Roosblad. 2015. "Trade Unions, immigration and immigrants in Europe revisited: Unions' attitudes and actions under new conditions." *Comparative Migration Studies* 3 (1). <https://doi.org/10.1007/s40878-015-0003-x>
- Mårtensson, M., Österman, M., Palme, J. and M. Ruhs. 2021. "Shielding Free Movement? Reciprocity in Welfare Institutions and Opposition to EU Labour Immigration", *Journal of European Public Policy*, DOI: 10.1080/13501763.2021.1981980
- Martin, P. and M. Ruhs. 2019. "Labour Market Realism and the Global Compacts on Migration and Refugees." *International Migration* 57(6): 80-90
- Massey, D. 1987. "Do undocumented migrants earn lower wages than legal immigrants? New evidence from Mexico." *International Migration Review* 21(2): 236-74.
- McKenzie, D. and J. Gibson. 2010. *The Development Impact of a Best Practice Seasonal Worker Policy*. Washington, DC: World Bank
- McKnight, A. et al. 2016 Low pay and in-work poverty: preventative measures and preventative approaches. Evidence Review. European Commission.
- Meardi, G., Simms, M. and D. Adam 2019. "Trade unions and precariat in Europe: Representative claims." *European Journal of Industrial Relations* 27(1): 41-58.
- Medici per I Diritti Umani. 2021. *Zone Rosse, Lavoro Nero: Emergenza Sanitaria e Sfruttamento Endemico*. MEDU.
- Mešic, N. 2017. "Framing Solidarity in the Unionisation of Undocumented Migrant Workers". In *Reimagining the Nation: Essays on Twenty-First Century Sweden*, ed. A. Ålund et al, 303-325. Bern: Peter Lang Publishing Group.
- Migration Advisory Committee. 2014. *Migrants in low-skilled work*. London: MAC.
- Naumann, E., Stoetzer, F., and L. Pietrantuono. 2018. "Attitudes towards highly skilled and low-skilled immigration in Europe: A survey experiment in 15 European countries." *European Journal of Political Research* 57: 1009-1030.
- O'Connell, C. 2014. "Migrant Rights Under the European Social Charter." In *Migrants at Work: Immigration and Vulnerability in Labour Law*, ed. C. Costello C. and R. Freedland, 381-398. Oxford: Oxford University Press.
- OECD. 2020. *What is the Impact of the Covid Pandemic on Immigrants and their Children?* Paris: OECD.
- OSCE. 2021. *Regularization of Migrants in an Irregular Situation in the OSCE Region: Recent Developments, Points for Discussion and Recommendations*. Organisation for Security and Co-Operation in Europe.
- Pace, P. 2011. "The Right to Health of Migrants in Europe." In *Migration and Health in the European Union*, ed. B. Rechel et al, 55-65, Open University Press: Maidenhead.
- Palumbo, L. and A. Corrado. 2021. Italy's Problem is not Labour Shortages, but a Shortage of Workers' Rights. Open Democracy. 7th September 2021. <https://www.opendemocracy.net/en/pandemic-border/italys-problem-is-not-labour-shortages-but-a-shortage-of-workers-rights/>

- Pannia, P. 2022. "Questioning the Frontiers of Rights: The Case Law of the Italian Constitutional Court on Non-European Union Citizens' Social Rights". *European Journal of Legal Studies*, special issue May 2022, 133-170.
- Pavlou, V. 2021. *Migrant Domestic Workers in Europe: Law and the Construction of Vulnerability*. Oxford: Hart Publishing.
- Pew Research Centre. 2020. "Americans broadly support legal status for immigrants brought to the U.S. illegally as children", Available at <https://www.pewresearch.org/fact-tank/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children/> (accessed on 26 February 2022)
- Pew Research Centre. 2019. Europe's Unauthorised Immigrant Population Peaks in 2016, Then Levels Off.
- Piccoli, L., and P. Wanner. 2022. "The political determinants of the health of undocumented immigrants: a comparative analysis of mortality patterns in Switzerland." *BMC Public Health* 22 (804) <https://doi.org/10.1186/s12889-022-13188-8>
- PICUM. 2020. *A Worker is a Worker: How to Ensure that Undocumented Migrant Workers can Access Justice*. Brussel: PICUM.
- PICUM. 2005. *Ten Ways to Protect Undocumented Migrant Workers*. Brussels: PICUM.
- Polakowski, M. and Quinn, E. 2022. *Responses to Irregularly Staying Migrants in Ireland. Research Series, No. 140*. Dublin: Economic and Social Research Institute.
- Reeskens, T. and W. Van Oorschot. 2012. "Disentangling the 'new liberal dilemma': On the relation between general welfare redistribution preferences and welfare chauvinism." *International Journal of Comparative Sociology* 53(2): 120–139.
- Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences: Visit to Italy, 2019.
- Rodríguez C. and R. Rubio-Marín. 2011. "The Constitutional Status of Irregular Migrants: Testing the Boundaries of Human Rights Protection in Spain and the United States." in *Are Human Rights for Migrants: Critical Reflections on the Status of Irregular Migrants in Europe and the United States* (Ed) Marie Bénédicte Dembour and Tobias Kelly.
- Rudolph, L. and M. Wagner. 2022. "Europe's migration crisis: Local contact and out-group hostility." *European Journal of Political Research* 61: 268-280
- Ruhs, M. 2022. "Who cares what the people think? Public attitudes and refugee protection in Europe". *Politics, Philosophy & Economics*, Early View
- Ruhs, M. 2018. "'Migrants', 'Mobile Citizens', and the Borders of Exclusion in the European Union", in Bauböck, R. (ed.) *Debating European Citizenship*, IMISCO, Springer
- Ruhs, M. 2017. "The impact of acquiring EU status on the earnings of East European migrants in the UK: Evidence from a quasi-natural experiment", *British Journal of Industrial Relations* 55(4): 716-750.
- Ruhs, M. 2014. "Immigration and Labour Market Protectionism: Protecting Local Workers' Preferential Access to the National Labour Market", in *Migrants at Work: Immigration and Vulnerability in Labour Law*, edited by Cathryn Costello and Mark Freedland, Oxford University Press

- Ruhs, M. 2013. *The Price of Rights. Regulating International Labor Migration*. Princeton University Press
- Ruhs, M. and B. Anderson eds. (2010a) *Who Needs Migrant Workers? Labour Shortages, Immigration and Public Policy*, Oxford University Press.
- Ruhs, M. and B. Anderson (2010b) "Semi-compliance and illegality in migrant labour markets: An analysis of migrants, employers and the state in the UK", *Population, Space and Place* 16 (3): 195-215.
- Ruhs, M. and J. Wadsworth (2018) "The impact of acquiring unrestricted work authorization on Romanian and Bulgarian migrants in the UK", *Industrial and Labor Relations Review* 71 (4): 823 – 852.
- Sanfelici, M. 2021. "The Impact of the Covid-19 Crisis on Marginal Migrant Populations in Italy". *American Behavioural Scientist* 65(10): 1323-1341.
- Santinho C., Rebelo D. and Cardoso S. 2020. "COVID-19, The 'Undercover' Portuguese Asylum System, and Its Jerry-Riggings." Available at: [www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/06/covid-19](http://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2020/06/covid-19).
- Schiewe, K. 2021. "Domestic Workers, EU Working Time Law and Implementation Deficits in National Law – Change in Sight?" EUI Working Paper Law. Florence: EUI.
- Schröder, M. 2009. "Integrating Welfare and Production Typologies: How Refinements of the Varieties of Capitalism Approach Call for a Combination of Welfare Typologies." *Journal of Social Policy* 38(1): 19-44.
- Scott, S., Craig, G. and A. Geddes. 2012. *Experiences of Forced Labour in the UK Food Industry*. York: Joseph Rowntree Foundation.
- Selberg, K. 2014. "The Laws of 'Illegal' Work and Dilemmas in Interest Representation on Segmented Labor Markets: À propos Irregular Migrants in Sweden." *Comparative Labour Law and Policy Journal* 35: 246-288.
- Sigona, N., Kato, J. and I. Kuznetsova. 2021. "Migration infrastructures and the production of migrants' irregularity in Japan and the United Kingdom." *Comparative Migration Studies* 9 (31) <https://doi.org/10.1186/s40878-021-00242-4>
- Sjödin, E. 2021. "Criminalisation as a response to low wages and labour market exploitation in Sweden". *European Labour Law Journal* 12(4): 529-546.
- Song, S. and I. Bloemraad. 2022. "Immigrant legalization: a dilemma between inclusion and the rule of law?" *Migration Studies*, mnac014, Advance Article.
- Spencer, S. and Delvino, N. 2014. *Irregular Migrants in Italy: Law and Policy on Entitlements to Services*. Oxford: Compas Report.
- Spencer, S. 2020. "Cities Breaking the Mould: Municipal Inclusion of Irregular Migrants in Europe". In *Migrants with Irregular Status in Europe*, ed. S. Spencer and A. Triandafyllidou, 187-206. IMISCOE: Springer Open.
- Spencer, S. and A. Triandafyllidou, eds. 2020. *Migrants with Irregular Status in Europe. Evolving Conceptual and Policy Challenges*. IMISCOE: Springer Open.
- Stark, O. 2007. "Work effort, moderation in expulsion, and illegal migration." *Review of Development Economics* 11(4): 585–90

- Steinmayr, A. 2021. "Contact versus Exposure: Refugee Presence and Voting for the Far Right." *The Review of Economics and Statistics* 103(2): 310–327.
- Stubik, K. 2014. Ed. *Unprotected: Migrant Workers in an Irregular Situation in Central Europe*. Warsaw: Association for Legal Intervention (SIP).
- Taylor, J. 1992. "Earnings and mobility of legal and illegal immigrant workers in agriculture." *American Journal of Agricultural Economics* 74(4): 889–96.
- Twigg, J., Mathews R. and K. Guadagno 2021. *Inclusion of Migrants and Refugees in Preparedness and Response to Biological Disasters: Case Study of the Covid-19 Pandemic*. Council of Europe and IOM.
- United Nations Development Programme. 2009. *Overcoming Barriers: Human Mobility and Development*. Human Development Report. New York: UNDP
- Van Nierop, V., Schönenberg, L. and P. Terziev. 2021. *Counteracting Undeclared Work and Labour Exploitation of Third Country National Workers*. Brussels: European Platform for Undeclared Work.
- van Ostaijen, M., Reeger, U. and K. Zelano. 2017. "The commodification of mobile workers in Europe - a comparative perspective on capital and labour in Austria, the Netherlands and Sweden." *Comparative Migration Studies* 5 (6) <https://doi.org/10.1186/s40878-017-0048-0>
- Varsanyi, M.W. 2011. "Neoliberalism and Nativism: Local Anti-Immigrant Policy Activism and an Emerging Politics of Scale". *International Journal of Urban and Regional Research* 35: 295-311
- Vrânceanu, A. 2019. "The impact of contextual factors on party responsiveness regarding immigration issues." *Party Politics* 25(4): 583-593.
- Weale, A. 1983. *Political Theory and Social Policy*. London: Macmillan.
- Wright, M., Levy, M. and J. Citrin. 2016. "Public Attitudes Toward Immigration Policy Across the Legal/Illegal Divide: The Role of Categorical and Attribute-Based Decision-Making." *Political Behaviour* 38: 229–253



---

This study, commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the LIBE Committee, aims to inform policy debates about how to protect more effectively the fundamental rights of irregular migrant workers in the EU. It analyses the *nature* and *causes* of the gaps between the fundamental rights protections enshrined in EU legal standards and the rights realised by irregular migrants working in EU Member States in practice, and it discusses strategies for how these ‘protection gaps’ can be reduced.

---

---

PE 702.670  
IP/C/ LIBE/IC/2021-101

Print ISBN 978-92-846-9156-2 | doi:10.2861/637975 | QA-07-22-176-EN-C  
PDF ISBN 978-92-846-9157-9 | doi:10.2861/952707 | QA-07-22-176-EN-N