



**Centre for European Policy Studies (CEPS)**

**REPORT**

***Irregular Migration in Europe: EU policies and the  
Fundamental Rights Gap***

**Authors: Massimo Merlino and Joanna Parkin**

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## Introduction

The labour exploitation of undocumented workers needs to be understood within the broader context of the vulnerability of third country national TCNs lacking a regular status of entry or stay. The negative impact of certain immigration policies, hindering or denying access by undocumented migrants to employment and fair working conditions and to basic socio-economic rights more generally, has been found to compound this vulnerable status. This problematic has been repeatedly underlined by academics and civil society actors across the European Union.

This report aims to provide an overview of undocumented migrant workers in the EU, drawing on current policy making, academic texts and the results of EU funded research projects on undocumented migration. It addresses some of the core issues at stake when trying to understand the broader context of irregular migration: Who are we talking about when we refer to irregular migrants, how is this group addressed within the legal and policy frameworks of the European Union and what are the practical issues affecting their access to employment related rights?

The paper should be read in conjunction with the CEPS paper “*Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*”, which sets out the broader EU and international legal framework of rights accorded to undocumented migrants. Together, these reports aim to provide a starting point for the “What Price the Tomatoes?!” project, offering a broad legal and policy framework in which to locate issues surrounding the labour exploitation of undocumented migrant workers.

The first section sets the context by shedding light on basic questions surrounding irregular migration: who is an irregular migrant, how do individuals fall into irregularity and what is the size of the irregular migrant population in the EU. The second section examines how irregular migrants are addressed by the legal and policy framework of the European Union. Special attention is paid to the policies, programmes and projects of the European Commission implicating undocumented migrants, leaving the legislative framework to be developed in greater depth in the second CEPS paper.<sup>1</sup> The third section examines evidence of the barriers faced on a day-to-day basis by undocumented migrants in their access to basic social and economic rights – particularly concerning employment and fair working conditions.

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<sup>1</sup> Merlino, M. and Parkin, J. (2011), *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, CEPS Report.

# 1. Undocumented migrants in the EU: setting the context

## 1.1. Who is an irregular migrant?

Despite the high profile of irregular migration in public discussion, the question of *who* constitutes an irregular migrant is seldom examined. Guild notes that definitions of illegal entry or stay are rarely specified in the national laws of EU Member States.<sup>2</sup> At EU level, the Return Directive (2008/115)<sup>3</sup> defines “illegal stay” “the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry (...), stay or residence in that Member State”.

Under this broad definition, there are three primary ways through which individuals may be classified as irregular: First, through irregular *entry*, where a foreigner arrives clandestinely on the territory of a state; Second, through irregular *residence*, where a foreigner lacks the authorisation to stay in a country; and third, through irregular *activity*, where a non-national engages in employment when not permitted to do so or takes on employment in a manner that is inconsistent with his or her immigration status.<sup>4</sup>

These criteria can combine in many ways and produce many forms and ‘degrees’ of irregularity. For example, an individual may enter a Member State clandestinely, but subsequently gain a recognised legal status through filing an application for asylum. Likewise, they may enter legally, only to fall into irregularity upon the expiration of their residence permit. It is also important to note that irregular migrants do not necessarily engage in irregular employment. Many migrants reside irregularly in a country, but work legally and pay taxes.

## 1.2. Ways into irregularity

There is no typical profile of an irregular migrant and the ways through which individuals may fall into a situation of irregularity are highly varied. Popular images of “illegal” migrants give weight to those who cross EU borders undetected or with falsified papers with the clear intention of residing and working irregularly. Without doubt, the clandestine entry of migrants into Europe is a reality, one that has been variously linked to macro-phenomena including globalization, regional underdevelopment, environmental degradation and conflict.

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<sup>2</sup> E. Guild (2004) “Who is an irregular migrant?” in B Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds.) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden, Martinus Nijhoff Publishers.

<sup>3</sup> Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third country nationals, (OJ 2008 L 348/98).

<sup>4</sup> See E. Guild (2004) “Who is an irregular migrant?” in B Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds.) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden, Martinus Nijhoff Publishers, p.3. Also B. Ghosh (1998) *Huddled masses and uncertain shores: insights into irregular migration* Martinus Nijhoff Publishers p.3-4.

However, this image leaves aside alternative routes into irregularity, such as failed asylum seekers who feel they cannot return to their country of origin, rejected candidates for family reunification, children born to undocumented parents, as well as students that have lost their study permit or tourists overstaying their visa.<sup>5</sup> Indeed, it is more common to see the transition from regular to irregular status than vice versa.

For many labour migrants, continuation of a residence permit is tied to a work contract. This means that should workers lose their job or be refused a renewal of their employment contract, these individuals undergo a change in their legal status which leaves them facing the threat of expulsion and places them in a very vulnerable situation with regard to access to rights. This demonstrates the extent to which the status of irregularity is not fixed, but subject to changes over time, often related to developments in an individual's personal circumstances which renders their presence "illegitimate" in the eyes of the state. Foreigners become irregular because they do not fit into any legal administrative category. Their presence therefore challenges the authority of the state to govern legitimate means of movement and residence. The response is to characterise such individual as "illegal" and a security risk.<sup>6</sup>

### *Terminology*

Different terms are used to denote different facets of irregular migration: *illegal* or *irregular* (with no regular/legal status), *clandestine*, *undocumented* (without the appropriate papers) or *unauthorised*.

The term 'illegal' is employed in several EU policy documents framing the debate on irregular migration, such as the Stockholm Programme (2009) and the European Pact on Immigration and Asylum (2008).

The use of terms such as "illegal" and other criminal categories to describe undocumented migrants has been widely criticised by academics, civil society and several European actors, including the Council of Europe, the EU Parliament, the Fundamental Rights Agency, and others.

These criticisms have begun to effect a change in the discourse of the European Commission (DG Home). In particular it is noteworthy that the Commissioner for Home Affairs, Cecilia Malmström now uses the term "irregular migration".

It is important to highlight the fact that the use of certain terminology has deep implications for the way in which public policies are justified, developed and implemented. Both at EU and national level the debate about undocumented migration has been framed in an *insecurity continuum* that ranges between irregular migration and criminality.<sup>7</sup> This insecurity process allows for repressive measures such as detention and expulsions as well as the use of criminal law for the management of irregular migration. The Council of Europe's commissioner for human rights highlighted that there is an increasing trend in the EU towards the criminalisation of undocumented migrants. He asserted

<sup>5</sup> PICUM (2003), *Book of Solidarity: Providing Assistance to Undocumented Migrants. Vol. I-III*. Brussels, PICUM. (Retrieved from: <http://www.picum.org/article/reports>.)

<sup>6</sup> E. Guild, (2009), *Security and Migration in the 21<sup>st</sup> Century*, Polity Press, Cambridge.

<sup>7</sup> D. Bigo, "Security and Immigration: Toward a Critique of the Governmentality of Unease", *Alternatives: Global, Local, Political*, Vol. 27, Special Issue, February 2002, pp. 63-92.

that such a method of controlling international movement is “a *disproportionate measure* which exceeds a state’s legitimate interest in controlling its borders” and that it “corrodes established international law principles, it also causes many human tragedies”.<sup>8</sup>

### 1.3. How many irregular migrants in Europe?

Besides terminology, the lack of reliable data and the use of inflated figures concerning undocumented migrants in the EU have been used as a basis for justifying increasingly restrictive policies and practices.

Wide ranging estimates from 2 million to 8 million people have appeared in EU policy documents. According to the CLANDESTINO project - Undocumented migration: Counting the uncountable data and trends across Europe) funded by the European Commission (DG Research) - estimates of undocumented migrants in the EU are based on numbers which are not derived from reliable sources and which do not specify any time frame.<sup>9</sup> On the basis of a detailed review of selected Member States, the project found that the undocumented population in 2005 more likely ranged from between 2.8 and 6 million persons. A recent estimation conducted by the project indicates that the size of the undocumented population in the EU in 2008 declined to 1.9 – 3.8 million (for the EU 27).<sup>10</sup>

The fact that there are fewer irregular migrants than previously assumed and that number of irregular migrants has been declining is also confirmed by the data provided by FRONTEX, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. According to the report by the Frontex Risk Analysis Network (FRAN) the first three months of 2010 showed significant drops in all indicators concerning the detections of irregular external border crossings which were down 36% on the fourth quarter of 2009 and 39% on the same period a year earlier.<sup>11</sup>

The misinformed use of statistics can have a negative impact, fuelling political and public fears that the EU is in the process of being flooded by irregular migrants and at times forming a basis for the trend towards restrictive practices and “emergency” led policy responses.<sup>12</sup> Consequently they can serve to exacerbate the vulnerable position of irregular migrants as targets of exclusionary policies and discriminatory practices.

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<sup>8</sup> T. Hammarberg, “It is wrong to criminalise immigration”, in *Human Rights in Europe: Time to Honour our Pledges, Viewpoints by T. Hammarberg, Commissioner for Human Rights*, Council of Europe, Strasbourg, 2009.

<sup>9</sup> M. Jandl, D. Vogel and K. Iglucka, *Report on Methodological Issues*, CLANDESTINO, Athens, October 2008, p. 4 (retrieved from [http://clandestino.eliamep.gr/wp-content/uploads/2009/02/clandestino\\_report-on-methodological-issues\\_finall.pdf](http://clandestino.eliamep.gr/wp-content/uploads/2009/02/clandestino_report-on-methodological-issues_finall.pdf)).

<sup>10</sup> Kovacheva, V. and D. Vogel (2009), The size of the irregular foreign resident population in the European Union in 2002, 2005 and 2008: A dynamic aggregate country estimate, Working Paper No. 4/2009, Database on Irregular Migration, Hamburg Institute of International Economics, Hamburg (retrieved from <http://irregular-migration.hwwi.net/>). P. 9

<sup>11</sup> [http://www.frontex.europa.eu/situation\\_at\\_the\\_external\\_border/art15.html](http://www.frontex.europa.eu/situation_at_the_external_border/art15.html)

<sup>12</sup> E. Guild and S. Carrera (2010) ‘*Joint Operation RABIT 2010*’ – *FRONTEX Assistance to Greece’s Border with Turkey: Revealing the Deficiencies of Europe’s Dublin Asylum System* Centre for European Policy Studies, November 2010.

One of the principal forms of migration today is labour migration. Hundreds of thousands of undocumented migrants work in the EU and their presence in various sectors of the economy – such as agriculture, construction, domestic work and others – has been tolerated by many governments in the EU. Undocumented workers represent an exceptionally vulnerable category and their labour, which in most of the cases is cheap and unprotected, has been a key factor for the development of shadow economies. Up to date and reliable statistics concerning the number of undocumented migrants currently working in various sectors of the EU economy are central in order to construct evidence based policies attentive to the protection of human and labour rights of undocumented workers.

## 2. The EU Political and Legislative Framework on Irregular Migration

### 2.1. EU legislative framework

#### 2.1.1 Treaty of Lisbon: implications for irregular migration<sup>13</sup>

The entry into force of the Lisbon Treaty in December 2009 has brought important changes in the EU's Area of Freedom Security and Justice (AFSJ). In particular, there are three innovations which are significant for reinforcing the protection of fundamental rights, including those of irregular migrants:

- ✚ The attribution of a legally binding status to the Charter of Fundamental Rights;
- ✚ The provision of a legal basis for the EU' accession to the European Convention of Human Rights (ECHR);
- ✚ The expansion of the jurisdiction of the European Court of Justice.

Firstly, the existence of a legally binding Charter obliges the EU institutions and Member States' authorities to respectively adopt and transpose EU law in conformity with fundamental rights. The majority of the rights enshrined in the Charter are accorded to *everyone* independently of the migration status and can be claimed before relevant institutions and courts.

Secondly, with the accession of the EU to the ECHR, those who consider that their rights have been infringed by the EU institutions or Member States implementing EU law will have the opportunity to take their cases before the ECtHR. The EU in this way will be subject to a more rigorous external control and monitoring in human rights matters.

The third innovation introduced by the Treaty of Lisbon consists of the repeal of the disposition limiting to higher courts the possibility to refer interpretative questions to the CJEU. This measure

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<sup>13</sup> A more detailed description of the implications that those changes will have in the upholding of the rights of irregular migrants is provided in the paper titled "*Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*".

is likely to increase the number of preliminary rulings and – as the interpretation provided by the CJEU is binding on both national administrations and courts across the EU Member States – to enhance a more uniform application of EU immigration law.

### 2.1.2 EU secondary law addressing irregular migration

In 1999 with the entry into force of the Amsterdam Treaty, the EU has acquired shared competences in the field of “visas asylum and immigration”. Since then the EU has adopted several secondary legislative measures dealing with diverse aspects of irregular migration. The body of the EU *acquis* on irregular migration is summarised in the table below:

**Table. 1 EU legally binding measures on irregular migration**

| Subject                        | Measure   |
|--------------------------------|---|
| Carrier Sanctions              | Directive 2001/51 on carrier sanctions (OJ 2001 L 187/45)   |
| Employers sanctions            | Directive 2009/52 on sanctions for employers of irregular migrants (OJ 2009 L 168/24)   |
| Expulsion/removal              | Directive 2008/115 (Returns Directive) (OJ 2008 L 348/98)   |
|                                | Decision on European return programme (OJ 2007 L 144)   |
|                                | Decision on costs of expulsion (OJ 2004 L 60/55)  |
|                                | Decision 2004/573 on joint flights for expulsion (OJ 2004 L 261/28)   |
|                                | Directive 2003/110 on assistance with transit for expulsion by air (OJ 2003 L 321/26)   |
|                                | Conclusions on transit via land for expulsion—adopted 22 Dec. 2003 by Council   |
|                                | Directive 2001/40 on mutual recognition of expulsion decisions (OJ 2001 L 149/34)   |
| External Borders               | Regulation 1988/2006 on SIS II, amending Reg. 2424/2001 (OJ 2006 L 411/1)   |
|                                | Regulation 1987/2006 establishing SIS II (OJ 2006 L 381/4)  |
|                                | Regulation 2424/2001 on funding SIS II (OJ 2001 L 328/4)  |
|                                | Regulation 871/2004 on new functionalities for SIS (OJ 2004 L 162/29)   |
|                                | Decision 2001/886/JHA on funding SIS II (OJ 2001 L 328/1)   |
| Exchange of Information / Data | Decision 2005/267 on early warning system (OJ 2005 L 83/48)   |
|                                | Directive 2004/82 on transmission of passenger data (OJ 2004 L 261/64)  |
|                                | Regulation 378/2004 on procedure for amendments to Sirene manual: (OJ 2004 L 64)  |
| Human Smuggling                | Directive 2002/90 on the facilitation of unauthorized entry, transit, and residence (OJ 2002 L328/17)   |
|                                | Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit, and residence (OJ 2002 L 328)  |
| Readmission                    | Readmission Agreements: concluded with Hong Kong (entered into force in 2004), Macao (2004), Sri Lanka (2005), Albania (2006), Russia (2007), Ukraine, Moldova, Bosnia and Herzegovina, Montenegro, Serbia and FYROM (on 1 January 2008), Georgia (2010), and Pakistan. 5 Current mandates are at various stages of negotiation: Morocco, Algeria, China, Turkey, Cape Verde and Belarus. |
| Trafficking in persons         | Directive 2004/81 on res. permits for trafficking victims (OJ 2004 L 261/19)  |
|                                | Framework Decision on trafficking in persons (OJ 2002 L 203/1)  |
| Visa policy                    | Regulation 453/03 amending Reg. 539/01 listing TCNs who must be in possession of visas when crossing external borders and those who are exempt (OJ 2003 L69/10)   |

The above table demonstrates the primary objective in the EU's strategy towards irregular migrants: that of "fighting illegal immigration". The key measures which have been adopted in the field of irregular migration have been primarily aimed at increasing the control and surveillance of the EU external borders, at enforcing the return irregular migrants (through the organization of joint flights and the conclusion of readmission agreements with countries of origin and transit), and in establishing administrative and *penal* sanctions for third parties – including facilitators, carriers, and employers – involved in the irregular migration process. This legislative effort aimed at countering the phenomenon of irregular migration has increased the vulnerability and marginalisation of irregular migrants, because it has not been accompanied by complementing measures addressing fundamental rights protection. Several academics have highlighted that the development of a comprehensive EU immigration policy is still missing the fundamental rights component and a strategy towards its practical delivery.<sup>14</sup>

In particular, at EU level the use of criminal law sanctions for individuals directly or indirectly involved in the irregular migration process has raised concerns. Cases in point are, the Facilitation Directive (2002/90/EC), which imposes on states the duty to penalise those who, for financial gain, intentionally assist an irregular migrant to enter and/or reside in the EU (this could in principle also include landlords who rent flats to irregular migrants) and the Employers Sanctions Directive (2009/52/EC), which lays down common minimum standards on sanctions to be applied by the EU member states to employers infringing the prohibition of employment of "illegally staying third-country nationals".<sup>15</sup>

#### ➤ **Employers Sanctions Directive (2009/52/EC)**

One of the core objectives of the Directive is to deter irregular immigration by tackling undeclared work. According to the directive, employers who cannot show that they have undertaken certain checks before recruiting a third-country national will be liable to fines and other administrative measures. The use of criminal penalties is foreseen in the following cases: repeated infringements, simultaneously employing a significant number of persons, particularly exploitative working conditions, knowingly using work or services exacted by a person who is a victim of human trafficking, and illegally employing a minor.

The application of a greater number of punitive measures and administrative burdens, as well as criminal sanctions, raises concerns as to whether such measures are compliant with the proportionality test and when examining their implications on irregular migrants' access to rights.

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<sup>14</sup> See R. Cholewinski (2004), 'European Union Policy on Irregular Migration', in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds.) *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* Leiden: Martinus Nijhoff Publishers, p.182; E. Guild, S. Carrera and A. Faure Atger (2009), *Challenges and Prospects for the EU's Area of Freedom, Security and Justice: Recommendations to the European Commission for the Stockholm Programme*, CEPS Working Document No. 313, April.

<sup>15</sup> The deadline for the EU member states to transpose the provisions of the Employers Sanctions Directive is 20 July 2011.

For instance, it has been pointed out that the Employer Sanctions Directive may have counterproductive effects on employment and working conditions.<sup>16</sup>

Regarding the Returns Directive (2008/115/EC), this instrument does foresee a number of safeguards for irregular persons pending removal.<sup>17</sup> However it has to be stressed that the Returns Directive constitutes minimum common standards that do not altogether prevent risks of human rights violations following transposition by EU Member States.<sup>18</sup> Particularly important will be the way in which Member States will implement the period of voluntary return and the procedural guarantees concerning forced return and detention.<sup>19</sup>

➤ **Returns Directive (2008/115/EC)**

The Return Directive aims at providing minimum standards and procedures at EU level for the return of immigrants staying irregularly on the territory of a member state. The Directive establishes a harmonised procedure, leading to the termination of the irregular stay and the consequent expulsion of the irregular immigrant.

### 2.1.3 *EU secondary law on labour migration*

Despite the fact that undocumented workers represent an important component of the labour force of several sectors of the EU economy, the EU secondary law on labour migration is only addressed to regular migrants and protects only their rights. For instance, the Blue Card Directive adopted in 2009,<sup>20</sup> aims at attracting only high-skilled immigrants. It regulates the conditions of entry and protects the rights – equal treatment with nationals concerning employment conditions and socio-economic rights – only for this specific category of workers.

Similarly, the yet to be adopted Seasonal Workers Directive also excludes irregular migrants from its personal scope.<sup>21</sup> The proposed Directive establishes a fast-track procedure for the admission of

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<sup>16</sup> See European Trade Union Confederation (ETUC), Platform for International Cooperation on Undocumented Migrants (PICUM) and Solidar, “Joint Comments on Expected Commission Proposals to Fight ‘Illegal’ Employment and Exploitative Working Conditions”, ETUC, PICUM and Solidar, Brussels, 26 April 2007 (retrieved from <http://www.picum.org>); see also European Network Against Racism (ENAR), Platform for International Cooperation on Undocumented Migrants (PICUM) and Solidar, “Employer’s Sanctions Directive: Will migrant workers pay the price of their exploitation?”, Joint Statement, ENAR, PICUM and Solidar, Brussels, 15 April 2008 (retrieved from <http://www.enar-eu.org>).

<sup>17</sup> For further details see the accompanying report of M. Merlino and J. Parkin (2011) *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, “What Price the Tomatoes?!” Working Paper.

<sup>18</sup> The deadline for transposition of the Returns Directive was 24<sup>th</sup> December 2010.

<sup>19</sup> See A. Baldaccini, “The Return and Removal of Irregular Migrants under EU Law: An Analysis of the Returns Directive”, *European Journal of Migration and Law*, Vol. 11, No. 1, 2009, pp. 11-17.

<sup>20</sup> Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.06.2009.

<sup>21</sup> Commission Proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final, 13.07.2010.

third-country seasonal workers, based on a common definition and common criteria, in particular the existence of a work contract or a binding job offer that specifies a salary equal to or above a minimum level. Seasonal workers will be issued with a residence permit allowing them to work for a specified maximum period per calendar year. Provision is also made for facilitating the re-entry of a seasonal worker in a subsequent season.

The stated purpose of the legislation is to meet gaps in the labour market which are often filled by irregular migrants, to ensure minimum standards that will prevent exploitation and protect the health and safety of third-country seasonal workers, and to ensure return and prevent overstaying of seasonal migrant workers. While the fundamental rights safeguards contained in the proposal would signify a welcome step forward, the proposed legislation nevertheless builds on the piecemeal, sectoral approach adopted by the EU with regard to regular immigration.<sup>22</sup> This approach has been criticised by the European Trade Union Confederation (ETUC, 2007) for the risk that it may “increase the divergence in rights for several groups of workers and may contribute to a two-tier migration policy with less or no rights and protection for the lower skilled and low-paid migrants”.<sup>23</sup>

Finally, the proposal for a Directive on a single application procedure for a single permit for Non-EU Member Country should be highlighted.<sup>24</sup> Again this directive, if adopted, would grant a common set of socio-economic rights to third country national workers equal to that of EU nationals. However, as it stands, the proposal not only excludes irregular migrants, but also other categories of workers such as refugees, seasonal workers, and intra-corporate transferees.

The concern arising from such a legislative approach to EU labour immigration is that these directives would lead to the application of different rights to different categories of workers, a sectoral approach to rights allocation that could give rise to discrimination.

## **2.2 The Stockholm programme and the EU policies on irregular migration**

The Stockholm programme, adopted by the Council in December 2009, is a key political document laying down the priorities and guidelines for a five-year period for the construction of an area of freedom security and justice. Its adoption, which coincided with the entry into force of the Lisbon Treaty, could have served to recognise that undocumented migrants are among the most vulnerable groups and to make the protection of their fundamental rights and their social inclusion a priority for EU policies. Regrettably, this has not been the case.

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<sup>22</sup> Sergio Carrera and Anaïs Faure-Atger, (2010), *Impact of the Seasonal Employment of Third-Country Nationals on Local and Regional Authorities*, Report for the Committee of the Regions.

<sup>23</sup> European Trade Union Confederation (ETUC) (2007), ETUC Position regarding the European Commission's Proposals on Legal and 'Illegal' Migration, ETUC, Brussels, 7 December (retrieved from [www.etuc.org](http://www.etuc.org)).

<sup>24</sup> Commission Proposal of 23 October 2007 for a Council Directive on a single application procedure for a single permit for Non-EU Member Country nationals to reside and work in the territory of a Member State and on a common set of rights for Non-EU Member Country workers legally residing in a Member State, COM(2007) 638, Brussels, 23.10.2007.

As reflected in its title, “An Open and Secure Europe Serving and Protecting the Citizens”, the Stockholm programme remained focused firstly on the rights of the “citizens” and secondly on the rights of “legally residing” TCNs. With the sole exception of “unaccompanied minors”, there is no express reference to irregular migrants in the programme under section 2.3 entitled “living together in an area that respects diversity and protects the most vulnerable”. On the contrary, the insecurity language of “illegality”, to refer to the lack of documentation of people who are on the move and are perceived as a threat, is widely used throughout the programme.

The control-oriented approach on irregular migration, which is based on criminalisation, return and readmission, has been the prevalent one in the Stockholm programme and the one which has been translated into the Action Plan elaborated by the Commission. The following are the priorities put forward in the Stockholm programme:

- ✚ monitoring the transposition of the Directives on Returns and Employers’ Sanctions;
- ✚ increasing cooperation among member states on the return of irregular immigrants by chartering joint flights;
- ✚ fostering the external dimension of Europe’s irregular immigration policy by developing information on migration routes, promoting cooperation on border surveillance and border controls, and facilitating readmission and capacity building in non-EU countries;
- ✚ concluding “effective and operational” readmission agreements, developing monitoring mechanisms for implementation and a common EU approach against non-cooperative countries;<sup>25</sup>
- ✚ developing an action plan on unaccompanied minors, focused on prevention, protection and assisted return.<sup>26</sup>

### **2.3. Irregular Migration policies inside the European Commission**

The European Commission has often recalled that measures to fight irregular immigration shall respect the dignity, fundamental rights and freedoms of the persons concerned and has highlighted the need to ensure irregular migrants’ access to services which are essential to guarantee their fundamental rights.<sup>27</sup> However, its central approach in policy making procedures addressing irregular migration has been control-oriented. The corresponding development of a rights-oriented approach has been marginalised, and limited only to “legally resident” TCNs.

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<sup>25</sup> See J.P. Cassarino, *Readmission Policy in the EU: Drivers and Implications for Human Rights Observance*, Study commissioned by the Policy Unit C of the European Parliament, Brussels, September 2010.

<sup>26</sup> This constituted one of the key priorities of the Spanish presidency during the first half of 2010. The European Commission presented the action plan in May 2010. See European Commission, Communication on an Action Plan on Unaccompanied Minors (2010–2014), COM(2010) 213 final, Brussels, 6 May 2010. In June 2010 the Justice and Home Affairs Council adopted the Council Conclusions on Unaccompanied Minors – Council of the European Union, Council Conclusions on Unaccompanied Minors, 3018<sup>th</sup> Justice and Home Affairs Council meeting, Luxembourg, 3 June 2010.

<sup>27</sup> See European Commission, Communication on Policy Priorities in the Fight against Illegal Immigration of Third-Country Nationals, COM(2006) 402 final, Brussels, 19 July 2006, at 2.8; European Commission, Communication on a Common Immigration Policy for Europe: Principles, Actions and Tools, COM(2008) 0359, Brussels, 17 June 2008, pp. 11 and 13.

Yet, within this overarching policy approach, a closer examination of the Directorates-General (DGs) within the Commission that directly or indirectly deal with the issue of irregular migration, reveals a more nuanced picture. Commission DGs have adopted different approaches to irregular migration which are not necessarily compatible.

### *2.3.1. DG Home Affairs*

DG Home Affairs is the main Commission department dealing with irregular migration. Its approach, which has been the prevailing one within the Commission, reflects the predominant approach to immigration policy taken by national Ministries of Interior.

DG Home makes a clear distinction in its policies and programmes between ‘legally residing’ and ‘illegally residing’ third country nationals (TCNs). This was evident in the Communication entitled “An area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment”, which served to feed into the Stockholm programme.<sup>28</sup>

The Communication was largely addressed to ‘the citizen’, and to a more limited extent, ‘legally residing TCNs’. It only addressed undocumented migrants within the scope of the “challenges ahead,” highlighting the need to ensure policies “for combating illegal immigration”.<sup>29</sup> It has to be highlighted that regrettably the Stockholm Programme omitted to include the Commission’s proposal for establishing common EU standards for dealing with non-removable irregular immigrants.

### *2.3.2. DG Employment, Social Affairs and Equal Opportunities*

The remit of DG Employment, Social Affairs and Equal Opportunities includes labour migration, however it is primarily through coordinating the EU’s anti-poverty agenda and social inclusion strategy that undocumented migrants are addressed by the work of this DG. Within the policies and programmes of DG Employment, undocumented migrants are categorised as a ‘vulnerable’ or ‘disadvantaged’ group and this DG does not make distinctions based on legal status.

The EU has no official competence to legislate in the field of social protection and social inclusion and Commission intervention comes largely through the coordination of member states’ actions based on the establishment of common objectives and indicators (the so-called ‘Open Method of Coordination’ or Social OMC).

‘Immigrants and ethnic minorities’ form a specific priority group within the Social OMC and the position of migrants has been a growing focus over the last years, with member states identifying important gaps between third country nationals and EU citizens as regards poverty, income, health,

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<sup>28</sup> Refer to European Commission, Communication on an Area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment, COM(2009) 262, Brussels, 10 June 2009. For an assessment refer to E. Guild and S. Carrera, *Towards the Next Phase of the EU’s Area of Freedom, Security and Justice: The European Commission Proposals for the Stockholm Programme*, CEPS Policy Brief No. 196, Centre for European Policy Studies, Brussels, August 2009.

<sup>29</sup> See p. 4 of the Communication.

employment and education. Although it is for the Member States to determine which categories of migrants to target, given that the social inclusion agenda has a needs-based approach, beneficiaries within this priority group are often the most vulnerable, and include undocumented migrants (as well as other groups such as asylum seekers and unaccompanied minors who are not targeted by the EU integration agenda or other mainstream programmes).<sup>30</sup> The joint reports and national actions plans assessing progress within the OMC include references to irregular migrants. For instance, the Joint Report on Social Inclusion and Social Protection 2010 points to the increasing presence of irregular migrants among the homeless in several member states.<sup>31</sup>

A selection of financial instruments managed by DG Employment and intended to support Member States actions implementing the Social OMC such as the European Social Fund include actions to examine and support the situation of undocumented migrants.<sup>32</sup> Under the PROGRESS programme, DG Employment has concluded a three-year partnership agreement with The Platform for International Cooperation on Undocumented Migrants (PICUM) for supporting its operational costs. The active partnership between DG Employment and PICUM includes efforts to develop reporting tools which will better enable local actors such as NGOs and healthcare providers to provide input into the National Action Plans on Social Inclusion and thereby increase the visibility of problems affecting undocumented migrants within the Social OMC.<sup>33</sup>

The Social OMC is currently being reviewed and its future will be decided by the end of 2011 following consultation with relevant stakeholders. The re-evaluation may offer an opportunity to raise the vulnerability of irregular migrants higher on the Commission's social inclusion agenda. However, this objective has recently seen a major setback with the launch of the "Europe 2020 strategy," (the Commission's flagship initiative for growth and jobs) in which the so called "social inclusion" guideline 10 of the Employment guidelines refers only to the integration of legal migrants.

### 2.3.3. *DG SANCO*

DG Health and Consumer Protection (SANCO) has traditionally considered migrants as a target group of policies relating to communicable diseases, in the context of the risks that immigration is perceived to pose to public health. For instance, the Commission has targeted migrants in regard to the prevention of HIV infections, highlighting the need for non-discriminating access to information and prevention, treatment, care and support.<sup>34</sup> More recently, migrant health has become an

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<sup>30</sup> Kate, A-M and Nieson, J. (2008), Guide to Locating Migration Policies in the European Commission, II edition, Report published by EPIM and MPG.

<sup>31</sup> Commission staff working document – joint report on social protection and social inclusion accompanying document to the Commission Communication on a Proposal for the Joint Report on Social Protection and Social Inclusion 2010, SEC(2010) 98 final, 5.2.2010, Brussels.

<sup>32</sup> For instance, the report "Access to Healthcare for Undocumented Migrants in Europe" was supported by the Community Action Programme to Combat Social Exclusion (now known as the PROGRESS Programme). DG Employment has also funded a series of reports by PICUM titled "Book of Solidarity: Providing Assistance to Undocumented Migrants (Volumes I-III) in 2003. DG Employment also supports the "What Price the Tomatoes?!" project, within which this report is produced.

<sup>33</sup> See the official website of PICUM – Social Inclusion Process: Reporting Templates: <http://www.picum.org/article/social-inclusion-process-reporting-templates>

<sup>34</sup> Communication (2005) 254 final on "Combating HIV/AIDS within the EU and in the neighbouring countries (2006-2009)".

increasingly central theme of this DG's work, in light of the often poor health conditions and difficulties that migrants face when gaining access to healthcare facilities.

During the Portuguese presidency of the EU Health Council, the conference on "Health and migration on the EU: Better health for all in an inclusive society", organized with the support of DG SANCO, gave particular attention to migrants health. Among the general conclusions produced by the conference, it has to be highlighted that: 1) migrants represent a disadvantaged group requiring particular services; 2) more data and knowledge on migrants health is necessary and there is a need to share it across EU member States; 3) migrant health needs to be included in the European Health Strategy and the Health Service Framework.

It is relevant to underline that access to health care is presented by DG SANCO as a basic human right. In this way, all migrants independently of their legal status are targeted in policy intervention as are the needs of particularly vulnerable groups, such as victims of trafficking.<sup>35</sup> Many of the projects that DG SANCO has funded (or co-funded)<sup>36</sup> specifically address undocumented migrants. For instance, the project *Health Care in NowHereLand* (2008-2010)<sup>37</sup> aimed to improve the level of health protection for undocumented migrants as an especially vulnerable group and as a group posing difficulties for health care providers and health policy. The *HUMA Network* (formerly called *AVERROES network*): *Health for Undocumented Migrants and Asylum Seekers* (2008-2011)<sup>38</sup> aims to improve asylum seekers' and undocumented migrants' access to health care by promoting exchange of knowledge and expertise on migrants' health in 19 EU member states. DG Sanco has also supported the AMAC project *Assisting migrants and communities: Analysis of social Determinants of Health and Health Inequalities* (2008-2009)<sup>39</sup> which consolidates the results of European initiatives addressing health and migration, and promote multi-stakeholder engagement in the dialogue on health inequalities linked to migration, as well as MIGHEALTHNET<sup>40</sup> which promotes exchange of expertise, information and good practices on healthcare for migrants and minority populations.

### 3. Undocumented workers and access to fair working conditions

Irregular migrants are holders of human rights. As it is shown in the paper "Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU",<sup>41</sup> the Charter of Fundamental Rights together with a framework of other regional and international human rights instruments enshrine a set of universal rights which apply to everyone, including undocumented migrants. However, a gap has been identified between the formal recognition of the principle of universal

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<sup>35</sup> Kate and Niessen, Guide to Locating Migration Policies in the European Commission, EPIM and MPG, October 2008.

<sup>36</sup> See list of projects at: [http://mighealth.net/eu/index.php/1\\_Projects\\_co-funded\\_by\\_DG\\_SANCO](http://mighealth.net/eu/index.php/1_Projects_co-funded_by_DG_SANCO)

<sup>37</sup> <http://www.nowhereland.info/>

<sup>38</sup> <http://www.huma-network.org/>

<sup>39</sup> Presentation available at:

[http://ec.europa.eu/eahc/documents/news/technical\\_meetings/Assisting Migrants and Communities IOM.pdf](http://ec.europa.eu/eahc/documents/news/technical_meetings/Assisting_Migrants_and_Communities_IOM.pdf)

<sup>40</sup> [http://www.mighealth.net/index.php/Main\\_Page](http://www.mighealth.net/index.php/Main_Page)

<sup>41</sup> M. Merlino and J. Parkin (2011) *Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU*, "What Price the Tomatoes?!" Working Paper.

human rights protection and the practical delivery and access to such rights by undocumented migrants. Several research projects funded by the European Commission provide evidence of the multiple barriers faced by undocumented migrants in their access to basic social and economic.<sup>42</sup>

This section focuses in particular on *access to fair working conditions*, which is a right whose attainment has direct implications for undocumented workers' access to other basic socio-economic rights such as health care, housing and education. A number of EU funded projects have revealed that fair working conditions rarely apply to irregular migrants who are particularly vulnerable to exploitative working conditions. It has been highlighted that working conditions are strictly related to administrative status of the individual and that undocumented migrants usually hold jobs at the bottom of the ladder (agriculture, cleaning, construction, domestic work, etc.). In particular those who are not self-employed usually experience unpaid wages, no holidays, dangerous conditions and are not covered by work insurance in case of accidents.<sup>43</sup>

The European Trade Union Confederation (ETUC) has expressed profound concerns regarding the exploitation of irregular immigrants in the EU and has called for more active social policies to end unfair competition between companies and Member States at the expense of workers' rights.<sup>44</sup> The lack of legal channels for low-paid works creates a vicious circle of no rights, fear of expulsion and practices of subcontracting chains through which enterprises avail themselves of cheap products and services.<sup>45</sup>

PICUM has highlighted that, when looking at fair employment conditions, four rights are central for the protection of undocumented workers: fair wages; compensation for work accidents; access to labour courts; and the right to organise. Trade unions can play a central role in the protection of these very basic rights for *all* workers.

The ILO's Committee on the Freedom of Association has stressed that undocumented workers are entitled equally to the fundamental trade unions rights which are established in the ILO convention 87 on the Freedom of Association and Right to Organize.<sup>46</sup> However undocumented workers face several barriers to joining unions: the cost of the yearly or monthly membership fees; fears of their personal data being passed on to immigration authorities; unawareness of the benefits of joining a union; threats from

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<sup>42</sup> See S. Carrera and M. Merlino, *Undocumented Immigrants and Rights in the EU: Addressing the Gap between Social Science Research and Policy-making in the Stockholm Programme*, CEPS Liberty and Security in Europe Series, Centre for European Policy Studies, Brussels, 2009.

<sup>43</sup> Undocumented Worker Transitions (<http://www.undocumentedmigrants.eu/>); The Book of Solidarity (<http://www.picum.org/Publications/bos1.pdf>); L'accès aux soins un droit non respecté en Europe ([http://www.mdm-international.org/index.php?id\\_rubrique=1](http://www.mdm-international.org/index.php?id_rubrique=1)).

<sup>44</sup> European Trade Union Confederation (ETUC), "Illegal immigration: ETUC calls for enforcement of minimum labour standards and decent working conditions as a priority", ETUC, Brussels, 2006 (retrieved from <http://www.etuc.org/a/2699>).

<sup>45</sup> Irina de Sancho Alonso (2010) "Access to labour rights for undocumented workers" in Carrera, S. and Merlino, M. (Eds) (2010), *Assessing EU Policy on Irregular Immigration under the Stockholm Programme*, CEPS, October 2010, p.10.

<sup>46</sup> For instance, in 2005, ILO's Committee of Experts requested that Spain amend the law because it violated Convention No. 87, since "workers must be accorded the right, without distinction whatsoever, to join organizations of their own choosing."

the employer; and the reluctance of certain unions (mainly in Nordic countries) to organise undocumented workers.<sup>47</sup>

Despite these barriers numerous unions have incorporated undocumented workers.<sup>48</sup> In fact, *all* workers, independently of their immigration status, should have access to fair employment conditions and should be treated with dignity. Secondly, it has to be stressed that it is in the common interest of *all* workers to protect undocumented workers. They are attractive for employers (and therefore can substitute national workers) in light of the fact that they are vulnerable to exploitation. The most effective way to counter the tendency to lower labour standards and wages is therefore to unionise and strengthen the rights of undocumented migrant workers.

The Action Plan adopted by the Executive Committee of the ETUC stated its intention to work with its affiliates to organise undocumented workers in the unions.<sup>49</sup> Furthermore the plan pointed out the following priorities: to establish common criteria to grant legal status to undocumented workers; to work toward a more proactive EU migration policy that is geared to managing (not preventing) migration; to intensify efforts (at EU and national level) for the ratification and application of international and national conventions and instruments for the protection of all migrant workers; and to support policies that recognise the fundamental social rights of *all* workers and which favour social cohesion by preventing the creation of two-speed migration channels and the exploitation of irregular workers.

## Conclusions

This report has aimed to establish the broad context of the treatment of irregular migration in the EU. It has shown that despite the fact that irregular migration is a central issue in political debates at both national and EU level, there is still a great deal of misinformation and misunderstanding regarding the profile and proportions of this group, with the policies implemented being far from “knowledge based”.

The report highlights that since the EU acquired, in 1999, shared competences in the field of “visa, migration and asylum” a control-based approach based on criminalisation, expulsion and readmission has prevailed and has underpinned EU policies on irregular migration. This approach is revealed to be highly problematic for the construction of a “comprehensive” common EU policy on immigration, one which takes due account of the fundamental socio-economic rights of irregular migrants which are enshrined in the EU Charter and in other regional and international human rights instruments.

The Stockholm Programme represented another missed opportunity to address the human rights gap of EU policies on irregular migration and to bring them in line with the findings of independent

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<sup>47</sup> PICUM (2005) Ten Ways to Protect Undocumented Migrants Workers, available at: <http://www.picum.org/article/reports>

<sup>48</sup> See list of union initiatives to protect undocumented workers in PICUM (2005) Ten Ways to Protect Undocumented Migrants Workers, pp. 56-58

<sup>49</sup> ETUC, Action Plan for an ETUC policy on migration, integration, and combating discrimination, racism and xenophobia, adopted by the ETUC Executive Committee in their meeting held in Brussels on 16-17 October 2003, (<http://www.etuc.org/1944>), last access 22/02/2011.

research projects which have highlighted the vulnerability of this group. The programme continues to make use of negative terminology that links undocumented migration with illegality, criminality and (in)security. This official discourse justifies repressive immigration measures and attempts to perpetuate the invisibility and marginalisation of undocumented migrants.

Indeed, despite being holders of fundamental human rights, this report has shown that undocumented migrant workers represent a particularly exploited and vulnerable group. The fact of not having access to fair working conditions has deep implications preventing undocumented migrants' access to other basic social and economic rights, including healthcare, housing and education. The denial of basic rights makes irregular migrants victims of social exclusion and increases their vulnerability in diverse areas of life.

Trade unions can play a central role in the protection of the labour rights of undocumented workers. Unionising undocumented worker would serve to make them less vulnerable to exploitation and in turn would serve to improve the employment conditions of all workers.

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