

# Criminalisation of migrants in an irregular situation and of persons engaging with them



The European Union (EU) is developing a common immigration policy, one of whose aims is to prevent 'illegal immigration', as per Article 79 of the Treaty on the Functioning of the European Union (TFEU).<sup>1</sup> This policy, one element in the EU's area of freedom, security and justice, must respect the rights, freedoms and principles reaffirmed in the Charter of Fundamental Rights of the European Union,<sup>2</sup> under Article 67 of the TFEU.

This paper looks at the use of sanctions to counteract irregular migration, building on previous work of the European Union Agency for Fundamental Rights (FRA) in the field of irregular migration, borders and return. It looks first at the punishments used for irregular entry or stay, when persons enter or stay in a territory although they are not authorised to do so. It examines, in particular, the custodial penalties for irregular entry or stay for persons to whom the safeguards of the EU Return Directive should apply. It then examines the risk that those who help such migrants or rent out accommodation to them are punished for smuggling human beings, or facilitating their entry or stay. The paper compares EU Member States' legislation and case law in this field, analysing the findings in light of relevant EU law. Based on this analysis, the paper proposes changes to policies against the smuggling of human beings, to render them more sensitive to fundamental rights.

Several EU Member States have resorted to criminal law measures to deter migrants from entering or staying in their territory in an irregular manner.

In addition, according to applicable EU legislation, EU Member States must punish persons who help irregular migrants to enter and stay in the EU. This paper looks at the impact of such measures on fundamental rights, such as the right to liberty and security of a person,<sup>3</sup> human dignity,<sup>4</sup> the right to life,<sup>5</sup> right to an effective remedy,<sup>6</sup> and access to social rights, such as housing.<sup>7</sup>

The findings are put forward in the context of the Return Directive (Directive 2008/115/EC), which sets out standards and procedures for returning irregular migrants,<sup>8</sup> as well as the Facilitation Directive (Directive 2002/90/EC)<sup>9</sup> and its accompanying Council Framework Decision 2002/946/JHA,<sup>10</sup> which oblige EU Member States to punish anyone who assists a person to irregularly enter, transit or stay in the territory of a Member State.

FRA research has highlighted the risk that domestic EU Member State legislation on the facilitation of entry and stay may lead to the punishment of those who provide humanitarian assistance or rent

3 *Ibid.*, Art. 6 (1) (f).

4 *Ibid.*, Art. 1.

5 *Ibid.*, Art. 2.

6 *Ibid.*, Art. 47.

7 Council of Europe, European Social Charter, CETS No. 35.

8 Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), OJ 2008 L 348, p. 98, Art. 1.

9 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (Facilitation Directive), OJ 2002 L 328, p. 17–18.

10 Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, p. 1.

1 EU (2010), Consolidated version of the Treaty on the functioning of the European Union, OJ 2010 C 83, p. 47.

2 EU (2010), Charter of Fundamental Rights of the European Union, OJ 2010 C 83 p. 389.

out accommodation.<sup>11</sup> Fishermen fear punishment for rescuing migrants in distress at sea, under the rules on facilitation of irregular entry.<sup>12</sup> Such risk for fishermen was also reported by the press following the tragedies off the Italian island of Lampedusa in October 2013, when two shipwrecks occurred and more than 380 people were reported to have died.<sup>13</sup>

The use of criminal sanctions and imprisonment to fight irregular migration harms not only the persons concerned, but also casts a negative light on how society as a whole perceives them. Migrants lacking permits to stay may be committing an offence and are, therefore, often unfairly seen as criminals, which makes them more vulnerable to exploitation and abuse. One tragic example involved 28 Bangladeshi migrant workers at a Greek strawberry plantation, who were shot at in a pay dispute over outstanding wages on 17 April 2013. Sensitive to the impact of language on society as a whole, the European Commission has abandoned the use of the term 'illegal migrant', in favour of the more neutral terminology 'irregular migrant' or 'migrant in an irregular situation'.

The human rights challenges connected to the criminalisation of irregular migration have been documented in various reports, including in a Council

of Europe Commissioner for Human Rights issue paper<sup>14</sup> and a report by the United Nations (UN) Special Rapporteur on the human rights of migrants on the management of the external borders of the EU.<sup>15</sup> FRA published in 2011 reports on *Fundamental rights of migrants in an irregular situation in the European Union* and in 2013 on *Fundamental rights at Europe's southern sea borders*. The reports draw attention to the fact that all persons have rights, including migrants who enter or stay in the EU without permission. In practice, however, such persons are often deprived of their basic rights.

The annex gives an overview of national legislation punishing irregular entry and stay, as well as the facilitation thereof, in the 28 EU Member States. It is available on FRA's website at: <http://bit.ly/iireoE>. It also covers the existence, or lack, of exceptions for assisting a person to enter or stay for humanitarian purposes, including for the purpose of seeking international protection, and the possible punishment of persons who provide accommodation to migrants in an irregular situation. The draft report and its annex were shared for comments with selected international organisations and NGOs, the European Commission, the FRA National Liaison Officers network and relevant authorities.

11 FRA (2011), pp. 63–64.

12 FRA (2013), pp. 34–36.

13 BBC (2013a, b).

14 Council of Europe, Commissioner for Human Rights (2010), *Criminalisation of migration in Europe: Human rights implications*, Issue paper, 4 February 2010. See also the Commissioner's Viewpoint, *It is wrong to criminalise migration*, 29 September 2008.

15 United Nations (UN), Human Rights Council, Crépeau, F. (2013).



# 1. Criminalisation of migrants in an irregular situation

In almost all EU Member States, irregular entry and stay are offences, often punishable with custodial sentences. Under certain conditions and provided certain safeguards are respected, a person may also be detained within the return procedure.

Applicable EU legislation obliges EU Member States to issue a return decision to any third-country national who is in an irregular situation, unless his/her status is regularised.<sup>16</sup> The EU Return Directive regulates the standards and procedures applicable to persons subject to a return decision.

Under certain conditions, Article 15 of the Return Directive allows the detention of third-country nationals for up to six months, which can exceptionally be extended up to 18 months, to carry out the removal process. In line with the case law elaborated by the European Court of Human Rights (ECtHR) on Article 5 (1) (f) of the European Convention on Human Rights,<sup>17</sup> the Return Directive provides that such detention pending removal must respect substantive and procedural safeguards. For example, detention is lawful only if removal arrangements are in progress and executed with due diligence and only as long as there is a reasonable prospect for removal. Detention is allowed only after other viable alternatives have been examined. Article 17 of the directive includes a strong presumption against the detention of children and in favour of alternatives. Detention must be reviewed at regular intervals, to ensure it is not unduly prolonged. In its ruling in the *Kadzoev* case, the Court of Justice of the European Union (CJEU) confirmed that the maximum detention period of 18 months may under no circumstance be exceeded.<sup>18</sup> The same ruling also clarified that deprivation of liberty cannot be allowed on grounds that a person has no means to support him- or herself and no accommodation.<sup>19</sup>

Several EU Member States have national laws prescribing custodial sanctions for irregular entry or stay. Accordingly, they may imprison migrants beyond pre-removal detention as allowed by the Return Directive.

Most aspects of criminal law and rules on criminal procedure are, in principle, outside EU competence. However, referring to the duty of loyal cooperation under Article 4 (3) of the Treaty on the European Union (TEU),<sup>20</sup> the CJEU has said that “a Member State may not apply criminal law rules which are liable to undermine the application of the common standards and procedures established by Directive 2008/115 and thus to deprive it of its effectiveness”.<sup>21</sup> Imprisonment of a migrant in an irregular situation for the offence of having unlawfully entered or stayed in the territory of a Member State must not, therefore, take precedence over applying the Return Directive, including its fundamental rights safeguards. In *Achoughbabian*, the CJEU said that imprisonment for the offence of irregular stay, before carrying out the removal, unnecessarily delays the removal process, even when such penalties are rarely imposed in practice.<sup>22</sup> It is, therefore, not allowed under EU law to apply a custodial penalty to a migrant in an irregular situation for irregular entry or stay, before a return decision is adopted and while it is implemented.<sup>23</sup>

In that decision, the CJEU did not, however, exclude the possibility that EU Member States impose a fine for irregular entry or stay,<sup>24</sup> or that they resort to imprisonment *after* the return procedure is completed – that is to say when the coercive measures provided for by Article 8 of the Return Directive have been applied but the person was not removed.<sup>25</sup> Home detention is also not allowed, unless its enforcement can be lifted as soon as the physical removal of the individual concerned becomes possible.<sup>26</sup>

Irregular entry and stay are unlawful in all EU Member States, and triggers a return procedure. In most Member States, these acts also constitute offences that are separately punishable with imprisonment

16 Council Directive 2008/115/EC, OJ 2008 L 348, pp. 98–107, Art. 6.

17 For an overview of ECtHR case law, see FRA and ECtHR (2013), Chapter 6 ‘Detention and restrictions to freedom of movement’, pp. 135–170.

18 CJEU, Case C-357/09 [2009] ECR I-11189, *Kadzoev*, 30 November 2009, para. 72 (1).

19 *Ibid.*, para. 72 (6).

20 EU (2010), Consolidated version of the Treaty on the European Union, OJ 2010 C 83, p. 13–45.

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

22 CJEU, Case C-329/11 [2011] *Alexandre Achoughbabian v. Préfet du Val-de-Marne*, 6 December 2011, para. 40.

23 *Ibid.*, para. 45.

24 CJEU, Case C-430/11, *Sagor*, 6 December 2012, para. 50.

25 CJEU, Case C-61/11, *El Dridi*, 28 April 2011, paras 52 and 609; CJEU, Case C-329/11 [2011] *Alexandre Achoughbabian v. Préfet du Val-de-Marne*, 6 December 2011, para. 46.

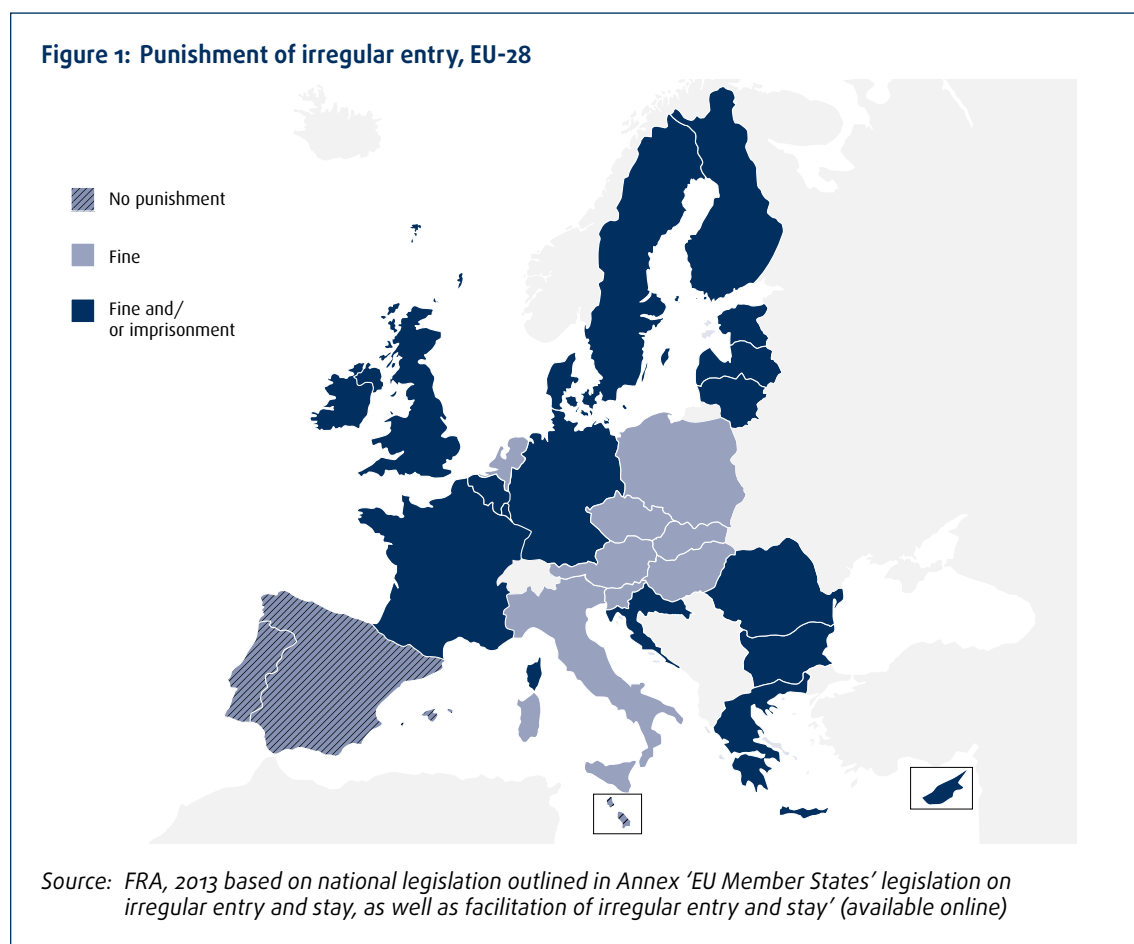
26 CJEU, Case C-430/11, *Sagor*, 6 December 2012, para. 50.

and/or fines. For irregular entry and stay, fines can be up to €10,000 (Italy). For irregular entry, the maximum length of imprisonment ranges from one month in Croatia to three months in Belgium and five years in Bulgaria. For irregular stay, it ranges from 60 days in Croatia to three years in Cyprus. In spite of the CJEU case law mentioned earlier, it is still generally possible to apply custodial sentences to persons subject to a return procedure.

Under Article 8 of the *EU Anti-Trafficking Directive (Directive 2011/36/EU)*,<sup>27</sup> victims of trafficking in human beings should not be punished for their involvement in criminal activities committed as a direct consequence of their victimisation. This includes an exemption from punishment for immigration-related offences.

## 1.1. Irregular entry

Legislation in all but three EU Member States punishes irregular entry with sanctions in addition to the coercive measures that may be taken to ensure the removal of the person from the territory of the state, as Figure 1 shows. Legislation in 17 Member States<sup>28</sup> punishes irregular entry with imprisonment and/or a fine. Eight Member States punish it with a fine only,<sup>29</sup> although in aggravated circumstances the punishment may still be imprisonment. Depending on the Member State, if the migrant has no means to pay the fine it may be converted into a custodial sentence. Malta, Portugal and Spain do not punish irregular entry with a fine or imprisonment, but return procedures are immediately initiated.



27 Council Directive 2011/36/EC of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011 L 101.

28 Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, Luxembourg, Romania, Sweden and the United Kingdom (see annex).

29 Austria, the Czech Republic, Hungary, Italy, the Netherlands (only if declared an "undesirable alien"), Poland, Slovakia and Slovenia (see annex).

States must not impose penalties on refugees who enter without authorisation if they come directly from a territory where their life or freedom was threatened, according to Article 31 of the 1951 Convention Relating to the Status of Refugees. Bulgarian, Finnish and Spanish legislation on irregular entry, for instance, makes reference to the obligation of the state vis-à-vis asylum seekers. In 2011 in Bulgaria, the Svilengrad and Smolyan regional courts convicted 63 % of the asylum seekers who submitted asylum applications at the border of illegal entry.<sup>30</sup> The Haskovo County (Appeal) Court ruled in 2013, however, that no crime of irregular entry has been committed if the person applied for asylum at the earliest convenience, in line with Article 279 of the Criminal Code and the Geneva Convention.<sup>31</sup>

## 1.2. Irregular stay

Similarly to irregular entry, legislation in 25 EU Member States punish irregular stay, with 10 applying a fine and and/or imprisonment<sup>32</sup> and 15 a fine only,<sup>33</sup> as Figure 2 illustrates. Such sanctions are in addition to the coercive measures that may be taken to ensure the removal of the person from the territory of the state. Depending on the Member State, the fine may be converted to a custodial sentence if the migrant cannot pay. In Malta, Portugal and France, irregular stay is not punished either with a fine or imprisonment; but a return procedure is initiated. France deleted provisions punishing irregular stay from the Code on Entry and Stay of Aliens and the Right to Asylum<sup>34</sup> following the *El Dridi* and *Achugbalian* cases. Belgium also plans to modify the Immigration Act, in accordance with CJEU

jurisprudence.<sup>35</sup> Dutch legislation in force in February 2014 punishes the stay of an alien declared 'undesired'. The Dutch House of Representatives is considering a legislative proposal which would expand this punishment to cover all unlawfully staying foreigners by adding a new Article 108 A to the Dutch Aliens Act.<sup>36</sup>

When a return decision is issued, a period of voluntary return is usually also set. The migrant may, however, still risk punishment for irregular stay within this period. A rejected asylum seeker in Slovenia, for example, was granted a period of voluntary return, but was still fined €400 for irregular stay. The Constitutional Court resolved the issue, ruling that irregular residence starts only after the period for voluntary return has elapsed. It ordered the laws to be amended accordingly.<sup>37</sup> The Dutch proposal mentioned earlier would make it explicit that aliens are not punishable until the departure period has expired.

Similarly, there is a risk that a person who cannot be returned is punished because the receiving country does not issue travel documents. Courts have been called upon to address this. In the Netherlands, for example, the Court of Appeal concluded that if the irregular migrant is unable to leave the Netherlands through no fault of his/her own, he/she cannot be punished for irregular stay.<sup>38</sup>

30 Bulgaria, General Directorate Border Police, UNHCR and Hungarian Helsinki Committee (2012), *Tri-partite annual border monitoring report on access to territory and procedure*, available at: [www.refworld.org/pdfid/524541d54.pdf](http://www.refworld.org/pdfid/524541d54.pdf).

31 Bulgaria, County (Appeal) Court, *Хасковски окръжен съд* (Haskovo County Court), *1-ви наказателен състав* (1st Division) Case No 92/2013 Haskovo, Decision No. 70, 14 May 2013, available at: <http://okrsud.haskovo.net/sprweb/0070d813/09242313.htm>.

32 Belgium, Croatia, Cyprus, Denmark, Estonia, Germany, Ireland, Luxembourg, the Netherlands, and the United Kingdom.

33 Austria, Bulgaria, the Czech Republic, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

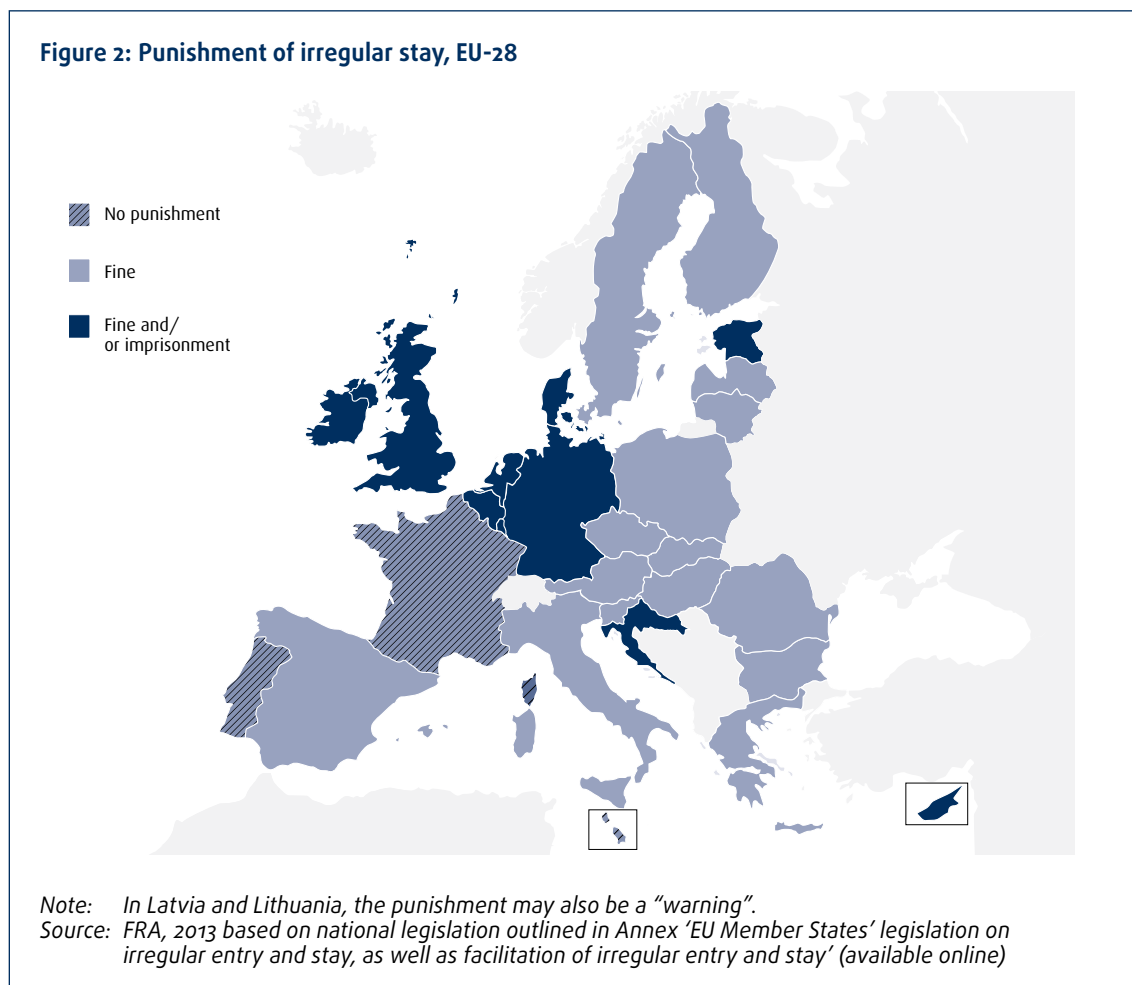
34 France, Law of 31 December 2012 (*Loi n° 2012-1560 du 31 décembre 2012 relative à la retenue pour vérification du droit au séjour et modifiant le délit d'aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées*), JO, 1er janvier 2013, Article 8, available at: [www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00026871211&dateTexte=&categorieLien=id](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00026871211&dateTexte=&categorieLien=id).

35 Communication by Belgium to the European Commission, EU-pilot No. 5555/13/home.

36 The Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*), Amendment of the Aliens Act 2000 in relation to the criminalisation of illegal stay of aliens in the Netherlands (*Wijziging van de Vreemdelingenwet 2000 in verband met de strafbaarstelling van illegaal verblijf van vreemdelingen in Nederland*), Parliamentary documents 2012/2013, No 33 512, available at: [www.tweedekamer.nl/kamerstukken/detail.jsp?id=2013D00696&did=2013D00696](http://www.tweedekamer.nl/kamerstukken/detail.jsp?id=2013D00696&did=2013D00696).

37 Slovenia, Constitutional Court of the Republic of Slovenia (*Ustavno sodišče Republike Slovenije*), Decision Nos. Up-456/10 and U-I-89/10, 24 February 2011, available at: [www.uradni-list.si/1/objava.jsp?urlid=201126&stevilka=1168](http://www.uradni-list.si/1/objava.jsp?urlid=201126&stevilka=1168).

38 The Netherlands, Nijmegen Court of Appeal, ECLI:NL:GHARN:2011:BP6259, 1 March 2011, available at: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARN:2011:BP6259>.



### 1.3. Migrants’ fear of apprehension results in impunity for perpetrators of crime

EU Member States must issue a return decision to illegally staying third-country nationals under Article 6 (1) of the Return Directive. FRA research found that certain apprehension and reporting practices disproportionately interfere with fundamental rights of migrants in an irregular situation. This is, for example, the case with apprehensions at or near service providers, such as schools or hospitals. Also, national legislation may require public authorities and service providers to report the offence of irregular entry and/or stay to the law enforcement agencies. Because of a real or perceived danger of detection, migrants in an irregular situation often refrain from approaching medical facilities, sending their children to school, registering their children’s births or attending religious services. If the state encourages the general public to report migrants in

an irregular situation to immigration authorities,<sup>39</sup> this will drive migrants further underground, depriving them of access to public services and making them more vulnerable to exploitation and abuse.

The rights included in the EU Victims’ Directive (Directive 2012/29/EU) apply to all victims of crime in a non-discriminatory manner, regardless their residence status (Article 1). Migrants in an irregular situation, however, will rarely be treated as victims of crime, as they typically refrain from reporting crimes, including serious crimes against themselves.<sup>40</sup> This reluctance to report effectively bars their access to justice, leading to impunity on the part of the perpetrators.

For migrant workers in an irregular situation, the Employer Sanctions Directive (Directive 2009/52/EC)

<sup>39</sup> See, for example, the United Kingdom, where the UKBA homepage contains information on how immigration-related crimes can be reported, available at: [www.ukba.homeoffice.gov.uk/aboutus/contact/report-crime/](http://www.ukba.homeoffice.gov.uk/aboutus/contact/report-crime/).

<sup>40</sup> FRA (2011), p. 59.



includes some important safeguards on access to justice through third-party representation, such as by trade unions or civil society organisations, in complaints procedures (Article 13). The directive clarifies that providing assistance to lodge complaints must not be considered as facilitation of irregular stay. It makes it possible to grant temporary stay to victims of particularly exploitative working conditions and to minors who cooperate with investigations or judicial proceedings (Article 13 (4)), like that which is provided in Article 8 of Directive 2004/81/EC introducing a residence permit for victims of human trafficking.<sup>41</sup> Article 3 (2) of that directive obliges EU Member States to issue residence permits to victims of trafficking in human beings and they 'may' also issue such permits to third-country nationals who have been subject to an action to facilitate irregular immigration.

Greece, for instance, plans to facilitate access to justice for migrants in an irregular situation by amending the Immigration Act to grant residence permits to third-country nationals who fall victim to, or are important witnesses of, serious crimes against life, health, physical integrity, property, and personal and sexual freedom.<sup>42</sup>

Destitute migrant women in an irregular situation and those working in the domestic sector are particularly vulnerable to sexual exploitation and abuse, in return for basic necessities, such as housing and food.<sup>43</sup> The UN report on violence against women migrant workers, published in 2013, suggested a number of ways to help make access to justice available to them. These include hotlines, complaint and dispute resolution mechanisms, legal aid and assistance, psychological, health and social services access to shelters and compensation for damages.<sup>44</sup>

A particular concern is that the residence permit of the victim may be dependent on the perpetrator. This may be a family member or, for domestic workers, the employer. This further discourages victims from reporting crimes. Victims' residence permits must be made independent from the perpetrator, according to Article 59 of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). If the perpetrator is a family member, Article 13 of the Free Movement Directive (2004/38/EC)

and Article 15 (3) of the Family Reunification Directive (2003/86/EC) also make it possible to grant victims an independent right of residence. EU Member State experts and the European Commission, in cooperation with FRA, have developed practical guidance on apprehending migrants in an irregular situation. The guidance offers law enforcement officials "dos and don'ts". It recommends delinking the immigration status of victims of violence from the main permit holder, when this person is also the perpetrator, to provide the victim with an independent right to stay. It builds on promising practices in EU Member States. National legislation in, for instance, France,<sup>45</sup> Spain<sup>46</sup> and the United Kingdom<sup>47</sup> allows undocumented women who are victims of domestic violence to apply for residence permits independent of the main permit holder. These laws also protect them from destitution by granting them access to the labour market or public funds. To support Member States in establishing and operating an application of Article 6 (1) of the Return Directive that complies with fundamental rights, these common principles have been included in the minutes of the Contact Group on the Return Directive that the European Commission convened.

45 France, Law on Violence against Women, No. 2010-769 of 9 July 2010, Art. 16-3; *Loi relative aux violences faites spécifiquement aux femmes, aux violences au sein des couples et aux incidences de ces dernières sur les enfants* (a temporary residence permit is issued to a foreigner who has been issued a protection order), available at: [www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022454032&categorieLien=id](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000022454032&categorieLien=id). Code on and Stay of Foreigners and on the Right to Asylum [*Code de l'entrée et du séjour des étrangers et du droit d'asile*], Art. L316-1 (temporary residence permit allowing access to the labour market for victims of domestic violence who file a complaint), available at: [www.legifrance.gouv.fr/affichCode.do?sessionid=62EED98ACDC020393460EF699CAB05F6.tpdjo16v\\_2?cidTexte=LEGITEXT000006070158&dateTexte=vig](http://www.legifrance.gouv.fr/affichCode.do?sessionid=62EED98ACDC020393460EF699CAB05F6.tpdjo16v_2?cidTexte=LEGITEXT000006070158&dateTexte=vig).

46 Spain, Law 4/2000 [*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*], Art. 31 bis (temporary residence permit giving access to the labour market to women victims of violence based on a protection order or a report by the Prosecutor's Office indicating signs of gender-based violence). Available at: [http://noticias.juridicas.com/base\\_datos/Admin/lo4-2000.html](http://noticias.juridicas.com/base_datos/Admin/lo4-2000.html).

47 United Kingdom, para. 289A-289C of the Immigration Rules (indefinite leave to remain if the relationship broke down as a result of domestic violence), available at: [www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/victimsofdomesticviolence/Guidance-Victims-of-domestic-violence](http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part8/victimsofdomesticviolence/Guidance-Victims-of-domestic-violence), 29 July 2013, pp. 40-43, available at: [www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/family/section4.pdf?view=Binary](http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/modernised/family/section4.pdf?view=Binary).

41 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subjects of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ 2004 L261.

42 Draft Code on Migration and Social Integration (Σχέδιο Νόμου Κώδικας Μετανάστευσης και Κοινωνικής Ένταξης).

43 FRA (2011), p. 7.

44 United Nations (UN), *et al.* (2013).

## 2. “*Délits de solidarité*” – criminalisation of persons engaging with migrants in an irregular situation

Criminalisation harms not only the migrants themselves, but also those who support them, such as providers of humanitarian or legal assistance or persons who rescue migrants in distress at sea. Landlords renting accommodation to migrants in an irregular situation may also risk punishment, particularly as laws often criminalise such support, if it is seen as an activity done for gain. A forthcoming FRA report on severe forms of labour exploitation will also examine the sanctions against persons employing migrants in an irregular situation.

The UN Smuggling of Migrants Protocol supplementing the UN Convention against Transnational Organised Crime, which has been ratified by all EU Member States except Ireland,<sup>48</sup> requires states to criminalise the procurement of irregular entry or residence to obtain, directly or indirectly, a financial or other material benefit (Article 6). Aggravating circumstances should be established if there is a threat to the lives or safety of migrants or in the case of inhuman or degrading treatment (Article 6 3 (a) and (b)). The reference to financial or other material benefit for the perpetrator is intended to exclude family members<sup>49</sup> or other support groups such as religious or non-governmental organisations (NGOs) from punishment.<sup>50</sup>

Concerning EU law, Article 27 (1) of the [Convention implementing the 1985 Schengen Agreement \(CISA\)](#) required Contracting Parties to impose “appropriate penalties on any person who, for financial gain, assists or tries to assist an alien to enter or reside within the territory of one of the Contracting Parties in breach of that Contracting Party’s laws on the entry and residence of aliens”.

In 2004, the [EU Facilitation Directive \(Directive 2002/90/EC\)](#)<sup>51</sup> and its accompanying [Framework Decision 2002/946/JHA](#)<sup>52</sup> to combat smuggling in human beings entered into force. They replaced Arti-

cle 27 of the CISA. The directive obliges EU Member States to punish anyone who intentionally assists a person to irregularly *enter or transit* through a Member State (Article 1 (1) (a)). Member States may, however, refrain from punishment if the aim of enabling a foreigner to *enter or transit* through the country is to provide that person with humanitarian assistance (Article 1 (2)). Indeed, failure to respect the duty to rescue is usually a criminal act.<sup>53</sup> The provision does not cover humanitarian assistance enabling a foreigner to *stay*.

The Facilitation Directive also obliges EU Member States to punish anyone who, for financial gain, intentionally assists a foreigner to irregularly *reside* within the territory of a Member State (Article 1 (1) (b)). Based on this provision, Member States may refrain from punishing facilitation of irregular stay, if this is not done intentionally and/or for financial gain; the directive, however, does not require them to refrain. Thus, the directive does not encourage the punishment of people who provide emergency shelter, food and other necessities to migrants in an irregular situation, as long as this is not done for financial gain. At the same time, it does not explicitly discourage or prohibit them from punishing such people. In contrast to emergency aid, renting accommodation involves a financial transaction. In some Member States, landlords risk punishment, under national law criminalising facilitation of stay, if they rent accommodation to migrants in an irregular situation (see Section 2.3).

According to the accompanying Framework Decision, criminal penalties must be effective, proportionate and dissuasive and may entail extradition (Article 1). Minimum penalties are defined only in those cases where facilitation is done for financial gain by a criminal organisation, understood as a structured association of more than two persons established over a period of time,<sup>54</sup> or where the crimi-

48 United Nations (UN) (n.d).

49 See also, in this regard, ECtHR, *Mallah v. France*, No. 29681/08, 10 November 2012.

50 United Nations (UN), 3 November 2000, p. 469.

51 Council Directive 2002/90/EC of 28 November 2002 on defining the facilitation of unauthorised entry, transit and residence, OJ 2002 L 328/17. The directive does not apply to Ireland or Denmark.

52 Council of the European Union (2002), Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328/1.

53 See for instance, Greece, 1974 Greek Code for Sea Law (*Κώδικας Δηροσίου Ναυτικού Δικαίου*), Art. 227; Italy, Royal Decree 1942 as amended in 2002 (*Codice de la Navigazione, Approvato con R.D. 30 marzo 1942, n. 327 (con succ. mod. e integr. sino al 2002)*), Art. 1158; Malta, Merchant Shipping Act, Cap. 234, Art. 305(1) and 306(1); Spain, Penal Code – Omission of the duty to provide assistance (*omisión del deber de socorro*), Art. 195.

54 See Joint Action 98/733/JHA adopted by the Council on the basis of Article K. 3 of the TEU, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, OJ L 351, 29 December 1998, p. 1, Art. 1.



nals endanger the migrants’ lives. In these cases, the punishment should be a maximum sentence of not less than eight, or exceptionally six, years.

The Framework Decision includes a safeguard related to international protection: it applies without prejudice to protection afforded to refugees and asylum seekers (Article 6). This means that it should not be applied to punish facilitation of entry and stay for persons in need of protection if they come directly from a territory where their life or freedom was threatened and present themselves without delay to the authorities (1951 Convention relating to the Status of Refugees, Article 31). There is no general safeguard in the Framework Decision preventing the punishment of acts performed for humanitarian purposes, rescue at sea or emergency situations. There is a risk that domestic legislation aimed at addressing facilitation of irregular entry and stay may result in punishing rescue at sea, the provision of humanitarian assistance or landlords renting out accommodation.

Some EU Member States punish facilitation of entry and stay with fines or imprisonment, others with both in combination. The penalty scales vary greatly. The maximum fine for facilitating entry and stay is €78,000 in the Netherlands. In Spain, the fine for facilitating stay can be up to €100,000. In both the Netherlands and Spain facilitation of stay is punishable only if the motive is gain. In Greece, facilitation of entry prison terms can be up to 10 years and in the United Kingdom, 14 years for facilitation of entry and stay.

Mitigating circumstances can influence the punishment. In Sweden, when assessing the punishment, special consideration shall be given to whether in a particular case the crime was committed for reasons of “strong human compassion” [“om brottet föranletts av stark mänsklig medkänsla”].<sup>55</sup>

Under national criminal law, a person is not liable if the act was committed to avert danger, in other words keep someone from harm. This is the case,

for instance, in Hungary,<sup>56</sup> Lithuania<sup>57</sup> and Spain,<sup>58</sup> if the danger could not have been averted by other means and the damage caused is less than the damage sought to be averted. Facilitation of irregular entry and stay could fall under such provisions. In Portugal “[t]he act is not criminally punishable when its unlawfulness is excluded by the legal system considered as a whole”, for instance by exercising a right or by fulfilling a duty imposed by law [“O facto não é punível quando a sua ilicitude for excluída pela ordem jurídica considerada na sua totalidade”].<sup>59</sup>

## 2.1. Facilitating irregular entry

Facilitating irregular entry is punished in all 28 EU Member States, as illustrates Figure 3. Legislation in 26 EU Member States does not require financial gain or profit for it to be a punishable offence.<sup>60</sup> In these countries, financial gain or profit is often considered an aggravating circumstance or subject to a separate provision. In Germany and Ireland does the law expressly require that facilitation is punishable only if proven to be for profit or gain. While the Smuggling Protocol requires the punishment of facilitation only if done for profit, the Facilitation Directive is silent on this.

The safeguard in Article 1 (2) of the Facilitation Directive, which allows states to refrain from imposing sanctions when irregular entry is facilitated

56 Hungary, Criminal Code (*Büntető törvény*), Section 23 (1) (save his own person or property or the person or property of others from an imminent danger that cannot otherwise be prevented, or acts so in the defence of the public interest shall not be prosecuted, provided that the harm caused by the act does not exceed the peril with which he was threatened).

57 Lithuania, Criminal Code (*Baudžiamasis kodeksas*), Art. 31 (attempt to avert the danger which threatens him, other persons or their rights, public or state interests, where this danger could not have been averted by other means and where the damage caused is less than the damage attempted to be averted); Code of Administrative Offences, Art. 17 (committed in a state of necessity, attempting to avert the danger which threatens state or public order, property, citizen’ rights and freedoms or government order, where this danger, under this circumstances, could not have been averted by other means and where the damage caused is less than the averted damage).

58 Spain, Criminal Code (*Código Penal*), Art. 20 (in a state of necessity in order to avoid damage to himself or others [...] the damage caused is not greater than the damage sought to be prevented).

59 Portugal, Penal Code, Chapter III, Book I, Title II, Causes for Exclusion of Unlawfulness and of Guilt (*Código Penal*), Art. 31 (1).

60 Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

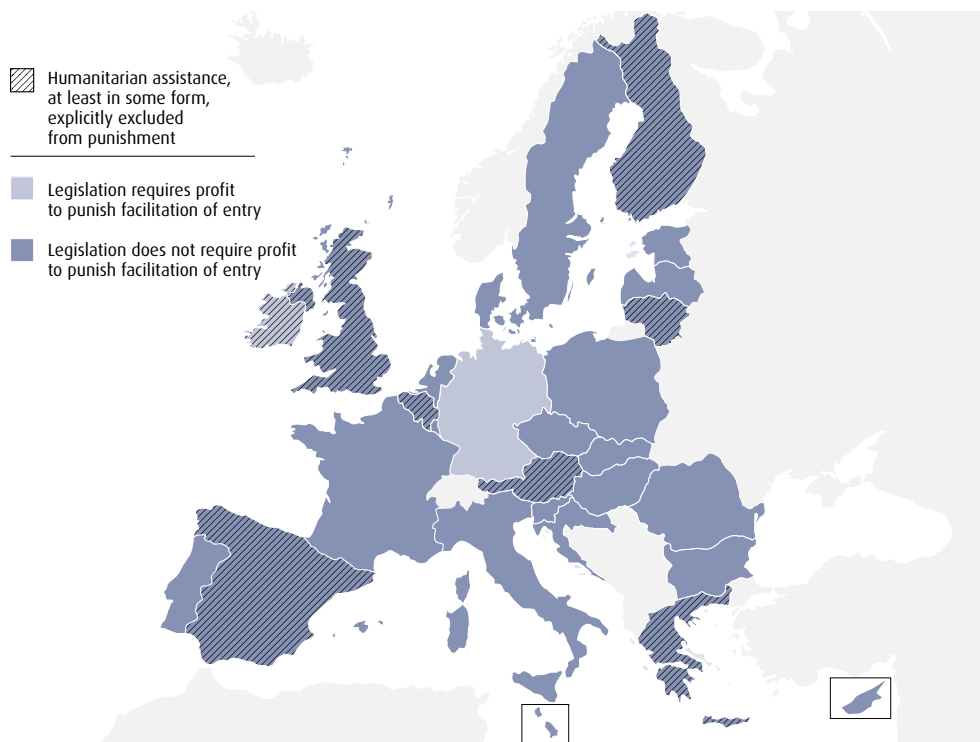
55 Sweden, Penal Code (*Brottsbalk*), Chapter 29, Section 3 (4).

for humanitarian purposes, is often not reflected in national legislation. Leaving aside references to general criminal law provisions, such as acts committed in a state of necessity to avert a danger, the domestic law of only eight EU Member States contains explicit language clarifying that certain acts carried out to facilitate entry for humanitarian purposes are not to be punished. Austria rules out punishment for assistance provided to family members. Belgian law rules out punishment for assisting a non-EU citizen to enter, stay or transit for humanitarian reasons. In Spain, it is not an offence to transport an asylum seeker into the country if he or she has presented an asylum request without delay and it has been admitted for processing. Greece excludes the rescue of persons at sea and transport of persons in need of protection from punishment for facilitation of entry. Under the Finnish criminal code, the motives of the person committing facilitation, and the circumstances pertaining to the safety of the foreigner in his or her home country or country of permanent residence, may lead to non-punishment. In

Lithuania, violations originating in unforeseen circumstances, such as accidents, natural disasters, emergency medical aid and rescue, are not punishable. The legislation in Ireland and the United Kingdom states that facilitation of entry of an asylum seeker will be punished, but it also explicitly excludes from punishment a person acting on behalf of an organisation which aims to assist asylum seekers and does not charge for its services.

In those EU Member States where facilitation of entry without profit may be punished, the duty to ensure that the migrant's fundamental rights and in particular the right to asylum are respected lies with the administration and domestic courts. FRA could, nonetheless, find only limited case law on this matter. The Swedish Supreme Court has argued that assisting someone for humanitarian reasons to apply for asylum may, in principle, be excluded from punishment. This was also Sweden's interpretation when transposing the EU rules on facilitation.<sup>61</sup> This particular case, however, dealt with entry facilitated over

**Figure 3: National legislation punishing facilitation of irregular entry and exceptions for humanitarian assistance, EU-28**



Source: FRA, 2013 based on national legislation outlined in Annex 'EU Member States' legislation on irregular entry and stay, as well as facilitation of irregular entry and stay' (available online)

61 Sweden, Government Bill, 2003/04:35, available at: [www.regeringen.se/content/1/c4/07/35/b23b338b.pdf](http://www.regeringen.se/content/1/c4/07/35/b23b338b.pdf).

an internal EU border; the persons in need of protection should have applied for asylum, under the Dublin rules, in the Member State in which they arrived. The Court therefore convicted the accused of human smuggling, but, because he had helped close relatives to cross EU internal borders to apply for asylum in Sweden without financial gain, it reduced the penalty to that of a petty offence.<sup>62</sup>

EU Member States handle the punishment of facilitation of transit in different ways. According to the Finnish Supreme Court, merely facilitating transit to help a person leave Finland is not sufficient to constitute the crime of facilitation. In this particular case, the facilitators were aware that the migrants had entered irregularly, but they had not been involved in facilitating that entry. They only facilitated transit through Finland.<sup>63</sup> In contrast, the Lithuanian Supreme Court argued in its case that the facilitator knew he was transporting persons who had entered Lithuania irregularly. He transported them from the border with Belarus to Kaunas, where they were accommodated in his friend’s apartment. He claimed that he was not aware that they had entered Lithuania unlawfully. The court punished him for facilitating transit.<sup>64</sup>

## 2.2. Facilitating irregular stay

Facilitating irregular stay is punishable in all EU Member States, except Ireland, which is not bound by the Facilitation Directive. As Figure 4 illustrates, legislation in 13 Member States does not require a profit motive for facilitation of irregular stay to be punished.<sup>65</sup> This includes Estonia and Lithuania, where the provision of housing alone is punishable. In 14 Member States, facilitation of stay is punishable only if done for profit.<sup>66</sup> Austria requires a “not [...] insignificant pecuniary advantage”: the Austrian Higher Administrative Court has established that an amount of €400 is sufficient to qualify as “not [...] insignificant pecuniary advantage”, as required by law.<sup>67</sup>

Leaving aside general criminal law provisions on acts committed out of necessity to avert a danger, legislation in eight EU Member States expressly exempts from punishment at least some forms of humanitarian assistance to irregularly staying migrants. These include five Member States that do not require profit for punishing facilitation of stay (Belgium, Finland, France, Malta and the United Kingdom) as well as Austria, Germany and Italy that require profit. Exemptions concern assistance provided to family members (Austria, France and Malta) and the provision of humanitarian assistance (Austria, Belgium, Finland, France and Italy). Germany exempts persons who carry out “specific professional or honorary duties” from punishment. France, in addition, expressly exempts the provision of legal advice. In the United Kingdom, persons who act on behalf of an organisation that aims to assist asylum seekers and does not charge for its services are exempted.

This leaves eight EU Member States that exempt neither facilitation of stay that is not for profit, nor humanitarian assistance, from punishment. Croatia, Denmark and Greece punish facilitation of stay with a fine and/or imprisonment, and Estonia, Latvia, Lithuania, Romania and Slovenia with a fine. Depending on the Member State, the fine may be converted into imprisonment if the person is unable to pay. In these countries, profit is often listed as an aggravating circumstance. The intent to conceal or hide the migrant might also be an aggravating circumstance.

A pending legislative proposal on irregular stay in the Netherlands would exempt from punishment humanitarian assistance to irregularly staying persons.<sup>68</sup> The Dutch Section of the International Commission of Jurists has warned that a migrant who is repeatedly (three times) fined for the offence of irregular stay will be committing a crime (*misdrif*). At that point, assistance of any kind may be seen as complicity, thereby criminalising humanitarian assistance as well.<sup>69</sup>

62 Sweden, Supreme Court (*Högsta Domstolen*), Case No. NJA 2009 s. 424, 15 June 2009, available at: <https://lagen.nu/dom/nja/2009s424>.

63 Finland, Supreme Court (*Korkein Oikeus, Högsta Domstolen*), KKO:2012:24, 27 February 2012, available at: [www.kko.fi/57719.htm](http://www.kko.fi/57719.htm).

64 Lithuania, Supreme Court (*Aukščiausiasis Teismas*), Case 2K-451/2011, 18 October 2011, available at: [www.eteismai.lt/byla/121907635688307/2K-451/2011](http://www.eteismai.lt/byla/121907635688307/2K-451/2011).

65 Belgium, Croatia, Denmark, Estonia, Finland, France, Greece, Latvia, Lithuania, Malta, Romania, Slovenia and the United Kingdom.

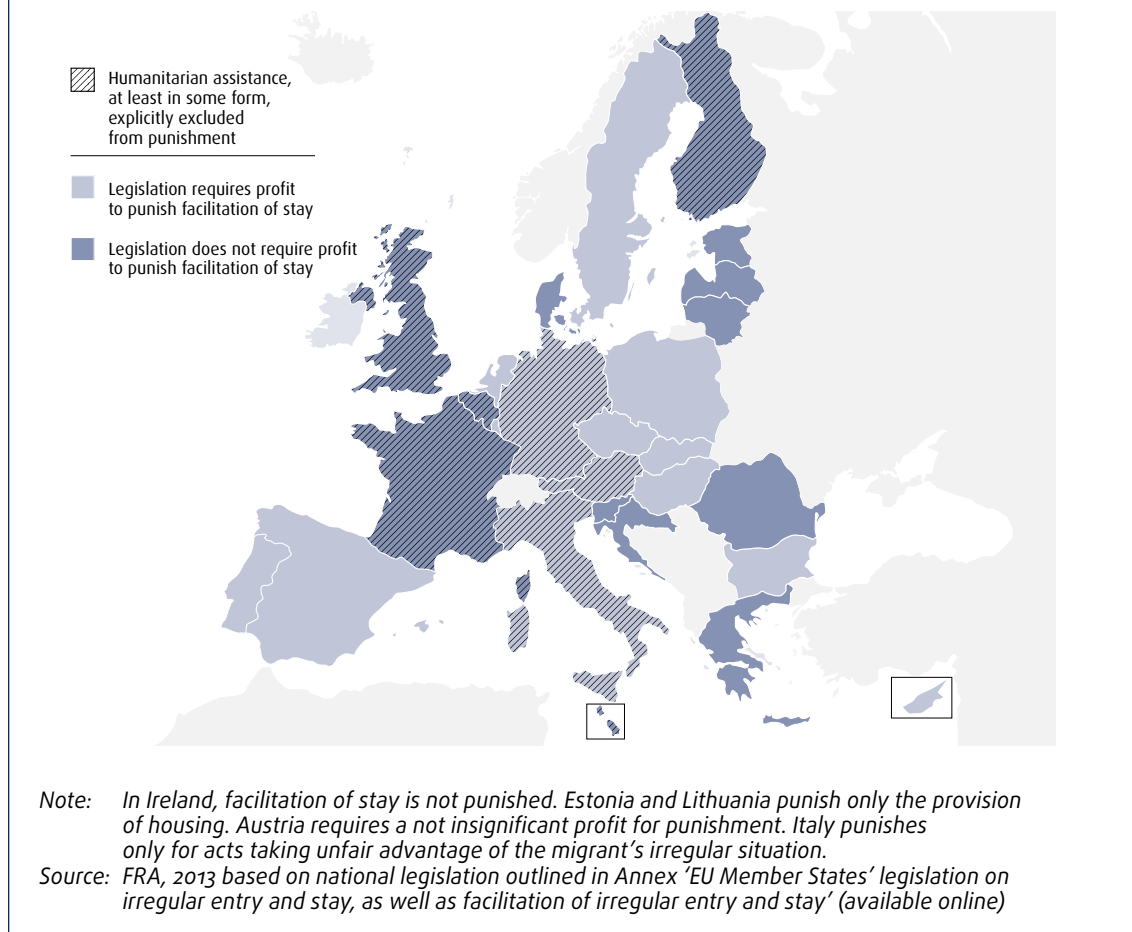
66 Austria, Bulgaria, the Czech Republic, Cyprus, Germany, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Spain and Sweden.

67 Austria, Aliens Police Act, Article 104(1), now Article 114. The Higher Administrative Court (*Verwaltungsgerichtshof, VwGH*), 2001/18/0128.

68 Netherlands, House of Representatives (*Tweede Kamer der Staten-Generaal*) (2012), Letter of the informants (*Brief van de informateurs*), Parliamentary Documents (*Kamerstukken*) (2012/2013), No. 33410/15, 29 October 2012, available at: <https://zoek.officielebekendmakingen.nl/kst-33410-15.html>.

69 Dutch Section of the International Commission of Jurists (*Nederlands Juristencomité voor Mensenrechten, NLCM*), Consequences of the legislative proposal on illegal stay for providing assistance to aliens by individuals or individual organisation (*Gevolgen Wetsvoorstel illegaal verblijf bij het hulp bieden aan vreemdelingen door particulieren en particuliere organisaties*) (2013), Letter to the House of Representatives, Leiden, 21 March 2013, available at: [www.njcm.nl/site/uploads/download/515](http://www.njcm.nl/site/uploads/download/515).

**Figure 4: National legislation punishing facilitation of irregular stay and exceptions for humanitarian assistance, EU-27**



When punishment is not limited to acts carried out for profit and no exemption exists for the provision of humanitarian assistance, there is a risk that persons who support migrants in an irregular situation may also be targeted. Although FRA research has shown that authorities do not normally target NGOs for assisting migrants in an irregular situation, it also has revealed that NGOs may be uncertain whether or not they risk punishment when they provide support.<sup>70</sup> At a Council of Europe roundtable in 2012, NGOs active in migrant rights protection in Belgium, France and Greece reported instances of detention, prosecution or lack of protection by national authorities against harassment in the context of their human rights protection activities.<sup>71</sup>

In 2007, the French police targeted humanitarian supporters and searched for irregular migrants at

soup kitchens.<sup>72</sup> The French national human rights institution (*Commission nationale consultative des droits de l'homme, CNCDH*) carried out a comprehensive study on the impact of punishing facilitation of stay to persons providing humanitarian support. Although only a few convictions were found, the study reported on the practice of intimidating NGO activists with legal proceedings and arrests. The legislation was amended in 2012 to exclude from punishment humanitarian assistance, such as food, accommodation, medical care or housing, provided it is not done for profit (*"lorsque l'acte reproché n'a donné lieu à aucune contrepartie directe ou indirecte"*).<sup>73</sup>

<sup>70</sup> FRA (2011), p. 64.

<sup>71</sup> See Council of Europe Commissioner for Human Rights (2013), pp. 6–8.

<sup>72</sup> FRA (2011), p. 41.

<sup>73</sup> France, Law of 31 December 2012 (*Loi n° 2012-1560 du 31 décembre 2012 relative à la retenue pour vérification du droit au séjour et modifiant le délit d'aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées*), OJ, 1 January 2013.

In some EU Member States, the judiciary has clarified how to deal with humanitarian support to migrants in an irregular situation. The Austrian Constitutional Court, for example, determined that providing humanitarian assistance “does not aim to prevent official measures over a longer time” and is not facilitation of entry.<sup>74</sup> In Denmark, the High Court acquitted a father who had been found guilty of having facilitated his daughter’s irregular stay based on a general provision of penal law. The court noted that the daughter could no longer live with her mother or grandmother in Morocco and the father was only fulfilling his parental duties.<sup>75</sup>

## 2.3. Punishment for renting accommodation to migrants in an irregular situation

Article 6 (1) of the UN Smuggling of Migrants Protocol and Article 1 (1) (b) of the Facilitation Directive both require that assistance be punished only when “committed intentionally”. EU Member States do not, however, necessarily limit punishment to cases in which a person intentionally conceals a migrant to prevent his or her removal. Landlords may be punished for renting accommodation to migrants in an irregular situation, as a 2011 FRA report notes. As a result, migrants can rent flats only informally, which exposes them to a greater risk of abuse and exploitation.<sup>76</sup> They may be forced to pay a high rent for substandard accommodation. In return for housing, migrant women in an irregular situation are particularly vulnerable to sexual exploitation and abuse.

As Figure 5 illustrates, five EU Member States (Cyprus, Denmark, Estonia, Greece and Lithuania) have legislative provisions explicitly punishing landlords for renting accommodation to migrants in an irregular situation, although the sanction in Estonia and Lithuania is a fine only. In addition, based on rules on facilitation of stay, under the national laws of 11 Member States,<sup>77</sup> landlords renting accommodation to migrants in an irregular situation may also risk a fine and/or imprisonment. In another seven EU Member States – Bulgaria, Czech Republic, Finland, Latvia, Romania, Slovenia and Spain – the

punishment is a fine. In aggravated circumstances, the punishment may be imprisonment.

Of the remaining five Member States, France and Malta both exclude punishing those who accommodate a close relative, although the Maltese exclusion is limited to no more than seven days. Italy punishes landlords for renting accommodation to irregular migrants only if they take unfair advantage of their vulnerable situation. Belgian law explicitly, and in an all-encompassing manner, excludes from punishment assistance provided for humanitarian reasons. Therefore, providing accommodation to migrants in an irregular situation may be interpreted as falling within the exception. As Ireland does not punish facilitation of stay, it also does not punish landlords for renting accommodation to irregular migrants.

Landlords appear to be at greater risk of punishment for renting accommodation to irregular migrants than when FRA previously reported on the fundamental rights of irregular migrants,<sup>78</sup> drawing on research carried out in 2009. A number of Member States have in the meantime adopted new laws on foreigners, regulating facilitation of stay.

Case law on renting housing to migrants in an irregular situation appears to diverge considerably among Member States. In Italy, Article 12 (5) of the Immigration Act specifies that renting accommodation is a crime only if the landlord takes ‘unfair advantage’ of the migrant’s situation. The Supreme Court clarified the meaning, saying that, to be liable, the landlord needs to be consciously imposing particularly onerous and exorbitant conditions on the migrant.<sup>79</sup> The Dutch Supreme Court, in contrast, ruled that ‘gain’ need not be strictly interpreted as financial gain, but can also encompass in-kind benefits, such as, in this particular case, baby-sitting in return for accommodation.<sup>80</sup>

In the United Kingdom, Parliament is debating legislation which would hold landlords responsible for checking tenants’ immigration status.<sup>81</sup> Such measures shift immigration law enforcement on to the general public, resulting in further reluctance to rent housing to migrants. This, in turn, increases migrants vulnerability to exploitation and the risk that they must accept substandard housing.

74 Austria, Constitutional Court (*Verfassungsgerichtshof*, VfGH) (2006), G11/06, 22 June 2006.

75 Denmark, the High Court upheld the District Court’s judgement to drop the punishment under Article 83 of the Danish Penal Code, U.2012.1974ø, 29 February 2012.

76 FRA (2011), p. 63. See also PICUM (2012), p. 82.

77 Austria, Croatia, Germany, Hungary, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Sweden, and the United Kingdom.

78 FRA (2011), pp. 59–61.

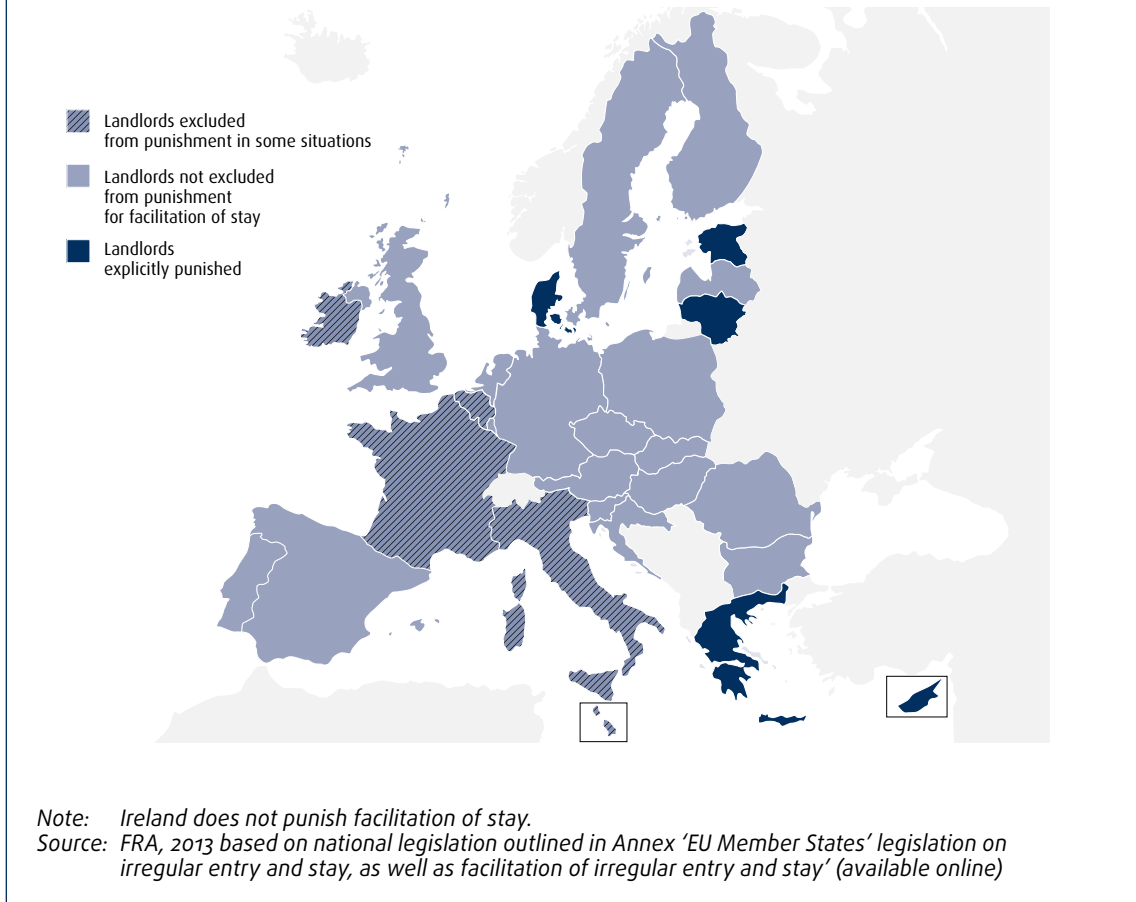
79 Italy, Criminal Court of Cassation (*Cassazione Penale*, Sez. I) (2013), No. 26457, 18 June 2013 (24 April 2013).

80 Netherlands, Supreme Court (*Hoge Raad*), ECLI:NL:HR:2012:BX5419.

81 United Kingdom, Immigration Bill, 110, 2013-13, available at: <http://services.parliament.uk/bills/2013-14/immigration.html>.



**Figure 5: National legislation punishing renting of accommodation, EU-28**



## 2.4. Carriers' support for immigration law enforcement

Another example of shifting immigration law enforcement tasks to third parties is carrier sanctions and carriers' liability. According to [Council Directive 2004/82/EC](#) on the obligation of carriers to communicate advanced passenger data, airlines are obliged to share details of passengers with the border guards responsible for immigration control at the port of arrival. Airlines which have not transmitted data, or have transmitted incomplete or false data, are penalised (Article 4).

According to the UN Smuggling of Migrants Protocol, commercial carriers may be held responsible for ascertaining that all passengers are in possession of travel documents to enter the receiving state (Article 11 (3)). If the receiving state does not admit the passenger, international aviation law makes the carrier liable to cover the costs of the return and, if this is not possible within a reasonable timeframe, any

costs related to the passenger's stay including the provision of food and water.<sup>82</sup> At the EU level, Article 26 of the CISA and [Council Directive 2001/51/EC](#) both regulate the duty of carriers to return non-admitted third-country nationals at their own cost, providing for sanctions against those who transport undocumented migrants into the EU. As a result, carriers check passengers' travel documents and visas at check-in, refraining from carrying those passengers who are not properly documented.

82 See United Nations (UN), International Civil Aviation Organisation (1944), Convention on International Civil Aviation, Annex 9, Chapter 5, 'Inadmissible persons and deportees', with subsequent IATA agreements. See also Council Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in case of denied boarding and cancellation or long delays.

# Conclusions and FRA opinions

## Custodial sentences for irregular entry and stay

In almost all EU Member States, irregular entry and stay are offences, often punishable with imprisonment. At the same time, under certain conditions and provided certain safeguards are respected, EU law allows for the detention of a person being returned. The CJEU stated that imprisonment of a migrant based on national criminal law sanctions punishing irregular entry or stay must not take precedence over applying the Return Directive, including its fundamental rights safeguards. It noted that custodial sentences for the offence of irregular stay, before carrying out the removal, unnecessarily delay the return process.

### FRA opinion

*Building on the CJEU judgments, guidance should be developed to assist EU Member States to treat migrants in an irregular situation in line with the Return Directive's safeguards. As long as the Return Directive applies to them, they should not be subject to custodial penalties for irregular entry or stay.*

*Following on from the right to asylum enshrined in Article 18 of the EU Charter of Fundamental Rights, EU Member States must not impose penalties on refugees who enter without authorisation if they come directly from a territory where their life or freedom was threatened. This should be made explicit in domestic law.*

## Access to justice for migrants in an irregular situation

Migrants in an irregular situation rarely report a crime to the police, either as a victim or as a witness, as they are afraid of detection and return. This effectively bars their access to justice, leading to perpetrator impunity. EU Member States' experts and the European Commission, in collaboration with FRA, have developed practical guidance on apprehension of migrants in an irregular situation. It suggests ways to increase access to justice for this group of persons, such as introducing anonymous or semi-anonymous reporting. Member States are encouraged to use this guidance.

Destitute migrant women in an irregular situation and those employed in the domestic work sector are at heightened risk of exploitation and abuse. They may be forced to provide sex in return for housing and food. A particular concern is that the residence permit of the victim may be dependent on the perpetrator, namely a family member or the employer of persons hired to do domestic work. This further discourages them from reporting crimes. A destitute migrant woman in an irregular situation may at the same time be a victim of trafficking in human beings and thus entitled to specific protection measures.

### FRA opinion

*To promote access to justice, third-country nationals who are victims of exploitation and abuse would require a residence permit which is not dependent on the perpetrator. This is particularly important for victims of gender-based violence. EU Member States should favourably consider granting such permits beyond what is already provided for in various EU legal instruments, and as provided for in the Council of Europe Convention on preventing and combating violence against women and domestic violence, building on existing promising practices existing in some Member States. Police should be sensitive to the gender-based aspects of the abuses the victim may report.*

## Introducing fundamental rights safeguards into the Facilitation Directive

The Facilitation Directive raises a number of fundamental rights challenges. The directive fails to remind EU Member States of their obligation under international law to assist persons in distress at sea, regardless of their immigration status, nor that those who do so should not be punished under the directive. About a quarter of the Member States have national legislation that reflects, at least in some form, the safeguards in Article 1 (2), allowing states not to impose sanctions when irregular entry is facilitated for humanitarian purposes.

The rules on facilitation of entry may also undermine respect for Article 31 of the 1951 Convention relating to the Status of Refugees, which states that refugees should not be penalised for entering

unauthorised, if they come directly from a territory where their life or freedom was threatened. The reference to international protection in the Council Framework Decision 2002/046/JHA only affects punishment; it does not eliminate the offence of facilitating entry as such.

The directive punishes facilitation of stay done for profit, but it does not prevent Member States from also punishing acts not undertaken for profit, such as provision of humanitarian assistance to facilitate stay. More than a quarter of the Member States fail in their national legislation to exempt non-profit acts or humanitarian assistance from the rules on facilitation of stay. Provision of housing against rental payments could be interpreted as intentionally assisting a person to unlawfully reside and, therefore, be punished as an act done for profit. As explained, in most EU Member States landlords risk punishment for housing under such rules. The interpretation is reinforced by a few Member States where legislation explicitly punishes provision of housing to migrants in an irregular situation.

#### FRA opinion

*To ensure a fundamental rights compliant implementation of the Facilitation Directive, FRA's report on Fundamental rights of migrants in an irregular situation in the European Union proposes a rewording of the directive. In the meantime, practical guidance to support EU Member States to implement the directive in a fundamental rights compliant manner should be considered. Such guidance should explicitly exclude punishment for humanitarian assistance at entry (rescue at sea and assisting refugees to seek safety) as well as the provision of non-profit humanitarian assistance (e.g. food, shelter, medical care, legal advice) to migrants in an irregular situation. It should also make clear that renting accommodation to migrants in an irregular situation without the intention to prevent the migrant's removal should not be considered facilitation of stay, while ensuring that the legal system punishes those persons who rent accommodation under exploitative conditions.*



# References

BBC (2013a), 'Mediterranean "a cemetery" – Maltese PM Muscat', 12 October 2013, available at: [www.bbc.co.uk/news/world-europe-24502279](http://www.bbc.co.uk/news/world-europe-24502279).

BBC (2013b), 'Migrant boat capsizes leaves 27 dead in Mediterranean', 11 October 2013, available at: [www.bbc.co.uk/news/world-europe-24499890](http://www.bbc.co.uk/news/world-europe-24499890).

Council of Europe Commissioner for Human Rights (2013), *The protection of migrant rights in Europe, round-table with human rights defenders, Paris, 5 October 2012*, report of 18 April 2013, available at: <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2341138&SecMode=1&DocId=2049674&Usage=2>.

FRA (European Union Agency for Fundamental Rights) (2011), *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, Publications Office of the European Union (Publications Office).

FRA (2013), *Fundamental rights at Europe's southern sea borders*, Luxembourg, Publications Office.

FRA and European Court of Human Rights (ECtHR) (2013), *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office.

PICUM Platform for International Cooperation on Undocumented Migrants (2012), *Strategies to end double violence against undocumented women protecting rights and ensuring justice*, Brussels.

United Nations (UN), Human Rights Council, Crépeau, F., Special rapporteur on the human rights of migrants, (2013), 'Regional study: management of the external borders of the European Union and its impact on the human rights of migrants', A/HRC/23/46, 24 April 2013.

United Nations (UN) (n.d), Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, Treaty Series, vol. 2241, No. 39574, list of State Parties, available at: [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en).

United Nations (UN) (3 November 2000), *Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (A/55/383/Add.1, paras 88–90)*, reproduced in the *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (UN publication, Sales No. E.06.V.5).

United Nations (UN), United Nations General Assembly and Economic and Social Council (2013), *Report of the Secretary-General on Violence against women migrant workers*, A/68/178, 23 July 2013.

This paper examines the sanctions applied to counteract irregular migration, building on previous work by the European Union Agency for Fundamental Rights (FRA) on the rights of migrants in an irregular situation. It looks first at the punishments used for irregular entry or stay, when persons enter or stay in a territory although they are not authorised to do so. It examines, in particular, the custodial penalties for irregular entry or stay for persons to whom the safeguards of the EU Return Directive should apply. It then examines the risk that those who help such migrants or rent out accommodation to them are punished for smuggling human beings, or facilitating their entry or stay. The paper compares EU Member States' legislation and case law in this field, analysing the findings in light of relevant EU law. Based on this analysis, the paper proposes changes to policies against the smuggling of human beings, to render them more sensitive to fundamental rights.

## Further information:

For the annex providing an overview of EU Member States' legislation on punishing irregular entry and stay, as well as the facilitation thereof, see:  
<http://fra.europa.eu/en/publication/2014/criminalisation-irregular-migrants>.

The following FRA reports examine various aspects of and case law related to asylum, borders and immigration into the EU:

- FRA-ECtHR (2013), *Handbook on European law relating to asylum, borders and immigration*, available at: <http://fra.europa.eu/en/publication/2013/handbook-european-law-relating-asylum-borders-and-immigration>;
- FRA (2013), *Fundamental rights at Europe's southern sea borders*, available at: <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>;
- FRA (2011), *Fundamental rights of migrants in an irregular situation in the European Union*, available at: <http://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union>;
- FRA (2011), *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, available at: <http://fra.europa.eu/en/publication/2012/migrants-irregular-situation-employed-domestic-work-fundamental-rights-challenges>;
- FRA (2010), *Detention of third country nationals in return procedures*, available at: <http://fra.europa.eu/en/node/1220>.

An overview of FRA activities on asylum, borders and migration is available at:  
<http://fra.europa.eu/en/theme/asylum-migration-borders>.



Publications Office

© European Union Agency for Fundamental Rights, 2016  
Photo: © Italian cost guard; iStockphoto

## FRA – EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Schwarzenbergplatz 11 – 1040 Vienna – Austria  
Tel: +43 158030-0 – Fax: +43 158030-699  
[fra.europa.eu](http://fra.europa.eu) – [info@fra.europa.eu](mailto:info@fra.europa.eu)  
[facebook.com/fundamentalrights](https://www.facebook.com/fundamentalrights)  
[linkedin.com/company/eu-fundamental-rights-agency](https://www.linkedin.com/company/eu-fundamental-rights-agency)  
[twitter.com/EURightsAgency](https://twitter.com/EURightsAgency)



Print: ISBN 978-92-9491-358-6  
doi:10.2811/237025  
PDF: ISBN 978-92-9491-359-3  
doi:10.2811/504846

TK-06-16-010-EN-C (print); TK-06-16-010-EN-N (PDF)