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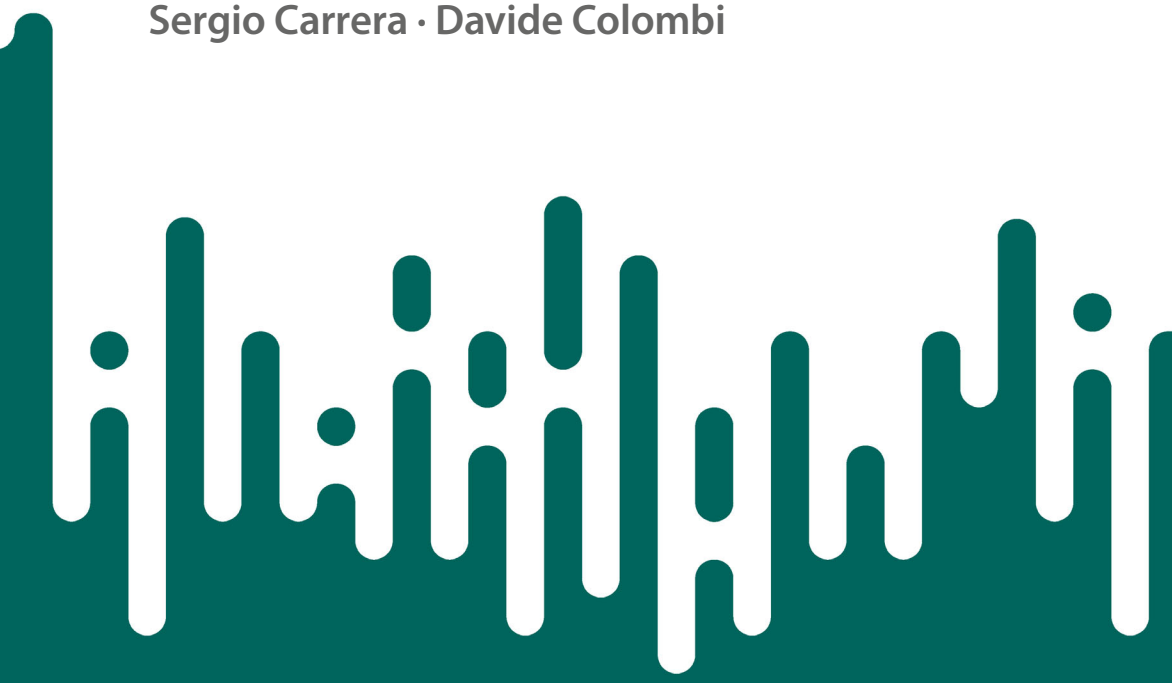

Irregularising Human Mobility

EU Migration Policies and the European Commission's Role

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Abbreviations

AFSJ	Area of Freedom, Security and Justice
AMIF	Asylum, Migration and Integration Fund
CEAS	Common European Asylum System
Cedefop	European Centre for the Development of Vocational Training
CEPOL	The European Union Agency for Law Enforcement Training
CERD	Committee on the Elimination of Racial Discrimination
CFREU	EU Charter of Fundamental Rights
CJEU	Court of Justice of the European Union
COM	European Commission
DG EAC	DG Education, Youth, Sport and Culture
DG EMPL	DG Employment, Social Affairs and Inclusion
DG GROW	DG Internal Market, Industry, Entrepreneurship and SMEs
DG HOME	DG Migration and Home Affairs
DG JUST	DG Justice and Consumers
DG REGIO	DG Regional and Urban Policy
DG SANTE	DG Health and Food Safety
DGs	Directorate Generals
EC	European Community
ECRI	European Commission against Racism and Intolerance
EED	Employment Equality Directive
EESC	European Economic and Social Committee
EIGE	European Institute for Gender Equality
ELA	European Labour Authority
EMPACT	EU Policy Cycle for organised and serious international crime
ERDF	European Regional Development Fund
ESD	Employers Sanctions Directive
ESF+	European Social Fund +
ETUC	European Trade Union Confederation
EU OSHA	European Agency for Safety and Health at Work
EU	European Union
EUAA	European Union Asylum Agency

Eu-LISA	European Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice
Eurodac	European Asylum Dactyloscopy Database
Eurofound	European Foundation for the Improvement of Living and Working Conditions
Eurojust	EU Agency for Criminal Justice Cooperation
Europol	EU Agency for Law Enforcement Cooperation
FRA	EU Agency for Fundamental Rights
Frontex	European Border and Coast Guard
GCM	United Nations Global Compact for Safe, Orderly and Regular Migration
HoReCa	Hotels, Restaurants and Catering sectors
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant of Economic, Social and Cultural Rights
ILO	International Labour Organisation
JHA	Justice and Home Affairs
JLS	Justice, Liberty and Security
LGBTQIA+	Lesbian, Gay, Bisexual, Transgender, Queer/Questioning, Intersex, Asexual and Plus
MEPs	Members of the European Parliament
OMC	Open Method of Coordination
OSH	Occupational Safety and Health Standards
PES	Public Employment Services
PICUM	Platform for International Cooperation on Undocumented Migrants
RED	Race Equality Directive
RRF	Recovery and Resilience Facility
SBC	Schengen Borders Code
SCIFA	Strategic Committee on Immigration, Frontiers and Asylum
SEA	Single European Act
SG	Secretariat General
SIS	Schengen Information System
SOCTA	Serious and Organised Crime Threat Assessment
SPC	Social Protection Committee
TCNs	Third Country Nationals
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	UN Refugee Agency
VDL	Ursula von der Leyen
VIS	Visa Information System
VPs	Vice-Presidents

Chapter 1
Introduction

This Book presents the background and the current state of play of EU law and policy covering irregularised migration. It examines how this policy area is currently problematised at EU institutional levels, in particular by the European Commission, and critically assesses the assumptions lying behind its political priorities and agendas (Tawell & McCluskey, 2022). The assessment pays attention to the effects of these approaches on the human rights and dignity of irregularised persons. The Book aims to provide a better understanding of the 'irregular condition' and the factors that (co-) produce the irregularisation of certain types of human mobility in contemporary EU policies.

The relationship between irregularised migration and EU policy has been a contested and evolving one. The Book focuses on how prevailing EU policy approaches are reflected in the legislation and policy documents adopted by the 2019–2024 Ursula von der Leyen (VDL) European Commission, and how these affect the priorities covering the irregularity condition in EU policymaking. This is combined with an analysis of the institutional configurations underpinning the European Commission Directorates-General (DGs) and relevant services with direct or indirect competencies and mandates over irregularised migrations.

The European Commission is entrusted by the EU Treaties[1] with the power to propose new legislative acts. It plays a key driving role in the EU policy agenda-setting in areas related to migration. In addition to this 'political' role, the Commission acts as the 'guardian of the Treaties' and has been granted a constitutionally-embedded enforcement role; it must independently enforce EU law and take action against Member States in cases of non-implementation or incorrect/non-effective practical application of EU policy and its founding values (Kelemen & Pavone, 2022;

[1] EU Treaties here refers to the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). An additional key source of primary EU law is the Charter of Fundamental Rights of the European Union (CFREU) which according to Article 6 TEU has the same legal value as the Treaties.

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Pech & Bárd, 2022).[2] As such, the Commission is one of the most influential inter-institutional actors at the EU level in the problematisation of relevant 'policy issues' and what constitutes 'non-policy issues', and in the creation and (re)production of preferred policy solutions (Bacchi, 2012). It plays an active role in manufacturing and spreading dominant narratives and ways to speak within individual policy areas such as that of migration.

Between 2019 and 2024 the Commission was composed of different bureaucratic services including the President, three Executive Vice-Presidents, three Vice-Presidents and the Commissioners' Cabinets, the Secretariat General (SG), the Legal Service, among others. It includes several policy departments, called DGs, responsible for distinct policy fields and which often pursue different—and often competing—policy agendas, priorities, and understandings/perspectives, including on issues related to cross-border and intra-EU human mobilities. It directly operates in fields where the EU has legal competencies under the Treaties. The area of migration falls under shared competence between the EU and its Member States (Article 4.2.j TFEU). Over the course of the last few decades, Member States' governments have committed to abide by a broad EU legal framework which lays down a large body of common administrative standards, rights, and guarantees covering the conditions of entry, residence, and rights of non-EU nationals. Still, migration policy has remained a highly contested policy area where the Commission's role and authority are often challenged by EU Member States governments (Boswell, 2008).

'Europeanisation'[3] has developed in areas where the Commission does not explicitly have the power or explicit legal basis in the Treaties to enact legislation and which fall under the exclusive legal competence of Member States (Carrera & Parkin, 2010). Here, instruments such as EU funds and soft policy coordination tools allow the Commission to influence and steer national policies in fields where it has weak or no competencies. In crucial policies areas such as employment, social protection/inclusion, integration, education, youth and vocational training, the relevant Commission DGs provide coordination, support, and incentives to EU Member States. These alternative governance instruments have been defined as Open Methods of Coordination (OMC) or, in some specific EU policy domains such as integration, as EU Frameworks (Carrera, 2009).

This Book is informed by the notion of *irregularity assemblages* (Gonzales et al., 2019; I-CLAIM, 2023; Sigona et al., 2021), whereby irregularity is not an intrinsic and fixed characteristic of some individuals. It is the result of a nexus of nested legal systems and political and public discourses on irregularity which must be examined in the context of the specific labour market and welfare regimes unevenly impacting individuals depending on their national origin, gender, class, and belonging to racialised communities. In the light of this, the concept of *irregularised human*

[2] Article 17.1 TEU.

[3] According to Radaelli (2003), 'Europeanisation' comprises 'processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, 'ways of doing things' and shared beliefs and norms which are first defined and consolidated in the making of EU public policy and politics and then incorporated in the logic of domestic discourse, identities, political structures and public policies'.

mobility is chosen in our analysis of EU migration policy and the European Commission's role.[4] Bringing this notion to the study of EU public policy, the assemblage approach implemented in this Book consists of a socio-legal assessment of how EU policy professionals in the Commission interact with each other, understand and compete in relation to their mandates, and their framings of human mobility as an 'irregular migration problem' or not.

The analysis makes use of a broad definition of irregularity and *irregularised persons* as entailing any individuals who are present or reside within the territory of a Member State of which they are not nationals without satisfying the conditions/criteria for stay, residence and/or employment. This may include both Third Country Nationals (TCNs) and European citizens. These persons may be known or unknown to national authorities, may be subject to expulsion procedures, or may have lost the right to remain within the territory of a Member State following the expiration of their authorised or regular stay, a change in their personal circumstances, or the wider political context (e.g. British citizens residing in the EU after Brexit). The Book also includes EU citizens who may fall into irregularity of stay/residence in a second EU Member State by not satisfying the criteria set out in EU free movement law, as well as EU citizens belonging to Roma communities.

The assessment is informed by desk research of EU primary and secondary sources related to various EU policy areas, including those strictly covering migration policies, but also those presenting indirect linkages to irregularised human mobility such as employment, social inclusion, non-discrimination, and EU citizenship/free movement. The Book provides an examination of relevant EU legislation, policy documents, academic research, evidence gathered by international organisations and civil society actors, as well as international/regional and EU legal standards. This has been complemented with 11 semi-structured interviews with EU policy officials from services within relevant DGs of the European Commission, as well as representatives from EU agencies such as the EU Agency for Fundamental Rights (FRA) and the European Labour Authority (ELA). The interviews conducted for this Book were given in a personal capacity and do not reflect the institutional views of the European Commission.

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[4] The notion of 'migration' and the category of 'migrant' aren't neutral. They entail and nurture a securitising framing of certain forms of human mobilities and categories of people as insecurity issues or even threats. For a critical migration studies approach refer to Guild (2009), who has argued that 'even using the concept of migration itself is to think like the state', p. 3.

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Chapter 2
EU Policy Irregularising Migration—Background, General Trends, and Guiding Logics

2.1 The Early days of European Cooperation: The Schengen and Dublin Systems

The 1986 Single European Act (SEA) emphasised the objective of effectively implementing an area without internal frontiers and the free movement of persons. This constituted a central catalyst for European cooperation on what has come to be known as Justice and Home Affairs (JHA) policies, and their role in the irregularisation of certain forms of cross-border human mobilities. The abolition of internal border controls inside the Schengen area can be traced back to the early 80s with reiterated calls by transport industries to lift barriers to intra-EU trade and eliminate internal border controls. The matter of 'free movement'—particularly 'Third Country Nationals (TCNs)'—soon became an issue of concern for some EU Member States' Ministries of Interior in the scope of the Schengen system.

The adoption of the Schengen Agreement in 1985—and the 1990 Convention implementing it—constituted an inter-governmental response by national Ministries of Interior to counterbalance and constrain the Commission's free movement programme laid down in the 1985 White Paper on the completion of the internal market (Commission of the European Communities, 1985a). The White Paper implemented the European Council's commitment to establishing an internal market and the Treaties' objective of accomplishing the free movement of persons (Groenendijk et al., 2022; Anderson & Bigo, 2022; Guild & Bigo, 2005). It was jointly authored by the then Commission's Internal Market and Industry DGs. The document underlined that border formalities affecting travellers constituted a visible reminder that 'the construction of a real European Community is far from complete'; they were seen as '*the outward sign of an arbitrary administrative power over individuals* and as an *affront* to the principle of freedom of movement within a single Community'

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(emphasis added).[1] The White Paper called for a complete abolition of internal border checks.

Ministries of Interior representatives argued that the proposal constituted a direct challenge to national sovereignty and would require a set of 'compensatory or flanking measures' addressing the alleged 'security deficit' that the lifting of internal border checks would create in relation to 'criminal activities' or threats, including irregularised human mobilities. These flanking measures, laid down in the 1990 Schengen Convention, emphasised law enforcement and the policing of the mobility of non-EU nationals. They are comprised of a common visa policy and negative list of countries whose nationals require a visa before entering the Schengen territory; an enhanced focus on controls and surveillance at the external borders; and the creation of a large-scale information system called the Schengen Information System (SIS). Since then, the operationalisation and implementation of these flanking measures have informed contemporary understandings of irregularity in the EU.

A policing and criminalisation logic also emerged from the text of the Convention dealing with Member States' distribution of responsibility for assessing asylum applications, namely, the 1990 Dublin Convention, which came into force in 1997. The then 12 European Community (EC) Member States agreed on another intergovernmental arrangement falling outside the remit of the EC Treaties.[2] Rather than free movement, priority was given to constraining and irregularising the intra-EU mobility of refugees and asylum-seekers and framing them as 'secondary movements'. This has since been operationalised through: first, the application of a hierarchy of criteria and the establishment of responsibility for the assessment of asylum claims to the Member State of first unauthorised entry; second, the lack of mutual recognition of positive asylum decisions across the Union; and third, the penalisation of asylum-seekers and refugees who engage in unauthorised intra-EU mobility.[3] This model has generated grave human rights violations and greater administrative responsibilities for EU Member States at the EU external border, with well-documented systematic incapacities and structural dysfunctions in national asylum systems across the Union which perdure more than 30 years since its original inception.

Additionally, in the mid-1980s, the Commission published a Communication on Guidelines for a Community Policy on Migration (1985b), which identified 'migration and integration of immigrants' as key policy issues in need of a common

[1] Paragraphs 47 and 48 of the White Paper. In paragraph 24 the White Paper started by saying that 'It is the physical barriers at the customs posts, the immigration controls, the passports, the occasional search of personal baggage, which to the ordinary citizen are the obvious manifestation of the continued division of the Community - not the 'broader and deeper Community' envisaged by the original Treaties but a Community still divided'; and paragraph 27 emphasises that 'Our objective is not merely to simplify existing procedures, but to do away with internal frontier controls in their entirety'.

[2] The original signatory states were Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, The Netherlands, Portugal and the United Kingdom.

[3] Refer to Art. 6 of the former 1990 Dublin Convention which read as follows 'When it can be proved that an applicant for asylum has irregularly crossed the border into a Member State by land, sea or air, having come from a non-member state of the European Communities, the Member State this entered shall be responsible for examining the asylum application'.

European response. The lead Commission service was DG Employment, Social Affairs and Inclusion. This translated into a prevailing labour market/employment and social policy focus and the Commission's call for a 'Community approach' aimed at ensuring 'stable footing' between third-country workers and Community nationals, as well as equality of treatment in living and working conditions for all migrants, whatever their origin. The Communication called for the development of Community legislation applying to 'migrant workers' and the establishment of a non-binding consultation procedure to coordinate national migration policies.[4]

This attempt faced fierce resistance from Member States' Ministries of Interior. Shortly after the publication of the Communication, Germany, France, The Netherlands, Denmark, the UK, and Ireland asked the Luxembourg Court to invalidate the Commission's Decision as, in their view, migration policy fell under their exclusive legal competence.[5] The Court concluded that the Commission did have the competence to enact legislation on immigration under the social policy provisions of the Treaties, in particular considering close linkages with and impacts upon employment situations and living and working conditions. However, the Court ultimately invalidated the Decision on the grounds that it would have granted the Commission too far-fetched powers over Member States' decisions.[6]

2.2 From Maastricht (1993) to Amsterdam and Tampere (1999)

The 1993 Maastricht Treaty signalled European cooperation on borders, asylum and migration. The Treaty introduced a Greek Temple structure comprising of a First Pillar (areas falling under Community competence), a Second Pillar (Common Foreign and Security Policy) and a Third Pillar (Justice and Home Affairs, JHA). Cooperation under the latter remained intergovernmental, with the Member States in the driving seat of decision-making and sharing the right to initiate legislation with the Commission and with unanimity voting in the Council. The role of Community institutions was severely, if not completely, curtailed. JHA decision-making procedures and outputs were characterised by legal uncertainty, complexity, obscurity and

[4] Refer to European Commission Decision of 8 July 1985 setting up a prior communication and consultation procedure on migration policies in relation to non-member countries, OJ L 217, 19.8.1985. For an analysis refer to Carrera (2009), pp. 27–30.

[5] Court of Justice of the European Communities, Joined Cases C-281, 283, 284, 285 and 287/85, *Germany and Others v. Commission* [1987] CR 3245.

[6] In particular the Court considered that the Commission would have exceeded its powers by determining the result to be achieved in the consultations with Member States, and by preventing them from adopting/implementing draft legislations that would not be considered in conformity with Community policies and actions; Instead, the Ministers of Home Affairs of the Member States of the European Union decided to create the 'Groupe ad hoc Immigration' (AHI) in October 1986, which led to the 1989 Palma Document. Guild and Niessen (1996).

a profound lack of transparency (Carrera & Balzacq, 2006). Furthermore, the Maastricht Treaty introduced the status of European citizenship, which now constitutes the fundamental status of nationals of EU member states (Carrera & de Groot, 2015). The right to move and reside freely represents one of the most symbolic features of the EU citizenship *acquis*, anchored on the prohibition of individuals being discriminated against based on nationality in comparison with nationals of a second Member State.

The mid-1990s witnessed a fundamental paradigm shift in the inner structuring and prevailing policy of the European Commission on migration (Svantesson, 2014). The until-then predominant focus on employment and social policies with DG Employment and Social Affairs, and free movement with DG Internal Market, was accompanied by a law enforcement agenda based on the JHA Third Pillar giving preference to Schengen 'flanking or compensatory measures' (Ucarer, 2001). This translated into the setting up of a new Task Force on Justice and Home Affairs in 1995, under the responsibility of Commissioner Anita Gradin. The result was the emergence of competing approaches within the Commission where law enforcement on cross-borders and intra-EU human mobilities fields gaining ground.[7]

The 1999 Amsterdam Treaty progressively brought the Community method of cooperation to EU borders, migration and asylum policies. It gave EC institutions an increasing role in these areas by transferring them to the First Pillar and the EC Treaties institutional arrangements. The Amsterdam Treaty brought the Schengen *acquis* under the Community framework and called on Member States to adopt common measures covering asylum, refugees and immigration. In a Decision of 22 December 2004, the Council agreed to move border controls and some asylum-related measures to qualified majority voting. Measures dealing with regular immigration fell outside this Decision. Nonetheless, this addressed a key weakness common to previous JHA initiatives which were subject to the unanimity requirement in the Council (Balzacq & Carrera, 2005, p. 56).

Full political recognition of the EU's competence in the Amsterdam Treaty came with the adoption by the European Council of the 1999 Tampere Conclusions (European Carrera, 2020; Council, 1999), and the first EU multi-annual policy programme on JHA Policies. The Tampere Programme emphasised a principled approach towards the development of an EU Area of Freedom, Security and Justice (AFSJ), which included a commitment to European integration's foundations of freedom, based on the common values of human rights, democratic institutions, and the rule of law, now enshrined in Article 2 TEU. The Programme called for ensuring the 'fair treatment' of TCNs in comparison with EU nationals. Coinciding with the adoption of the Tampere Programme, the Task Force on JHA was transformed into a permanent Directorate General (DG) inside the Commission in October 1999, led by Commissioner Antonio Vitorino.

[7] According to Svantesson (2014), 'there are then indications that the internal structure of the Commission during the 1990s was slowing moving the issue of irregular migration away from a labour market orientation and more towards a perspective leaning on law enforcement and border controls', p. 196.

Since then, the DGs responsible for Employment and the Internal Market became increasingly weaker, and their role and influence on migration-related matters declined progressively, to the point where the DG JHA became the lead framer, *chef-de-file* and agenda-setter of 'irregular migration' policy (Svantesson, 2014, pp. 198–9). Yet, as Boswell (2009) argued, from the start, this DG experienced profound struggles with other Commission departments over 'who does what' on migration policy-related issues.

During the Barroso I Commission (2004–2009), Franco Frattini held the posts of Vice-President and Commissioner for Justice, Freedom and Security until his resignation in 2008, and DG JHA was renamed as DG Justice, Liberty and Security (JLS). His portfolio was temporarily assigned to the then-Vice President and Commissioner for Transports, Jacques Barrot. He retained the Justice, Freedom and Security portfolio until the end of the legislature in 2010 (Brunsden, 2008) and was the last EU Commissioner to cover both home affairs and justice/fundamental rights (Guild et al., 2010).

2.3 The Lisbonisation of the EU's Area of Freedom, Security and Justice and Crisis Politics

The 2009 Lisbon Treaty brought major institutional and decision-making innovations to EU AFSJ cooperation including those on borders, migration and asylum. It 'constitutionalised' many of the principles and priorities enshrined in the Tampere Programme (Carrera & Guild, 2010; Guild et al., 2010).

The Lisbon Treaty transferred—subject to some exceptions—*all* AFSJ policies under the Community method of cooperation, which included a move from unanimity to qualified majority voting under the then co-decision procedure. The Treaty put an end to the 'pillar divide' characterising JHA cooperation since the early 1990s. This included, from December 2014, policies related to judicial cooperation in criminal matters and police cooperation (Mitsilegas et al., 2014). Furthermore, the Lisbon Treaty harmonised the package of legal acts used to develop AFSJ policies, increasing legal certainty (Carrera & Guild, 2006, p. 225). It also expanded the 'Community method of cooperation' to the domains of regular migration and integration of TCNs.

Article 6(1) TEU granted the Charter of Fundamental Rights of the European Union (CFREU) 'the same legal value as the Treaties'. This reconfigured its legal nature and force as binding towards EU institutions and agencies, as well as EU Member States when implementing EU law. Its observance and safeguarding go beyond the implementation of EU secondary legislation by the Member States and applies to all EU institutions, including the Commission itself. The CFREU constitutes a 'Bill of Rights' which extends beyond European citizens and covers every person—including TCNs, irrespective of nationality or administrative status. The

CFREU brought human dignity at the centre of EU action[8] (Guild, 2010). Moreover, the Lisbon Treaty inserted into the Treaties, in particular Article 67 TFEU, the fair treatment paradigm from the 1999 Tampere Programme, which, read in light of the CFREU, gives particular emphasis to non-discrimination and equality of treatment of *every worker*.[9]

The Lisbon Treaty reinforced the mandate and role of the Commission and the European Parliament as policy-agenda setters and legislative planning on AFSJ policies. This represented a formal end to the monopoly of power in this domain by the JHA Council (Carrera & Guild, 2012). The Barroso II Commission (2010–2014) split the JHA domain at first inside the same DG, between a portfolio dealing with 'Justice, Fundamental Rights and European Citizenship', under Commissioner Vivianne Reding—which took the discrimination dossier away from DG Employment and Social Affairs; and another dealing with 'Home Affairs', led by Commissioner Cecilia Malmström, responsible for issues such as borders and 'irregular migration' (Guild et al., 2010; Taylor, 2009).[10] This division followed the European standard across EU Member States where 'the balancing of interests by means of reciprocal control is part of the separation of powers' (Lieber, 2010).

Despite the Commissioners' commitment to 'close working relationships', Reding's priority of mainstreaming fundamental rights in home affairs dossiers reportedly led to 'turf wars' (Taylor, 2010b). This translated into an institutional bifurcation of the DG into two as of July 2010 (Taylor, 2010a). The high political ambition shown by these two new Commission DGs towards 'more EU' in a number of migration-related issues (European Commission, 2010) 'was considered by the JHA Council and Member States representatives as an act of provocation and even as a shameful practice' (Carrera, 2012).

The power held at that time by each single European Commissioner was well exemplified by the strong response by Commissioner Reding to the so-called 2010 Roma affair, where the French authorities forcedly evicted and unlawfully expelled thousands of Romanian and Bulgarian EU citizens of Roma origin. In a Speech issued on 14 September 2010 'on the latest developments on the Roma situation', she confirmed the Commission's intention to launch infringement proceedings against France (Reding, 2010). Reding expressed her 'deepest concerns' about the developments, and stated that 'enough is enough' and that 'no member state can expect special

[8] Refer to Preamble of the EU Charter which states that 'the Union is founded on the indivisible, universal values of human dignity, and Article 1 which states that 'Human dignity is inviolable. It must be respected and protected'.

[9] See for instance Articles 15 and 31 of the EU Charter which emphasize that '*every worker* has the right to working conditions which respect his or her health, safety and dignity' (Emphasis added), with no reference to this being contingent on resident or migration administrative status. Additionally, Article 15, which covers the right to engage in work, stipulates that TCNs who are 'authorised to work' in EU's territory are 'entitled to working conditions equivalent to those of citizens of the Union' (Emphasis added). The use of the word equivalency, here, confirms the equality of treatment interpretation of 'fairness' in EU law (Carrera et al., 2022).

[10] One of the key proponents of a clearly formulated division of DGs was the Berlin's Senate Department of Justice.

treatment, especially not when fundamental values and European laws are at stake. This applies today to France'. This provoked an enormous clash between President Barroso and the then French President Nikolas Sarkozy at the Extraordinary (Foreign Affairs) Council meeting of the 16th September 2010 which dealt with the situation of Roma in Europe (Taylor, 2010c). Reportedly, an 'infuriated Sarkozy played down a 'violent' clash with European Commission chief Jose Manuel Barroso … during the EU summit, with his shouting reportedly heard at the other end of the corridor' (Pop, 2010). The controversy, however, ended up in the Commission not effectively pursuing the enforcement of the EU Citizens Directive, but instead developing a so-called 'EU Framework on the Integration of Roma in Europe' which shifted the responsibility towards Roma citizens (For a critique refer to Carrera, 2013; Carrera & Faure-Atger, 2010).

The role of single Commissioners was reshaped and diminished under the Jean-Claude Juncker Commission (2014–2019), which pushed for a 'political Commission'. This meant a fundamental reshuffling of internal Commission structures, granting immense 'control and command' power to the Cabinet of the President and the Secretariat-General, and a top-down approach aimed at 'streamlining' all Commission actions and giving preference to the President's political choices (Russack, 2019). It also translated into a new Vice-Presidents model[11] and the appointment of a First Vice-President, Frans Timmermans, responsible for 'EU values' ('Better Regulation, Inter-Institutional Relations, Rule of Law and the EU Charter of Fundamental Rights') and coordinating, monitoring and acting as a 'watchdog' over all Commissioners, including those dealing with JHA policies and their compliance with EU values.

It further translated into an increase in the role given to 'politics' and political bargaining, including the enforcement of EU law and substantiating all its legislative initiatives on evidence, and the so-called EU Better Regulation Guidelines (Blockmans, 2019). This made the implementation of the Lisbon Treaty guidebook a daunting task, particularly due to the increased usage of 'crisis-led and emergency-driven policy making' politics by the Commission. The previous dual DGs framing separating 'Justice' and 'Home Affairs' continued under the Juncker Commission.[12] The Commission also counted, for the first time, on a third Commissioner, Julian King, in JHA-related domains, who was responsible for the so-called 'Security Union' which gave particular impetus to the further development of the

[11] See Juncker (2014): 'Vice-Presidents will not just have an honorary role. They will be in charge of steering and coordinating project teams. These mirror the political guidelines. A Commissioner will depend on the support of a Vice-President to bring a new initiative into the Commission Work Programme or on to the College Agenda. At the same time, a Vice-President will depend on the contributions of his or her Project Team Commissioners to successfully complete the project assigned to him or her'.

[12] DG Justice was renamed as 'Directorate General for Justice and Consumers', under Commissioner Vera Jourova, with fundamental rights and citizenship disappearing from its title and moving to the portfolio of the First Vice-President; and DG HOME was relabelled as Directorate General on Migration and Home Affairs, under Commissioner Dimitris Avramopoulos, with the word 'migration' finding its way up to the top of the DG's title.

'flanking measures' and a law enforcement and preventive justice-approach to issues artificially linked to cross-border human mobility (Carrera & Mitsilegas, 2017).[13]

EU rule of law, fundamental rights and better regulation were the main victims of the 'politics of crisis' during the 8th Legislature and the Juncker Commission (Carrera, 2020). A paradigmatic example of the nature and effects of EU crisis politics was the response to the so-called 'European humanitarian refugee crisis' in 2015 and 2016. Migration became one of the most salient topics at the EU level, and the European Council took an increasingly active role going well beyond its envisaged role in the Treaties. The adoption of new legislation and policy agendas in the migration domain was not always followed by the legal principles and decision-making parameters delineated in the Treaties and the CFREU. In fact, some of the most important EU policy developments directly contravened these foundational principles. The European Council and Member States' governments started to act outside or in contravention of the Lisbon Treaty commitments (Carrera, 2020). The resulting picture was one where the driving logics characterising the old Member-State centric JHA-state of mind continued to prevail in EU policy (Carrera, 2018).

The Ursula von der Leyen (VDL) Commission took over in 2019. In her 'Political Guidelines for the Next European Commission 2019–2024 - A Union that strives for more - My agenda for Europe' (von der Leyen 2020), the Commission President included as one of her priorities 'Strong borders and a fresh start on migration'. Has the VDL Commission meant a new start for EU policy in the policy field of irregularised human mobility? (Fig. 2.1).

2.4 Relevant EU Legal and Policy Frameworks on Irregularised Human Mobility

There is a complex set of normative frameworks on EU policies directly or indirectly related to irregularised human mobility. This Book identifies six approaches as the most relevant in the 2019–2024 European Commission's work. For the purpose of this Book, these public policy approaches are understood as follows:

(i) *Home Affairs*: this approach gives precedence to a policing and law enforcement understanding of questions related to cross-border human mobility of non-EU nationals or TCNs. It frames human mobility as 'migration' through an insecurity lens. Such an approach corresponds with those of early European cooperation on JHA, which are now called AFSJ policies in Title V (Area of Freedom, Security and Justice) of the TFEU. It is primarily shaped by the Schengen and Dublin *acquis*, and the 'flanking or compensatory measures',

[13] Refer to European Commission (2015), The European Agenda on Security, COM(2015) 185 final, Brussels, European Commission, 'Seventh progress report towards an effective and genuine Security Union', COM(2017) 261 final, Strasbourg, 16.5.2017 and 'Eighth progress report towards an effective and genuine Security Union', COM(2017) 354 final, Brussels, 29.6.2017.

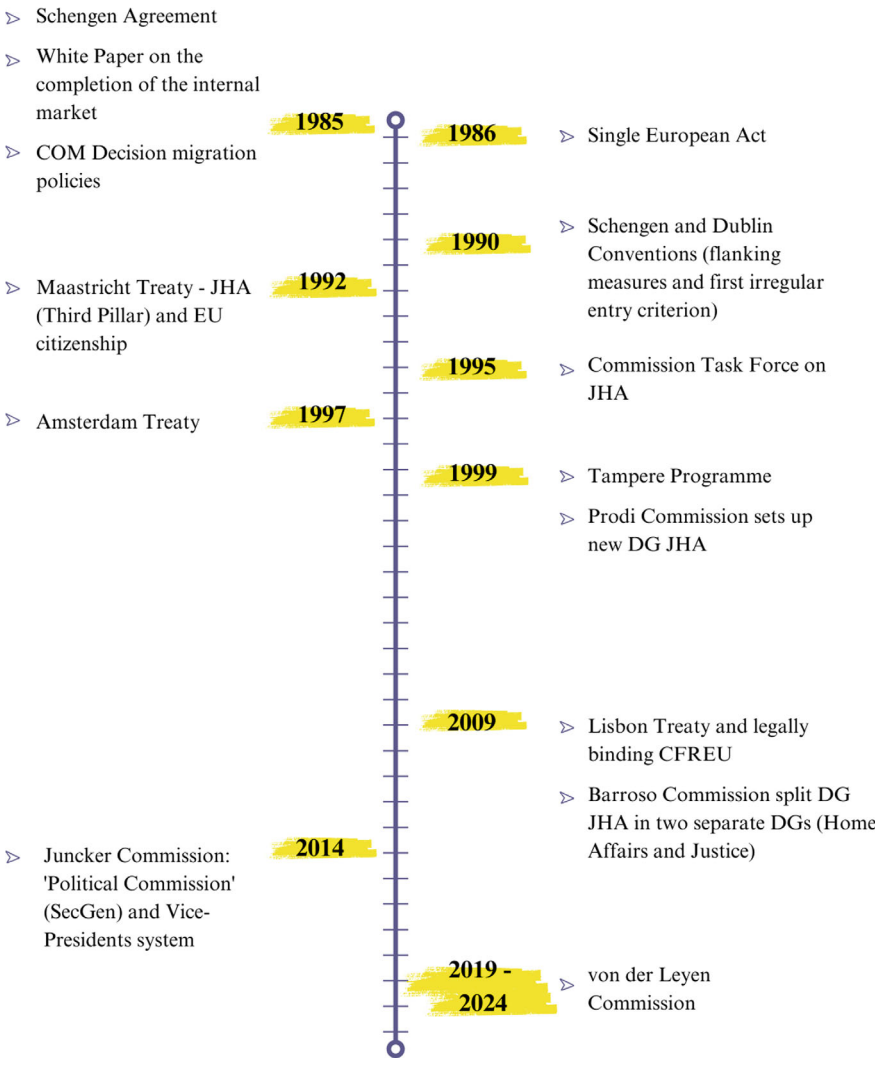

Fig. 2.1 Timeline of key developments. *Source* Authors' own elaboration

as well as EU law and policy dealing with migration and asylum management, external border checks, and police cooperation. These are policy areas finding their legal basis in the Treaties' provisions on border management and visas, asylum, immigration, and police cooperation. This home affairs approach mirrors the dominant views and priorities of national Ministries responsible for 'migration'—typically Ministries of the Interior—in EU Member States (Chap. 3 of this Book).

(ii) *Employment and Social Inclusion*: this approach gives priority to issues related to working standards and conditions, social security, social protection, and social inclusion of all workers. The entry point is not migration administrative status, but rather the extent to which s/he is a worker, and their societal inclusion. The employment and social inclusion approach finds its legal basis in Titles IX (Employment) and X (Social Policy) of the TFEU. It is also informed by some of the rights enshrined in the CFREU (see Chap. 4).

(iii) *Fundamental Rights*: this approach gives precedence to the application and enforcement of fundamental rights, which stem from *human dignity,* and many of which are not dependent upon migration status and nationality but apply to *every person.* Its legal foundations can be found in the CFREU, Articles 2 and 6 TEU, and international/regional human rights standards (see Chap. 5 of this Book).

(iv) *Non-Discrimination*: this approach prioritises the fight against all forms of discrimination, including on grounds such as national origin and belonging to national minorities such as Roma communities. Its normative roots can be found in Article 21 CFREU, Articles 2 and 3 TEU, Articles 8, 18 and 19 TFEU, and international/regional human rights standards (see Chap. 5).

(v) *EU citizenship*: this approach focuses on questions related to EU citizenship and free movement, as well as issues covering Union citizens' rights following the 2019 Withdrawal Agreement between the EU and UK. It pays particular attention to the extent to which the individual at hand holds the nationality of one EU Member State and therefore qualifies as a Union citizen or not. Article 20 and 21 TFEU and Article 45 CFREU constitute its legal foundations (see Chap. 6).

(vi) *Criminalisation*: this approach consists of the use of criminal-law or criminal-law-like measures and instruments, giving priority to punitive or penalisation approaches to issues related to cross-border and intra-EU human mobility. In some instances, and to a lesser extent, it covers the protection of victims and their access to remedies. Its foundations can be mainly found in provisions on judicial cooperation in criminal matters under Title V TFEU (see Chap. 7).

The following Chapters delve into a detailed analysis of these approaches in EU policies and the Commission's structures.[14] Each Chapter starts by outlining a selection of the most relevant EU legislative and policy instruments, identifying their overriding priorities and their relevance for and effects on persons in a situation of irregularity in the EU. The analysis of existing EU instruments is key to understanding the current setting of priorities and problematisation of issues and 'solutions' at the EU level. The examination pays particular attention to how policy professionals at the Commission perceive specific issues as falling, or not falling, within their specific portfolio or 'policy territories'—both with respect to the content and scope of their policy field. By doing so, and following Bacchi's study of 'problematisations' of public policies (Bacchi, 2012), the analysis seeks to gain a better understanding of the policy approaches currently prevailing or predominant in EU policy, those which

[14] This Book takes into account the Commission's internal structures as of January 2024.

may compete with each other, as well as their potential contradictions and intrinsic limitations, and how these affect the human rights and dignity of persons in situations of irregularity in the EU.

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Chapter 3
A Home Affairs Approach

The 2019–2024 VDL Commission maintained the division between home affairs and justice. The Directorate General for Migration and Home Affairs (DG HOME) fell under the portfolio of the Commissioner for 'Home Affairs', Ylva Johansson (European Commission, 2019b). Unlike under the Juncker Commission, in 2019–2024, DG HOME was no longer overseen by the Vice-President covering 'EU values', Věra Jourová, including the rule of law and fundamental rights (European Commission, 2019c). Instead, it fell under the responsibility of a new Vice-President, Margaritis Schinas, who directly oversaw Johansson's work and was controversially tasked with 'Promoting our European Way Life' (European Commission, 2019a). The initial title of the portfolio was '*Protecting* our European way of life', altered only after MEPs and civil society actors expressed their outrage. It was reported that 'critics said [this portfolio] played into the hands of far-right extremists because the job includes management of migration and asylum policy, and might be viewed as suggesting that refugees pose a threat to the way Europeans live' (de la Baume, 2019).[1] Ultimately this problematically blurred the Treaties' constitutional requirement for safeguarding EU values—both in the scope of EU's internal and external policies—with home affairs and identitarian agendas. Schinas's portfolio was left completely outside of the EU rule of law, fundamental rights and Better Regulation supervision and coordination.

In 2019–2024, DG HOME's main responsibilities included 'a balanced and comprehensive Migration Policy', 'internal security', 'securing external borders—Schengen, borders and visa', and the 'external dimension' of home affairs (European Commission, n.d.). The different strands of work covered by DG HOME rest on several different legal bases. First, EU competencies related to the management of external EU borders derive from Article 3(2) TEU and Articles 67 and 77 TFEU, which foresees the creation of an area of freedom, security and justice with no internal border controls; the free movement of persons; and the establishment of

[1] The French extreme-right leader, Marine Le Pen, endorsed the title and called it an 'ideological victory'. See Sheftalovich (2019).

S. Carrera and D. Colombi, *Irregularising Human Mobility*,
SpringerBriefs in Law, https://doi.org/10.1007/978-3-031-74021-3_3

border checks on persons, monitoring, and an integrated management system at the EU's external borders. Article 77(2) TFEU is also the legal basis for a common policy on visas and short-stay residence permits.

Secondly, Article 78 TFEU sets the normative grounds for the Common European Asylum System (CEAS) and the Dublin *acquis*, i.e., the harmonisation of asylum and subsidiary protection status across EU Member States, a common system of temporary protection, common procedures for granting and withdrawing protection, the criteria determining Member States' responsibilities, the harmonisation of reception conditions, and partnerships and cooperation with third countries on matters related to international protection.

Thirdly, Article 79 TFEU is the legal basis for migration management. It establishes 'a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'. In this field, the EU shares competencies with Member States.

Finally, competencies in the area of police cooperation derive from Articles 87–89 TFEU. These include activities related to the 'prevention, detection and investigation of criminal offences' (Article 87 TFEU), cooperation between national police and other law enforcement authorities and Europol's activities aimed at 'preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy' (Article 88).

3.1 Borders, Visas, and Asylum

The main instrument of EU secondary law in the area of border management is the Regulation (EU) 2016/399 of 9 March 2016 of the European Parliament and of the Council on a Union Code of the rules governing the movement of persons across borders (the Schengen Borders Code, SBC). The SBC 'provides for the absence of border control of persons crossing the internal borders between the Member States of the Union' and 'lays down rules governing border control of persons crossing the external borders of the Member States of the Union' (Article 1).

Article 6 SBC sets the conditions TCNs must fulfil to legally enter EU territory: they must hold a valid travel document, a valid visa (if required), be able to justify the purpose and conditions of the intended stay, have sufficient means of subsistence, raise no alert in the Schengen Information System (SIS; see Regulation (EU) 2018/1862), and must not be considered a threat to public policy, internal security, public health or the international relations of any of the Member States or be registered as such in national databases. Exceptions are provided for TCNs who hold a residence permit or a long-stay visa issued by a Member State and have to transit through another to reach the issuing Member State; TCNs who fulfil all conditions except holding a valid visa and receive a visa at the border; and TCNs who do not fulfil one or more conditions and may be authorised by a Member State to enter its territory

on humanitarian grounds, on grounds of national interest or because of international obligations. Member States are required to respect the principle of *non-refoulement* (Article 3b).

A second key instrument is Regulation (EC) No 810/2009 of 13 July 2009 establishing a Community Code on Visas (Visa Code). The Visa Code 'establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the Member States not exceeding three months in any six-month period', i.e., short-term visas (Article 1). It provides for the possibility of uniform visas, i.e., valid for the whole Schengen area and allowing for multiple entries over up to five years, or visas with limited territorial validity (i.e., valid for only one country) 'on humanitarian grounds, for reasons of national interest or because of international obligations' for applicants who do not fulfil the entry conditions (Article 25). The biometric data of applicants is stored in the Visa Information System (VIS) database (see Regulation (EC) No 767/2008).

Complementary to the Visa Code, Regulation (EU) 2018/1806 of 14 November 2018 lists the third countries whose nationals must be in possession of visas when crossing the external borders and those countries whose nationals are exempt from that requirement (codification), differentiating between different categories of TCNs with regard to visas. EU visa policy places nationals of certain countries under Schengen visa obligations. The so-called 'negative visa list' carries significant risks of discrimination based on their origin (Cholewinski, 2002). Following a 2019 amendment, the Visa Code also provides for more favourable conditions (i.e., fee reduction, reduction of waiting times, and increased validity period for the visa) for nationals of countries that cooperate in the 'readmission of irregular migrants' (Article 25a).

A third component of this Home Affairs approach is the Common European Asylum System (CEAS) and, particularly, Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin Regulation). Under the Dublin Regulation, asylum-seekers have the obligation to apply for asylum in the 'first country of irregular entry' and remain in said country for the duration of the assessment of their application. The Dublin Regulation forbids the intra-EU mobility of asylum-seekers—so-called 'secondary movements'. Asylum-seekers apprehended and identified in a Member State other than the one where they submitted their asylum application would be returned to the Member State responsible for their application. The identification of asylum-seekers across different Member States relies on the Eurodac database, which collects the biometric data of asylum-seekers (see Regulation (EU) No 603/2013).

As previously argued (Carrera et al., 2019a), the Dublin Regulation is based on the idea that being within the territory of an EU Member State is already a strong enough indication of 'safety'. It also presupposes that the intra-EU mobility of asylum-seekers is voluntary or a matter of choice and, as such, illegitimate in all circumstances. It is therefore labelled as 'secondary movement' instead of free movement (ibid.; Carrera et al., 2022). Since 2015, several Member States, i.e., Austria, Denmark, Germany, Norway, and Sweden, have referred to so-called 'secondary

movements' as grounds for the indefinite reintroduction of internal border controls within the Schengen area, despite an overall lack of evidence as to why the intra-EU mobility of asylum-seekers represents a 'threat' to their 'public security and public order' (Carrera et al., 2023).[2]

As Chap. 2 has shown, these three components, i.e., the Schengen, visas, and Dublin *acquis*, have developed in parallel and reveal an overarching commitment to the containment and criminalisation of unauthorised mobilities by non-EU nationals. As part of the 'flanking measures' inherent to the Schengen system, the development of an area of free movement has been accompanied by an increasing management and surveillance of external EU borders (under the notion of 'integrated border management'), the tightening of entry and residence conditions for *some* TCNs based on their country origin and perceived risks related to their mobility, and the insecuritisation of intra-EU mobility for asylum-seekers. These old framings and priorities were still successful in guiding the overall work of the 2019–2024 VDL Commission on cross-border and intra-EU mobility.

The most significant legislative and policy instruments presented by the 2019–2024 VDL Commission in this area were contained in the so-called 2020 Pact on Migration and Asylum (Carrera & Geddes, 2021; European Commission, 2020e). In the Pact, 'irregularity' is acknowledged in two senses: (a) the crossing of the external EU borders by TCNs and, specifically, the modality of said crossing; and (b) in the context of return procedures. The response provided in the Pact is the expansion of asylum and return border procedures to 'eliminate the risks of unauthorised movements and send a clear signal to smugglers' (ibid., p. 4; see European Commission, 2016, 2020a, 2020d). Similarly, the responsibility of the first country of irregular entry to assess asylum applications and the criminalisation of 'secondary movements' are maintained in the Pact's Regulation on asylum and migration management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] (European Commission, 2020c), which has replaced the Dublin Regulation.

3.2 Returns

Article 79 TFEU gives the Union competencies over the 'removal and repatriation of persons residing without authorisation'(Article 79(2)(c)) TFEU. In 2019–2024, the lead Commission service in charge of returns was Unit C.1 (Irregular Migration and

[2] Similar restrictions were also put in place during the Covid-19 pandemic, despite the overall lack of evidence on their necessity and effectiveness. For more information, see Carrera and Luk (2020), Carrera et al., (2023).

Returns) at DG HOME.[3] Directive 2008/115/EC 'on common standards and procedures in Member States for returning illegally staying third-country nationals' (hereinafter the Returns Directive) is the key legislative instrument in the EU expulsions policy. The Returns Directive provides a legal definition of 'illegal stay' as:

> '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 as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State (Article 3(2)).

The manifest priority of the Return Directive—and of its proposed recast (European Commission, 2018)—is the 'codification of an expulsion regime' and not the effective protection of the rights of those affected (Baldaccini, 2009a, 2009b). Despite its expulsion-driven rationale, the Directive provides a number of minimal guarantees for TCNs who are subject to a return procedure and recognises that some people cannot be returned at all—so-called 'unremovable' persons. This category includes persons who cannot be removed due to legal and humanitarian reasons, practical circumstances and technical reasons (e.g., issues or uncertainty related to the person's identity or nationality, absence of travel document and logistical issues), or as an explicit policy choice by the Member State in question (see FRA, 2011, 2017).

Eurostat data shows that the rate between orders to leave issued by Member States and numbers of effective returns across the EU27 has remained relatively low between 2017 and 2022—between a maximum 36% in 2017 and a minimum 17% in 2022 (Eurostat, n.d.—a, migr_eiord; Eurostat, n.d. —b, migr_eirtn).[4] While the Commission has interpreted the low rate as a sign that the existing system must be strengthened and made more 'efficient' (i.e., stricter), in reality, this reveals that a significant number of TCNs without legal status cannot be returned due to legitimate grounds such as their specific personal circumstances, human rights considerations, effective remedies and/or the lack of cooperation from the countries of origin (Carrera, 2016; Carrera & Allsopp, 2017). The people in question—whose identity is known to the national authorities—must be allowed to remain within the territory of the given EU Member State. Recital 12 of the Return Directive establishes that '[i]n order to be able to demonstrate their specific situation in the event of administrative controls or checks, such persons should be provided with written confirmation of their situation' (Recital 12). Additionally, Article 6(4) allows Member States to grant 'an autonomous residence permit or other authorisation offering a right to stay

[3] At the time of the interviews (December 2023–January 2024), Unit C.1 covered 'Irregular Migration and Returns'. As of March 2024, however, Unit C.1 had been renamed 'Returns and Readmission', and Unit C.4 'Migration Management Response & Counter-Smuggling' took over the portfolio on 'irregular migration'.

[4] As argued by Carrera and Guild (2016), existing quantitative estimates and statistics on irregularised population in the EU raise deep methodological issues: First, they take for granted that 'irregularity' is an existential category that can be counted independently from states' actions; second, they disregard the highly evolving nature of authorized entry and departure, as well as the transitioning possibilities towards regular statuses; and third, the evidence provided by immigration and border authorities is disregarded in favour of an existential figure developed by researchers and experts. Refer to pp. 2 and 3.

for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory' and avoid or suspend a return decision.

Not all Member States grant temporary residence permits to unremovable TCNs as allowed for by Article 6(4) of the Return Directive, leaving them in legal limbo, hindering their access to socio-economic rights and thus fostering more destitution and precarity (see FRA, 2017). Depending on the national context, the non-issuing of residence permits to unremovable TCNs can translate into complete exclusion from all inclusion policies, with no regard for their human dignity and their right to remain within the relevant Member State's territory following the suspension and unenforceability of the return decision.

DG HOME has consistently supported the increase of the overall return rate and given overriding priority to expulsions at all costs. In the Commission's words, 'the success of any return policy is often measured by the number of those that actually return to their country of origin' (European Commission, 2021a). In light of this, the Commission stressed the need for 'stronger structures inside the EU through a reinforced legal and operational framework for swift and fair return procedures that respect fundamental rights in compliance with the CFREU, and strengthened governance at EU and national level, as proposed in the New Pact on Migration and Asylum' (ibid.; see also European Commission, 2023c).

Expulsions, together with 'reintegration measures' and 'partnerships' with countries of origin and transit, have thus been portrayed as the main policy solution for 'irregular migration' (see European Commission, 2021a). 'An effective and common EU system for returns' was described as a key component of 'the Strategy towards a fully functioning and resilient Schengen area to *compensate for the absence of controls at internal borders and thereby also an integral part of the Schengen policy cycle*, as well as part of the European Integrated Border Management' (European Commission, 2023c; emphasis added).

Interviewees confirmed that the 'success' or 'effectiveness' of the return system has been primarily measured through the return rate and the number of enforced removal orders. As they put it: 'the Commission's political priority would be for that return rate to change' (COM2). They acknowledged that this could be achieved through different 'sustainable solutions', i.e., either by increasing the numbers of 'successful' returns of TCNs to third countries or through the suspension of the orders to leave following regularisation processes in the EU Member States. They noted that EU Member States have given priority to the former, and 'it is not a Commission competence to push for regularisations' (COM2).

The interviewees also acknowledged that the available data on returns shows differences in treatment based on nationality. While the definition of 'illegally staying TCNs' encompasses all TCNs who are on EU territory without fulfilling the entry and stay conditions, Member States have prioritised the expulsion of persons who received negative decisions on their asylum applications (so, mostly from the 'Global South') and have been more lenient on TCNs from countries such as the United States, Australia, and the UK.

3.3 Regular Migration

Under Article 79(2)(a) and (b) TFEU, regular migration policy[5] is understood as 'conditions and procedures for entry and stay for long-term periods, and for different reasons (work, study, research, family reunification)'. The focus is exclusively on 'legally residing third-country nationals'. Unit C.2 (Legal Migration) at DG HOME has been the lead service in this area within the Commission.

The EU *acquis* on regular migration is made up of seven distinct Directives: (i) Council Directive 2003/86/EC on the right to family reunification (Family Reunification Directive); (ii) Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (Long-Term Residents Directive); (iii) Directive (EU) 2021/1883 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC (EU Blue Card Directive); (iv) Directive (EU) 2024/1233 of the European Parliament and of the Council of 24 April 2024 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (recast) (Single Permit Directive); (v) Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (Seasonal Workers Directive); (vi) Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Intra-Corporate Transferees Directive); (vii) Directive (EU) 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) (Students and Researchers Directive).

In the 2019 Fitness Check, the Commission identified important issues related to the existing EU regular migration *acquis*. These included 'fragmentation, limited coverage of EU rules, inconsistency between various directives, [and] complexity of procedures and incorrect implementation' (European Commission, 2019d, 2019e, 2019f). The EU framework on regular and labour migration remains inherently transactional, discriminatory, and utilitarian (Carrera et al., 2017, 2019b). It pursues a migration management rationale, pays exclusive attention to TCNs who are 'legally residing' and 'wanted' or so-called 'highly skilled and qualified', and provides no real answers or solutions for persons who are already in a situation of irregularity within the EU.

[5] This Book uses the notion of 'regular migration' *acquis* and policy instead of 'legal migration'. Refer to the United Nations, Global Compact for Safe, Orderly and Regular Migration (GCM), Morocco, 10 and 11 December 2018, UN Resolution 73/195. Objective 5 of the GCM states that 'We commit to adapt options and pathways for regular migration in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities, optimizes education opportunities, upholds the right to family life, and responds to the needs of migrants in a situation of vulnerability, with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration'. Refer to PICUM Terminology Leaflet, Words Matter.

The EU regular migration *acquis* only covers specific categories of workers, i.e., students and researchers, intra-corporate transferees, seasonal workers, or highly-skilled workers, and provides common rules for family reunification, long-term residents and the issuing of single permits for stay and work. A former DG HOME official confirmed that TCNs without authorised residence status were a 'non-policy issue' in the discussions surrounding regular and labour migration at the EU level. According to them, this was not only due to the current division of competencies between the EU and the Member States, but also to the widespread idea among national authorities that 'mass regularisations' can be a 'pull factor'. While Member States have engaged in formal and informal regularisations periodically, there has been extreme reluctance to take any steps at the EU level by DG HOME.

In the 2019 Fitness Check, the Commission reported that the total exclusion of persons without legal residence status from the regular migration *acquis* was raised as an issue by the European Economic and Social Committee (EESC), experts, and civil society organisations. Labour inspectorates also highlighted its links with undeclared work. However, 'Member States' experts argued that more EU-level action in this area could risk creating pull factors for irregular migration and expressed a preference for dealing with the status of these TCNs on a discretionary basis at national level' (European Commission, 2019d, p. 39).

The Seasonal Workers Directive is a clear example of this exclusion. Despite being born out of issues affecting TCN workers without regular status employed in the agricultural sector, the Seasonal Workers Directive completely disregards these individuals, despite their representation in this sector in several EU countries. The justification offered by interviewees is that regularisation processes fall within the competencies of Member States, and the EU cannot take action in this area (COM5). Considering the flexible and ad hoc nature of the demand for workforce in the agricultural sector, the issuing authorisation under the Seasonal Workers Directive can be too burdensome or time-consuming, which may ultimately promote undeclared work (van Nierop et al., 2021). Furthermore, the Seasonal Workers Directive is based on an employer-driven approach, which increases the dependency of workers on employers and gives Member States wide discretionary powers over the implementation of the provisions concerning access to social rights by seasonal workers (Zoeteweij, 2018). This has contributed to national policies and legislation foreseeing insufficient entry channels and limited access to socio-economic rights.

A key component of the Pact on Migration and Asylum is the Skills and Talent Package (European Commission, 2022). Overall, the Package is based on a utilitarian and exclusionary understanding of 'skills' and 'talent'. TCNs considered as 'high-skilled' are the main beneficiaries of the measures proposed by the Commission, with little to no attention given to sectors that traditionally rely on TCN workers. 'All skill levels' are only mentioned in the context of the Talent Partnerships and in relation to specific sectors, i.e., ICT, science, engineering, health and long-term care, agriculture, transport, horticulture, food processing and tourism, construction and harbour work, transport and logistics (ibid., p. 11). This means that Member States would facilitate the issuing of work permits to nationals of selected partner countries

based on a previous analysis of the labour shortages and needs experienced by the EU Member State in question.

In interviews for the present Book, Commission officials suggested that 'linking the Member States' labour shortages and needs with work permits to TCNs would allow for the broadening of the scope of the Package to cover also TCNs who are not traditionally included in the 'high-skilled' category' (COM4). However, the Talent Partnerships fall short of providing EU-wide comprehensive, sustainable, and legally certain pathways for persons involved in more manual and blue-collar work. They completely ignore TCNs residing in the EU without authorised residence and migration status.

In November 2023, the Commission released an additional communication on 'Skills and Talent Mobility' (2023a), a Proposal for a Regulation of the European Parliament and of the Council Establishing an EU Talent Pool (2023d), and Recommendations on the recognition of qualifications of third-country nationals (2023b). These measures aim to operationalise the instruments set out in the Pact on Migration and Asylum to facilitate the regular migration of TCNs with 'the skills necessary to fill the labour gaps' identified in EU Member States. The Regulation acknowledges that the expansion of 'legal pathways' through the EU Talent Pool 'incentivises potential economic migrants to come to the EU through regular channels, which contributes to reducing irregular migration pressure'.

3.4 Integration

The EU's policy on integration finds its legal basis in Article 79(4) TFEU, which excludes legislative harmonisation in this field and establishes that EU co-legislators 'may establish measures to *provide incentives and support* for the action of Member State with a view to promoting the integration of third-country nationals residing legally in their territories' (emphasis added). The integration of TCNs largely remains a national competence. EU action in this area can only take place through non-legislative means, e.g., the use of funds, issuing of recommendations, and promotion and exchange of identified 'best practices' between Member States (Carrera, 2009).

In 2019–2024, Unit C.2 (Legal Migration) at DG HOME was the lead Commission service in charge of integration, which hints once more at a migration management rationale in this field. Several other Commission DGs have been active within their specific remit and areas of expertise through inter-service meetings: inputs have been provided—through so-called inter-service consultations—by DG EMPL, DG JUST, DG Education, Youth, Sport and Culture (DG EAC), and DG Regional and Urban Policy (DG REGIO).

Various understandings of what integration means can be found in non-binding policy documents. The Commission defines it as 'a dynamic, two-way process of mutual accommodation by all immigrants and residents of EU Member States' (European Commission, n.d.). The most relevant policy document on integration is the Action Plan on Integration and Inclusion 2021–2027, which covers both legally

residing TCNs and EU citizens with a 'migrant background' (European Commission, 2020b). Unlike in the past, it goes beyond a focus on integration and encompasses the label of 'inclusion' in its title and scope. This expansion was officially motivated by the fact that '[t]he challenge of integration and inclusion is particularly relevant for migrants, *not only newcomers but sometimes also for third-country nationals who might have naturalised and are EU citizen[s]*' (ibid., p.1; emphasis added).

Despite this, the Action Plan remains exclusionary when it comes to TCNs. Integration has been made into a pre-condition for security of residence and family reunification and access to rights in the EU regular migration *acquis*, including in the Family Reunification (2003/86/EC) and Long-Term Residents (2003/109/EC) Directives. This includes restrictive integration programmes on civic values and language proficiency which may be mandatory depending on the specific Member States, and which negatively interfere with human rights (Carrera & Vankova, 2019). The 'inclusion' component of the Action Plan only applies to EU citizens with a 'migrant background' who 'cannot be subject to the fulfilment of integration conditions in order to access their rights linked to EU citizenship', as this would qualify as discrimination under EU law (European Commission, 2020b). The terms *integration* and *inclusion* are mutually exclusive in the current Commission discourse and policy: the former refers to TCNs who legally reside in the EU; the latter exclusively applies to EU citizens. It is particularly noteworthy that the Action Plan on Integration and Inclusion mentions a 'two-way process' not only in relation to *integration* of TCNs but also vis-à-vis the *inclusion* of EU citizens with a 'migrant background' (ibid., p.2).

As in the case of the EU regular migration policies, the Action Plan on Integration and Inclusion stresses the high level of education and skills of a significant number of migrants and that 'We [i.e., the EU] cannot afford to waste this potential'. It recognises the key role of migrants and 'EU citizens with a migrant background' in the European economy and society and their contribution during the COVID-19 pandemic through their employment in essential services and other highly exposed professions (ibid.). The exclusion of undocumented TCNs is particularly interesting in this context. On top of their overall contribution to the economy, there is extensive evidence that, during the COVID-19 pandemic, irregularised persons were employed in essential sectors of the economy, often experienced sub-standard labour, safety and health conditions, were highly exposed to the virus and—due to their status—faced significant challenges as regards their access to socio-economic rights, including healthcare (Anderson et al., 2020; Fasani & Mazza, 2020). Additionally, the ESF + includes the explicit objective of social inclusion, including integration of migrants, (25% of the overall budget) and does not specify residence status as a criterion of exclusion (EU Funding Overview, n.d.).

Based on the Action Plan on Integration and Inclusion, undocumented migrant children seem to be the only category formally included in integration and inclusion projects. This is explicitly acknowledged in relation to the EU Comprehensive Strategy on the Rights of the Child, which 'seek to ensure that *all children, regardless of origin, ability, socio-economic background, legal and residence status* have equal access to the same set of rights and protection' (emphasis added) (see European Commission, 2021b). This Strategy, however, falls within the remit of DG JUST.

The explicit inclusion of children regardless of their legal and residence status is undoubtedly a positive aspect, particularly in the case of unaccompanied minors. Nonetheless, the lack of attention to the household level is an important flaw in the EU integration policy framework. Limited attention is paid to how the existing legal and administrative obstacles on the access to socio-economic rights imposed on the adult members of the household can lead to mistrust towards service providers and public authorities, overall reluctance to make use of services provided to children for fear of being reported and returned and, as a consequence, undermine the rights and best interest of the child.

The exclusion of irregularised TCNs from the Action Plan was justified by interviewees as a direct consequence of integration policy remaining a Member State legal competence and the Commission only being able to act through policy instruments and other 'soft law' tools (COM6). Within the relevant European Commission services, the living conditions of undocumented TCNs were acknowledged as an issue or limitation with concrete negative impacts at the local and regional levels. However, the justification provided for their exclusion from EU-funded projects is that 'EU taxpayers' money cannot be spent on people who are *illegally* (sic) residing within the Member States' territory' (ibid.). While excluded from the scope of EU-financed projects, local authorities and civil society can make use of the results of said projects to the benefit of undocumented TCNs.

3.5 Police Cooperation

Articles 87–89 TFEU are the legal basis for 'police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences' (Article 87(1)), as well as the establishment of and activities carried out by the EU Agency for Law Enforcement Cooperation (Europol) (Article 88). In 2019–2024, the Commission service leading in this area was Directorate D (Internal Security) at DG HOME. Specifically, Unit D.1 covered law enforcement cooperation and oversaw the work of Europol and CEPOL (The European Union Agency for Law Enforcement Training), while Unit D.5 was responsible for Organised Crime and Drugs and directly contributes to the work of the EU Anti-Trafficking Coordinator (see Chap. 7).

Europol is a key actor when it comes to the policing approach to irregularity. Europol's activities are based on the EU Policy Cycle for organised and serious international crime (EMPACT cycle), i.e., 'a permanent and key EU instrument for structured multidisciplinary cooperation to fight organised and serious international crime driven by the Member States and supported by EU institutions, bodies and agencies in line with their respective mandates' (Europol, 2023). The EMPACT cycle is based on the EU Serious and Organised Crime Threat Assessment (EU SOCTA), i.e., Europol's assessment of criminal networks and individual actors and key developments which then informs the agency's recommended key priorities

for the years to come (Europol, 2021). Ultimately, the final list of priorities for the EMPACT cycle is agreed upon by the Council (see General Secretariat of the Council of the EU, 2023).

EMPACT priorities for 2022–2025 feature, among others, trafficking in human beings and migrant smuggling (Europol, 2023). While recognising the inter-relations between smuggling and trafficking, Europol (2021) sees the former as 'a crime against the state, infringing national and international laws on entry, transit or residence of aliens', and the latter as 'a crime against a person and violates fundamental human rights'. The former is based on the facilitation of '*illegal* movement' (sic), while the latter on the victims' exploitation (ibid.). As of 2016, Europol includes a European Migrant Smuggling Centre (Europol, 2022).

In November 2023, the Commission proposed to strengthen the agency's role in the areas of human trafficking and migrant smuggling (European Commission, 2023e). During interviews, the strengthening of the Europol mandate was presented by officials as a positive development for the enforcement of the Employers Sanctions Directive (ESD) and the Anti-Trafficking Directive (COM2; COM3). Based on the nature of the proposed texts, however, this will likely be limited to the investigations and the more repressive aspects of the two Directives, with limited improvements made to the still-lacking protective elements of the EU legal framework, and the weak independent accountability framework of Europol's activities.

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Chapter 4
An Employment and Social Inclusion Approach

Under the 2019–2024 VDL Commission, the employment and social inclusion approach mirrored the mandate of the Commissioner for 'Jobs and Social Rights', Nicolas Schmit (European Commission, 2019). Commissioner Schmit was part of the Commissioners' group on 'Promoting our European Way of Life', chaired by Vice-President Schinas, and on 'an Economy that Works for People', headed by Executive Vice-President Valdis Dombrovskis. It is worth noting that Schmit was part of the former group for issues concerning skills shortages and the latter for issues concerning social rights and social inclusion.

DG Employment, Social Affairs and Inclusion (DG EMPL) has been responsible for employment and labour standards, the ESF+, the free movement of workers, the coordination of social security schemes, and social inclusion (European Commission, n.d.—a). The work of the Commission on employment and social inclusion is based on Article 153 TFEU, which establishes that the EU 'shall *support* and *complement* the activities of the Member States' (emphasis added) in the field of social policy, e.g., working conditions, social security and social protection of workers, conditions of employment for TCNs legally residing in the EU, social inclusion, gender equality for work opportunities and treatment at work.

4.1 Employment

Despite not being included in EU primary or secondary law, CJEU case-law has confirmed a broad interpretation of the term 'worker'. The CJEU established that a 'worker' is 'a person who undertakes genuine and effective work for which he is paid under the direction of someone else, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary'. Generally speaking, a person is to be considered a 'worker' if: (a) for a certain period of time a person

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performs services; (b) for and under the direction of another person (c) in return for which he or she receives remuneration (European Commission, 2023).[1]

Further clarity on the status of undocumented TCN workers has emerged from Case C-311/13 (*Tümer*). In this case, the CJEU was asked if undocumented migrant workers were included in the definition of 'employee' and whether they could claim unpaid wages from their insolvent employer and insolvency benefits under national Dutch law stemming from the EU Insolvency Directive. The Court found that Tümer could not be excluded based on his migration status and, as a worker, was entitled to the rights afforded to employees by the Insolvency Directive (2019/1023; for more details, see Peers, 2014). Based on Tümer, it is possible to conclude that most legal instruments in this area cover *all workers*, regardless of their immigration status. According to PICUM (2022), the interpretation of 'worker' contained in the Tümer case would lead to conclude that persons in a situation of irregularity, including TCNs without legal status, who are working in the EU *should* also be covered by the Working Time Directive (2003/88/EC), the Working Conditions Directive (2019/1152), the Part-time Work Directive (97/81/EC), the Parental Leave Directive (2010/18/EC), the Work-Life Balance Directive (2019/1158), the Young People at Work Directive (94/33/EC), and the Temporary Agency Workers Directive (2008/104/EC).[2]

The lack of references to immigration status or the (un)declared nature of the work, together with the CJEU's interpretation in *Tümer*, indicates that the EU employment framework covers *all people engaged in work activities*, regardless of other secondary factors such as those mentioned above. This is in line with international labour law and the right to *decent* work, as developed by the International Labour Organisation (ILO), which applies to every worker, irrespective of migration status, and puts special emphasis on the need to guarantee equality of treatment and non-discrimination between third-country workers and national workers.[3] Accordingly, persons in an irregular situation who qualify as 'workers' are undoubtedly covered by the protections and standards afforded to all workers under EU law and EU policy instruments. Interviewees confirmed that, based on EU case law, residence or immigration status are not relevant factors in the application of the legal instruments covered by DG EMPL. The only relevant criterion is the existence of a relationship with an employer (COM1). As such, irregularised TCNs who are employed in the EU fall within the remit of the work of DG EMPL.

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[1] See also CJEU, Cases C-138/02 Collins, C-456/02 Trojani, C-46/12 LN, C-139/85 Kempf, C-171/88 Rinner-Kühn, C-1/97 Birden, C-102/88 Ruzius-Wilbrink, C-152/73 Sotgiu, C-196/87 Steymann, C-151/04 Nadin, C-344/87 Bettray, C-27/91 Hostellerie Le Manoir, C-270/13, Haralambidis.

[2] PICUM has argued that, based on Tumer, some of these Directives definitely apply and some others may apply to undocumented migrant workers. See here: https://picum.org/wp-content/uploads/2022/04/Guide-to-undocumented-workers-rights-EN.pdf.

[3] ILO standards are an example of where 'fairness' alludes to the right to 'decent work', which is defined as 'productive work… in conditions of freedom, equity, security and human dignity' such as a fair income, secure form of employment, equal opportunities and treatment for all, social protection for workers and their families, and prospects for personal development and social integration.

4.1.1 Occupational Safety and Health Standards

The area of occupational safety and health standards (OSH), one of the most developed areas of law in the realm of social policy, provides further clarity on this point. The cornerstone of the EU OSH system is the Framework Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work. The Framework Directive sets minimum standards across all EU Member States for all workers, i.e., 'any person employed by an employer, including trainees and apprentices but excluding domestic servants' (Article 3(a)), and all employers, i.e., 'any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment' (Article 3(b)). The OSH framework does not differentiate between workers based on their residence, immigration or legal employment status, but covers *all* people engaged in work activities. The only explicit exceptions from the OSH framework—but not from the broader definition of 'worker'—are domestic workers, specific public and military services, and self-employed workers.

The exclusion of domestic workers is problematic. Domestic workers were left out of the OSH framework based on existing legal and technical obstacles to conducting labour inspections within private households. While some Member States do provide OSH standards for domestic workers, the absence of EU wide standards for this category is an important gap. As a 2011 Study by the FRA showed, irregularised TCNs working in this sector 'are at heightened risk of exploitation and abuse, including sexual abuse', and face significant problems in relation to working conditions, unjustified dismissal, freedom of association, access to redress mechanisms and family life (FRA, 2011, 2018a, 2018b).

The exclusion of self-employed persons from the OSH framework is also relevant, particularly in light of so-called 'bogus self-employment'. This is defined as a situation 'where workers are self-employed but have a de facto employment relationship, economic dependence (where a worker generates their income from one or mainly from one employer) and personal dependence (i.e., subordination and lack of authority on working methods, content of work, time and place)' (Williams et al., 2020: p. 2). There is extensive evidence of bogus self-employment among platform workers within the logistics and delivery sector. Research has shown that platform work is a more accessible form of labour for migrant workers, including people in a situation of irregularity, but often entails lower salaries and labour standards, exclusion from socio-economic rights, and greater precarity and instability for the workers (van Nierop et al., 2021; Alyanak et al., 2023).

4.1.2 The European Labour Authority and Undeclared Work

A key actor within the employment and social inclusion realm is the European Labour Authority (ELA). Based on Recital 13 of the ELA Regulation (2019/1149), ELA's

activities only cover 'individuals who are subject to the Union law within the scope of this Regulation, including workers, self-employed persons and jobseekers', that is, 'citizens of the Union and third-country nationals *who are legally resident in the Union*, such as posted workers, intra-corporate transferees or long-term residents'.

In practice, ELA's activities do encompass EU citizens and TCNs in situations of irregularity when it comes to undeclared work, defined as 'any paid activities that are lawful as regards their nature but not declared to public authorities, taking into account differences in the regulatory system of Member States' (Commission of the European Communities, 1998, 2007). This falls within the remit of the European Platform Tackling Undeclared work, which mainly functions as a forum to exchange good practices and information, develop expertise and analyses, encourage and facilitate innovative approaches to effective and efficient cross-border cooperation and evaluating experiences, and contribute to a horizontal understanding of matters related to undeclared work (Article 12(2)). In this area, however, ELA's activities are limited to analysis, sharing, best practices, and supporting cooperation between Member States.

Other considerations also play a role in the Platform's wider mandate. As one interviewee noted, 'we [at ELA] know that when it comes to efficiently and effectively tackling undeclared work, one cannot differentiate between different categories of workers' (ELA1). Similarly, when it comes to providing support for joint labour inspections, ELA cannot practically foresee which categories of workers will be found in a given place at a given time, or which type of irregularities might 'affect' them.

A study published in 2021 by the European Platform Tackling Undeclared Work specifically looked at the involvement of TCN workers in undeclared work and issues related to labour exploitation (van Nierop et al., 2021). It highlighted the increased risk for TCNs in situations of irregularity to be employed in undeclared work due to the lack of other alternatives and their higher vulnerability to labour exploitation. The study recommended 'a clearer division of activities between migration and labour inspectors to allow victims to seek support without fearing arrest, detention and deportation' in cases concerning labour exploitation (p. 68). The interviewed ELA officials confirmed the relevance of labour sectors such as agrifood (see Stefanov, 2021), domestic work (see Guzi et al., 2022) and delivery/logistics, and also pointed attention to the HoReCa (i.e., hotels, restaurants, and catering) and construction sectors as high-risk sectors in the context of undeclared work.

ELA and the Platform Tackling Undeclared Work interact with a series of other Commission services and agencies. At the time of writing, there is a platform subgroup on safe reporting and complaint mechanisms, which includes officials from DG HOME: C.1 and other relevant agencies and met in February 2024 to discuss the *Manual for labour inspectors on the protective elements of EU law for third-country workers* issued by the FRA.

4.2 Social Inclusion

In 2019–2024, the lead Commission service in the area of social inclusion was Directorate D (Social Rights and Inclusion) at DG EMPL, but the political strategy surrounding the European Pillar of Social Rights was covered by Directorate A. In the realm of social inclusion, the EU can act solely through non-legislative cooperation—or the so-called open method of coordination in the area of social inclusion (Social OMC) through the Social Protection Committee (SPC) (European Commission, n.d.—c; see also EUR-Lex, n.d.; Council of the EU, 2011). No official legal definition of social inclusion is available at the EU level, which can be explained by the limited 'hard-law' competencies of the Union in this field.

A central policy instrument in the EU employment and social inclusion approach has been the European Pillar of Social Rights (European Commission, n.d.—a, n.d.—b). Launched in 2017 by the Juncker Commission, the European Parliament and the Council of the EU, the European Pillar of Social Rights sets 20 principles divided into three chapters: (i) Equal Opportunities and Access to the Labour Market; (ii) Fair Working Conditions; and (iii) Social Protection and Inclusion. Recital 15 of the Interinstitutional Proclamation on the European Pillar of Social Rights (2017) states that:

> The principles enshrined in the European Pillar of Social Rights concern Union citizens and third-country nationals with legal residence. Where a principle refers to workers, it concerns *all persons in employment, regardless of their employment status, modality and duration* (emphasis added).

On the one hand, this seems to exclude TCNs without legal residence status from the application of these principles; on the other hand however, it confirms the application of all work-related protections and principles to all workers, including TCN workers in a situation of irregularity, regardless of their residence and immigration status. In practice, this means that TCN workers in situations of irregularity would be covered by the principles in the European Pillar of Social Rights related to fair working conditions. While it would seem that the other principles would not apply to TCNs in a situation of irregularity, this is not an accurate conclusion as case law has proven that socio-economic rights and fundamental rights are inextricably linked (see Chap. 5). Undocumented TCNs are excluded from most inclusion activities and services under the current Multiannual Financial Framework (MFF, 2020/2093) (PICUM, 2023; for the AMIF, see Regulation 2021/1147; for the ESF+, refer to Regulation 2021/1057; see also PICUM, 2021).

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Chapter 5
Fundamental Rights and Non-discrimination Approaches

5.1 Fundamental Rights

During the 2019–2024 VDL Commision, the monitoring of the application of the CFREU was within the portfolio of Vice-President Věra Jourová (European Commission, 2019c). Oversight of the CFREU was within the remit of Unit C.2 (Fundamental Rights Policy) at DG JUST. While the unit was overseen by Commissioner for Justice Didier Reynders, his mission letter did not directly include fundamental rights except for matters related to artificial intelligence (European Commission, 2019b). The main legal basis for the identified fundamental rights approach is the CFREU.

DG JUST publishes annual reports on the application of the CFREU. Since 2021, the reports have focused on specific thematic areas. Most relevantly, the 2023 report focused on 'effective legal protection and access to justice as a precondition for enjoying fundamental rights' (European Commission, 2023) and provided a fundamental rights perspective on access to justice (comprising both judicial and non-judicial remedies) *for all*. It referred, for instance, to the rights of human trafficking victims, 'including through witness protection programmes, and have access to legal counselling and representation' and 'the protection of victims in criminal proceedings and access to compensation' (page 8). The 2023 Annual Report included Section 2.10 titled 'Asylum and migration' and legal protections offered in the EU migration and asylum *acquis* to TCNs'. It underlined, for instance, how in the area of employment, the Employers Sanctions and Seasonal Workers Directive grants non-EU nationals the right to file complaints against employers.

In the interview with the FRA, the fundamental right to human dignity was highlighted as a key factor to consider when assessing the impact of irregularity on the living and working conditions of persons without legal residence status (FRA1). Under EU law, more favourable conditions can be reserved for specific categories of persons, e.g., following bilateral agreements with countries of origin, based on the conditions set by the Directives covering specific categories of workers, or based on the specific circumstances of persons. Nonetheless, the fundamental right to human

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dignity de facto constitutes a threshold below which Member States cannot go when it comes to the treatment of TCNs. In general terms, the lack of legal residence or immigration status within the EU heightens the risk of fundamental rights violations—both in the case of TCNs and EU citizens. Even for EU citizens, the enjoyment of rights can be subject to 'the conditions and limits defined by the Treaties and by the measures adopted thereunder' (Article 20 TFEU), for example, the conditions set by Directive, 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (*Citizens' Rights Directive*) (see this chapter).

It must be noted that there is a formal difference between CFREU rights that are universally applicable and acquired rights to which conditions might apply. Part of the rights in the CFREU are guaranteed to 'everyone' (e.g. life, liberty, prohibition of torture, inhuman or degrading treatment, freedom from slavery or forced labour; family life, freedom of conscience, freedom of expression, freedom of association, education, work, property, non-discrimination, preventive healthcare, effective remedy) or 'every worker' (rights of collective bargaining, fair and just working conditions, protection against unjustified dismissal); others are only granted to 'persons residing and moving legally within the Union' (social security rights and employment conditions equivalent to EU citizens) or to 'every citizen of the Union' (right to vote, stand for elections, freedom of movement for employment and residence) (Fox-Ruhs & Ruhs, 2022, p. 16).

The existing instruments of EU secondary law, as well as the on-the-ground practices of Member States, de facto translate into increased barriers for TCNs without regular residence or immigration status and EU citizens who do not fulfil the conditions of the Citizens' Rights Directive to access to a number of rights, including healthcare, education, housing, and fair working conditions. Case law has clarified that all fundamental rights, including socio-economic rights, apply to persons regardless of residence or immigration status where such rights are required to protect their human dignity and right to life, which are absolute fundamental rights accepting no derogation in the name of migration policies.

The European Committee on Social Rights has reiterated this in multiple instances based on the European Social Charter. In *FIDH v. France* (No. 14/2003), the Committee found that limiting access to healthcare for children without residence status in life-threatening situations was a violation of the right to human dignity since '*health care is a prerequisite for the preservation of human dignity*' (para. 31; emphasis added). In *FEANTSA v. the Netherlands* (No. 86/2012), the Committee found that the Netherlands had violated the right to housing, right to social and medical assistance, migrant workers and their families' right to protection and assistance, and the right to protection against poverty and social exclusion under the ESC by failing to provide adequate access to emergency assistance (food, clothing, and shelter) to adult migrants in an irregular situation. Finally, *Conference of European Churches (CEC) v. Netherlands* (No. 90/2013) found that lack of adequate provision of food, clothing, and shelter to TCNs without legal residence status was a violation of the right to social and medical assistance and the right to housing, which are

'closely connected to the human dignity of every person regardless of their residence status'.

The International Covenant of Economic, Social and Cultural Rights (ICESCR) is of particular relevance here. While the Covenant refers to the progressive realisation by State party of the socio-economic rights, it envisages legally binding standards for EU governments. This includes instance the right to minimum adequate standards of living, as a pre-condition for the right to health, and the right to decent work, which applies to everyone irrespective of status.[1] This is in line with the core principles enshrined in the United Nations Global Compact on Migration (GCM; United Nations General Assembly, 2018). The GCM has underlined the commitment to ensuring decent work,[2] facilitating transitioning of status,[3] and safe access to basic services.[4]

5.2 Equality and Non-discrimination

The work of the 2019–2024 VDL Commission on equality and non-discrimination was mainly entrusted to the Commissioner for Equality, Helena Dalli (European Commission, 2019a; see also European Commission, n.d.—a). Her work was supported by 'relevant units' at DG EMPL and DG JUST. This means that, unlike in the past, both DG EMPL and DG JUST had two leading Commissioners each, with different units reporting to either of them based on their thematic focus. Dalli's work was directly overseen by Vice-President for Values and Transparency, Věra Jourová. Nonetheless, part of Dalli's portfolio fell within the remit of Vice-President Schinas through the Commissioners group on 'Promoting our European Way of Life' (see Chap. 3) and Vice-President for Demography and Democracy, Dubravka Šuica. The lead Commission service in the field of non-discrimination has been DG JUST's Directorate D (Equality & Non-Discrimination). For the focus of this Book, anti-racism and the rights of Roma communities (Unit D.2) are particularly relevant.

As regards primary law, Article 18 TFEU establishes that 'within the scope of application of the Treaties, and without prejudice to any special provisions contained

[1] Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 20 (2009), Non-Discrimination ESC Rights. See also General Comment No. 18 (2005) on the Right to Work; and General Comment No. 23 (2016) on the right to just and favourable conditions of work. Refer also to the General Comments No. 14 (2000), The right to the highest attainable standard of health (Article 12), No. 20 (2009), Non-Discrimination in Economic, Social and Cultural Rights (Article 2(2)), and No. 13 (1999), The right to education (Article 13).

[2] Objective 6 of the GCM calls in Point (i) to 'provide migrant workers with the same labour rights and protections extended to all workers in the respective sector…'; and in Point (j), to 'ensure that migrants working in informal economy have safe access to effective reporting, complaint and redress mechanisms'.

[3] For instance, Objective 7.h of the GCM.

[4] Refer to Objective 15 which states in paragraph 31 that '…all migrants, regardless of status, can exercise their human rights through safe access to basic services'.

therein, any discrimination on grounds of nationality shall be prohibited'. Article 21 CFREU prohibits any type of discrimination based on grounds such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, or sexual orientation. Paragraph 2 specifically establishes that '[w]ithin the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited'.

The main instruments of secondary law on equality and non-discrimination are the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive, RED), and the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive, EED). The former lays down 'a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment' (Article 1 RED). The latter deals with discrimination on the grounds of religion or belief, disability, age, or sexual orientation in employment and occupation (Article 1 EED).

Both Directives define direct discrimination as situations 'where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin' and indirect discrimination as cases 'where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

They both cover direct and indirect discrimination in (a) conditions for access to employment, to self-employment or to occupation; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations. The RED also covers discrimination in access to social protection, including social security and healthcare; social advantages; education; as well as access to and supply of goods and services which are available to the public, including housing.

It is expressly specified that the two Directives '[do] not cover differences of treatment based on nationality and [are] without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned' (Article 3(2) RED; Article 3(2) EED). In other words, they do not cover differences in treatment between Member States' nationals and EU citizens or TCNs based on their residence or migration status. The EED must be read through the lens of the CFREU, and specifically Article 31 CFREU on fair and just working conditions.

The entry point in EU policy should be whether the individual is a worker or not—and not nationality or origins. This is directly tied to the above-mentioned ILO

standards, as well as Article 6 and Article 7 ICESCR which apply to 'everyone' including migrant workers. This is particularly important for the EED provisions related to the defence of rights, victimisation, access to information, social dialogue, sanctions, and compensations.

Jurisprudence from the Committee on the Elimination of Racial Discrimination (CERD) shows that the interconnections between racial, ethnic, or national origin and nationality might entail that 'in some cases discrimination on the basis of nationality may actually be a proxy for discrimination on the basis of race' (de Schutter, 2009, p. 21). The 2004 General Recommendation No. 30 of the CERD has underlined that 'xenophobia against non-nationals, particularly migrants, refugees and asylum-seekers, constitutes one of the main sources of contemporary racism', and highlights that '*undocumented non-citizens* and persons who cannot establish the nationality of the State on whose territory they live are also of concern to CERD' (emphasis added). The Directives' exclusion of consideration of discrimination on the basis of nationality should be interpreted strictly in order to avoid possible conflicts with the international legal obligations of Member States under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and EU law (Fennelly & Murphy, 2021).

Discrimination issues are not isolated to TCNs but may affect mobile EU citizens not fulfilling the conditions for free movement. The principle of equality and non-discrimination in Article 24(1) of Directive, 2004/38/EC applies only to those persons who reside in the host Member State in compliance with the residence conditions laid down in Directive, 2004/38/EC. It is therefore conditional on the fulfilment of those conditions. The inherent contradiction is that the differentiation of people's rights based on their right to stay within a given Member State, including as regards access to social assistance and socio-economic rights, is by definition a direct or indirect discrimination contrary to Article 18 of the Treaty on the Functioning of the European Union and Article 21 of the CFREU. This then leads to disparity between different categories of EU citizens and can lead to violations of their absolute human rights to life and human dignity under the CFREU. To make up for this contradiction, civil society actors have called for a recast of the RED to explicitly include discrimination based on nationality and make it applicable to law enforcement, immigration, and border agents (PICUM, 2023).

'A Union of equality: EU anti-racism action plan 2020–2025' offers additional insights into the Commission's approach to non-discrimination (European Commission, 2020b). In this policy document, the Commission committed to countering all forms of racism, including anti-black racism, antigypsyism, antisemitism, anti-Asian racism and anti-Muslim hatred, as well as its combination with other forms of discrimination or hatred on grounds such as gender, sexual orientation, age, and disability, or against migrants. The Commission identified a number of areas of 'everyday life' where more action is needed. These include discrimination by law enforcement, safety and security (e.g., hate crime), risks in new technologies, employment, education, health and housing, as well as more structural forms of racism.

As regards employment, education, health, and housing services, the Commission identified significant systemic barriers and discrimination to access by racialised

persons across the EU. References are made to the European Pillar of Social Rights and the use of EU funds (primarily the ESF+) as responses to such issues. It is particularly noteworthy that the Commission stated that EU funds 'will support Member States' efforts to promote social inclusion by ensuring equal opportunities *for all* and tackling discrimination' and that they would 'promote infrastructure development and equal access to the labour market, health and social care, housing and high quality, non-segregated and inclusive services in education and training, *for all,* in particular for disadvantaged groups' (emphasis added; p.9). As seen in Chap. 3, the policies in the realm of social inclusion do, in reality, cover *all people*, but have been deliberately limited to EU citizens and—in the form of 'integration'—to legally-staying TCNs. Yet, the framing adopted in the Action Plan shows a distinct and singular openness that clashes with the dominant distinction made based on immigration or residence status.

5.2.1 Roma Communities

The Roma population[5] has been disproportionately targeted by national authorities in several Member States based on their lack of legal residence status and formal registration (Maslowski, 2015; Sigona, 2011). As already outlined, Unit D.2 was the lead Commission service on issues related to anti-racism and Roma coordination in 2019–2024. Due to the complex nature of these issues, inputs have also been provided by DG EMPL and DG REGIO, specifically regarding the use of EU funds.

The Commission's 'Union of Equality: EU Roma Strategic Framework on equality, inclusion and participation' (European Commission, 2020a) aims at 'promoting effective equality, socio-economic inclusion and meaningful participation of Roma'. The 2020 EU Roma Strategic Framework is based on seven objectives: (i) fight and prevent antigypsyism and discrimination; (ii) reduce poverty and social exclusion to close the socio-economic gap between Roma and the general population; (iii) promote participation through empowerment, cooperation and trust; (iv) increase effective equal access to quality inclusive mainstream education; (v) increase effective equal access to quality and sustainable employment; (vi) improve Roma health and increase effective equal access to quality healthcare and social services; and (vii) increase equal access to adequate desegrated housing and essential services.

The approach currently adopted by the Commission shows a broadening of attention from exclusive socio-economic 'integration' to a three-pillar approach based on equality, inclusion, and participation (European Commission, n.d.—b). Interviewees underlined that this 'shift' aims at tackling the root causes of the social exclusion experienced by Roma communities across the EU (COM9). The Framework now

[5] For a definition, see Council of Europe (2012): 'The term 'Roma' used at the Council of Europe refers to Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned, including persons who identify themselves as Gypsies'.

covers 'Anti-Gypsyism',[6] which is widespread across EU Member States and manifests itself in institutionalised forms of racism, discrimination, and exclusion towards Roma communities (Carballo-Mesa et al., 2023). The mobility of Roma people within the EU has more often than not been considered a 'problem' (Yıldız & De Genova, 2020). However, the Framework leaves unresolved profound questions related to the very essence of EU citizenship and the right to free movement of Roma communities (ibid.; Carrera & Guild, 2013; Aradau et al., 2013). Frequently reduced to or wrongly labelled as 'immigrants', European Roma may be nationals of EU countries and, as European citizens, be entitled to all the rights and freedoms afforded to this status. Discrimination against the Roma community is in direct violation of EU legal instruments, such as the RED, and fundamental rights.

The 2021 Roma survey by the FRA found progress on Roma inclusion is still lagging due to the persisting impacts of antigypsyism and with significant fundamental rights issues in the areas of employment, education, healthcare, and housing (FRA, 2022). Interviewees from the Commission underlined that the situation of Roma people across Europe resembles in many cases the situation of undocumented persons, particularly as regards administrative registration, housing registration, and access to socio-economic rights. Interviewees noted that

> they [i.e., Roma people] are citizens of their own countries and, as such, the responsibility of their wellbeing and their access to rights and services on equal footing with all other citizens lies with the concerned Member State. (COM9)

Despite this—an interviewee added:

> though constitutions clearly speak of equality before the law and in terms of accessing rights and services and opportunities, it is well documented that the situation is much different and unequal and a majority of Roma people as they are severely excluded [from services], face discrimination and racism and are victims of hate speech, hate crimes and scapegoating, including racially-motivated violence. (COM9)

This aspect was highlighted as the main reason why Roma EU citizens' issues are tackled thematically by the non-discrimination 'branch' of DG JUST, rather than falling under the mainstream EU citizens' rights portfolios. Being, for the most part, EU citizens, the question for these Commission officials is not whether Roma are entitled to EU citizenship rights, but whether Member States ensure them equal access to services and rights, tackle their material deprivation, and take actions to combat and prevent antigypsyism, structural racism and discrimination, and to eradicate segregation in education and housing. Another important aspect raised in the interviews is that EU and national policies targeting Roma communities have shifted from addressing their 'integration' to speaking of 'social inclusion'. As already pointed out in Chap. 3, the use of the two terms carries specific discriminatory connotations,

[6] The Alliance against Antigypsyism (2017) defines it as 'historically constructed, persistent complex of customary racism against social groups identified under the stigma 'gypsy' or other related terms, and incorporates: (1) a homogenizing and essentializing perception and description of these groups; (2) the attribution of specific characteristics to them; (3) discriminating social structures and violent practices that emerge against that background, which have a degrading and ostracizing effect and which reproduce structural disadvantages'.

as well as expectations from the 'beneficiaries' regarding entry and residence conditions and alignment with perceived civic values and language. In current Commission policy, the former is used in relation to TCNs, while the latter is reserved for EU citizens.

Significant issues also arise from how the Commission understands and frames the intra-EU mobility of Roma people. It is important to point out that, in the EU Roma strategic framework, the Commission never explicitly refers to the situation of EU Roma citizens who exercise their free movement and the enforcement of their EU Citizenship rights. EU Roma citizens regularly face issues related to the registration of residence, which is often connected to the provisional or informal nature of their housing. The interviewees pointed out that, even when registered, further issues may emerge if the registration needs to be updated, expires, or if deadlines for renewal are missed. Considering the conditions set by the Citizens' Rights Directive, which interviewees (COM7) preferred to label the 'Free Movement Directive' (see Chap. 6 on the citizenship approach), Roma EU citizens are structurally more likely to not fulfil the criteria for residence in a Member State of which they are not nationals. The non-fulfilment of this criteria is likely to further entrench the exclusion of Roma citizens from socio-economic rights and put them at risk of receiving an order to leave from national authorities.

ECRI (2020) noted that 'that for many Roma citizens of the European Union, the exercise of their right to move freely is hindered by administrative obstacles, and that they are the victims of intolerance and abusive practices' and called on the Member States to ensure that 'the legislation, and its implementation, on the freedom of movement of persons are not discriminatory towards Roma' (see also FRA, 2009). In other words, EU law is vague and leaves vacuums related to the situation of Roma citizens, which may translate into de facto structural discrimination. Interviewees noted that the expulsion of EU citizens from Member States is futile as their right to free movement would allow them to re-enter the territory (COM9).

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Chapter 6
An EU Citizenship Approach

EU citizens who reside in a Member State of which they are not a national can also find themselves without legal residence status and, in some cases, be deported to their country of origin. Interestingly, the term 'irregular' or 'irregularity' is not used by the Commission to define such situations. They are rather defined as 'persons who do not fulfil the requirements residence conditions of EU free movement law'. In the 2019–2024 VDL Commission, the protection of citizens' rights fell within the portfolio of Commissioner for Justice Didier Reynders (European Commission, 2019). Unit C.4 (Democracy, Union Citizenship and Free Movement) at DG JUST has been the lead Commission service in this area.[1]

Article 21 TFEU establishes that EU citizens 'shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. The right to free movement of all EU citizens is also enshrined in Article 45(1) CFREU. Article 45(1) TFEU, instead, reinforces freedom of movement for all workers. Directive, 2004/38 on the right of citizens of the Union and their family members to move and reside freely within Member States' territory (Citizens' Rights Directive)[2] lays down the conditions for the right of free movement and residence of EU citizens within the EU, and the rights of EU citizens who reside in a Member State other than that of which they are a national, as well as those of their family members. The implementation and enforcement of the Citizens' Rights Directive

[1] As already outlined in the previous section, the specific situation of EU citizens of Roma origin is not included in the remit of this unit but falls within the scope of work of Unit D.2 (Anti-racism and Roma coordination). Therefore, it is tackled from a non-discrimination point of view, rather than a citizens' rights one.

[2] In the interviews, DG JUST officials raised the point that the Directive should be referred to as Free Movement Directive, and not as Citizens' Rights Directive. The official reasoning provided is that free movement (Article 21 TFEU) is 'only one' of the citizens' rights provided for by Articles 20–25 TFEU.

S. Carrera and D. Colombi, *Irregularising Human Mobility*,
SpringerBriefs in Law, https://doi.org/10.1007/978-3-031-74021-3_6

has fallen within the remit of Unit C.4 (Democracy, Union Citizenship and Free Movement) at DG JUST.

EU citizens have the right to reside in any EU Member State for up to three months without any conditions or formalities (Article 6). The right of residence beyond three months is instead subject to some conditions (Article 7): the person(s) must (a) be workers or self-employed; *or* (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; *or* (c) be enrolled in an accredited private or public establishment for a course of study, including vocational training, as well as have comprehensive sickness insurance cover in the host Member State and be able to prove that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State; *or* (d) be family members of EU citizens who satisfy points (a), (b) or (c).

Under the Citizens' Rights Directive, Member States may require EU citizens to register with the relevant authorities (Article 8(1)). EU citizens who fulfil the above-mentioned criteria, as well as their family members, are entitled to equal treatment (Article 24), which includes access to social assistance systems (for more information, see European Commission, 2023).

Qualifying as a worker or self-employed person grants EU citizens the right of residence beyond six months (see definition in Chap. 4). Even when no longer employed or when temporarily unable to work, EU citizens retain the status of worker, and therefore qualify for equal treatment, but might have to respect certain conditions set by Member States, e.g., register as jobseekers with the relevant employment offices. The type of contract, salary level or working hours are not restricting factors.[3] Based on the previous discussion on TCN workers without legal residence status and/or engaging in undeclared work, it can be assumed that the (un)declared nature of the work is also not a determining factor in the acquisition and retention of the status of worker for mobile EU citizens, though this necessarily entails that the relevant Member States would not be aware of one's status as a worker and might have legal repercussions.

If the status of workers is lost, EU citizens can continue searching for a job but might be required to provide evidence that 'that they are continuing to seek employment and that they have a genuine chance of being engaged' (Article 14(4)(b)). This also apply to first-time jobseekers, i.e., EU citizens who move to another Member State for the purpose of finding a job. In such circumstances, 'a genuine chance of being engaged' is to be ascertained by taking into consideration the situation of the national labour market in the sector matching the jobseeker's occupational qualifications.

A central factor to consider under current EU policy is that EU citizens shall not 'become a burden on the social assistance system of the host Member State during their period of residence'. This is based on the notion of 'sufficient resources', i.e., a level equal to or higher than the threshold under which a minimum subsistence benefit

[3] See for instance CJEU, C-53/81, *Levin*, para. 21; C-14/09 *Genc*, paras 25-2.

is granted in the host Member State. Students and other non-economically active EU citizens, e.g., pensioners, may be required to prove that they are in possession of sufficient means of subsistence for themselves and their family members. Some Member States expressed unfounded and non-evidence-based concerns related to so-called 'benefit tourism' (Carrera et al., 2013), particularly following the accession of Bulgaria and Romania in 2007.[4] In our interviews, it was suggested that the result of the Brexit referendum was driven by similar fears among part of the British public (COM8).

If EU citizens do not fulfil the criteria set by the Citizens' Rights Directive or are considered 'an unreasonable burden on the social assistance system', Member States can order them to leave their territory. Article 14(3) clarifies that 'an expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'. In other words, while a request for social benefits may indicate a lack of sufficient resources, it cannot lead to an automatic order to leave the country. A thorough proportionality and individualised assessment is required and should take into account the person's fundamental rights, as well as the duration of the enjoyment of social benefits, the person's situation, and the amount and history of aid received. It is unclear, however, how, and under which exact conditions, such assessments are carried out in administrative practices across EU Member States.

Further restrictions on mobile EU citizens can be placed on grounds of 'public policy, public security and public health'. These grounds must be interpreted strictly and do not give Member States absolute discretion to carry out expulsions. Protection against expulsion for EU citizens is provided for by Article 28 of the Citizens' Rights Directive. The personal conduct of the EU citizen in question must represent a genuine, present, and sufficiently serious threat and Member States cannot take any restrictive measures on general preventive grounds (European Commission, 2023, p. 59). Interviewees have confirmed that the threshold for expulsion is high and should be based on an assessment of the nature of the offence(s), their frequency, and the damage or harm caused (ibid., p. 61), followed by a proportionality assessment.

The level of protection granted to mobile EU citizens increases the more time they spend within the receiving Member State. All EU citizens are entitled to a basic level of protection. For example, lack of registration is not considered as a sufficient ground to constitute 'conduct threatening public policy and public security'. EU citizens with permanent residence status (i.e., at least 5 years of residence) can only be issued an order to leave on serious grounds of public policy and public security. If the person has resided in the Member State for more than 10 years, only imperative grounds of public security may be a valid ground for an order to leave—and, therefore, not public policy.

While consistent statistical data on the expulsion of EU nationals is not available, evidence shows that there are significant discrepancies in Member States'

[4] In 2013, Ministers from Austria, Germany, the Netherlands and the UK addressed a letter to the EU Council Presidency and the Commissioners Viviane Reding, Cecilia Malmström and László Andor. See: http://docs.dpaq.de/3604-130415_letter_to_presidency_final_1_2.pdf

conduct, as well as abuses and discrimination against specific groups of EU citizens. Research shows that Member States have significant margins of interpretation both for grounds of public policy, security and public health and for persons considered as 'an unreasonable burden to the social assistance system of the host Member State' (Mantu & Minderhoud, 2023; Maslowski, 2015). There is also evidence of Member States engaging in collective expulsions of EU citizens. Roma citizens have been the primary targets of such actions (Carrera, 2013). However, it also affects other categories of EU citizens. For example, between 2012 and 2014, the media reported cases of thousands of EU citizens (mostly from Romania, Bulgaria, and Spain) expelled from Belgium on grounds of constituting an 'excessive burden on the national social security system' (European Parliament, 2014).

6.1 EU-UK Withdrawal Agreement

A particular situation concerns the residence of UK citizens in the EU and EU citizens in the UK after the withdrawal of the UK from the European Union. This is also covered by Unit C.2 at DG JUST. Issues related to the implementation of the 2019 Withdrawal Agreement between the UK and the EU are discussed by the Specialised Committee on Citizens' Rights, which includes officials from the Commission's Secretary General (in the lead), DG JUST, DG EMPL, DG HOME, and DG GROW and from the UK government. The Free Movement Expert Group also covers issues related to the Withdrawal Agreement. Furthermore, DG JUST has an official posted at the EU delegation to the United Kingdom specifically covering issues related to citizens' rights.

Part Two of the Withdrawal Agreement specifically deals with citizens' rights for UK citizens residing in the EU and EU citizens residing in the UK before the end of the transition period, i.e., before 31 December 2020 (Article 126), frontier workers, as well as family members of legal residents. Persons who have exercised the right to free movement before the transition period retain the right to reside within the host state under the limitations and conditions set by Articles 21, 45, and 49 TFEU and Articles 6, 7, 14, 16, and 17 of the Citizens' Rights Directive. Family members—both EU/UK nationals and TCNs—retain the same rights set in Article 21 TFEU and the Citizens' Rights Directive (see European Commission, 2020). The right to permanent residence is foreseen after five continuous years in the host state, as provided for by the Citizens' Rights Directive.

The Withdrawal Agreement does not in and of itself create new situations of 'irregularity' for people who were residing in the UK or EU before the end of the transition period. The conditions and limitations applicable to their specific situations are the same as the ones set by EU law. These include the obligation to register in the host state (if foreseen under national law). Furthermore, EU Member States can reserve more favourable conditions for UK citizens if they wish to do so. Despite the rights foreseen in the Withdrawal Agreement, evidence shows that an increasing number of EU citizens have been receiving orders to leave the UK or have been

denied (re-)entry into the country. For example, the Guardian reported a fivefold increase in the number of EU citizens refused entry: 'In the first three quarters of 2019 just over 2 200 people from the EU were turned away at the border – compared with 11 600 in the first three quarters of 2023' (O'Carroll & Goodier, 2023).

Particularly targeted were EU citizens from Romania and Bulgaria. Some of these were legally residing and working in the UK, and thus entitled to re-enter the country under the Withdrawal Agreement. The increasing discretion granted to border guards was identified as one of the main factors behind this surge. Additionally, it was reported that backlogs and delays in the review of applications for pre-settlement increase the vulnerability of EU citizens in the UK (Ramírez, 2024), de facto co-creating situations of irregularity. Similarly, evidence shows that EU citizens with the legal right to reside in the UK have been increasingly denied access to social assistance benefits after the Brexit referendum, contributing to the so-called 'hostile environment' policy for EU residents (Butler & Rankin, 2019).

On the EU side, data from Eurostat (n.d.—a; n.d.—b) shows that 1 375 UK citizens were ordered to leave the EU in 2021 and 1 270 in 2022. In 2022, 655 orders to leave were effectively carried out. Sweden was the EU Member State with the highest rate of orders to leave (715 in 2021; 385 in 2022) and effective returns (305 in 2021; 265 in 2022) of UK citizens. It was reported that these problems were, in large part, due to missed deadlines for registration, as well as insufficient information provided by national authorities to UK nationals residing in the EU (Henley, 2023). This data points to shortcomings in the practical implementation of the Withdrawal Agreement. While the law in the books protects the rights of people who were residing in the EU or the UK before the end of the transition period, the lack of clarity regarding registration under national law, deadlines, and increasing discretion at the border may de facto push people into irregularity and deprive them of their right to free movement, as well as other related rights.

Interviewees clarified that there are no known cases of persons covered by the Withdrawal Agreement who have been refused entry or expelled from either the UK or the EU Member States (COM8). They did however acknowledge that, among those not covered by the Withdrawal Agreement terms, specific nationalities of EU citizens are subject to a higher rate of entry refusal at the UK border. It was also noted that, among the reported cases of expelled British citizens from EU Member States, the people affected had never fully complied with the requirements set by the Citizens' Rights Directive, but their situation had only come to the attention of the authorities after they were required to formally register as residents.

New situations of 'irregularity' may arise in the case of EU or UK citizens excluded from the personal scope of the Withdrawal Agreement—for example, if they have moved across the English Channel from 2021 onwards. While visa-free tourism is allowed between the UK and the EU, residence and work are subject to domestic and EU/national immigration law. The interviewees shared that Pilot Projects for the identification and expulsion of EU citizens who are not covered by the Withdrawal Agreement and do not fulfil the criteria for residence under national law would be implemented starting in spring 2024. On the EU side, UK citizens falling outside the

scope of the Withdrawal Agreement would be considered TCNs and, as such, would fall within the remit of DG HOME (see Chap. 3).

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Chapter 7
A Criminalisation Approach

The existing EU legal and policy framework gives precedence to the criminalisation of persons in a situation of irregularity. While the Return Directive criminalises the irregular entry and stay of irregularised TCNs, other legal instruments are in place to set administrative and criminal sanctions for persons engaging with persons in a situation of irregularity. This is the case of the Facilitators Package and the Employers Sanctions Directive (Sects. 7.1 and 7.2). Its legal basis is Articles 82–86 TFEU (Judicial Cooperation in Criminal Matters). Particularly, Article 83 TFEU identifies 'areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. These include trafficking in human beings and sexual exploitation of women and children (Sect. 7.3).

Different Commission services have been involved depending on the specific nature of the criminal offence: in 2019–2024, Unit C.1 (Irregular Migration and Returns) at DG HOME was in the lead and covered criminal sanctions against employers and migrant smuggling; Unit D.5 (Organised Crime and Drugs) at DG HOME and the Office of the EU Anti-Trafficking Coordinator covered human trafficking; Unit A.4 at DG JUST covered criminal justice in a broad sense and victims' rights. The EU Agency for Criminal Justice Cooperation (Eurojust) is tasked with 'support[ing] and strengthen[ing] coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases' (Article 85 TFEU).

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7.1 Human Smuggling

Human smuggling is not included in the 'areas of particularly serious crime with a cross-border dimension' laid out in the TFEU. Nonetheless, EU criminal law instruments in this area refer to Article 83(2) TFEU as their legal basis, i.e., the possibility for directives establishing minimum standards 'if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures'.

Commonly referred to as the Facilitators Package, Council Directive 2002/90/EC of 28 November 2002 defines the facilitation of unauthorised entry, transit, and residence (Facilitation Directive) and Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence set common rules on criminal sanctions for the offence of facilitation of unauthorised entry, transit, or residence in the EU. These include '(a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens; (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens' (Article 1 of the Facilitation Directive).

The Facilitation Directive provides for the possibility—not the obligation—for Member States to not apply such sanctions to persons where 'the aim of the behaviour is to provide humanitarian assistance to the person concerned'. This includes both humanitarian non-governmental organisations (NGOs) and private citizens. In the 2021 Action Plan Against Migrant Smuggling (2021–2025), the Commission reiterated that humanitarian acts 'mandated by the law' should not be criminalised, for example in the case of search and rescue operations, and invited Member States to differentiate between humanitarian assistance not mandated by the law and genuine facilitation and smuggling activities (European Commission, 2021b, p. 18).

Despite this, there is extensive evidence that Member States have not transposed and implemented this provision, with some of them engaging in the extensive criminalisation of solidarity acts and artificially conflating humanitarian actions with human smuggling (see Carrera & Guild, 2016; Carrera et al., 2016a, 2016b; FRA, 2014; PICUM, 2022).

In November 2023, the Commission put forward a Proposal to revise the Facilitation Directive (European Commission, 2023a). While it acknowledged the findings of the 2017 evaluation and clarified that 'it is not the purpose of this Directive to criminalise, on the one hand, assistance provided to family members and, on the other hand, humanitarian assistance or the support of basic human needs provided to third-country nationals in compliance with legal obligations' (Recital 7), it only did so in the explanatory memorandum and recitals, and not in the operational part which will be transposed by Member States. The proposed Directive mostly aims

at strengthening the prevention, investigation, and prosecution of human smugglers and harmonising penalties.

7.2 Employers Sanctions Directive

One of the main legal instruments within the remit of Unit C.1 (Irregular Migration & Returns) at DG HOME was Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals of 18 June 2009 (Employers Sanctions Directive, ESD). The ESD sets minimum standards to contrast the employment of TCNs without legal status through administrative and criminal sanctions for employers 'in order to fight illegal immigration' (*sic)* and, as introduced in Chap. 5, provides for a set of protections for the rights of people affected, such as access to complaint mechanisms, representation by NGOs and trade unions, and the possibility to receive outstanding payments, even after return.

In September 2021, the Commission released a communication assessing the implementation of the ESD, which acknowledged severe limitations affecting its protective elements. Some of the main issues are related to the implementation of the ESD at the national level, particularly as regards access to complaint mechanisms and the way inspections are carried out under Article 14 of the ESD. Depending on the specific Member State, inspections can be carried out exclusively by labour inspectorates, law enforcement and immigration authorities, or jointly by the different authorities. The inclusion of law enforcement authorities in these inspections and the existence of legal obligations to report the identity of the workers to law enforcement and immigration authorities fundamentally weaken the labour inspectorates' mandate to guarantee workers' rights, and undermines the effectiveness of the ESD. It ultimately discourages workers from reporting their employers for fear of being identified and returned (FRA, 2018, 2021; van Nierop et al., 2021; PICUM, 2023).

As PICUM (2023) has noted, '[w]ithout help, undocumented victims are at an increased risk of repeat victimisation, continued social exclusion and may struggle to obtain the justice and redress to which they are entitled'. Undocumented women, LGBTQIA + persons, and sex workers are particularly exposed to these risks (ibid.). To prevent this, some Member States, e.g. the Netherlands, allow online anonymous complaints. Interviewees underlined that the Commission has often emphasised the need for access to complaints and re-iterated that one of the goals of the ESD is to protect the rights of TCNs—and not exclusively sanctioning the employers and carrying out returns (COM2).

In its 2021 communication on the application of the ESD, the Commission also identified the need for further efforts as regards access to information, access to justice and recovery of back payments, and the granting of temporary residence permits (European Commission, 2021c). In the ESD, temporary residence permits are only foreseen for the duration of the criminal proceedings against employers, and Member States retain competence over the issuing, withdrawing, and overall

nature of said permits. The link between residence permits and proceedings has been acknowledged in multiple instances as a crucial limitation of this system: it raises important questions regarding what happens to the persons affected once criminal proceedings end, if they are never initiated, or if the persons affected do not feel comfortable cooperating with national authorities.

The existing limitations reveal that the repressive elements of the Directives against employers prevail over the enforcement and effectiveness of the fundamental rights-related elements for the TCNs affected. This may have to do with DG HOME being in the lead in this dossier, not DG JUST. When asked about the enforcement of the ESD, interviewees re-iterated that Member States have correctly transposed the Directive (COM2). While it is within their prerogative to do more, the basic standards set by the Directive are overall correctly implemented across the Member States. The systematic issues surrounding the protective elements of the ESD, however, seem to suggest the contrary. If the ESD sets the minimum standards to be followed and Member States are failing to uphold the protective elements, then more decisive action from the Commission, including infringement procedures, could be necessary to enforce the Directive. When asked about the enforcement and possible strengthening of the protective aspects of the ESD however, interviewees noted that they 'do not have such plans at the moment', which highlights that this is not framed as a policy priority (COM2). The current political priority is on the harmonisation and reinforcement of the criminalisation provisions against employers.

Around the ESD, a relevant initiative is the Labour Migration Platform, a cooperation between DG HOME and DG EMPL, bringing together EU Member States representatives 'specialising in migration and employment policy' (combining Ministries of Interior, Labour, Social Policies and employment agencies), and European social partners such as BusinessEurope, EuroChambers, SMEUnited, and SGI Europe. The Platform aims at facilitating discussions on EU-level initiatives on legal migration and employment.[1] At the inaugural meeting on 10 February 2023, Commissioner for Jobs and Social Rights, Nicolas Schmit, underlined the Platform's role in developing 'a more strategic labour migration policy involving the Public Employment Services (PES) and the European agencies (ELA and Cedefop) in identifying strategic shortages and supporting skills and qualifications recognition'. He also put emphasis on 'the importance of ensuring adequate labour standards and combating undeclared work in order to avoid unfair treatment of domestic workers and migrants'.[2]

[1] For more information refer to https://home-affairs.ec.europa.eu/networks/labour-migration-platform_en.

[2] European Commission (2023c), Minutes, Labour Migration Platform, HOME C.2., Brussels. During the discussions BusinessEurope 'welcomed the launch of the Platform and emphasised the need to continue creating synergies between DG EMPL and DG HOME'.

7.3 Human Trafficking

Human trafficking is prohibited under Article 5 CFREU and recognised as a serious crime with a cross-border dimension under Article 83 TFEU. A significant number of Commission services have been involved in or around the issue of human trafficking. On top of the Office of the EU Anti-Trafficking Coordinator and Unit D.5 (Organised Crime and Drugs), other stakeholders have included DG HOME officials working on irregular migration and returns (Unit C.1) and DG Health and Food Safety (DG SANTE) for organ trafficking. The EU Strategy on Combatting Trafficking in Human Beings reports that ten EU agencies have signed a Joint Statement of commitment to work together against trafficking in human beings.[3]

Within the EU and in line with the 2000 UN Trafficking Protocol, trafficking in human beings is defined as 'the recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or over position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation' (Article 2(1) of Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims; the Anti-Trafficking Directive).

Human trafficking is understood as an involuntary and non-consensual or coerced movement with the purpose of exploitation; human smuggling, instead, is described as a voluntary and consensual form of migration facilitated by the smugglers (Andrijasevic, 2016: p. 59). Previous research shows that this separation is extremely simplistic and relies on gendered and racialised assumptions with potential negative implications on the recognition of victims (ibid.; van Liempt, 2011).

In 2021, the Commission released the EU Strategy on Combatting Trafficking in Human Beings (2021–2025) (European Commission, 2021a). In this communication, the Commission reiterated that the fight against trafficking of human being is a priority for the EU and significant progress has been achieved (p. 2). It found that 'while Member States made substantial efforts to transpose the Directive, there is still room for improvement as regards the prevention, protection, assistance and support measures to victims, including child victims' (ibid.). The Commission also recognised the additional difficulties faced by victims who are not EU nationals, particularly as regards the issue of residence permits, and raised concerns related to the transfer under the Dublin Regulation of asylum-seekers who have been trafficked within the EU, as this could expose them to re-trafficking. It also clarified that the Action Plan on Integration and Inclusion covers victims of trafficking.

[3] The European Asylum Support Office (EASO; now European Union Asylum Agency, EUAA), Europol, European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (eu-LISA), European Monitoring Centre for Drugs and Drug Addiction (EMCDDA), Eurojust, European Institute for Gender Equality (EIGE), Frontex (European Border and Coast Guard), FRA, EU Agency for Law Enforcement Training (CEPOL), and the European Foundation for the Improvement of Living and Working Conditions (Eurofound).

Commission officials stressed the central importance and effectiveness of the Directive as a legal instrument in the field of criminal justice since its adoption in 2011. When it comes to the identification and treatment of victims, the Directive establishes that victims should receive assistance and support from the very moment when there are reasonable indications that the person is a victim. In the context of its ongoing revision (European Commission, 2022), the Commission deliberately chose not to include any amendments to the protection, assistance and support provisions. While it had identified several shortcomings through the evaluation of the Directive, including on compensation and the actual enjoyment of rights by trafficking victims, these were found to be not related to the legislation itself but rather to the implementation by Member States.

Civil society actors have defined the Commission proposal as a missed opportunity. The Red Cross EU Office (2023) stressed that the text is limited and overemphasises law enforcement responses; does not strengthen humanitarian assistance to trafficked persons, the protection of their rights, nor the support they need to reintegrate into society; and should rather prioritise information campaigns, concrete measures to counter the exclusion of undocumented migrants, access to regularisation in the country and increasing pathways for regular migration over indistinct criminalisation.

Like the ESD, the identification of victims of trafficking for labour exploitation relies on the investigations carried out by labour inspectors and other relevant national authorities. The sharing of information by these authorities can also help people realise that they are victims of trafficking. Commission officials stressed the need for extensive and comprehensive training of labour inspectors to identify victims of trafficking in work settings (COM3). Unlike for the ESD, however, the involvement of law enforcement authorities in the inspections was not acknowledged as an issue in and of itself during the interviews due to the different and special nature of human trafficking, its gravity, and the special status and protection afforded to victims. This is however controversial as it could normalise the mistreatment of other TCNs identified during inspection.

Security of residence or residence permits for victims of human trafficking are a key issue for victims of trafficking. Residence permits for victims are outside the scope of the Anti-Trafficking Directive. They are covered by Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (Residence Permit Directive)—which fell within the remit of Unit C.1 (irregular migration and returns) in 2019–2024. During the initial reflection period, victims who are not EU nationals are allowed to remain for the time set under national law regardless of whether they cooperate with national authorities. After this period, the issuing of temporary residence permits of at least six months is tied to cooperation in the investigation and criminal proceedings.

While the Anti-Trafficking Directive is specific to victims of human trafficking, all victims of crimes, independent from their residence or immigration status, are also covered by the Directive 2012/29/EU establishing minimum standards on the rights,

support, and protection of victims of crime of 25 October 2012 (Victims' Rights Directive). The Victims' Rights Directive includes provisions related to the right to access information, the right to support and protection, in accordance with victims' individual needs, and other procedural rights. As part of the EU Strategy on victims' rights (2020–2025) (European Commission, 2020) and following the evaluation of the Directive and a public consultation, a revision of the Directive was published by the Commission in July 2023 (European Commission, 2023b).

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Chapter 8
Problematising Irregularised Human Mobility in the Commission

Abstract There is a complex patchwork of normative approaches delineating irregularised human mobilities, reflected in the intra-institutional settings and DG structuring of the European Commission (synthesised in Fig. 8.1).

8.1 A Home Affairs and Criminalisation Approach in Competition with Other Relevant Policy Approaches

There is a complex patchwork of normative approaches delineating irregularised human mobilities, reflected in the intra-institutional settings and DG structuring of the European Commission (synthesised in Fig. 8.1). While formally, the majority of European Commission representatives have internalised home affairs and criminalisation approaches in discussions related to irregularised human mobilities, in reality, other competing policy approaches do exist and even prevail in some areas. This gives priority to entry points different from migration status, such as employment, social inclusion, fundamental rights, and non-discrimination.

The previous Chapters have shown that relevant EU legal and policy documents reflect a dominant home affairs and criminalisation approach, giving priority to a Member States' Ministries of Interior angle and reflected in the 2019–2024 Commission's setting of political priorities. This approach has limited any EU-level discussion of irregularity to irregular crossings at the external Schengen borders, preventing 'secondary movements', the unsuccessful outcomes of asylum applications, and the non-enforceability of return orders. Interviews revealed that a majority of Commission officials have internalised and accepted the predominance and validity of this approach. Interviewees further acknowledged that this was due to the fact that any issue officially framed as 'migration' would be discussed and agreed upon at the Council of the EU structures composed of Member States' Ministries of Interior (e.g. Justice and Home Affairs Council, the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA), or the Working Party on Integration, Migration and Expulsion) (see European Council, n.d.), and not other key national Ministries such

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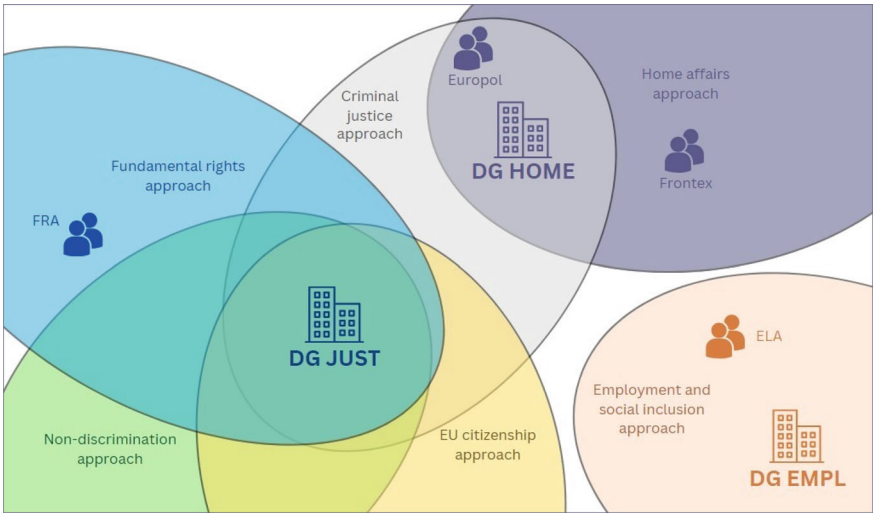

Fig. 8.1 Mapping key actors and approaches to 'irregularity'. *Source* Authors' own elaboration

as those responsible for employment and social policies (e.g. Working Party on Social Questions).

This approach disregards that a great portion of what is wrongly framed as 'irregular migration' involves asylum-seekers, refugees, and other persons who are eligible for international protection in the EU (Carrera & Guild, 2016, p. 5; Carrera et al., 2023a, pp. 180–185). It also leaves aside the fundamental rights of undocumented people who are already present within the EU, which stem from their human dignity, and not their administrative status (see Chap. 5 of this Book). The home affairs approach additionally ignores crucial issues related to living and working conditions, as well as the concerns raised by social partners and civil society organisations on the current state and priorities of EU policy, and their practical impacts in these domains. A policing and law-enforcement logic reduces individuals to deportable or expellable subjects without agency and rights. Due to its narrow focus on the management of external borders, it further fails to acknowledge additional forms of irregularity affecting EU citizens as 'issues'.

A focus on overly restrictive asylum policies and visa regimes dominating the EU's home affairs approach, is a direct product of the intergovernmental origins of European cooperation on restricting free movement inside the Schengen area studied in Chap. 2 of this Book, which have proven to be short-sighted and overall counter-productive. These policies have played a key role in co-creating irregularity and pushing people who have legitimate mobility and asylum claims into irregularised status. They have also created structural incapacities in EU Member States and resulted in grave human rights violations. For instance, Vedsted-Hansen (2017) has underlined how the EU Dublin System has constituted a source of 'protective failure' in a context characterised by dysfunctional asylum systems in a number of EU

member states, leading to grave human rights violations. This reveals a stark contradiction between 'reality', as perceived by the relevant Commission officials, and the effects of these policies on the ground. While other alternative policy approaches are often described as a 'pull factor' in the legislation and policy documents produced by DG HOME, evidence shows that the tightening of asylum and visa policies directly contributes to increasing the numbers of people falling into 'irregular' mobility channels by curtailing other 'regular' access avenues.

Relevant DGs other than DG HOME do not perceive themselves as directly concerned with or as having competence over TCNs living in the EU, especially those without administrative status. This means that 'irregular migration' is almost constantly not expressly mentioned in legislation and policies in fields such as employment, social affairs, and social inclusion. In the few cases where it is referred to, it is only acknowledged as an 'issue', and practical responses or 'solutions' are not specifically put forward. Our analysis shows that in many instances these other DGs and Units do deal indirectly with the situations of irregularised populations in EU Member States, even though they do not use the labels or terms 'migration' or 'irregular migration'.

Some Commission officials confirmed previous academic findings that the Commission is not a unitary actor reaching decisions by consensus (Hartlapp et al., 2014). There are significant differences in mentality between policy professionals engaged in the home affairs/interior approach versus an employment and social inclusion approach.[1] Some Commission officials welcomed the increased involvement of DG EMPL in the 'Skills and Talent Mobility' examined in Chap. 3, Sect. 3.3.), and the Labour Migration Platform mentioned in Chap. 7 (Sect. 7.2). They saw here a potential for reframing EU policy conversations from purely 'migration management and law enforcement' terms to one including social partners and socio-economic rights. In their view, this would constitute a 'significant shift' from the past: DG EMPL used to be reluctant to engage in international mobility and labour migration issues, only limiting its actions to questions of intra-EU mobility. Now, there appears to be more awareness within the Commission that different DGs must work together on these topics. According to a Commission official, 'this might contribute to framing migration not only as something to deter, but as something that can be beneficial to face labour shortages and demographic changes' (COM4).

That notwithstanding, such a 'mainstreaming' of the migration agenda in DG EMPL could run the risk of solidifying the home affairs approach even further, to the detriment of an employment and social inclusion focus, where the migration status of the individual is not the entry point. There are constitutional, international/regional

[1] The rivalry between the DG EMPL and former DG JHA had been acknowledged by previous academic research in 2008. See Chap. 2 of this Book. Boswell has underlined the predominance of various sectorial interests and agendas inside the Commission, with different DGs presenting noticeable differences in terms of 'ideologies, organisational cultures and policy styles'. In her view, the relevant Commission departments invest substantial energy and time in inter-service turf wars as a means of expanding their fields of competences, which in her view flows from contested Treaty-basis competences and the lack of'overarching party, national or ideological affinity' (Boswell, 2008).

and EU human rights and labour standards which require policy professionals whose main portfolio and mandate is not one focused on policing certain human mobilities and irregularising them, but rather ensuring and upholding key standards which put the human condition, societal well-being and the worker status first. For example, limiting DG EMPL approach to only those third-country workers that 'the EU needs' is still one characterised by a home affairs and utilitarian rationale prioritising 'the economy' over decent work for every worker. This stands in contradiction with international labour and socio-economic human rights standards requiring equality of treatment and non-discrimination of *all* workers, irrespective of their status, origins, skills or the economic interests or 'labour market' needs as perceived in specific Member States (Carrera et al., 2017).

8.2 Who Does What, and Who is Covered by Whom?

When analysing the problematisation of irregularised human mobilities in the VDL Commission, key questions are 'who covers what specific policy area?' and 'how do policy professionals frame what they do or not, and under which terms specifically?'. During the interviews conducted for this Book, some of the most common responses given by Commission representatives were 'This is not within the exact remit or territory of this DG/Unit' or 'is not my responsibility'. This was especially witnessed in relation to themes which are not considered a 'priority' in the 2019–2024 Commission policy, such as the situations of 'irregularised migrants' beyond the overall law enforcement-driven prioritisation of expulsions and criminalisation. Thus, equally relevant questions relate to what exactly these policy professionals consider the personal scope of their work to be, i.e. who is covered and who is excluded from their policy field.

The thematic demarcations in the VDL Commission have not been so straightforward (see *Annex 1* of this Book). For instance, DG EMPL representatives said that they only formally cover intra-EU mobility for work-related purposes and social inclusion for people holding the status of European citizens or legally-residing TCNs. On issues related to the Citizens' Rights Directive, DG JUST has mainly dealt with freedom of movement for EU citizens and not with social security-related rights, which have been allocated to another Unit in DG EMPL. Similar scoping restrictions can be noticed in the ELA, which does not formally cover TCNs. Furthermore, some of the Units in DG HOME have presented themselves as exclusively covering the situations of TCNs who are 'legally residing' in the EU (e.g. Units covering legal/labour migration and integration), and haven't seen themselves as responsible for or with the legal competence to deal with irregularised people.

That notwithstanding, the detailed examination of their legal and policy instruments has shown that this apparent formalistic or 'silo framing' has not always corresponded with reality. DG EMPL does cover *all workers* irrespective of their migration status through various policy instruments—in the context of specific coordination and financial tools. Similarly, despite being formally limited to EU citizens

and legally-residing TCNs, in practice, ELA's activities do encompass irregularised EU citizens and TCNs when it comes to tackling undeclared work. Furthermore, various DGs have used certain financial instruments which have indirectly covered projects and activities on irregularised immigrants in the EU.

Interviews with various Commission officials revealed specific nested ways of thinking about cross-border human mobility. This includes what does and does not constitute 'migration', who is a 'migrant' and an 'irregular immigrant', and who is not. These are often related to issues of class, wealth status, and race/ethnicity, which is reflected in thematic policy divisions across relevant DGs and Unit structures inside the Commission and has direct implications in the resulting policy outputs. For instance, all the Commission officials interviewed for this Book understood the intra-EU mobility and residence of EU citizens and their families as part of 'free movement of persons' or freedom of movement. They expressly refused to depict them as 'migrants', their movements as 'migration', and frame their irregularisation as a salient policy issue. For many of them, the very word 'migration' carries heavy normative and negative connotations. Moreover, when speaking about EU citizens, Commission officials avoided speaking about 'integration' policies, but rather referred to the word 'inclusion'. It is clear that words matter a big deal in EU policy professionals' structures and universes when allocating responsibilities and ownership of policy dossiers, as well as when attempting to justify exclusionary policies for certain groups.

Some intra-EU mobilities, and not others, have been uncritically understood and presented as an insecurity problem within the scope of EU policy areas covering migration, asylum, and borders. Individuals with certain origins are assumed to be 'seasonal workers', and not 'highly skilled workers' or 'talent'. The rights and living conditions of EU citizens of Roma origin have not been addressed under the Commission's structures dealing with Union citizenship and 'free movement', but rather those dealing with 'discrimination'. EU citizens with a 'migrant background' have been called to 'integrate' and comply with a 'two-way integration process' with the receiving society. The irregularisation of stay/work of British nationals in EU Member States after Brexit has not been seen as an issue of key concern, nor has the overstaying in the EU of nationals from countries like the US.

Special focus has been given to individuals from certain countries and world regions which, according to UNHCR, are the source of asylum-seekers and refugees, i.e., mainly African and Middle-East countries and some Asian and South American countries. This raises serious questions regarding the Commission's compliance with its own EU Anti-Racism Action Plan 2020–2025 (European Commission, 2020a), which calls for the need to address institutionalised discrimination related to issues such as origin and class. Additionally, interviews confirmed that non-EU nationals residing/living in a situation of irregularity, including those who cannot be expelled or returned, have been a 'non-policy issue' or non-priority in the European Commission. The overriding policy priority has been their expulsion from the EU's territory, overcoming the obstacles to enforce their removal, and increasing the rate of effective returns at all costs.

Some of the justifications provided during the interviews by Commission officials included that Member States retain a large degree of competencies in the areas of regular migration and regularisation processes, which, together with the high degree of politicisation of these fields, limits the Commission's scope of action. There has been extreme reluctance to take significant steps inside the Commission in this domain. Interviewees alluded that regularisations or allowing transitioning of statuses so that people do not fall into irregularity could be a so-called 'pull factor'. This has been perceived as such even though there is no scientific evidence on the extent to which policies giving priority to rights and dignity actually influence people's choices/decisions to travel to the EU, and that the pull factor theory is not equally applied to people moving and residing in the EU from wealthy and Western countries.[2]

8.3 The Geopolitical Commission and Worst Regulation

This Book has raised the question as to whether the VDL Commission meant a 'fresh start' for EU policy in the field of irregularised migrations compared to the previous Juncker Commission. In light of the assessment of irregularity assemblages inside the current Commission, our research underlines the need to consider and scrutinise the Commission's increasingly political role resulting from its inner-bureaucratic structuring (Nugent & Rhinard, 2019).

Firstly, like the previous Juncker Commission model, the 2019–2024 VDL Commission continued to rely heavily on a 'control and command' or top-down structure seeking to centralise the political mainstreaming of all the key issues/priorities and political solutions on migration policies. This has taken the form of, in the first place, a strong supervisory and coordinating role allocated to the Secretariat-General (SG), which directly has supported and cooperated with the President's Cabinet. In 2019–2024, the SG counted on an entire team dealing with 'Citizens, health, migration and security union'—which also covered issues related to EU values, and which de facto constituted a shadow system for all the relevant thematic DGs, including DG HOME and DG JUST, and their respective Commissioners. The SG mandate has consisted of shaping the Commission's political agenda, cross-cutting policies and operational priorities. It has 'steer[ed] and coordinate[d] the Commission's policy work, *from its inception*' at DG and Units' level (emphasis added), and 'coordinate[d] the Commission's policy on enforcement of EU law' (see European Commission, n.d.—a).

Secondly, the VDL Commission continued and deepened the previous Vice-Presidents arrangement, but developed it further by designating three Executive Vice-Presidents and four Vice-Presidents. As was the case under the Juncker Commission, Vice-Presidents had a major role to play (See *Annex 2* of this Book) in assessing

[2] On the 'pull and push factor' theory refer to Greenwood (2019), Massey et al. (1993), and Guild (2021).

whether new initiatives fit the political guidelines of the President and in recommending their inclusion in the Commission work programme (Bassot, 2020). The organisation scheme introduced by VDL replicated to some extent the hierarchical and centralised structure of the previous Commission. That structure was criticised by some for departing from the principle of collegiality and introducing differences among Commissioners, but welcomed by others as a mechanism to overcome the difficulties with the coordination of an over-sized Commission and to ensure 'strong political leadership'.

As underlined in this Book, the Vice-President responsible for 'EU Values', Věra Jourová was no longer a 'First Vice-President' supervising the entire Commission, including DG HOME nor Vice-President Schinas ('Promoting our European Way of Life'), responsible for security and coordinating the Commission's work on the Pact on Migration and Asylum as well as the European Security Union agenda. Schinas gave overwhelming priority to a home affairs and criminalisation approach in these fields, where policy initiatives have not always been compliant with EU Better Regulation and Treaty values. The resulting picture has been one where the autonomy and agency of each Commissioner, e.g. Ylva Johansson and Didier Reynders, former Commissioners for Home Affairs and Justice respectively, was enormously diminished and often side-lined in comparison to the Barroso II Commission model.

Furthermore, the 2019–2024 VDL Commission structure gave priority to political interests and agendas, real or perceived, of some Member States in migration management. Our interviews revealed the profound impact that such a mindset has on prevailing policy framings and prioritisation in the Commission, as well as self-censoring regarding initiatives and agenda-items that may be perceived as politically sensitive or not in the interests of some Member States in the Council. Here, relevant political party membership and country of origin of the President and (Executive) Vice-Presidents were highly relevant, to the detriment of the Commission's assigned role in the Treaties to 'promote the general interest of the Union' and act as'guardian of the Treaties' beyond political party or national government lines.

In her 'Political Guidelines for the Next European Commission 2019–2024 - A Union that strives for more - My agenda for Europe' (von der Leyen, 2020), the Commission President developed her vision for a 'geopolitical commission'[3] and underlined that 'There can be no compromise when it comes to defending our core values'. However, this proved not to be the case in her most important migration policy-related initiatives. Previous research showed that the 2019–2024 VDL Commission fundamentally disregarded the EU Better Regulation Guidelines and Toolbox (European Commission, 2021) and the 2016 Interinstitutional Agreement on Better Law-Making (Interinstitutional Agreement, 2016) in migration policy. It also sidelined the enforcement of EU Treaty values and EU secondary law against misbehaving EU Member States (Carrera et al., 2023a; Kelemen & Pavone, 2022; Pech & Bárd, 2022).

[3] Bayer (2019). The analysis of the external dimensions of EU migration policies, and the so-called 'partnerships' between the EU and selected third states, fall outside the scope of this Book.

As a way of illustration, the so-called EU Pact on Migration and Asylum came along without an Impact Assessment justifying its need or evaluating its expected impact on fundamental rights and rule of law. Instead of taking into serious consideration civil society actors and the social partners working in these fields, gathering robust evidence questioning why any legislative reform was needed, and examining its impacts on fundamental rights and the CFREU, Commissioner Johansson and Vice-President Schinas held consultations with all Member States 'to gather views and ideas on the future Pact on Migration and Asylum' (European Commission, 2020b). Member States' political priorities (e.g., new forms of inter-state solidarity, unauthorised movements by asylum seekers within the EU, or enforcing return orders and increasing the number of expulsions) were *the* driving force behind the overall conception and design of the Pact, showing a victory of intergovernmentalism over a truly EU and principled approach (Carrera, 2020; Carrera & Geddes, 2021).

Paradoxically, the Commission finds itself thinking like a Member State government instead of faithfully and effectively performing its role under the EU Treaties. EU crisis politics have continued to be used to fast-track the negotiations and adoption of highly controversial legislative initiatives whose added value, proportionality and fundamental rights compliance have not been proven. These have been presented as serving (some) Member States' governments and Ministries of Interior interests, which has led Better Regulation Guidelines being disregarded and to the emergence of 'worst regulation' EU policy-making. Previous studies and the existing literature has also observed the lack of enforcement of relevant EU standards related to values (Brouwer et al., 2021; Carrera et al., 2023a, 2023b).

EU Treaty principles and fundamental rights, and their enforcement, were not framed nor understood as a priority in the 2019–2024 European Commission. For example, an enforcement gap and impunity has been evidenced regarding the Schengen free-movement area. As introduced in Chap. 3 (Sect. 3.1), since 2015 a group of six Member States have unlawfully reintroduced internal border controls on grounds such as 'secondary movements of third-country nationals', terrorism and crime, the Covid-19 pandemic or even the Ukraine war. All of them exceeded the prescribed time limits expressly foreseen in Article 25 of the Schengen Borders Code (SBC, 2016) to reintroduce and prolong internal border checks, which after more than eight years led to a systematic lack of compliance of EU law in an area laying at the heart of EU's identity. Instead of launching infringement proceedings, the Commission decided to pursue informal or diplomatic tools with the relevant national governments, and putting forward new legislative proposals envisaging elements seeking to normalise, and in some cases even legalise ad hoc and provide 'flexibility' for the current misbehaviour and illegal practices by some EU Member States and their Ministries of Interior or Justice (Carrera et al., 2023a).

Furthermore, even when legal protections and effective remedies are provided to TCNs under EU law and policy, such as access to justice and compliant mechanisms in the case of the ESD or Anti-Human Trafficking, they are ineffective and not easily accessible in practice, and/or are poorly implemented by Member States. Additionally, even when evidence confirms that stronger protections could increase the overall effectiveness of these EU legal instruments (see, for example, European Parliament,

2021; ETUC, 2021), these are not implemented. Despite evidence that the effectiveness of the ESD is undermined by TCNs' distrust and fear of law enforcement and immigration authorities and the lack of security of residence (FRA, 2021; PICUM, 2017), there have been no attempts to limit inspections to labour inspectorates only or enforce access to justice for individuals under irregular employment.

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Chapter 9
Conclusions

This Book has examined how the European Commission problematises irregularised human mobilities in EU policy. It has identified the most influential actors; presented the most crucial instruments of secondary legislation and policy documents revealing the political priorities, 'way of seeing things', and key assumptions of different Commission services; and critically assessed how the prevailing approaches of the 2019–2024 Commission directly impacted the human rights and dignity of irregularised migrants.

The Book finds that a home affairs and criminalisation approach that prioritises a law enforcement and migration management understanding of cross-border and intra-EU mobility and employment continued to prevail in the 2019–2024 Commission. This approach gives preference to increasing the return (enforced removals) rates, criminalising the persons in question and those employing or assisting them. It does so over other crucial public policy issues, including the situations of irregularised third-country workers in European labour markets and the effective enforcement of their rights, which are framed as non-policy issues and are not therefore understood as political priority areas for EU policy intervention.

The assessment has shown that the 2019–2024 VDL Commission did not represent a 'new start' of EU policy in the field of irregularised migration. The political structuring of the VDL Commission has contributed to the predominance of a home affairs approach and has fundamentally undermined EU Better Regulation Guidelines and EU values in migration policies. This is due to the supervisory and political role entrusted to the Secretariat General, which, together with the President Cabinet and the Executive Vice-Presidents, has modelled, steered, and coordinated the entire work and initiatives of all Commission services, side-lining other legitimate approaches and priorities in the thematic DGs and their respective Commissioners.

In the name of avoiding a 'siloed' management of different Commission portfolios, the current Commission structuring has adopted a top-down managerial strategy imposing certain politics and a prevailing home affairs and criminalisation approach to migration, preventing essential checks and balances against other legitimate policy

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agendas beyond those traditionally held by Ministries of Interior in Member States. Thus, other thematic portfolios, corresponding with Member States' Ministries of Labour, Social Policy, Equality, etc. are marginalised and short-circuited in favour of a hierarchical structuring of the Commission, which severely limits the independent enforcement of EU law and Treaty values, and gives priority to the interests of specific political parties or some national governments.

Under the 2019–2024 VDL Commission structuring, the Vice-President and Commissioner responsible for 'Promoting the European Way of Life' and 'Home Affairs' are no longer under the scrutiny and 'watchdog' control of the Vice-President responsible for 'EU values'. This is counter to the European standard of checks and balances in these fields as well as the rationale behind the separation of DG HOME and DG JUSTICE into two separate DGs back in 2010. The resulting picture is one that reinjects intergovernmentalism in an area where the EU has consolidated legal competencies in the Treaties. The Commission is not playing its conferred role as guardian of the Treaties and serving the European interest in all areas of EU policy intervention, putting at stake the legitimacy of its role in European integration.

This internalised predominance of a home affairs and criminalisation approach across the Commission structures finds no justification in the Treaties nor in the CFREU. It also runs contrary to relevant international/regional and EU human rights and labour standards. These standards show that socio-economic rights cannot be separated from other human rights and that they are intimately related to *human dignity*. Limiting or restricting access to healthcare, housing, food, or social assistance can amount to grave violations of the right to life and human dignity. These human rights must not be balanced against or waived in favour of migration policy priorities. This is consistent with Habermas's (2012) understanding of 'human dignity as the moral source from which all of the basic rights derive their substance' (p. 75). In this way, human dignity constitutes 'the key to the logical interconnections' between all human rights categories, and only 'in collaboration with each other can basic rights fulfil the moral promise to respect human dignity of every person equally' (ibid., p. 79).

A home affairs and criminalisation approach to irregularised human mobility contradicts the human dignity backbone of the EU fundamental rights system as enshrined in Article 1 of the CFREU. It is the inalienable human condition which constitutes the entry point for EU policy covering the situations and rights of irregularised people, irrespective of their status. Persons in situations of irregularity are rights holders and therefore entitled to socio-economic rights where these are required to protect their human dignity and right to life. Finally, a human dignity lens allows for the expansion of analysis from undocumented and/or irregularly staying TCNs to other additional forms of irregularity requiring equal access to human rights and justice.

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Annex 1: Dominant Approaches and Narratives on 'Irregularity' in the EU

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EU areas of intervention	Description	Treaty articles	Actors	Secondary legislation	Selected policy documents (priorities and agenda-setting)
Home Affairs	Schengen, Dublin, migration, border control, border management, entry conditions, residence conditions; law enforcement, police cooperation	Articles 67, 77, 78, 79, 87–89 TFEU	● DG HOME—C.1 ● DG HOME—C.2 ● Office of the anti-trafficking coordinator ● Frontex ● European Union Asylum Agency	● Schengen borders cod ● Visa code ● Common European asylum system, including the Dublin regulation ● Return directive Labour and legal migration ● Family reunification directive ● Long-term residents directive ● EU blue card directive ● Single permit directive ● Seasonal workers directive ● Intra-corporate transferees directive ● Research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing	● Communication on the Pact on Migration and Asylum ● Action Plan on Integration and Inclusion ● Talent Pool ● Skills and Talent Package ● Towards an operational strategy for more effective returns ● EU strategy on voluntary return and reintegration ● EU Strategy on Combatting Trafficking in Human Beings 2021-2025 ● EMPACT cycle ● EU Strategy to tackle Organised Crime 2021–2025 ● A renewed EU action plan against migrant smuggling (2021–2025) ● AMIF

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EU areas of intervention	Description	Treaty articles	Actors	Secondary legislation	Selected policy documents (priorities and agenda-setting)
Employment and social inclusion	Fair labour conditions, decent work, health and safety at work, undeclared work, equal, non-discriminatory access to social services and socio-economic rights	Article 3 TEU; Articles 9, 10, 45–48, 145–161 TFEU	● DG EMPL ● ELA (including European platform tackling undeclared work) ● EU OSHA ● CEDEFOP	● OSH framework directive and individual OSH directives ● Insolvency directive ● Working time directive ● Working conditions directive ● Part-time work directive ● Parental leave directive ● Work-life balance directive ● Young people at work directive ● Temporary agency workers directive	● European Pillar of Social Rights ● EU strategic framework on health and safety at work 2021–2027, Occupational safety and health in a changing world of work ● Proposal on improving working conditions in platform work ● EU Child Guarantee ● ESF + ● ERDF and Cohesion fund ● RRF
Fundamental rights	CFREU, human dignity	CFREU, Articles 2 and 6 TEU	● DG JUST—C.2 ● FRA		● Annual Reports on the application of the CFREU ● EU strategy on the rights of the child

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EU areas of intervention	Description	Treaty articles	Actors	Secondary legislation	Selected policy documents (priorities and agenda-setting)
Non-discrimination	Roma communities, LGBTIQ, gender equality	Article 21 CFREU; Articles 8, 18–19 TFEU	● DG JUST—Directorate D	● Employment equality directive ● Race equality directive	● A Union of equality: EU anti-racism action plan 2020–2025 ● EU Roma strategic framework for equality, inclusion and participation for 2020 – 2030
EU citizenship	European citizenship, free movement	Articles 20–21 TFEU; Article 45 CFREU	● DG JUST—C.4	● Citizens' rights directive ● Withdrawal agreement between EU and UK	● Guidance on the right of free movement of EU citizens and their families

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EU areas of intervention	Description	Treaty articles	Actors	Secondary legislation	Selected policy documents (priorities and agenda-setting)
Criminalisation	Use of criminal law or criminal-law like punitive approaches	Articles 82–86 TFEU; Article 7 CFREU	● DG JUST—A.3 ● DG HOME—C.1 ● Eurojust ● Europol	● Facilitators package ● Employers sanctions directive ● Anti-human trafficking directive ● Victims directive	● EU Strategy on Combatting Trafficking in Human Beings (2021–2025) ● EU strategy on victims' rights ● Commission Guidance on the implementation of EU rules on definition and prevention of the facilitation of unauthorised entry, transit and residence 2020/C 323/01

Source Authors' elaboration

Annex 2: List of Interviews

Sector	Position	Organisation	Date of interview	No of interview
EU institutions	Commission official	DG EMPL	28 Nov 2023	COM1
EU institutions	Commission official	DG HOME	18 Dec 2023	COM2
EU institutions	Commission official	DG HOME	19 Dec 2023	COM3
EU institutions	Commission official	DG EMPL	19 Dec 2023	COM4
EU institutions	Commission official	DG HOME	20 Dec 2023	COM5
EU institutions	Commission official	DG HOME	20 Dec 2023	COM6
EU institutions	Commission official	DG JUST	23 Jan 2023	COM7
EU institutions	Commission official	DG JUST	31 Jan 2023	COM8
EU institutions	Commission official	DG JUST	6 Feb 2023	COM9
EU institutions	EU agency official	ELA	28 Nov 2023	ELA1
EU institutions	EU agency official	FRA	21 Dec 2023	FRA1

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