

## LEGAL ASPECTS OF EU POLICY ON IRREGULAR IMMIGRATION

V. Voinikov\*



*This article focuses on the issue of adoption and development of legislation on irregular migration in the context of uncontrolled growth of the number of migrants from North Africa and the Middle East to the EU. This is a study of the EU legislation on irregular migration, as well as an attempt to classify it and analyze the future of EU migration legislation with the increase of irregular migration into the EU.*

*The author systematizes and classifies the current EU legislation on irregular migration, and analyzes the conditions in which this legislation was developed. Using the legislation analysis method, the author proposes the following classification of EU legislation on irregular migration: rules preventing assistance to irregular migration, rules preventing employment of irregular migrants, rules on the return of irregular migrants and readmission, rules on border control, and rules on collaboration with third countries. The author pays special attention to the current state of irregular migration to the EU, dubbed the 'greatest migration crisis in Europe', and concludes that the European Union succeeded in the development of pioneering legislation on irregular migration, which may serve as the basis for reception by other states. However, changes in the political and economic situation in the south of the Union have made the current legal mechanisms incapable of withstanding new threats. It necessitates a radical reform of the legislation on irregular migration.*

*Key words:* European Union, irregular migration, external EU borders, Frontex

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\* Immanuel Kant Baltic Federal University  
14 A. Nevskogo ul., Kaliningrad,  
236041, Russia.

*Submitted on August 27, 2015.*

doi: 10.5922/2079-8555-2015-4-4

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Recently, the European Union has faced increasing threats to the security of its external borders. According to the European Agency for the Management of Operational Cooperation at the External Borders of the EU (Frontex),

283,532 instances of illegal entry to the EU were registered in 2014 alone, a staggering 164% of that in 2013 [1].

The European Commission defines an irregular migrant as a citizen of a third country or a stateless person who enters the territory of an EU Member State illegally or a person who enters the territory of the EU legally but overstays the period for which entry was granted or whose reasons for entry changed without a permission of the receiving state's authorities [2].

Therefore, one can distinguish between two types of irregular migrants — 'illegal entry' and 'illegal overstay'. Legal tools to deal with each category of irregular migrants can differ. This article will focus on the problem of preventing *illegal entry* to the EU.

Two main types of illegal entry can be distinguished based on the way of entry: bypassing crossing points on the green (land)/blue (sea) border or going through crossing points using forged documents or other false means of entry. The most frequent type of irregular entry is bypassing crossing points.

The European Commission identifies three major routes of irregular entry — the Central Mediterranean (from North Africa via the Mediterranean Sea to Italy and Malta), Eastern Mediterranean (via Turkey to Greece, Bulgaria, or Cyprus), and Western Balkans (via Western Balkans to Hungary)[3]. According to Frontex, these routes accounted for 93% of all irregular entries to the EU in 2014 [1]. Based on the means of entry, one can distinguish between *illegal entry* and *human smuggling*.

In the first case, a migrant crosses the border independently, and, as a rule, without a third party's assistance. This act of illegal entry is characterised by the absence of direct outside help. While third parties can still assist the migrant in obtaining a visa or forged documents, renting vehicles, etc., these acts do not comprise an offence relating to illegal entry, being either independent offences or legal actions [4].

In the second case, facilitation takes place [5]. An important feature of this type of irregular migration is that the entry is organised not by a migrant but rather by an organised criminal network of human smugglers.

The illegal migrant plays a passive role in the process of border crossing, being either a customer or a victim. Depending on the migrant's attitude to illegal border crossing, the latter can be divided into two subgroups: illegal entry organised with consent or at request of the migrant, and illegal entry organised without either request or consent, i. e. human trafficking [6]. Human trafficking is one of the most dangerous types of illegal migration, since it is a crime against a person, which makes human trafficking a relatively independent subject area of the EU policy. Therefore, the problem of human trafficking is beyond the scope of this study.

The development of EU legislation on irregular migration started in the early 2000s. On November 15, 2001, the European Commission prepared a communication to the Council and the European Parliament on the common policy in illegal migration [7], which identifies six areas for possible actions preventing and fighting illegal migration: visa policy; infrastructure for information exchange, co-operation, and co-ordination; border management; police co-operation; alien law and criminal law; return and readmission poli-

cy. Based on this communication of November 15, 2001, a proposal for a comprehensive plan to combat illegal migration and trafficking of human beings in the European Union [8] was prepared in February 2002. The proposal contains a more detailed list of measures to prevent irregular migration.

Later, the European Union adopted a series of legislative acts, primarily directives, instrumental in the development of legal tools to combat different aspects of irregular migration. The system of legislation on irregular migration has the following elements.

### **1. Rules to prevent facilitation to unauthorised migration**

The European Union assigns an independent legal meaning to the notion of facilitation to unauthorised migration. In November 2002, two acts were adopted to increase the efficiency of measures to combat this phenomenon: Directive 2002/90/EC [9, pp. 17—18], introducing the notions of unauthorised entry, transit, and residence; and Framework Decision 2002/946/JHA [10, pp. 1—3] on the strengthening of the penal framework to prevent facilitation of unauthorised entry, transit and residence. According to the current legislation, the first act was adopted as part of the first pillar and the second one as part of the third pillar.

Directive 2002/90/EC defines a person guilty of facilitation of unauthorised migration as: (a) a person who intentionally assists a non-EU country national to enter or transit through the territory of an EU country, in breach of laws; (b) a person who intentionally, and for financial gain, assists a non-EU country national to reside in the territory of an EU country, in breach of laws.

The Framework Decision 2002/946/JHA established requirements for criminal responsibility for acts identified in Directive 2002/90/EU, common to all EU countries. Moreover, according to Articles 2 and 3 of the Framework Decisions, Member States should establish responsibility of legal persons for the above actions.

Moreover, in 2006 [11, 12], the European Union acceded to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime [5].

### **2. Rules to prevent employment of irregular migrants**

An important step in this direction was the 2009 adoption of Directive 2009/52/EC on minimum standards on sanctions and measures against employers of illegally staying third-country nationals [13, p. 24—32]. The Directive is aimed against the ‘pull factor’ for illegal migration. Most irregular migrants come to the EU seeking employment. Directive 2009/52/EC imposes a general prohibition on the employment of third-country nationals who do not have the right to reside in the EU. In particular, the Directive defines a third-country national who does not have the right to be resident in the EU as a person who resides in an EU country and who does not meet the conditions for residence in that country. Therefore, the scope of the Directive does not extend to persons legally residing in the EU but working without a necessary permission.

According to the Directive, in case of a violation of the employment prohibition, Member States have to establish liability for the employer.

The Directive suggests the following types of employer's liability:

- a) financial sanctions include payments of the costs of return of illegally employed third country nationals;
- b) administrative sanctions — temporary or permanent closure of the establishment, or temporary or permanent withdrawal of a licence;
- c) criminal penalties in the presence of qualifying elements; both natural and legal persons can face criminal charges;
- d) other measures, including, exclusion from entitlement to public benefits, aid, and subsidies; exclusion from participation in a public contract, etc.

### 3. Rules on return of irregular migrants and readmission

To meet the objectives provided for by the 2002 Green paper on a community return policy on illegal residents, the Council and Parliament adopted a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive) [14, p. 98—107].

The Directive is to provide clear and transparent common rules on returning illegal migrants, using coercive measures, detention, and readmission. To increase the efficiency of return of irregular migrants, the EU adopted a series of legislative acts regulating legal and intelligence cooperation between the EU countries. These acts include the Directive on assistance in cases of transit for the purposes of removal by air [15, pp. 26—31], the Decision on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders [16, p. 28—35], and the Directive on the mutual recognition of decisions on the expulsion of third country nationals [17, p. 34—36].

Readmission is an important EU policy on returning illegal migrants. Readmission is a state's obligation under an international agreement to admit its nationals or nationals of third countries once residing in that state and subject to removal from another state. According to the European Commission, in 2010—2012, only 36% of all decision on the removal (deportation) of irregular migrants was implemented [18]. One of the key causes of such low performance is insufficient cooperation with the source country.

That is why the European Union pursues a policy towards establishing readmission agreements with third countries. In November 1994, the Council adopted a recommendation concerning bilateral readmission agreements between the Member States and third countries [19, p. 20—24]. However, after the Amsterdam Treaty entered into force, the competence to be a party in readmission agreements was transferred from the individual Member States to the EU.

As of May 2015, the EU entered readmission agreements with 17 European, Asian, and African countries [20].

#### **4. Rules regulating relations concerning external border protection**

In the EU, border protection functions are performed by national border services. However, border management legislation is still drawn up at national levels. The EU countries have to perform this function more efficiently, through strengthening cooperation, among other means. One of such tools is the European Border Surveillance System (EUROSUR).

In October 2013, the Regulation of the European Parliament and of the Council on establishing the European Border Surveillance System was adopted [21, p. 11—26]. EUROSUR is a cooperation and information exchange mechanism supporting joint border management, which makes it possible for Frontex to cooperate at tactical, strategic, and intelligence levels. Eighteen states sharing a border with third countries cooperate within these programs.

The basis of EUROSUR is a network of national coordination centers (NCCs) designed to coordinate border surveillance at the national level. NCCs collect all relevant information about the border situation and develop an operative plan. Later the plan is submitted to the other Member States and Frontex, the agency responsible for developing and distributing the European operative plan between all Member States.

In effect, this system does not create a new external border management system, nor does it replace the existing systems. It is aimed at structuring the existing national border management systems in order to prevent illegal entries, control transnational crimes, and save the lives of migrants.

#### **6. Rules on cooperation with third countries**

Special attention is paid to cooperation with third countries in preventing illegal migration. It is worth stressing that such cooperation takes place in multiple fields, ranging from concluding international agreements to providing economic assistance.

One form of cooperation is the creation of a network of liaison officers. The officers deployed to third countries are commissioned to support the implementation of EU measures to prevent irregular migration. On February 19, 2004, the EU Council adopted a regulation on the creation of a migration liaison officer network [22, p. 1—4]. This regulation provides that each Member State is to post a liaison officer to a third country to establish and support contacts with the authorities of the host country in the field of migration. Moreover, liaison officers cooperate with their counterparts from other Member States deployed in the same third states through creating a local network. This legislation system served as the basis for a mechanism to combat traditional threats associated with irregular migration.

However, as the Union legislation was developing, the EU faced new challenges. Not only was the number of irregular migrants increasing each year, but also the range of potential threats to border security expanded. In 2015, the migration situation in the European Union deteriorated. Experts

observed a significant increase in the number of irregular migrants on all major routes. According to the UN data, 60,000 migrants crossed the Mediterranean in the first five months of 2015 [23]. Moreover, the number of victims of illegal transportation of migrants increased. The same data suggest that approximately each thirtieth migrant crossing the Mediterranean died before reaching the EU shores. Migrants are often transported using vessels unsuited for long voyages. Sometimes those who manage the transportation would leave the vessel in case of danger, thus abandoning their ‘passengers’.

In April 2015, yet another tragedy struck at the Mediterranean: a vessel from North Africa carrying, according to different estimates, from 700 to 900 illegal migrants, sank off the coast of Sicily.

Another threat is posed by members of extremist groups entering the EU to recruit the Union’s citizens to participate in regional armed conflicts. Experts argue that ISIS has already infiltrated the flow of migrants following from North Africa and the Middle East to Europe via the Mediterranean [24]. This information was substantiated by Eurojust [25]. An increase in the number of terrorist attacks on the countries of North Africa, the Middle East, and the EU is another proof of terrorism advancing on the EU.

In July 2015, the problem of irregular migration surfaced once again, this time not on the coast of the Mediterranean, but on the relatively calm shores of the English Channel. In the vicinity of the French city of Calais, a large group of migrants struck on a cargo terminal servicing the railway tunnel under the English Channel (Eurotunnel) to enter the UK illegally.

We should note that the problem of transporting migrants from France to the UK is not new — this route has been used for years. According to the French newspaper *Le Figaro*, there are at least four ways to transport migrants illegally via the Eurotunnel at rates ranging from 500 to 10,000 euros depending on the scope of ‘services’ provided [26].

Against the background of an increasing irregular migration threat, the Calais crisis emphasised another problem of the Union’s migration policy. Alongside preventing irregular entry to the EU, there is a need to develop mechanisms for preventing free movement of irregular migrants within the Union.

The Calais events are a logical consequence of the migration crisis in the European Union. Wars and failing economies in the countries of North Africa and the Middle East force people to leave these regions for prosperous Europe using dangerous ways to reach their destination [27].

As a response to the increase in the number of irregular migrants, EU Member States started strengthening their southern borders — Hungary, Bulgaria, Greece, and Spain began building walls along their external frontiers. All the above events make it possible to speak of an unprecedented migration crisis in the European Union [28].

It became evident that the existing measures were not fit for the task. The situation is aggravated by a number of factors:

- 1) a steep increase in the number of unauthorised and uncontrolled entries to the EU;
- 2) deaths of migrants;

- 3) growing crime rate associated with human trafficking and slavery;
- 4) rise of European extremism;
- 5) deterioration of the political and economic situation at EU borders;
- 6) financing of terrorism through illegal transportation of migrants.

Apparently, the problem of illegal migration to the EU is changing its face and thus forcing European officials to revisit the issue. On April 23, 2015, a special meeting of the European Council [29] dedicated to illegal migration took place. The European Council identified four major areas of preventing irregular migration — strengthening presence at sea, fighting the traffickers, preventing illegal migration flows, and reinforcing internal solidarity and responsibility.

On May 13, 2015, the European Commission prepared a communication entitled the European Agenda on Migration [30]. The communication outlined a number of organisational measures to facilitate prevention of irregular migration and eliminate conditions contributing to its growth. These measures can be divided into primary and mid- and long-term initiatives.

Primary measures are focused on rescue operations at sea and tracking and possible destruction of smugglers' infrastructure, primarily vessels. The EU plans to carry out these operations in both neutral waters and territorial waters of North African countries (Libya).

Such measures raised concerns as to compliance with the rules of international law. Evidently, sinking vessels in international waters is possible only with sanction from the UN Security Council. Moreover, it is unclear how the existing EU services can identify vessels used to transport migrants. Libya's representative to the UN voiced strong opposition to such measures [31]. The Secretary-General of the UN also expressed concerns about the EU plans to sink vessels used to transport migrants. Moreover, the European Commission deemed it necessary to strengthen cooperation with the source countries and provide technical and organisational assistance to the border EU states. As to legislative measures, the European Commission proposed new schemes for resettlement and relocation of persons in need of protection.

In this context, resettlement is the transfer of non-EU national or stateless persons who have been identified as in need of international protection from a third country to an EU state. Relocation is the transfer of persons who are in need of or already benefit from a form of international protection in one EU Member State to another EU Member State.

On July 20, 2015, the Council issued a draft resolution requesting Member States to approve a temporary mechanism of relocating 32,256 persons in need of international protection from Italy to Greece. A decision on relocating another 7,744 people had to be made until the end of 2015 [32]. First-stage relocation had to be carried out in accordance with quotas established in an appendix to the resolution. Germany and France are to accept the largest number of migrants — 10,500 and 6,752 people respectively — under the quota system.

The relocation system is based on objective criteria showing the ability of EU Member States to accept and integrate a certain number of migrants. These criteria contain four differently weighted elements — population size

(40%), GDP (40%), average asylum application number (10%), and unemployment rate (10%).

The relocation mechanism is both temporary and extraordinary. This means that it has to be introduced at once due to the extreme situation. However, the EU needs to develop a permanent relocation scheme, should extraordinary circumstances arise again.

Denmark and the UK do not take part in this mechanism.

According to Article 1 of Protocol 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice supplementing the Treaty on the Functioning of the European Union [33, pp. 295], the UK and Ireland do not participate in decision-making in the area of freedom, security and justice, including migration issues. However, the Protocol suggests that these states can take part in certain mechanisms voluntarily. Denmark is granted a similar position under Protocol 22.

In view of the mentioned positions, the UK and Denmark decided against participating in the relocation mechanism, while Ireland, according to Article 3 of Protocol 21, expressed its resolve to participation in the decision-making process. The Council approved the decision on the transfer of persons in need of international protection to the EU. It was planned to resettle 22,504 people to all EU Member States, including the UK, Ireland, and Denmark, as well as Switzerland, Iceland, Norway, and Lichtenstein. Most potential refugees were to be resettled to Norway (3,500 people).

The resolution of July 20, 2015 was a preliminary one, to be formalised through corresponding Council procedures in autumn 2015.

Alongside the above primary measures, the European Council plans to increase financial assistance to both EU Member States and third countries in mid- and long-term perspective. It is also planned to improve asylum law and laws on preventing irregular migration. A special role is assigned to strengthening cooperation with third countries — sources of irregular migration. These issues will be discussed at the Valetta Summit with the participation of EU and African leaders. The Summit will focus on issues relating to strengthening cooperation to neutralise the causes of irregular migration and to combating human smuggling and human trafficking.

## Conclusions

Based on the study, it can be concluded that over the past decade and a half the European Union managed to develop and introduce legal tools to respond to traditional challenges to security associated with irregular migration and human trafficking.

The above legislative system is a reflection of advanced practices in preventing irregular migration it can serve as a basis for reception by other countries.

At the same time, short-sighted policies pursued by some of the EU Member States in North African and Middle Eastern regions aimed to overthrow undesirable regimes resulted in the emergence of new threats that cannot be tackled using traditional tools. This calls for a radical change in the



whole spectrum of tools used to combat irregular migration, whose efficiency might be tested in the near future.

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### *About the author*

*Dr Vadim Voinikov*, Associate Professor, the Department of International and European Law, IKBFU, Russia.

E-mail: [voinicov@yandex.ru](mailto:voinicov@yandex.ru)