Chapter 3
In the Territory: The Use of Substantive Criminal Law to Regulate the Presence of Migrants

3.1 Introduction

The past decade witnessed a growing emphasis on the use of substantive criminal law as a means of enforcing immigration control in Europe. This chapter will map the evolution and content of such criminalisation at the European Union and national level, by exploring the intersection between migration law and criminal law at the level of the European Union and by examining the challenges that criminalisation poses for the relationship between European Union law and national immigration law. For these purposes, the chapter will employ a narrow definition of criminalisation, which is defined as the use of substantive criminal law to treat conduct related to migration flows as a criminal offence and to impose sanctions for the breach of criminal law. The analysis will take place at two levels: at the level of criminalisation of migration in the law of the European Union; and at the level of the criminalisation of migration by European Union Member States. The first part of the chapter will thus examine the various ways in which European Union law has employed criminal law in order to deal with immigration enforcement. The second part will examine the ways in which Member States of the European Union have criminalised migration and will highlight the limits that European Union law has posed on state sovereignty and the power of the state to criminalise. The chapter will thus test the protective function of European Union law, in setting limits to state power and safeguards for the migrants who fall within the reach of criminal law.

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3.2 The Criminalisation of Migration in the Law of the European Union

The European Union legislator has adopted a number of measures dealing with the criminalisation of migration. However, and unlike recent trends in certain EU Member States, European Union law has not criminalised the conduct of migrants as such. Rather, the law has focused primarily at targeting individuals who facilitate in one way or another irregular migration. Such criminalisation has been founded on a broader process of securitization of migration, with phenomena of human trafficking and human smuggling viewed as global security threats linked to the threat of transnational organized crime. A second wave of criminalisation measures has been linked with the broader trend towards the privatisation of immigration control, whereby the private sector (including in this case employers) are co-opted by the State to assist in immigration control and to prevent irregular movement or stay. While such criminalisation does not necessarily lead to the imposition of criminal sanctions on migrants themselves, it has potentially a significant impact on their rights and their visibility vis-à-vis the State.

3.2.1 Criminalisation as Securitisation: The Criminalisation of Human Trafficking

The criminalisation of human trafficking and human smuggling in European Union law follows closely the approach adopted by the 2,000 United Nations Convention on Transnational Organised Crime (the Palermo Convention), with the European Union playing a key part in its negotiation.[1] The Convention includes two Protocols, one on human trafficking and one on human smuggling. The first major global effort to legislate on immigration control was thus made possible on the basis of security considerations.[2] According to Gallagher, "[w]hile human rights concerns may have provided some impetus (or cover) for collective action, it was clearly the sovereignty/security issues surrounding trafficking and migrant smuggling, as well as the perceived link with organized criminal groups operating across national borders, that provided the true driving force behind such efforts."[3] Rather than focusing on the rights of migrants, the Trafficking and Smuggling Protocols were justified primarily on the basis of the need to protect states from transnational criminality. This securitisation approach has been criticized heavily for effectively criminalizing migration and extending the reach of the state, with James Hathaway arguing that "the focus of the transnational effort against human trafficking on the

[1] See Mitsilegas (2011).

[2] See Mitsilegas (2012).

[3] Anne T. Gallagher, The International Law of Human Trafficking 71 (2010).

prevention of cross-border movements created a legal slippery slope in which it proved possible to set a transnational duty to criminalize not only 'human trafficking' … but also the much broader phenomenon of human smuggling,"[4] and that the U.N. intervention is really a pretext for the globalization of border control.[5]

The first major legal instrument criminalising human trafficking at EU level has been the 2002 Framework Decision on combating trafficking in human beings.[6] The Framework Decision put forward a comprehensive criminalisation framework[7]: it established criminal offences for the trafficking in human beings which mirrored to a great extent the definitions of trafficking included in the Palermo Convention[8] and called upon Member States to punish these offences with substantial sanctions.[9] The Framework Decision prioritised criminalisation and enforcement over the rights of the victims of trafficking, containing only limited and general provisions on the protection of victims.[10]

A similar approach to victims' rights was also reflected in the subsequent Directive on Residence Permits to Victims of Trafficking,[11] which was adopted with the specific purpose "to define the conditions for granting residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country

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[4] James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking,"* 49 Va. J. Int'l L. 1, 5 (2008). *But see* Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway* 49 Va. J. Int'l L. 789 (2009).

[5] Hathaway, supra note 4, at 25–35.

[6] COUNCIL FRAMEWORK DECISION of 19 July 2002 on combating trafficking in human beings (2002/629/JHA) L203/1, 1.8.2002.

[7] For an analysis of the 2002 Framework Decision see Obokata (2003).

[8] Article 1(1) of the Framework Decision calls upon Member States to take the necessary measures to ensure that the following acts are punishable: the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person, where: (a) use is made of coercion, force or threat, including abduction, or (b) use is made of deceit or fraud, or (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved, or (d) payments or benefits are given or received to achieve the consent of a person having control over another person *for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.*

[9] See in particular Article 3(2) which called for high levels of sanctions (imprisonment with a maximum penalty of no less than 8 years) if any of the following aggravating circumstances have occurred: (a) the offence has deliberately or by gross negligence endangered the life of the victim; (b) the offence has been committed against a victim who was particularly vulnerable (a victim shall be considered to have been particularly vulnerable at least when the victim was under the age of sexual majority under national law and the offence has been committed for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including pornography) (c) the offence has been committed by use of serious violence or has caused particularly serious harm to the victim; (d) the offence has been committed within the framework of a criminal organisation.

[10] See Article 7.

[11] Council Directive 2004/81, 2004 O.J. (L 261) 19 (EC).

nationals who cooperate in the fight against trafficking in human beings or against action to facilitate illegal immigration".[12] The Directive places a duty on Member States to consider issuing a residence permit for victims of trafficking if the following conditions are met: the opportunity presented for the victim to prolong his or her stay on its territory for the investigations or the judicial proceedings; the demonstration by the victim of a clear intention to cooperate; and the victim having severed all relations with those suspected of human trafficking.[13] The residence permit provided is entirely conditional upon the progress of the criminal proceedings—it will not be renewed if the above conditions cease to be satisfied or if a decision adopted by the competent authorities has terminated the relevant proceedings.[14] Security of residence may thus be provided to victims only if they facilitate the prosecution of suspected traffickers.

The relationship between the enforcement and protective aspects of EU trafficking legislation has been somewhat rebalanced after the entry into force of the Lisbon Treaty by the recent adoption of the 2011 Directive on Trafficking in Human Beings.[15] The Directive, which is the outcome of a co-decision process between the Council of Ministers and the European Parliament replaces the 2002 Framework Decision in relation to Member States who participate in it.[16] The Directive extends and intensifies criminalisation, in particular by expanding the concept of exploitation in the definition of the trafficking offences,[17] by raising the penalty levels for trafficking in human beings[18] and by expanding the concept of vulnerability as an

[12] See Article 1.

[13] See Article 8.

[14] See Article 13(1).

[15] Council Directive 2011/36, 2011 O.J. (L 101) 1 (EU). DIRECTIVE 2011/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (OJ L101/1, 15.4.11).

[16] Article 21.

[17] Article 2(3) of the Directive calls for the punishment of 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 of a 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. Exploitation includes, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs (Article 2(5)).

[18] The Directive now provides for a penalty threshold for all trafficking offences defined therein (a maximum penalty of at least 5 years of imprisonment). The sentence level rises to a maximum penalty of at least 10 years of imprisonment where one of the following aggravating circumstances occur: the offence was committed against a victim who was particularly vulnerable, which, in the context of this Directive, shall include at least child victims; the offence was committed within the framework of a criminal organization; the offence deliberately or by gross negligence endangered the life of the victim; or was committed by use of serious violence or has caused particularly serious harm to the victim. Member States must also treat the commission of trafficking by public officials in the performance of their duties is regarded as an aggravating circumstance (Article 4).

aggravating circumstance enhancing the penalty threshold for trafficking.[19] However, at the same time it includes a wide range of provisions on the rights of victims of trafficking. The Directive includes provisions on the protection of victims of trafficking in human beings in criminal investigation and proceedings[20]; on assistance, support and protection measures for child victims of trafficking in human beings[21]; on assistance and support to child victims[22]; on protection of child victims of trafficking in human beings in criminal investigations and proceedings[23]; on assistance, support and protection for unaccompanied child victims of trafficking in human beings[24]; on compensation to victims and access to national compensation schemes[25]; and on the non-prosecution or imposition of penalties on victims for their involvement in criminal activities they have been compelled to commit as a direct consequence of being subjected to trafficking.[26] The new trafficking Directive thus combines a strong criminalisation focus with an emphasis on the need to protect victims of trafficking. The Directive provisions must also be viewed in the light of the judgment of the European Court of Human Rights in *Rantsev*, where the Court held that trafficking was prohibited by Article 4 of the ECHR (on the prohibition of slavery and forced labour) and stressed that compliance with Article 4 requires Member States to comply with a series of positive obligations to protect victims of trafficking.[27] However, and notwithstanding these developments, it should be noted that a number of the victims' provisions in the new trafficking Directive continue to be framed in whole or in part under a logic of prosecutorial efficiency.[28] Moreover, the fact remains that victim protection continues, after the adoption of the 2011 Directive, to be disassociated from security of residence as the 2004 Directive on residence permits for victims of trafficking remains in force.

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[19] A position of vulnerability is defined generally as a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved (Article 2(4)).

[20] Article 12.

[21] Article 13.

[22] Article 14.

[23] Article 15.

[24] Article 16.

[25] Article 17.

[26] Article 8.

[27] *Rantsev v Cyprus and Russia,* judgment of 7 January 2010, Application no. 25965/04. For a critical analysis, see Stoyanova (2012).

[28] Referring to the justification for Article 8 of the Directive, the Preamble states that, "[t]he aim of such protection is to safeguard the human rights of victims, to avoid further victimisation *and to encourage them to act as witnesses in criminal proceedings against the perpetrators*." (emphasis added) *Id.* at 3.

3.2.2 Criminalisation as Securitisation: The Criminalisation of the Facilitation of Unauthorised Entry, Transit and Residence

An extensive criminalisation approach has been adopted in the context of the aim of combating human smuggling (or, in more neutral EU terminology, the facilitation of unauthorized entry, transit and residence), with a key question in this context being whether the criminalisation of smuggling would lead to the criminalisation of smuggled migrants themselves. This issue has been partly addressed by the Palermo Convention Protocol on the Smuggling of Migrants. While the Protocol expressly states that migrants will not become liable to criminal prosecution for the fact of having been the object of smuggling,[29] the provision on the criminalisation of smuggling expressly states that it does not prevent states from taking measures against a person whose conduct constitutes an offense under their domestic law.[30] The Smuggling Protocol thus does not prevent states from treating illegal entry, stay, or residence as such as criminal offenses under their domestic law.[31] Moreover, the Smuggling Protocol does not exclude the criminalisation of individuals or organizations providing assistance to individuals for the purposes of them accessing or remaining in the territory of states in order to lodge an application for asylum.

An expansive approach to the criminalisation of human smuggling is reflected in EU law. The relevant legal framework is set out by a Directive defining what is called in EU law the "facilitation of unauthorized entry, transit and residence"[32] accompanied—in the light of the first pillar competence limits regarding criminalisation at the time[33]—by a third pillar Framework Decision confirming that conduct which is defined as facilitation in the Directive will be treated as a criminal offence.[34] The EU Directive goes further than the Smuggling Protocol in that it dispenses with the condition of obtaining a financial or other material benefit for the smuggling offence to be established.[35] The Directive calls upon member states to adopt criminal sanctions for "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 … ". The Framework Decision contains a general obligation for Member

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[29] *Id.* at 7.

[30] Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the Convention Against Transnational Organized Crime Article 6(4), Nov. 15, 2000, *available at* http://www.unhcr.org/refworld/docid/479dee062.html [hereinafter Smuggling Protocol].

[31] *Id.*

[32] Council Directive 2002/90, 2002 O.J. (L 328) 19 (EC).

[33] See Mitsilegas (2009).

[34] COUNCIL FRAMEWORK DECISION of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (2002/946/JHA), L 328/1, 5.12.2002.

[35] *See* Article 1(1)(a), *id.*

States to criminalise such conduct[36] and imposes specific high levels of sanctions only when certain aggravating circumstances occur.[37] In spite of the lack of specificity as regards the level of criminal sanctions to be imposed by Member States,[38] it is clear that the scope of criminalization at EU level is very broad as it can cover any form of assistance to enter or transit the territory of an EU Member State in breach of what is essentially administrative law (such as cases where the migrant is traveling without travel documents).

Such broad criminalisation may have a negative impact on the position of third-country nationals seeking access to the European Union in order to apply for international protection. The scope of the criminal offences prescribed in EU law may lead to the prosecution of any individual or member of an organisation who provides advice or assistance to migrants. The Directive does attempt to address this issue by providing Member States the option not to impose sanctions for human smuggling by applying their national law and practice for cases where the aim of the behavior is to provide humanitarian assistance to the person concerned.[39] However, this provision is discretionary and its value in redressing the balance set out by the broad definition and criminalisation of human smuggling under EU law is questionable. By using the threat of criminal sanctions, the EU measures on human smuggling essentially aim at deterring individuals and organisations from coming into contact and assisting any third-country national wishing to enter the territory of EU Member States. As has been noted in an issue paper published by the Council of Europe Commissioner for Human Rights, "the message which is sent is that contact with foreigners can be risky as it may result in criminal charges."[40]

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[36] According to the Framework Decision, Each Member State shall take the measures necessary to ensure that the infringements defined in Articles 1 and 2 of the Directive are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition (Article 1 (3)). Article 1(6) of the Framework Decision further states that If imperative to preserve the coherence of the national penalty system, the actions defined in para 3 shall be punishable by custodial sentences with a maximum sentence of not less than 6 years, provided that it is among the most severe maximum sentences available for crimes of comparable gravity.

[37] According to Article 1(3), Member States must ensure that,when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than 8 years where they are committed in any of the following circumstances: the offence was committed as an activity of a criminal organization; and the offence was committed while endangering the lives of the persons who are the subject of the offence.

[38] According to the European Commission, this has led to a wide range of penalties imposed by Member States in the transposition of the Framework Decision—*Report from the Commission based on Article 9 of the Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence*, COM (2006) 770 final, Brussels, 6.12.2006.

[39] See Article 1(2), Council Directive 2002/90, supra note 28.

[40] Elspeth Guild, *Criminalisation of Migration in Europe: Human Rights Implications*, Council of Eur., Comm'r Hum. Rts. 39 (2009).

3.2.3 Criminalisation as Privatisation: The Introduction of Employers' Sanctions

A more recent expansion of the criminalisation of migration at EU level concerns the imposition of criminal sanctions on employers of irregular migrants. This move is part of a general trend towards the privatisation of immigration control, whereby the private sector is co-opted by the state in order to conduct what are essentially state functions of immigration control.[41] Thus far the privatisation of immigration control has focused primarily on the prevention of entry into the territory by requiring the private sector (in particular carriers) to conduct immigration controls *before* entry into the territory—with privatisation acting thus as a form of extra-territorial immigration control.[42] The imposition of criminal sanctions on employers of irregular migrants extends the privatisation of immigration control *after* entry in the territory, thus multiplying the criminal law enforcement avenues for those deemed to facilitate irregular residence. However, and along with the broader question of whether the private sector can legitimately be asked to assume immigration control duties, the extent to which *criminal* law is the most effective and proportionate means of privatising immigration control is contested.

The debate on the extent to which criminalisation is the optimal way forward towards privatising immigration control by imposing obligations on employers is reflected in the content of the recently adopted EU Directive on employers' sanctions.[43] The Directive prohibits the employment of 'illegally staying' third-country nationals.[44] An 'illegally staying' third-country national are defined as 'a third-country national present on the territory of a Member State, who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State.'[45] The scope of the Directive is thus broad, apparently including the employment of both third-country nationals who have entered the territory of a Member State irregularly, and the employment of overstayers. In addition to this prohibition, the Directive imposes a series of extensive immigration-related duties upon employers, including identification, record-keeping and reporting duties on employers.[46] Sanctions for the infringement of the prohibition to employ 'illegally staying' third-country nationals are mainly financial,[47] but the Directive provides also for alternative sanctions such as exclusion from public procurement.[48] Failure to comply

[41] See Mitsilegas in *Indiana Journal of Global Legal Studies, call-out.*

[42] Mitsilegas (2010).

[43] Council Directive 2009/52, 2009 O.J. (L 168) 24 (EC).

[44] See Article 3(1). However, Member States are granted the discretion not to apply this provision to illegally staying third-country nationals whose removal has been postponed and who are allowed to work in accordance with national law (Article 3(3)).

[45] Article 2(b).

[46] See Article 4(1).

[47] See Articles 5–6.

[48] See Article 7.

with the identification and reporting duties imposed by Article 4(1) of the Directive also triggers liability for the infringement of the prohibition of illegal employment set out in Article 3: the Directive obliges Member States to ensure that employers who have fulfilled these obligations are not held liable for an infringement of the prohibition of illegal employment unless the employers knew that the document presented as a valid residence permit or another authorization for stay was a forgery.[49] The Directive thus attempts to strike a balance between the aim of rendering employers responsible for checking and recording residence permits of third-country nationals on the one hand, and the aim of addressing the employers' concerns that they are in no position to proactively identify forged documents on the other. However, it is clear that by equating liability for illegal employment with liability for failure to comply with identification obligations, the Directive aims at establishing a far-reaching layer of privatised control of third-county nationals residing in the territory of EU Member States.

While the employers' sanctions Directive imposes a wide range of duties to the private sector, the use of criminal law for the breach of these duties is limited to specific circumstances. Criminal law sanctions apply only for the intentional infringement of the prohibition of illegal employment under Article 3 (and not for the breach of the identification, recording and reporting obligations set out in Article 4 of the Directive); in accordance with the limits to the then first pillar (Community) criminal law competence set by the Court of Justice in its ship-source pollution ruling,[50] the level of criminal sanctions is not specified (infringements are punishable in general by effective, proportionate and dissuasive criminal penalties)[51]; and criminal sanctions apply only if the following aggravating circumstances occur as regards the infringement of Article 3: the infringement continues or is persistently repeated; is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals; is accompanied by particularly exploitative working conditions; is committed by an employer who, while not having been charged with or convicted of a human trafficking offence, uses work or services exacted from an illegally staying third-county national with the knowledge that he or she is a victim of trafficking in human beings; or relates to the illegal employment of a minor.[52] The Directive thus uses criminal law to address not only traditional aggravating circumstances (such as persistent offending) but also as a means of acknowledging the need to protect vulnerable migrants who are subject to various forms of exploitation.

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[49] Article 4(3).

[50] *Commission v. Council, Case C-440/05* ECR [2007] I-9097. For an analysis, see Mitsilegas (2009).

[51] Article 10(1). This approach may lead to considerable differences in national implementing law. For an initial overview of implementation trends, see Commission Staff Working Paper accompanying the Commission's Annual Report on Immigration and Asylum (2010), SEC (2011) 620 final, Brussels, 24.5.2011, pp. 27–28.

[52] Article 9(1).

The proclaimed focus of the Directive on tackling exploitation[53] is also reflected in the insertion of further provisions aimed at targeting the private sector when employing irregular migrants under exploitative conditions. At the heart of these provisions is an effort to make irregular migrants come forward and report instances of exploitation. In this light, the Directive places Member States under the duty to ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State.[54] Member States must ensure in this context that third parties which have a legitimate interest in ensuring compliance with the Directive, may engage either on behalf of or in support of an illegally employed third-country national, with his or her approval, in any administrative or civil proceedings provided for with the objective of implementing the Directive.[55] However, the legal position of third parties who assist irregular migrants in this context is uncertain, as, was analysed earlier in the chapter, they may be held criminally liable for facilitating unauthorised residence. Acknowledging this risk of criminalisation, the employers' sanctions Directive includes a safeguard clause according to which providing assistance to third-country nationals to lodge complaints will not be considered as facilitation of unauthorized residence under Directive 2002/90/EC.[56]

The Directive does not stop there, but includes a call to irregular migrants *themselves* to cooperate with state authorities with the view of tackling employer exploitation. Adopting a strategy similar to the content of the Directive on residence permits on victims of trafficking (analysed earlier in the chapter), the employer sanctions Directive states that, in respect of criminal offences covered by Article 9 (1)(c) (the infringement is accompanied by particularly exploitative working conditions) or (e) (the infringement relates to the illegal employment of a minor), Member States will define in national law the conditions under which they may grant, *on a case-by-case basis, permits of limited duration*, *linked to the length of the relevant national proceedings*, to third-country nationals involved, under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC (residence permits for victims of trafficking).[57] As with the Directive on residence permits for victims of trafficking, the employer sanctions Directive provides with extremely limited safeguards on security of residence: residence permits will be granted on a case-by-case basis (thus subject to state discretion), will be of limited duration, and are again framed purely within a logic of prosecutorial efficiency (they are linked to the relevant national proceedings). The Directive thus asks migrants in an irregular situation to

[53] See also recital 13 of the Preamble.

[54] Article 13(1).

[55] Article 13(2).

[56] Article 13(3).

[57] Article 13(4). Emphasis added.

come forward and present themselves to the state without offering any legal certainty as to the rights which will be conferred to them if they cooperate and without excluding the prospect of their subsequent return. It remains to be seen whether this provision when implemented by Member States will have any real impact, especially in view of the fact that the vulnerability of exploited workers is not necessarily reflected in detail in EU law compared to the vulnerability of victims of trafficking.

The above analysis demonstrates a double contradiction at the heart of the employer sanctions Directive: the Directive's main objective is to apply what Garland has called the 'responsibilisation strategy'[58] to the private sector, by requiring employers to (pro)actively cooperate with the state in tackling irregular employment. Employers are thus viewed as allies to the state, but at the same time they are viewed as targets: irregular migrants, trade unions and other organizations are urged to come forward and denounce exploitation in the workplace. This contradiction is also replicated with regard to migrants themselves: irregular migrants are seen as allies to the state (in being helpful in denouncing exploitation) but they are also obviously the main targets of the Directive, whose aim is to make it more and more difficult for these migrants to find work. This double contradiction poses real obstacles to the Directive achieving its stated aims. It is compounded by the fact that the criminalisation of migration in other EU law instruments provides few safeguards for migrants and citizens alike. The extensive criminalisation of the facilitation of unauthorised entry and residence has the potential of minimising contact by NGOs, other organisations and individuals with migrants under the threat of criminal prosecution. On the other hand, migrants are offered with extremely limited rights as a reward for them cooperating with the state to tackle irregular migration. As will be seen in the next part, however, the disassociation of this law and policy area from pure state discretion and the very existence of secondary EU law in these fields may be a step forward towards providing safeguards from migrants, when interpreted in the light of European Union constitutional law and its general principles.

3.3 European Union Law as a Limit to the Criminalisation of Migration by EU Member States

While European Union law has not explicitly treated breaches of immigration requirements by migrants themselves as criminal offences as such, such trends have been increasingly prevalent in the national legislation of a number of EU Member States. Key examples in this context have been the treatment of irregular entry and residence per se as a criminal offence; and the criminalisation of the failure to comply with return instructions. This punitive turn at the national level has posed

[58] Garland (1996).

considerable challenges for European Union law. The shared competence between Member States and the European Union in the field of migration law raises complex issues with regard to the degree of sovereignty or discretion left to Member States when they legislate on irregular migration and when they promote legislative choices resulting in the criminalisation of migration. A key question in this regard is whether European Union law poses limits to the power of Member States to adopt national legislation in the field. This part of the chapter will examine the limits that European Union law places on domestic criminal law in general. The analysis will then focus on two recent judgments of the Court of Justice of the European Union focusing specifically on the compatibility of national legislation criminalizing migration with European Union law. The limits posed to the national legislator by EU law will be dissected, and the protective function of European Union law as regards the position of the migrant will be highlighted.

3.3.1 The Limits of EU Law on National Criminal Law

The debate on the existence and extent of a role for the European Union in the field of criminal law has been long-standing.[59] It appeared long before Member States decided to confer express powers to the European Union (but not to the then European Community) to legislate in criminal matters (in the Maastricht Treaty) and certainly before the entry into force of the Lisbon Treaty which abolished the third pillar and streamlined to a great extent Union powers in the field. Already in the days of the Treaty of Rome, it became clear that it was impossible to draw a neat distinction between legislation related to the four freedoms and the single market on the one hand, and criminal law on the other. While the European Community at the time did not possess express competence to adopt criminal offences and sanctions at EC level, the European Court of Justice confirmed in a number of occasions that Community law places limits on the application of *national* criminal law. The Member States of the European Union are not entirely free to adopt national criminal law but are bound by their EU law obligations when doing so. The Court of Justice has placed limits on domestic criminal law measures if the latter would have as its effect to limit disproportionately rights established by Community law, in particular rights related to free movement. As early as 1981, the Court stated in *Casati* that

> In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that Community law also sets *certain limits* in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be concerned in such a

[59] For an overview, see Mitsilegas (2009).

> way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom.[60]

The Court justified this approach on the grounds of the necessity to prevent the erosion of Community law freedoms by national measures.[61] The Court's approach is based on the principle of proportionality.[62] In subsequent cases, and in order to ensure the effective exercise of Community rights, the Court has not hesitated to check the compatibility with Community law of domestic criminal laws penalising conduct as diverse as driving without a licence in the host Member State (resulting from failure to exchange within the time limits prescribed by the law of the host State the home state driving licence with the host state licence),[63] and pursuing the organised activity of collecting bets without a licence or a police authorisation.[64] In addition to prescribing limits to the imposition of criminal sanctions by Member States, the Court has also found that Community law had an influence in the conduct of domestic criminal proceedings—more specifically, national autonomy in prescribing the language of criminal proceedings may be limited in order to ensure non-discrimination against persons to whom Community law grants equal treatment rights, as well as free movement.[65] It is clear from these cases that the fundamental Union law objective of free movement places considerable limits to national sovereignty in legislating in criminal matters, with European Union law acting as a safeguard against overcriminalisation at national level.[66]

This general overview of the limits European Union law places on the power of Member States to criminalise suggests that similar limits apply to the power of Member States to treat breaches of immigration rules as criminal offences. The existence of such limits has now been confirmed by the Court of Justice in two judgments concerning the compatibility of national law criminalising migrants with European Union law. What is significant in these judgments (which will be analysed in detail below), is that the Court examined the compatibility of domestic criminal law not with European Union law on free movement, but with European Union immigration law, and in particular legislation dealing with the enforcement of immigration law (the Returns Directive).

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[60] Case 203/80, [1981] ECR 2595, para 27. Emphasis added.

[61] Paragraph 28.

[62] Tridimas (2006).

[63] Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929.

[64] Joint Cases C-338/04, C-359/04 and C-360/04, *Placanica, Palazzese and Sorricchio*, ECR [2007] I-1891. The Court referred therein to the case of *Calfa*, Case 48/96 [1999] ECR I-11, where it was held that the penalty of expulsion of a Community national found guilty of drug possession for personal use was precluded by Articles 48, 52 and 59 of the EC Treaty and Article 3 of Directive 64/221/EC. Being a tourist, Calfa was deemed by the Court to be a recipient of services following the earlier *Cowan* ruling (Case 186/87 *Cowan v Trésor Public* [1989] ECR 195).

[65] Case C-274/96 *Bickel and Franz*, ECR [1998] I-7637.

[66] See also Mitsilegas (2014).

3.3.2 The Limits of EU Migration Law on National Criminal Law—the El Dridi Ruling

In the case of *El Dridi*[67] the Court of Justice examined a preliminary reference request made in proceedings brought against Mr El Dridi, who was sentenced to 1 year's imprisonment for the offence of having stayed illegally on Italian territory without valid grounds, contrary to a removal order made against him by the Questore di Udine. He appealed against that decision before the Corte d'appello di Trento (Appeal Court, Trento). That court was in doubt as to whether a criminal penalty may be imposed during administrative procedures concerning the return of a foreign national to his country of origin due to non-compliance with the stages of those procedures, since such a penalty seems contrary to the principle of sincere cooperation, to the need for attainment of the objectives of Directive 2008/115 (the returns Directive) and for ensuring the effectiveness thereof, and also to the principle that the penalty must be proportionate, appropriate and reasonable. The Court of Appeal noted in particular that the criminal sanction provided for in Italian law came into play *subsequently* to the finding of an infringement of an intermediate stage of the gradual procedure for implementing the return decision, provided for by the returns Directive and that the level of penalty imposed by national law (a term of imprisonment of 1–4 years) seems, to be *extremely severe*. In those circumstances, the Corte d'appello di Trento decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> In the light of the principle of sincere cooperation, the purpose of which is to ensure the attainment of the objectives of the directive, and the principle that the penalty must be proportionate, appropriate and reasonable, do Articles 15 and 16 of Directive 2008/115 … preclude:
>
> - the possibility that criminal penalties may be imposed in respect of a breach of an intermediate stage in the administrative return procedure, before that procedure is completed, by having recourse to the most severe administrative measure of constraint which remains available?
> - the possibility of a sentence of up to 4 years' imprisonment being imposed in respect of a simple failure to cooperate in the deportation procedure on the part of the person concerned, in particular where the first removal order issued by the administrative authorities has not been complied with?[68]

3.3.2.1 The Ruling of the Court of Justice

The Luxembourg Court summed up the referring court's question as asking whether Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State's legislation, such as that at issue in the main

[67] Case C-61/11 PPU, *Hassen El Dridi, alias Karim Soufi,* Judgment of 28 April 2011.

[68] Paragraphs 22–25 of the judgment.

proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period. The CJEU noted in this context the emphasis placed by the national court on the principle of sincere cooperation and on the objective of ensuring the effectiveness of EU law.[69] In the light of this question, the CJEU followed a step-by-step approach in order to assess the compatibility of Italian law with EU migration law (the returns Directive).

3.3.2.2 Step 1: Interpreting the Returns Directive Restrictively in the Light of Fundamental Rights

The first step in the Court's reasoning in *El Dridi* was to provide an interpretation of the returns Directive, which will inform the implementation of the Directive by Member States. The Court confirms a restrictive interpretation of the coercive provisions of the Directive, stressing from the outset that the Directive pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and also their dignity.[70] Member States can depart from the common standards and procedures established by the Directive only as provided for therein.[71] In any case, although Article 4(3) of the Directive allows Member States to adopt or maintain provisions that are more favourable than Directive 2008/115 to illegally staying third-country nationals provided that such provisions are compatible with it, that directive *does not allow those States to apply stricter standards* in the area that it governs.[72] The Court further observes that the returns Directive sets out specifically the procedure to be applied by each Member State for returning illegally staying third-country nationals and fixes the order in which the various, successive stages of that procedure should take place.[73] It is only in particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than 7 days for voluntary departure or even refrain from granting such a period.[74] In the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of Directive 2008/115 provides that, in order to ensure effective return procedures, those provisions require the Member State which has issued a

[69] Paragraphs 29–30.

[70] Paragraph 31.

[71] Paragraph 32.

[72] Paragraph 33. Emphasis added.

[73] Paragraph 34. For a detailed overview of these stages see paragraphs.

[74] Paragraph 37.

return decision against an illegally staying third-country national to carry out the removal by taking all necessary measures including, where appropriate, coercive measures, *in a proportionate manner and with due respect for, inter alia, fundamental rights.*[75] Following from recital 16 in the Preamble to the directive and from the wording of Article 15(1) that the Member States must carry out the removal *using the least coercive measures possible*. It is only where, *in the light of an assessment of each specific situation*, the enforcement of the return decision in the form of removal risks being compromised by the conduct of the person concerned that the Member States may deprive that person of his liberty and detain him.[76] Articles 15 and 16 of the Directive places strict limits on detention.[77]

In the light of the above discussion, the Court of Justice confirmed that the return procedure established by the Directive corresponds to a *gradation* of the measures to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialised facility. The Court adds that the principle of proportionality must be observed throughout those stages.[78] Even the use of the latter measure, which is the most serious constraining measure allowed under the directive under a forced removal procedure, is strictly regulated, inter alia *in order to ensure observance of the fundamental rights of the third-country nationals concerned*.[79] It is in the light of those considerations that it must be assessed whether the common rules introduced by the returns Directive preclude national legislation such as that at issue in the main proceedings.[80] The assessment of the compatibility of national law with EU migration law (the returns Directive) must thus take into account the need to ensure proportionality and the respect of the fundamental rights of third-country nationals.

3.3.2.3 Step II: Confirming the Direct Effect of the Relevant Provisions of the Returns Directive

Having established the need to assess the compatibility of Italian criminal law in the light of the returns Directive (and taking into account the need to observe proportionality and fundamental rights), the Court was faced with an additional challenge: while Italy had introduced domestic criminal law affecting directly third-country nationals who had not complied with return orders, it had not transposed

[75] Paragraph 38.

[76] Paragraph 39. Emphasis added.

[77] Paragraph 40.

[78] Paragraph 41. Emphasis added.

[79] Paragraph 42. Emphasis added. See also the references to relevant human rights instruments and case-law in para 43.

[80] Paragraph 44.

the returns Directive into Italian law.[81] The question thus arises whether the relevant provisions of the returns Directive (Articles 15 and 16) were applicable in Italy in the first place. The Court did not hesitate to grant to these provisions direct effect, meaning that even in the absence of national implementation, Mr El Dridi (whose situation falls within the scope of the Directive) can rely upon Articles 15 and 16 of the returns Directive against the State.[82] The Court thus sends a clear message that Member States cannot act unilaterally while at the same time disregarding their obligations under EU law. The Court noted in particular that the removal procedure provided for by the Italian legislation at issue in the main proceedings is significantly different from that established by the Directive.[83]

3.3.2.4 Step III: Assessing National Criminalisation Legislation in the Light of the Returns Directive: Asserting the Principles of Effectiveness and Loyal Cooperation

Having set out the interpretative parameters of the returns Directive and confirming that the Directive provisions relevant to the case have direct effect, the Court went on to assess the compatibility of national law with the Directive. The Court began by granting a certain degree of freedom to Member States to adopt national criminal law aimed inter alia at dissuading those nationals from remaining illegally on those States' territory: however, this freedom arises only if it is clear that the coercive measures Member States may adopt in implementing the returns Directive have not led to the expected result being attained, namely, the removal of the third-country national against whom they were issued.[84] The Court went on to limit Member States freedom further. By evoking settled case-law mentioned earlier in the chapter (see inter alia the cases of *Casati* and *Cowan*), the Court reiterated its finding that although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, this branch of the law may nevertheless be affected by European Union law.[85] While neither the legal basis of the Directive (or its Lisbon successor) nor the Directive itself precludes the Member States from having competence in criminal matters in the area of irregular immigration and irregular stays, they must adjust their legislation in that area in order to ensure compliance with European Union law.[86]

The Court based the limits on the power of Member States to adopt criminal law upon the principles of effectiveness and loyal cooperation. It reiterated that Member States may not apply rules, even criminal law rules, which are liable to jeopardise

[81] Paragraph 45.
[82] Paragraphs 46–48.
[83] Paragraph 50.
[84] Paragraph 52.
[85] Paragraph 53.
[86] Paragraph 54.

the achievement of the objectives pursued by a Directive and, therefore, deprive it of its effectiveness.[87] It also confirmed the applicability of the principle of loyal cooperation as expressed in the second and third subparagraphs respectively of Article 4(3) TEU, according to which Member States inter alia 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and 'shall … refrain from any measure which could jeopardise the attainment of the Union's objectives', including those pursued by Directives.[88]

Applying these principles to the specific case before it, the Court found that Member States may not, in order to remedy the failure of coercive measures adopted to carry out removals under Article 8(4) of the returns Directive (measures which are subject to the principle of proportionality) provide for a custodial sentence *on the sole ground* that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired; rather, they must pursue their efforts to enforce the return decision, which continues to produce its effects.[89] Such a custodial sentence risks jeopardising the attainment of the objective pursued by that directive, namely, the establishment of an effective policy of removal and repatriation of illegally staying third-country nationals as it is liable to frustrate the application of the measures referred to in Article 8(1) of Directive 2008/115 and delay the enforcement of the return decision.[90] The returns Directive, and in particular Articles 15 and 16 thereof, must thus be interpreted as precluding a Member State's legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.[91]

This finding does not preclude the possibility for Member States to adopt 'provisions' (note that there is no express reference to criminal law provisions) regulating the situation in which coercive measures have not resulted in the removal of a third-country national staying illegally on their territory. However the adoption of these measures must occur with respect for the principles and objective of the returns Directive (which thus continues to provide the benchmark for the adoption of national criminal law).[92] In the light of the above, the national court is called upon to apply and give full effect to the provisions of EU law, to refuse to apply any provision of the Italian law in question which is contrary to the result of the returns

[87] Paragraph 55.
[88] Paragraph 56.
[89] Paragraphs 57–58. Emphasis added.
[90] Paragraph 59.
[91] Paragraph 62.
[92] Paragraph 60.

Directive taking due account of the principle of the retroactive application of the more lenient penalty.[93]

3.3.2.5 European Union Law as a Limit to the Criminalisation of Migration: The Impact of El Dridi

El Dridi is a landmark judgment on two levels: on the level of constitutional law, it reiterates—based on settled case-law in the field—that EU law places limits to the power of EU Member States to criminalise, limits which stem from the obligation of Member States to comply with the EU law principles of effectiveness and loyal cooperation; on the level of migration law, it confirms that EU law, and EU migration law specifically, places limits upon Member States' power to criminalise migration. *El Dridi* in this context marks a departure from earlier case-law: while traditionally, in rulings like *Casati,* the Court of Justice has placed limits on national criminal law in order to achieve free movement objectives, in *El Dridi* these limits are justified in order to achieve the effectiveness of an *enforcement* measure, namely the EU returns Directive whose potential negative impact on the position of migrants has been criticised.[94] Following *El Dridi,* the returns Directive plays a two-fold protective role for the affected migrants: being interpreted in the light of proportionality and fundamental rights, it places limits to Member States' criminalisation powers; and, more generally, it has the potential of bringing the full effect of European Union law on a wide range of Member States' choices to criminalise migration, with domestic criminal law being subject to an assessment in the light of EU law when all aspects of the return of third-country nationals come into play. While the Court is careful to leave a degree of discretion to Member States by stating that the latter retain the power to adopt provisions in cases where coercive measures provided for by EU law have not resulted in the return of the third-country nationals, it adds that these measures must occur with respect for the principles and objective of the returns Directive.

3.3.3 The Limits of EU Migration Law on National Criminal Law—the Case of Achughbabian

The extent to which European Union law places limits on the power of EU Member States to criminalise migration was tested again post-*El Dridi* in the case of *Achughbabian.*[95] The judgment was in response to a reference for a preliminary ruling

[93] Paragraph 61.

[94] For a critical analysis, see Baldaccini (2009).

[95] Case C-329/11, *Alexandre Achughbabian v Préfet du Val-de-Marne*, judgment of 6 December 2011.

from the Cour d'Appel de Paris and concerned the compatibility of French law criminalising migration with EU law. The case differs from *El Dridi* in that it concerns the criminalisation and imposition of criminal sanctions by French law for irregular entry or residence per se. The applicant was placed in police custody for being suspected of having committed the offence described above. An order obliging the applicant to leave France was already imposed in 2009, and a deportation order was issued in 2011. The applicant argued that the provision criminalising irregular entry and residence was incompatible with EU law in the light of *El Dridi.* The *Cour d'Appel* decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

> Taking into account its scope, does Directive [2008/115] preclude national legislation, such as Article L. 621-1 of [Ceseda], which provides for the imposition of a sentence of imprisonment on a third-country national *on the sole ground of his illegal entry or residence* in national territory?[96]

3.3.3.1 Step I: Determining the Applicability of the Returns Directive to National Law Criminalising Irregular Stay

Achughbabian differs from *El Dridi* in that the question referred to Luxembourg concerns the compatibility with EU law of national law concerning the criminalisation of migration *prima facie unrelated to a returns procedure.* The French legislation in question criminalised irregular entry or residence as such. It is thus not surprising that the Court of Justice commenced addressing the question by the *Cour d'Appel* by examining the extent to which the returns Directive applies in this context. The Court confirms that Member States retain a degree of sovereignty in adopting criminal sanctions for the breach of immigration law: the returns Directive is not designed to harmonise in their entirety the national rules on the stay of foreign nationals (note the use by the Court of the term 'stay' and not 'residence' here) and thus does not preclude the law of a Member State from classifying an illegal stay as an offence and laying down penal sanctions to deter and prevent such an infringement of the national rules on residence.[97] Neither does the Directive (which concerns only the adoption of return decisions and the implementation of those decisions) preclude a third-country national being placed in detention with a view to determining whether or not his stay is lawful.[98]

However, the above findings do not mean that national action to criminalise or detain third-country nationals necessarily falls outside the scope of the returns Directive. Firstly, the Court states that national authorities are required, in order to prevent the objective of the returns Directive from being undermined, to act with diligence and take a position without delay on the legality or otherwise of the stay

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[96] Paragraph 25. Emphasis added.

[97] Paragraph 28.

[98] Paragraphs 29–30.

of the person concerned. The finding that the stay is illegal will lead in principle, according to the returns Directive, to a return decision.[99] Detention is thus inextricably linked with the outcome of the return of the third-country national concerned. Secondly, and notwithstanding state power to criminalise or detain along the lines set out above, it needs to be examined whether the returns Directive precludes the criminalisation of irregular entry or residence under French law *in so far as it is capable of leading to an imprisonment in the course of the return procedure* governed by the said Directive.[100] In that respect, the Court reiterated its ruling in *El Dridi* that Member States cannot apply criminal legislation capable of imperilling the realisation of the aims pursued by the said directive, thus depriving it of its effectiveness.[101] The Court thus envisages the possibility that national law criminalising irregular entry or residence is assessed in the light of the returns Directive.

3.3.3.2 Step II: Applying the Returns Directive to National Law Criminalising Irregular Stay—the Return of Effectiveness and Loyal Cooperation

Having concluded that national law criminalising irregular entry or stay may be assessed in the light of the returns Directive, the Court found that in the present case the situation of the applicant in the main proceedings fell indeed within that referred to in Article 8(1) of that directive.[102] It is clear to the Court that the imposition and implementation of a sentence of imprisonment during the course of the return procedure provided for by the returns Directive does not contribute to the realisation of the removal which that procedure pursues, namely the physical transportation of the person concerned outside the Member State concerned and that such a sentence does not therefore constitute a 'measure' or a 'coercive measure' within the meaning of Article 8 of the Directive.[103] The Court went on to highlight the differences between national criminalisation and the system put forward by the returns Directive: it is undisputed that the national legislation at issue in the main proceedings, in that it provides for a term of imprisonment for any third-country national aged over 18 years who stays in France illegally after the expiry of a period of 3 months from his entry into French territory, is capable of leading to an imprisonment whereas, following the common standards and procedures set out in Articles 6, 8, 15 and 16 of the returns Directive, such a third-country national must, as a matter of priority, be made the subject-matter of a return procedure and may, as

[99] Paragraph 31.

[100] Paragraph 32. Emphasis added.

[101] Paragraph 33.

[102] Paragraphs 34–36.

[103] Paragraph 37.

regards deprivation of liberty, be subject at most to placing in detention.[104] National legislation such as that at issue in the main proceedings is, consequently, likely to thwart the application of the common standards and procedures established by the returns Directive and delay the return, thereby, like the legislation at issue in *El Dridi*, undermining the effectiveness of the said directive.[105]

Linking the criminalisation of irregular stay with the return of the third-country national enabled the Court to apply *El Dridi* in this case which prima facie involved the criminalisation of irregular stay per se. A key factor in the Court's reasoning was the self-standing nature of criminalisation. The Court noted that in the particular case there was nothing in the evidence before the Court to suggest that Mr Achughbabian has committed any offence other than that consisting in staying illegally on French territory. The situation of the applicant in the main proceedings could not therefore be removed from the scope of the returns Directive, as Article 2 (2)(b) of the latter clearly cannot, without depriving that directive of its purpose and binding effect, be interpreted as making it lawful for Member States not to apply the common standards and procedures set out by the said directive to third-country nationals who have committed only the offence of illegal staying.[106] The finding of the applicability of the returns Directive led to the Court to apply its *El Dridi* reasoning and stress that the principles of effectiveness and loyal cooperation must be respected in order to ensure the objectives of the returns Directive, in particular that return must take place as soon as possible.[107] That would clearly not be the case if, after establishing that a third-country national is staying illegally, the Member State were to preface the implementation of the return decision, or even the adoption of that decision, with a criminal prosecution followed, in appropriate cases, by a term of imprisonment. Such a step would delay the removal and does not appear amongst the justifications for a postponement of removal referred to in Article 9 of the returns Directive.[108]

3.3.3.3 Step III: Affirming the Power of Member States to Criminalise in Cases Where the Returns Directive has been Applied Unsuccessfully

In *Achughbabian*, the Court of Justice affirmed the fact that national legislative choices to criminalise migration are constrained by Member States' obligations to respect European Union law. Mindful of the impact of this ruling on state sovereignty and in order to address Member States' concerns that EU law limitations

[104] Paragraph 38.
[105] Paragraph 39.
[106] Paragraph 41.
[107] Paragraphs 43–45.
[108] Paragraph 45.

would put an end to the possibility of Member States deterring illegal stays,[109] the Court went on to confirm its finding in *El Dridi* that Member States retain the power to criminalise when the procedure provided for in the returns Directive was applied but did not lead to the return of third-country nationals. According to the Court, while Member States bound by the returns Directive cannot provide for a term of imprisonment for illegally-staying third-country nationals in situations in which the latter must, by virtue of the common standards and procedures established by that directive, be removed and may, with a view to preparation and implementation of that removal at the very most be subject to detention, that does not exclude the possibility of Member States adopting or maintaining provisions, which may be of a criminal nature, governing, in compliance with the principles of the said directive and its objective, the situation in which coercive measures have not enabled the removal of an illegally staying third-country national to take place.[110] The returns Directive does not preclude penal sanctions being imposed, following national rules of criminal procedure, on third-country nationals to whom the return procedure established by that directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return.[111] However, the Court added a further limit to such criminalisation stating that the imposition of the sanctions mentioned in the previous paragraph is subject to full compliance with fundamental rights, particularly those guaranteed by the European Convention for the Protection of Human Rights.[112]

3.3.3.4 The Impact of Achughbabian—Affirming the Protective Function of European Union Law

Achughbabian is an important follow-up to *El Dridi* in two respects: in reiterating the Court's finding that Member States are not entirely free to adopt domestic criminal law, but when doing so they are under the obligation to respect European Union law, and the returns Directive in particular; and in extending the scope of *El Dridi* to bring within the ambit of EU law national legislation which at first sight does not appear to be directly related to the returns Directive. It is true that the Court was mindful to leave Member States a degree of freedom to legislate in criminal matters in this context—the Court has followed this strategy in the past in the ship-source pollution ruling,[113] when it affirmed an inroad to state sovereignty in criminal matters (by confirming the earlier ruling in the environmental crime case[114] that the Community had competence to adopt criminal offences and

[109] Paragraph 47.

[110] Paragraph 46. See also the reference to El Dridi, paras 52 and 60.

[111] Paragraph 48.

[112] Paragraph 49.

[113] See part 3.3.3.2 above.

[114] Commission v Council, Case C-176/03 ECR [2005] I-7879.

sanctions) but at the same time left Member States the choice to adopt specific sanctions levels unanimously under the third pillar.[115] However, Member States' freedom to criminalise is placed under strict EU law limits. national criminal law must still be in compliance with the objectives and provision of the returns Directive, as well as with fundamental rights. Moreover, and crucially, the reasoning of the Court leads to the conclusion that it is very unlikely that criminalisation at national level (in particular the criminalisation of irregular entry or stay) can be viewed independently from the returns Directive. As is clear from *Achughbabian*, the criminalisation of irregular entry or stay cannot be an aim in itself but is ultimately linked to the objective of the return of the third-country national affected—thus bringing into play the application of EU law. In this manner, the Court managed to use EU law (and remarkably an enforcement measure such as the returns Directive) in order to protect third-country nationals from extensive criminalisation in Member States.

3.3.4 The Limits of EU Migration Law on National Criminal Law—the Case of Sagor

The case of *Sagor*[116] concerned a reference for a preliminary ruling from the Tribunale di Rovigo in Italy on the compatibility of Returns Directive with national law which penalises illegal stay by third-country nationals by means of a fine which may be replaced by an order for expulsion or home detention. Unlike *Achughbabian*, where the Court was asked to rule on the compatibility of the Directive with national law criminalising irregular stay by the imposition of custodial sentences, *Sagor* addressed the question of the compatibility of the Returns Directive with alternative forms of criminalisation, i.e. the imposition of fines which may be replaced by an expulsion order or home detention. The Court reiterated its finding in *Achughbabian* that in principle the Returns Directive does not preclude the criminalisation of illegal stay by Member States[117] but qualified this statement by reiterating its finding in both *Achughbabian* and *El Dridi* that Member States may not apply criminal law rules which are liable to undermine the application of the common standards and procedures established by the Returns Directive and thus to deprive it of its effectiveness.[118] The Court proceeded by distinguishing criminalisation leading to imprisonment from criminalisation under the facts of the present case leading to a fine or to an expulsion order. According to the Court, legislation which provides for a criminal prosecution which can lead to a fine for which an expulsion order may be substituted *has markedly different effects* from those of

[115] Mitsilegas, EU Criminal Law, Chap. 2.

[116] Case C-430/11.

[117] Paragraph 31.

[118] Paragraph 32.

legislation providing for a criminal prosecution which may lead to a term of imprisonment during the course of the return procedure.[119] The key factor here is the impact of such criminalisation on the functioning of the Returns Directive: according to the Court the possibility that *a criminal prosecution as prescribed by the Italian legislation under review may lead to a fine is not liable to impede the return procedure* established by the Returns Directive—the imposition of a fine does not in any way prevent a return decision from being made and implemented in full compliance with the conditions set out in Articles 6–8 of the Directive, nor does it undermine the common standards relating to deprivation of liberty set out in Articles 15 and 16 of the directive.[120] Moreover, the option given to the criminal court of replacing the fine with an expulsion order accompanied by an entry ban of at least 5 years, is also not, in itself, prohibited by the Directive, which does not preclude the decision imposing the obligation to return from being taken—in certain circumstances as determined by the Member State concerned—in the form of a criminal judgment.[121] The Court noted in this context that Article 7(4) of the Directive allows the Member States to refrain from granting a period for voluntary departure, *in particular where there is a risk that the person concerned may abscond* in order to avoid the return procedure.[122] The discourse of risk enabled the Court here to adopt a harsh interpretation of the Returns Directive as regards the process of return, privileging automatic enforced removal over voluntary return.

However, the Court did apply its findings on the link between imprisonment and the effectiveness of the Returns Directive on the imposition by national law of a fine for which a home detention order may be substituted. The Court reiterated its finding in *Achughbabian* that it follows both from the duty of loyalty of the Member States and from the requirements of effectiveness referred to in the Directive that the obligation imposed on the Member States by Article 8 of that directive to carry out the removal must be fulfilled as soon as possible.[123] According to the Court, the imposition and enforcement of a home detention order during the course of the return procedure provided for by the Directive clearly do not contribute to the achievement of the removal which that procedure pursues, namely the physical transportation of the relevant individual out of the Member State concerned. Such an order does not therefore constitute a 'measure' or a 'coercive measure' within the meaning of Article 8 of the Returns Directive.[124] The Court added that the home detention order is liable to delay, and thus to impede, the measures, such as deportation and forced return by air, which can be used to achieve removal. Such a risk of undermining the return procedure is present in

[119] Paragraph 34. Emphasis added.

[120] Paragraph 36.

[121] Paragraphs 37–39.

[122] Paragraph 41, emphasis added. But the Court added that such assessment must be done on an individual basis.

[123] Paragraph 43.

[124] Paragraph 44.

particular where the applicable legislation does not provide that the enforcement of a home detention order imposed on an illegally staying third-country national must come to an end as soon as it is possible to effect that person's removal.[125] The Returns Directive thus precludes national legislation which allows illegal stays by third country nationals to be penalised by means of a home detention order without guaranteeing that the enforcement of that order must come to an end as soon as the physical transportation of the individual concerned out of that Member State is possible. The Directive aim of speedy return thus prevails upon national criminalisation which may take the form of home detention.

3.3.5 The Compatibility of National Criminal Sanctions with the Returns Directive in the Context of the Imposition of Re-entry Bans—Filev and Osmani

In its recent ruling in *Filev* and *Osmani,*[126] the Court examined the compatibility with the returns Directive of German legislation imposing criminal sanctions for irregular entry following the imposition of an entry ban of unlimited duration predating the Directive. In the case of *Osmani*, an additional element has been that initial removal has been a consequence of a criminal conviction for drug trafficking.[127] The referring court made clear that Mr Filev did not appear to pose a serious threat to public policy, public security or national security within the meaning of Article 11(2) of the returns Directive.[128] The Court was called to answer two questions concerning the compatibility of national criminal law with the Directive. The first question involves the compatibility of the imposition of national criminal sanctions for breach of an entry ban. Following its classic effectiveness reasoning in *El Dridi* and *Achughbabian*, the Court reiterated that Member States may not apply criminal legislation capable of imperilling the achievement of the objectives pursued by the Directive, thus depriving it of its effectiveness.[129] The application of this reasoning in the present case led to the conclusion that a Member State may not impose criminal sanctions for breach of an entry ban falling within the scope of the returns Directive if the continuation of the effects of that ban does not comply with Article 11(2) of the Directive.[130] Moreover, Article 11(2) of the Directive precludes a continuation of the effects of entry bans of unlimited length made before the date on which the Directive became applicable, beyond the maximum length of entry ban laid down in that provision, except where those entry bans were made against

[125] Paragraph 45.
[126] Case C-297/12, judgment of 19 September 2013.
[127] Paragraphs 15–18.
[128] Paragraph 21.
[129] Paragraph 36.
[130] Paragraph 37.

third-country nationals constituting a serious threat to public order, public security or national security. As mentioned by the referring court, Mr Filev did not appear to constitute such threat.

The Court was also called upon to answer a second question, on a different aspect of the relationship between the returns Directive and national criminal law. The referring Court asked whether an expulsion order which predates by 5 years or more (i.e. the maximum period of the entry ban) the period between the date on which the Directive should have been implemented and the date on which it was actually implemented may subsequently be used as a basis for criminal proceedings, where that order was based on a criminal sanction within the meaning of Article 2 (2)(b) of the Directive.[131] Article 2(2)(b) allows Member States to decide not to apply the Directive to third-country nationals who are the subject of, inter alia, return as a criminal law sanction or as a consequence of a criminal law sanction in accordance with the provisions of national law.[132] This question is of relevance as regards Mr Osmani, whose conviction for drug trafficking framed him as a high risk third country national. The Court accepted that the Directive will not apply to third-country nationals referred to in Article 2(2)(b) in cases where Member States use the discretion conferred to them by this provision at the latest upon expiry of the period for implementing the returns Directive.[133] By contrast, if Member States have not made use of such discretion after the expiry of the implementation deadline, in particular because of the fact that they have not yet implemented the Directive in national law, they may no longer restrict the scope of the persons covered by the Directive.[134] According to the Court, allowing Member States to use their discretion after the implementation deadline against a third country national such as Mr Osmani in the present case *who could already directly rely* on the relevant provisions of the returns Directive would be to worsen that person's situation.[135] Member States can thus not exclude third-country nationals, whatever the risk they pose, from the scope of the returns Directive and the protection it may offer if they do not loyally enforce EU law. European constitutional law, as reflected in the duty of loyal cooperation as far as Member States are concerned, and the principle of direct effect as far as the affected individual is concerned, has come here to the rescue of a presumably in the eyes of the German authorities high risk third country national.

[131] Paragraph 46.

[132] See para 40.

[133] Paragraph 52.

[134] Paragraph 53.

[135] Paragraph 55. Emphasis added.

3.4 Conclusion: The Protective Function of European Union Law

The intervention of the European Union legislator in terms of using criminal law to control immigration has focused both on preventing the irregular entry of third-country national into the European Union (via the criminalisation of trafficking in human beings and facilitation of unauthorised entry) and on identifying and sanctioning irregular stay and residence after entry (via the criminalisation of the facilitation of unauthorised transit and residence and the imposition of criminal sanctions on employers if a series of aggravating circumstances with regard to the employment of migrants in an irregular situation occur). The criminalisation of trafficking and facilitation of unauthorised entry, transit and residence reflects a confluence of policy objectives between the European Union and the global community, with criminalisation at EU level reflecting the securitisation of migration at global level and the establishment in policy and law of a link between migration and organised crime. This securitisation approach has resulted in the prioritisation of criminal law enforcement needs with little emphasis placed on the impact of these measures on migrants themselves. While it should be noted that the European Union legislator has not chosen to criminalise irregular entry, transit or residence per se, the broad scope of criminalisation (in particular as regards the facilitation offences) and the logic of law enforcement and prosecutorial efficiency as regards the granting of rights to migrants have resulted in a legal framework leading to limited safeguards and legal certainty for vulnerable migrants and significant adverse consequences for access to the EU by those who wish to claim international protection. This securitisation approach has been toned down somewhat in the second wave of criminalisation measures. The Directive on employers' sanctions outs forward a more limited and carefully circumscribed criminalisation approach, and addresses to some extent the precarious situation of irregular migrants. The situation of the migrant is also addressed by the revised Directive on trafficking in human beings, which contains a plethora of provisions on the rights of victims of trafficking. While neither Directive provides with a high level of legal certainty for migrants (in particular as regards security of residence), their provisions (in particular those granting rights to third-country nationals) have the potential to offer significant protection to migrants when interpreted by national courts or by the Court of Justice. The protective function of these measures will be enhanced when interpreted in the light of EU constitutional law which privileges the protection of fundamental rights and the respect of the principle of proportionality.

The protective function of European Union law is already evident as regards the second aspect of the criminalisation of migration in Europe, namely the criminalisation of migration not at the EU level, but by individual Member States. Unlike the European Union legislator, a number of Member States including France and Italy have chosen to criminalise conduct deemed contrary to national immigration law—thus criminalising migrants directly. In the light of the political sensitivity of the issue and the potential the impact of state sovereignty the determination of

whether Member States were free to adopt such legislation was crucial, in particular given the shared competence on migration between the Union and Member States. The Court of Justice was called upon to rule on the relationship between national criminal law and European Union law in this context. Its findings confirmed the limits that European Union law places upon national criminal law. In a departure from earlier case-law, the Court assessed national law in the light of European Union law dealing not with free movement, but with the enforcement of migration law (the returns Directive). In this manner, the Court found a way to apply the protective provisions of European Union law to third-country nationals. The protective function of EU law is expressed in this context in two ways: by reminding Member States that even EU law on immigration enforcement such as the returns Directive must be interpreted in accordance with fundamental principles of EU law including the protection of fundamental rights and the principle of proportionality; and, crucially, by linking national criminalisation of migration, and in particular the criminalisation of breaches of national immigration law such as irregular stay, with the implementation of the returns Directive. Member States cannot shield their criminal law by claiming that the criminalisation of irregular entry or stay is self-standing or an end in itself. Such criminalisation is inevitably linked with the ultimate objective of return, which signifies the applicability of European Union law. The Court's approach signifies a direct challenge to the employment of symbolic criminal law by Member States and makes it increasingly hard for Member States to evade the control of EU institutions and law when they make criminalisation choices in the field. Imprisonment for its own sake or as an end in itself is incompatible with EU law as it is not designed to lead to the eventual return of irregular migrants in accordance with proportionality and fundamental rights, even when these migrants are deemed to be high-risk. In all these ways, the Court has highlighted repeatedly the capacity of European Union law to act as a limit to the criminalisation of migration at the national level.

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