European Commission

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Justice Needs Trust

FP7 RESEARCH PROJECT
FOR NEW EUROPEAN CRIMES
AND TRUST-BASED POLICY

Edited by:
Stefano Maffei
Edith Stephany Carrillo Calderón

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Introduction

Since 2012, the purpose of the FIDUCIA research project (New European Crimes and Trust-based Policy) has been to conduct research on how normative compliance within the criminal justice systems could have a positive effect on the people complying with the law less because it is "in their self-interest" and more because it is "the right thing to do". In this final volume of the FIDUCIA project, we present a selection of deliverables on the research conducted on the development of trust-based policy in relation to new forms of criminality, which include the crimes of trafficking in human beings, trafficking in goods, cybercrime, and on the criminalisation of migrants and ethnic minorities.

The value of complying with the law is essential in reducing criminal activity and promoting a sense of social security within a justice system. Traditionally, instrumental compliance strategies have been the main force in securing a criminal justice system – because of the perceived consequences to be paid if a particular crime is committed. However, our research has shown that if we shift the attention to normative compliance strategies, people will be less likely to commit crimes if they have a certain degree of "trust" in the legitimacy of their criminal justice system.

Deliverable 5.2 sets the groundwork for this publication by defining normative compliance through trust-based policies that reconnect criminal law with morality within the framework of human rights. This is evident in the analysis conducted for the FIDUCIA crimes, especially when assessing the different categories of persons involved in the crimes. For example, in cases of human trafficking, instrumental strategies may often be seen as effective when it comes to deterring the recruiters and traffickers (D6.4). However, normative strategies may still be effective through an emphasis on the harm they would cause upon the victims, not only in cases of human trafficking but across all four of the crimes analysed. When it comes to the victims and service users, the analysis suggests that they are more likely to report the crime or abuse if they believe that the criminal justice system is legitimate and does not put them at risk of becoming criminally liable.

The criminalisation of migrants and ethnic minorities also affects the people in solidarity with them because they are at risk for assisting them in irregularly entering or irregularly staying within the Schengen Borders (D8.4-8.5). It suggests that although acts of solidarity and irregular migration may constitute administrative law infractions, the penalties are more criminal in nature. But when it comes to complying with the law, instrumental strategies are more commonly used under the assumption that migration can be controlled.

A way to implement normative compliance strategies is to increase public awareness on the moral implications of the crimes. This is particularly noted when it comes to raising awareness on purchasing original products rather than pirated and counterfeit products (D7.3). Another important element in the implementation of normative strategies is to harbour mutual cooperation among member states. Cybercrime occurs within and across borders, and therefore cybersecurity measures should be placed by public sectors in cooperation with private actors (D9.4).

Finally, it is hoped that the substantive findings of FIDUCIA in the crime-themed areas will continue to inspire a process of effective integration and mutual recognition among the criminal justice systems of European Countries, also with a view to facilitate the process of extradition of fugitives and the collection of admissible evidence across borders.

Stefano Maffei and Edith Stephany Carrillo

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of "Trust-Based" Policy

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Paper on the development of trust-based policy in relation to new forms of criminality

by: Mike Hough and Mai Sato

editors: Edith Stephany Carrillo and Claudia Ricci

** **Special thanks to** HEUNI for their comments*

EXECUTIVE SUMMARY

The FIDUCIA research project (New European Crimes and Trust-based Policy) is funded primarily by the European Commission through the Seventh Framework Programme for Research and Development. FIDUCIA examines three crimes that have attracted the attention of the EU and domestic policymakers in the last decade as a consequence of developments in technology and the increased mobility of populations across Europe:

- Trafficking in human beings
- Trafficking in goods
- Cybercrime

In addition to the above three crimes, FIDUCIA also examines the increasing criminalisation of migrants and ethnic minorities.

Work package 5 is the conceptual work package of the FIDUCIA project. The project's main idea is that public trust in justice is important for social regulation, and FIDUCIA proposes a 'trust-based' policy model in relation to emerging forms of criminality. Its objective is to produce a model – or set of principles – for the application of 'trust-based' policy to the regulation of the three crimes under FIDUCIA. The work package has brought together elements of conceptual analysis and policy analysis to propose ways of achieving the best 'fit' between informal and formal systems of social control.

The work package proposes that there is scope for getting the formal and informal systems of regulation better aligned. Its main concern is the extent to which it is possible – or desirable – to intentionally infuse criminal justice systems with a normative element, so that people comply with the law less because it is in their self-interest and more because they think it is the right thing to do. This deliverable sets out the various forms of instrumental and normative strategy that are available for the regulation of the three crimes and the issue of the over-criminalisation of migrants and ethnic minorities. It argues that in general terms, trust-based policies involve building:

- trust in the legitimacy of the police, the courts and other institutions of justice:
  - by improving procedural fairness,
  - by improving distributive or outcome fairness,
  - by demonstrating moral alignment,
  - by demonstrating competence;
- trust in the legitimacy of the criminal law:
  - by building the legitimacy of the institutions of justice (as above),
  - by improving the congruence of law and morality through persuading the public that criminal law provisions are morally justified, or
  - by removing undesirable but morally tolerable behaviour from the scope of the criminal law.

This deliverable examines how applicable each of these policies is likely to be to the three crimes and to the over-criminalisation of migrants upon which FIDUCIA focuses.

Trafficking offences

It suggests that the emergent problems that involve trafficking, whether in human beings or in goods, share a common structure in that trafficking necessarily involves the supply of (illicit) goods or services to meet a pre-existing demand for such goods or services. Trust-based policies can be analysed according to whether they focus on supply or demand, but in both cases, the policies mainly relate to the legitimacy of criminal law. In the case of human trafficking, there is also scope for the development of trust-based policies targeting the victims, with a view to encouraging their cooperation with the authorities and thus enabling more effective enforcement to be directed at the perpetrators.

Cybercrime

Some forms of cybercrime and cyber-enabled crime also involve the supply or downloading or purchase of illicit goods or services, meaning that trust-based policies can be developed to reduce both supply and demand. Other forms of cyber-enabled crime, involving theft or fraud, do not include transactions between informed and consenting parties, and it makes less sense to explore trust-based policies designed to reduce demand. However, there may be considerable scope for procedural-justice styles of enforcement that discourage those on the margins of fraudulent activity.

The criminalisation of migrants and ethnic minorities

There is extensive scope for trust-based policies in relation to the criminalisation of migrants and ethnic minorities. These relate mainly to the legitimacy of the institutions of justice, and particularly to the legitimacy of the police, in the eyes of these groups. There are also issues that relate to the criminalisation of irregular migrants and the perceived legitimacy of strategies for controlling irregular migrants.

1. INTRODUCTION

WP5 is the conceptual work package of the FIDUCIA project. Its objective is to produce a model – or set of principles – for the application of 'trust-based' policy to the regulation of new forms of European crimes. The work package combines elements of conceptual analysis and policy analysis to propose ways of achieving the best 'fit' between informal and formal systems of social control as cross-national and supranational systems of criminal justice become more significant across Europe. The conceptual analysis takes as its starting point how normative compliance and instrumental compliance have traditionally interacted in the systems of criminal justice of European jurisdictions, and will assess the scope for and desirability of getting formal systems of regulation better aligned with informal systems of social control.

The key issue raised both in this deliverable and by the FIDUCIA project more generally is the extent to which it is possible to intentionally infuse criminal justice systems with a normative element, so that people comply with the law less because it is in their self-interest and more because they think it is the right thing to do. There is a growing body of research, summarised in previous FIDUCIA work packages, that shows that normative considerations play a very large part in determining when people do and do not comply with the police and, to some extent, the courts. This points to the possibility that Member States may be under-using normative strategies for securing compliance with various types of criminal law. We have used the term 'trust-based policies' as shorthand to refer to strategies of social control that:

- consolidate the legitimacy of justice institutions and of the criminal law, and thus
- improve compliance with the law because they
- strengthen people's sense of the morally grounded obligation to obey.

This deliverable (D5.2) sets out in schematic form the scope for trust-based policies in the four areas FIDUCIA focuses on. These are:
- Trafficking in human beings;
- Trafficking in goods;
- Cybercrime; and
- Criminalisation of migrants and ethnic minorities.

The deliverable is intended as a precursor of and a means of support to the policy analysis dimensions of work packages 6 to 9, which will be summarised in work package 13.

2. INSTRUMENTAL AND NORMATIVE COMPLIANCE STRATEGIES

Compliance theories have been well classified by Bottoms (2002), who proposed that there are four categories of explanation for compliance with authority in general and with the criminal law in particular. These are:
- Normative considerations about the 'rights and wrongs' of non-compliance;
- Prudential or self-interested calculations about the potential costs and benefits of punishment, which take into account the risks and costs of punishment;
- The impact of obstructive strategies, such as locking up offenders to prevent their reoffending, and locking up the targets of criminal attention, literally or metaphorically; and,
- Habit.

FIDUCIA has stressed the contrast between normative compliance strategies and instrumental ones. We avoid doing bad things either out of internalised moral considerations or because others impose and threaten to impose costs on us if we do so. Whether obstructive strategies should be regarded as instrumental or not is arguable. Some such strategies – typically ones involving situational crime prevention – render various forms of crime simply impossible to commit, removing from the offender any self-interested calculations about costs and benefits. But other obstructive strategies make forms of crime harder or riskier to commit, and in this case instrumental considerations come into play. The rationales for instrumental and normative strategies are mutually exclusive, but in practice some forms of intervention can combine both instrumental and normative mechanisms.

This deliverable gives no consideration to Bottoms' fourth form of compliance, that is habit. How to transform compliance that flows from normative or instrumental considerations into the compliance of habit is an important topic, much ignored by criminologists[1] but beyond the scope of FIDUCIA.

The thinking about normative compliance that underpins FIDUCIA has been heavily influenced by procedural justice theory, as discussed in our previous deliverable (D5.1). Tyler and colleagues (e.g. Sunshine & Tyler, 2003; Tyler & Fagan, 2008; Kirk et al., 2012; Huq et al., 2012a, 2012b; Tyler et al., 2010;Tyler et al., 2007; Tyler, 2011) have developed a set of consequentialist arguments based on the role of procedural justice in shaping institutional legitimacy and thus compliance with the law. This body of work emphasises the need for justice institutions to pursue fair and respectful processes – in contrast to outcomes – as the surest strategies for building trust in justice and thus institutional legitimacy and compliance with the law.

However, there are several other factors that are likely to consolidate the legitimacy of the institutions of justice and the legitimacy of the criminal law. These include the perceived fairness of outcomes of the justice system, as proposed by Robinson and Darley, who have argued that if the law's potential for building a moral consensus is

1. A notable exception being the work of Wikström (eg Wikström et al., 2012).

to be exploited, judicial outcomes, and especially court sentences, must be aligned at least to some degree with public sentiments (Robinson and Darley, 2007, 2010; Robinson, 2012). There are also macro-level theories about the relationship between the forms of political economy that operate in any given nation state and the preparedness of its citizens to comply with state authority (cf. Cavadino and Dignan, 2006, 2013; Messner and Rosenfeld, 2001, 2010; Reiner, 2007).

Stated at their most general level – that winning 'hearts and minds' is central to the effective use of authority – arguments about securing compliance through strategies of institutional legitimation are ones that have enjoyed varying degrees of political currency for many years. However, criminal justice policy has tended to shy away from any detailed analysis of issues of institutional legitimacy or any serious consideration about ways of building or consolidating this legitimacy. FIDUCIA proposes, in line with Beetham (1991), that an authority has legitimacy when three preconditions are met:

1. The 'governed' offer their willing consent to defer to the authority;
2. This consent is grounded first on the authority's conformity to standards of legality (acting according to the law); and
3. This consent is grounded second on a degree of 'moral alignment' between power-holder and the governed, reflected in shared moral values.

According to this definition, legitimacy is not simply signified by a positive duty to obey authority and a perception of that authority's entitlement to command. The second and third preconditions of empirical legitimacy – legality and moral alignment – ensure that the obligation to obey is built on a combination of legality and the moral validity of institutions of justice. Legitimacy is thus defined as an additive function of all three components.

3. A TYPOLOGY OF 'TRUST-BASED' POLICIES

FIDUCIA's analysis of institutional legitimacy (set out in detail in D5.1) identified the following strategies for enhancing normative compliance by focussing on legitimacy:

- Trust in the legitimacy of the police, the courts and other institutions of justice:
- by improving procedural fairness,
- by improving distributive or outcome fairness;
- by demonstrating moral alignment,
- by demonstrating competence.
- Trust in the legitimacy of the criminal law:
- by improving the congruence of law and morality through persuading the public that criminal law provisions are morally justified, or
- by removing undesirable but morally tolerable behaviour from the scope of the criminal law.

3.1 Improving the legitimacy of the police and other institutions of justice

There is now a very substantial body of research that demonstrates that procedural fairness on the part of the police improves their perceived legitimacy and promotes both compliance with the law and cooperation with justice officials. Procedural fairness involves:

- treating people with dignity and respect;
- listening to them and giving them 'voice' (letting them have their 'say'); and
- acting legally and sticking to regulations.

Procedural justice may be central to legitimacy-building strategies, but other factors may also be important. The police need to demonstrate moral alignment with public values on the one hand and a basic level of competence on the other, if they are to secure or retain legitimacy.

3.2 Improving the legitimacy of the criminal law

The legitimacy of the criminal law is a product, at least in part, of the legitimacy of the institutions of justice. However, there are also legitimation strategies that work beyond the framework of these institutions.

3.2.1. Reconnecting the criminal law with morality

There are clear examples of jurisdictions that have managed to connect or reconnect the criminal law with morality. A paradigmatic example of this can be found in the history of the drink/drive legislation in the UK (and probably in other countries), where government advertising campaigns have successively transformed drunken driving from a tolerated minor infraction into a matter of public censure. There are also examples – of questionable effectiveness – of 'viral marketing' campaigns designed to change attitudes towards the sexual exploitation of women and girls.

3.2.2. Decriminalisation

Where it is impossible to connect the criminal law with social norms, then a better alternative may be to regulate through means other than the criminal law. As will be discussed, the clearest example of candidates for decriminalisation are, of course, the laws that prohibit the production, trafficking in, possession and (in some jurisdictions) consumption of currently illicit drugs. However, the criminalisation of irregular migrants raises similar issues about the balance of costs and benefits of using the criminal law as a means of controlling behaviour which carries no stigma for migrants and those who offer them social solidarity.

3.2.3. Normative reintegration of offenders

There is a further set of normative strategies, those that target existing offenders and aim to achieve forms of normatively grounded rehabilitation. It may seem artificial to differentiate between rehabilitative strategies that aim to improve the instrumental decision-making of offenders on the one hand, and those that are designed to change their moral sensibility on the other. However, at a conceptual level the distinction can be made, the latter set aiming to improve the alignment between offenders' moral perspectives and wider social norms. Perhaps the clearest example of this is to be found in restorative justice conferencing.

3.2.4. A cautionary note

We should mention that historically some of the greatest injustices have occurred when the criminal law has reached too far into areas of private morality and religious precept. We advocate trust-based policies that aim to better align the criminal law and morality with the proviso that this is done within a framework of human rights (an issue that we discussed more fully in Deliverable 5.1). We suggest that the application of trust-based policies ought to be subject to three conditions:

1. Any extension of the criminal law needs to be justified primarily by reference to the need to preserve human rights;
2. Any narrowing of the criminal law needs to be justified primarily by reference to the fact that the laws in question do nothing to secure or protect human rights;

3. Provided that these two conditions are met, it makes sense to maximise the degree of correspondence between the law and morality by ensuring that as far as possible behaviour proscribed by the criminal law carries a public stigma.

The following four sections of this paper seek to map the scope for trust-based strategies for four issues covered by FIDUCIA.

4. TRUST-BASED STRATEGIES AND TRAFFICKING IN HUMAN BEINGS

Trafficking[2] in human beings involves three groups of participants: the victims of trafficking (i.e. victims), those who are involved in recruiting them in the source country and trafficking in them from it (i.e. traffickers), and those who benefit from them in the destination country (i.e. service users).[3] The conceptual boundaries between trafficked individuals and those who pay to be smuggled are clear: the latter are competent to enter willingly into an agreement with the smuggler for services which are provided as agreed, whilst the former are tricked or coerced into slavery, forced labour or sexual exploitation. In reality there are shades of grey between trafficking and smuggling, as the ‘contracts’ between smuggler and smuggled may be breached to varying degrees that render any consent meaningless. And similarly a degree of consent may be secured from trafficked victims by sharing with them a proportion of the profit that they generate. All three groups – the traffickers, the victim and service users in the destination country – are potential audiences for trust-based strategies. Depending on the type of trafficking involved, the groups may need to be further subdivided. (For example exploiters of trafficked sex workers include pimps and madams, on the one hand, and service users on the other; and exploiters of trafficked labourers may be both gang-masters and those paying for their labour.)

4.2.1. Recruiters and traffickers

Our preconceptions are that traffickers are entirely instrumental in their motivations, and inured to any moral consideration. To the extent that this is so, instrumental strategies must seem the only ones that are likely to achieve any impact. However, FIDUCIA analysis suggests that this group may not be entirely insensitive to the effects of social stigma; strategies of exposure and stigmatisation may be able to make their business harder, less rewarding and less profitable. From the perspective of EU Member States that are receiving countries, putting strategies of this sort into place is obviously difficult, especially when the source country is not a Member State. But in principle, one can envisage stigmatising strategies that stress the real harm that is caused to the victims of trafficking.

In doing so, it may be important to follow Acharya’s (2004: 239) advice that ‘norm diffusion’ from one cultural setting to another can fail without some ‘norm localisation’ where ‘local agents reconstruct foreign norms to ensure the norm fits with the agents’ cognitive priors and identities’.

4.2.2. Trafficked victims

FIDUCIA analysis suggests that victims are likely to place little trust in the police of the country to which they are trafficked, and that those who are exploiting them will foster this distrust. Especially when trafficked victims are from outside the EU, their immigration does indeed render them vulnerable to the attention of immigration officials and the police, and it would be naïve to think that their treatment by officials routinely meets the highest standards of procedural justice if and when they seek help from the police.

2. At FIDUCIA, we are interested in trafficking of a cross-border nature.

3. In some cases a separation of roles was also seen in recruitment, arrangement of transit and placement (and exploitation) in the destination country.

Fearful and uncooperative victims can compromise effective enforcement action against traffickers and exploiters. Clearly there is considerable scope for ensuring that principles of procedural justice are closely followed in dealings with victims.

4.2.3. Service-users in receiving countries

As discussed above, those who exploit trafficked human beings in receiving countries fall into two groups: those who sell the services of the victims, and those who are 'end users'. As with recruiters and traffickers, it should not be taken for granted that pimps, madams and gang-masters are entirely economically motivated, and stigmatising strategies may have some effect on participants. However, there may be rather more scope for 'tarnishing the brand of their product' in the eyes of potential consumers. This is not easy to do well (as illustrated by the US campaign 'Real men don't buy girls', the impact of which is uncertain[4]). But if it has been possible to stigmatise behaviours such as drunken driving – albeit over a period of some years – it should be possible to achieve equivalent outcomes in respect of the purchasing of sexual and other services from victims of trafficking.

Whether strategies of stigmatisation targeting end users should be accompanied by criminalisation is a complex issue. On the one hand, criminalisation of end use may seem the quickest and surest way of conveying stigma, and this is frequently advocated. On the other hand, criminalisation – and in particular strict liability laws that do not require proof of intent – could be seen to lack legitimacy and may prompt defiance; they may also reduce the likelihood that, in the case of trafficked people, end users provide help to victims.

5. TRUST-BASED STRATEGIES AND TRAFFICKING IN GOODS

The organisation of trafficking in goods varies substantially depending on the nature of the trafficked goods. Thus, in the case of trafficking in naturally cultivated illicit drugs (heroin, cocaine, cannabis) there are producers in supplier countries who often operate in subsistence economies and driven by economic necessity. The export of goods is usually more structured. Then there are systems of retail distribution in the receiving country, and end users. Trafficking in synthetic drugs (and increasingly in strong-strain cannabis) differs in that the initial parts of the supply chain involve organisation and technical production skills. Trafficking in cigarettes and alcohol sometimes side steps these production processes, when trafficked products are legitimately produced and purchased in countries with low production costs and low taxation regimes. Trafficking in counterfeit tobacco and alcohol products bears a closer relationship to trafficking in illicit synthetic drugs. Trafficking in arts and antiques differs yet again in that theft usually substitutes a production process (counterfeiting again being the exception). But in all these forms of trafficking the basic structure of the distribution process involves:

- sufficient demand for the product from end-users to create a market that is sufficiently valuable to offset enforcement costs;
- producers, traffickers and distributors who respond to this demand.

These illicit market systems will of course prove most resilient when consumers who generate demand are in affluent countries and where producers and traffickers operate in countries with undeveloped economies, where (a) production costs are low, and (b) where there is also scope to undermine the enforcement process.

Perhaps the most important trust-based strategy to review for these forms of trafficking is whether the legitimacy of the rule of law is best consolidated by strategies of decriminalisation, especially in relation to illicit drugs. The high costs of drug production and trafficking to the rule of law in producer and trafficker countries, notably

4. Viral marketing is intended to be organic and self-replicating whereby people exposed to the 'pitch' pass it on to others. For the Real Men videos, see http://www.youtube.com/playlist?list=PL353AAAF819D112CF

in Latin America, the Caribbean and Afghanistan, are well documented. But there is increasing concern about the criminalisation of significant minorities of the population in consumer countries who would otherwise count as law-abiding. Not only is there the financial cost of enforcement, but also the costs in terms of the legitimacy of the criminal law and the legitimacy of the enforcing institutions. Decriminalisation or legalisation – accompanied by other regulatory strategies – now look like serious policy options, with support from politicians in a growing number of both producer and consumer countries. Insofar as this is a realistic policy option for the forms of trafficking under review by FIDUCIA – and it is clearly unrealistic for some of these – removing offences of production, supply and possession from the criminal law (or from its enforcement) also renders irrelevant the other sorts of trust-based policy covered by this paper. Any moves towards decriminalisation would need to be made in a concerted and coordinated fashion across Member States.

Where legislation such as that prohibiting drugs faces a large legitimacy deficit, simply tolerating the mismatch between public attitudes and the law is a very risky strategy. Where it is judged inappropriate to decriminalise or legalise drug use, it is probably important to put in place strategies designed to realign public opinion and the law. The obvious example here is the outlawing of cocaine production, supply and possession. The relevant legislation could be dismantled, but if this were judged impossible, it would make sense for governments – and civil society bodies – in consumer countries to take determined action to 'taint the brand' of cocaine in ways that re-infused the legislation with legitimacy. It is less clear whether there is similar scope to stigmatise the purchase of black market alcohol and tobacco on which taxes have been evaded: whilst there is a groundswell of popular hostility in many European countries to tax evasion by the very wealthy, it is unclear whether similar sentiments could – or should – be mobilised to stigmatise the poorest sectors of communities who most welcome relief from the high rates of taxes on alcohol and tobacco.

Where the law faces a legitimacy deficit, but is nevertheless judged necessary, then the enforcement agencies need to take particular care that they treat suspects and defendants with particular care. They need to observe principles of procedural justice, treating people fairly, respectfully and legally.

It is harder to judge the scope to deploy trust-based policies in producer countries. On the one hand, those involved in the cultivation of illicit products may be responding to the whip of economic necessity, and on the other the minority who are involved at a high level in the trafficking and supply of these products may be only marginally responsive to normative strategies. Nevertheless, community development programmes have been developed successfully to dissuade wildlife poachers through a combination of normative and economic incentives, and the same may be possible in other analogous fields. It may also be that those involved at a senior level in trafficking operations may themselves be highly instrumental in their motivations, but may nevertheless expect enforcement agencies to operate according to the rule of law. Where enforcement agencies fail to follow principles of procedural justice, this may prompt defiance and amplify non-compliance.

6. TRUST-BASED STRATEGIES AND CYBERCRIME

With the spread of information technology across almost every sphere of public life a number of new criminal offences have emerged which are not covered by existing criminal laws. At the same time, some traditional offences, such as fraud, copyright violation and dissemination of illegal content, have become more of a problem due to the increase in scale that has been facilitated by information technology.

The international legal instruments do not cover the entire spectrum of cybercrimes. The EU has adopted legal acts governing specific types of offences such as attacks against information systems and sexual abuse and exploitation of children including child pornography but not a comprehensive legal instrument covering all types of cybercrime. Unlike international law, Member States' criminal law usually covers the entire diversity of cybercrime. Most countries have changed their criminal laws in order to criminalise a variety of new acts and adapt the provisions of already criminalised offences to adequately cover their new forms.

Despite the expanding legal framework on cybercrime, neither law nor academic research provide for a common definition or classification of cybercrime. The most often used classification is the division of offences into typical cybercrimes and traditional crimes committed through the use of information technologies. Cybercrime and cyber-enabled crime covers a wide range of offending, and as information technology infuses the lives of more and more people one can expect this trend to continue. We often categorise cybercrime in terms of crime against an individual (e.g. cyber-bullying, distributing pornography), property (e.g. cyber fraud), or the government (e.g. cyber-terrorism). For thinking about trust-based strategies, it is useful to distinguish between different forms of cyber-enabled crime. The main ones are:

- Cyber-enabled illegal transactions (trading in goods such as illicit drugs, pornography or weapons);
- Cyber-enabled theft and fraud against persons and organisations;
- Illegal transactions that exist only by virtue of the existence of the Internet (e.g. illegal downloading and file sharing);
- Cyber-bullying and stalking;
- Cyber-terrorism (hacking governments and military website).

The first two categories of cyber-enabled crime raise questions about trust-based policies only indirectly. For example trust-based strategies may be applicable to Internet-based drug markets, such as different generations of The Silk Road, but these strategies will not differ substantially from those discussed in the previous section. In the case of cyber-enabled theft and fraud, the offenders constitute the only coherent audience for trust-based strategies, and again, it is unclear whether the fact that the offences are cyber-enabled requires a specific form of trust-based strategy that is specific to Internet offences.[5]

The third, fourth and fifth categories of cybercrime reflect genuinely new forms of crime, and as often happens in the case of new technological developments, emerging norms and standards that relate to the use of ICTs lag behind the technology's capacity. There is room for a little optimism that norms may evolve about what is, and what is not, acceptable behaviour, not least since the hugely increased ease of interpersonal communication that the Internet and other communications technologies offer simultaneously provide the means for the diffusion of new norms. Clearly the criminal law has an important declaratory role in setting the outer limits of morally acceptable behaviour, but for this to be successfully achieved close attention needs to be paid to the legitimacy of new legislation in the eyes of users, and to the alignment of the criminal law with emerging public sentiment. An important issue is the extent to which the state (or supra-state bodies) should lead or follow the debate about standards of behaviour in Internet and mobile phone usage.

6.1 Current initiatives and new structures

There are many supranational and regional international organisations that have a narrow or broad coverage of states, more or less making efforts to maintain cyber secu-

5. It is worth emphasising, however, that the scope for trust-based strategies in the enforcement of fraud legislation tends to go unrecognised. The boundaries between well-planned and clearly intended fraud, negligence and simple incompetence are often fuzzy and ill-defined. Enforcement strategies that are grounded in principles of procedural justice (explaining, listening to offenders) may in the long run create less defiance and more compliance.

rity and harmonise international measures to prevent/combat cybercrime. A number of actions at the EU level have addressed these issues by enhancing dialogue with relevant stakeholders, including public administrations, the private sector and individual users, and supporting national and European public-private partnerships. Although the national responses of EU Member States to cyber threats vary, their focus appears to be on increasing cyber security, countering cybercrime, and on crime prevention and/or protection policies under strong governmental commitment.

The cross-border nature of cybercrime, affecting both governments and private actors, motivates an increasingly active role amongst business and non-governmental organisations in ensuring safe and secured cyber space and countering global threats through a variety of tools, rules and innovations, as well as by developing and participating in diverse cooperation mechanisms at national and international levels including public-private partnerships. The private actors dealing with information and communication technologies are contributing to cyber security and the response to cybercrime by a variety of voluntary initiatives and actions at international and national level. The forms of self-regulation implemented to date and other successful non-legislative practices are based on persuasive rather than coercive measures and in combination with traditional regulatory frameworks based on coercive measures are mitigating cyber threats and vulnerabilities. On the one hand they can balance the increasing over-regulation and on the other they can help promote the legitimacy of the relevant criminal law provisions and other regulations and thus be also used in the process of developing and implementing trust-based policies. The impact would be for both Internet service providers (ICT companies), Internet users and (potential) offenders.

The enforcement of self-regulation, however, does not have the same deterrent effect on cybercrime as the legislative regulations implemented by law enforcement and criminal justice. Nevertheless, if the private sector organisations, especially Internet service providers, adopt and consistently implement high cyber security standards, best practices, relevant recommendations, etc., they can create a safer Internet environment that is unfavourable for cyber criminality, and thus by increasing prevention reduce cybercrime rates. Parallel to this, the co-regulation jointly developed by the public sector and private actors, and public-private partnerships offers a combination of voluntary non-legislative efforts and stronger enforcement potential. Although the public-private partnerships are still mainly focused on information sharing and are, according to the criticism, leaving behind collaboration in other aspects as research and development, setting standards for ensuring interoperability, etc. (Thomas, R. N., 2012, updated 2013, p.7), their potential can be further developed and directed also towards cybercrime prevention, deterrence or resilience. The best models and practices could serve as a starting point for formulating future policies based more on trust and soft/persuasive measures in contrast to the fear-based policies and coercive measures dominating so far.

7. TRUST-BASED STRATEGIES AND THE CRIMINALISATION OF MIGRANTS AND ETHNIC MINORITIES.

FIDUCIA's final focus on a criminal justice problem is the criminalisation of migrants and ethnic minorities. The problem is related not to specific forms of criminality, but to the interaction of three separate phenomena that in combination create one of the most challenging set of criminal justice problems facing Member States. The first of these is the historic over-policing of visible ethnic minorities in many Member States. In some cases this reflected the immigration of ethnic minority groups from colonial and post-colonial countries and in others the migration or mere presence of Roma. In the two decades after the Second World War, when overt racial intolerance was still commonplace, these minority groups were both economically and socially marginalised and intensively policed. A frequent consequence was their perceived or real over-involvement in crime. The result was a downward spiral of relations between police and minority groups.

The second and more recent phenomenon was the increasing mobility of populations both within and into Member States, against a backdrop of growing concern about immigration. There have been two significant results: the increasing criminalisation in law of irregular migrants, and the increased policing of groups who might conceivably contain irregular migrants. The third phenomenon, which is still more recent, is associated with the emergence of concerns about Islamic fundamentalism and the terrorist risks that this is seen to present. These three factors interact to a greater or lesser degree across many Member States, creating the risk of a perfect storm of worsening relationships between majority and minority ethnic groups.

Trust-based policies have an important role to play in mitigating this risk. It is essential to assess any new criminal law legislation designed to control irregular migration in terms of its legitimacy seen through the eyes of irregular migrants and those who offer them social solidarity. This is important to ensure compliance with the rule of law. It is equally essential to ensure that anti-terrorist legislation (such as provisions for stop-and-search, detention and restriction of movement) are legitimate in the eyes of those likely to be subject to the powers.

If it is important to ensure the legitimacy of the relevant criminal law provisions in the eyes of affected groups (including those acting in social solidarity), it is equally important to attend to issues of police legitimacy. Fair and respectful treatment by the police of marginalised groups sends important signals to those groups about their social integration. Abusive, illegal and unresponsive policing sends an equally powerful message about their excluded status. However, the policing of minority groups against a historic legacy of distrust and mutual suspicion is a real challenge, and one that has to be recognised.

8. CONCLUSION

This paper has set out to map the scope for trust-based policies to tackle four forms of criminal justice problem across Europe. It has aimed to identify the key audiences for various forms of trust-based strategy across the four sets of problems. Two themes run throughout the paper. First, in tackling problems, close attention needs to be given to the perceived legitimacy of existing or proposed legislation. The creation of a legitimacy deficit in laws designed to regulate trafficking, or control new forms of cybercrime or irregular migrants, will most certainly bring with it future problems.

Secondly the style with which the police and other parts of the criminal process treat lawbreakers – or those suspected of law breaking – is crucial in shaping not just their own institutional legitimacy but public consent to the rule of law. Procedural justice strategies to secure normative compliance are often misunderstood to be nothing more than 'soft' policing and soft justice, leading to questions about the role of coercion and punishment in justice. Procedural justice is about the fair and skilful use of authority, and that includes the use of coercive powers, and, in the final analysis, the deployment of deadly force and the use of imprisonment as an incapacitative strategy. In general, policies that pay close attention to the legitimacy of the law and the legitimacy of policing are likely to prove benign and have few perverse effects. It is hard to see how unfair and disrespectful treatment of crime suspects, for example, would improve their commitment to the rule of law, and it is easy to see how fair and respectful treatment might foster compliance. We have suggested that principles of procedural justice should be especially useful in improving the policing of marginalised groups, such as disadvantaged ethnic minorities, where relations with the police are often strained and marked by suspicion.

The next and final stage of the FIDUCIA project is intended to flesh out the ideas presented in this paper, so that there is a coherent roadmap for trust-based policies, as they affect some key emerging crime problems across Europe.

REFERENCES

Acharya, A. (2004) How ideas spread: whose norms matter? Norm localization and institutional change. *International Organization*, 58(2): 239–275.

Beetham, D. (1991) *The Legitimation of Powe*r. London: Macmillan.

Bottoms, A. (2002) 'Compliance and Community Penalties' (pp. 87–116), in Bottoms, A., Gelsthorpe, L., and Rex, S., *Community Penalties: Change and Challenges*. Cullompton: Willan.

Cavadino, M. and Dignan, J. (2006) *Penal Systems. A Comparative Approach*. London: Sage Publications.

Cavadino, M. and Dignan, J. (2013) *Political Economy and Legal Systems*, in (eds.) Body-Gendrot, S., Lévy, R., Hough, M., Snacken, S. and Kerezsi, K. The Routledge Handbook of European Criminology. London: Routledge.

Huq, A. Z., Tyler, T. R. and Schulhofer, S. J. (2011a) 'How do the Purposes and Targets of Policing Influence the Basis of Public Cooperation with Law Enforcement?', *Psychology, Public Policy and the Law* 17(3): 419–50.

Huq, A. Z., Tyler, T. R. and Schulhofer, S. J. (2011b) 'Mechanisms for Eliciting Cooperation in Counterterrorism Policing: A Study of British Muslims', *Journal of Empirical Legal Studies* 8(4): 728–61.

Messner, S. and Rosenfeld, R. (2001) 'An Institutional-Anomie Theory of Crime', in Paternoster, R. and Bachman, R. (eds), *Explaining Criminals and Crim*e. Los Angeles: Roxbury.

Messner, S. and Rosenfeld, R. (2010) 'Institutional-Anomie Theory: A Macro-Sociological Explanation of Crime', in Krohn, A. J. L. and Hall, G. P. (eds), *Handbook on Crime and Deviance*. New York: Springer.

Miller, W. (2010) 'Conservatism and the Devlin-Hart Debate' *International Journal of Politics and Good Governance*, 1(1.3), Quarter III: 1–20.

Reiner, R. (2007) *Law and Order: an Honest Citizen's Guide to Crime Control*. Cambridge: Polity Press.

Robinson, P. H. (2012) 'Criminalisation Tensions: Empirical Desert, Changing Norms, and Rape Reform', in Duff, R. A., Farmer, L., Marshall, S. E., and Tadros, V. (eds), *The Structures of the Criminal Law*. Oxford: Oxford University Press.

Robinson, R. H. and Darley, J. M. (1997) 'The Utility of Desert', *Northwestern University Law Review* 91: 453–99.

Robinson, P. H. and Darley, J. M. (2004) 'Does Criminal Law Deter? A Behavioural Science Investigation', *Oxford Journal of Legal Studies* 24: 173–205.

Sunshine, J. and Tyler, T. (2003) 'The Role of Procedural Justice and Legitimacy in Public Support for Policing', *Law and Society Review* 37(3): 513–48.

Thomas, Rachel Nyswander (2012, updated 2013): *Securing Cyberspace through Public-Private Partnership: A Comparative Analysis of Partnership Models*, available online at: http://csis.org/files/publication/130819_tech_summary.pdf [accessed: 24.06.2014]

Tyler, T. R. (2006a) 'Psychological Perspectives on Legitimacy and Legitimation', *Annual Review of Psychology* 57: 375–400.

Tyler, T. R. (2006b) *Why People Obey the Law*. Princeton: Princeton University Press.

Tyler, T. R. (2011) *Why People Cooperate: The Role of Social Motivations*. Princeton: Princeton University Press.

Tyler, T. R. and Fagan, J. (2008) 'Legitimacy and Cooperation: Why do People help the Police Fight Crime in their Communities?', *Ohio State Journal of Criminal Law* 6: 231–75.

Tyler, T. R. and Huo, Y. J. (2002) *Trust in the Law: Encouraging Public Cooperation with the Police and Courts*. New York: Russell-Sage Foundation.

Tyler, T. R., Schulhofer, S. J., and Huq, A. Z. (2010) 'Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans', *Law and Society Review* 44(2): 365–401.

Tyler, T. R. and Wakslak, C. J. (2004) 'Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority', *Criminology* 42: 253–82.

Wikström, P. O. H., Oberwittler, D., Trieber, K. and Hardie, B. (2012) *Breaking Rules: The Social and Situational Dynamics of Young People's Crime*. Oxford: Oxford University Press

Work Package 6
Trafficking
of human beings

6.4

Attitudes, motivations and strategies of participants in trafficking operations: evidence from Italy and the United Kingdom

by: Paolo Campana and Giorgia Cigalla

INTRODUCTION

This study explores the organisation of human trafficking, including the motivations of participants and the strategies adopted by offenders to secure compliance from, and exert control over, victims. In addition, it offers an assessment of the current approach to combating trafficking and discusses potential alternative strategies to improve policy responses with a focus on trust-based strategies. Finally, the study briefly touches upon the role played by ethnic communities and the implications of criminalising the purchase of sexual services in order to prevent trafficking. This study looks at trafficking solely as regards trafficking for the purpose of sexual exploitation.

This study is based on a systematic analysis of in-depth interviews conducted in Italy and the United Kingdom between February and June 2014. We interviewed a total of eight individuals with direct experience in assisting trafficking victims, including running shelters and mobile units. The Italian part of the fieldwork was conducted in three regions in Northern Italy: Piedmont, Lombardy and Emilia-Romagna. In the United Kingdom we focused on England and contacted 14 non-governmental organisations (NGOs). We experienced an extremely high level of non-response to or unwillingness to cooperate with this project. Only one NGO agreed to participate in the study and kindly arranged for two of its members to be interviewed. A semi-structured questionnaire consisting of 14 questions was devised for the fieldwork and administered during face-to-face interviews.

While this is by no means a representative sample of all the NGOs and charities working with victims of trafficking, our selection process retains some elements of a random procedure and is based on publicly available lists of organisations with working experience in local authorities. Interviewees had privileged access to victims in protected settings and thus were in a position to gain first-hand insights into the phenomenon.

1. THE ORGANISATION OF HUMAN TRAFFICKING

Broadly speaking, two distinct organisational models emerge from our interviews. The first model is typically associated with trafficking from Nigeria. Criminal organisations included in this model are often described as more complex, better organised, and ultimately larger in scale (Interview 7).

> 'Nigerian traffickers typically have large and well-developed networks. [...] Organisations are very well-structured. Moreover, members of the network can rely on support in several European countries. Organisations are often so developed and complex that trafficked women do not even know who to report to the police as they do not know who the members of these extremely complex structures are.' (Interview 4)

> 'Nigerian trafficking presents large and complex networks. [These networks] are highly structured and organised, and are often supported by a network of people that spans many countries.' (Interview 5)

A second – radically different model – is often associated with trafficking from Eastern Europe. This model is characterised by rather small organisations – or no organisation at all. Interviewees frequently referred to it as the 'boyfriend' model: a situation in which an offender becomes the boyfriend of his victim in order to first gain control over her and then exploit her, usually in the prostitution industry (Interview 7).

> 'If we look at Eastern European trafficking, for instance when Romanian or Albanian nationals are involved, there is no real criminal organisation behind it, but rather one or two young men who decide to "run their own business". These men, who tend to be very young and violent, exploit girls with whom they often have a relationship. Girls and traffickers share the same, extremely backward mentality, based on the concept of the inferiority of women.' (Interview 4)

> 'Eastern European trafficking is usually managed by two or three young men, who often have a love affair with the victims.' (Interview 5)

This evidence is in line with previous findings on the organisation of trafficking operations (Okojie 2003; Prina 2003; Carling 2006; Aronowitz 2010; Mai 2011; Mancuso 2014; see also Campana, The organszation of human trafficking, included in this deliverable).

What are the motivations of the participants in human trafficking? There is some consensus among the interviewees that – regardless of the organisational model adopted by offenders – human trafficking essentially remains a profit-driven business. Economic motivations were stated by all respondents as the main driver underpinning human trafficking operations:

> 'Basically, these organisations engage in trafficking for money. Trafficking in human beings does not represent an easy criminal business; however, it is considered easier than trafficking of goods. In fact, it is hard to find a valid explanation for carrying a gun, or drugs, instead of "just being with somebody".' (Interview 3)

> 'The first and main reason why people engage in trafficking is money.' (Interview 5)

> 'Trafficked girls are commodities. They can be bought in Nigeria for €4,500 and then moved to Italy. When a girl reaches Italy, her value is usually €12,000. She is only finally free when she has earned some €50,000 for her exploiter.' (Interview 1)

> 'If we look at Nigerian trafficking, some of the "old" madams have now left [Italy] and moved back to Nigeria where they have made considerable investments. Other madams have decided to stay in this country and opened legitimate shops, like phone centres and corner shops.' (Interview 1)

Trafficking appears to be a market with low barriers to entry and no monopoly control (on this point, see also Campana, The organisation of human trafficking, included in this deliverable):

> 'It is relatively easy to enter a trafficking network, and also relatively low-risk. There is room for everybody. All it takes is the ability to resort to violence and some capital to invest. Trafficking is open; there is no monopoly of any sort. Entering the business is relatively low-risk since there are no global mafias controlling this market.' (Interview 1)

Financial motivations may underpin the decisions not only of traffickers, but in some instances also the decisions of the families of victims – particularly in the case of Nigerian trafficking:

> 'Families may consent to send their daughter to Europe as this is a valuable source of future income. Even when working in the least profitable segment of the prostitution market, girls are often still able to send some money back to their family. Being "the chosen one", the one who gets to go to Europe, is often seen as a privilege. It is at the same time a sacrifice and a privilege. Once in Europe, she will have the opportunity to build a better future for herself, after the initial period spent under the control of a madam.' (Interview 1)

In addition to economic factors, some interviewees have also stated that psychological gratification and the desire to acquire power are motivating factors as regards participating in human trafficking:

> 'Making a profit is not the only reason that motivates traffickers; psychology plays a role as well. Criminals feel powerful – through influence and control over people, they achieve gratification and self-confidence.' (Interview 3)

2. HOW TRAFFICKERS EXERT CONTROL OVER VICTIMS AND ENSURE COMPLIANCE

As discussed elsewhere in this deliverable, human trafficking generates high monitoring costs. Victims need to be monitored for prolonged periods of time, particularly during the exploitation phase (on this, see Campana, The organisation of human trafficking, included in this deliverable). What are the strategies that traffickers adopt in order to ensure compliance from their victims and to secure control over them? According to the interviewees, there is a number of distinct strategies that offenders may adopt. While some strategies are not specific to any trafficking organisational model (e.g. intimidation and confiscation of identity documents), others tend to be model-specific.

A common strategy often adopted by both Nigerian and Eastern European traffickers is the confiscation of the victim's documents. As explained by one interviewee, 'often women only have photocopies of their documents, because the original copies are held by the traffickers' (Interview 4). By taking away their documents, traffickers seek to make victims feel vulnerable and to separate them from the rest of society: 'Without documents, your world is your exploiters. They try to close every opportunity for a victim to have contact with the outside world' (Interview 1).

Other strategies appear to be specific to a given organisational model. In the case of Nigerian trafficking, for instance, traffickers have developed a system of informal contracts that are signed before pastors or even notaries (Interview 1; see also Okojie 2003; Prina 2003; and Carling 2006). Over the years this system 'has become highly professionalised' (Interview 1). Informal contracts are often matched with voodoo rituals (Interview 6). Voodoo rituals are employed to induce fear in the victims regarding the consequences of a possible breach of a contract, and thus ensure compliance with the terms of such a contract:

> 'African culture is strongly connected to spirituality. Rituals have a deep influence on the behaviour of victims. Therefore, women carefully comply with the agreement. It happens very rarely that victims come forward before the debt is paid back. They are terrified by the consequences that the breach of the ritual could bring. We witnessed cases of women experiencing panic attacks, and who tried to cut their abdomen because they believed they were possessed by evil.

> However, one can also take advantage of this intense spirituality to help girls. In fact, Nigerian women are willing to cooperate when assisted by religious associations' (Interview 5).

Traffickers also resort to hostage-taking strategies to ensure compliance from victims:

> 'Organisations may threaten [the victims'] families in the country of origin. For example, it happened that, after a victim reported her situation to the police, traffickers found her father in her home country and severely assaulted him.' (Interview 5)

Taking hostages – or information about their whereabouts – to guarantee promises is a practice that has a long and well-documented history (Shelling 1960 and 2006; Raub 2004; Gambetta 2009). It has been shown that criminals have adopted this practice to foster cooperation and support exchange (Campana and Varese 2013). The evidence discussed indicates that traffickers may also rely on this same practice (Interview 7).

Resorting to violence is a practice that is common to most criminal organisations, and trafficking groups are no exception. However, according to our interviewees, violence tends to be more associated with Eastern European traffickers than with Nigerian ones (Interview 6; Interview 1). Besides physical violence, traffickers may also exert psychological violence on their victims (Interview 7). According to one interviewee, violence takes a variety of distinct forms:

> 'First there is physical control that is implemented through physical violence: these young men beat women. In addition, traffickers "test" the girls by sending friends who pretend to be clients to have sex with them. Also, they tend to be physically present when the girls are "at work".' (Interview 5)

Psychological control exerted by Eastern European traffickers also plays out in a more subtle way:

> 'Sometimes girls see traffickers as saviours. In fact, these women often come from very difficult situations in their home country, and the life they get in Italy may still be better than the condition they experienced back home. I remember a trial in which a girl refused to report her exploiter to the police because she was extremely grateful to him. She had a difficult early life as an orphan and came to believe that the trafficker was the only person who "took care" of her.' (Interview 5)

Eastern European victims tend to develop romantic relationships with their traffickers, and this facilitates controls (Interview 6).

In addition, social stigma may work in favour of traffickers, by creating what has been defined by an interviewee as 'moral extortion':

> 'Victims are aware that working in prostitution is socially stigmatised, both in Italy and in their own country. So they may not come forward. The fact that prostitution is perceived as morally deplorable constitutes a barrier for them to escape their condition of exploitation' (Interview 3).

Traffickers can also resort to positive incentives to ensure compliance from victims. In the case of Nigerian trafficking, instances of co-participation in profits have been documented. One respondent reports cases where 'the madam sets the amount that a victim needs to pay her during, say, the next month. If she is able to earn more, then she can keep the rest and maybe send it back to her family in Nigeria' (Interview 1). According to a second interviewee:

> 'Generally speaking, trafficking is less violent now than in the 1990s. In fact, the current approach is rather "entrepreneurial". Girls and criminal organisations sometimes make agreements according to which the income generated by victims is shared,usually not equally, but nonetheless shared.' (Interview 4)

According to another respondent, 'traffickers implement strategies based on positive incentives, for instance they try to improve the conditions of victims while the latter are working for them' (Interview 3). Positive incentives decrease the risk of traffickers being reported to the police, as well as the monitoring costs associated with trafficking.

Finally, in the case of Nigerian victims, 'they look at madams and see a projection of themselves. They too were exploited and now they are successful and make good money. Victims are led to think "one day you also will be as rich and well respected as your madam"' (Interview 1).

3. HOW TO COMBAT TRAFFICKING: SHORTCOMINGS OF THE CURRENT APPROACH AND POSSIBLE ALTERNATIVE STRATEGIES

3.1 Problems with the current approach

The respondents based in Italy identified a number of shortcomings with the current approach to combating trafficking. Three main issues were mentioned in relation to the working of the justice system: (i) lack of procedural uniformity; (ii) excessive length of trials and their failure to reach a final verdict; and (iii) lack of resources.

> 'We often find a lack of procedural uniformity among different local authorities. For example, each Questura [central police station] implements the procedure to combat trafficking in a different way. This generates confusion and awkward outcomes.' (Interview 4)

> 'The judicial system is not adequate: trials are too long, victims do not get justice, and no proper protection for victims is provided. The main problem is the lack of resources: the authorities and associations do not have adequate economic resources. This also affects police morale.' (Interview 3)

> 'Often trials do not reach a final verdict. As a consequence, it is quite easy for trafficking organisations to generate large incomes without any real risk.' (Interview 4)

Victims can play a major role in tackling trafficking operations. However, how does the justice system deal with victims? Serious concerns have been expressed by respondents about the failure of the justice system to protect victims properly (e.g. trials are not victim-oriented). In turn, this generates fear and uncertainty among victims:

> 'The justice system does not protect victims properly. Women often do not get justice. Victims are worried about the consequences of reporting their condition

> to the police as the new phase that begins after coming forward is extremely uncertain: Where will I go? Will I be safe? Will I have concrete alternatives to my current living conditions?' (Interview 4)

> 'During trials victims are not protected enough. It happens quite often that they have to face their traffickers in court, sometimes many years after they managed to get out of exploitation.' (Interview 6)

Difficulties as regards offering protection and shelter for an adequate period of time appear to be a cause of concern that is shared by social workers in both Italy and the United Kingdom (Interview 1 and Interview 7).

Often a lack of credible alternatives to the exploitative situation prevents victims from cooperating with the authorities:

> 'The major obstacle that prevents women from leaving the exploitative condition is the lack of concrete alternatives. This has been exacerbated by the current economic crisis. Victims do not easily find job opportunities. The only possibility for them is to join religious associations [...]. However, these religious communities are usually rather over-protective, and they do not offer a real opportunity for women to empower themselves, and join the rest of society.' (Interview 5)

> 'What do we [Italy] offer victims? Maybe a residence permit that is very difficult to extend, welfare services of a low quality and an internship that pays EUR 500 a month, if they are lucky. Let's be honest: we do not offer much. This is not an attractive alternative. In Italy, the anti-trafficking network has been destroyed over the years.' (Interview 1)

Financial and psychological factors may go hand-in-hand, as explained by one interviewee:

> 'The main obstacle that prevents victims from coming forward is their fragility, both psychologically and financially. In addition, some victims are undocumented migrants, so they believe they do not have alternatives. Traffickers often take advantage of the psychological weaknesses and fragility of their victims. We have witnessed an increasing number of cases of criminal organisations exploiting girls with mental diseases, as they are easier to control.' (Interview 6)

Finally, according to one interviewee, victims themselves may not fully realise the seriousness of their condition:

> 'There was a case of a Romanian girl who moved to Italy to take up a job offered to her by some fellow countrymen. Once in Italy, she ended up working in prostitution. She came forward but, when she was offered help and assistance from a charity, she preferred to stay with some Romanians she was already in touch with. Unfortunately, two weeks later, she was again in a police station after being beaten and abused by these new "friends." When the charity offered assistance the second time, she refused again and decided to join some relatives in Italy. [...] She trusted her family and fellow countrymen more than the authorities, despite the extremely negative experiences she already had.' (Interview 3)

> 'Typically women decide to report their condition to the police either at the very beginning or when they are exhausted, as a last resort. In between they go

> through resignation and a sense of guilt. … From a psychological point of view, coming forward implies acknowledging the complete failure of her ambitions and the dream of getting a better life through migration. Acknowledging this "failure" can be extremely traumatic for victims.' (Interview 3)

3.2 Improving the response of the justice system to trafficking

Respondents based in Italy have stated that they see no need for introducing new laws to combat human trafficking. The existing legislation is deemed adequate:

> 'No change to the current legislation is required. The letter of the legislation is adequate enough as it is. But it has to be implemented in an effective way.' (Interview 5)

> 'We should make the legislation work more effectively and it should be better implemented.' (Interview 4)

> 'In theory, our legal system offers good opportunities. When compared to some other European countries, the Italian system is often better structured in terms of protection offered to victims. The problem is the reality: there are not enough resources available to implement these measures.' (Interview 3)

> 'The legislation should be applied in a more homogeneous way throughout the country. The residence permit for victims should not be considered a "reward" for their cooperation, but a standard procedure. Unfortunately this is considered "unaffordable" by some local authorities. Procedures are not applied in a uniform and homogeneous way across local authorities, and this creates problems. The same situation can be handled differently in different places, depending on which authority is in charge of the case.' (Interview 6)

Rather than suggesting a need for new legislation, respondents have highlighted the necessity for a more effective and uniform implementation across Italy of the actual legislation that already exists. It is also clear that respondents are concerned about the mismatch between the opportunities to be provided to victims stated in the legislation and the resources allocated to implement those opportunities. Additional resources could be generated by seizing the assets of traffickers, and then using that money to finance social assistance programmes for victims of trafficking. One interviewee stressed the need for extensive cooperation with the authorities in source countries, to tackle the large flows of funds that are generated in the destination countries and channelled back to the source countries.

> 'It is crucial to start seizing assets in source countries. Many traffickers live a modest life here [in Italy] when in reality they have large capital in their country of origin, for instance real estate. We need to target these assets, the big financial transactions, and not the "small" madams living here.' (Interview 1)

Another interviewee suggested broadening the range of actions taken by law enforcement agencies:

> 'More controls at borders are needed. In addition, it is crucial to target individuals who are not directly connected to forced prostitution, but who are still neces-

> sary to make this market work. For example, individuals who rent apartments or employers who sign fictitious employment contracts for victims.' (Interview 4)

However, according to another interviewee, identifying victims at the border may be very challenging for police forces as victims may not display clear signs of their situation during this stage of the trafficking process (Interview 7).

3.3 New approaches to human trafficking and trust-based measures

Besides improving the justice system, what measures can be devised outside the realm of the criminal law? In addition, what role does trust play in the context of human trafficking?

A first strategy should aim at addressing the moral stigma associated with victims of trafficking due to their involvement in prostitution.

> 'Sex workers are seen with prejudice and are attributed a very low social standing. A deeper public consciousness and awareness is needed to give value to the role of these women and their needs. [...] However, awareness should not equate to paternalism or moralism. The idea is that educated customers as well as the general public should be able to distinguish between prostitutes and victims of trafficking. The former are emancipated women who voluntarily decide to enter this business; the latter are victims who need to be protected from their exploiters.' (Interview 4)

> 'The most important strategy would be to focus on cultural change. Currently the media do not provide adequate information on trafficking. In addition, they tend to adopt an alarmingly self-righteous approach. [...] An extremely negative and moral judgement is often made about prostitution. Public opinion should be made more aware of this phenomenon and be more careful in judging the women involved. In addition, customers should be educated and should choose critically who they deal with.' (Interview 5)

> 'Measures outside criminal law should be aimed at increasing awareness, both in the country of origin and in the destination country.' (Interview 6)

At the same time, social stigma constitutes a tool that can be used against traffickers:

> 'We need to stigmatise the behaviour of traffickers. At the moment, traffickers are perceived as successful individuals … rich and successful. [...] We should change the current model in which the successful people are only those who have managed to make a fortune abroad. Traffickers are perceived as "the" successful people.' (Interview 1)

> 'Trafficking is also a way to achieve social mobility and empowerment. If you're the son of a trafficker, then you can go to a better school and maybe achieve some success in life.' (Interview 1)

What is the role of trust in the context of trafficking? Analytically speaking, four distinct trust dimensions can be identified:

- trust between victims and the authorities/social workers;
- trust between clients and the authorities/social workers;
- trust between victims and clients; and
- trust between victims and traffickers.

If present, trust can play a critical role in identifying victims, reaching out to them and finally helping them to come forward and to report their exploiters. Trust is a precious commodity – but it is difficult to generate and easy to destroy. Trust can be created as a result of positive interactions between institutions and victims. For instance, the (perceived) level of efficiency, fairness or corruption of an institution appear to have an impact on the creation of trust.

> 'Instead of trust, the current feeling is "mistrust", particularly towards institutions: trials are always too long and in the meantime traffickers have the opportunity to go on with their business. This sends a very bad signal.' (Interview 6)

> 'Victims tend to trust relatives and fellow countrymen more than charities and institutions. Women feel guilty, vulnerable and failed, and consequently they are not willing to ask for help from a stranger, who most likely will act with a moralistic approach and blame their behaviour and their failure.' (Interview 3)

Corruption erodes trust in institutions, and as a consequence makes the fight against trafficking more difficult.

> 'There have been instances in which falsification of identity documents took place in Questure [Italian central police stations] carried out by corrupt police officers. Institutions are made up of individuals who can be corrupted. The only way for people to trust institutions is if institutions themselves make an effort to maintain high standard of integrity and competence, punishing corrupt and incompetent officers.' (Interview 3)

Another interviewee painted a quite negative profile of the work of police in Italy (Interview 5). According to the testimony of a social worker, police officers lack training and tend to show a low level of professionalism. This interviewee told us that in one instance a sex worker was raped and, while reporting the crime at the police station, she was addressed with explicitly sexual allusions by the policeman who was writing the report (Interview 5).

Building trust is seldom an easy task. In addition, negative previous experiences in victims' home countries tend to travel with them and hinder the creation of trust in the destination country:

> 'Often victims come from countries where the police are brutal or corrupt, and this stays with them.' (Interview 1)

Trust, however, can also lead to a negative outcome (the fourth trust dimension in the list above). For instance, abuse of trust may facilitate the recruitment of future victims:

> 'Girls are recruited through people they trust, e.g. relatives and teachers, who offer them job opportunities in Europe. […] These young women are then subject to a voodoo ritual, through which they make a promise to pay their debt (usually €40,000 – €70,000). Once in the destination country, the only possibility to pay their debt back is to engage in prostitution.' (Interview 5)

Finally, non-criminal measures require resources and adequate funding. One interviewee expressed the need for 'more financial resources [to be] given to NGOs' (Interview 4).

4. CRIMINALISING THE PURCHASE OF SEXUAL SERVICES

Through Directive 2011/36/EU, the European Union made an attempt to introduce measures aimed at tackling the demand-side of trafficking across Member States. Article 18(4) of this Directive states that Member States shall establish as a criminal offence the use of services which are the object of trafficking-related exploitation. In the view of some Member States as well as advocacy groups, this translates into criminalising the purchase of sex tout court, along the lines of the so-called 'Swedish model' (Gould 2001). In 1999, Sweden passed legislation that outlawed the purchase of sexual services of any kind (but not the sale of such services), with punishment for the violator ranging from a fine to imprisonment for up to six months. The debate on the effectiveness of this model in reducing the level of trafficking and increasing the welfare of victims is still an open one, and the preliminary findings from Sweden are far from being unambiguously positive (Levy and Jakobsson 2014). In 2010, England and Wales introduced a new offence criminalising the purchase of the sexual services of a prostitute who has been subject to exploitation. Kingston and Thomas (2014) provide an excellent assessment of this provision, and find that it is rather ineffective.

What are the views of our respondents regarding criminalising the purchase of sexual services tout court? There is consensus among interviewees that such a measure would be detrimental to the fight against trafficking, with the negative consequences outweighing the positive outcomes:

> 'We do not consider the criminalisation of customers to be a good strategy at all. On the contrary, customers should be considered a positive resource. Based on our own experience with assisting victims of trafficking, I reckon that 50% of victims were rescued thanks to the assistance of former customers who decided to help these women, whereas the other 50% of victims voluntarily reported their situation to the police. Criminalised customers will fear the penalties and also feel a strong sense of shame; as a reaction, prostitution will become ever more hidden. Instead of criminalising them, customers should be educated.' (Interview 6).

Instances of clients reporting abuse of sex workers and potential trafficking situations have also been recorded in the United Kingdom (Interview 7; see also Pai 2013).

> 'Criminalising customers is the wrong strategy. Customers should be considered a resource that we can exploit to detect crimes and shed light on the phenomenon. Customers should be educated to "choose" women based on whether they are carrying out their business freely or if they are under exploitation.' (Interview 5)

> 'This NGO does not agree with the criminalisation of customers. Fines do not represent an effective tool to combat trafficking. In addition, by criminalising customers, we risk making trafficking even more hidden, and thus more difficult to tackle.' (Interview 4)

> 'Criminalisation of customers is the wrong approach to the phenomenon. [...] This strategy is more concerned with decorum and respectability than a real willingness to eliminate trafficking and exploitation.' (Interview 3)

> 'As an NGO, we are against the criminalisation of customers. If the whole trade becomes hidden, then it will be much more difficult for us to reach out to potential

> victims and offer them assistance. It may even have the unintended consequence of making it more difficult to build cases against traffickers.' (Interview 1)

Many respondents stressed the need for awareness-raising campaigns. However, they also expressed a strong belief that campaigns should target a specific audience in a specific way, rather than just conveying a 'general' message:

> 'We could think of campaigns that target clients of prostitution. But these campaigns should be non-judgmental… they should carry non-judgmental messages. Selling sex is work, and needs to be paid fairly given the risks involved. I would put a stigma on these clients who seek to pay €10 for a night with a sex worker. "Shame on you!" It is clear that there is something wrong in this exchange and clients should be suspicious. We should be selective about which clients we put a stigma on. Not all of them should be stigmatized.' (Interview 1)

Finally, one interviewee has put forward the idea of a 'fair-trade' system to guide the choice of customers.

> 'We should offer customers of sex an alternative in which the price is fair and the working conditions are fair too. And this should be easily identifiable by the clients' (Interview 1).

5. THE ROLE OF DIASPORAS AND ETHNIC COMMUNITIES

Turner and Kelly (2009) have emphasised the importance of looking at the potential interplay between diasporas and trafficking in human beings. This is still a rather underexplored aspect of the phenomenon and thus we tried to explore this aspect with our interviewees. Ethnic communities can play a double role: they can either facilitate trafficking, e.g. by shielding traffickers from the authorities, or they can combat trafficking, e.g. by assisting the authorities in identifying victims and then offering support to victims during the post-trafficking period.

> 'One can find individuals with links to trafficking in churches and organisations within the Nigerian community in Northern Italy. In addition, these people tend to be perceived – although not always – as successful in their community. They can give support, advice, and solve disputes. People turn to them to ask favours, as they do in Sicily with the local "don".' (Interview 1)

Among some Nigerian communities, the work of madams is often perceived as legitimate:

> 'Madams are not seen as deviant in the community. Actually, sometimes they can even be a role model. They can be wealthy and successful.' (Interview 1)

> 'Madams are well known in their community. In our city [in Northern Italy] they were even part of an organisation that would give small gifts to each newborn kid in the community. There are no negative feelings towards them. It is actually quite the opposite: sometimes it is the girls we shelter who are mocked by the community.' (Interview 1)

Although communities may have an important role to play, it is crucial for the authorities to engage with them in the right way. The unintended consequences of an inexpert engagement with communities can be serious:

> 'One day the mayor of our town [a middle-sized town in Northern Italy] decides to reach out to the Nigerian community and invites three representatives to his office in the city hall. Guess who were his guests? Two of most prominent madams in town and a guy involved in the trafficking of stolen credit cards. They had an official meeting with the mayor and a picture was taken with him. This made them legitimate in the eyes of their community. I am pretty sure that the mayor had no intention of doing this … it is just that he ignored the background of these people. However, the mayor's decision ended up legitimising them. When we engage with communities we should be particularly careful. People involved in shady businesses tend to be the wealthiest and thus the more prominent.' (Interview 1)

Finally, as one interviewee pointed out, 'ethnic communities play a different role depending on the nationality of the people involved. In some cases there is little cohesion and solidarity among members while other communities, like the Chinese one, tend to be close-knit' (Interview 6). Therefore, there is no universal rule as to how to engage ethnic communities in the fight against trafficking: a careful assessment of the local circumstances is needed, to avoid potentially serious unintended consequences.

6. CONCLUSIONS

This study has explored a number of dimensions of trafficking operations through face-to-face interviews with NGO personnel in Italy and the United Kingdom. We conducted a total of eight interviews using a semi-structured questionnaire and a sampling method that retained some elements of a random procedure. Given the procedure adopted and the relatively small number of organisations approached, any generalisation of the findings must be made with extreme caution. Nonetheless, the interviewees have offered a number of fruitful insights related to trafficking into Western European countries. This work has focused on trafficking for the purpose of sexual exploitation.

Two distinct organisational models have emerged from the interviews. The first model is typified by Nigerian trafficking rings, and is characterised by more complex and better structured criminal organisations. The second model is typically described as the 'boyfriend' model and is associated with Eastern European trafficking. This model is commonly interpreted as a situation in which a trafficker becomes the boyfriend of his victim in order to exploit her, often in prostitution.

There was a consensus among the interviewees that trafficking is essentially a profit-driven business. Economic motivations were identified as the main driver underpinning trafficking operations. These were cited as an important factor not only in relation to traffickers, but in some instances also on the part of the victims' families. Trafficking appears to be a market with low barriers to entry and no monopoly control (there is no global mafia which controls the market). In addition to financial motivations, psychological gratification and the desire to acquire power were cited as motivating factors for traffickers.

The interviewees identified a number of strategies that traffickers may adopt to exert control over victims and to ensure compliance. Some strategies cut across organisational models, e.g. intimidation and confiscation of documents, while others tend to be associated with a specific model. For instance, Nigerian traffickers have developed a system of contracts, which are usually signed before a pastor or a notary and are often associated with voodoo rituals. Eastern European traffickers tend to resort more often to violence – both physical and psychological – to gain control over victims. Violence may play out in a context of exploitative 'romantic' relationships. Finally, hostage-taking strategies have also been identified.

In addition, traffickers may adopt positive incentives to ensure compliance. For instance, there are instances of co-participation in the profits generated by victims. The sharing of profits is usually done on a rather unequal basis, yet it nevertheless gives the victims an incentive not to defect or inform on their exploiters.

A number of shortcomings in the response of the justice system to trafficking were identified, particularly by respondents based in Italy. Three main issues emerged: (i) the lack of procedural uniformity; (ii) the excessive length of trials and their failure to reach a final verdict in most cases; and (iii) the lack of resources. Interviewees also expressed concern about the failure of the authorities to protect victims effectively and adequately. Criminal law measures should be enhanced by implementing a better strategy to seize the assets of offenders. This would not only send a strong signal to offenders but would also generate resources that could then be used to support social intervention programmes, e.g. classes and training to improve the skills of former trafficking victims, and to place them in a better position when looking for jobs.

In addition to criminal law measures, this study has also explored the extent to which normative measures can be developed and applied to combat human trafficking. While traffickers display predominantly instrumental behaviour, there is nonetheless some scope for alternative measures. Ideally, normative and instrumental measures should interact in order to trigger a virtuous circle and, therefore, change the structure of the incentives which motivate traffickers. Normative measures could help the authorities identify victims or increase the opportunities given to victims to come forward and report their exploiters to the police, as well as to increase their willingness to do so. In this respect, trust-based measures may play a crucial role.

Analytically speaking, four distinct trust dimensions were identified:

- trust between victims and the authorities/social workers;
- trust between clients and the authorities/social workers;
- trust between victims and clients; and
- trust between victims and traffickers.

Where the authorities are concerned, the creation of trust appears to be related to the (perceived) level of efficiency, fairness or corruption of a given institution. To increase trust, therefore, one should devise strategies that will reduce the level of corruption and increase the efficiency and fairness of institutions. This would have an impact as regards creating trust between victims and the authorities, as well as between clients and the authorities (trust dimensions one and two). It has also been noted that past negative experiences, e.g. in the victims' home countries, may hinder the creation of trust in the destination country.

It is important to remember that trust is not always associated with desirable outcomes. The fourth trust dimension is an example of trust leading to negative outcomes for victims, and for the public more generally. A high level of trust between traffickers and victims decreases the monitoring cost associated with trafficking and thus increases the trafficking capacity of the organisations involved. In addition, trust can be manipulated to deceive victims in the source country and, therefore, facilitate recruitment.

In addition, 'moral stigma' has also emerged as a key mechanism. Stigma can work in two ways: it can facilitate trafficking, e.g. by increasing the cost faced by victims for leaving their exploitative situation, or it can help tackle trafficking, e.g. by tainting the reputation of key players. According to our interviewees, madams and traffickers are often not perceived as deviant figures by their community; on the contrary, they may have a positive reputation. Stigmatising their activity may have an impact on the profitability of their business, as well as on the ease of conducting it. Ethnic communities could play a major role in this respect. However, engaging these communities in the fight against trafficking requires in-depth knowledge about the internal dynamics of a community. An ill-thought-out strategy may have the unintended consequence of boosting the legitimacy of the very individuals that the authorities intend to target.

Also, moral stigma can be a double-edged sword and could hinder the fight against trafficking, instead of supporting it. For instance, placing a stigma on sex workers will make it harder for them to come forward and report their situation to the authorities. In addition, stigmatising the behaviour of clients will also make it much less likely that they will approach the authorities and NGOs and alert them to potential victims of trafficking. According to one interviewee, some 50% of victims assisted by the interviewee's NGO were reported to the authorities by clients. Stigmatising customers will decrease – if not eliminate altogether – the trust between clients and the authorities (the third trust dimension in our list). Legislation that criminalises customers of sex workers while falling short of eliminating the whole market altogether may have exactly the same unintended consequence: to wipe out the trust between clients and the authorities – and possibly also between victims and clients – thus making it more difficult for the authorities to identify victims of trafficking.

Finally, trust and social norms are not inherently positive or negative. They are devices that can work both ways: they can facilitate trafficking or hinder it. How we alter the normative climate is therefore crucial. In particular, the decision as regards which norms we base our strategies on is extremely significant, as is the decision regarding which actors we target. Good intentions may have serious unintended consequences.

APPENDIX A. LIST OF INTERVIEWEES

(Interview ID; Name of the Organisation; Place of the Interview; Country; Date of the Interview)

Interview 1. PIAM: Asti, Italy, February 2014
Interview 2. PIAM: Asti, Italy, February 2014
Interview 3. Lule Onlus: Milan, Italy, April 2014
Interview 4. Non si tratta: Bologna, Italy, April 2014
Interview 5. Fiori di strada: Bologna, Italy, April 2014
Interview 6. Casa delle donne: Bologna, Italy, April 2014
Interview 7. Unseen: Bristol, United Kingdom, June 2014
Interview 8. Unseen: Bristol, United Kingdom, June 2014

REFERENCES

Aronowitz A., Theuermann G., and Tyurykanova E. (2010), *Analysing the business model of trafficking in human beings to better prevent the crime.* Vienna: OCSE.

Campana, P., and Varese, F. (2013), 'Cooperation in criminal organizations: Kinship and violence as credible commitments'. *Rationality and societ*y, 25(3), 263–289.

Carling J. (2006), *Migration, Human Smuggling and Trafficking from Nigeria to Europe.* Geneva: IOM.

Gambetta, D. (2009). *Codes of the Underworld: How Criminals Communicate.* Princeton, NJ: Princeton University Press.

Gould, A. (2001), 'The criminalisation of buying sex: The politics of prostitution in Sweden', *Journal of Social Policy*, 30(03), 437–456

Kingston, S., and Thomas, T. (2014), 'The Police, Sex Work, and Section 14 of the Policing and Crime Act 2009', *The Howard Journal of Criminal Justic*e, 53:3, 255–269.

Kleemans, E. R. (2009), 'Human smuggling and human trafficking', in M. H. Tonry (ed), *Oxford Handbook on Crime and Public Polic*y, 409–427.

Kleemans, E. R. (2011), 'Expanding the domain of human trafficking research: introduction to the special issue on human trafficking', *Trends in Organized Crime*, 14(2), 95–99.

Levy, J., and Jakobsson, P. (2014), 'Sweden's abolitionist discourse and law: Effects on the dynamics of Swedish sex work and on the lives of Sweden's sex workers', *Criminology and Criminal Justice*, online first.

Mai, N. (2001), Transforming traditions: A critical analysis of the trafficking and exploitation of young Albanian girls in Italy. In R. King (ed). *The Mediterranean Passage. Migration and New Cultural Encounters in Southern Europ*e. Liverpool: Liverpool University Press.

Mancuso, M. (2014). 'Not all madams have a central role: analysis of a Nigerian sex trafficking network', *Trends in Organized Crim*e, 17(1-2): 66–88.

Okojie C. E. E., Okoji O., Eghapona K., Vincent-Osaghae G., and Kalu V. (2003), *Trafficking of Nigerian Girls to Italy.* Turin: UNICRI.

Pai, H.H. (2013), I*nvisible. Britain's Migrant Sex Workers.* London: The Westbourne Press.

Prina F. (2003), *Trafficking of Nigerian girls to Italy. Trade and exploitation of minors and young Nigerian women for prostitution in Italy.* Turin: UNICRI.

Raub, W. (2004), 'Hostage posting as a mechanism of trust: binding, compensation, and signalling', *Rationality and Society*, 16(3): 319–365.

Schelling, T. (1960). *The Strategy of Conflict*. Cambridge, MA: Harvard University Press.

Schelling, T. (2006). *Strategies of Commitments and Other Essays*. Cambridge, MA: Harvard University Press.

Siegel, D. (2012), 'Mobility of sex workers in European cities', *European Journal on Criminal Policy and Research*, 18(3), 255–268.

Siegel, D., and de Blank, S. (2010), 'Women who traffic women: the role of women in human trafficking networks – Dutch cases', *Global Crime*, 11(4), 436–447.

Turner, J., and Kelly, L. (2009), 'Trade Secrets Intersections between Diasporas and Crime Groups in the Constitution of the Human Trafficking Chai', *British Journal of Criminology*, 49(2): 184–201.

Work Package 7
Trafficking of goods

7.3

Report on the state-of-the-art situation of trafficking of goods in EU countries

by: Susanne Knickmeier, Skirmantas Bikelis, Mike Hough, Mai Sato, Hasan Buker

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1. INTRODUCTION: TRAFFICKING IN GOODS IN GENERAL

Article 1 of the Treaty of Amsterdam (1997) establishes the European Union as an area of freedom, security and justice. One of the European Union´s most important freedoms is the free movement of goods, including the related promotion of intra-community trade and the abolition of customs tariffs. Since the Treaty of Maastricht (1993), the movement of goods is no longer controlled within the European Union, but rather at its external borders. It is, however, not only the legal market that has benefited from the abolishment of internal controls: traffickers involved in illicit markets have also seen their possibilities to transport illegal goods within the European Union increase.[1] Trafficking in goods is a widespread problem within the European Union that causes enormous damage to national economies, legal markets, job markets, tax revenues, customs tariffs, human life, health and well-being. Many people are affected on a daily basis by illegal trafficking, be it as offenders, as consumers (with the knowledge that they are consuming a counterfeit or smuggled product) or as victims (affected trademark-holders, tax payers or someone buying a trafficked good without knowledge of it). Even though the clandestine nature of illegal markets makes is difficult to determine the extent of trafficking in goods in the EU should not be underestimated.

Illegal markets work on the basis of supply, demand and availability on the legal market.[2] They do not have as effective structures as legal markets, because the markets have to be hidden from law enforcement agencies. Instead, they are highly adaptable and respond promptly to changing consumer habits, law enforcement and prices.[3] Illegal activities can be: (1) production contrary to the law, for example: counterfeiting, factory overruns or looting of antiques; (2) illegal cross-border smuggling activities, which include importing illegally produced goods or goods without paying tax and customs duties; and (3) selling counterfeited, pirated or illegal goods to consumers at a retail level. The types of offenders range from one-time offenders smuggling small amounts to loose groups cooperating transnationally or hierarchically organised, highly profitable networks. Networked groups are usually linked via economic, family or ethnic ties. Crime networks cooperate around the world using global transport routes by different means.[4] Consumers reflect the range of actors found in modern society. Even though trafficking is classified as a crime, the purchase of smuggled cigarettes or other products is often socially accepted. European criminal policy is faced with extensive problems to tackle and prevent trafficking in goods. Instrumental measures of control and punishment rarely affect offenders as they are either active outside the EU or deal with such small amounts of goods — for example cigarettes — that they face little more than an administrative fine. Additionally, customs at the external European borders can only control goods on a random basis. As offenders try to cover up their tracks, it is difficult to detect illegal goods. To interrupt not only the supply but also the demand, normative measures should be taken into consideration to ensure consistence between the law and moral perceptions, and to persuade people to not do the wrong thing. The following chapter provides a more detailed description of product piracy as an example.

2. PRODUCT PIRACY

2.1 Overview

Product piracy[5] and counterfeiting are a widespread, well-known worldwide problem with a long history of at least 2000 years; they are currently linked to the growth

1. cf. Lithuanian Customs Criminal Office, 2013.
2. cf. Vander Beken, 2005, p. 158.
3. cf. Wehinger, 2011, p. 122.
4. cf. Fiedler, 2013, p. 277; cf. Tenbrock, 2007.
5. As WP 9 is about cyber-crime, WP 7 excludes all products that are commonly understood as part of this criminal phenomenon, for example software piracy, illegal downloads, illegal digital copies of media.

of international trade and international markets.[6] The legal markets of the European Union are assessed as a destination area for counterfeit/pirated products, although additional markets appear in Africa due to the need for goods and the wish to consume the same products as first world countries. Product piracy is regarded as a victimless crime that is increasingly attractive for traffickers.[7] The risk of detection is comparatively low and it enables obtaining high profits from low investments.[8]

2.2 Definition, scope and consequences

Definition

The United Nations Economic Commission for Europe labels a counterfeit or pirated product as one that 'infringes on an intellectual property right.'[9] Though not legally defined, the term 'product piracy' is regularly classed with intellectual property crime, which covers the counterfeiting and piracy of goods.[10] Product piracy can appear in several forms, for example trademark piracy, counterfeiting of patented inventions, violations of intellectual property rights, counterfeiting of trademarks, misuse of designation of origin labels. [11]

While counterfeiting involves the unauthorised imitation of a branded good, piracy is the unauthorised exact copying of an item covered by an intellectual property right.[12] In this context, Staake/Fleisch (2008) emphasised that a clear definition is needed to clearly differentiate the black market of product piracy and counterfeiting from the parallel trade/grey market, overproduction and the legal 'white market'.[13] Parallel trade and grey market activities are situations "where goods are bought in one territory and distributed within another without the authorisation of the right holder in the receiving market."[14]

In other words, parallel imports involve products produced legitimately by trademark holders for one selected market (e.g. USA) and imported to another market (e.g. EU), where they compete with goods legitimately produced for this market.[15] Factory overrun is described as the conscious decision to produce more of the original products than the agreed maximum quantity and/or does not observe territorial borders of sale.[16]

Scope

Nearly every product can be counterfeited or pirated.[17] The following table demonstrates which kinds of products are particularly counterfeited:

Table 1: Classification of counterfeit products (cf. Jacobs, et al., 2001, p. 500)

1. Highly visible, high-volume, low-tech products with well-known brand names, such as toothpaste or sweets.
2. High-priced, high-tech products, such as computer games, audio/video entertainment or faked car parts.
3. Exclusive, prestige products such as well-known accessories, perfumes and other expensive gift items.
4. Intensive Research & Development, high-tech products such as pharmaceuticals.

An estimation of the scope of product piracy in general is impossible due to an extensive number of unknown cases. In 2013, the customs within the European Union registered 87 000 detected cases. Almost 36 million detained articles were concerned with a retail value of original goods of over EUR 768 million. The table below illustrates a selection of ten products sorted by the highest number of seized articles. The ten articles particularly include daily-use products for wearing, washing or working

6. cf. Chaudhry/Zimmerman, 2009, p. 7; cf. Meiwald, 2011, p. 6.
7. cf. Nitsche, 2007, p. 44.
8. cf. SOCA (Serious Organised Crime Agency), 2013; cf. Kirchner, 2009, p. 17; cf. IHK Erfurt, 2014, p. 109; cf. Plagiarius, n.d.
9. United Nations Economic Commission for Europe, 2007.
10. cf. Brun, 2009, pp. 2, 3; cf. Hetzer, 2002, p. 304; cf. Phau, et al., 2001, p. 47.
11. cf. Brun, 2009, pp. 2, 3; cf. Niemand, 2014, p. 2; cf. Patrignani, 2008, pp. 13, 14.
12. cf. Erd/Rebstock, 2010, p. 16; cf. europa.eu, 2010.
13. cf. Staake/Fleisch, 2008, p. 16.
14. Staake/Fleisch, 2008, p. 18.
15. cf. Bundesministerium der Finanzen - Zoll, 2012, p. 4; cf. Paradise, 1999, p. 30; cf. Meiwald, 2011, p. 23.
16. cf. Staake/Fleisch, 2008, p. 18; cf. Tödtli, 2011, p. 3.
17. SOCA (Serious Organised Crime Agency), 2013.

Table 2: Seizure Statistics 2013[18]

Product	Number of articles	Retail values of original goods
Clothing (ready to wear)	4 504 004	€ 85 322 321
Medicines and other products (e.g. condoms)	3 690 876	€ 11 974 020
Packaging materials	3 227 679	€ 3 946 258
Toys	2 788 944	€ 23 199 855
Body care items	2 018 190	€ 6 878 611
Shoes	1 705 587	€ 75 775 477
Office stationery	1 382 077	€ 1 968 940
Mobile phones, including parts and technical accessories	1 300 575	€ 27 677 390
Jewellery and other accessories	1 228 919	€ 20 582 738
Perfumes and cosmetics	1 108 537	€ 55 342 738

such as clothing, footwear, body care items, cosmetics, also medicine, office stationery or packaging materials. These products include luxury goods like jewellery and technical items like mobile phones or toys.

Consequences

Product piracy and counterfeiting affect legal business, distort international trade and undermine legitimate marketplaces.[19] They cause heavy costs for (1) companies, who pay for research, development and advertisement, while forgers only use their inventions, (2) retailers, (3) governments that loose taxes and duties and (4) the general public. Counterfeited products can be dangerous or a threat to public health.[20] Further consequences for companies concern cases of liability. In the case of product liability, the legal manufacturer has to prove that a counterfeited product is counterfeited and not produced by his factory.[21]

2.3 Structures and illegal activities

Counterfeiting and distributing pirated goods requires different levels of expertise or techniques and attracts criminals of all types. Similar to legal markets, the supply chain and demand-side include manufactures, distributors, retailers and consumers.[22] Within the supply-side each function could be illegal and is permeable; for example an illegal manufacturer can distribute his products via legal distributors or retailers.[23] Offenders usually divide responsibilities and act internationally.[24]

The following graphic outlines the permeable structures at different levels on the supply-side as well as different kinds of consumers. Within the group of consumers, deceived and non-deceived consumers, the latter know that they are not buying the original good, need to be differentiated at a legal and illegal level. Similar to other trafficked goods, such as for example tobacco products, the product could be manufactured legally and then be illegally distributed or the product might be manufactured illegally in the first place.

What are the offenders' activities?

Illegal manufacturers either counterfeit a product or use factory overruns (see above). Factory overruns are especially fostered if the holder of the intellectual property rights produces in a far-away country with inadequate control measures.[25] It is often impossible to detect a good coming from a factory overrun. Sometimes prod-

18. cf. European Commission, 2014, p. 25 ff.
cf. Kelly, et al., 2005, p. 83.

19. cf. Patrignani, 2008, p. 7; cf. Staake/Fleisch, 2008, p. 6; cf. Haie-Fayle/Hübner, 2007; cf. Müller, 2012, p. 29; cf. Erd/Rebstock, 2010, pp. 11, 12; cf. Gebhard, 2014; cf. Blume, 2004, p. 5.

20. cf. Wildemann, et al., 2007, p. 7; cf. Meiwald, 2011, p. 21.

21. cf. Staake/Fleisch, 2008, p. 21.

22. cf. Staake, et al., 2009, p. 324.

23. cf. Lichtensteiger/Zenklusen, 2009, p. 79.

24. cf. Stephan/Schneider, 2011, p. 148.

25. cf. Kahl, 2012, p. 34; cf. Staake, et al., 2009, p. 321.

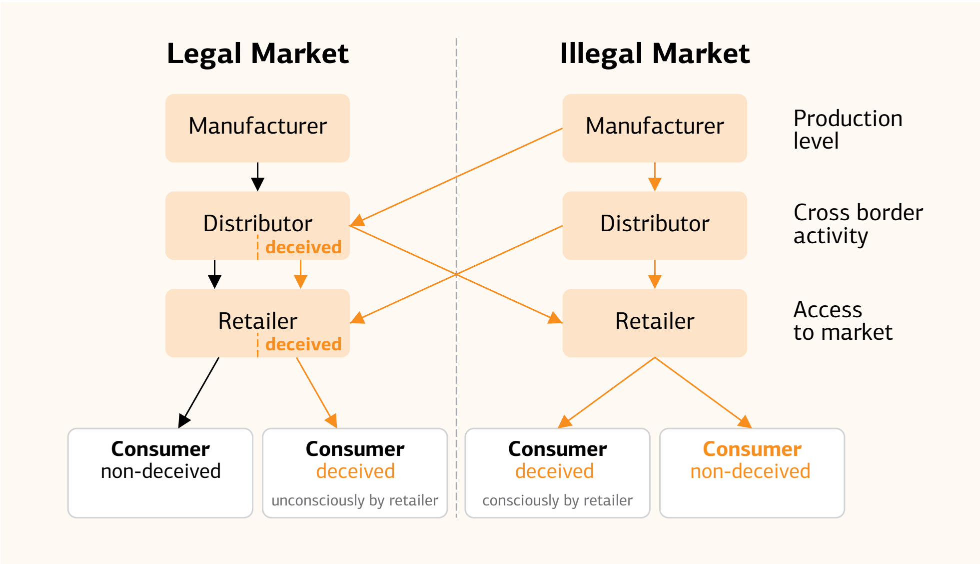

Table 3: Distribution and supply chain overview

ucts are counterfeited completely, from the content and package to security features, which makes it impossible to differentiate the imitation from the genuine product.[26] As regards the Plagiarius Action[27], it is ambiguous as to who orders and supports the purchase within the European Union. Moreover, it is discussed whether even European companies order counterfeit products on their own to sell them profitably (cf. Plagiarius, n.d.). Stirnemann/Wächter suspected that European companies order counterfeit products in China and purchase them via the Internet.[28]

Not much is known about cross-border activities, but it is assumed that supply chains of illegal traders are oriented towards legal trade routes (cf. Spiess, 2009, p. 25), (cf. Patrignani, 2008, p. 38). An important part of the supply chain is access to markets in the countries of provenance or transit, consistently accompanied by corruption either through bribed staff members or bribed customers. According to Patrignani, the final entrance into the market depends on the effectiveness of the legislation in a given country.[29]

In general, products are often distributed through informal markets. Offenders use multifarious distribution channels: (1) Tourists purchase counterfeit products in the country of origin or a transit country and import them into the European Union. (2) Commercial sale can be divided into primary and secondary distribution. Primary distributors receive and store the product directly from manufacturers and distribute it to retailers. Secondary distribution uses intermediate parties between the major distributors and retailers to sell a product.[30] Usually, goods are distributed via well-organised international networks.[31] (3) Street markets, which, according to Staake/Fleisch, are not widespread in countries where product piracy is strictly enforced.[32] (4) In those countries Internet purchases are increasingly used as a distribution channel.[33] The Internet enables anonymity (it is possible to conceal the true identity thus limiting the risk of detection), flexibility and an extensive (global) market reach.[34] Counterfeit goods bought via the Internet and sent by postal services are seldom identified by customs authorities.[35]

Excursus: China

In the area of product piracy, China plays an important role as the main source country, where the economic activities of some villages are focused almost entirely on counterfeiting and piracy.[36] Globalisation and liberalisation have come together with the opening of Chinese markets and reforms. As a result, Chinese manufacturers have started to learn from several foreign investors.[37] According to Staake/Fleisch, the economy has developed 'from easy-to-manufacture goods to a wide range of simple to

26. 'Since 1977 the Plagiarius Action aims to inform the public about the problem of fake and plagiarised articles and the negative impacts they have on not only the economy as a whole but especially on small companies and individual designers' cf. Plagiarius.

27. cf. Stirnemann/Wächter, 2007.

28. cf. Patrignani, 2008, p. 39.

29. cf. Patrignani, 2008, p. 79; cf. Erd/Rebstock, 2010, p. 136; cf. Spiess, 2009, p. 21.

30. cf. Erd/Rebstock, 2010, p. 135.

31. cf. Staake/Fleisch, 2008, p. 11.

32. cf. European Commission, 2012.

33. cf. OECD - Secretary General, 2007, p. 14.

34. cf. Staake/Fleisch, 2008, p. 12.

35. cf. Müller, 2012, p. 29.

36. cf. Müller, 2012, p. 30.

37. cf. Staake/Fleisch, 2008, pp. 9, 10.

sophisticated products', 'from poor quality to a wide range of quality levels', 'from low quantity to mass production" and "from non-deceptive to deceptive counterfeiting'.[38] For decades China has sought to become economically important. To achieve this aim the protection of intellectual property rights is balanced against the importance of expanding economically. Therefore, the Chinese authorities and government tolerate the violation of intellectual property rights despite international obligations.[39] In his report about product piracy in China, Blume explained that the protection of IP rights has improved in the last 25 years, particularly after China's accession to the World Trade Organisation (WTO) in 2001.[40] Winkler/Wang assume that the protection of IP rights is dependent on the development of key technologies which enable Chinese companies to draw on their own inventions.[41] Despite the Chinese WTO membership and the requirement to comply with the TRIPS agreement,[42] the lack of effective law enforcement and with it a lack of punishments is still a major problem.[43] Cases of product piracy are dealt with by the authority responsible for industry and commerce through an administrative proceeding.[44] Nevertheless, despite some positive developments, it is still difficult to enforce the administrative procedure against offences in China.[45] Product piracy is broadly accepted among the Chinese public as it enables developing countries to consume the same products as wealthy ones.[46] Even the Chinese Mafia is deeply involved in product piracy and counterfeiting. Organised criminals hold the reigns of counterfeiters and purchase the most important goods to support black markets.[47]

What are the drivers for product piracy?

The illegal market cannot exist without the legal market, as the success of the illegal trade is dependent on prices and availability on the legal market.[48] As regards the findings of most researchers, the illegal trade with pirated or counterfeit products is enabled by the following drivers: (1) high profits, (2) high tariffs and taxes, (3) globalisation and lower trade barriers, (4) expansion of channels and markets, (5) unsatisfied markets, (6) powerful worldwide brands, (7) ineffective laws, (8) weak international and national law enforcement.[49] In some areas, the illegal trade is supported by exclusive and expensive goods.[50] Further drivers are derived from the markets themselves. Markets are increasingly globalised and everyone would like to reduce production and distribution costs.[51]

2.4 Transport structures and countries of provenance

Although not much information is available about transport structures, it is assumed that supply chains of illegal traders are oriented towards legal traders and products are usually sent via a network of delivery service and different modes of transportation.[52] The goods are transported by air, rail, road and sea. As regards EU customs, most cases registered so far were transported by regular post, while most of the detained articles were transported by sea.[53] Regarding European Union customs enforcements, in 2013 nearly 97% of illegal goods were brought by freight traffic and 3% by passenger traffic.[54] Similar to other trafficked goods, the main points of entry into the EU are either via the Eastern European border or via international ports and airports.[55] If possible, traffickers select free-trade zones with a relative lack of controls or with ports of transit well-known for laissez-faire controls, for example in Singapore, Dubai and Malaysia. In the such free trade areas, the labels of goods can be changed to cover the countries of provenance.[56] Subsequently, it is nearly impossible to define where a product has been produced, to determine the country of origin and to trace back the offenders.[57]

Weak points of transport structures include the different standards of import controls at ports/airports worldwide.[58] Moreover, customs authorities can only perform

38. cf. Winkler/Wang, 2007, p. 113.

39. cf. Blume, 2004, p. 11.

40. cf. Winkler/Wang, 2007, p. 88.

41. cf. Blume, 2004, pp. 16, 22.

42. cf. Dudas, 2004, cf. Erd/Rebstock, 2010, p. 25.

43. cf. Bruhn/Groß, 2011, p. 444).

44. cf. Erd/Rebstock, 2010, p. 65, cf. Blume, 2004, p. 24 ff..

45. cf. Erd/Rebstock, 2010, p. 12.

46. cf. Zäuner, 2009, pp. 261, 262.

47. cf. Patrignani, 2008, p. 37.

48. cf. Chaudhry/Zimmerman, 2009, p. 18; cf. Kelly, et al., 2005, p. 83; cf. Spink, 2009, pp. 4, 30; cf. Niemand, 2014, p. 1.

49. cf. Zäuner, 2009, p. 261

50. cf. Patrignani, 2008, p. 78.

51. cf. Spiess, 2009, p. 25.

52. cf. European Commission, 2014, p. 20.

53. cf. European Commission, 2014, p. 19.

54. cf. Patrignani, 2008, p. 115.

55. cf. IHK Erfurt, 2014, p. 14.

56. cf. Spiess, 2009, p. 23.

57. cf. Maier, 2006, p. 4.

58. cf. Erd/Rebstock, 2010, p. 136.

random checks on the basis of risk-analysis or through random samples due to the huge amount of containers traded daily.[59] Containerships enable the transport of large amounts of goods and are the preferred method of transport for pirated products, over longer routes.[60] Around 601 million containers were moved in 2012 in ports worldwide.[61] To obscure their illegal consignment, offenders change delivery companies, split shipments into small parts, hide illegal goods among legal ones, exchange legal and illegal goods or declare them falsely.[62] Additionally, small amounts are sent via post or courier services to reduce the risk of detection and possibility of tracing.[63] If illegal goods have crossed the European external border, cross-border trade without controls is possible within the European Union.[64]

The following overview, compiled by the UNODC (2010), provides an overview of the main illegal trade routes worldwide.

The countries of provenance are mainly China, which is still lacking in key technologies, Malaysia, Russia, Philippines and some African or South American countries.[65] Only a small portion of counterfeit products go from China to Europe, a higher number of products head to Southeast Asia, the Middle East, South America or even Africa.[66] Nevertheless, European companies suffer losses as they cannot sell their legal products in these regions.[67] Additional countries of provenance are Turkey and India.[68] As regards the European customs authorities, the countries of provenance for the small number of passenger traffic are mainly Morocco, Turkey and China.[69] Within the European Union, Italy, Germany, the United Kingdom, Spain and France seem to be the most popular destination countries (based on detained articles, which does not reflect the real markets).[70] The European Union is a destination particularly for shoes, clothes and cigarettes.

2.5 Offenders and consumers

The field of offenders and consumers is broad and all age groups and social classes are represented.[71]

59. cf. Lithuanian Customs Criminal Office, 2013.
60. cf. International Association of Ports and Harbors, 2013.
61. cf. Wildemann, et al., 2007, p. 30; cf. Tödtli, 2011, p. 5.
62. cf. IHK Erfurt, 2014, p. 14.
63. cf. Lichtensteiger/Zenklusen, 2009, p. 89; cf. Gebhard, 2014.
64. cf. Zäuner, 2009, p. 264.
65. cf. Erd/Rebstock, 2010, p. 135; cf. Chaudhry/Zimmerman, 2009, p. 64.
66. cf. Erd/Rebstock, 2010, p. 135.
67. cf. VDMA, 2014, p. 16.
68. European Commission, 2014.
69. cf. European Commission, 2014, p. 24.
70. cf. Lichtensteiger/Zenklusen, 2009, p. 80.
71. cf. Meiwald, 2011, p. 29; cf. Paradise, 1999, p. 21; cf. Blume, 2004, p. 47; cf. OECD - Secretary General, 2008, p. 66.

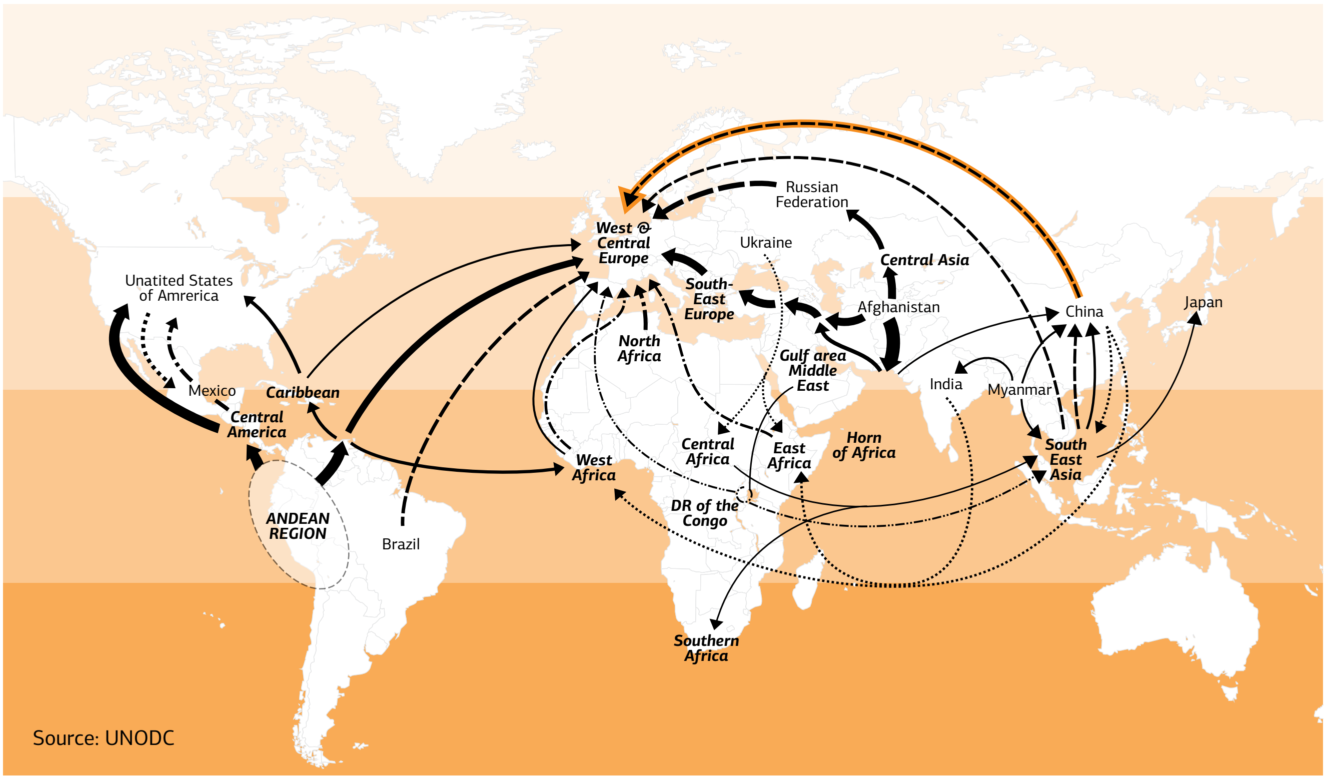

Table 4: Main illegal trade routes worldwide (UNODC, 2010, p. 175).

Offenders

Offenders regularly work together. In general, someone has to counterfeit or pirate the goods or make a factory overrun. The illegal good has to be transported across borders and purchased on the destination market. The group of offenders can be differentiated into small-scale offenders, groups working together, which includes companies and their partners, and well-organised groups, classed among mafia groups or terrorist groups.[72] Although counterfeiting and product piracy seem to be low-intensity criminal offences, they are often connected to serious crimes due to possible high profits and low risks of being detected.[73] Organised crime groups, like mafias (Italian, Turkish, Russian) or the Chinese triads, are involved in the production and distribution of counterfeit goods and work around the world.[74]

Consumers

The group that enables product piracy are consumers.[75] But who are these people who knowingly buy counterfeit products? Consumers are a heterogeneous group that reflect society as a whole. As mentioned above, deceived consumers have to be differentiated from non-deceived consumers. While non-deceived consumers consciously decide to buy a counterfeit or pirated product, deceived consumers do not know that the product is counterfeit or pirated.[76] Staake/Fleisch pointed out that the illegal market is most profitable when consumers are not aware of the existence of counterfeit products.[77] To reach and deceive this group the product must 'be marketed as genuine and must attempt to penetrate the legal distribution chain'.[78]

2.6 Attitudes and justifications

But why do consumers buy counterfeit products in the knowledge that they are counterfeit? An argument which is regularly stated refers to economic reasons: counterfeited items look similar to the original but are much cheaper.[79] Consumers get a bargain, although usually with lower quality.[80] If people are satisfied with their purchase, they will probably buy counterfeit products again.[81] The bargain hunting mentality shines a light on the lack of public awareness about the consequences of counterfeiting and product piracy, although social concerns are seen as a factor inhibiting consumption.[82] A study conducted in China emphasised that people buy counterfeit products due to social reasons, because they cannot afford the real ones but want to be accepted by society by having that branded product everyone has.[83] Particularly luxury brands are goods one must have to reinforce social status and self-image.[84]

Wilcox et al. analysed attitudes towards luxury goods with regard to the social-adjusting function and value-expression.[85] The study goes beyond financial motivations and included value expressive attitudes, which are an important link to the FIDUCIA project to support the moral value of norms. According to their study, counterfeits can have a social-adjusting function and be used for self-presentation or self-expression, particularly, if the brand is conspicuous. In turn, the conspicuousness of a brand also influences people who refer to the quality or reliability of luxury goods to buy the original one.[86] Another reason for buying pirated or counterfeit products could be that the desired goods are not available on legal markets or only available at unrealistic prices.[87] It has been observed that consumers with lower integrity and lower ethical standards are more oriented towards buying counterfeit products and usually feel less guilty than others when they do so.[88]

The following table provides an overview of consumers' motives to buy or not to buy counterfeit products. The answers are mostly based on ten interviews conducted in 2005 by Staake/Fleisch about the reasons for buying counterfeit luxury goods.

72. cf. Stirnemann/Wächter, 2007), (cf. IP Crime Group, 2013, p. 24.

73. cf. Patrignani, 2008, p. 116 ; cf. Haie-Fayle/Hübner, 2007; cf. OECD - Secretary General, 2008, p. 87.

74. cf. Plagiarius, n.d.

75. cf. Aschmoneit/Schneider, 2011, p. 4 ff.

76. cf. Staake/Fleisch, 2008, p. 48.

77. cf. Patrignani, 2008, p. 77.

78. cf. Marcketti/Shelley, 2009, p. 328.

79. cf. Haie-Fayle/Hübner, 2007; cf. Erd/Rebstock, 2010, p. 23.

80. cf. Matos, et al., 2007, p. 47.

81. cf. Nitsche, 2007, p. 43; cf. Bennett, 2009, p. 5; cf. Marcketti/Shelley, 2009, p. 328.

82. cf. Jiang/Cova, 2012, p. 4.

83. cf. Jiang/Cova, 2012, p. 5.

84. Their study is not representative and has some limitations: it includes students, who are usually a low-income group and susceptible to social influences. In general, the purchasers of counterfeit products reflect the whole range of society. cf. Wilcox, et al., 2009, p. 248 ff.

85. cf. Wilcox, et al., 2009, p. 253.

86. cf. Patrignani, 2008, p. 37.

87. cf. Matos, et al., 2007, p. 35.

88. cf. Karstedt/Farrall, 2006, p. 1011.

Consumers' motives to buy or not to buy counterfeit (luxury) products
Results from a survey conducted in 2005 (unless otherwise stated)

Reasons for:
- Good quality of counterfeits
- High prices of the genuine article
- High value for money
- Interest in counterfeits and the fun associated with having one
- Attractiveness of the brand and unwillingness to pay for it
- Motives of consumers: status conveyed by the product logo (cf. Phau, et al., 2001, pp. 45–46)
- Positive experience with counterfeit product (cf. Niemand, 2014, p. 186)
- Buying counterfeit goods is socially accepted (cf. Niemand, 2014, p. 186)
- Low risk, high profit (cf. Niemand, 2014, p. 186)

Reasons against:
- Limited availability
- Bad quality of fakes
- Missing warranty
- Better value for money of genuine articles in the long run
- Personal values
- Potential conflicts with the law (cf. Staake/Fleisch, 2008, p. 53).
- Feel obliged morally (cf. Niemand, 2014, pp. 191, 192).

Justification

Small-scale smugglers and consumers are regularly those who think of themselves as respectable members of society.[89] They do not consider themselves to be criminal. As these people have internalised rules of society and laws, they develop techniques to justify their deviant behaviour. Arguments of justification could be that people feel treated unfairly as a result of high prices or no access to the market. Sykes and Matza (1957) described five techniques of neutralisation: (1) denial of responsibility, (2) denial of injury, (3) denial of victim, (4) condemnation of the condemners and (5) appeal to higher loyalties.[90] Particularly the technique of 'denial of injury' plays an important role in the case of the small-scale purchasing or smuggling of illegal products like clothes or cigarettes. Moreover, the victim is denied, as no one is affected directly. Companies are seen as indirect victims that have enough money. It is conceivable that producers of counterfeit products in economically weak regions justify their actions through an appeal to higher loyalties, as they have to earn money for their livelihood.

2.7 Measures and strategies

Tackling piracy and counterfeiting is a major challenge for policy makers, law enforcement agencies and the legal market, as product piracy and counterfeiting directly affect economic growth within the European Union and, with it, the job market. Patrignani pointed out that 'weak penalties and enforcement as well as a lack of awareness regarding the involvement of organised crime among civil society' are an extensive problem.[91] Already in 1991, Sielaff demanded an exchange of methods for detecting features of counterfeiting, public relations campaigns, the setup of special police units and disgorgement.[92] In their survey on 'Counterfeit goods in the UK', PwC asked the sample: 'What do you think should be done to stop counterfeiting?' They received the following answers: (1) Harsher penalties for counterfeiters, (2) stronger enforcement, (3) better education of consumers, (4) harsher penalties for consumers.[93] To tackle and prevent product piracy

89. cf. Sykes/Matza, 1957, pp. 667-669.

90. Patrignani, 2008, p. 6.

91. cf. Sielaff, 1991, p. 438.

92. cf. PwC, 2013, p. 16.

93. Europa.eu, 2011.

and counterfeiting, measures primarily concentrate on (1) criminalisation of counterfeiting and piracy, (2) consequent prosecution and (3) prevention, e. g. security technologies, cooperation between companies, but also public relations campaigns.

Legislation

Based on the importance of intellectual property for European businesses, the European Commission and the European Council have launched several Action Plans and Regulations in the last years e.g. the Action Plan to Combat Intellectual Property Rights Infringements 2012 or Council Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights. One year later, the European Parliament and the Council launched Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights. The Directive focuses on the harmonisation of national law and the creation of a unitary right at a European level to ensure a similar level of protection within the EU. Additionally, the Directive aims to promote innovation and business competitiveness, to protect the job market and consumers, to prevent tax loss, destabilisation of the markets and the maintenance of public order.[94]

Already in 1994, the WTO adopted the Agreement on trade related aspects of IPR, which is legally binding on WTO members. It defines the minimum rights that must be protected and obligations for national governments to provide procedures and remedies under their national law including provisions for border control measures.[95] In 1995, the TRIPS agreement, referring to the protection of intellectual property rights, became part of the WTO system. In recent years, the European Commission has held negotiations with several countries worldwide about an Anti-Counterfeiting Trade Agreement (ACTA)[96] which refers to TRIPS and is controversially discussed within the EU.

An important legal instrument for trademark or rights holders is the ability to request customs officials to take action in cases where the suspicion exists that an intellectual property right has been violated.[97] Therefore, the Commission has developed a manual for lodging of applications for customs action.[98] The number of applications from right holders are stored in the European database COPIS, which is an EU-wide information system for customs officials on counterfeiting and piracy.[99]

Law enforcement agencies

Law enforcement agencies like Interpol, Europol, national police and customs authorities focus their activities on five central pillars: (1) (joint) operations on regional, but also international level to prosecute (organised) networks, (2) common, special trainings for officials, (3) international cooperation (for example data exchange), (4) information campaigns to raise public awareness and (5) technical measures to control goods and try to detect illegal ones.[100]

Cooperation

In the field of product piracy, companies are more committed than in other fields to combat the trafficking of goods due to the damage they suffer. Therefore, they invest in technical and sociological research (for example: BASCAP: Report on Consumer Attitudes and Perceptions on Counterfeiting and Piracy). They focus particularly on (1) cooperation with other industries and/or law enforcement agencies, (2) shared databases and (3) prevention through new technologies. Companies also use their economic power to ensure and insist on compliance of their suppliers with the law. As regards cooperation among manufacturers, companies and business partners Hormats and Passman emphasised that

94. cf. World Trade Organisation, 2013.

95. The ACTA seeks to establish a comprehensive, international framework, which should assist ACTA parties to combat the infringement of intellectual property rights effectively and to ban the undermining of legitimate trade and the sustainable development of the world economy.

96. cf. Krug, 2000, p. 138 ff.

97. The manual is available under: http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/right_holders/manual-application-for-action_en.pdf.

98. cf. Dumortier, et al., 2010, p. 4.

99. cf. Interpol, 2013; cf. Europol, 2013; cf. World Customs Organisation, 2012/2013.

100. Hormats/Passman, 2012.

> businesses can compel their suppliers and business partners to maintain a high-level of integrity and quality by introducing management systems and standards that hold supply chain participants accountable. Companies can use their purchasing power to ensure, and insist, that their suppliers avoid involvement with corrupt officials; do not steal trade secrets; reject counterfeit and pirated goods, and utilize genuine, high-quality components. A positive and mutually reinforcing series of actions all along the international supply chain can result.[101]

In 1980, the Anti-Counterfeiting Group (ACG) was founded by 18 brand owners in the United Kingdom. The group now represents around 160 organisations worldwide. ACG's tasks are to act

> on behalf of consumers and legitimate business interests, in partnership with government and law enforcement agencies, and other rights organisations ... to change society's perception of counterfeiting as a harmless activity.[102]

Public relations campaigns

Especially given the difficulties of law enforcement, missing knowledge of the law as well as the public perception that the risk of being prosecuted is low, it is important to raise public awareness and to install a strong proactive marketing.[103] The OECD assumed that 'tackling public attitudes can help, particularly in those markets where people deliberately seek out bargains' but added that awareness campaigns are less effective as long as consumers believe that they are buying a genuine item.[104] Niemand pointed to the importance of convincing people to buy the original product and to raise their awareness about the consequences of pirated and counterfeit products.[105]

3. CONCLUSION

It is estimated that the market remains stable despite of several measures. It is, therefore, vital to discuss whether current legislative acts and political actions are effectively tackling the trafficking of goods.

The FIDUCIA project works under the hypothesis that many European states focus on tougher laws and imprisonment to manage various crimes. Commonly, criminal policies and law enforcement agencies pay much attention to deterrence strategies and crime control. Compliance with the law should be obtained through deterrence strategies, which means that individuals are afraid of punishment. In the case of the trafficking in goods, customs agencies experience difficulties detecting counterfeit or illegal products. Their activities seem to be tilting at windmills. The criminal prosecution of offenders acting internationally is another problem. As mentioned above, smuggling is nearly impossible to detect. Offenders follow routes that display weak law enforcement, lax controls, corrupt systems and instable political conditions. As a result, it is difficult to enforce measures of surveillance and control to reduce supply. The borderless European Union allows goods and people to cross borders mostly without control. Due to the dichotomy of supply and demand, consumers play a crucial enabling role. In general, consumers are not afraid of being detected and punished. Instead, several illegal markets, like those dealing with piracy products, are socially accepted by consumers.

But how can compliance with these laws and rules be achieved? As such, it is assumed that besides rational choice theories, normative considerations play an equally important role in people's compliance with the law. Tom Tyler has pointed out:

101. Anti-Counterfeiting Group, 2008.

102. cf. Jacobs, et al., 2001, p. 506; cf. Stirnemann/Wächter, 2007.

103. cf. Haie-Fayle/Hübner, 2007; cf. OECD - Secretary General, 2007, p. 21.

104. cf. Niemand, 2014, p. 209.

105. Tyler, 1990, p. 3.

> If people view compliance with the law as appropriate because of their attitudes about how they should behave they will voluntarily assume the obligation to follow legal rules. [106]

The objective of such strategies is to persuade people of the moral correctness of legal norms, so that they comply with the law. The first step covers informing about existing laws. The knowledge of legal rules is a precondition for deviant behaviour. Karstedt and Farrall (2006) warned of too many legal rules and emphasised that 'too many rules and regulations decrease the legitimacy of norms and moral obligations', which in turn normalises illegal behaviour.[107]

Trust-based policies including information campaigns can be used to inform about legal rules and to explain the dark side of illegal markets (e.g. connection of product piracy with exploitation of workers) as well as the reasons for paying the price, taxes and duties. Therefore, attempts should be made to change people's view that in several cases high prices, taxes and duties are legitimate, justifiable and even necessary. Information campaigns could also be used to increase awareness of legal rules among people with a missing sense of guilt. Marcketti emphasised that the willingness to pay more for non-counterfeit goods increased directly with greater concern, knowledge and attitude towards counterfeit apparel goods.[108] If people could be persuaded softly, they would comply with the law not just because it is in their self-interest to avoid the risk of prosecution and bad quality, but also because they think it is the right thing to do.

Messner and Rosenfeld pointed out the need to strengthen social culture to overcome institutional anomie.[109] Therefore, on the demand level the interruption of the socially embedded acceptance of product piracy as part of everyday life could be an anchor for trust-based approaches. Without social acceptance, the self-perception of people, who see themselves as respectable citizens, totters and their behaviour is stigmatised. The stigmatisation of behaviour also interrupts techniques of neutralisation. If deviant behaviour is no longer accepted by society, a precondition, which according to Ajzen's theory of planned behaviour leads to deviant actions, is missing as people's intention to buy counterfeit clothes is implemented due to the acceptance (behavioural control). According to market rules, illegal markets could be diminished if demand declines. The goal of sellers (offenders) is high profit, which is impossible to gain without consumers.

REFERENCES

Ajzen, Icek (1991): The theory of planned behavior. In: *Organizational Behavior and Human Decision Processes* 50 2, p.^pp. 179-211.

Anti-Counterfeiting Group (2008): About ACG - Overview.

Online: http://www.a-cg.org/guest/about_acg/guest_about_acg_overview.php.

Aschmoneit, Hauke/Schneider, Martin (2011): *Kundenverhalten im Kontext der Produkt- und Markenpiraterie.*
Online:
https://www.uni-marburg.de/fb02/bwl01/forschung/Discussionpapers/dp_11-3_onlineversion.pdf.

Bennett, Dag (2009): *The Black Market in China Lightens up*. Online:
https://www.academia.edu/3826315/The_Black_Market_in_China_Lightens_up.

106. cf. Karstedt/Farrall, 2006, p. 1017.

107. cf. Marcketti/Shelley, 2009, p. 335.

108. cf. Messner/Rosenfeld, 2013, p. 97 ff.

109. cf. Ajzen, 1991, p. 182.

Blume, Andreas (2004): *Produkt- und Markenpiraterie in der Volksrepublik China.* Online: http://www.chinapolitik.de/studien/china_analysis/no_33.pdf.

Bruhn, Heike/Groß, Kathrin (2011): Produkt- und Markenpiraterie. In: *Kriminalistik* 7, p.^pp. 442-447.

Brun, Simon (2009): Begriff und Erscheinungsformen der Produktpiraterie. In: Münch, Peter/Brun, Simon (ed.): *Produktpiraterie*. Schulthess: Zürich, Basel, Genf, p.^pp. 1-19.

Bundesministerium der Finanzen - Zoll (2012): *Kopiert. Geraubt. Gefälscht - und niemals ein Schäppchen.*

Chaudhry, Peggy/Zimmerman, Alan (2009): *The economics of counterfeit trade - governments, consumers, pirates and intellectual property rights.* Springer: Berlin, Heidelberg.

Dudas, Jon W. (2004): *Pirates of the 21st Century: The Curse of the Black Market.*

Dumortier, Jos/Somers, Geert/Tshiananga, Boris/Meyvis, Eric/Bachraoui, Kais (2010): *Study on rapid information exchange on counterfeiting and piracy.* Online: http://ec.europa.eu/internal_market/iprenforcement/docs/study_information_en.pdf.

Erd, Rainer/Rebstock, Michael (2010): *Produkt- und Markenpiraterie in China.* Shaker-Verlag: Aachen.

europa.eu (2010): *Counterfeiting and Piracy - frequently asked questions.* Online: http://europa.eu/rapid/press-release_MEMO-10-272_en.htm.

Europa.eu (2011): *Enforcement of intellectual property rights.* Online: http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_counterfeiting/l26057a_en.htm

European Commission (2012): *Counterfeiting.* Online: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/counterfeiting/index_en.htm.

European Commission (2014): *Report on EU customs enforcement of intellectual property rights - Results at the EU border 2013.* Online: http://ec.europa.eu/taxation_customs/resources/documents/customs/customs_controls/counterfeit_piracy/statistics/2014_ipr_statistics_en.pdf.

Europol (2013): *EU Serious and Organised Crime Threat Assessment.* Online: https://www.europol.europa.eu/content/eu-serious-and-organised-crime-threat-assessment-socta.

Fiedler, Robert (2013): Illegaler Handel mit kleinen und leichten Waffen (SALW). In: *Kriminalistik* 67 4, p.^pp. 277-281.

Gebhard, Marius (2014): Wie Fälschungen der Wirtschaft schaden. In: *Handelsblatt*, 26.04.2014. Online:

http://www.handelsblatt.com/unternehmen/handel-dienstleister/produktpiraterie-wie-faelschungen-der-wirtschaft-schaden/9798696.html

Haie-Fayle, Linda/Hübner, Wolfgang (2007): Counterfeiting and piracy. In: *OECD Observer*, July 2007. Online: http://www.oecdobserver.org/news/archivestory.php/aid/2278/Counterfeiting_and_piracy_.html.

Hetzer, Wolfgang (2002): Godfathers and pirates: counterfeiting and organised crime. In: *European Journal of Crime, Criminal Law and Criminal Justice* 10, p.^pp. 303-320.

Hormats, Robert/Passman, Pamela (2012): *How to Save Global Trade From Thieves, Pirates, and Black Market Kingpins.*

Online: http://www.theatlantic.com/business/archive/2012/12/how-to-save-global-trade-from-thieves-pirates-and-black-market-kingpins/266110/.

IHK Erfurt (2014): *Schutz vor Marken- und Produktpiraterie.*

Online: http://www.erfurt.ihk.de/produktmarken/international/Mehr_Wissen/2551950/IHK_Erfurt_veroeffentlicht_Ratgeber_fuer_Unternehmen_zum_Schutz.html.

International Association of Ports and Harbors (2013): *World Container Traffic Data.*

Online: http://www.iaphworldports.org/Statistics.aspx.

Interpol (2013): *Trafficking in illicit goods.*

Online: http://www.interpol.int/Crime-areas/Trafficking-in-illicit-goods/Trafficking-in-illicit-goods.

IP Crime Group (2013): *IP Crime - Annual Report 2012-2013.* Online: http://www.ipo.gov.uk/ipcreport12.pdf.

Jacobs, Laurence/Samli, A. Coskun/Jedlik, Tom (2001): The Nightmare of International Product Piracy: Exploring Defensive Strategies. In: *Industrial Marketing Management* 30 6, p.^pp. 499-509.

Jiang, Ling/Cova, Veronique (2012): Love for Luxury, Preference for Counterfeits –A Qualitative Study in Counterfeit Luxury Consumption in China. In: *International Journal of Marketing Studies* 4 6, p.^pp. 1-9.

Kahl, Wolfgang (2012): Von der Missachtung des Urheberrechts bis hin zur Produkt- und Markenpiraterie. In: *Forum Kriminalprävention* 1, p.^pp. 34-36.

Karstedt, Susanne/Farrall, Stephen (2006): The Moral Economy of Everyday Crime: Markets, Consumers and Citizens. In: *British Journal of Criminology* 46 6, p.^pp. 1011-1036.

Kelly, Robert J./Maghan, Jess/Serio, Joseph D. (2005): *Illicit trafficking - a reference handbook.* ABC-CLIO: Santa Barbara, California.

Kirchner, Andree (ed.) (2009): *Marken- und Produktpiraterie - ein Praxisleitfaden.* MLS Rechtsanwaltsgesellschaft mbH: Bremen, Berlin.

Krug, Martin (2000): *Aspekte der CD-Piraterie aus kriminologischer Sicht.* Doctoral thesis: Frankfurt am Main.

Lichtensteiger, Simon/Zenklusen, Stéphanie (2009): Kriminologische und strafrechtliche Aspekte der Produktpiraterie. In: Münch, Peter/Brun, Simon (ed.): *Produktpiraterie*

Schulthess: Zürich, Basel, Genf., p.^pp. 79-93.

Lithuanian Customs Criminal Office (2013): Expert Interview. Conducted by: Bikelis, Skirmantas.

Maier, Johann (2006): *Anfrage des Abgeordneten Mag. Johann Maier und GenossInnen an die Bundesministerin für Justiz betreffend "Vollziehung des Produktpirateriegesetzte 2004 - Maßnahmen seit 2005 - Entwicklung der Produkt- und Markenpiraterie".* Online: http://www.parlament.gv.at/PAKT/VHG/XXII/J/J_04345/fname_064982.pdf.

Marcketti, Sara B./Shelley, Mack C. (2009): Consumer concern, knowledge and attitude towards counterfeit apparel products. In: *International Journal of Consumer Studies* 33 3, p.^pp. 327-337.

Matos, Celso Augusto de/Ituassu, Cristiana Trindade/Rossi, Carlos Alberto Vargas (2007): Consumer attitudes toward counterfeits: a review and extension. In: *Journal of Consumer Marketing* 24 1, p.^pp. 36-47.

Meiwald, Thomas (2011): *Konzepte zum Schutz vor Produktpiraterie und unerwünschtem Know-how-Abfluss.* Doctoral thesis: TU München.

Messner, Steven F./Rosenfeld, Richard (2013): *Crime and the American dream.* Wadsworth Cengage Learning.

Müller, Constanze (2012): Produkt- und Markenpiraterie in der deutsch-chinesischen Zusammenarbeit. In: *Aus Politik und Zeitgeschichte* 48, p.^pp. 28-33.

Niemand, Thomas (2014): *Produktpiraterie: Eine Integrative Analyse der Einflussgrößen, Moderatoren und Mediatoren des Erwerbs von Fälschungen und Raubkopien.* Springer Gabler: Wiesbaden.

Nitsche, Katrin (2007): *Counterfeiting - the impact of selling and purchasing counterfeit products.* VDM Verlag Dr. Müller: Saarbrücken.

OECD - Secretary General (2007): *The Economic Impact of Counterfeiting and Piracy - executive summary.*
Online: http://www.oecd.org/industry/industryandglobalisation/38707619.pdf.

OECD - Secretary General (2008): *The Economic Impact of Counterfeiting and Piracy.*
Online: http://www.oecd-ilibrary.org/docserver/download/9208041e.pdf?expires=

1408376314&id=id&accname=ocid57015174&checksum=4C7819DC06BD1C5FE37D2B5AECBDD162.

Paradise, Paul R. (1999): *Trademark counterfeiting, product piracy, and the billion dollar threat to the U.S. economy.* Quorum Books: Westport, Connecticut.

Patrignani, Angela - Interregional Crime and Justice Research Institute (ed.) (2008): *Counterfeiting - a global spread, a global threat.* UNICRI: Turin.

Phau, Ian/Prendergast, Gerard/Hing Chuen, Leung (2001): Profiling brand-piracy-prone consumers: an exploratory study in Hong Kong's clothing industry. In: *Journal of Fashion Marketing and Management* 5 1, p.^pp. 45-55.

Plagiarius (n.d.): Online: http://plagiarius.de/d_index_china.html.

PwC (2013): *Counterfeit goods in the UK - Consumer survey October 2013.* Online: http://www.pwc.co.uk/en_UK/uk/assets/pdf/anti-counterfeiting-consumer-survey-october-2013.pdf.

Sielaff, Wolfgang (1991): Produktpiraterie. In: *Kriminalistik* 45, p.^pp. 434-438.

SOCA (Serious Organised Crime Agency) (2013): *Intellectual property crime.*

Online: http://www.soca.gov.uk/threats/intellectual-property-crime.

Spiess, Harry (2009): Geografie der Produktpiraterie - Schauplätze und Netzwerk. In: Münch, Peter/Brun, Simon (ed.): *Produktpiraterie*. Schulthess: Zürich, Basel, Genf, p.^pp. 20-26.

Spink, John Williams (2009): Analysis of counterfeit risks and development of a counterfeit product risk model. Doctoral thesis: Michigan State University.

Staake, T./Fleisch, E. (2008): *Countering Counterfeit Trade: Illicit Market Insights, Best-Practice Strategies, and Management Toolbox*. Springer-Verlag: Berlin, Heidelberg.

Staake, Thorsten/Thiesse, Frédéric/Fleisch, Elgar (2009): The emergence of counterfeit trade: a literature review. In: *European Journal of Marketing* 43 3-1, p.^pp. 320-349.

Stephan, Michael/Schneider, Martin J. (ed.) (2011): *Marken- und Produktpiraterie - Fälscherstrategien, Schutzinstrumente, Bekämpfungsmanagemen*t. Symposion Publication: Düsseldorf.

Stirnemann, Elisabeth/Wächter, Christiane (2007): *Gut organisierte Fälscher - Interview mit Franz-Hermann Brüner, Generaldirektor des Europäischen Amts für Betrugsbekämpfung* (OLAF).
Online: http://www.arte.tv/de/produktpiraterie/1577920.html.

Sykes, Gresham M./Matza, David (1957): Techniques of Neutralization: A Theory of Delinquency. In: *American Sociological Review* 22 6, p.^pp. 664-670.

Tenbrock, Christian (2007): Das globalisierte Verbrechen - Menschenhenhandel, Drogen, gefälschte Produkte: Die Kaufleute der Unterwelt überwinden alle Grenzen. In: *Die Zeit*, 28.06.2007. Online: http://www.zeit.de/2007/27/Glob_-Kriminimalit-t.

Tödtli, Maria (2011): *Fälschungen - Marken - und Produktpiraterie unter der Lupe.* Online: http://www.stop-piracy.ch/StopPiracy/media/_content/PDF/Fallstudie-Lacoste-fur-Studenten.pdf.

Tyler, Tom R. (1990): *Why people obey the law.* Yale University Press: New Haven.

United Nations Economic Commission for Europe (2007): *Counterfeiting and Piracy Project.2007.*

UNODC (2010): *The Globalization of Crime - A Transnational Organized Crime Threat Assessment.*
Online: http://www.unodc.org/documents/data-and-analysis/tocta/TOCTA_Report_2010_low_res.pdf.

Vander Beken, Tom (ed.) (2005): *Organised crime and vulnerability of economic sectors the European transport and music sector.* Maklu: Antwerp.

VDMA (2014): *VDMA Study Product Piracy.*
Online: http://www.vdma.org/article/-/articleview/3842960.

Wehinger, Frank (2011): *Illegale Märkte - Stand der sozialwissenschaftlichen Forschung.* Max-Planck-Institut für Gesellschaftsforschung: Köln.

Wilcox, Keith/Kim, Hyeong Min/Sen, Sankar (2009): *Why Do Consumers Buy Counterfeit Luxury Brands?* In: Journal of Marketing Research (JMR) 46 2, p.^pp. 247-259.

Wildemann, Horst/Ann, Christoph/Broy, Manfred/Günthner, Willibald A./Lindemann, Udo (2007): *Plagiatschutz: Handlungsspielräume der produzierenden Industrie gegen Produktpiraterie;* Forschungsbericht.
Online: http://www.produktionsforschung.de/ucm/groups/contribution/@pft/documents/native/ucm01_000318.pdf.

Winkler, Ingo/Wang, Xueli (2007): Made in ©hina: Marken-und Produktpiraterie; Strategien der Fälscher & Abwehrstrategien für Unternehmen. IKO-Verlag für Interkulturelle Kommunikation: Frankfurt am Main, London.

World Customs Organisation (2012/2013): The UNODC-WCO Container Control Programme.
Online:
http://www.wcoomd.org/en/topics/enforcement-and-compliance/activities-and-programmes/unodc_wco_container_control_programme.aspx.

World Trade Organisation (2013): *Legal texts: the WTO agreements.*
Online: http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#nAgreement.

Zäuner, Günther (2009): *Verbrechen zahlt sich aus - über kriminelle Karrieren.* Goldegg Verlag: Wien.

Work Package 8
Criminalization of migration
and ethnic minorities

8.4/8.5

Combined paper on the consequences of the use of criminal law in the criminalisation of migrants and the criminalisation of solidarity across Europe

by: Mark Provera

1. INTRODUCTION

In addition to the clear trend over the last 30 years of irregular migrants being the subject of criminalisation measures in an attempt to control irregular migration, there has also been a corresponding criminalisation of the behaviour of individuals who are in solidarity with migrants. The combined effect of these measures has been to place irregular migrants in an increasingly isolated legal and social space in order to coerce behaviour (chiefly, departure or removal from EU territory). These measures are predicated on the belief that not only can irregular migration be controlled, but that it can also be *perfectly* controlled — that is that the law can be used in an instrumental fashion, removed from normative considerations that generally underpin criminal law provisions (that is that the law embodies the 'right thing' to do). The realities, however, raise questions about the application of the law in this way. Further consequences touching the lives of irregular migrants have also emerged. But the impacts have not been limited to irregular migrants — the lives of citizenry and regular migrants have also been affected through the criminalisation of acts of solidarity. Further, resistance to criminalisation measures has been manifested *by* citizens and from *within* governments.

If compliance with the law is the ultimate goal, then there must be a high level of institutional legitimacy (that is the authority of institutions to command compliance with the law). The concern about applying the law as it has been cast in relation to the criminalisation of irregular migrants and those in solidarity with them, is that institutional legitimacy, an important factor in ensuring compliance, may be undermined by diminished normative legitimacy (that is the fulfilment of objective, quantifiable standards) and diminished empirical legitimacy (that is the experience of those governed is that the authority asserted is legitimate).

Accordingly, this paper examines whether criminalisation of irregular migrants and those that act in solidarity with them may be eroding institutional legitimacy at the European Union and national levels. After outlining the material and personal scope, the paper will encapsulate the theoretical framework which underpins the FIDUCIA project[1] and the methodology adopted. The paper will then identify some of the intentional policy goals for the adoption of criminalisation measures at the EU and national levels before proceeding to consider normative legitimacy by reference to the application of those measures and the emergence of other consequences on the lives of irregular migrants as well as on those of citizens and regular migrants. Lastly, the empirical legitimacy of criminalisation measures will be explored by reference to the spaces of contestation and resistance. This paper is an abridged version of the original submitted for the FIDUCIA project.[2]

2. SCOPE

This paper examines measures directed towards both irregular migrants and those that act in solidarity with them. A combined examination was necessary because law makers have sought to control and coerce irregular migrants from two angles: firstly, with measures directed towards irregular migrants to place them in a legally isolated space and the ability to assert their rights; and secondly, with measures directed toward persons who assist irregular migrants to enter or stay in the territory. Those who assist irregular migrants play an important role in the lives of such migrants by helping them to gain access to their rights[3] (such as access to health care, food, education). Accordingly, between criminalisation measures directed towards irregular migrants and criminalisation measures directed toward those in solidarity there is an interrelationship that warrants their joint examination.

1. M. Hough and M. Sato (2013), 'Report on compliance with the law: how normative and instrumental compliance interact', FIDUCIA Deliverable 5.1.

2. The unabridged version is available at www.ceps.eu/book/criminalisation-irregular-migration-european-union

3. PICUM (2002), *Book of Solidarity, Providing Assistance to Undocumented Migrants in Belgium, Germany, the Netherlands, and the UK*, Vol. 1, Brussels: PICUM; PICUM (2003), *Book of Solidarity. Providing Assistance to Undocumented Migrants in France, Spain and Italy*, Vol. 2, Brussels: PICUM (2003); *Book of Solidarity. Providing Assistance to Undocumented Migrants in Sweden, Denmark and Austria*, Vol. 3, Brussels: PICUM.

3. WHO ARE IRREGULAR MIGRANTS?

Instead of the term 'illegal migrants', the term 'irregular migrants' is used. The reason for this is because the use of the term 'illegal' is not juridically accurate. Migration law is conventionally based on administrative law. 'Illegal' suggests that the act of unauthorised entry or stay is a breach of criminal law when in many countries there is no such criminal sanction for illegal entry or stay. Even where criminal sanctions are in place for irregular entry or stay, it still remains inaccurate because it refers to a body of persons who have not yet been tried and convicted for committing such a crime. The use of the term 'illegal' can have harmful discursive consequences against migrants as it can perpetuate prejudice and stereotypes.[4] As a result, many international bodies have resolved to refer to persons who enter or stay without authorisation as 'irregular migrants'.[5]

Irregular migrants are persons who have entered a country without prior authorisation or who have remained in a country without legal authorisation. Irregularity can be the result of many pathways[6] and take many forms — it may include people who are smuggled or trafficked, people who seek temporary protection or asylum (even if prior authorisation is not necessary under international law[7]), as well as persons who may have entered with authorisation but have stayed beyond the period for which they have been authorised (often referred to as 'overstayers'). Irregular migrants can also include an overlap of categories (for example persons smuggled into a country will sometimes also seek asylum).[8]

It is not always easy to determine if a person is an irregular migrant at law. This is because EU secondary legislation leaves it up to Member State law to define irregular migrants[9] and Member State legal provisions are not always clear[10] or identical.

4. WHAT IS 'SOLIDARITY'?

Solidarity is the act whereby persons assist irregular migrants in particular ways. This may include assisting an irregular migrant to enter or remain in a Member State (also called 'facilitation')[11], but it also includes behaviours towards irregular migrants which may be characterised as humanitarian: such as providing or assisting migrants to gain access to basic rights such as health care, accommodation, transport, food and clothing. Research has revealed the importance of social networks for irregular migrants to access their rights.[12] For the purpose of this paper we do not include an examination of human trafficking given that human trafficking is being examined under the work package of another FIDUCIA partner. However, some consideration needs to be given as to what point (if any) acts of solidarity (such as assisting irregular entry and stay) become acts of criminality (such as people smuggling and human trafficking).

There are two aspects to this; the first one is a legal aspect. The EU Facilitation Directive, for example, attempts to exempt from sanctions humanitarian assistance

4. J. Parkin (2013), 'The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research', CEPS Paper in Liberty and Security in Europe No. 61, CEPS, Brussels, October

5. PICUM (2015), 'Why "Undocumented" or "Irregular"?' (picum.org/picum.org/uploads/file_/Terminology-Leaflet_reprint_FINAL.pdf).

6. F. Düvell (2011), 'Paths into Irregularity: The Legal and Political Construction of Irregular Migration', *European Journal of Migration and Law*, Vol. 13 pp. 275-295; B. Anderson (2013), *Us and Them? The Dangerous Politics of Immigration Control*, Oxford: Oxford University Press

7. G.S. Goodwin-Gill and J. McAdam (2007), *The Refugee in International Law*, Oxford: Oxford University Press, p. 264; J. C. Hathaway (2005), *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, pp. 302-303.

8. A. Triandafyllidou and T. Maroukis (2012), *Migrant Smuggling – Irregular Migration from Asia and Africa to Europe*, Basingstoke: Palgrave McMillan.

9. Article 3(1) of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348, 24.12.2008 ('Return Directive'); Article 2(a) and (b) Directive 2009/52/EC of the European Parliament and of the Council 18 of June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30.6.2009, ('Employer Sanctions Directive'); Article 1 Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence, OJ L 328, 28.11.2002 ('Facilitation Directive'). The Return Directive refers to 'third country nationals staying illegally' on the territory of an EU Member State; see also the Employer Sanctions Directive and the Facilitation Directive.

10. E. Guild (2004), 'Who Is An Irregular Migrant?' in B. Bogusz, R. Cholewinski, A. Cygan, and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff, pp. 3-28; pp. 15-16.

11. See the Facilitation Directive.

12. PICUM (2002), *Book of Solidarity*, Vol. 1, op. cit., PICUM (2003), *Book of Solidarity*, Vol. 2, op. cit., PICUM (2003), *Book of Solidarity*, Vol.3, op. cit.

when a person is assisted to irregularly enter a Member State by use of an express humanitarian exception.[13] The problem is that this exemption is discretionary rather than mandatory for Member States to implement. Similarly, the Facilitation Directive also uses 'financial gain' as an element in determining whether acts which facilitate the stay of an irregular migrant in an EU Member State may be subject to criminal sanction (which might normally exclude humanitarian acts). However, some acts, such as landlords renting accommodation to irregular migrants, may still be caught under this definition as a landlord derives financial gain in the form of rent.[14] The second aspect is a philosophical one. There is the argument that governments have contributed to the demand for smuggling and trafficking through restrictive immigration law and policies and, although 'public protection' and 'doing good' are conventional goals of criminal sanction, the victims of these crimes (irregular migrants) are also the very persons that the state does not want in its jurisdiction.[15]

5. WHAT IS CRIMINALISATION?

Criminalisation is the use of criminal law, discourse and detention as applied against irregular migrants and those in solidarity with them.[16] However, penalties may also stem from administrative law. upon which migration law is conventionally based. This paper includes an examination of administrative penalties.[17] The reason for doing so is that in a migration context some administrative penalties have characteristics akin to criminal penalties but which may be implied rather than express (such as deterrence or punishment). Indeed, some of the most repressive aspects of criminal law and administrative law have 'cross-pollinated' ('asymmetrically incorporated')[18] resulting in what a number of academic authors have described as the 'criminalisation' of migration law.[19] Essentially, this means the incorporation of criminal law 'process, categories and techniques'[20] into migration enforcement as well as the incorporation of immigration consequences into criminal law (such as deportation upon the conviction of a crime).[21]

Scholarly research from the United States has played a central role in shaping what criminalisation means. The distinction in the United States between criminal and administrative law in migration enforcement has been important because certain constitutional protections are afforded to individuals depending on whether a measure emanates from administrative or criminal law.[22] Although there are exceptions,[23] the human rights protections in the European context apply regardless of migration status. Importantly, criminalisation includes those who act in solidarity with irregular migrants.[24]

6. METHODOLOGY

Research has been the subject of two elements: firstly, the setting up of a clear research agenda including desk research involving an analysis of the laws, policies and prac-

13. Article 1(2) of the Facilitation Directive.

14. Articles 1(1)(b) and 2 of the Facilitation Directive.

15. A. Aliverti (2012), 'Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-related Offences', *Social and Legal Studies*, Vol. 21, pp.515-516.

16. Parkin, op. cit.

17. Indeed, such an approach was adopted by the European Union Agency for Fundamental Rights (2014) 'Criminalisation of migrants in an irregular situation and of persons engaging with them', Vienna.

18. S.H. Legomsky (2007), 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms', Washington & Lee Law Review, Vol. 64, No. 2, pp. 469-528.

19. Legomsky, op. cit.; J. Stumpf (2006), 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power', *American University Law Review* Vol. 56, pp. 367-419; T.A. Miller (2005), 'Blurring the Boundaries Between Immigration and Crime Control After September 11th', *Boston College Third World Law Journal*, Vol. 25, pp. 81-123; D. Kanstroom (2004), 'Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"', *North Carolina Journal of International Law and Commercial Regulation*, Vol. 29, pp. 639-670; T.A. Miller (2003), 'Citizenship and Severity: Recent Immigration Reforms and the New Penology', *Georgetown Immigration Law Journal*, Vol. 17, pp. 611-666.

20. Miller, 'Citizenship and Severity', op. cit., pp. 617-618.

21. Legomsky, op. cit.

22. J. Stumpf, op. cit., pp. 390 – 391.

23. C. Costello (2012), 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law', *Indiana Journal of Global Legal Studies*, Vol. 19, No. 1, pp. 257 - 303, at pp. 261 - 263, 282

24. E. Guild (2010), 'Criminalisation of Migration in Europe: Human Rights Implications', Council of Europe Issues Paper, CommDH/IssuePaper (2010)1, Council of Europe, Strasbourg, February.

tices that criminalise, directly and indirectly, irregular migrants at both the EU and national level.

The second element involved a workshop with 21 local and regional government representatives, civil society experts and leading academics to discuss the issue of criminalisation of irregular migrants in their respective Member States and measures at the EU level. This was followed up in a questionnaire sent to workshop participants with a view to obtaining information on specific research questions about the consequences of criminalising migrants and those in solidarity with them in their Member State.

An in depth study of three Member States (the United Kingdom, France and Italy) was undertaken. These three countries were chosen because firstly, France and Italy had recently amended their legislation removing custodial sentences for irregular stay and some insight was sought into the policy rationales behind those decisions; secondly, the United Kingdom was chosen to provide a partial counterpoint as it is a common law jurisdiction and not bound by the Return Directive,[25] the Employer Sanctions Directive[26] and the Schengen Borders Code.[27] However, the United Kingdom is still bound by the Facilitation Directive,[28] the Framework Decision on unauthorised transit[29], the Carrier Sanctions Directive,[30] the Reception Conditions Directive I[31] and the Procedures Directive I.[32] A more general examination of the Netherlands, Germany and Spain substantiated issues emerging from the analysis of the three primary Member States. An annex to the unabridged version of this paper was prepared detailing the relevant Member State legislation.

7. INSTITUTIONAL LEGITIMACY AND IRREGULAR MIGRATION

The theoretical framework developed by Hough and Sato consists of four key ideas. *Firstly*, those individuals are moral agents who act according to whether they consider something to be right or wrong. The *second* idea is to encourage people to comply with the law because it is the right thing to do (that is adopting normative strategies for complying with the law). The *third* idea is to rely less on using deterrence and prosecution-based strategies (that is instrumental strategies) to make people comply with the law due to the cost and ineffectiveness of those strategies. The *fourth* idea is that the reactions of individuals are influenced by the quality of justice that they receive. For example, if a policeman treats a person respectfully, then the person might be more willing to comply with a *lawful* request. Procedural justice theory holds that if an individual is treated fairly and respectfully by institutions, then the person will trust the institution. The person then sees the exercise of authority by the institution as legitimate. As a result, the person is more willing to comply with the law and cooperate with law enforcement and justice institutions.

When referring to 'trust-based strategies for compliance', this is not the vain hope that individuals will obey the law because authorities trust them to do so. Rather, it is about creating the right conditions for individuals to trust law enforcement and justice institutions such that individuals will comply with the law because they see it as a

25. Recital 26 of the Return Directive

26. Recital 38 of the Employer Sanctions Directive

27. Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105, 13.4.2006.

28. Recital 7 of the Facilitation Directive

29. Recital 7 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 (2002/946/JHA), OJ L 328, 05.12.2002, Framework Decision).

30. Recital 7 of Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187, 10.07.2001 (Carrier Sanctions Directive).

31. Recital 19 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 031, 06.02.2003 (Reception Conditions Directive I) where it is noted that the United Kingdom is not bound by its legislative successor, see recital 33 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29.6.2013 (Reception Conditions Directive II).

32. Recital 32 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326, 13.12.2005, (Procedures Directive I) where it is noted that the United Kingdom is not bound by its legislative successor, see recital 58 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) OJ L 180, 29.6.2013 (Procedures Directive II)

legitimate exercise of authority. This is the authority of the institution to command compliance (otherwise known as 'institutional legitimacy').

Institutional legitimacy is assessed by two elements: normative legitimacy (against objective criteria) and empirical legitimacy (subjectively, the experience of those governed). An assessment of both normative and empirical legitimacy triangulates the understanding of institutional legitimacy (in other words, both normative and empirical legitimacy need to be assessed for a full understanding).

Normative legitimacy assesses the law against criteria using objective evidence such as efficiency, accountability, legality, ethical and moral standards and the rule of law.[33] In the migration context, 'efficiency' may be analogous to 'effectiveness'. Czaika and de Haas note that there has been considerable academic debate about the extent to which states have the capacity to control migration.[34] Part of this problem is said to have come from discursive, implementation and efficacy gaps in previous attempts to measure how effective migration policies are. Czaika and de Haas point out that with multiple and competing stakeholders and motives (such as constituencies, non-government organisations and government agencies), 'official' policy rationales may mask or be silent about implicit or collateral objectives.[35] Accordingly, it is not immediately possible to identify the 'reality' or totality of policy objectives. Further, without disaggregating both the purported consequences on, and classes of, migrants, it may be simplistic to ascribe certain outcomes to certain measures. Indeed, what does 'effective' mean? How to determine 'policy effectiveness' or 'policy failure' is highly variable depending on the perspective of the stakeholder: has a policy succeeded if it is mostly *effective* or if it simply has an *effect*? A fundamental question arises: from whose perspective is the policy a success or failure, the state, parts of the electorate, non-government organisations, private detention service providers or the migrant him- or herself? For the purposes of this paper, however, the empirical evidence merely raises questions about the application of these measures and their effectiveness, which in turn raises questions about the impact of these measures on normative legitimacy. Further detailed research is necessary to come to more definitive conclusions.

Empirical legitimacy assesses the experience of the governed to determine the legitimacy of the institution. Elements of the assessment include the legality of the measure concerned and the moral alignment or shared moral values between the person and the institution.[36]

To assess legality, normative legitimacy and ethical and moral standards, reference will be made to fundamental rights norms contained in the EU Charter, the European Convention on Human Rights (ECHR), the European Social Charter as well as to the principle of proportionality as a general principle of EU law.

8. THE INTERRELATIONSHIP BETWEEN EU LAW AND CRIMINALISATION

There is a relationship between EU law and policy in the field of migration and its effect on compelling its Member States to adopt 'a restrictive stance in the criminal law' which has, at times, been bi-directional and mutually reinforcing between the EU and national levels.[37] Indeed, it has been suggested that the challenges facing EU policy-making in this area have 'incentivised' frontier Member States to adopt a restrictive approach.[38]

In the EU context, there appears to be an underlying assumption that immigration can not only be controlled but that it can be *perfectly* controlled, chiefly through an instrumental use of the law. The realities suggest, however, that although EU policy may influence migratory movements, it cannot control them,[39] rather merely displacing

33. Hough and Sato, op. cit., pp. 6-8.

34. M. Czaika, and H. de Haas (2013), 'The effectiveness of immigration policies', *Population and Development Review*, Vol. 39, No. 3, pp. 487-508 at pp. 487-488; H. de Haas and M. Czaika (2013), 'Measuring Migration Policies: Some Conceptual and Methodological Reflections', *Migration and Citizenship*, Vol. 1, No. 2, pp. 40-47, at pp. 40-41.

35. Czaika and de Haas, op. cit., and de Haas and Czaika, op. cit.

36. Hough and Sato, op. cit., p.8.

37. Parkin, op. cit.

38. M. Richey (2013), 'The North African Revolutions: A Chance to Rethink European Externalization of the Handling of Non-EU Migrant Inflows', *Foreign Policy Analysis*, Vol. 9, No. 4, pp. 409-431.

39. Richey, op. cit.; E. Guild and S. Carrera (2013), 'EU Borders and Their Controls: Preventing unwanted movement of people in Europe?', CEPS Essay No. 6, CEPS, Brussels, November.

40. T. Spijkerboer (2007), 'The Human Costs of Border Control', *European Journal of Migration and Law*, Vol. 9, pp. 127-139.

41. H. de Haas (2007), 'The myth of invasion – Irregular migration from West Africa to the Maghreb and the European Union', International Migration Institute, University of Oxford, Oxford (www.imi.ox.ac.uk/pdfs/Irregular%20migration%20from%20West%20Africa%20-%20Hein%20de%20Haas.pdf).

migrants to take other routes.[40] Indeed, de Haas has demonstrated that the existence of migration between North Africa and Europe is not new.[41] Castles notes, amongst other things, that the failure of EU policy in relation to migration is based on the assumption that it can be 'turned on and off like a tap'[42] through the use of regulation when historical experience should inform otherwise and through a failure to address the much broader and complex dynamics that influence migration. Also bearing upon the ability of states to perfectly control migration are the consequences of human rights obligations to all those under their jurisdiction.[43] Yet Carrera and Merlino note that the Stockholm Programme and the Commission's Action Plan implementing it were devoid of references to the rights of irregular migrants (or irregular migrants as right holders) with the exception of unaccompanied minors.[44]

Accordingly, if migration is not being controlled by not addressing the much broader and complex dynamics that influence it, then it raises questions as to the role of criminal law in immigration enforcement and against those who assist irregular migrants, particularly if it produces adverse consequences on both the irregular migrant and on citizen or regular migrant populations, consequences which may be disproportionate to the objective sought. As Sklansky has observed, one explanation may be that the criminal law is being used instrumentally in an *ad hoc* manner, that is there are *indicia* that criminal law is being used selectively (as opposed to systematically) based on practical considerations because of its effectiveness in securing immigration enforcement objectives when non-criminal law measures are not as advantageous to states (rather than its normative underpinning or because the action is inherently 'wrong').[45] Sklansky's position is a useful prism through which to understand the role of criminal law in the migration enforcement sphere as regards the interchangeability of laws based on pragmatism. However, it must be tempered against the particularities of the European context: firstly, Member States differ as regards prosecutorial discretion and criminal legal traditions; secondly, the concept of criminalisation in Europe extends to those acting in solidarity with irregular migrants; and thirdly, the two chief regional human rights instruments (the EU Charter and the ECHR) provide fundamental rights to everybody within a Member State's jurisdiction with only very limited exceptions based on immigration status.

The interrelationship between EU measures and Member States' measures comes about in seven principal ways:

There is a legal vacuum in that EU law neither proscribes irregular entry *per se* nor prohibits Member States from adopting criminalisation measures. The Schengen Borders Code does not provide sanctions for an unauthorised border crossing *per se*. Further, the Court of Justice has held that although criminal law sanctions may be applied to those in a return situation, they must not be such as to undermine the effectiveness of the operation of the Return Directive (that is to hamper or delay the removal procedure) consistent with the principle of sincere cooperation.[46] Although the matters adjudicated before the Court have concerned criminal law measures adopted by Member States, the Court has always maintained that *any* measure (criminal or civil) which impedes or delays removal (and thus undermines the effectiveness of the Return Directive) will be incompatible with EU law. Indeed, the Court has not been concerned about the use of criminal sanctions *per se* (it has always acknowledged the competence of Member States in this regard) but rather about the *type* of sanction, ruling that fines may be imposed (which do not impede the effectiveness of the Directive) rather than custodial sentences (which do impede the effectiveness of the Directive).[47] However, the Court has also indicated that nothing in the Directive precludes the issuance of an expulsion order and entry ban *in substitution for* a fine where this can be enforced immediately.[48] One wonders whether this may incentivise Member States to impose

42. S. Castles (2010), 'Why migration policies fail', *Ethnic and Racial Studies*, Vol. 29, No. 2, pp. 205-227, at p. 208.

43. J.F., Hollifield (2000), 'The politics of international migration: how can we "bring the state back in"' in C.B. Brettell and J.F. Hollifield (eds), *Migration Theory: Talking Across Disciplines*, New York and London: Routledge.

44. S. Carrera and M. Merlino (2010), 'Undocumented migrants and the Stockholm Programme', in S. Carrera and M. Merlino (eds), *Assessing EU Policy on Irregular Migration under the Stockholm Programme*, CEPS Liberty and Security in Europe paper, CEPS, Brussels, October, p. 5.

45. D. Sklansky (2012), 'Crime, Immigration and Ad Hoc Instrumentalism', *New Criminal Law Review*, Vol. 15, No. 2, pp. 157–223.

46. Case C-430/11 *Md Sagor*, Judgment, 6 December 2012, para 32; Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 39 and 43; Case C-61/11 PPU *Hassen El Dridi (alias Soufi Karim)* [2011] I-03015, Judgment, 28 April 2011, paras 55-59.

47. Case C-430/11 *Md Sagor*, Judgment, 6 December 2012, para 34.

48. Case C-430/11 *Md Sagor*, Judgment, 6 December 2012, paras 35-37.

high fines for irregular entry or stay so as to compel irregular migrants to choose the expulsion option on account of any impecuniousness. Such an outcome would result in the guarantees under the Return Directive being undermined.

Consistent with the Court's view that the effectiveness of the Directive should not be undermined and that the return should be carried out as soon as possible, the Court has also indicated that the timing of any custodial sentence must not be before a return decision is adopted nor while the return decision is being implemented.[49] If the person has not been removed after the imposition of coercive measures under Article 8 of the Return Directive, then measures (including criminal measures) may be imposed at that point.[50] Further, the Court was not persuaded that because a Member State rarely imposed penalties solely for the offence of illegal stay (that is unconnected to another criminal offence) *in practice* the effectiveness of the Directive was not undermined by *the law*.[51] As Spena notes, the EU litmus test for the legitimacy of Member State criminal sanctions has been whether such national measures interfere with the expedited return (the real object of the Return Directive).[52] Accordingly, Spena notes the interrelationship between Member State and EU legitimacy.[53]

The Return Directive implicitly permits the criminalisation of migration enforcement by contemplating the use by Member States of an immigration consequence resulting from a criminal law infraction *unrelated to* immigration status. This occurs through the Directive allowing Member States to exclude from the Directive's personal scope those persons who 'are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures' (which will be explored later in the discussion on measures in select Member States).[54] The Court has made clear that Member States cannot avoid the scope of the Directive merely by imposing a criminal sanction on the basis of immigration status *only*, to do so would undermine the Directive entirely.[55] It would appear then that Member States are at liberty to apply the Directive in circumstances where an immigration consequence is being imposed *in addition to* a criminal sanction (that is a sanction which is otherwise unrelated to immigration status).

When detention is cited as an essential tool in the repatriation of irregular migrants, the Union's legislative and judicial silence about persons being repeatedly detained calls into question the legitimacy of that measure. Although the Court has interpreted the 18-month time limit for detention under the Return Directive as an absolute limit,[56] the Court remained silent about repeated periods of detention and as to whether separate periods of detention are to be aggregated in light of the 18-month limit for detention. As will be examined in a later section, the actual repatriation rates from some Member States and the relationship between the 18-month length of detention and successful repatriations also call into question the legitimacy of detention as a measure and the institutional legitimacy of the European Union.

As regards those who seek asylum at the border, detention is seen as a legitimate response to a perceived immigration control failure. In the European Union there is an implicit preference for asylum seekers to arrive 'regularly' and then seek asylum[57] under a system that insists on a territorial notion of asylum but provides limited means of providing authorised access to the territory.[58] This is manifested by the differential treatment afforded to asylum seekers on account of *where* they make their application for international protection, that is there is a distinction in treatment between border and other applicants. This distinction resulted in Member States having the possibility to severely derogate from rights to guarantees which border applicants might otherwise have[59] and which have since been removed under the second-generation asylum legislation (noting, however, that the UK is still bound by the first-generation asylum legislation as discussed earlier). However, the second-generation asylum legislation

49. Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 44-45.

50. Case C-61/11 PPU *Hassen El Dridi (alias Soufi Karim)* [2011] I-03015, Judgment, 28 April 2011, paras 52 and 60; Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 46.

51. Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 39-40.

52. A. Spena (2014), 'Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law', *Criminal Law and Philosophy*, Vol. 8, pp. 635–637, at p. 639.

53. Ibid.

54. Article 2(2)(b) of the Return Directive.

55. Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, para 41.

56. Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, Judgment, 30 November 2009, para 57.

57. M. Provera (2013), *The Detention of Asylum Seekers in the European Union and Australia: A Comparative Analysis*, Oisterwijk: Wolf Legal Publishers, p. 312.

58. E. Guild and V. Moreno-Lax (2013), 'Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR', CEPS Liberty and Security in Europe Paper No. 59, CEPS, Brussels, September.

59. See Articles 35 and 24(1)(b) of the Procedures Directive I; see also Article 14(8) of the Reception Conditions Directive I.

still maintains a number of distinctions based on whether the person is a border applicant or not,[60] indeed providing for the admissibility and *substance* of applications to be decided at border or transit zones.[61] Despite the removal of some express distinctions between border and other applicants for asylum, the ground for detention introduced in the Reception Conditions Directive II affects border applicants as it contemplates the detention of an asylum seeker 'in order to decide, in the context of a procedure, on the applicant's right to enter the territory'.[62] Concern has been expressed that a narrow interpretation of this ground for detention provides Member States with implicit permission to systematically detain asylum seekers at the border *throughout* the period that their asylum application is being determined.[63] Accordingly, the inference to draw from such distinctions in treatment are that border applications are considered an immigration control failure and measures such as detention are a response to that perceived failure.

The European Union has contributed to a stigmatising discourse and an association with criminality without foundation in criminal law by the use of the term 'third-country national staying illegally on the territory' in the Returns Directive. The recitals of the Directive refer to 'the fight against illegal immigration'[64] when the Directive itself provides for no criminal sanction for the irregular entry or presence on EU territory. Indeed, as Guild notes, the adoption of such terminology may be used to more easily justify the use of coercive force on migrants to carry out the removal process, a process which is not a result of an outcome of the criminal justice system but which is carried out under administrative law.[65]

The association of irregularly staying third-country nationals and asylum seekers with criminality is further reinforced by the possibility to resort, in exceptional circumstances, to prison accommodation under the Return Directive and the Reception Conditions Directive. Under the Return Directive, detention is to take place in 'specialised detention facilities'.[66] However, that provision is undermined by the qualification 'as a rule' and by the express permission under the Directive for Member States to resort to prison accommodation where specialised detention facilities cannot be provided.[67] Although third-country nationals are to be kept separate from ordinary prisoners, derogation is possible in 'exceptional circumstances'.[68] A similar formulation can be found in the Reception Conditions Directive II.[69] The use of penal incarceration facilities for administrative detention is an example of criminalisation through the imposition of criminal consequences for immigration infractions and the use of the same actors governing, in this situation, the detention of both irregular migrants and convicted criminals.

There is an ambiguity under the Facilitation Directive about assisting irregular migrants. The Facilitation Directive requires Member States to implement effective, proportionate and dissuasive sanctions against those who instigate, participate or attempt to assist a person who is not a national of a Member State to enter or transit across the territory of a Member State.[70] An exception, based on humanitarian assistance to the person concerned, is contemplated[71] but this provision is discretionary towards Member States rather than mandatory. 'Humanitarian assistance' is not defined under the Directive. Further, that 'humanitarian exception', even where implemented, places the burden of proof on the individual assisting the irregular migrant,

60. See, for example, Articles 4(2)(b), 46(7) of the Procedures Directive II; Articles 10(5) and 11(6) of the Reception Conditions Directive II.

61. Article 43 of the Procedures Directive II.

62. Article 8(3)(c) of the Reception Conditions Directive II.

63. UN High Commissioner for Refugees (UNHCR) (2009), 'UNHCR Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008)', March; UN High Commissioner for Refugees (UNHCR) (2011), 'UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum seekers', UNHCR, Brussels, April; ECRE (2009), 'Comments from the European Council on Refugees and Exiles on the European Commission Proposal to recast the Reception Conditions Directive', ECRE, Brussels, April; ECRE (2011), 'Comments from the European Council on Refugees and Exiles on the Amended Commission Proposal to recast the Reception Conditions Directive (COM(2011) 320 final)', ECRE, Brussels, September.

64. Recital 1 of the Return Directive.

65. Guild, 'Criminalisation of Migration in Europe: Human Rights Implications', op. cit.

66. Article 16(1) of the Return Directive.

67. Note, however, the CJEU's decision in Cases C-473/13 and C-514/13 *Adala Bero v Regierungspräsidium Kassel; Ettayebi Bouzalmate v Kreisverwaltung Kleve*, Judgment, Grand Chamber, 17 July 2014.

68. Article 18(1) of the Return Directive. Note, however, the CJEU's decision in Case C474/13 *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, Judgment, Grand Chamber, 17 July 2014.

69. Article 10(1) of the Reception Conditions Directive II.

70. Articles 1(1)(a), 2 and 3 of the Facilitation Directive.

71. Article 1(2) of the Facilitation Directive.

which may have a disincentive effect on those rendering assistance due to the fact that their actions need to be justified under the law as an exception in order to avoid conviction.

An ambiguity also arises in relation to assistance to irregular migrants to reside in the territory of a Member State. The Facilitation Directive,[72] supported by the Framework Decision,[73] compels Member States to provide for criminal sanctions on those who, for a financial gain, intentionally assist irregular migrants to reside within the territory of a Member State contrary to that Member State's laws on the residence of aliens. As 'financial gain' is an element of the proscribed behaviour, humanitarian behaviour would normally be regarded as outside sanction. but certain behaviours from service providers, such as the renting of accommodation by landlords to irregular migrants, are putatively caught by these provisions. Unlike for those assisting with the entry and transit of irregular migrants, there is no humanitarian exception relating to assistance for irregular residence.

Ambiguity also surrounds the Anti-Trafficking Directive, which provides for the non-penalisation of the acts committed by a person as a direct result of their being trafficked.[74] The Directive is silent as to whether the non-penalisation provision applies to breaches of immigration law; the Directive only contemplates exclusion from prosecution for *criminal* acts related to being trafficked, not to breaches of administrative law (upon which migration law is predominantly based).

Less ambiguous is the Carrier Sanctions Directive, which compels Member States to provide for sanctions against carriers and to ensure the carrier's responsibility (either directly or financially) for returning third-country nationals who have been refused entry into a Member State.[75] As was noted by a study conducted for the European Parliament, asylum seekers are greatly affected by the operation of the Directive because their need to flee and seek refuge cannot overcome documentary shortcomings (such as prior authorisation to enter, especially given the list of countries which are required to have visas to travel to Europe,[76] even if transiting[77]) and the consequent risk that carriers face of penalty and responsibility for their return.[78]

The Court of Justice has denuded the content of procedural guarantees surrounding the extension of a detention decision. In *MG and NR*,[79] the Court held that any breach of the right to be heard on the decision to extend a detention decision is not invalid where the outcome of the administrative procedure would not have been any different. This amounted to a complete rejection of Advocate General Wathelet's Opinion.[80] The decision sits uneasily with procedural justice theory, which emphasises a fair and respectful process to foster compliance with the law. The Court's decision may have the unintended consequence of significantly reducing the likelihood of the detained individual cooperating or complying with the efforts of authorities to return him or her because the individual does not perceive the authorities that detain him or her as being legitimately exercising their authority.

9. SELECT MEMBER STATES – LEGISLATION AND POLICY RATIONALES

In the comparative analysis of Member State laws, there were variations in the circumstances and penalties surrounding the irregular entry and stay and the provision of assistance to irregular migrants. As a general observation and from a juridical perspective, the penalties imposed on those assisting persons to irregularly enter and stay are at least equal to or more severe than those imposed on the actual person who has irregularly entered or stayed on the territory. One explanation may be that certain persons that assist irregular migrants (namely, citizens of the host country) cannot be sub-

72. Articles 1(1)(b) and 2 of the Facilitation Directive.

73. Article 1 of the Framework Decision.

74. Article 8 of 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 L 101, 15.4.2011 (Anti-Trafficking Directive).

75. Article 3 of the Carrier Sanctions Directive.

76. Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81, 21.03.2001.

77. In relation to Air Transit Visas (ATVs) see Articles 2 and 3 of, and the Annex to the Joint Action of 4 March 1996 adopted by the Council on the basis of Article K.3 of the Treaty on the European Union on airport transit arrangements (96/197/JHA), OJ L 63 13.3.1996.

78. European Parliament (2006), *Analysis of the external dimension of the EU's asylum and immigration policies – summary and recommendations for the European Parliament*, DGExPo/B/PolDep/ETUDE/2006_11, European Parliament, Brussels, June.

79. Case C-383/13 PPU *M.G. and N.R. v Staatssecretaris van Veiligheid en Justitie*, Judgment, 10 September 2013.

80. Case C-383/13 PPU *M.G. and N.R. v Staatssecretaris van Veiligheid en Justitie*, Opinion of A-G Wathelet, 23 August 2013.

ject to the additional measure of expulsion, in contrast to an irregular migrant who has irregularly entered or remains. This observation is qualified, however, on two counts: firstly, the severity of the penalties contemplated at the Member State level may also cover behaviours including people smuggling and human trafficking; secondly, further research is needed to examine the penalties *actually imposed* on those *successfully prosecuted* for assisting irregular migrants. The original version of this paper includes the legislative provisions of select Member States and an analysis of such provisions.[81]

Although the **United Kingdom** has included a criminal sanction for irregular entry and stay, effective as of 1 January 1973, research reveals a substantial increase in the criminal statute bookings concerning immigration offences.[82] Aliverti notes that there are several interrelated rationales explaining the increased reliance on criminal law in the immigration sphere in the United Kingdom: firstly, it serves as a means of overcoming a lack of confidence in the immigration system as a result of Home Office inabilities to reduce the number of outstanding asylum claims; secondly, it is due to the desire to back immigration enforcement with criminal law as a means of eradicating immigration 'abuse'; and thirdly, it aims to develop an immigration enforcement agenda through immigration crimes based on the level of 'harm' they created.[83] Although criminal sanctions have the traditional goal of providing 'public protection' and 'doing good', these are aspects which Aliverti notes are absent from immigration enforcement when the victim (the irregular migrant) is invariably also the person whom the State wishes to exclude and when the State is a source of harm through its use of legal barriers and its construal of illegality which in turn creates a demand for migrant exploitation.[84] The recently commenced *Immigration Act 2014* introduced obligations on landlords to check the immigration status of potential tenants, prohibiting landlords from renting accommodation to irregular migrants and punishing those landlords that do.[85]

In **Italy**, the chief objects of its criminalisation provisions have been firstly to improve the expulsion regime over an administrative-based system and secondly to avoid the operation of the Return Directive. The Bossi-Fini law in 2002 identified 'countering the danger of a real invasion to Europe' as the object of stricter immigration enforcement controls (including forced removal at the border) as a means of stopping the expulsion procedure from being undermined.[86] This approach was further augmented by the two 'Security Packages' in 2008 and 2009; the 2008 Security Package made irregular immigration status an aggravating circumstance of a crime (but which was subsequently struck down by the Constitutional Court as being inconsistent with Articles 3 (principle of equality) and 25(2) (punishment based on conduct not on personal qualities) of the Italian constitution).[87] The 2008 Security Package also introduced measures criminalising solidarity and attached immigration consequences (expulsion) to cases where a person (including an EU citizen) has been sentenced to more than two years' imprisonment for committing a crime.[88] The criminalisation of irregular entry and stay was introduced in the 2009 Security Package. The significance of the introduction of criminal sanctions for the irregular migrant status was expressly to avoid the application of the Return Directive (and its associated guarantees, *inter alia*, of a voluntary period for departure)[89] presumably through a narrow interpreta-

81. The original version of the paper is available at www.ceps.eu/book/criminalisation-irregular-migration-european-union

82. A. Aliverti (2013), 'Briefing – Immigration Offences: Trends in Legislation and Criminal and Civil Enforcement', The Migration Observatory, University of Oxford (www.migrationobservatory.ox.ac.uk/briefings/immigration-offences-trends-legislation-and-criminal-and-civil-enforcement).

83. A. Aliverti (2012), 'Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-related Offences', *Social and Legal Studies*, Vol. 21, pp. 511-527.

84. Ibid, pp. 515-516.

85. See further the second reading speech in the House of Commons of the Secretary of State for the Home Department, United Kingdom (2013), House of Commons, Hansard, 22 October (www.publications.parliament.uk/pa/cm201314/cmhansrd/cm131022/debtext/131022-0001.htm), particularly columns 164 and 166.

86. A. Di Martino, F. Biondi Dal Monte, I. Boiano, R. Raffaelli (2013), *The criminalization of irregular migration: law and practice in Italy*, Pisa: Pisa University Press, p. 9.

87. Judgment 249/2010, Constitutional Court, 5 July 2010, Massima Numero 38420.

88. Indeed, Fekete notes that the Italian Interior Minister at the time, Roberto Maroni, suggested that 'anyone helping an "illegal immigrant" with a job or an apartment should be criminalised and that property let to "illegal immigrants" should be confiscated': cited in L. Fekete (2009), 'Europe: crimes of solidarity', *Race and Class*, Vol. 50, No. 4, pp. 83-97 at p. 86.

89. See the speech of the Italian Interior Minister at the time, Roberto Maroni on 15 October 2008, Parlamento Italiano (2008), 'Comitato parlamentare di controllo sull'attuazione dell'Accordo di Schengen, di vigilanza sull'attività di Europol, di controllo e vigilanza in materia di immigrazione 2 – Resconti stenografici delle audizioni' 15 October, (http://leg16.camera.it/470?stenog=/_dati/leg16/lavori/stenbic/30/2008/1015&pagina=s020#Maroni%20Roberto%204%202) p. 6.

tion of Article (2)(2)(b) of the Directive which gives Member States the discretion not to apply the Return Directive in circumstances where the removal has resulted from a crime (as discussed above).[90] The 2009 Security Package also introduced the possibility for expulsion as a substitute sentence where a person had been convicted for the crime of irregular entry or stay. Di Martino *et al* are of the view that the real purpose of the substitution provisions (in combination with accelerated procedures) was to facilitate removal.[91] Since the CJEU decision in the *Archughbabian* case,[92] the Italian government recently decriminalised irregular stay and initial entry, maintaining a range of substantial fines.[93] However, it remains to be seen whether the practice of substituting expulsion for the payment of a fine continues, thereby continuing the attempt to operate outside the application of the Return Directive.[94]

In **France**, the crime of solidarity for assisting irregular migrants can be traced back to 1938, with further incomplete transpositions of the Schengen Agreement and the Facilitation Directive occurring in 1994 and 2003 respectively (which did not include the 'for profit' formulations contained therein or in the UN Protocol Against the Smuggling of Migrants by Land, Sea or Air). Indeed, the territorial application of the punishment provisions extended beyond French territory to acts committed on all Schengen territory and the territories of the state parties to the UN Protocol. Smaller immunities did appear in 1996.[95] In 2005, the current formulation appeared as L622-1 in CESEDA.[96] Allsopp notes that, under President Sarkozy, solidarity (in a particular a non-universal sense) was reframed as a product of immigration control and may be seen as a means of conflict prevention to deter citizens from resisting migrant removal procedures in the context of '*immigration choisie*' and quota-driven deportations.[97] Research reveals that criticisms of '*immigration choisie*' centred around the more prohibitive aspects as regards irregular migrants, including the establishment of a specialised immigration police force and the use of quotas for expulsion and migration with concerns about the effectiveness of professional quotas.[98] In 2012, the French government repealed the offence of irregular stay in order to comply with the CJEU's decision in the *Archughbabian*[99] case and broadened the humanitarian exception to the facilitation of irregular entry or stay in light of the ECHR judgment in the *Mallah* case.[100]

In the **Netherlands** a dual strategy of both exclusion and identification has been adopted[101], which manifested itself following the 1991 Zeevalking Commission and

90. See further, C. Favilli (2011), 'The Implementation of the Return Directive in Italy' in K. Zwaan (ed.), *The Returns Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, Nijmegen: Wolf Legal Publishing, in particular pp. 72–74.

91. Di Martino et al., op. cit., pp. 41, pp. 83–84.

92. Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011.

93. See PICUM (2014), 'PICUM Bulletin – 27 January 2014', www.picum.org/de/nachrichten/bulletin/42771/#news_42777, citing, Il Sole 24 Ore (2014), 'Dietrofront sull'immigrazione clandestine: non sarà più reato, torna illecito amministrativo', 21 January, (www.ilsole24ore.com/art/servizio/2014-01-21/dietrofront-immigrazione-clandestina-non-e-piu-reato-torna-illecito-amministrativo--123307.shtml?uuid=ABZ8y9q); La Stampa (2014), 'L'immigrazione clandestine sarà reato soltano se recidiva', 21 January (www.lastampa.it/2014/01/21/italia/politica/limmigrazione-clandestina-sar-reato-soltanto-se-recidiva-8Qxws0eLtMN5ZC-S815qs5N/pagina.html).

94. See R. Raffaelli (2012), 'Case Note: The Achughbabian Case. Impact of the Return Directive on National criminal Legislation', Diritto Penale Contemporaneo, Milano, 2 February (www.penalecontemporaneo.it/upload/Nota%20En%20Achughbabian.pdf), p. 9, noting the operation of Article 16 of the *Testo Unico sull'Immigrazione.*

95. J. Allsopp (2012), 'Contesting fraternité – Vulnerable migrants and the politics of protection in contemporary France', Working Paper Series No. 82, Refugees Studies Centre, Oxford, July, p. 14.

96. Fédération International des Ligues des Droits de'Homme (FIDH) and l'Organisation Mondiale Contre la Torture (OMCT) (2009), 'Délit de Solidarité – Stigmatisation, répression et intimidation de défenseurs des droits de migrants', June, (www.fidh.org/IMG/pdf/obsfra11062009.pdf); Allsopp, op. cit.

97. Allsopp, op. cit.

98. H. Courau (2009), 'Undocumented Migration – Counting the Uncountable. Data and Trends Across Europe. Country Report France', CLANDESTINO, FP6, European Commission, DG Research, pp. 56-57.

99. Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011; See République Française (2012), *LOI No. 2012-1560 du 31 décembre 2012 relative à la retenue pour vérification du droit au séjour et modifiant le délit d'aide au séjour irrégulier pour en exclure les actions humanitaires et désintéressées, Exposé des Motifs, NOR : INTX1230293*: (www.legifrance.gouv.fr/affichLoiPubliee.do;jsessionid=6D983780B353DB5BA0E95C81E15D792B.tpdjo11v_1?idDocument=JORFDOLE000026425454&type=expose&typeLoi=&legislature=).

100. Application 29681/08 *Mallah v France*, Judgment 10 November 2011.

101. D. Broeders (2009), *Breaking Down Anonymity – Digital Surveillance of Irregular Migrants in Germany and the Netherlands*, Amsterdam: Amsterdam University Press, pp. 191-192; A. Leerkes, G. Engbersen, and J. van der Leun (2012), 'Crime among irregular immigrants and the influence of internal border control', *Crime Law Society Change* (published online 16 February 2012).

the adoption of the *Linking Act* in 1996, which linked databases containing information on immigration status to municipal records, and the *Benefit Entitlement (Residence Status) Act* in 1998. Through excluding irregular migrants from education, employment, accommodation and welfare assistance, the idea is to place pressure on migrants to leave the Netherlands and, combined with identification and documentation, to reduce their anonymity in the community.[102] The Netherlands considers 'the most important pathway out of irregularity is return' and for which the migrant is deemed to hold ultimate responsibility.[103] Law and policy have been directed towards the issuance of return decisions for irregularly staying third-country nationals (who are given 0 or 28 days to voluntarily depart the Netherlands). If they are given 0 days to depart the Netherlands, an entry ban is also issued. 'Light entry bans' prohibit re-entry for up to 5 years whereas 'heavy entry bans' (usually for those with criminal convictions, those who have lost their regular immigration status because of such crimes, or who are believed to present a threat to public order or national security) are issued for up to 20 years.[104] Breach of the entry ban constitutes a crime. It is also possible to be declared an 'undesirable alien'.[105]

The Dutch Government sees detention as an essential tool in ensuring the effective return of irregular migrants.[106] Research reveals that an additional reason for the use of immigration detention in the Netherlands is to pressure irregular migrants to depart the Netherlands and to induce cooperation with the mechanics of expulsion.[107]

Amnesty International notes that use of the criminal law to penalise irregular stay was contemplated in 2002 but the then Minister of Justice, Piet Hein Donner, withdrew such plans in 2005 on the basis that it would not deter irregular migrants and over concerns that the effect of such measures would be to push irregular migrants into crime to survive, with adverse consequences for society.[108] Re-agitation in the Netherlands in 2011 by the current Rutte government for the criminalisation of irregular stay was predicated on three bases: making irregular stay in the Netherlands unattractive; deterring irregular migrants; and facilitating the forced removal of irregular migrants.[109] The bill was withdrawn in April 2014 after the Minister for Security and Justice reached a political compromise with his PvDA colleagues (who felt uncomfortable about supporting such a measure)[110] to reduce taxes on middle-income earners in return for dropping the proposed bill.[111]

10. THE USE OF CRIMINAL LAW, PROSECUTION AND DETENTION

How criminal law and detention are used in a migration context raises questions about normative legitimacy. In other words, how efficient is the law to do as it purports? In light of the shortcomings identified by Czaika and de Haas, the effectiveness

102. D. Diepenhorst (2012), 'Practical Measures for Reducing Irregular Migration in the Netherlands', European Migration Network, Rijswijk: Ministry of the Interior and Kingdom Relations (http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/nl_20120424_irregularmigration_en_version_final_en.pdf) p. 17; See also J. van der Leun and M. Ilies (2009), 'Undocumented Migration – Counting the Uncountable. Data and Trends across Europe. Country Report The Netherlands', CLANDESTINO, FP6, European Commission, DG Research, p. 12.

103. Diepenhorst, op. cit., p. 18.

104. A. Leerkes and E. Boersema (2014), 'Het lot van het inreisverbod', Memorandum 2014-2, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Den Haag: Ministerie van Veiligheid en Justitie (www.wodc.nl/images/mem2014-2-volledige-tekst_tcm44-555776.pdf).

105. See further, I. van Breugel (2012), 'Being A Criminal: On the Penalisation of Irregular Residence in the Netherlands', *Oxford Monitor of Forced Migration*, Vol. 2, No. 2, pp. 32–38, at p.34.

106. Diepenshorst, op. cit., p. 56.

107. A. Leerkes and D. Broeders (2010), 'A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention', *British Journal of Criminology*, Vol. 50, pp. 830-850; see also M. Kox (2011), 'Leaving Detention? A study on the influence of immigration detention on migrants' decision-making processes regarding return', The Hague: International Organisation for Migration (IOM) (www.schipholwakes.nl/Migrantengevangenis%20Mieke%20Kox%20IOM.pdf), pp. 10-11.

108. The Netherlands Tweede Kamer (2005), Kamerstukken II, 2004-2005, 29 537, No 23, p. 4, cited in Amnesty International The Netherlands, 'The Detention of Asylum Seekers and Irregular Migrants' (2008), EUR35/02/2008, Amsterdam: Amnesty International (www.amnesty.nl/sites/default/files/public/rap_nederland_vreemdelingendetentie_0.pdf) at p. 29 and p. 89.

109. Diepenhorst, op. cit., p. 27.

110. P. van den Dool (2013), 'VVD: stafbaastelling illegaliteit is ons geen kabinetscrisis waard', *NRC*, 8 May, (www.nrc.nl/nieuws/2013/05/08/vvd-strafbaarstelling-illegaliteit-is-ons-geen-kabinetscrisis-waard/); H. van Lier (2013), 'Bussemaker heft alle vertrouwen in Samsom: "Het komt goed"', *De Volkskrant*, 5 May (www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/3436595/2013/05/05/Bussemaker-heeft-alle-vertrouwen-in-Samsom-Het-komt-goed.dhtml)

111. De Verdieping Trouw (2014) 'Wetsvoorstel van tafel: geen cel of boete voor illegaliteit', 1 April, (www.trouw.nl/tr/nl/4500/Politiek/article/detail/3626238/2014/04/01/Wetsvoorstel-van-tafel-geen-cel-of-boete-voor-illegaliteit.dhtml) of migration policies requires robust empirical research. The purpose of this section is merely to identify characteristics which raise questions about the application and effectiveness of policies containing criminalising elements and how these might inform institutional legitimacy. The prosecution of migration crimes — both their application and the rates of prosecution — are one such indicator. Despite penalisation provisions applying *prima facie* to all irregular migrants and those in solidarity with them, the choice and number of prosecutions, as well as any correlation between prosecution and enforcement, may be telling as to whether the criminal provisions undermine normative legitimacy by being applied selectively and minimally. In this way, some view can be formed as to whether the law is being used instrumentally as opposed to normatively and whether the application of the law reveals '*ad hoc* instrumentalism'.[112] Further, the use and outcomes of detention when compared against policy rationales may also be telling as to whether normative legitimacy is being undermined.

The selected Member States have used criminal law in an instrumental manner, which appears disjointed from normative underpinning. The examples show the use of criminal law for practical reasons, to overcome administrative law obstacles to removal. The under-prosecution of immigration offences reveals a high level of selectivity and arbitrariness which calls into question the compatibility of the measures with the rule of law. The inference to draw from the analysis is that normative legitimacy may be undermined because the objective data raise questions as to compliance with the rule of law, the predominance of pragmatic reasons for its application and the absence of normative underpinnings for the transgression contemplated. The United Kingdom, not being bound by the Return Directive, provides an example of the internal choice of administrative or criminal law based on practical and arbitrary considerations,[113] and low prosecution and conviction rates reveal that removal is the overriding objective.[114] The Italian example shows the use of criminal law also for pragmatic reasons,[115] disjointed from their normative underpinning,[116] but the choice is between national criminal law and the proper implementation of the Return Directive in accordance with Union law. The very small number of convictions in Italy (in 2009) also suggests removal as the predominant goal.[117] Conversely, the Netherlands' example of light entry ban under prosecution may be partially attributed to the practical reasons that prosecution hinders the overall objective of expediting return and that, in the case of heavy entry bans, detection is usually by secondary means (that is in connection with another suspected and unrelated transgression rather than active investigation).[118] A further, important factor in the under-prosecution of light entry bans in the Netherlands is minimal support from stakeholders because of the perception that it does not constitute a 'real' crime 'and is considered less harmful than crimes such as theft and violence, and should therefore receive less priority'.[119]

If the purpose of detention is to facilitate the removal and/or coerce the departure of irregular migrants, then such a purpose might be consistent with short periods of detention with high rates of removal and very limited (if any) instances of repeated detention. However, certain data raise questions as to the accuracy of that purpose and the legitimacy of detention. In **Spain**, the Ombudsman noted that, although detention is to be used to ensure effective repatriation, 52.49% of those detained in immigration detention centres in 2013 were removed, from which the Ombudsman drew the inference that 47.51% were not removed.[120] In the **United Kingdom**, data compiled by the Oxford Migration Observatory noted that, at the two detention centres examined (Brook House and Campsfield House) in the 2008-2009 period, 57% of the persons detained in the Brook House detention centre left the United Kingdom but that a substantial proportion (43%) remained (21% released, 16% transferred to another detention centre and 6% transferred to a prison or placed into police custody).[121] For those at Campsfield

112. Sklansky, op. cit.

113. Aliverti, 'Exploring the Function of Criminal Law in the Policing of Foreigners', op. cit.

114. Aliverti, 'Briefing – Immigration Offences', op. cit.

115. See discussion above and Di Martino et al., op. cit., p. 9, pp.87-88

116. A. Spena (2014), 'Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law', *Criminal Law and Philosophy*, Vol. 8, pp. 635–637

117. Di Martino, et al., op. cit., pp.87–88

118. A. Leerkes and E. Boersema (2014), 'Het lot van het inreisverbod', Memorandum 2014-2, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Den Haag: Ministerie van Veiligheid en Justitie (www.wodc.nl/images/mem2014-2-volledige-tekst_tcm44-555776.pdf), pp.56–57

119. Ibid, p.56.

120. Defensor del Pueblo, Spain (2014), 'Informe Anual 2013 – Mecanismo Nacional de Prevencion de la Tortura', Madrid (www.defensordelpueblo.es/es/Mnp/InformesAnuales/InformeAnual_MNP_2013.pdf), p.72, para 37.

121. M. Bosworth (2011), 'Immigration Detention: Policy Challenges', Migration Observatory, University of Oxford (www.migrationobservatory.ox.ac.uk/sites/files/migobs/Immigration%20Detention%20Policy%20Primer.pdf), p. 6.

122. Ibid.

123. Amnesty International (2013), 'Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf', Amsterdam, (www.amnesty.nl/sites/default/files/public/ai-13-36-rap-reemdelingendetentie-lr.pdf), pp. 9–10.

House, an accurate figure on those given removal orders was unclear as removal orders were apparently given to 42.7% , but 18% of such orders were unsuccessful, yet 21.2% were given temporary admission or bail and 35.7% were transferred to other facilities.[122] In **the Netherlands**, Amnesty International noted that, in 2012, 50.5% of those detained were held for three months or longer and that 29% of those detained in 2010 had been detained two or three times.[123] In **Italy**, data analysed by Medici per I Diritti Umani noted that only 50.54% of persons in immigration detention centres were repatriated and that extending the detention period from six (in 2010) to eighteen months (in 2011) only resulted in a 2.3% increase in the repatriation rate.[124] Accordingly, the legitimacy of Union law through the Return Directive may well be called into question given that the Directive provides for an 18-month maximum period of detention and is silent about aggregated periods of detention for those who have been detained multiple times. Further, as noted earlier, the Court of Justice remained silent about aggregated periods of detention under the Return Directive in the *Kadzoev* case.[125] The International Detention Coalition has identified research, which shows a lack of correlation between immigration detention policies and decisions by irregular migrants to enter a destination state.[126]

11. OTHER CONSEQUENCES

Institutional legitimacy, through an assessment of normative legitimacy, is questioned due to the collateral consequences of criminalisation and the legality of those measures when assessed against international, supranational and regional human rights standards. Five main consequences of criminalisation question normative legitimacy: *first*, further marginalisation of irregular migrants in society (a strong and common concern amongst questionnaire respondents);[127] *second*, impunity for crimes due to the irregular immigrants' fear of detection;[128] *third*, the use of racial profiling[129], not affecting just irregular migrants, but also citizens and regular migrants as well; *fourth*, the adverse impacts on the mental health of those detained,[130] particularly when health may be a factor in the willingness of a person to leave the country[131] and when detention may have no bearing on the willingness to leave the host country (in that case the Netherlands) with other factors playing a much more significant role;[132] and *fifth*,

124. Medici per i Diritti Umani (2013), 'The CIE Archepelago – Inquiry into the Italian Centres for Identification and Expulsion', (www.mediciperidirittiumani.org/pdf/CIE_Archipelago_eng.pdf), p. 28.

125. Case C-357/09 PPU *Said Shamilovich Kadzoev (Huchbarov)* [2009] ECR I-11189, Judgment, 30 November 2009.

126. D. Corlett, G. Mitchell, J. Van Hove, L. Bowring, and K. Wright (2012), *Captured Children*, Melbourne: International Detention Coalition, particularly at note 70.

127. F. Düvell, op. cit., p. 293; see also K. Kallas, K. Fangen and T. Sarin (2011), 'EU Policy Report', EUMARGINS Project, October. Regarding the links between criminalisation measures and the marginalisation of irregular migrants in the context of the Netherlands, see A. Leerkes, G. Engbersen and J. van der Leun, op. cit., footnote 101 and corresponding text.

128. European Union Agency for Fundamental Rights (2014), 'Criminalisation of migrants in an irregular situation and of persons engaging with them', Vienna, p.40.

129. European Union Agency for Fundamental Rights (2011), 'Fundamental Rights of migrants in an irregular situation in the European Union: Comparative Report', Vienna (http://fra.europa.eu/sites/default/files/fra_uploads/1827-FRA_2011_Migrants_in_an_irregular_situation_EN.pdf), p.40; note also Chacón has identified the conflation between immigration enforcement and a criminal challenge as a factor which motivates and gives implicit approval for racial profiling in the United States: J.M. Chacón (2012), 'Overcriminalizing Immigration' *Journal of Criminal Law and Criminology*, Vol. 102, No. 3, pp. 613–652.

130. K. Robjant, R. Hassan and C. Katona (2009), 'Mental health implications of detaining asylum seekers: systematic review', *British Journal of Psychiatry*, Vol. 194, No. 4, pp. 306-312; M. Ichikawa, S. Nakahara and S. Wakai (2006), 'Effect of post migration detention on mental health among Afghan asylum seekers in Japan', *Australian and New Zealand Journal of Psychiatry*, Vol. 40, No. 4, pp. 341-346; A. S. Keller, B. Rosenfeld, C. Trinh-Shevrin et al. (2003), 'Mental health of detained asylum seekers', *The Lancet*, Vol. 362, pp. 1721-1723; Z. Steel and D. M. Silove (2001) 'The mental health implications of detaining asylum seekers', *Medical Journal of Australia*, Vol. 175, Nos. 11-12, pp. 596-599; C. Pourgourides (1997), 'A second exile: the mental health implications of the detention of asylum seekers in the UK', *Psychiatric Bulletin*, Vol. 21, pp. 673-674. S. Mares and J. Jureidini (2004), 'Psychiatric assessment of children and families in immigration detention – clinical, administrative, and ethical issues', *Australian and New Zealand Journal of Public Health*, Vol. 28, No. 6, pp. 520-526; A. Sultan and K. O'Sullivan (2001), 'Psychological disturbances in asylum seekers held in long-term detention: a participant-observer account', *Medical Journal of Australia* Vol. 175, No. 11, pp. 593–596. Z. Steel, D. M. Silove, R. Brooks, S. Momartin, B. Alzuhairi and I Suslijk (2006), 'Impact of immigration detention and temporary protection on the mental health of refugees', *British Journal of Psychiatry*, Vol. 188, pp. 58-64

131. B. van Alphen, T. Molleman, A. Leerkes, J. van Hoek (2014), *Van bejegining tot vertrek – Een onderzoek naar de werking van vreemdelingenbewaring*, onderzoek en beleid 308, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Den Haag: Ministerie van Veiligheid en Justitie, p. 150.

132. Kox, op. cit.

Member States have, at times, acted contrary to the law in the context of immigration detention and thus the legality of those measures raise questions about normative legitimacy, that is Member States have acted contrary to both established human rights norms and to European Union secondary legislation.[133]

12. SPACES OF RESISTANCE AND CONTESTATION

Acts and actors of resistance also question institutional legitimacy, assessed by reference to empirical legitimacy. By contesting and resisting measures which criminalise both irregular migrants and those in solidarity with them, the inference to be drawn is that the governed (not only the citizenry but also irregular migrants) experience a disjunction between the institution's assertion of legitimacy and their experience of the institution's exercise of authority, that is a lack of moral alignment between values of the individual and the measures asserted by the state. Spaces of contestation and resistance may also evidence a lack of consent on the citizenry's part to the assertion of authority by the institution.

National policy does not always meet local and regional needs and experiences of irregular migration, and local governments have developed (formal or informal) strategies for dealing with the direct consequences of national policies. In the Netherlands, research, as part of the CLANDESTINO project, has already revealed a disjunction between national policy and local government implementation.[134] Through responses to the questionnaires and discussions at the practitioner and expert workshop, Utrecht municipality has contested national policy by providing accommodation to rejected asylum seekers, medical shelter to irregular migrants and distributing leaflets (with the city of Amsterdam) laying out the rights of irregular migrants. Similarly, information was provided about the expressly inclusive approach of the city council of Barcelona to register irregular migrants and incorporate them into its mainstream services, as well as to promote intercultural diversity and interaction through its ambitious 'Anti-Rumours Campaign'.[135]

Public resistance was evidenced in the 'Let's Save Hospitality' (*Salvemos la Hospitalidad*) campaign which successfully saw, in November 2013, the withdrawal of a proposed Spanish law which sought to amend Article 318*bis* of the Codigo Penal by broadening the scope of the anti-trafficking and smuggling provisions to potentially include solidarity and humanitarian aid in broad terms at the discretion of the prosecutor.[136] In the United Kingdom, the use of mobile billboards circulating in six London boroughs with ethnically diverse and settled populations between 22 July and 22 August 2013 containing the text 'GO HOME OR FACE ARREST' attracted 224 complaints to the Advertising Standards Authority,[137] including criticism from a council leader[138] and Redbridge London Borough Council,[139] from within the Liberal Democrat

133. Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011, paras 48 and 49 ; *MSS v Belgium and Greece* No. 30696/09 Judgment Grand Chamber, 21 January 2011, paras 223-234; *R.U. v Greece*, No. 2237/08. Judgment, 7 June 2011, paras 62-64; *S.D. v Greece*, No. 53541/07, Judgment, 11 June 2009, paras 49-54; *Tabesh v Greece*, No. 8256/07, Judgment, 26 November 2009, paras 38-44; *A.A. v Greece*, No. 12186/08, Judgment, 22 July 2010, paras 57-65; *Riad and Idiab v Belgium*, Nos. 29787/03 and 29810/03, Judgment, 24 January 2008, paras 104-111; *Rahimi v Greece*, No. 8687/08, Judgment, 5 April 2011 paras 109-110 ; Case C-430/11 *Md Sagor*, Judgment, 6 December 2012; Case C-61/11 PPU *Hassen El Dridi (alias Soufi Karim)* [2011] ECR I-03015, Judgment, 28 April 2011; Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment, Grand Chamber, 6 December 2011 ; Cases C-473/13 and C-514/13 *Adala Bero v Regierungspräsidium Kassel; Ettayebi Bouzalmate v Kreisverwaltung Kleve*, Judgment, Grand Chamber, 17 July 2014 ; Case C474/13 *Thi Ly Pham v Stadt Schweinfurt, Amt für Meldewesen und Statistik*, Judgment, Grand Chamber, 17 July 2014 ; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No. 13178/03, Judgment, 12 October 2006; *Muskhadzhiyeva & ors v Belgium*, No. 41442/07, Judgment, 19 January 2010.

134. Van der Leun and Ilies, op. cit., pp. 12-13.

135. See, Ajuntament de Barcelona (2015), 'Estratègia BCN Antirumours', (http://bcnantirumors.cat/; see also http://ec.europa.eu/ewsi/en/practice/details.cfm?ID_ITEMS=28379).

136. See, Salvemos la Hospitalidad (2015), 'La Hospitalidad No Es Delito', (www.salvemoslahospitalidad.org/).

137. Advertising Standards Authority, op. cit.

138. BBC News (2013), 'Council horrified over scheme for immigrants to go', 23 July, (www.bbc.com/news/uk-england-london-23419848).

139. T. Bridge (2013), 'Council joins attack on Government immigration vans', *LocalGov*, 29 July, (www.localgov.co.uk/Council-joins-attack-on-Government-immigration-vans/28386).

coalition government,[140] bishops,[141] various non-government organisations, such as Show Racism the Red Card[142] and Liberty,[143] and including a legal challenge on the basis of a breach of the Equality Act 2010.[144] In France, Allsopp and Fekete have highlighted instances of resistance — both individual and collective — against solidarity offences[145] and the treatment of forcibly removed persons on aircraft.[146]

The presence of non-government services and professionals, acting in defiance of national policy, are also indicators of empirical legitimacy being questioned. Some Member State policies severely limit medical services to irregular migrants and irregular migrants also fear detection through accessing such services. In response, organisations like NAGA[147] in Italy and Medibüro[148] in Germany have responded to that need through volunteer medical practitioners and other medical professionals. Similarly, in the United Kingdom, the organisation Doctors of the World run a clinic in London for vulnerable migrants to overcome barriers to accessing health care.[149]

Fair and respectful processes have an important role to play in dealing with irregular migrants. Information was provided in the questionnaire about Stichting Haven International Partnership (SHIP),[150] based in Amsterdam but operating in Amsterdam, The Hague, Utrecht and Rotterdam. SHIP is said to adopt an approach of respectful guidance towards North African and Middle Eastern irregular migrants using native Arabic, Berber or French speakers to assist with voluntary return to the person's country of origin. Research from the WODC in the Netherlands has highlighted that, in a detention context, the more a detained person perceived their detention as legitimate, the more they were willing to cooperate for their departure from the Netherlands.[151] Research undertaken as part of the International Detention Coalition's *Community Assessment and Placement* model has highlighted the importance of fair processes noting that negative asylum decisions are more likely to be complied with by rejected asylum seekers if the refugee status determination process is fair.[152] In the European context, fair process may be analogous to effective remedies under Article 47 of the EU Charter and Article 13 of the ECHR whilst incorporating respectful dealings and treatment of individuals

13. CONCLUSIONS

The theoretical framework of the FIDUCIA Project aims to assess institutional legitimacy through the dual lenses of normative and empirical legitimacy, as well as a means of identifying ways in which compliance with the law can be engendered.

Measures which criminalise migrants and those in solidarity with them present a particular challenge for an assessment of institutional legitimacy through normative compliance, as the research has revealed a propensity of states to use criminal law *instrumentally* in the migration context. The instrumental approach adopted seems disconnected from a normative underpinning and is rather used for pragmatic reasons and in an arbitrary manner. Further, instrumental use of the law in the migration context is contestable because it is based on the assumption that migration can be controlled — a premise which in itself is vigorously contested in both academic and policy-making spheres.

140. The Huffington Post UK (2013), 'Vince Cable: Immigration Crackdown And #RacistVan Is "Stupid And Offensive"', 28 July, (www.huffingtonpost.co.uk/2013/07/28/cable-immigration_n_3666286.html?utm_hp_ref=uk); R. Syal (2013), 'Anger at "go home" message to illegal migrants', *The Guardian*, 25 July (www.theguardian.com/uk-news/2013/jul/25/coalition-row-adverts-illegal-immigrants).

141. Ekklesia (2013), 'Bishops condemn Home Office "go home" campaign', 12 August, (www.ekklesia.co.uk/node/18785).

142. Show Racism the Red Card (2013), 'Show Racism the Red Card calls on government to abandon "Go Home" campaign' (www.srtrc.org/news/news-and-events?news=4520).

143. I. Sankey (2013), '"Go home" vans: Nasty, racist and likely unlawful', Liberty, 1 August (https://www.liberty-human-rights.org.uk/news/latest-news/go-home-vans-nasty-racist-and-likely-unlawful#overlay-context=).

144. Deighton, Pierce, Glynn (2013), 'Home Office Agree Never to Run Van Adverts Telling Migrants to Go Home Again Without Consulting', Press Release, 12 August (www.migrantsrights.org.uk/files/news/DPG_press_release_12_08_2013.pdf).

145. Allsopp, op. cit.

146. Fekete, op. cit., pp. 92-94

147. NAGA (2015), 'Il Naga' (www.naga.it/index.php/Chi_Siamo.html)

148. Medibüro (2015), 'Who We Are' (www.medibuero.de/en/Who%20we%20are/Our%20aims.html).

149. Doctors of the World (2015), 'London Clinic' (http://doctorsoftheworld.org.uk/pages/london-clinic); Doctors of the World (2015), 'About Us' (http://doctorsoftheworld.org.uk/pages/what-we-do).

150. SHIP Foundation (2015), (http://shipfoundation.nl/).

151. Van Alphen, Molleman, Leerkes and van Hoek, op. cit., p. 150.

152. R. Sampson and L. Bowring (2011), *There are alternatives: A handbook for preventing unnecessary immigration detention*, Melbourne: Immigration Detention Coalition, p. 17

Normative legitimacy, which looks at the objective use of the law, is inclusive of quantifiable measures such as efficiency, legality and the rule of law. In a migration context, efficiency may be analogised to effectiveness but it presents a number of methodological problems as regards assessment. In order to advance trust-based methods of compliance in the migration context, this is certainly an area that could greatly benefit from further empirical research.

An assessment of the normative legitimacy revealed that institutional legitimacy may be undermined due to the legality of measures: firstly, through their *application* for pragmatic reasons in a somewhat arbitrary manner and disconnected from normative underpinning which raises questions about compliance with the rule of law; and secondly, the other *consequences* resulting from such measures raise questions about legal compliance, that is compliance with international, supranational and regional human rights obligations.

Empirical legitimacy, which seeks to examine the experience of those governed in a subjective sense, is inclusive of *indicia* such as the legality of the measure, moral alignment between governor and the governed and shared moral values between the individual and the institution. The research reveals that empirical legitimacy may be undermined where there is a disjunction between national and local or regional needs, goals, priorities and experiences such that empirical legitimacy *within* governments is contested. Resistance and contestation from local and regional governments, organisations and individuals are *indicia* of a misalignment of moral values between national policies and those governed. This may also be evidenced by the presence of organisations and individuals who provide support and services to irregular migrants (in sectors where the state would normally be expected to operate) in defiance of national policy. Fair and respectful processes are also shown to have a role to play in fostering compliance with the law.

Accordingly, on the basis of normative and empirical legitimacy assessments undertaken, it can be concluded that there is a basis for questioning the legitimacy of institutions which criminalise irregular migrants and the persons that act in solidarity with them.

The FIDUCIA Project's theoretical framework also explores the relationship between criminal law and morality, distinguishing crimes which are inherently wrong and carry some 'normative charge' (*mala in se*) from regulatory or administrative penalties which do not carry any normative charge or stigma (*mala prohibita*).

In striking this balance between law and morality, Hough and Sato suggest a synthesis of positions between the Hart-Devlin debate. Hart's position was that criminal law should not be based solely on the moral views of the majority and that criminal law should not intervene where no public harm was done or no rights were breached and that popular. Devlin's position was that the legitimacy of the justice system required some level of connection between law and morality. Hough and Sato advance the synthesis of these two positions as follows:

1. ny extension of the criminal law needs to be justified primarily by reference to the need to preserve human rights;
2. Any narrowing of the criminal law needs to be justified by reference to the fact that the laws in question do nothing to secure or protect human rights;
3. Provided that these two conditions are met, it makes sense to maximise the degree of correspondence between law and morality by ensuring that as far as possible the behaviour proscribed by criminal law carries a social stigma.[153]

The challenge for viewing the criminalisation of irregular migration and those in solidarity with them through this theoretical lens results from the use of not only criminal law but also administrative law measures to criminalise migrants.

Migration law is conventionally based on administrative law and has regulatory or

153. Hough and Sato, op. cit., p.11

administrative penalties at its disposal to ensure enforcement. Such penalties can be characterised as *mala prohibita* and, as Hough and Sato point out, do not carry a 'normative charge'.[154] However, as indicated throughout this paper, the cross-pollination of criminal consequences for immigration infractions and immigration consequences for criminal infractions to ensure compliance (as put forward by Legomsky)[155] has resulted in measures grounded in administrative law but which have assumed characteristics more akin to criminal sanction (such as detention or having the objects of punishment and deterrence). With the exception of trafficking in human beings (which is the subject of another FIDUCIA Project work package), irregular entry and stay may be considered victimless behaviour. As such, both administrative and criminal law sanctions may be equally devoid of a 'normative charge' (which is a characteristic of conventional regulatory or administrative penalties whereas criminal penalties do carry such a normative charge and social stigma).

Accordingly, the latter part of the theoretical framework may not reach its full potential in situations where measures are based on administrative law but have characteristics akin to criminal law sanctions (such as immigration detention). It is submitted that, as regards criminalisation of migration and of those that act in solidarity with irregular migrants, the distinction between regulatory offences and criminal offences is irrelevant where the consequences on the individual are largely identical. In the migration context, an understanding of the *substance* of the consequences of criminalisation measures on individuals, rather than only their legal *form* (as either criminal or administrative law), is essential in any attempt to reconcile criminal or administrative measures and morality. Care should be taken to ensure that, in proposing a synthesis of the Hart-Devlin debate as advanced by the theoretical framework, states are not incentivised to transfer criminal law measures to the administrative sphere but with similarly deleterious consequences on human rights and with a discourse that maintains social stigma around the behaviour. Similarly, care should be exercised to ensure that states do not embark on a course of moral engineering to create social stigma, thereby engendering public trust and support for criminalisation measures against irregular migrants and those that act in solidarity with them that are otherwise inconsistent with universal human rights norms.

The role of public trust in fostering compliance with migration law does present a paradox. This largely stems from the fact that the individuals whose trust a state wishes to engender (irregular migrants) are also the very individuals a state does not want in its jurisdiction. This is not to say that public trust has no relevance in the field of migration law compliance. On the contrary, examples show that fair and respectful treatment and process have an important role to play in policy execution and compliance with human rights obligations. Further, it demonstrates that public trust also plays an important role for seeking the compliance of those who act in solidarity with irregular migrants — namely citizens and regular migrants — particularly given the severity of the measures against those facilitating irregular migration and the presence of resistance to criminalising measures.

SELECTED LITERATURE

Ajuntament de Barcelona (2015), 'Estratègia BCN Antirumours', (http://bcnantirumors.cat/).

A. Aliverti (2012), 'Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-related Offences', *Social and Legal Studies*, Vol. 21, pp.515-516.

154. Hough and Sato, op. cit., p.9

155. Legomsky, op. cit.

A. Aliverti (2013), 'Briefing – Immigration Offences: Trends in Legislation and Criminal and Civil Enforcement', The Migration Observatory, University of Oxford (www.migrationobservatory.ox.ac.uk/briefings/immigration-offences-trends-legislation-and-criminal-and-civil-enforcement).

A. Aliverti (2012), 'Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-related Offences', *Social and Legal Studies*, Vol. 21, pp. 511-527.

J. Allsopp (2012), 'Contesting fraternité – Vulnerable migrants and the politics of protection in contemporary France', Working Paper Series No. 82, Refugees Studies Centre, Oxford, July, p. 14.

Amnesty International (2013), 'Vreemdelingendetentie in Nederland: Mensenrechten als Maatstaf', Amsterdam, (www.amnesty.nl/sites/default/files/public/ai-13-36-rap-reemdelingendetentie-lr.pdf), pp. 9-10.

B. Anderson (2013), *Us and Them? The Dangerous Politics of Immigration Control*, Oxford: Oxford University Press.

BBC News (2013), 'Council "horrified" over scheme for immigrants to go', 23 July, (www.bbc.com/news/uk-england-london-23419848).

T. Bridge (2013), 'Council joins attack on Government immigration vans', *LocalGov*, 29 July, (www.localgov.co.uk/Council-joins-attack-on-Government-immigration-vans/28386).

D. Broeders (2009), *Breaking Down Anonymity – Digital Surveillance of Irregular Migrants in Germany and the Netherlands*, Amsterdam: Amsterdam University Press, pp. 191-192.

M. Bosworth (2011), 'Immigration Detention: Policy Challenges', Migration Observatory, University of Oxford

(www.migrationobservatory.ox.ac.uk/sites/files/migobs/Immigration%20Detention%20Policy%20Primer.pdf) p. 6.

S. Castles (2010), 'Why migration policies fail', *Ethnic and Racial Studies*, Vol. 29, No. 2, pp. 205-227, at p. 208.

S. Carrera and M. Merlino (2010), 'Undocumented migrants and the Stockholm Programme', in S. Carrera and M. Merlino (eds), *Assessing EU Policy on Irregular Migration under the Stockholm Programme*, CEPS Liberty and Security in Europe paper, CEPS, Brussels, October, p. 5.

D. Corlett, G. Mitchell, J. Van Hove, L. Bowring, and K. Wright (2012), *Captured Children*, Melbourne: International Detention Coalition, particularly at note 70.

C. Costello (2012), 'Human Rights and the Elusive Universal Subject: Immigration Detention Under International Human Rights and EU Law', *Indiana Journal of Global Legal Studies*, Vol. 19, No. 1, pp. 257 - 303, at pp. 261 - 263, 282

H. Courau (2009), 'Undocumented Migration – Counting the Uncountable. Data and Trends Across Europe. Country Report France', CLANDESTINO, FP6, European Commission, DG Research, pp. 56-57.

M. Czaika, and H. de Haas (2013), 'The effectiveness of immigration policies', *Population and Development Review*, Vol. 39, No. 3, pp. 487-508 at pp. 487-488.

Defensor del Pueblo, Spain (2014), 'Informe Anual 2013 – Mecanismo Nacional de Prevencion de la Tortura', Madrid (www.defensordelpueblo.es/es/Mnp/InformesAnuales/InformeAnual_MNP_2013.pdf), p.72, para 37.

Deighton, Pierce, Glynn (2013), 'Home Office Agree Never to Run Van Adverts Telling Migrants to Go Home Again Without Consulting', Press Release, 12 August (www.migrantsrights.org.uk/files/news/DPG_press_release_12_08_2013.pdf).

De Verdieping Trouw (2014) 'Wetsvoorstel van tafel: geen cel of boete voor illegaliteit', 1 April, (www.trouw.nl/tr/nl/4500/Politiek/article/detail/3626238/2014/04/01/Wetsvoorstel-van-tafel-geen-cel-of-boete-voor-illegaliteit.dhtml).

D. Diepenhorst (2012), 'Practical Measures for Reducing Irregular Migration in the Netherlands', European Migration Network, Rijswijk: Ministry of the Interior and Kingdom Relations (http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/irregular-migration/nl_20120424_irregularmigration_en_version_final_en.pdf) p. 17.

A. Di Martino, F. Biondi Dal Monte, I. Boiano, R. Raffaelli (2013), *The criminalization of irregular migration: law and practice in Italy*, Pisa: Pisa University Press, p. 9.

Doctors of the World (2015), 'London Clinic' (http://doctorsoftheworld.org.uk/pages/london-clinic); Doctors of the World (2015), 'About Us' (http://doctorsoftheworld.org.uk/pages/what-we-do).

F. Düvell (2011), 'Paths into Irregularity: The Legal and Political Construction of Irregular Migration', *European Journal of Migration and Law*, Vol. 13 pp. 275-295.

Ekklesia (2013), 'Bishops condemn Home Office "go home" campaign', 12 August, (www.ekklesia.co.uk/node/18785).

L. Fekete (2009), 'Europe: crimes of solidarity', *Race and Class*, Vol. 50, No. 4, pp. 83-97 at p. 86.

C. Favilli (2011), 'The Implementation of the Return Directive in Italy' in K. Zwaan (ed.), *The Returns Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, Nijmegen: Wolf Legal Publishing, in particular pp. 72-74.

G.S. Goodwin-Gill and J. McAdam (2007), *The Refugee in International Law*, Oxford: Oxford University Press, p. 264.

E. Guild (2004), 'Who Is An Irregular Migrant?' in B. Bogusz, R. Cholewinski, A. Cygan, and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nijhoff, pp. 3-28; pp. 15-16.

E. Guild (2010), 'Criminalisation of Migration in Europe: Human Rights Implications', Council of Europe Issues Paper, CommDH/IssuePaper (2010) 1, Council of Europe, Strasbourg, February.

E. Guild and S. Carrera (2013), 'EU Borders and Their Controls: Preventing unwanted movement of people in Europe?' CEPS Essay No. 6, CEPS, Brussels, November.

E. Guild and V. Moreno-Lax (2013), 'Current Challenges regarding the International Refugee Law, with focus on EU Policies and EU Co-operation with UNHCR', CEPS Liberty and Security in Europe Paper No. 59, CEPS, Brussels, September.

H. de Haas and M. Czaika (2013), 'Measuring Migration Policies: Some Conceptual and Methodological Reflections', *Migration and Citizenship*, Vol. 1, No. 2, pp. 40-47, at pp. 40-41.

H. de Haas (2007), 'The myth of invasion – Irregular migration from West Africa to the Maghreb and the European Union', International Migration Institute, University of Oxford, Oxford (www.imi.ox.ac.uk/pdfs/Irregular%20migration%20from%20 West%20Africa%20-%20Hein%20de%20Haas.pdf).

J.F., Hollifield (2000), 'The politics of international migration: how can we "bring the state back in"' in C.B. Brettell and J.F. Hollifield (eds), *Migration Theory: Talking Across Disciplines,* New York and London: Routledge.

M. Ichikawa, S. Nakahara and S. Wakai (2006), 'Effect of post migration detention on mental health among Afghan asylum seekers in Japan', *Australian and New Zealand Journal of Psychiatry*, Vol. 40, No. 4, pp. 341-346.

K. Kallas, K. Fangen and T. Sarin (2011), 'EU Policy Report', EUMARGINS Project, October.

J. C. Hathaway (2005), *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press, pp. 302-303.

D. Kanstroom (2004), 'Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"', *North Carolina Journal of International Law and Commercial Regulation*, Vol. 29, pp. 639-670.

A. S. Keller, B. Rosenfeld, C. Trinh-Shevrin et al. (2003), 'Mental health of detained asylum seekers', *The Lancet*, Vol. 362, pp. 1721-1723.

M. Kox (2011), 'Leaving Detention? A study on the influence of immigration detention on migrants' decision-making processes regarding return', The Hague: International Organisation for Migration (IOM) (www.schipholwakes.nl/Migrantengevangenis%20Mieke%20Kox%20IOM.pdf), pp. 10-11.

La Stampa (2014), 'L'immigrazione clandestine sarà reato soltano se recidiva', 21 January (www.lastampa.it/2014/01/21/italia/politica/limmigrazione-clandestina-sar-reato-soltanto-se-recidiva-8Qxws0eLtMN5ZCS815qs5N/pagina.html).

A. Leerkes and D. Broeders (2010), 'A Case of Mixed Motives? Formal and Informal Functions of Administrative Immigration Detention', *British Journal of Criminology*, Vol. 50, pp. 830-850.

A. Leerkes, G. Engbersen, and J. van der Leun (2012), 'Crime among irregular immigrants and the influence of internal border control', *Crime Law Society Change* (published online 16 February 2012).

A. Leerkes and E. Boersema (2014), 'Het lot van het inreisverbod', Memorandum 2014-2, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Den Haag: Ministerie van Veiligheid en Justitie (www.wodc.nl/images/mem2014-2-volledige-tekst_tcm44-555776.pdf).

A. Leerkes and E. Boersema (2014), 'Het lot van het inreisverbod', Memorandum 2014-2, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Den Haag: Ministerie van Veiligheid en Justitie (www.wodc.nl/images/mem2014-2-volledige-tekst_tcm44-555776.pdf), pp.56-57.

S.H. Legomsky (2007), 'The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms', *Washington & Lee Law Review*, Vol. 64, No. 2, pp. 469-528.

Legomsky, op. cit.; J. Stumpf (2006), 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power', *American University Law Review* Vol. 56, pp. 367-419.

S. Mares and J. Jureidini (2004), 'Psychiatric assessment of children and families in immigration detention – clinical, administrative, and ethical issues', *Australian and New Zealand Journal of Public Health,* Vol. 28, No. 6, pp. 520-526.

Medici per i Diritti Umani (2013), 'The CIE Archepelago – Inquiry into the Italian Centres for Identification and Expulsion', (www.mediciperidirittiumani.org/pdf/CIE_Archipelago_eng.pdf), p. 28.

Medibüro (2015), 'Who We Are' (www.medibuero.de/en/Who%20we%20are/Our%20aims.html).

T.A. Miller (2003), 'Citizenship and Severity: Recent Immigration Reforms and the New Penology', *Georgetown Immigration Law Journal*, Vol. 17, pp. 611-666.

T.A. Miller (2005), 'Blurring the Boundaries Between Immigration and Crime Control After September 11th', *Boston College Third World Law Journal,* Vol. 25, pp. 81-123.

NAGA (2015), 'Il Naga' (www.naga.it/index.php/Chi_Siamo.html).

J. Parkin (2013), 'The Criminalisation of Migration in Europe: A State-of-the-Art of the Academic Literature and Research', CEPS Paper in Liberty and Security in Europe No. 61, CEPS, Brussels, October.

PICUM (2002), *Book of Solidarity, Providing Assistance to Undocumented Migrants in Belgium, Germany, the Netherlands, and the UK*, Vol. 1, Brussels: PICUM.

PICUM (2003), *Book of Solidarity. Providing Assistance to Undocumented Migrants in France, Spain and Italy,* Vol. 2, Brussels: PICUM.

PICUM (2003); *Book of Solidarity. Providing Assistance to Undocumented Migrants in Sweden, Denmark and Austria*, Vol. 3, Brussels: PICUM.

PICUM (2014), 'PICUM Bulletin – 27 January 2014', www.picum.org/de/nachrichten/bulletin/42771/#news_42777, citing, Il Sole 24 Ore (2014), 'Dietrofront sull'immigrazione clandestine: non sarà più reato, torna illecito amministrativo', 21 January, (www.ilsole24ore.com/art/servizio/2014-01-21/dietrofront-immigrazione-clandestina-non-e-piu-reato-torna-illecito-amministrativo--123307.shtml?uuid=ABZ8y9q).

PICUM (2015), 'Why "Undocumented" or "Irregular"?' (picum.org/picum.org/uploads/file_/TerminologyLeaflet_reprint_FINAL.pdf).

M. Provera (2013), *The Detention of Asylum Seekers in the European Union and Australia: A Comparative Analysis*, Oisterwijk: Wolf Legal Publishers, p. 312.

C. Pourgourides (1997), 'A second exile: the mental health implications of the detention of asylum seekers in the UK', *Psychiatric Bulletin*, Vol. 21, pp. 673-674.

R. Raffaelli (2012), 'Case Note: The Achughbabian Case. Impact of the Return Directive on National criminal Legislation', Diritto Penale Contemporaneo, Milano, 2 February (www.penalecontemporaneo.it/upload/Nota%20En%20Achughbabian.pdf), p. 9, noting the operation of Article 16 of the *Testo Unico sull'Immigrazione.*

M. Richey (2013), 'The North African Revolutions: A Chance to Rethink European Externalization of the Handling of Non-EU Migrant Inflows', *Foreign Policy Analysis*, Vol. 9, No. 4, pp. 409-431.

K. Robjant, R. Hassan and C. Katona (2009), 'Mental health implications of detaining asylum seekers: systematic review', *British Journal of Psychiatry*, Vol. 194, No. 4, pp. 306-312.

Salvemos la Hospitalidad (2015), 'La Hospitalidad No Es Delito', (www.salvemoslahospitalidad.org/).

R. Sampson and L. Bowring (2011), *There are alternatives: A handbook for preventing unnecessary immigration detention,* Melbourne: Immigration Detention Coalition, p. 17.

I. Sankey (2013), "Go home" vans: Nasty, racist and likely unlawful', Liberty, 1 August (https://www.liberty-human-rights.org.uk/news/latest-news/go-home-vans-nasty-racist-and-likely-unlawful#overlay-context=).

SHIP Foundation (2015), (http://shipfoundation.nl/).

Show Racism the Red Card (2013), 'Show Racism the Red Card calls on government to abandon "Go Home" campaign' (www.srtrc.org/news/news-and-events?news=4520).

D. Sklansky (2012), 'Crime, Immigration and Ad Hoc Instrumentalism', *New Criminal Law Review*, Vol. 15, No. 2, pp. 157–223.

A. Spena (2014), 'Iniuria Migrandi: Criminalization of Immigrants and the Basic Principles of the Criminal Law', *Criminal Law and Philosophy*, Vol. 8, pp. 635–637, at p. 639.

T. Spijkerboer (2007), 'The Human Costs of Border Control', *European Journal of Migration and Law*, Vol. 9, pp. 127-139.

Z. Steel and D. M. Silove (2001) 'The mental health implications of detaining asylum seekers', *Medical Journal of Australia*, Vol. 175, Nos. 11-12, pp. 596-599.

Z. Steel, D. M. Silove, R. Brooks, S. Momartin, B. Alzuhairi and I Suslijk (2006), 'Impact of immigration detention and temporary protection on the mental health of refugees', *British Journal of Psychiatry*, Vol. 188, pp. 58-64.

A. Sultan and K. O'Sullivan (2001), 'Psychological disturbances in asylum seekers held in long-term detention: a participant-observer account', *Medical Journal of Australia* Vol. 175, No. 11, pp. 593–596.

R. Syal (2013), 'Anger at "go home" message to illegal migrants', *The Guardian*, 25 July (www.theguardian.com/uk-news/2013/jul/25/coalition-row-adverts-illegal-immigrants).

A. Triandafyllidou and T. Maroukis (2012), *Migrant Smuggling – Irregular Migration from Asia and Africa to Europe*, Basingstoke: Palgrave McMillan.

The Huffington Post UK (2013), 'Vince Cable: Immigration Crackdown And #RacistVan Is 'Stupid And Offensive'', 28 July, (www.huffingtonpost.co.uk/2013/07/28/cable-immigration_n_3666286.html?utm_hp_ref=uk).

B. van Alphen, T. Molleman, A. Leerkes, J. van Hoek (2014), *Van bejegining tot vertrek – Een onderzoek naar de werking van vreemdelingenbewaring*, onderzoek en beleid 308, Wetenschappelijk Onderzoek- en Documentatiecentrum (WODC), Den Haag: Ministerie van Veiligheid en Justitie, p. 150.

I. van Breugel (2012), 'Being A Criminal: On the Penalisation of Irregular Residence in the Netherlands', *Oxford Monitor of Forced Migration*, Vol. 2, No. 2, pp. 32-38, at p.34.

J. van der Leun and M. Ilies (2009), 'Undocumented Migration – Counting the Uncountable. Data and Trends across Europe. Country Report The Netherlands', CLANDESTINO, FP6, European Commission, DG Research, p. 12.

P. van den Dool (2013), 'VVD: stafbaastelling illegaliteit is ons geen kabinetscrisis waard', *NRC*, 8 May, (www.nrc.nl/nieuws/2013/05/08/vvd-strafbaarstelling-illegaliteit-is-ons-geen-kabinetscrisis-waard/).

H. van Lier (2013), 'Bussemaker heft alle vertrouwen in Samsom: 'Het komt goed'', *De Volkskrant*, 5 May (www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/3436595/2013/05/05/Bussemaker-heeft-alle-vertrouwen-in-Samsom-Het-komt-goed.dhtml).

Work Package 9
Cybercrimes

9.4

Report on self-regulation and other non-legislative practices against cybercrime

by: Maria Yordanova

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INTRODUCTION

The cross-border nature of cybercrime affecting both governments and private actors increasingly incentivises active-role business and non-governmental organisations to ensure a safe and secure cyber space and counter global threats through a variety of tools, rules and innovations, as well as by developing and participating in diverse cooperation mechanisms at national and international levels including public-private partnerships.

The report reviews self-regulation and non-legislative measures to prevent and counter cybercrime at national and international level and tries to identify best practices. In addition, the research also examines the international and national cooperation between businesses, governments and civil society to combat the inexorable growth in cybercrime. Its aim is to identify the best models and practices that could serve as a starting point for the development of future policies based more on trust and persuasive measures in contrast to the fear-based policies and coercive measures that currently dominate.

This abridged version of the report does not include the detailed overview of supranational initiatives from the private sector on self-regulation and other non-legislative measures against cybercrime. However, the conclusion includes the main findings regarding the instruments developed, adopted and/or applied by the most influential and reputable international, multi-national, European and other regional business organisations dealing with information and communication technologies and related new technologies (such as online content and service providers, and social networks), and by leading non-profit organisations, as well as the best practices in joint initiatives and public-private partnerships to ensure cybersecurity, including the experience of US companies, operating at supranational or national level.

1. NATIONAL EFFORTS TO COUNTER CYBERCRIME THROUGH SELF-REGULATION AND OTHER NON-LEGISLATIVE PRACTICES

This section of the report presents an overview of the best practices of self-regulation and other non-legislative measures against cybercrime and for cybersecurity in six European countries (Bulgaria, Finland, Germany, Spain, Turkey and the United Kingdom). It focuses on the initiatives undertaken by the private sector in these countries to meet current and future challenges of cyber-threats.

1.1 Bulgaria

1.1.1. Industry self-regulation

A number of Bulgaria's organisations or associations of companies in the e-business, Internet provision and telecom industries have their own ethics codes, maintaining good corporate practices concerning, among others, the prevention of cybercrime.

The *Society for Electronic Communications* (SEC) is an industry association of 19 telecom operators and Internet service providers in Bulgaria aimed at the self-regulation of the electronic communications market, developing non-discrimination and fair competition. The SEC has its own *Code of Ethics* (SEC, 2014), some provisions of which regulate the relations of companies with each other, and their relations with their customers and third parties concerning cyber security. The code envisages that SEC members do as much as possible to prevent and counteract computer crime or suspicions of such crime, cooperate with authorities, and avoid any practices related to the sending of unwanted messages and unauthorised access to client content. Moreover, the SEC has set up its own complaint-based *sanctioning mechanism.* Complaints that appear to fall within the jurisdiction of state institutions are passed on to them. Internet providers should provide guidance to users on the availability of filtering software in order to block access to inappropriate content.

The *Bulgarian Association of Information Technologies*, established in 1995, comprises 135 member companies and organisations, among them hardware, software, system integration, networks, telecommunications and Internet providers. In accordance with its statutes all members are obliged to adhere to a *code of ethics* providing for protection of the reputation of the organisation, although this code does not explicitly mention cybercrimes.

The *Bulgarian Web Association* (BWA) includes companies of different branches (web design companies, online media and web-based service providers) that provide online services. As of 2012, the Association has its own Ethics Code (BWA, 2011), which provides rules for observing copyright when dealing with both software and content as well as for avoiding the spreading of content which contradicts the law, morals and good manners via services offered by BWA members. The BWA, together with the Commission for Consumer Protection, prepares common terms of use for all providers of web services, and another set of terms of use for e-commerce websites. These documents, which are in the form of contracts between the companies and their clients, include clauses which, among others, protect the personal data of clients, and bind the clients to use the products in a legal way, in line with good conduct and their purpose.

In 2008, *Bulgaria's mobile operators* signed a *Code of Conduct on Safer Mobile Use by Younger Teenagers and Children.*[1] This was built on the European Union's 2007 undertaking on the same subject. Bulgaria's code sets out some minimum standards for the country's mobile operators, including the classification of content to enable the identification of content which is inappropriate for access by minors and to provide (to the best of their ability) access control mechanisms which could be enabled at the request of parents or guardians to prevent access to content deemed to be inappropriate or harmful to children.

1.1.2. NGO-driven initiatives, awareness and joint cybercrime prevention campaigns

The *Law and Internet Foundation* (LIF)[2] is a non-government organisation established in 2001. A number of the Foundation's initiatives are oriented towards universities and academic institutions for the development of legal disciplines in the information and communications technology sector and providing training for magistrates on dealing with computer crime cases.

The *International Cyber Investigation Training Academy* (ICITA)[3] is a non-governmental organisation established at the end of 2009. Its goal is to improve the qualification of experts working in the field of cyber security and combating cyber crime as well as to increase awareness in society of the latest threats and risks. The ICITA runs a two-year initiative entitled *Bulgarian Cyber Centre of Excellence for Training Research and Education* (B2CENTRE), which aims to contribute to the creation of an early warning system network as a part of the EU-wide European Centre of Excellence Network for Training Research and Education[4] (www.2centre.eu).

The *Bulgarian Safer Internet Centre* is a part of the EU-wide InSafe network and a member of the International Association of Internet Hotlines (INHOPE).[5] The Centre is run by two non-governmental organisations, the *Applied Research and Communications Fund* (ARC Fund)[6] and *Association 'Roditeli'* (Parents).[7] Since 2005, it has maintained a *Bulgarian Safer Internet Hotline*[8] with the aim to create conditions for receiving reports on online content and conducts that are illegal and harmful, concerning primarily child

1. To read the code in full go to: http://www.gsma.com/gsmaeurope/wp-content/uploads/2012/04/bulgaria-coc.pdf
2. http://www.netlaw.bg/l_en/?s=2&page=2
3. http://www.e-crimeacademy.com/index_en.html
4. The project began in early 2013, is biennial and is being conducted in cooperation with the Bulgarian unit on combating organised crime, the Centre for Cybersecurity and Cybercrime Investigation of University College Dublin, 2CENTRE (European network of training centres and research), the International Agency for Crime and Security Policies, Microsoft Bulgaria, the security division of EMC - RSA and the 'Computer Systems and Management' Faculty of the Technical University - Sofia.
5. INHOPE functions under the framework of the European Commission's Safer Internet Programme to work for a safer Internet environment for children and young persons: http://www.inhope.org/gns/home.aspx
6. http://www.arcfund.net/index.php?id=350&no_cache=1..
7. http://roditeli.org/
8. The Bulgarian Safer Internet Hotline was created in 2005 under a project co-funded by the European Commission within the framework of the Safer Internet Programme.

sexual abuse images or violence against children. These reports are usually submitted by Internet users, who fill out an online form on the website of the hotline.[9] Since 2006, the hotline has processed over 5600 reports. The reports were classified as follows: child pornography – 1147; child erotica – 458; child grooming – 300; adult pornography accessible to minors – 277; adult pornography – 196; extreme pornography – 118; racism and xenophobia – 180; promoting violence against an individual – 470; promoting drugs – 47. Reports on content located in another country are forwarded to a partner organisation in the INHOPE network responsible for that country. This was done in the case of 220 reports. The successful collaboration between the hotlines of Ireland and Bulgaria and the Bulgarian Cybercrime Unit resulted in the identification and arrest of a teacher in Bulgaria on 12 May 2011 for possession and dissemination of child sexual abuse images.[10]

An advisory board, the Public Council on Safer Internet Use, founded in April 2006, supervises the Bulgarian Internet Hotline for fighting online content and conducts that are illegal and harmful for children. The members of the Public Council are representatives of the major stakeholders: public institutions, industry associations, private companies and non-governmental organisations involved in the development of information technologies and knowledge-based society.

The Bulgarian Safer Internet Centre is the initiator of many awareness campaigns among children and relevant institutions and companies, the most widely known of which is the annual Safer Internet Day. The Centre also conducts training for children, teachers, parents, social workers, police officers and magistrates. Parallel to this, initiatives for improving and further developing legislation are also a focus of their activities[11]. In cooperation with the Bulgarian Cybercrime Unit, the State Agency for Child Protection and the Centre for the Study of Democracy[12], suggestions and recommendations for the amendment of the Criminal Code were made to reflect the spirit of the European Directive on combating the sexual abuse of children and child pornography (Bulgarian Safer Internet Centre, 2014).

1.2 Finland

1.2.1. Operators and Internet service providers

Under the Communications Market Act (393/2003) and the Electronic Communications Privacy Act (516/2004) telecommunication companies in Finland are required to assist governmental officials in investigations and to report abnormal activity.

Internet services providers recommend 'data labelling' (e.g. blocking sites according to specific keywords or domains) so that users would be able to decide themselves what they want to see on the Internet. The currently debated issues include the right to self-regulation in relation to the legal obligation of the operator to prevent access to certain material as well as whether the neutrality of the Internet should be kept intact or not. Telecommunication operators in Finland have the possibility to block access to child pornography sites but are not obligated by law to do so.

The operators in the Finnish mobile market have developed a *Finnish Code of Conduct for Safer Mobile Use by Younger Teenagers and Children* (2010)[13] that emphasises nationally-based sector initiatives, and urges all the parties concerned to promote the sustained development of safer mobile use by younger teenagers and children. The code states that individual mobile providers should offer capabilities, which can be used by parents to customise access to content by children using mobiles. Mobile providers should support awareness-raising campaigns designed to improve the knowledge of their customers and also provide advice and effective access to information, e.g. co-operation with government bodies, municipalities, enterprises, and NGO programs. Additionally, the code states that mobile providers will continue to work with

9. Hotline operational and complaints procedures are publically accessible at: http://web112.net/en/NewSignalEN.aspx

10. http://www.safenet.bg/index.php?id=1387&art_id=15603

11. The Criminal Code of the Republic of Bulgaria recognises the offence of online child pornography and lays down various custodial sentences and fines according to the nature of the offence. Rules for the use of the Internet in schools have been developed which specifically cover the need to protect children from 'harmful or illicit content or information'. The need to protect privacy online is also recognised, with the rules stating that children must not disclose a variety of personal details (such as home address, etc.) without permission from their parents. See more at: http://www.fosigrid.org/europe/bulgaria

12. www.csd.bg

13. The code implements the European Framework for Safer Mobile Use by Younger Teenagers and Children.

law enforcement authorities in executing their legislative obligations regarding illegal content (GSMA, 2013) as well as to support the authorities in their fight against child pornography, as well as non-governmental organisation working towards improving children's rights, in their efforts to report such material (Save the Children Finland, 2013).

1.2.2. Educational campaigns and websites sharing information

A number of activities such as educational campaigns and sharing information through the Internet aim at raising awareness among individuals about the 'basic rules of their online behaviour, e.g. not to open suspicious attachments or links, to have appropriate passwords to make sure that online shopping and banking is done on a secure computer' (Limnéll, J., 2013).

The '*Safer Internet Day' event*[14] (Tietoturvapäivä, 2013) is an annual theme-day in Finland (and worldwide) with a yearly changing focus. The Safer Internet Day is, as of 2013, part of a week-long 'Media Literacy' event[15] (Mediataitoviikko, 2013). The theme of the Media Literacy Week in 2013, which was organised in cooperation with 35 organisations in Finland, focused on the rights and obligations of Internet users.[16] The second annual Media Literacy Week was held in February 2014, with the main focus on '*Let's Create a Better Internet Together*' (Yhdessä parempi Internet). The Media Literacy Week is coordinated by the *Finnish Centre for Media Education and Audiovisual Media* (MEKU),[17] which is subordinated to the Ministry of Culture and Education. Altogether 40 organisations and institutions (ministries, national agencies, telecom operators, data security companies, media companies and NGOs) are engaged in Media Literacy Week (Media Literacy School 2013).

Websites promoting techniques of self-regulation, directed especially towards younger users, aim to advance media reading skills and informed clicking behaviour in the Internet (such as the 'Think Before You Click' campaign as part of the Safer Internet Day in 2012). One specific aim of media education is to remind users about the permanency of shared online materials. Individuals are encouraged to carefully consider how much information they should share about themselves and about related parties (Mannerheimin Lastensuojeluliitto,[18] 2013). Various webpages provide advice on how to identify and deal with online bullying[19] and online sexual harassment,[20] what measures can be taken, and how the law defines the sexual rights of young people.[21] The *Save the Children Finland*[22] webpages provide media education as well as tools for protecting children in the digital media. Their own hotline, especially targeted at the sexual abuse of children on the Internet and related photographic material, is meant for reporting the dissemination of illegal material and criminal behaviour.[23] This online service is operated as part of an international network led by the International Association of Internet Hotline (INHOPE). Reports can be anonymous (Save the Children Finland, 2013). Additionally, the webpages list the sexual rights of children, offer advice on how to identify online sexual exploitation, which issues should be reported to the police and how important it is to record suspicious online behaviour and report it to the administrator of that page, as well as to parents, teachers or, if the situation requires, to the police.

Awareness-raising webpages also encourage using the privacy settings on browsers in order to block access by misbehaving persons, and not going along with provocative behaviour (Family Federation of Finland, 2013; Mannerheimin Lastensuojeluliitto, 2013).

Social cooperation against cybercrime: the Virtual Community Police initiative

The Helsinki Police Department has its own three-person *Virtual Community Police Team* which has a visible presence especially in social networking websites. This team

14. Safer Internet Day http://www.tietoturvapaiva.fi/

15. Media Literacy Week http://www.mediataitokoulu.fi/mediataitoviikko

16. The event is part of the European In safe-network, which promotes different projects in 27 EU Member States.

17. Finnish Centre for Media Education and Audiovisual Media http://www.meku.fi/

18. Mannerheim League for Child Welfare.

19. http://www.mll.fi/nuorten-netti/kiusaaminen/nettikiusaaminen/

20. http://www.nuortenelama.fi/elavaa-elamaa/netti-ja-media

21. Family Federation of Finland http://www.vaestoliitto.fi/nuoret/

22. Save the Children Finland http://www.pelastakaalapset.fi/toiminta/mediakasvatus/

23. Save the Children Finland – Hotline http://www.pelastakaalapset.fi/en/how-we-work/safer-internet-work/hotline/

supports all Helsinki Police Department operations but is also a nationwide service with the involvement of officers from all around Finland. The assigned virtual community police officers have their individual profiles in social media sites such as Facebook and Twitter. Their work includes offering guidance via social media groups, as well as maintaining and developing visible police work in social media. Additionally, they train the police and various stakeholders on police matters connected with social media, such as online sex crimes, online identity theft, virtual property offences and cyberbullying. For example in the case of online bullying the issuing of 'virtual warnings' through the profile of the online-police has proven to be an efficient way of putting an end to such behaviour (Finnish Police, 2011; Forss, 2012; Finnish Police, 2014).

The police are cooperating with the private sector on cybercrime prevention. For instance *Save the Children Finland* has had different forms of cooperation with the Finnish police and especially with the *Finnish Virtual Community Police Team*, such as conducting research and drafting guides, recommendations and protocols for online behaviour (i.e. on how to intervene in online racism), as well as 'The Moderator's Handbook' (Save the Children Finland, 2012). They have also produced materials directed especially towards children on the topic of media education. The Finnish Virtual Police Team is often present in the media, raising cybercrime-related issues and warning about new phenomena. In late 2013, the Team warned that also adults could be victims of online sexual exploitation.

The Finnish Ombudsman for Minorities encourages reporting all inappropriate material to the website administrator, which can usually be done by a one-click reporting function. If the comments are not removed accordingly, the police should be informed of the matter. The police have a 'Net Tip' service on their website[24] through which these non-emergency reports can be submitted (Finnish Ombudsman for Minorities, 2013).

1.3 Germany

The German private sector plays an active role in ensuring cybersecurity and initiates a number of measures for cybercrime prevention at the national and international level. The interaction between the private and public sectors is expanding.

1.3.1. Measures for preventing and countering cybercrime

TeleTrusT (IT Security Association Germany)[25] is a non-profit association whose objective is to provide the public, politicians and companies with information on technical, political and legal issues related to IT security, raising awareness and improving best practices in all domains of information security. It has members from industry, administration and research, and has national and international partners with similar objectives. The association is a member of the European Telecommunications Standards Institute (ETSI). It embodies the largest competence network for IT security in Germany and Europe providing interdisciplinary fora for IT security experts, organising events and conferences and facilitating information exchange between vendors, users and authorities. The list of current TeleTrusT Working Groups includes Biometrics, Cloud Security, Legal aspects, Smart Grids/Industrial Security, Information Security Management, and IT Security made in Germany.

The *Independent Centre for Data Protection* in the federal state Schleswig-Holstein[26] provides the public and policymakers with: information for citizen, authorities and companies; own project studies focused on cybercrime; statements on political action plans and legislative measures. The Centre deals with several issues concerning the data protection aspect of the response to cybercrime.

24. https://www.poliisi.fi/poliisi/home.nsf/feedbacktip?openform&l=3

25. https://www.teletrust.de/en/startseite/

26. https://www.datenschutzzentrum.de/cybercrime/cyberkon.htm

The *Nuremberg Chamber of Commerce and Industry*,[27] an entrepreneurial organisation, has a special page on its website called '*Challenge Cybercrime*'[28] which provides information about cybercrime, the legal background and legal problems as well as a short guide about measures and contact points at the police. It addresses the public, but is oriented towards companies.

The *Cyber Security Council Germany*[29] was founded in 2012 by private persons as a politically neutral association pursuing the objective of consulting companies, authorities and political decision-makers in the field of cyber security. Its activities include: fostering cooperation between authorities and companies for improving cyber-security both in the entire federal territory and on the communal and regional level; various initiatives for increasing cyber-security sensitiveness for communal, regional and federal authorities as well as for political decision-makers and companies; elaborating studies, analyses, papers and essays dealing with the subject of cyber-security to make current and future threats clear and to illustrate the effects caused by future trends, including demographic and technical changes; training courses in the field of cyber-security; setting up a cyber-security network all over Germany in the international context, etc. Any natural person or corporate entity may become a full member. Authorities and policymakers can be admitted as associate members without the right to vote.

The *Alliance against Cyberbullying*[30] was founded in 2011 by teachers, parents, lawyers, physicians, researchers, companies and policymakers and is connected with the COST-action ISO801 'Cyberbullying' on the EU level. The main aims of the Alliance are to enlighten, prevent, research and act as an adviser. The target groups of its activities are schools, policymakers, children and parents. The Alliance aims to provide the public with more information and transparency about cyberbullying and tries to find solutions to reduce cyberbullying (Schneider, Christoph/Katzer, Catarina/Leest, Uwe, 2013).

The *Specialised Portal for Assisting Children and Youth (2012): Cyberbullying*[31] is a website that publishes cyberbullying-related information and guidance designed for parents, schools, teachers and children . The website is maintained through the support of a number of social organisations and institutions such as the Association for supporting children and youth (Arbeitsgemeinschaft für Kinder- und Jugendhilfe), the Bureau for International Youth Service of the Federal Republic of Germany (Fachstelle für Internationale Jugendarbeit der Bundesrepublik Deutschland e. V.), the German Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, (Bundesministerium für Familie, Senioren, Frauen und Jugend), and the Association of the highest Federal States authorities on Youth and Family (Arbeitsgemeinschaft der Obersten Landesjugend- und Familienbehörden).

1.3.2. Public-private partnerships

Established partnerships are driven by the mutual interest of the public and private sectors and are result of initiatives of both sides. The Federal Government supports raising the level of IT security on the IT platforms of enterprises, public administrations and private users by introducing Trusted Computing solutions based on TCG specifications that meet the criteria listed in the *Key Requirements on 'Trusted Computing' and 'Secure Boot'*[32] (Federal Ministry of Interior, 2012). The Federal Government calls on businesses and organisations in Germany to become involved in Trusted Computing projects and in the TCG in particular.

The *Cyber Security Strategy for Germany* (Federal Ministry of Interior, 2011) seeks to provide more security with regard to IT systems used by citizens and small and medium-sized businesses by organising joint initiatives with groups in order to pool information and advice on a consistent basis. A task force '*IT security in industry*' with the participation of industry was set up by the Federal Ministry of Economics and Technology to sup-

27. http://www.ihk-nuernberg.de/en/Business_Departments/index.html

28. http://www.ihk-nuernberg.de/de/IHK-Magazin-WiM/WiM-Archiv/WIM-Daten/2012-12/Special/recht-steuern/herausforderung-comp

29. http://www.cybersicherheitsrat.de/

30. http://www.buendnis-gegen-cybermobbing.de/

31. http://www.jugendhilfeportal.de/forschung/jugendforschung/artikel/eintrag/weltweite-studie-zu-cybermobbing-unter-kindern-und-jugendlichen-veroeffentlicht

32. 'Trusted Computing' is defined as architectures, implementations, systems and infrastructures which are based on or utilise the specifications of the Trusted Computing Group (TCG). This includes 'Secure Boot' and additional functions in the Unified Extensible Firmware Interface (UEFI) specification of the Unified EFI forum, which in turn builds on the TCG specifications or closely related technologies.

port small and medium-sized businesses in the secure use of IT systems.

Business representatives were invited as associate members of the *National Cyber Security Council*[33] (see D9.3) which was established in 2011 to facilitate cooperation within the Federal Government as well as between the State and businesses/industry, as well as to coordinate preventive tools and the interdisciplinary cyber security approaches of the public and the private sectors. The group of about 40 major German infrastructure companies and their interest groups working with the Federal Ministry of Interior since 2005 under the *Protection of IT-Infrastructure and Implementation Plan KRITIS*[34] (see D9.3) is also connected to the National Cyber Security Council.

The *Research Centre* for *Cyber Defence (CODE)*,[35] established in 2013, brings together experts from different disciplines as well as experts from companies and authorities to work on the development of new techniques and concepts in order to protect data, software and data systems.

1.4 Spain

The non-profit association *Confianza Online*, operating since 2000, joins the efforts of Adigital (the Spanish Electronic Commerce and Relations Management Association) and Autocontrol (a not-for-profit association working for publicity). The association promotes the use of a 'Trustmark' as a way of recognising the commitments to self-regulation its members have made in the different sectors of information society in which the association works. The activities of the association are aimed at increasing consumer confidence in e-commerce and interactive advertising, providing public and private entities with a tool for demonstrating to consumers the ethical commitment they have made to society in the realm of e-commerce and interactive advertising, providing online consumers and businesses with a quick, inexpensive, and effective extrajudicial mechanism for solving disputes.

The *Confianza Online's Ethical Code* was entered into force in January 2003[36] and was subsequently amended in 2005, 2009, 2011 and 2013(Confianza online, 2002). Including more than 10 associations representing sectors of the new digital media, e-commerce and advertising of Spain, the code is the most representative self-regulation in its sector. It consists of a set of ethical rules divided into 5 main areas: commercial communications, electronic commerce with consumers, protection of personal data, protection of children and youth, accessibility and usability. The Ethical Code is intended to serve as a guide for any entity that seeks to provide services or offer their products by way of the Internet or interactive media (mobile phone data, mobile applications, text messages, multimedia messages, and all types of viewing platforms).

The *Pantallas Amigas*[37] webpage aims to promote the safe use of new technologies, avoiding or reducing risk consequences, seeking comprehensive well-being physically, mentally, socially, individually and collectively, promoting welfare in a responsible manner, and digital citizenship for children and teenagers. Development projects take place in response to specific needs, and also make multiple interventions that take place at different times. They start with a special emphasis on grooming, cyberbullying and sexting.[38] The initiative has been operating since 2004 and is supported by organisations and institutions such as the Children's Ombudsman in Madrid; Ararteko, the Ombudsman of the Basque Country; the Ombudsman of Castilla-La Mancha,

33. http://www.bmi.bund.de/DE/Themen/IT-Netzpolitik/IT-Cybersicherheit/Cybersicherheitsstrategie/Cybersicherheitsrat/cybersicherheitsrat_node.html

34. KRITIS (abbreviation for 'Critical Infrastructures in Germany' — Kritische Infrastrukturen) supports the cooperation between authorities and companies in the field of cyber security (http://www.bmi.bund.de/DE/Themen/IT-Netzpolitik/IT-Cybersicherheit/Cybersicherheitsstrategie/IT-Infrastrukturen/it-infrastrukturen_node.html).

35. CODE is affiliated with the Bundeswehr University in Munich (https://www.unibw.de/praes/forschung/forschungszentren/code)

36. Before the approval of CONFIANZA ONLINE's Ethical Code, Spain had two different self-regulatory systems on the Internet. The first of these was the Code of Data Protection on the Internet issued by Adigital in 1998. The second was AUTOCONTROL's Ethical Code for Internet Advertising (1999). Each of these systems had mechanisms for enforcing the implementation of their codes in the event of a dispute and was considered a pioneer in the development of self-regulation systems in Spain at a time when specific legal norms on new media did not yet exist.

37. http://www.pantallasamigas.net/

38. Sexting is considered to be a dangerous trend among teenagers. Sexting means sending sexually explicit photographs or messages via mobile phones. Cyberbullying is defined as peer harassment in the ICT environment, and includes acts of blackmail, harassment and abuse of children by other children. It is considered to be the case when a child torments, threatens, harasses, humiliates or annoys another over the Internet, mobile phones, gaming consoles or other telematics technologies. It is

the Basque Government, the Government of Navarra, Generalitat de Catalunya; the Government of Aragon, the Canary Islands Government, the Regional Government of Castilla-La Mancha; the Basque Data Protection Agency; councils such as Portugalete, Bilbao, Agüimes, Legazpi, and Santa Cruz de Tenerife; business associations such as GAIA, AETICAL or ALETIC.

PROTEGELES is a non-profit organisation for the protection of minors, in which lawyers, psychologists and experts in security and child protection work together offering, always free of charge, solutions to younger victims, their families and schools.[39] The organisation also serves as a centre for Internet safety for Spanish children under the Safer Internet Programme of the European Commission. It is the only Spanish organisation that is a permanent member of the INHOPE organisation (International Association of Internet Hotlines), INSAFE (European Network of Awareness Centers) which is attached to the European Commission, and ENACSO (European NGO Alliance for Child Safety Online). Helplines receive daily requests for assistance in situations involving bullying on the Internet (cyberbullying), sexual harassment of minors (grooming), impersonations and individuals from Spain. Receiving an average of 350 new cases each year, PROTEGELES provides legal and psychological assistance to children and their families. It also plays an important role in cybercrime prevention and training, conducting workshops on the safe use of the Internet and the ICTs and reaching more than 1 500 schools and more than 150 000 students across Spain. PROTEGELES has developed a web site, *Internet Without Harassment*,[40] where a victim can directly report cases of cyberbullying.

1.5 Turkey

In Turkey, research institutes and NGOs support the information and communications technology sector in many different ways.

The *Scientific and Technological Research Council of Turkey* (TÜBİTAK)[41] is the leading agency managing, funding and conducting research in Turkey. It was established in 1963 with a mission to advance science and technology, conduct research and support Turkish researchers. It also acts as an advisory agency to the Turkish Government on science and research issues, and is the Secretariat of the Supreme Council for Science and Technology (SCST), the highest S&T policymaking body in Turkey. It is governed by a Scientific Board whose members are selected from among prominent scholars from universities, industry and research institutions. TÜBITAK has conducted the *Public Information Security Programme* with the goal of raising awareness and increasing the technical capacity and professional skills of computer engineers and IT specialists. To this end, the programme was built on three steps: training, establishing a databank, and risk analysis. In terms of training, existing training materials were updated, new training programmes were developed and selected personnel were trained. The databank included the necessary updated information, technical checklists and handbooks which provide methods for preventing attacks. In terms of risk analysis, public agencies were tested every six months for possible vulnerabilities. The results of these tests were compared and solutions suggested. The effectiveness of training and the databank were evaluated via risk analysis.

The *Turkish Scientific and Technological Research Institution* has implemented the *Management of Information Security in Critical Infrastructures Project* aimed to identify a critical infrastructure and analyse the effects of vulnerabilities on critical infrastructures.

There is a number of NGOs in the information and communications technology sector working towards establishing cooperation with state institutions and supporting

a highly relevant phenomenon because of its prevalence, the severity of its consequences and the difficulty involved in approaching and preventing it. Practical guides for teachers and parents have been created so that they can detect this type of cybercrime. Another word for grooming is 'coaxing' and it is used to describe the online practices certain people employ to gain the trust of a minor or to pretend empathy, affection, etc. in order to achieve sexual satisfaction. The main objective is obtaining images of minors naked or performing sexual acts. This is connected to paedophilia and child pornography on the Internet.

39. http://www.protegeles.com/

40. http://www.internetsinacoso.com/

41. http://www.tubitak.gov.tr/en

the relationship between the state and businesses. The *Independent Telecommunications Operators Association*[42] works to keep the market liberal and competitive while maintaining collaboration between operators to increase activity outside of Turkey. The *Information Security Association*[43] is involved in technical, scientific, social and cultural activities in the fields of individual, cooperative, national and international information and communication security. The *Information Sector Association*[44] maintains high business improvement standards through seminars and tries to address the political and financial problems of the sector. It has 655 members and serves as a platform for assessing current problems and identifying opportunities in open systems, free software, open source code and Internet technologies. The *Telecommunication Businessmen Association*[45] is an establishment that aims for fairness for both consumers and personnel in the sector, taking action according to the regulations. The *Turkish Informatics Industry Association*[46] endeavours to improve cooperation within state agencies to maintain a healthy business climate and a good relationship between the state and the business world.

The recently published report *Information & Communications Technology* (Republic of Turkey Prime Ministry Investment Support and Promotion Agency (ISPAT), Deloitte Turkey 2014), considering the fast-growing economy and the information and communications technology sector in Turkey, indicates that cybercrime has become a serious threat in the last decade. It further points out that Turkey ranked 9 on the 2009 list of 'countries with the most cyber crime' according to Business Week. It concludes that there is potential for the implementation of cyber security systems and cyber security consulting in Turkey (Republic of Turkey Prime Ministry Investment Support and Promotion Agency).

1.6 United Kingdom

The private sector in the UK is initiating a variety of preventive and protective measures against the cyber threat. The industry and non-profit organisations are contributing to the building of a secure cyberspace by introducing rules and regulations for reducing cyber risks.[47] Many business organisations are participating in partnerships with government and public agencies to develop digital economy and protect cyber space from unlawful actions.

1.6.1. Initiatives for raising digital awareness and controlling cyber risks

Nominet Trust[48] is a UK registered charity that brings together, invests in and supports people committed to using digital technology to create social and economic value. Nominet, the non-profit organisation responsible for the smooth and secure running of the UK Internet infrastructure, founded Nominet Trust in 2008. Nominet has a strong public purpose and the Trust is one example of its commitment to creating a safer, accessible and diverse Internet.

E-skills UK[49] is a non-profit organisation that addresses the current and future needs of the industry and ICT in the UK. A major focus is the shortages of skills in the information technology industry in the UK. E-skills UK has developed sets of qualifications for IT workers. The group has devised the e-skills passport and IT User Qualification (ITQ) qualifications, as its National Occupational Standards. Among its primary publications are the e-skills Bulletin, the Regional Gap-UK report (which targets skills gaps), and the Technology Insights report, which details the skills that are needed most. E-skills UK is developing partnerships with employers and stakeholders from across the sector to address IT skills needed in different parts of the UK (England, Wales, Scotland and Northern Ireland).

42. http://www.telkoder.org.tr

43. http://www.bilgiguvenligi.org.tr

44. http://www.tubider.org.tr

45. http://www.tuted.org.tr/

46. http://www.tubisad.org.tr

47. In July 2008 the UK Parliament's Culture, Media and Sport Select Committee released its report on 'Harmful content on the Internet and in video games'. Three areas of risk that the report identifies are: content-based risks, such as from pornography and violence; contact-based risks, such as from sexual predators; and conduct-based risks, such as from cyber-bullying. The report makes specific self-regulation recommendations to the industry for 'controlling' these risks.
For more information see: UK Pushes For Internet Industry Self-Regulation, Thursday, 31 July 2008 - by Daniel A. Begun, available at: http://hothardware.com/News/UK-Pushes-For-Internet-IndustrySelfRegulation/#ixzz32HpvTa00

48. http://www.nominettrust.org.uk

49. https://www.e-skills.com/

Cyber Security Challenge UK[50] helps education institutions introduce the concepts behind cyber security. It offers an innovative way to ensure students are adequately prepared for a career as a cyber-security professional.

Make IT Happy or *Girls Get Coding 2014*[51] is a joint initiative organised by e-skills UK,[52] the Parliamentary Internet, Communications and Technology Forum (PICTFOR),[53] the Institution of Engineering and Technology (IET)[54] and Nominet Trust (see above in this section). It challenges schools to find out more about safe use of the Internet to have fun and learn new things. The initiative also wants pupils to speak to other people about what they have learned. After six successful years, the initiative has created three sets of 2 45-minute lesson plans that can be used in class with pupils aged 9 – 11. Any school is free to use the lesson plans however they want; they have been created by teachers to cover what this age group needs to know about Internet safety, and are fully mapped to the National Curriculum. Girls Get Coding is the UK-wide campaign to encourage girls aged 9 to 12 to show off their coding skills.

1.6.2. Public-private partnerships and other joint initiatives

In 2011, the Government and private companies signed a *Cybersecurity Information Sharing Partnership* (CISP).[55] As a result a pilot scheme was launched to test the feasibility of sharing information and intelligence between the government and the industry on cyber threats and mitigations. The pilot involved 80 companies from across five sectors of business including defence, pharmaceuticals, telecommunications, finance and energy; this figure was later expanded to 160 firms. Building on the pilot, the industry and the government have co-designed the Cyber-security Information Sharing Partnership. In 2013, CISP was ready to launch an 'interim capability' to enable private firms to sign up to begin testing the proposed procedures. In November 2013, Scotland Yard announced that it would add 500 additional cyber crime officers to its specialist E-crimes Unit. The partnership is designed to deliver a new secure 'collaboration environment', a joint industry/government-resourced 'Fusion Cell' to provide analysis and support, terms and conditions for information sharing and the necessary information support.

Tech UK[56] is a joint initiative of the UK government and the private sector representing over 850 large and small UK technology organisations. A high-level group within this partnership will identify how to support the growth of the UK cyber security industry, with an emphasis on increasing exports.

The National Technical Authority for Information Assurance in the UK (CESG),[57] considered to be the information security arm of British Intelligence and Security organisation GCHQ,[58] launched a *certified professional scheme* (CCP) in October 2012. The scheme is a part of the UK government's cyber security strategy to certify information assurance professionals. Its overall aim is for the UK to create a set of standards to assess cyber security professionals on their competency and skills, to ensure that the industry and the government are being protected by staff with the right skill sets. The scheme was initially targeted at information assurance and cyber security professionals working on government networks, but now those who work to protect UK industry networks from cyber threats and vulnerabilities can also sign up to the scheme. The opening up of CESG's cyber security certification scheme to the private sector is a good example of *co-regulation.* Certifications are valid for three years. The CCP scheme is run by independent certification bodies appointed and audited by CESG.

The *Child Exploitation & Online Protection Centre* (CEOP)[59] was launched in 2006 with the aim of eradicating the sexual abuse of children and in 2013 became an integral part of the new National Crime Agency (NCA). CEOP works with the industry, the voluntary sector and representatives of the public sector. As part of UK policing, CEOP

50. https://cybersecuritychallenge.org.uk/education.php

51. http://makeithappy.cc4g.net/about/#sthash.iJ0hOVbn.dpuf

52. https://www.e-skills.com/about-e-skills-uk/

53. http://www.pictfor.org.uk/

54. http://www.theiet.org/local/uk/index.cfm

55. https://www.gov.uk/government/news/government-launches-information-sharing-partnership-on-cyber-security

56. http://www.techuk.org/focus/programmes/defence-security-cyber-security

57. http://www.cesg.gov.uk/Pages/homepage.aspx

58. http://www.gchq.gov.uk/who_we_are/Pages/index.aspx

59. http://www.ceop.police.uk/safety-centre/Parents/

is also involved in tracking and bringing offenders to account either directly or in partnership with local and international forces. Cases of online child abuse (sexual or offensive chat that makes the child feel uncomfortable or aimed at ensuring a meeting with the child) can be reported directly to CEOP. CEOP works to track registered offenders who have a sexual interest in children and who have failed to comply with their notification requirements under the Sexual Offences Act 2003. This includes disrupting or preventing travels by offenders and disseminating intelligence to international forces and specifically targeting offenders while they remain overseas. It includes non-UK nationals who travel to the UK. CEOP also focuses on organised criminal groups profiteering from the publication or distribution of child abuse images, supports local police forces with computer forensics and covert investigations and provides authoritative investigative advice and support to maximise the response of UK law enforcement to the crimes of child sexual abuse and exploitation.

The work of the *CEOP's International Child Protection Network* (ICPN) builds relationships across geographic borders in order to make 'every child matter everywhere'. It is active in many parts of the world (in countries such as Romania, Cambodia, Thailand and Vietnam) — areas where for some time they have worked to build partnerships and knowledge and where children have been targeted in the past in particular by offenders travelling from the UK. The annual timeline that CEOP uses to link its partners and supporters to the delivery of CEOP's objectives is described in its first *Relationship Management Strategy*. In October each year CEOP produces its *UK Threat Assessment of Child Sex Abuse and Exploitation* detailing the current threats to children and young people. In January it produces its *Centre Plan*, with its objectives based on the threat assessment.

Get Safe Online[60] is a jointly funded initiative between several Government departments and private sector businesses. The website is a unique resource providing practical advice on how to protect oneself, computers and mobiles devices, and businesses against fraud, identity theft, viruses and many other problems encountered online. It also contains guidance on many other related subjects, including performing backups and how to avoid theft or loss of one's computer, smartphone or tablet. Get Safe Online is the UK's leading source of unbiased, factual and easy-to-understand information on online safety. Get Safe Online is not only a website functioning as an online security channel, it also organises national events such as Get Safe Online week.

The *Guiding Principles on Cyber Security* were co-developed by the UK government (Department for Business, Innovation and Skills) and the Internet industry[61] and published on 12 December 2013[62] to serve as Guidance for Internet Service Providers. All parties involved recognised that Internet service providers and other service providers, Internet users, and the UK government all have a role in minimising the cyber threats on the Internet ensuring that cyber security is perceived as protection of information, processes, and systems, connected or stored online, and takes a broad view across the technical, people, and physical domains. The Guiding Principles cover three areas: the activities of Internet service providers to help their customers protect themselves from cyber threats; government activities to help protect consumers and businesses from cyber threats; government and Internet service provider activities in partnership to help protect consumers and businesses from cyber threats. The partnership members have met on a quarterly basis, to implement the Guiding Principles and explore other issues for potential joint work. The idea is that the partnership will regularly review its progress against the activities outlined in the Guiding Principles and provide an annual progress report to the National Cyber Security Programme led by the Office of Cyber Security & Information Assurance (OCSIA)[63].

60. http://getsafeonline.org

61. Among the industry contributors are: the Internet Services Providers' Association, BT, SKY, TalkTalk, Vodafone and Virgin.

62. https://www.gov.uk/government/publications/cyber-security-guiding-principles

CONCLUSION

The private sector dealing with information and communication technologies is not homogeneous. It consists of business organisations belonging to all forms of the Internet industry, non-profit entities dealing with different aspects of cybercrime and alliances of such entities. The public-private partnerships and various ad hoc partnerships that have been established can be considered to be closely related to or part of it. In all its diverse forms, the private sector addresses the dynamic and challenging environment of new and emerging cyber threats, risks and solutions. A large number of private actors are implementing forms of co-regulation (joint initiatives with the public sector and public-private partnerships) and self-regulation (voluntary measures, codes of conduct, codes of ethics etc.), and developing partnerships to combat violations on the Internet at international and national level.

Given the cross-border nature of cyber threats and cybercrime (and in a manner corresponding to the national and supranational activities of the governments), there is a clear trend also within the private sector towards global or regional expansion and coordination of the efforts against cybercrime. *The International Cyber Security Protection Alliance* (ICSPA) performs its activities in Europe, the Commonwealth and Latin America. The cross-border effort of the Asia Pacific Computer Emergency Response Team is aimed at creating a safe, clean and reliable cyber space in the Asia-Pacific region. There is a number of cross-border initiatives and alliances within the EU, etc.

Multinational companies profiled in the Internet industry contribute worldwide to the advancement of the global fight against cybercrime and for a safer Internet. *Microsoft,* for instance, has created a Cybercrime Center that successfully cooperats with governments/law enforcement agencies, industry partners, NGOs, academics and others.

The cybersecurity measures taken by companies are accompanied by a constant demand for new technological solutions (although some of these solutions are not always welcomed by all users), paying attention at the same time to cyber diplomacy, critical infrastructure, cloud computing, the integrity of the supply chain of technology products and many other factors.

Many international non-profit organisations (such as *the International Electrotechnical Commission*, *the International Organisation for Standardisation*, and *the Business Software Alliance*) are developing international standards on information security or cybersecurity and addressing to governments and international bodies, including EU institutions, guiding principles and recommendations aimed at building trust and confidence in new technologies. Furthermore, a number of national organisations around the globe (such as *the National Fusion Center Association*, *the US Council on CyberSecurity*, and *the Data Security Council of India*) are involved in international activities, such as sharing strategic information on cyberthreats and cyber risks, that significantly influence the security and governance of cyberspace. A good example of co-regulation is the *Australian Cybercrime Code of Practice* developed in 2003 as a result of joint efforts between the Information Industry Association (IIA) and the Australian Securities and Investments Commission (ASIC). This Code of Practice is reviewed periodically.

A variety of partnerships have been established among government, industry and civil society representatives to work on cybersecurity. Successful public-private partnerships in the US include the *National Cyber Security Partnership* that develops new tools, technologies and practices to reduce vulnerabilities at every level and recommends them to governments and the industry; partnerships developed by *the US Center for Internet Security* that shape key international and national security policies and decisions; *the Cyber Security Research Alliance* that address R&D issues in cyber security; and the Global Network Initiative, which is a multi-stakeholder group of compa-

63. The Office of Cyber Security & Information Assurance (OCSIA) supports the Minister for the Cabinet Office, the Rt Hon. Francis Maude MP, and the National Security Council. See: https://www.gov.uk/government/groups/office-of-cyber-security-and-information-assurance nies, NGOs, investors and academics from all over the world applying a self-regulatory approach and advocating for freedom of expression and privacy in the information and communication technologies.

Certain organisations and alliances, such as *the International Cyber Security Protection Alliance* (ICSPA), provide resources and expertise from the private sector to support law enforcement agencies around the world and their governments in response to cybercrime and for reducing the harm from cybercrime through the provision of practical support and funding to law enforcement organisations or the development of programmes to assist their own governments and those of other countries to implement cyber resilience programmes. Other organisations and alliances (such as *the European Business Conferences Group* and *the US National Institute of Standards and Technology*) help governments and the corporate sector to identify and eliminate modern cyber risks, prepare themselves for the risk of cyber threats and attacks (e.g. hackers and viruses), as well as to improve and protect critical information infrastructures, etc.

The private sector, supported by the EC, consistently undertakes and implements a wide range of initiatives at EU and national level to protect children and youth from cyber threats. Such initiatives range from self-regulation aimed at creating a better Internet for children to concrete measures against online sexual abuse. The European mobile industry initiated the adoption of *the European Framework for Safer Mobile Use by Younger Teenagers and Children* that has been transposed into national codes of conduct in almost every EU Member State, where the mobile operator signatories have taken substantial action to implement these codes alongside other voluntary activities. A number of coalitions and self-regulatory agreements were launched to ensure safe use of the Internet and new technologies (examples include *the CEO coalition* to make the Internet a better place for kids, *the European Financial Coalition against Commercial Sexual Exploitation of Children Online*, and *Safer Social Networking Principles for the EU*), bringing together actors from the law enforcement area, the private sector (the major social networking service providers) and civil society in Europe.

The cybersecurity policies of companies are also oriented also towards future security challenges in cyberspace and how to meet them. Scenarios for the future of cybercrime were developed, calling on the authorities to develop more creative and flexible responses to criminality, following the example of existing quasi-judicial sanctions such as asset recovery and crime prevention orders.

In the face of growing cyber threats, human rights are more vulnerable than ever. Alongside the human rights violations involved in cybercrimes and cyber threats in themselves, there are also examples of human rights violations by governments that may undertake politically driven actions and censorship, and use illegitimate pressure against the private sector, under the pretext of combating cybercrime and ensuring cybersecurity. Protection of fundamental rights and the role of the Internet industry in this respect are being addressed by a number of initiatives (e.g. the Principles on Freedom of Expression and Privacy, established by the *Global Network Initiative*, and recent criticism of the restrictions on using social networks in Turkey). Also on the agenda is the need to improve cooperation between law enforcement agencies and Internet service providers in order to enhance cybercrime prevention and investigation while respecting the fundamental rights of users.

Two very recent events are directly related to human rights protection in cyberspace and will probably be addressed by the public and private sectors in Member States in their future policies, legislation, self-regulations and non-legislative measures.

The *Council of Europe* calls on governments, private companies and other actors to respect human rights offline and online with a *Human Rights Guide for Internet Users* launched in April 2014 (Council of Europe, 2014). The guide was developed in broad consultation with all stakeholders (governments, private companies, in particular telecommunications and online service providers, civil society organisations, and representatives of the technical community and academia). Based on the rights and freedoms enshrined in the European Convention on Human Rights (as interpreted by the European Court of Human Rights), and in other conventions and legal texts of the Council of Europe, the Guide focuses on the human rights on which the Internet has the most impact: access and non-discrimination, freedom of expression and information, freedom of assembly, association and participation, privacy and data protection, education and literacy, protection of children and young people, and the right to effective remedies for violations or restrictions of human rights. The Guide creates obligations for both the private sector (Internet service providers, providers of access to online content and services, and other companies) and public authorities to provide users with easily accessible information about their rights and possible remedies. National authorities should protect users from criminal activity committed on or using the Internet.

The *Court of Justice of the EU* in a Judgment in Joined Cases C-293/12 and C-594/12[64] declared on 8 April 2014 the Data Retention Directive[65] to be invalid (Court of Justice of the EU, 2014). The Directive, transposed to a different extent in the laws of the Member States, but often debated or disputed, provides that certain traffic and location data as well as related data necessary to identify a subscriber or user must be retained by providers of publicly available electronic communications services or of public communications networks for a period of at least six months and for no longer than two years from the date of the communication. It also provides that the data need to be available for the purpose of the prevention, investigation, detection and prosecution of serious crime, such as, in particular, organised crime and terrorism.

In its ruling the Court points out that the Directive entails an interference with the fundamental rights to respect for private life and to the protection of personal data of practically the entire European population. Based on the explicit grounds, the Court concluded that the interference, however, is not sufficiently circumscribed to ensure that it is actually limited to what is strictly necessary and that by adopting Directive 2006/24, the EU legislature has exceeded the limits imposed by compliance with the principle of proportionality.

This judgment opens a discussion on its possible consequences[66] and future regulation of data retention and data protection at both the EU and the national level while maintaining the necessary balance between countering serious crime and protecting fundamental rights.

Self-regulation and non-legislative measures to prevent and counter cybercrime at national level in the selected countries correspond, to the greatest extent, to the initiative at the EU level and are associated with one or another international initiative. They, however, reveal a rich variety of specific national forms and practices.

Almost all national Internet industry and non-profit organisations implement codes of ethics and develop good practices for preventing and countering cybercrime. Some codes set up their own sanctioning mechanisms based on complaints (*Bulgaria, the Society of Electronic Communications*) or extrajudicial mechanisms for solving disputes (*Spain, Confianza online*). On the other hand, most codes have instead the nature of recommendations. Many business and non-profit organisations in the UK have introduced and apply guiding rules and regulations to reduce cyber risks.

Co-regulations are also used for building cybersecurity. Two recent examples are derived from the experience in the UK: *the Certified Professional Scheme* (2012) opened up to the private sector, creating standards to certify information assurance and cybersecurity professionals working in both government networks and the private sector, as well as *the Guiding Principles on Cyber Security* (2013), co-developed by the government

64. The High Court (Ireland) and the Verfassungsgerichtshof (Constitutional Court, Austria) are asking the Court of Justice to examine the validity of the directive, in particular in the light of two fundamental rights under the Charter of Fundamental Rights of the EU, namely the fundamental right to respect for private life and the fundamental right to the protection of personal data. For more information see: Court of Justice of the European Union, PRESS RELEASE No 54/14, Luxembourg, 8 April 2014, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf

65. Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC (OJ 2006 L 105, p. 54)

66. For more information on the discussion see: EU Data Retention Directive declared null and void: what is next and how the ruling has been received in the member states, Co-authors: Dr. Undine von Diemar, Prof. Dr. Wolfgang G. Büchner, Jonathon Little, Edouard Fortunet , Stefano Macchi di Cellere and Afra Mantoni, available at: https://www.lexology.com/library/detail.aspx?g=5b2a9e7a-a6e2-4564-a1ff-c5168064159c and the Internet industry to provide a best practice approach to informing, educating and protecting the customers of Internet service providers.

Other forms of public-private partnerships and joint initiatives of business, non-profit organisations and governments are being developed to protect cyber space from unlawful actions. Examples include the *Cybersecurity Information Sharing Partnership* and *Get Safe Online in the UK, the Finnish Virtual Community Police Team* cooperating with the private sector, *the National Cyber Security Council in Germany*, the Turkish Industry Association, and *the Public Council on Safer Internet Use in Bulgaria.*

The private sector in all Member States plays a leading role in protecting children and young persons from cyber threats and abuses primarily through their centres under the Safer Internet Programme of the European Commission and has adopted *Codes of Conduct for safer mobile use by younger teenagers and children.* There are a number of success stories for preventing/detecting cyber abuses against children, based on a collaboration between private initiatives and law enforcement (Bulgaria, Finland, Ireland). Parallel to this a number of other useful and well-functioning initiatives have appeared, such as the *Alliance against Cyberbullying and the Specialised Portal for Assisting Children and Youth: Cyberbulling in Germany, the Spanish NGO Protegeles for Minor Protection, the UK Child Exploitation & Online Protection Centre* and its *International Child Protection Network, Make it Happy*, etc.

Education and awareness activities, targeted campaigns and events addressing children, teachers and parents and in general all users of the Internet and mobile services form an important part of private sector involvement in building cybersecurity, promoting the safe use of the Internet and new technologies as well as increasing confidence in them. A great variety of websites in all selected Member States provide information, techniques of self-regulation, tools for protection, etc. Certain web sites maintain hotlines for receiving online reports of illegal and harmful content and other cybercriminal behaviour. The latter are often part of the international network led by *INHOPE.*

In conclusion, the private actors dealing with information and communication technologies are contributing to cybersecurity and the response to cybercrime by a variety of voluntary initiatives and actions at international and national level. These persuasive measures offer flexible approaches and in combination with traditional regulatory frameworks based on coercive measures can mitigate cyber threats and vulnerabilities. They can balance the increasing over-regulation that can become an obstacle for the development of information and communication technologies and their availability.

The enforcement of self-regulation, however, does not have the same deterrent effect on cybercrime as the legislative regulations implemented by law enforcement and criminal justice. Nevertheless, if private sector organisations, especially Internet service providers, adopt and consistently implement high cybersecurity standards, best practices, relevant recommendations, etc., they can create a safer Internet environment that is unfavourable for cyber criminality, and thus by increasing prevention, reduce cybercrime rates. Parallel to this the co-regulation jointly developed by the public sector and private actors, public-private partnerships offer a combination of voluntary non-legislative efforts and stronger enforcement potential. Although the public-private partnerships are still focused mainly on information sharing (National Fusion Centre Association) and, according to criticism, leave behind collaboration in other aspects as research and development, setting standards for ensuring interoperability, etc. (Thomas, R. N., 2012, updated 2013, p.7), their potential can be further developed and directed also on cybercrime prevention, deterrence or resilience.

REFERENCES

Asia – Pacific Computer Emergency Response Team (APCERT) (2013): Annual Report 2013, available at: http://www.apcert.org/documents/pdf/APCERT_Annual_Report_2013(FINAL).pdf [accessed: 14 May 2014]

Bulgarian Web Association (BWA)(2011): Етичен кодекс на българска уеб асоциация, available in Bulgarian at: http://bwa.bg/wp-content/uploads/2013/03/BWA-Ethic-New2.pdf [accessed: 24 March 2014]

Bulgarian Association of Information Technologies: Statute, available at: http://www.bait.bg/documents/bait-documents [accessed: 24 March 2014]

Bulgarian Safer Internet Centre (2006 – 2012): Public Reports, available in English at: http://www.safenet.bg/index.php?id=1371 [accessed: 24 March 2014]

Bulgarian Safer Internet Centre (2014): Public report 2013 for the activities of the Bulgarian Safer Internet Centre and Internet Hotline for fighting illegal and harmful content in Internet, available in Bulgarian at: http://www.safenet.bg/index.php?id=1353 [accessed: 18 May 2014]

B2CENTRE – Centre of Excellence Bulgaria,http://www.2centre.eu/coe/bulgaria [accessed: 24 March 2014]

B2CENTRE – Cybercrime Centres of Excellence Network for Training Research and Education, http://www.2centre.eu/ [accessed: 24 March 2014]

Business Software Alliance (BSA) (2010): Global Cybersecurity Framework, available at: http://www.bsa.org/country/Public%20Policy/~/media/Files/Policy/Security/CyberSecure/Cybersecurity_Framework.ashx [accessed: 09 May 2014]

Business Software Alliance (BSA): Cloud Computing Policy Agenda for Europe, available at: http://www.bsa.org/country/~/media/Files/Policy/enGB/bsaeucloudagenda.ashx [accessed: 13 April 2014]

Child Exploitation & Online Protection Centre (CEOP): Relationship management strategy, available at: http://www.ceop.police.uk/Documents/ceopdocs/Relationship_Management_Strategy.pdf [accessed: 20 May 2014]

Center for Internet Security (CIS) (2012): Annual Report, available at: http://www.cisecurity.org/about/documents/CIS_AR2012_FINAL_Spreads-small.pdf [accessed: 20 April 2014]

Computerworld (2009): Избраха ново ръководство на сдружението на независимите интернет доставчици, 27 October 2009, available in Bulgarian at: http://computerworld.bg/27407_izbraha_novo_rakovodstvo_na_sdruzhenieto_na_nezavisimite_internet_dostavchici [accessed: 20 March 2014]

Confianza Online (2002): El Código Ético, available in Spanish at: https://www.confianzaonline.es/documentos- confianzaonline/Codigo_CONFIANZA_ONLINE_2013.pdf [assessed: 19 May 2014]

Council of Europe (2014): Recommendation CM/Rec (2014) 6 of the Committee of Ministers to member States on a Guide to human rights for Internet users, adopted by the Committee of Ministers on 16 April 2014 at the 1197th meeting of the Ministers' Deputies, Strasbourg, available at: https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2014)6&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&Back [accessed: 27 May 2014]

Court of Justice of the EU (2014): Judgment of the court (Grand Chamber), 8 April 2014, available at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d570b8782a866546ed81aeb4e21873dcd4.e34KaxiLc3qMb40Rch0SaxuNbhv0?text=&docid=150642&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=179596

Electronic Frontier Finland (2013): Sananvapaus [online], available at: http://www.effi.org/sananvapaus/ [accessed: 27 December 2013]

Family Federation of Finland (2013): Sexual rights of young people [online], available at: http://www.vaestoliitto.fi/nuoret/seksi/seksuaalioikeudet/ [accessed 17 December 2013].

Federal Ministry of Interior, Germany (2011): Cyber Security Strategy for Germany, available in English at: https://www.bsi.bund.de/SharedDocs/Downloads/EN/BSI/Publications/CyberSecurity/Cyber_Security_Strategy_for_Germany.pdf?__blob=publicationFile [accessed: 23 April 2014]

Federal Ministry of Interior, Germany (2012): Key Requirements on 'Trusted Computing' and 'Secure Boot': available at: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/OED_Verwaltung/Informationsgesellschaft/trusted_computing_eng.pdf;jsessionid=B1262F462DBCF6764AF7221C2090F4D8.2_cid295?__blob=publicationFile [accessed: 21 March 2014]

Finnish Code of Conduct for Safer Mobile Use by Younger Teenagers and Children (2010): available at: http://www.gsma.com/gsmaeurope/wp-content/uploads/2012/04/finnishcodeofconduct.pdf [accessed: 26 May 2014]

Finnish Competition and Consumer Authority (2011): Children and payment via mobile phones – guide [online], available at http://www.kuluttajavirasto.fi/Page/6389c922-4723-4fc0-8332-d104b4f88e36.aspx [accessed: 17 December 2013].

Finnish Ombudsman for Minorities (2013): Racist language and images [online], available at: http://www.ofm.fi/en/ethnic_discrimination/questions_and_answers/racism#I came across a blog / text / image on the Internet which might constitute ethnic agitation. What should I do? [accessed: 17 December 2013]

Finnish Police (2014): Poliisit sosiaalisessa mediassa [online], available at: http://www.poliisi.fi/poliisi/home.nsf/www/poliisit-somessa [accessed: 17 December 2013]

Finnish Police (2013): Tietoturvapäivähanke [online], available at: http://www.poliisi.fi/poliisi/home.nsf/webprint/54546509581954B5C22576BF004B67D9?OpenDocument [accessed: 17 December 2013]

Finnish Police (2011): Internet policeman chosen as Police Officer of the Year [press release], 25 October 2011, available: https://www.poliisi.fi/poliisi/home.nsf/Pages/99204B8AE0E6DCC6C225796B0034CCBF [accessed: 17 December 2013]

Forss, M. (2012): Virtual Community Policing, [online presentation] in Finnish Police (2014) Helsingin nettipoliisi ja lähipoliisi [online], available in English at: http://www.poliisi.fi/irc-galleria [accessed: 02 June 2014]

Global Network Initiative (GNI) (2012a): The Principles on Freedom of Expression and Privacy, available at: http://globalnetworkinitiative.org/sites/default/files/GNI_-_Principles_1_.pdf [accessed: 19 April 2014]

Global Network Initiative (GNI) (2012b): Implementation Guidelines for the Principles on Freedom of Expression and Privacy, available at: http://globalnetworkinitiative.org/sites/default/files/GNI_-_Implementation_Guidelines_1_.pdf [accessed: 19 April 2014]

Global Network Initiative (GNI) (2012c): The Governance, Accountability & Learning Framework, available at: http://globalnetworkinitiative.org/sites/default/files/GNI_-_Governance_Accountability_Learning.pdf [accessed: 19 April 2014]

Global Network Initiative (GNI) (2013): 2012 Annual report, p. 2, available at: http://globalnetworkinitiative.org/sites/default/files/GNI%20Annual%20Report%202012.pdf [accessed: 19 April 2014]

Haakana, K. (2013): Suomalaista sensuuria, Blog by Kari Haakana, Yle Uutiset [online], Yle Uutiset, 14 February 2013, available at: http://yle.fi/uutiset/kari_haakana_suomalaista_sensuuria/6494795?ref=leiki-uu [accessed: 17 December 2013]

International Cyber Security Protection Alliance (2012): Project 2020. Scenarios for the Future of Cybercrime – White Paper for Decision Makers, available at https://www.icspa.org/uploads/media/ICSPA_Project_2020_–_Scenarios_for_the_Future_of_Cybercrime.pdf [accessed: 20 April 2014]

Kelley, Jodie (2013): Using Legal Software to Reduce Cyber Vulnerabilities, in: Cybersecurity, Piracy June 26, 2013, [online] available at: http://techpost.bsa.org/2013/06/26/using-legal-software-to-reduce-cyber-vulnerabilities/ [accessed: 19 April 2014]

Limnéll, J. (2013): Kybertohtori, OP-Pohjola-Ryhmän Talouslehti Chydenius,(4) p. 20-25.

London Action Plan and M3AAWG (2012): Best Practices to Address Online and Mobile Threats, October 15, 2012, available at: http://www.m3aawg.org/sites/maawg/files/news/M3AAWG_LAP_Best_Practices_to_Address_Online_and_Mobile_Threats_0.pdf [accessed: 21 May 2014]

Mannerheimin Lastensuojeluliitto (2013): Nuortennetti – netiketti [online] available at: http://www.mll.fi/nuortennetti/mina_ja_media/netiketti/ [accessed: 17 December 2013]

Media Literacy School (2013): Mediataitoviikko [online], available at: http://www.mediataitokoulu.fi/mediataitoviikko-3/ [accessed: 13 December 2013]

Microsoft Security Intelligence Report Special Edition (2014): The Cyber Security Risk Paradox. Impact of Social, Economic, and Technological Factors on Rates of Malware, Authors: David Burt, Paul Nicholas, Kevin Sullivan, and Travis Scoles, 2014), available at: http://download.microsoft.com/download/E/1/8/E18A8FBB-7BA6-48BD-97D2-9CD32A71B434/Cybersecurity-Risk-Paradox.pdf [accessed: 10 April 2014]

Microsoft Security Intelligence Report Special Edition (2013): Linking Cybersecurity Policy and Performance, Authors: Aaron Kleiner, Paul Nicholas, Kevin Sullivan, Microsoft Trustworthy Computing, 2013) available at: http://aka.ms/securityatlas [accessed: 10 April 2014]

National Institute of Standards and Technology, USA (NIST) (2014): Framework for Improving Critical Infrastructure Cybersecurity, Version 1.0, February 12, 2014, available at: http://www.nist.gov/cyberframework/upload/cybersecurity-framework-021214-final.pdf [accessed: 10 April 2014]

Niska, S-M. (2013): Poliisi varoittaa: uusi seksikiristyshuijaus leviää Suomessa, Iltalehti [online] 17 December 2013, available at: http://www.iltasanomat.fi/digi/art-1288633408238.html [accessed: 17 December 2013]

Nuorten Elämä (2013): Netti ja Media [online] available at: http://www.nuortenelama.fi/elavaa-elamaa/netti-ja-media/turvallinen-netink%C3%A4ytt%C3%B6-523 [accessed: 13 December 2013]

Organisation for Economic Co-operation and Development (2002): Guidelines for the Security of Information Systems and Networks: Towards a Culture of Security, adopted as a Recommendation of the OECD Council at its 1037th Session on 25 July 2002, available at: http://www.oecd.org/sti/ieconomy/oecdguidelinesforthesecurityofinformationsystemsandnetworkstowardsacultureofsecurity.htm [accessed: 19 March 2014]

Poliisin, Päivä (2014): Poliisin päivä-etusivu [online] available at: http://www.poliisinpaiva.fi/ [accessed: 13 December 2013]

Republic of Turkey Prime Ministry Investment Support and Promotion Agency (ISPAT), Deloitte Turkey (2014): Information & Communications Technology, January 2014, available at: http://www.invest.gov.tr/enUS/infocenter/publications/Documents/ICT.INDUSTRY.pdf [accessed: 20 May 2014]

Savola, P. (2013): Internet operaattori perusoikeuksien objektina ja subjektina, unpublished thesis (M.A.) University of Helsinki Faculty of Law, available at: https://helda.helsinki.fi/bitstream/handle/10138/38179/savolagradu.pdf?sequence=2 [accessed 17 December 2013]

Save the Children Finland (2013): Who We Are [online], available at: http://www.pelastakaalapset.fi/en/organization/who-we-are/ [accessed 2 January 2014]; Lasten suojelu digitaalisessa mediassa [online], available at: http://www.pelastakaalapset.fi/toiminta/lasten-suojelu-digitaalisessa-me [accessed 17 December 2013]

Save The Children Finland (2012): Moderaattorin käsikirja [online], available at: http://pelastakaalapset-fi-bin.directo.fi/@Bin/ced7edb3fc969bd-7da44d1e122ef132a/1387286962/application/pdf/733508/moderaattori_opas.pdf [accessed: 17 December 2013]

Save the Children Finland & The Helsinki Virtual Community Policing Group (2011): Children's experiences of sexual harassment and abuse on the internet [online] available at: http://resourcecentre.savethechildren.se/library/childrens-experiences-sexual-harassment-and-abuse-internet [accessed: 12 December 2013]

Schneider, Christoph/Katzer, Catarina/Leest, Uwe (2013): Cyberlife – Spannungsfeld zwischen Faszination und Gefahr: Cyberlife – Between the priorities of Fascination and Danger, available at: http://www.buendnis-gegen cybermobbing.de/Studie/cybermobbingstudien.pdf [accessed: 19 May 2014]

Society for Electronic Communications (SEC) (2014): Code of Ethics, available at: http://bgsec.org:8080/en/ethics [accessed: 24 March 2014]

The GSMA European Framework for Safer Mobile Use by Younger Teenagers and Children (2007) [online] available at: http://www.gsmeurope.org/documents/safer_children.pdf [accessed 27 December 2013]

The GSMA European Framework for Safer Mobile Use by Younger Teenagers and Children (2010): Third Implementation Review of the European Framework for Safer Mobile Use by Younger Teenagers and Children, available at: http://www.gsma.com/gsmaeurope/safer-mobile-use/implementation-review/ [accessed 27 April 2014]

The GSMA European Framework for Safer Mobile Use by Younger Teenagers and Children (2013): National Measures [online] available at: http://www.gsma.com/gsmaeurope/safer-mobile-use/national-measures [accessed 17 December 2013].

Tietoturvapäivä (2013): Tietoturvainfo [online], available at: http://www.tietoturvapaiva.fi/ [accessed 15 December 2013]

Thomas, Rachel Nyswander (2012, updated 2013): Securing Cyberspace through Public-Private Partnership: A Comparative Analysis of Partnership Models, available online at: http://csis.org/files/publication/130819_tech_summary.pdf [accessed: 24.06.2014]

UK Government, Department for Business, Innovation and Skills (2013): Guiding Principles on Cyber Security (Guidance for Internet Service Providers), London 2013, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265328/bis-13-1327-guiding-principles-for-cyber-security-isps-and-hmg-FINAL.pdf [accessed: 22 May 2014]

United Nations Office on Drugs and Crime (2013): Comprehensive Study on Cybercrime. New York: United Nations, February 2013, available at: http://www.unodc.org/

documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_22/_E-CN15-2013-CRP05/Comprehensive_study_on_cybercrime.pdf [accessed: 26 May 2014]

YLE Uutiset (2008): Poliisi sensuroi suomalaisen internetsivuston, YLE Uutiset, 13 February 2013, available at: http://yle.fi/uutiset/poliisi_sensuroi_suomalaisen_internetsivuston/5823120 [accessed: 30 December 2013]

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This publication contains the findings of the FIDUCIA project's third-year of research, namely the innovative concept of "trust-based policy" and the use of normative strategies to promote willingness to report a crime and better mutual cooperation among Member States.
This book also brings the dimension of "trust-based policy" to four main areas of research: the crimes of human trafficking, trafficking of goods, cybercrime and the criminalisation of migrants and ethnic minorities.

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