



Exclusion by design:
Unveiling unequal treatment and racial
inequalities in migration policies

Acknowledgments:

This briefing was written by Louise Bonneau, Advocacy Officer, and edited by Michele LeVoy, Director of PICUM Platform for International Cooperation on Undocumented Migrants. We wish to thank Alyna Smith (Deputy Directive), Lilana Keith (Senior Advocacy Officer), Marta Gionco (Senior Advocacy Officer), Silvia Carta (Advocacy Officer) for their contributions, and Safia Cissoko (Advocacy Trainee) for her support in the final stages.

Since 2017, PICUM has organised seminars which look at EU law and its impact on and relevance for undocumented people. This briefing draws upon insights from the 2023 legal seminar, co-organised with Equinox Initiative for Racial Justice, which looked at the intersection of racial profiling, policing and immigration control. We would like to extend our thanks to all participants of the seminar, and pay in particular thanks to the following individuals: Tendayi Achiume (former UN Special Representative on Contemporary forms of racism), Emmanuel Achiri (European Network Against Racism), Parvin Abkhoudarestani, Mpanzu Bamenga (Human Rights Activist, Founder Human Rights Initiatives and Incleaders, the Inclusion Leaders Network and Member of the Dutch Parliament), Laure Baudrihaye, Selma Benkhelifa (Progress Lawyers Network), Vida Beresnevičiute (European Union Agency for Fundamental Rights), Chloe Berthelemy (European Digital Rights, EDRI), Dr. Monish Bhatia (University of York), Saskia Bricmont (Member of the European Parliament), Sarah Chander (Equinox Initiative for Racial Justice), Ting Chen (Roses D'Acier), Hanne Deckman (former PICUM Advocacy Trainee), Eleftherios Eleftheriou (European Commission), Lamprini Gyftokosta (Homo Digitalis), Jennifer Kamau (International Women* Space), Laurence Meyer (Digital Freedom Fund), Laure Palun (Anafé), Stephanie Richanie (Equinox Initiative for Racial Justice), Ulrich Stege (International University College of Turin and Association for Juridical Studies on Immigration (ASGI), Adla Shashati (Greek Forum of Migrants), Sara Traylor (Alarm Phone) and Dr. Karin de Vries (Utrecht University).

While the 2023 legal seminar was co-organised with Equinox Initiative for Racial Justice, this briefing is authored only by PICUM.

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Design: www.chocolatejesus.be

Cover image: Timon Studler - Unsplash



This report has received financial support from the European Union Programme for Employment and Social Innovation "EaSI" (2021-2027). For further information please consult: <http://ec.europa.eu/social/easi>. The information contained in this publication does not necessarily reflect the official position of the European Commission.

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Summary

Migration policies are far from being racially neutral. They determine who is eligible for citizenship, regulate mobility across borders, and dictate the type of residence permits people may obtain, if any. These policies serve as gatekeepers of inclusion and exclusion within our communities, shaping individuals' experiences of discrimination and marginalisation, and leave many individuals with undocumented or precarious statuses. The resulting patterns of marginalisation often follow racialised lines.

This briefing explores EU migration policies and enforcement practices from the perspective of racial justice. It does so by drawing upon insights from a legal seminar that PICUM co-organised with the Equinox Initiative for Racial Justice in November 2023, which looked at the intersection of racial profiling, policing and immigration control. It also draws upon prior analysis conducted by a wide range of civil society organisations. The briefing shows both how the EU's anti-discrimination legal and policy framework fails to adequately protect racialised communities, and how EU migration policies contribute to racial inequalities.

“Migration frameworks all over the world are mechanisms through which racial subordination is achieved.”

Tendayi Achiume, Former UN Special Rapporteur on Contemporary Forms of Racism at PICUM and Equinox 2023 legal seminar

Glossary

Migration or residence status

Refers to the type of (or lack of) formal recognition of an individual's residence by the government of the country they live in. Residence or migration status is based on an individual's administrative situation and is linked to a visa, travel authorisation, residence permit, a suspension of deportation,¹ an ongoing legal procedure to access a residence permit on any grounds (including for asylum), or citizenship. Residence permits can be issued for a fixed or indefinite duration and on various grounds (e.g. employment, study, family, medical reasons,² international protection or a child protection order³), subject to EU⁴ or country-specific rules.

Racialised groups

Refers to individuals and communities that have been subjected to the political and social process of racialisation, wherein they are designated as belonging to a specific "race". This process often results in these groups being perceived as distinct from other racial categories and consequently subjected to differential and unequal treatment. While all people can be racialised, the term particularly emphasises those who are negatively racialised, seen as "other" or marginalised compared to what is perceived as the normative racial category.⁵

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- ¹ Suspensions of deportations are not residence permits in the sense that the government has suspended the person's deportation order but not given them the right to reside in the country. The access to services and the labour market varies widely for these statuses, with German suspensions of deportation giving access to certain social rights and sometimes training and the labour market, and Greek suspensions of deportation not giving access to any. See PICUM, 2023, [Regularisation mechanisms and programmes: Why they matter and how to design them](#)
 - ² In a [2023 Ad Hoc Query of the European Migration Network](#), a majority of member states self-reported that foreign nationals residing in the country can apply for a residence permit on the basis of their health condition.
 - ³ In a [2023 Ad Hoc Query of the European Migration Network](#) about half of the responding member states self-reported that they have legal frameworks in place to granting a residence permit on the basis of a child protection order.
 - ⁴ At EU level multiple Directives regulate residence statuses, such as [Directive 2003/109/EC](#) on the status of third-country nationals who are long-term residents, the EU Blue Card [Directive 2009/50/EC](#) on highly-qualified workers, the [Single Permit Directive 2011/98/EU](#), [Directive \(EU\) 2016/801](#) on Students and Researchers, [Directive 2003/86/EC](#) on Family reunification, the Return [Directive 2008/115/EC](#) and [Directive 2011/95/EU](#) on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection
 - ⁵ Drawing on definitions developed by the European Network Against Racism (ENAR) in their 2022 report [Racial discrimination in Europe: ENAR Shadow report 2016-2021](#) (p. 12) and Equinox Initiative for Racial Justice 2021 report [Towards Racial Justice: How the EU can create lasting change for racialised people](#) (p. 5).

Criminalisation of migration

Refers to policies that treat (undocumented) migrants and irregular migration through the lens of threat. This often involves the use of criminal sanctions for irregular entry or stay, including the employment of someone who does not have authorisation to work, and renting to an undocumented person. Similarly, criminalisation of migration involves surveillance, policing, profiling and deprivation of liberty (immigration detention) to prevent or control movement. It includes the recourse to criminal law and security approaches to address phenomena such as smuggling and trafficking, and the frequent use of such criminal provisions against migrants and their family members.

Criminalisation of solidarity

Refers to the threat of and actual harassment or intimidation by authorities as well as potential criminal or administrative sanctions of people acting in solidarity with undocumented people. Those who are criminalised for acting in solidarity with migrants include individual citizens, volunteers, NGOs, journalists, local authorities, as well as migrants themselves. People have been criminalised for a wide range of acts, including providing search and rescue operations; providing food, housing and services; and for monitoring or denouncing fundamental rights violations.⁶

Introduction

While the EU has a robust legal framework against discrimination,⁷ instances of discrimination have increased in recent years, especially in employment and housing.⁸ Likewise, discriminatory profiling practices, racist communications and excessive use of force, remains widespread in policing,⁹ with evidence of structural, institutional and systemic racism in policing.¹⁰

Migration policies are far from being racially neutral.¹¹ They determine who is eligible for citizenship, regulate mobility across borders, and dictate the type of residence permits people may obtain, if any. These policies serve as gate keepers of inclusion and exclusion within our communities, shaping individuals' experiences of discrimination and marginalisation, and leave many individuals with undocumented or precarious statuses. The resulting patterns of marginalisation often follow racialised lines.

Tendayi Achiume, former UN Special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance highlights the

role of “ethno-nationalism” as a driving force behind racial discrimination within citizenship, nationality and immigration laws, policies and practices.¹² Ethno-nationalism, rooted in notions of blood ties and ethnicity, is often deeply embedded in laws and policies determining “political membership” - namely an individual's inclusion and exclusion to/from a community.¹³

This is true of migration policies in the EU, which build on centuries of colonial relations between EU member states and third countries, leading to a current framing and implementation which perpetuate a cycle of racial and ethnic discrimination and inequality. This intersects with various forms of discrimination, including on the basis of gender, sex, disability,¹⁴ religion or belief, age, social class and sexual orientation.¹⁵

Against this backdrop, this briefing aims to explore EU migration policies and enforcement practices from the perspective of racial justice. It draws upon insights from a legal seminar organised in November 2023 by PICUM and the Equinox Initiative for Racial

7 See the Fundamental Rights Agency [Handbook on European non-discrimination law – 2018 edition](#) for an overview.

8 The Fundamental Rights Agency has found an increase in racial discrimination (discrimination on at least one of the three grounds, namely skin colour, ethnic or immigrant background and religion or religious beliefs) faced by people of African descent (rising from 24% of people surveyed in 2016 to 34% in 2022). For more information, see: FRA, 2023, [Being black in the EU: experiences of people of African descent](#)

9 The FRA found that one in four (26 %) survey respondents indicated that the police had stopped them in the last 5 years. Among those stopped in the 12 months before the survey, more than half (58 %) perceived the last stop as racially motivated. For more information, see: FRA, 2023, [Being black in the EU: experiences of people of African descent](#)

10 The FRA finds that incidents of racial discrimination, harassment and criminal victimisation – including hate crime – are inadequately reported and recorded. For more information, see: FRA, 2024, [Addressing Racism in Policing](#)

11 For an analysis of migration law as a form of discrimination based on nationality under international law, see Spijkerboer, T., 2018, [The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control](#), p. 267-268

12 United Nations General Assembly, Human Rights Council, 2018, [Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance](#), para 6

13 Ibid para 29

14 Pisoni, M. 2021, [Intersectionality between migrants and people with disabilities](#). A Path for Europe.

15 An example of intersecting forms of oppression is the case of undocumented sex workers, who face discrimination and criminalisation in relation to their residence status and their work in ways that are deeply gendered, racialised and classist. See: European Sex workers Rights Alliance, 2022, [Sex Work & Racism: The Impact of Structural Racism on Racialised Sex Workers in Europe and Central Asia](#); PICUM, 2019, [Safeguarding the human rights and dignity of undocumented migrant sex workers](#)

Justice,¹⁶ and desk research, including prior analysis conducted by wide range of civil society organisations.¹⁷ The briefing does not intend to provide an exhaustive analysis of all facets of EU migration

policies, but rather offers an overview and examples based on insights provided in the legal seminar.

Personal experience within various EU borders¹⁸

Parvin Abkhoudarestani was born in Iran and fled to Germany where she filed a complaint against Greece regarding the violent pushbacks she experienced at the Greek-Turkish border.¹⁹ She is now working as a child psychologist in Germany.

"I was stopped from travelling to this event [PICUM-Equinox legal seminar] as I still don't enjoy freedom of movement. It is painful, I want to be free. Already this is the heart of the issue. Who can move depends on your skin colour and race and my movement is being illegalised. At the border - and the borders are everywhere - they call me 'illegal', no questions asked, documents are not relevant and rights are worthless.

It's six years that I have been asking for protection at different borders. Now I am recognised as a refugee but I still cannot travel, and so the oppression continues. But even if I can't move, they can't keep me silent.

I am a feminist, and an Iranian and I lived under the fascist Islamic regime for 25 years. I arrived in Germany in 2020 and lived many years in limbo waiting on a decision in my asylum application. I also filed a legal complaint to the UN Human Rights Committee regarding the pushbacks I experienced at the Greek-Turkish border. With the NGO, ECCHR and Forensic Architecture, we created an online investigation to track and reconstruct my route.

16 Since 2017, PICUM has organised seminars which look at EU law and its impact on and relevance for undocumented people. The 2023 legal seminar looked at the intersection of racial profiling, policing and immigration control. See also: PICUM, 2024, [Racial profiling, policing and immigration control](#). While the 2023 legal seminar was co-organised with Equinox Initiative for Racial Justice, this briefing is authored only by PICUM.

17 This includes for example the following (non-exhaustive list): European Sex workers Rights Alliance, 2022, [Sex Work & Racism: The Impact of Structural Racism on Racialised Sex Workers in Europe and Central Asia](#); Equinox Initiative for Racial Justice, 2021, [Ending Fortress Europe: Recommendations for a racial justice approach to EU migration policy](#); Euromed Rights, 2020, [Racism, a pandemic in the Euro-Mediterranean too](#); European Network Against Racism, 2017, [Racism and discrimination in the context of migration in Europe: ENAR Shadow Report 2015-2016](#)

18 Based on the intervention of Parvin Abkhoudarestani at the PICUM-Equinox legal seminar organised in November 2023.

19 European Centre for Constitutional and Human Rights, [Bringing Greek pushbacks to justice, Woman refugee files complaint exposing secret state policy](#) [accessed 1 May 2024]

From my experience, there is no real border procedure. Europe's border management is based on racial profiling. It is the officers who decide who can move and who cannot, based on racial profiling.

Based on racial profiling, they push us back at the border at night in remote locations. They don't look at us, and don't talk with us.

We were not met in a human way - because of our race. Officers came at us with dogs, shooting live ammunition, and tear gas. Before anything else they demanded that we give them all our belongings (money, bags, clothes, phones), and then held us in secret detention. We were never officially registered. When I was in a wooden boat trying to cross the Mediterranean sea, they towed us back to Turkish waters and left us there, our boat filling with water.

During my first pushback, I called out that I want to apply for asylum and asked where my human rights are. The officer told me: 'You have no human rights, you have no right to stay here. You are coming into our house through the window instead of through the door.' But which door exactly? I tried them all.

We were held in overcrowded detention cells with toilets overflowing with sewage, no windows, no water, no food. You are reminded: you are disposable. They make it clear they want to get rid of you. During the last pushback an officer came over and pulled me up off the ground with his hands around my neck and said: don't come back.

But the nightmare doesn't stop when you get into Europe.

The EU prides itself on its human rights, and they look good on paper but they are no use just on paper. The racist structures persist. We are here as a new modern slave society of immigrants and if you want what you deserve, you have to work three times as hard. How long must I live this role? When can my life begin?"

EU legal and policy frameworks governing racial equality

The following section provides an overview of the EU's legal and policy framework on racial equality.

Legal framework

The principles of equality and the prohibition of discrimination on the basis of racial and ethnic origin have an extensive legal basis in the EU Treaties.²⁰ This is complemented by the Charter of Fundamental Rights of the EU,²¹ which has the same legal value as the Treaties.²² The Charter states explicitly in Article 20 that everyone is equal before the law and in Article 21(1) that “any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of

a national minority, property, birth, disability, age or sexual orientation shall be prohibited”.²³

The EU Racial Equality Directive further sets out the principle of equal treatment between persons in the EU on the grounds of racial or ethnic origin.²⁴

20 Notably Articles 2 and 3 of the [Treaty on European Union \(TEU\)](#), and 10, 19 and 67(3) of the [Treaty on the Functioning of the European Union \(TFEU\)](#).

21 [Charter of Fundamental Rights of the European Union, 2012/C 326/02](#)

22 In accordance with Article 6 of the [Treaty on European Union](#).

23 [Charter of Fundamental Rights of the European Union, 2012/C 326/02](#)

24 [Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin](#)

International and regional authoritative guidance on racial discrimination

International and regional human rights treaties serve as essential authoritative guidance in combating racial discrimination in the EU. They are invoked in the preamble of the Racial Equality Directive²⁵ and provide minimum standards of protection as stipulated under the Charter of Fundamental Rights of the EU (Articles 52 and 53).

Various global and regional bodies have outlined provisions related to racial equality and non-discrimination in key treaties and documents:

United Nations Treaties

- [Universal Declaration of Human Rights](#): Articles 2, 7, 16, and 23 emphasise equality, non-discrimination, and the right to family life and work without regard to race.
- [Convention on the Elimination of all Forms of Racial Discrimination](#): A cornerstone treaty explicitly aimed at eradicating racial discrimination.
- [Convention on the Rights of the Child](#): Ensures non-discrimination, protection of cultural rights, and equality for children from minority groups.
- [International Covenant on Civil and Political Rights](#): Article 2 prohibits discrimination based on race, ensures equal protection, and prohibits incitement to racial hatred.
- [Convention on the Protection of the Rights of All Migrant Workers and Members of their Families](#): Article 7 and 25 protect migrant workers from discrimination based on race and ethnic origin, ensuring equality of treatment.

Council of Europe

- [European Convention of Human Rights](#): Article 14 prohibits discrimination in the enjoyment of Convention rights without discrimination on any ground such as race.
- [European Social Charter](#): Article E ensures the right to non-discrimination, including on the basis of race, in the enjoyment of social rights.
- General Policy Recommendation No.16 on [Safeguarding irregularly present migrants from discrimination](#) and other General Policy Recommendations of the European Commission against Racism and Intolerance,²⁶ which offer specific guidance on combating racism, xenophobia, and intolerance, including recommendations for legislative action and combating discrimination in various sectors.

²⁵ [Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, para 2](#)

²⁶ The full overview of General Policy Recommendations developed by the European Commission against Racism and Intolerance are available [here](#).

African Union

- [African Charter on Human and Peoples' Rights](#): Article 2 prohibits discrimination based on race and ethnic group.

Organisation of American States

- [American Convention on Human Rights](#) - Article 1(1) prohibits discrimination on various grounds, including race.

Association of Southeast Asian Nations (ASEAN)

- [ASEAN Human Rights Declaration](#): Article 2 prohibits discrimination, including on the basis of race.

Arab League

- [Arab Charter on Human Rights](#): Article 2 prohibits discrimination on various grounds, including race, among member states of the Arab League.

What is discrimination based on 'racial and ethnic origin'?

While the EU's Racial Equality Directive refers to racial and ethnic origin, it is not defined in this instrument.²⁷ Other instruments and bodies provide guidance on how to understand "racial and ethnic origin":

- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) defines discrimination in Article 1.1 as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" (Article 1.1). The Committee on the Elimination of Racial Discrimination, responsible for interpreting and monitoring compliance with the treaty, has further stated that unless justification exists to the contrary, determination as to whether an individual is a member of a particular racial or ethnic group "shall [...] be based upon self-identification by the individual concerned."²⁸ This prevents the state from excluding from protection any ethnic groups whom it does not recognise.
- The Council of Europe European Commission Against Racism and Intolerance (ECRI) has also adopted a broad approach to defining 'racial discrimination', which includes the grounds of "race, colour, language, religion, nationality or national or ethnic origin".²⁹

- The EU [Council's Framework Decision on combating racism and xenophobia under criminal law](#) defines racism and xenophobia to include violence or hatred directed against groups by reference to "race, colour, religion, descent or national or ethnic origin" (Article 1).

At the same time, the Racial Equality Directive defines the concept of equal treatment, which covers both direct and indirect discrimination. Article 2 provides the following definitions:

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

²⁷ [Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin](#)

²⁸ UN Committee on the Elimination of All Forms of Racial Discrimination (1990), [General Recommendation VIII concerning the interpretation and application of Article 1, Paragraphs 1 and 4 of the Convention](#), Doc. A/45/18, 22 August 1990

²⁹ Council of Europe European Commission Against Racism and Intolerance, [General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination](#), CRI (2003)8, adopted 13 December 2002, paras. 1 (b) and (c)

Who is protected?

The Racial Equality Directive applies to “all persons, as regards both the public and private sectors, including public bodies” (Article 3(1)). The directive does not cover differences of treatment based on nationality and statelessness, and does not address

matters of immigration law or cover unequal treatment arising from a residence status (Article 3(2)). At the same time, protection against discrimination is not conditional on nationality, citizenship, or residence status.³⁰

Law and border enforcement authorities excluded from the EU Racial Equality Directive

The Racial Equality Directive covers a variety of areas, such as employment, vocational guidance and training, employment and working conditions, social protection, social advantages, education, access to and supply of goods and services which are available to the public, including housing (Article 3(1)). However, the directive does not protect against racial discrimination by law and border enforcement authorities.

30 FRA and European Court of Human Rights and Council of Europe, 2018, [Handbook on European non-discrimination law](#), p. 196

Residence status-based discrimination protected under EU law only for victims of crime

The EU Victims' Directive,³¹ adopted in 2012, determines common standards across all EU member states³² for the rights of victims of crimes. While not guaranteeing a resolution of an undocumented person's status, it requires states to take the needed steps to ensure that rights do not depend on the victim's residence status or their citizenship or nationality (Article 1).

The directive recognises that victims who are not nationals are at "particularly high risk of harm" and might therefore need specialist support and legal protection. It entitles all victims to access free and confidential support services, even if they choose not to file a criminal complaint.³³

In July 2023, the European Commission proposed to revise the Directive³⁴, among others to strengthen safe reporting for undocumented migrants through the introduction of a partial firewall.³⁵

31 [Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#)

32 Except Denmark, the only EU member state that opted out of the directive.

33 See also: PICUM, 2013, [Guide to the EU Victims' Directive: Advancing access to protection, services and justice for undocumented migrants](#); PICUM, 2021, [Preventing Harm, Promoting Rights: Achieving safety, protection and justice to for people with insecure residence status in the EU](#)

34 European Commission [Proposal for a Directive amending Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA](#)

35 Civil society organisations across Europe have come together to [call on EU negotiators to strengthen rights of all victims of crime regardless of residence status in the revision](#).

Policy framework

Four months after the killing of George Floyd, an African-American man, by a police officer in the United States, the European Commission presented the EU's first Anti-Racism Action Plan as a response to the growing demands for racial equality and justice in Europe and against police brutality.³⁶ Meant to step up EU action to counter racial discrimination and racism within the EU, the Anti-Racism Action Plan acknowledges the existence of systemic racism in Europe and sets a clear goal: ensuring equal treatment and rights for all to “make a racism-free EU a reality”.

The EU's Anti-Racism Action Plan does not address or acknowledge the EU's migration policy or its negative impact on racialised people, or how EU migration policies contribute to discrimination against migrants within and outside Europe.³⁷ The Action Plan rather subsumes migration as part of the broader policy areas to cover in a mainstreaming approach and in the role of the internal EU Task Force on Equality.³⁸

Moreover, within days of the launch of the EU Anti-Racism Action Plan, the European Commission released its proposal for a Pact on Migration and Asylum.³⁹ From the outset, the Pact received strong criticism from civil society organisations across Europe.⁴⁰ After years of negotiations, the Pact was adopted in April 2024, and – as noted by widespread civil society organisations,⁴¹ researchers,⁴² as well as UN bodies⁴³ – is feared will exacerbate human rights violations, including discriminatory policing, racial profiling and police violence against people at and within Europe's borders.

The EU Anti-Racism Action Plan identifies structural racism as the ‘underlying problem’ it seeks to address. It acknowledges colonialism, slavery and the Holocaust among the historical roots of racism in Europe and their profound consequences for society today.⁴⁴

36 European Commission, 2020. A Union of equality: EU anti-racism action plan 2020-2025, [COM\(2020\) 565 final](#)

37 Equinox Initiative for Racial Justice, 2022, [Ending Fortress Europe: Recommendations for a racial justice approach to EU migration policy](#); Abigail Cárdenas Mena, 2021, [The EU's Migration and Anti-Racism policies: are we ready for a racism-free Europe?](#) Part two of a series of PICUM blogs looking at the intersection between racism and migration policy.

38 European Commission, 2020. A Union of equality: EU anti-racism action plan 2020-2025, [COM\(2020\) 565 final](#), p.19

39 European Parliament, 10 April 2024, [MEPs approve the new Migration and Asylum Pact](#), Press release

40 PICUM, 2023, [Over 50 NGOs pen eleventh-hour open letter to EU on human rights risks in Migration Pact](#), Press release; PICUM, 2023, [EU now poised to lower detention and deportation age to six in shock Migration Pact move](#); PICUM, 2023, [Migration Pact: EU lawmakers flirt with racial profiling in final negotiations](#).

41 See for example: Joint civil society statement, 2024, [More than 160 Civil Society Organisations call on MEPs to vote down harmful EU Migration Pact](#); PICUM, 2024, [European Parliament final vote on Migration Pact foreshadows human rights violations](#); #ProtectNotSurveil coalition, April 2024, [The EU Migration Pact: a dangerous regime of migrant surveillance](#)

42 See for example the [Open letter to the Council of the EU and the European Parliament](#) launched by a group of researchers at Brussels Interdisciplinary Research centre on Migration and Minorities (BIRMM, Vrije Universiteit Brussel) against the introduction of mandatory border procedures following a political agreement on the new EU Pact on Migration and Asylum in December 2023. Within a few weeks, over 250 migration experts from almost 100 universities signed this letter.

43 See for example: Letter by the [mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on trafficking in persons, especially women and children](#) from 15 December 2023, Ref.: OL OTH 144/2023; United Nations Human Rights Office of the High Commissioner, 2 May 2024, [Child immigration detention must be prohibited following adoption of EU migration and asylum pact, UN experts say](#), Press Release

44 European Commission, 2020. A Union of equality: EU Anti-Racism Action Plan 2020-2025, [COM\(2020\) 565 final](#), p.14

Yet the EU Anti-Racism Action Plan falls short of recognising the intrinsic link between the EU's migration policy and racism, including in the EU's colonial past. This omission falls in stark contrast to recognition by the former UN Special rapporteur on contemporary forms of racism, Tendayi Achiume, that European

colonialism used ethno-nationalist ideologies to "systemically exclude non-Europeans from effective citizenship status".⁴⁵

"Whenever the subject of structural racism is broached, EU policymakers are quick to refer to the EU Anti-Racism Action Plan as evidence of Europe seriously tackling structural racism. However, the new Migration Pact is a step in the opposite direction, signalling that those who do not fit imagined stereotypes of Europeanness are unwelcome – not due to Europe's inability to provide protection but solely because of their non-whiteness."

European Network Against Racism⁴⁶

⁴⁵ Ibid, para 40

⁴⁶ European Network Against Racism, 2023, [Structural Racism in the New European Union Pact on Migration: A devastating blow to the right to asylum](#). Policy Briefing.

CASE STUDY

Historical perspective on the right of movement⁴⁷

The historical development of migration law, including the European Court of Human Rights' stance on migration and racial discrimination, has consistently favoured the interests of the predominantly white population of today's global North.

United States

Shortly after the abolition of slavery in 1865, labour shortages prompted a treaty between the US and China in 1868, granting Chinese citizens the right to migrate. However, concerns about the possible erosion of white dominance led to the enactment of the Chinese Exclusion laws, marking a significant shift towards restricting Chinese immigration. The US Supreme Court's series of judgments known as the Chinese Exclusion cases (1889-1895) solidified the state's authority to control migration.

United Kingdom

The UK, like other European countries, granted independence to former colonies after WWII. European countries granted citizenship to former colonial subjects, allowing for free movement within and between their territories. However, the UK gradually dismantled this free mobility regime within the Commonwealth through legislation between 1962 and 1981, treating former colonial subjects as undesirable foreigners subject to more restrictive migration laws. This policy disproportionately affected non-white people from African and Asian Commonwealth countries, representing a reversal of the post-war mobility regime. Decolonisation restored sovereignty to former colonies, enabling them to assert control over migration. However, this formal equality did not translate into practical independence, as former colonial powers continue to this day to exert economic and political influence over their former colonies.⁴⁸

⁴⁷ Based on the intervention of Dr. Karin De Vries, Utrecht University at the PICUM-Equinox legal seminar organised in November 2023. See also: De Vries, K., & Spijkerboer*, T. (2021). *Race and the regulation of international migration. The ongoing impact of colonialism in the case law of The European Court of Human Rights*. *Netherlands Quarterly of Human Rights*, 39(4), 291-307.

⁴⁸ See also Tendayi Achiume, 'Migration as Decolonization' (2019) 71 *Stanford Law Review* 1509, 1539–1547

European Court of Human Rights (ECtHR)

In the 1985 case of *Abdulaziz, Cabales & Balkandali vs. UK* (1985),⁴⁹ three foreign-born women lawfully residing in the UK appealed against British immigration rules that denied residence permits to their husbands. The applicants claimed a violation of their right to family life and discrimination based on sex, race, and birth. The ECtHR granted the claim of sex discrimination but found that the British legislation did not discriminate on the grounds of race or birth. The Court acknowledged the right of states to control the entry of non-nationals into their territory. The Court also failed to consider the historical, social and policy context surrounding the adoption of British immigration restrictions, which allowed it to conclude that those restrictions were not aimed at limiting the arrival of people of colour.

49 ECtHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom* App no 9214/80, 9473/81 and 9474/81

Relationship between EU migration policies and racial inequalities

To explore the relationship between EU migration policies and racism, this section will consider several questions:

- Who can enter the EU, both for short stays and longer durations;
- How people are treated while living and working in the EU with an irregular migration status;
- The ways in which racial profiling is used to enforce migration measures;
- The ways in which people are forced to leave the territory.

Regulating who can enter the EU

At the core of European Union migration policies lies the regulation of entry into its territory, increasingly limiting the opportunities for safe and regular migration pathways,⁵⁰ with notable distinctions made on the basis of countries of origin.

Entry for short stay to the EU is regulated by the EU's common visa rules. Currently, the EU exempts 61 countries from the visa regime, two special administrative regions of China (Hong Kong and Macao) and one territorial authority that is not recognised as a state by at least one EU member state (Taiwan).⁵¹ Only two of 55 member states of the African Union are visa exempt (Seychelles and Mauritius).⁵² Furthermore, a recent study revealed that African visa applicants (despite their lower per capita application rates) encounter notably greater challenges in securing a Schengen visa than applicants from

other regions, with refusal rates reaching 30% in 2022 compared to the worldwide average of 17.5%.⁵³ The report suggests concerns about visa holders potentially overstaying the period of their visa as a primary reason for refusals, although there is a lack of evidence connecting this to decreased irregular migration.⁵⁴ Women of certain nationalities are also more likely to be refused access to visas or stopped at borders (usually airports) and summarily deported to their country of origin, when border guards suspect them of being victims of trafficking.⁵⁵

50 Rosenberg, A., 2022, [Racial Discrimination in International Visa Policies](#), *International Studies Quarterly*; Spijkerboer, T., 2018, [The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control](#), *European Journal of Migration and Law*, 20, 452-469.

51 See annex II of [Regulation \(EU\) 2018/1806](#) of the European Parliament and of the Council of 14 November 2018 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

52 The full list of African Union member states is available [here](#).

53 Taddele Maru, M., 2024, [Predetermined Bias: Comparing the Visa Rejection Rate of Africans versus the Rest of the World](#)

54 Ibid.

55 See for example, the Scottish Sun, 24 August 2017 '[100 sex slaves at airport: Around 100 sex slaves nabbed by border cops at Glasgow Airport in just nine months](#)'; Vuolajärvi, N. 2018, [Governing in the Name of Caring—the Nordic Model of Prostitution and its Punitive Consequences for Migrants Who Sell Sex](#)

The granting of visas also intertwines with socio-economic status.⁵⁶ A condition to grant or refuse visas, as set out by the EU Visa Code,⁵⁷ includes whether there is a 'risk' that the applicant would stay irregularly on the territory upon expiration of their visa. Additionally, possession of sufficient means of subsistence is crucial, as highlighted in Article 21(3)(b) and Article 21(5). Moreover, the EU Visa Handbook explicitly references applicants' socio-economic positions, considering factors such as employment situation, income regularity and level, "social status in the country of residence" (including examples such as "elected to public office, NGO representative; profession with a high social status: lawyer, medical doctor, university professor"), and ownership of property.⁵⁸ These criteria effectively stratify visa applicants based on their financial resources and social standing, perpetuating discrimination and inequality within the visa application process, and embedding assumptions about "risk" and deservingness.⁵⁹

When it comes to labour migration policies, national authorities tend to focus available work permits mainly for workers in highly-paid employment or for very specific skills shortages, perpetuating inequalities.⁶⁰

Bilateral labour migration agreements are also seen as a key tool to organise labour migration. Corridors are often created for people of a particular nationality and gender to work in particular jobs, resulting in very limited job opportunities based on nationality and gender.⁶¹ Data on first time permits issued for remunerated activities in the EU 27 member states in 2022, disaggregated by country of citizenship, shows that more than 47% of available permits were issued to citizens of 22 countries coded as Europe, whereas only 10% were issued to citizens of the 55 countries coded as Africa.⁶²

56 Spijkerboer, T. (2018). [The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control](#). *European Journal of Migration and Law*. 20. P. 457

57 [Regulation \(EC\) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas \(Visa Code\)](#), Article 21

58 [Annex to the Commission Implementing Decision amending Commission Decision C\(2010\) 1620 final as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas \(Visa Code Handbook I\)](#), C(2020) 395 f, P.70

59 Spijkerboer, T., 2018. [The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control](#). *European Journal of Migration and Law*. 20. P. 457

60 For more information, see PICUM, 2021, [Designing labour migration policies to promote decent work and social inclusion](#).

61 For example, since the 2001 bilateral agreement between Spain and Morocco, seasonal workers are hired in Morocco and brought to Spain for seasonal work in the harvesting of berries and soft fruits in the region of Huelva, Andalusia. While the agreement does not specify selection criteria based on gender, [women are particularly recruited](#). In 2020 the UN special rapporteur on extreme poverty and human rights called out the "shocking abuse" of migrants picking strawberries in Spain and in 2021 [Aljazeera released an investigation](#) which revealed the sexual harassment and exploitation women face from their employers.

62 Internal analysis based on Eurostat data on [First permits issued for remunerated activities by reason, length of validity and citizenship](#), last updated 15 December 2023. The Eurostat dataset on first permits issued for remunerated activities by reason, length of validity and citizenship (migr_resocc) normally includes the following categories: employment reasons, EU blue card, highly skilled workers, researchers and season workers and other employment reasons. For 2022, when analysing by country of origin no data was available for seasonal workers.

Table 1: First time permits issued by EU member states for remuneration disaggregated by country of citizenship in 2022⁶³

	Total	Percentage
Africa ⁶⁴	232,303	10,24%
Americas ⁶⁵	324,570	14,30%
Asia ⁶⁶	625,260	27,56%
Europe ⁶⁷	1,079,667	47,58%
Oceania ⁶⁸	5648	0,25%
Other ⁶⁹	1660	0,07%
Total	2,269,108	100,00%

Recent research⁷⁰ also shows that roughly one out of two university-educated migrants is overqualified for their jobs, compared to roughly one out of three EU citizens, and that this issue affected women more than men. It also found that policies focused on easing the recognition of foreign diplomas did not

seem to have substantial impact on improving labour market outcomes, indicating there remain additional barriers to migrant workers being able to access employment in their fields.

63 Ibid.

64 Angola, Cameroon, Central African Republic, Chad, Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, São Tomé and Príncipe, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Rwanda, Seychelles, Somalia, Uganda, Tanzania, Zambia, Zimbabwe, Algeria, Egypt, Libya, Morocco, South Sudan, Sudan, Tunisia, Western Sahara, Botswana, Lesotho, Namibia, South Africa, Eswatini, Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, The Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo.

65 Canada, United States, Antigua and Barbuda, Bahamas, Barbados, Cuba, Dominica, Dominican Republic, Grenada, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Belize, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, Venezuela

66 Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, China, Japan, Mongolia, North Korea, South Korea, Taiwan, Afghanistan, Bangladesh, Bhutan, India, Iran, Maldives, Nepal, Pakistan, Sri Lanka, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar/Burma, Philippines, Singapore, Thailand, Timor-Leste, Viet Nam, Armenia, Azerbaijan, Bahrain, Iraq, Israel, Jordan, Kuwait, Lebanon Palestine, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates, Yemen

67 Iceland, Liechtenstein, Norway, Switzerland, United Kingdom, British overseas countries and territories, Bosnia and Herzegovina, Montenegro, Moldova, North Macedonia, Albania, Serbia, Türkiye, Ukraine, Kosovo*, Georgia, Andorra, Belarus, Holy See, Monaco, Russia, San Marino

68 Australia, New Zealand, Fiji, Papua New Guinea, Solomon Islands, Vanuatu, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Cook Islands, Samoa, Tonga, Tuvalu

69 Recognised non-citizens, Stateless and unknown

70 Investigative journalism carried out by Lighthouse Reports, 'Brain Waste', 18 April 2024, available [here](#)

Unequal treatment in new EU asylum legislation

The Asylum Procedures Regulation, part of the EU Pact on Migration and Asylum⁷¹ which EU member states must fully implement by 2026, will lead to different asylum decisions on the basis of national origin, thus reinforcing racial inequalities in access to asylum through EU legislation. Applicants from a country with a rate of positive asylum decisions below 20% will be mandatorily conveyed into border procedures,⁷² which will likely lead to discrimination in terms of access to protection and automatic de facto detention on the grounds of nationality.

Poor living and working conditions in the EU

The EU and member states have developed policies with strict conditions for stay in the EU. People are often put in situations where they are dependent on an employer or spouse which makes them vulnerable to exploitation and abuse. According to Eurostat data, women are more likely to be on spouse-dependent visas than men.⁷³ If the relationship on which their status depends breaks down – for instance, because of domestic violence – they risk becoming undocumented.⁷⁴

People who are unable to access residence and work permits have limited job opportunities when residing irregularly. In the absence of accessible regularisation pathways, people often can only find

work - regardless of their education and training - in the sectors which have high levels of undeclared work, and often rely on undocumented workers, such as construction, hospitality, agriculture and domestic work. The workforce in some of these sectors is also highly gendered (for example, men are commonly employed in construction work and women in domestic, care and sex work). Workers are sometimes assigned different jobs in a workplace, and paid different wages for the same work, along lines of national or ethnic origin.⁷⁵ This contributes to reinforcing racial and gender biases in the country of migration and disproportionately exposes certain people to risks associated with particular jobs.⁷⁶

71 The EU Pact on Migration and Asylum is a set of legislative proposals and recommendations which was [proposed](#) by the European Commission in September 2020 and [adopted](#) in 2024. All the legislative files are available [here](#).

72 [Regulation \(EU\) 2024/1348](#) of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU

73 An internal analysis of Eurostat data on first permits by reason, age, sex and citizenship [migr_resfas] (last updated 30 May 2024) shows that in 2022, EU member states issued more permits for family reasons to women (59%) than men (41%). The analysis is based on data from all EU member states except Malta and Slovakia, for which no data was available. The data for family reasons is based on data provided by member states on residence permit issued to a third-country national for the purpose of family reunification under [Family Reunification Directive 2003/86/EC](#) (which makes the residence permit of the arriving spouse or unmarried partner dependent on their sponsor for at least five years), family unity under Article 23 of the [Qualification Directive 2011/95/EU](#) or relevant national legislation where the sponsor is a beneficiary of protection status.

74 PICUM, 2012, [Strategies to End Double Violence Against Undocumented Women Protecting Rights and Ensuring Justice](#)

75 PICUM, 2020, [A Worker is a Worker: How to ensure that undocumented migrant workers can access justice](#)

76 On the domestic and care sectors, see for example: Triandafyllidou, A., 2013, [Irregular migrant domestic workers in Europe: who cares?](#), p. 2; International Labour Organisation, 2013, [Promoting integration for migrant domestic workers in Europe: A synthesis of Belgium, France, Italy and Spain](#), p.13; Ricard-Guay, A., 2016, [Addressing demand in the context of trafficking in the domestic work sector: perspectives from seven European countries](#), DemandAT working paper; FRA, 2011, [Irregular migrants employed in domestic work](#); PICUM, 2018, Working paper: ['Shared concerns and joint recommendations on migrant domestic and care work'](#); On sex work, see for example: PICUM, 2019, [Safeguarding the human rights and dignity of undocumented migrant sex workers](#)

French labour court found systemic discrimination based on national origin and residence status

In 2019, a French labour court in Paris found an employer guilty of systemic discrimination against 25 undocumented Malian construction workers in the organisation of work, for assigning the more difficult and dangerous tasks to people based on their origin and irregular status.⁷⁷ This case shows how the interaction between national origin and residence status can be found to be discrimination on racial or other prohibited grounds.⁷⁸

People also have restricted access to social protection mechanisms and access to health, thus compounding their risk of poverty, destitution, homelessness, violence and exploitation.⁷⁹

They also may experience discrimination in the housing market, live in cramped, inadequate and expensive housing, and are relegated to accommodation that is spatially segregated.⁸⁰ In some European countries landlords can be criminalised for renting accommodation to undocumented migrants, due to transposition of the EU Facilitation Directive.⁸¹ The Facilitation Directive requires EU member states to adopt “effective, proportionate and dissuasive sanctions” for facilitating irregular migration.⁸² However, the lack of an explicit exclusion of normal interactions and transactions without undue financial profit in the Directive means that renting

accommodation to undocumented people can be considered a criminal offence.

National authorities in some countries require landlords to check the immigration status of tenants and can impose fines or criminal penalties on those renting to undocumented people.⁸³ Due to their irregular migration status, and especially in countries where renting to undocumented persons is criminalised, undocumented adults and children tend to be more vulnerable to exploitative landlords. Undocumented tenants may be unable to access existing complaint mechanisms to hold landlords to account, continuing the inadequate housing situation.⁸⁴

77 [Conseil de Prud'Hommes de Paris](#) of 17 December 2019 (n° RG F 17/10051)

78 See also: PICUM, 2022, [Guide to Undocumented Workers' Rights at Work under International and EU law](#), p. 55

79 PICUM, 2022, [A snapshot of social protection measures for undocumented migrants by national and local governments](#)

80 For the impact of inadequate housing on undocumented children's well-being and development, see PICUM, 2021, [Navigating Irregularity: The Impact of Growing up Undocumented in Europe](#); PICUM, 2021, [PICUM's contribution to the consultation of the UN Special Rapporteur on the right to adequate housing on housing discrimination and spatial segregation](#)

81 The criminalisation of landlords and other legitimate service providers may predate the Facilitation Directive. See Directorate General for Internal Policies of the Union, [Fit for purpose? The Facilitation Directive and the criminalisation of humanitarian assistance to irregular migrants: 2018 Update](#) for more info.

82 [Council Directive 2002/90/EC](#) of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

83 PICUM, 2013, [Housing and homelessness of Undocumented Migrants in Europe: Developing Strategies and Good Practices to Ensure Access to Housing and Shelter](#)

84 PICUM, 2021, [PICUM's contribution to the consultation of the UN Special Rapporteur on the right to adequate housing on housing discrimination and spatial segregation](#)

Criminalising migration

Migration law, as a subset of administrative law, regulates the relationship between the state and individuals and does not usually entail punitive features. However, policies are increasingly criminalising migration, meaning that they treat (undocumented) migrants and irregular migration through the lens of threat.

In turn, the logic and tools of criminal law⁸⁵ are increasingly being used to prevent and control movement, and to identify, monitor, apprehend and contain certain categories of non-citizens. This approach involves the blending of administrative and criminal law, also known as ‘cimmigration’. This often involves the use of criminal sanctions for

irregular entry or stay, including the employment of someone who does not have authorisation to work, and renting to an undocumented person.

Administrative law typically operates based on a set of fundamental principles, such as non-discrimination, proportionality, and transparency. These principles are intended to guide administrative officers in implementing the law judiciously. However, migration management often deviates from these principles, in ways that contradict established legal norms. This is particularly evident in the areas of immigration detention; the use of criminal law as a deterrent measure, and technological surveillance.⁸⁶

Administrative detention⁸⁷

Every year, more than 100,000 people are detained for immigration purposes in Europe.⁸⁸ In recent years, there has been a trend towards accepting the immigration detention of migrants on security grounds at the EU level. This is exemplified by the European Commission’s 2018 proposal to amend the Return Directive which includes a new ground for detention, which would allow states to detain people if they “pose a risk to public policy, public security or national security”.⁸⁹

Administrative immigration detention exemplifies the asymmetrical convergence between administrative and criminal law. This is because criminal law guarantees are not fully incorporated into the administrative detention regime.⁹⁰ This creates different fair trial guarantees for people accused of national security-related offences depending on their nationality and migration status. These factors will dictate whether they will be held in criminal pre-trial detention or administrative detention, the latter of which has lower safeguards.⁹¹

85 Defined as ‘the body of law that defines criminal offenses, regulates the apprehension, charging, and trial of suspected persons, and fixes penalties and modes of treatment applicable to convicted offenders’. The definition can be found at: <https://www.britannica.com/topic/criminal-law>

86 See also PICUM, 2024, [Between administrative and criminal law: an overview of criminalisation of migration across the EU](#)

87 There exist overall three types of administrative detention, namely pre-entry detention (often seen in airport procedures and zones d’attente in France), detention during asylum procedures and detention during the return procedure.

88 Global Detention Project, 2022, [Annual Report](#)

89 [European Commission Proposal for a directive of the European Parliament and the Council on common standards and procedures in member states for returning illegally staying third-country nationals \(recast\)](#)

90 Majcher, I. 2014, [Crimmigration in the European Union, the case of immigration detention](#); Legomsky, S.H. 2007, [The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms](#), *Washington & Lee Law Review*, 64 (2), pp. 469-528.

91 PICUM, 2024, [Between administrative and criminal law: an overview of criminalisation of migration across the EU](#)

CASE STUDY

Human consequences of “crimmigration” practices⁹²

Moussa Balde, a 22-year-old, was attacked on 9 May 2021 in the streets of Ventimiglia, Italy by three unknown men. After being briefly hospitalised for his injuries, the young man was taken to the Head of Police of Imperia, which ordered his confinement at the Pre-Removal Detention Centres of Turin in order to deport him. At the Pre-Removal Detention Centres he was placed in solitary confinement and was found dead on 23 May 2021.

Criminal law as deterrence

Criminal law is employed as a deterrent against migration, often penalising migrants for irregular border crossings or stay. States have increasingly turned to smuggling-related offences as a way to deter certain forms of migration. In 2023, media monitoring conducted by PICUM revealed at least 76 cases of migrants who were criminalised for the act of crossing EU borders on grounds of facilitation of irregular migration, smuggling and other charges.⁹³ Under counter-smuggling legislation, migrants (or “third country nationals”) face additional harsh treatment during legal proceedings, including lack of interpretation, limited or no access to legal aid, no contact with the external world, and prolonged pre-trial detention due to challenges in accessing alternative measures such as house arrest.⁹⁴ Criminal proceedings, including when they end in acquittals, can also have a life-long impact on the possibility of living regularly in the EU.

Research by other civil society organisations and activist groups also confirms this trend:

- Within Italy, the organisation ‘ARCI Porco Rosso’ reported that as of January 2024, it is supporting 107 individuals accused of ‘smuggling’, the majority of whom are currently held in criminal detention.⁹⁵
- In Greece, a recent report looking at the situation in the country’s prisons found that, as of February 2023, people convicted of smuggling formed the second largest group by crime, with 1,897 (almost 90%) being third-country nationals.⁹⁶ Alleged boat drivers are often identified on the basis of faulty evidence or unreliable testimonies.

Convictions are often issued after procedures characterised by lack of fair trial guarantees, such as unavailable or inadequate access to legal aid and translation.⁹⁷

92 ASGI, 2021, [Fleeing misery, seeking refuge in Italy, being destroyed by the state: when Europe denies the human. The Black book on the Pre-Removal Detention Centre \(CPR\) of migrants in Turin](#)

93 PICUM, 2024, [Between administrative and criminal law: An overview of criminalisation of migration across the EU](#)

94 Ibid.; ARCI Porco Rosso and Alarm Phone, 2021, [From Sea to Prison: The Criminalization of Boat Drivers in Italy](#)

95 Arci Porco Rosso, 2024, [Senza Frontiere: La Criminalizzazione Dei Cosiddetti Scafisti Nel 2023](#)

96 Borderline Europe, 2023, [The Systematic criminalization of migrants driving a boat or car to Greece.](#)

97 Borderline Europe, 10 January 2023, [As Long As You Can Still Listen: The Criminalization of Migrant Boat Drivers in 2022](#); Borderline Europe, 2023, [The Systematic criminalization of migrants driving a boat or car to Greece.](#)

Under the new EU Return Border Procedure regulation, border and accelerated procedures can be applied to people who are considered a threat to national security and public order, including unaccompanied children.⁹⁸ People conveyed to such procedures will not only be more at risk of being detained, but will have limited safeguards against deportation if their asylum application is rejected.⁹⁹

The new Schengen Borders Code also embraces a very harmful narrative which assumes that people crossing borders without formal authorisation are a threat to the EU and subsequently proposes to increase policing.¹⁰⁰ It also prescribes that member

states take any necessary measure to preserve “security, law and order”, without any clear proportionality assessment, if a large number of migrants attempt entering the country irregularly “en masse and using force”.

Finally, the use of criminal law as a deterrent also extends to people engaged in humanitarian action and solidarity efforts towards migrants, perceived and labelled as engaging in “illicit” activity and causing harm to society, also known as ‘criminalisation of solidarity’.¹⁰¹

Criminalisation of unauthorised entry, transit or residence under EU law

The Facilitators' Package (comprising Facilitation Directive 2002/90¹⁰² and Framework Decision 2002/946¹⁰³) is the main EU legislative instrument that defines the criminal offence of facilitation of unauthorised entry, transit or residence and sets out the related criminal sanctions. The Facilitation Directive leaves it up to EU member states whether to exempt or to criminalise civil society organisations (CSOs) and individuals who provide assistance to migrants who entered or transited a country irregularly. In November 2023, the European Commission published a proposal for a new Facilitation Directive.¹⁰⁴ The proposal for a new Facilitation Directive fails to adequately address the risk of criminalisation of migration and solidarity, while adding new, controversial grounds for criminalisation. For a more detailed analysis of the proposal, see PICUM's [website](#).

98 [Regulation \(EU\) 2024/1349](#) of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation (EU) 2021/1148

99 PICUM, 2024, [81 Civil Society Organisations call on MEPs to vote down harmful EU Migration Pact](#)

100 Council of the EU, 24 May 2024, [Schengen area: Council adopts update of Schengen Borders Code](#), Press Release; [Regulation of the European Parliament and of the Council amending Regulation \(EU\) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 2021/0428\(COD\)](#)

101 PICUM, 2023, [More than 100 people criminalised for acting in solidarity with migrants in the EU in 2022](#); PICUM, 2024, [Cases of criminalisation of migration and solidarity in the EU in 2023](#)

102 [Council Directive 2002/90/EC](#) of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence

103 [2002/946/JHA](#): Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence

104 [Proposal for a Directive of the European Parliament and of the Council laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union, and replacing Council Directive 2002/90/EC and Council Framework Decision 2002/946 JHA](#)

CASE STUDY

Solidarity responses to the criminalisation of boat captains¹⁰⁵

Since 2013, nearly 3,200 individuals have been arrested in Italy for their involvement in driving boats bringing people to EU borders.¹⁰⁶

The crime of facilitating border crossing is entrenched in law, leading to the incarceration of those who have tried to help both themselves and others in seeking to reach the EU. Articles 12 and 12 bis of the Italian Immigration Act criminalise the facilitation of irregular entry and stay, with penalties up to 30 years imprisonment and fines of up to 15,000 EUR per transported person.¹⁰⁷

Trials often lack adequate translation and interpretation services, with state-appointed lawyers ill-equipped to provide proper representation. Witness testimonies, often obtained under duress, form the basis of many accusations, resulting in plea deals and harsh sentences. Post-release, individuals face administrative detention and deportation, perpetuating a cycle of incarceration and uncertainty.¹⁰⁸

To support captains facing these charges, there have been multiple initiatives:

- [Captain Support Network](#): A transnational network advocating against the criminalisation of individuals involved in migrant transport. It conducts research, provides social-legal support, monitors trials, and campaigns against criminalization across Europe.
- [From Sea to Prison Project](#): Based in Italy, this initiative offers social-legal support to criminalised individuals, both inside and outside prison. It collates information on criminalisation, supports legal efforts, and raises awareness within solidarity networks.

¹⁰⁵ Based on Sarah Traylor's (Alarm Phone) intervention with PICUM-Equinox legal seminar organised in November 2023.

¹⁰⁶ Borderline Europe, 2024, [Without Frontiers: The criminalization of migrant boat drivers in 2023](#)

¹⁰⁷ "Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero", law n. 286 of 1998.

¹⁰⁸ ARCI Porco Rosso and Alarm Phone, 2021, [From sea to prison: the Criminalisation of boat drivers in Italy](#)

Technological surveillance

The use of technology for immigration enforcement further reinforces the criminalisation of migrants, amplifying surveillance and control measures.

CASE STUDY

Eurodac: An EU-wide discriminatory surveillance database¹⁰⁹

In 2003, the EU put in place an EU-wide database called 'Eurodac'. Created to implement the Dublin system¹¹⁰ and record the country responsible for processing asylum claims, the Eurodac database originally stored only limited information, mostly fingerprints, on just two categories of people: asylum-seekers and people apprehended irregularly crossing the EU's borders. Following a 2013 reform granting police access to the database, the EU has continued to expand Eurodac's scope, detaching it from asylum procedures and rebranding it as a system serving broader immigration and law enforcement purposes.

The latest reform – heavily criticised by civil society¹¹¹ – will transform Eurodac into an extensive identification tool. This reform includes the incorporation of additional personal data such as names, dates of birth, family ties, and travel and identity documents on a wider range of people: those resettled, relocated, disembarked following search and rescue operations or arrested at borders or within national territories. In addition to fingerprints, the reform seeks to include facial images in the central database in order to use of facial recognition and lowers the age of children registered from 14 to 6 years old. Integration into the interoperability framework¹¹² further complicates data protection efforts by interconnecting multiple databases within migration and law enforcement domains.

These surveillance efforts are supported by European funds, with increased operational roles assumed by EU agencies like FRONTEX and EUROPOL.¹¹³ However the European Digital Rights (EDRi) network has indicated¹¹⁴ that the European Data Protection Supervisor has raised concerns about the necessity and proportionality of the proposed reforms, emphasising the potential for increased arbitrariness and surveillance in migration management procedures.¹¹⁵

109 Based on Chloe Berthelemy (European Digital Rights – EDRi) intervention with PICUM-Equinox legal seminar organised in November 2023. See also: EDRI, 2021, [Warnings against arbitrariness and mass surveillance in EURODAC](#)

110 The [Dublin regulation](#) establishes the criteria and mechanisms for determining which EU Member State is responsible for examining an asylum application.

111 EDRI, 2023, [Civil society calls for an end to the expansion of EU's EURODAC database](#)

112 PICUM, 2020, [Digital technology; policing and migration – what does it mean for undocumented migrants?](#); PICUM and Statewatch, 2019, [Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status](#)

113 EDRI, 2022, [Building the biometric state: Police powers and discrimination](#)

114 EDRI, 2022, [Warnings against arbitrariness and mass surveillance in EURODAC](#)

115 European Data Protection Supervisor letter to Members of the European Parliament, 15 July 2022, [Replies to the additional questions on data protection in the Proposal for a recast of Eurodac Regulation](#)

CASE STUDY

Digital surveillance in Greece¹¹⁶

In recent years, Greek police have carried out abusive and often discriminatory stops and searches of migrants and other marginalised populations.¹¹⁷ Homo Digitalis, a non-governmental organisation focused on the protection of digital rights in Greece, has on numerous occasions raised concerns about how Greece is increasingly turning to digital technologies to enhance surveillance measures targeting migrants, raising concerns about data protection and human rights violations.¹¹⁸ Here are three examples of these practices:

Biometric Police Gadgets

Since 2019, the police have used smart portable devices co-funded by the EU during police stops, primarily targeting third-country nationals.¹¹⁹ These devices collect biometric data and personal information, potentially compromising privacy rights. Despite a complaint filed with the Greek Data Protection Authority,¹²⁰ the deployment of these gadgets has continued, highlighting regulatory challenges in safeguarding migrants' rights. The Greek police have used these powers in a discriminatory manner to target people based on their race, perceived nationality, ethnicity, or physical appearance.¹²¹

Centaur and Hyperion Projects

The EU-funded surveillance systems Centaur and Hyperion projects aim to strengthen security measures in Closed Control Access Centers hosting asylum seekers.¹²² Utilising closed-circuit television (CCTV), drones, and AI behavioural analytics, these projects place individuals within the facilities under surveillance, signalling alarms of irregular behaviour and controlling entry and exit through biometric authentication. The introduction of these systems raises concerns about the extensive surveillance of vulnerable populations. Following a complaint submitted by Homo Digitalis and its partners,¹²³ the Hellenic Data Protection Authority identified significant violations of the EU's General Data Protection Regulation (GDPR)¹²⁴ in this case by the Ministry of Immigration and Asylum and decided to impose in April 2024 a fine of €175,000 euros.¹²⁵

¹¹⁶ Based on Lamprini Gyftokosta (Homo Digitalis) intervention during PICUM-Equinox's legal seminar organised in November 2023.

¹¹⁷ Human Rights Watch, 2013, [Greece: Abusive Crackdown on Migrants Police Sweeps, Invasive Searches, Arbitrary Detention](#)

¹¹⁸ Chelioudakis, E. 2024, [Unpacking AI-enabled border management technologies in Greece: To what extent their development and deployment are transparent and respect data protection rules?](#)

¹¹⁹ Human Rights Watch, 2022, [Greece: New Biometrics Policing Program Undermines Rights Risk of Illegal Racial Profiling and Other Abuses](#)

¹²⁰ Homo Digitalis, 2024, [Request for the Greek DPA's opinion on the Greek Police Agreement on Smart Policing](#)

¹²¹ Human Rights Watch, 2013, [Unwelcome Guests: Greek Police Abuses of Migrants in Athens](#)

¹²² Algorithm Watch, 2021, [Greek camps for asylum seekers to introduce partly automated surveillance systems](#); Apostolis Fotiadis, I. and Malichudis, S. 2022. [Asylum Surveillance systems launched in Greece with data safeguards](#), Balkan Insight.

¹²³ Homo Digitalis, 2022, [The Hellenic DPA is requested to take action against the deployment of ICT systems IPERION & KENTAUROS in facilities hosting asylum seekers in Greece](#)

¹²⁴ [Regulation \(EU\) 2016/679](#) of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance)

¹²⁵ European Data protection Agency, 2024, [Ministry of Migration and Asylum receives administrative fine and GDPR compliance order following an own-initiative investigation by the Greek SA](#)

Social Media Monitoring App

The Hellenic Coast Guard's procurement of a social media monitoring software tool further expands its surveillance capabilities. This tool collects, analyses, and stores publicly displayed data from platforms including Facebook, Twitter, and Instagram, enabling detailed profiling and monitoring of an indeterminately large number of users of the social networks without indicating the purpose of the processing operations, the legal bases that allow them and any other safeguards for the protection of personal data. Despite legal challenges and complaints regarding privacy infringements submitted by Homo Digitalis together with the Hellenic League for Human Rights, HIAS Greece, Privacy International and a researcher to the Data Protection Agency on February 14, 2022, the deployment of such tools continues.¹²⁶

Reporting obligations

Some countries require public officials to report undocumented people to immigration authorities.¹²⁷ The nature and extent of this data sharing depends on the public authorities and sector, but in the countries with such obligations, this type of sharing appears to be quite common between the police and immigration authorities.

Recently Sweden¹²⁸ and Finland¹²⁹ have announced their intention to enhance data sharing between immigration enforcement and a wide range of service providers as well as educational facilities.

In Germany, the requirement for social welfare offices to report undocumented migrants to the immigration authorities has been subject to criticism from civil society organisations.¹³⁰ A complaint was addressed to the European Commission in 2021 and relaunched in 2024 claiming a breach of EU law by German authorities.¹³¹ Although the government pledged to remove the duty to report undocumented people in its 2021 coalition programme,¹³² the UN Committee on the Elimination of Discrimination against Women noted in its 2023 concluding observations that Germany has no intention of repealing or amending section 87 of the Residence Act.¹³³

126 Homo Digitalis, 2022, [The Hellenic Coast Guard wants to acquire social media monitoring software: The Hellenic DPA is urged to exercise its investigative and supervisory powers](#), Karzi, V. 2023. Franet National contribution to the Fundamental Rights Report 2023: Greece.

127 A 2023 Swedish Parliament report found that Belgium, Bulgaria, Croatia, Estonia, Germany, Lithuania, Poland, and Slovenia have national provisions requiring some civil servants to report undocumented people. Hungary and Austria indicated that there is a reporting obligation for law enforcement authorities. Other countries (Finland and Ireland) also pointed out that there are national rules on the exchange of information between authorities. All member states except Greece, Italy, Malta, Spain and the Czech Republic submitted replies. See: Sveriges Riksdag, 2023, [Rapport från utredningstjänsten informationskyldighet beträffande personer utan tillstånd](#), Dnr 2022:1294 For further information, contact the Research Service of the Swedish Parliament: www.riksdagen.se

128 [Tidöavtalet: Överenskommelse för Sverige](#); For more information see Lindt, J., Lundberg, A., Scott, H., Aberg, K., 2023, [Sweden: government considers obligation to denounce undocumented migrants](#), Blog published on PICUM website.

129 Finnish Government, 2023, [A strong and committed Finland: programme of the Prime Minister Petteri Orpo's Government](#)

130 See: <https://gleichbehandeln.de/>

131 Gesellschaft Für Freiheitsrechte and Ärzte Der Welt, 2024, [Beschwerde zur Europäischen Kommission Verstoß der aufenthaltsrechtlichen Übermittlungspflicht in § 87 Abs. 2 S. 1 Nr. 1 AufenthG gegen Art. 5 Abs. 1 lit. b\), Art. 6 Abs. 4 Datenschutzgrundverordnung und Art. 8 Abs. 1 sowie Art. 35 Europäische Grundrechtecharta](#).

132 Coalition agreement 2021-2023 ("[Koalitionsvertrag 2021-2023](#)") between SPD, Bündnis 90/Die Grünen und FDP

133 Committee on the Elimination of Discrimination against Women Concluding observations on the ninth periodic report of Germany, [CEDAW/C/DEU/CO/9](#)

Discrimination in reporting obligations

Reporting obligations constitute direct discrimination based on residence status. In 2016, the Council of Europe European Commission against Racism and Intolerance called on state parties to ensure “no public or private bodies providing services in the fields of education, health care, housing, social security and assistance, labour protection and justice are under reporting duties for immigration control and enforcement purposes”.¹³⁴ Reporting obligations also constitute a violation of the right to privacy and data protection enshrined in the EU Charter of Fundamental Rights and the EU General Data Protection Regulation.

The absence of a formal requirement to report immigration status does not mean that data sharing does not happen informally or in an ad hoc manner in other member states. Moreover, there are difficulties in monitoring informal data sharing arrangements or practices among authorities that can have immigration consequences for individuals. There is some evidence that there is an increasing cross-sector data sharing. For instance, in the Netherlands a digital welfare fraud detection system called *Systeem Risico Indicatie (Syri)* used “migration background” to uncover alleged fraud.¹³⁵

Implementing rules targeting people in an irregular situation often results in racial or ethnic profiling, perpetuating prejudice and discrimination. Already in 2012, research by EU Fundamental Rights Agency (FRA) highlighted that immigrants are more likely to be victims of hate crime and other forms of criminal victimisation.¹³⁶

134 Council of Europe European Commission against Racism and Intolerance, 2016, [General Policy Recommendation No° 16 on safeguarding irregularly present migrants from discrimination](#)

135 Borgesius, F. And van Bekkum, M., 2021, [Digital welfare fraud detection and the Dutch Syri judgement](#)

136 FRA, 2012, [Making hate crime visible in the European Union: acknowledging victims' rights](#)

Racial profiling and migration control

Racial profiling constitutes a specific form of racial discrimination, which the European Commission against Racism and Intolerance (ECRI) defines as “use by the police, with no objective or reasonable justification, of grounds such as ‘race’, colour,

language, religion, citizenship or national or ethnic origin in control, surveillance or investigation activities”.¹³⁷ There is evidence of this practice at the EU’s external and internal borders, but also in people’s daily life, whether undocumented or not.

External and internal borders

Research showed that 79% of surveyed border guards at airports rated ethnicity as a “helpful indicator” to identify people attempting to enter the country in an irregular manner before speaking to them.¹³⁸ In the context of criminalisation of sex work and anti-trafficking initiatives, migrants and people of colour – cis and transgender migrant women of colour in particular – are disproportionately subject to police harassment and targeted for immigration enforcement.¹³⁹

The reform of the Schengen Borders Code¹⁴⁰ explicitly allows member states to carry out police checks near internal EU borders for migration control, which, in practice, is likely to be conducted on the basis of racial profiling.¹⁴¹ In other words, the new Schengen Border Code creates two parallel regimes, one that upholds free movement for selected categories of people, and one where people, usually from racialised communities, can be stopped and checked at any given time. The new screening procedure for undocumented people apprehended within the territory of EU member states also risks encouraging discriminatory profiling, which would strongly rely on racial, ethnic, national, or religious characteristics.¹⁴²

137 Council of Europe European Commission against Racism and Intolerance, [General Policy Recommendation n°11](#)

138 FRA, 2014, [Fundamental rights at airports: border checks at five international airports in the European Union](#)

139 PICUM, 2019, [Safeguarding the human rights and dignity of undocumented migrant sex workers](#); PICUM, 2024, [Submission to Special Rapporteur on violence against women and girls on prostitution and violence against women and girls](#); European Sex workers Rights Alliance, 2022, [Sex Work & Racism: The Impact of Structural Racism on Racialised Sex Workers in Europe and Central Asia](#)

140 On 24 April 2024, the European Parliament [approved the new rules](#), despite a call signed by 132 civil society organisations [to MEPs to uphold fundamental rights and reject harmful Schengen Borders Code recast](#)

141 PICUM, 2024, [Racial profiling key element in the new deal on the Schengen Borders Code](#); FRA, 2023, [Police stops and minorities: understanding and preventing discriminatory ethnic profiling](#)

142 PICUM et al., 2023, [Joint Civil Society Statement on Article 5 of the EU Screening Regulation](#).

CASE STUDY

Discriminatory controls at French borders¹⁴³

For over three decades, the National Association for Border Assistance for Foreigners ([Anafé](#)) in France has been dedicated to upholding the rights of foreign individuals encountering difficulties at borders or transit zones by providing legal assistance and monitoring border police practices. Their work extends to people arrested at French airports, both internal and external borders, where they witness firsthand how border controls often supersede the protection of individuals' rights, especially for those fleeing discrimination.

External borders

Several mechanisms contribute to racial profiling at the French external borders. One such example is the strict visa policy, particularly concerning airport transit visas. These visas, often difficult to obtain, disproportionately affect individuals from certain regions, hindering their access to the territory.

France also has in place a legal regime of holding centres / transit zones ("zones d'attente") since 1992, which inspired the border procedures introduced in the EU Pact on Migration and Asylum.¹⁴⁴ People can be held in the holding centres (particularly in airports, ports and international train stations) for a maximum period of 26 days. Access to the territory is refused because the border police consider that these individuals do not meet the conditions of entry and/or may be suspected of being a "migration risk."

Civil society organisations have documented numerous human rights violations in transit zones: individuals may be subject to inhumane conditions of confinement, violations of the right to asylum, difficulty or lack of access to care, failure to take vulnerabilities into account, confinement of isolated or accompanied children, lack of access to an interpreter, a lawyer, a judge, no access to a telephone as well as police violence.¹⁴⁵

143 Based on Laure Palun (Anafé) intervention with PICUM-Equinox legal seminar organised in November 2023. See also Anafé, 2020, [Refuser l'enfermement: Critique des logiques et pratiques dans les zones d'attente. Rapport d'observations 2018-2019.](#)

144 Anafé, 2022, [Screen, detain, deport - Analysis of the provisions applicable to borders in the New European Pact on Migration and Asylum](#)

145 Anafé, Groupe accueil solidarité, Gisti, La Cimade, MRAP, 2022, [Rapport Alternatif \(France\) Communication conjointe de l'Anafé, le Groupe accueil solidarité, le Gisti, la Cimade et le MRAP sur les droits présenté au Comité des droits de l'homme en vue de l'examen périodique universel des personnes étrangères dans les zones d'attente](#)

Internal borders

In 2015, France reintroduced internal border controls (although the Schengen Borders Code sets a limit of six months for such measures), which further compounds these issues. The Schengen Borders Code, revised in 2024,¹⁴⁶ does not solve this situation. In 2022, the Court of the European Union (CJEU) decided that such controls contravene European Union law, except in the presence of a serious and inherently new threat to public policy or internal security. The diversion of the initial purpose of reintroducing border controls for the purposes of migration controls highlights a drift in the application of internal border policies in France.¹⁴⁷

Despite legal challenges, internal border controls persist, resulting in discrimination, illegal pushbacks, and a rise in migrant deaths.¹⁴⁸ Additionally, the criminalisation of activists supporting migrants adds to the institutional violence and stigmatisation faced by migrants.

146 Council of the EU, 24 May 2024, [Schengen area: Council adopts update of Schengen Borders Code](#), Press Release; [Regulation of the European Parliament and of the Council amending Regulation \(EU\) 2016/399 on a Union Code on the rules governing the movement of persons across borders, 2021/0428\(COD\)](#)

147 Anafé, 2024, [Droits des personnes exilées aux frontières intérieures : le gouvernement sommé de revoir sa copie](#), Communiqué de presse inter-associatif ; Anafé, 2023, [Les pratiques de la France à la frontière franco-italienne jugées non conformes par Luxembourg](#), Communiqué de presse inter-associatif

148 Anafé, La Cimade, Médecins du Monde, Médecins sans Frontières, Secours Catholique-Caritas France, 2022, [Rapport Alternatif \(France\) Communication conjointe de l'Anafé, La Cimade, Médecins du Monde, Médecins sans Frontières, Secours Catholique-Caritas France sur les droits aux frontières intérieures terrestres \(frontière franco-italienne et frontière franco-espagnole\) présenté au Comité des droits de l'homme en vue de l'examen périodique universel](#)

CASE STUDY

Impact of racial profiling on documented racialised communities¹⁴⁹

Documented people have been targeted by racial profiling.

Student from the Congo

Junior, a young student from Congo, arrived in Belgium with a valid study visa. However, upon arrival at the airport, he was subjected to interrogation by policy officers regarding his studies and ultimately placed in immigration detention. Despite winning the initial case, the Belgian state appealed, arguing that possessing a visa does not guarantee entry, and individuals can be detained even with a valid visa. Although Junior was finally granted access to the territory,¹⁵⁰ this case sheds light on the systemic barriers faced by racialised individuals in accessing their rights upon entry into a country.

Dutch citizen

Upon returning from a conference to Eindhoven Airport, Dutch citizen Mpanzu Bamenga encountered racial profiling at the border in 2018.¹⁵¹ He observed that border police disproportionately targeted black individuals while allowing white individuals to pass without scrutiny. When Bamenga raised concerns and spoke out on social media, he faced intimidation and threats from the border police. Despite efforts to challenge these discriminatory practices through legal avenues and media engagement, initial court rulings upheld the border police's actions, citing the need for differentiation between what they distinguished as "Dutch" and "non-Dutch" individuals. In 2023, the Dutch Court of Appeals overturned a lower-court ruling and prohibited the country's border police from using racial profiling to carry out identity checks at borders.¹⁵² This case exemplifies and underscores the importance of advocacy and legal action in challenging discriminatory policies.

149 Based on the interventions of Selma Benkhelifa (Progress Lawyers Network) and Mpanza Bamenga (Member of the House of Representatives of the Netherlands) intervention at PICUM-Equinox legal seminar organised in November 2023.

150 The Bulletin, 2021, [Congolesse student facing deportation allowed to stay in Belgium](#)

151 Systemic Justice, 2023, [Strategic litigation: A guide for legal action](#)

152 Politico, 2023, [Dutch police are guilty of racial profiling, court rules](#)

In daily life

The enforcement of migration policies, often characterised by racial profiling, has far-reaching implications, particularly for racialised communities. Research by the EU Fundamental Rights Agency

shows that people from an ethnic minority background are disproportionately affected by police stops, both when they are walking and when in a vehicle.¹⁵³

CASE STUDY

Les Roses d'Acier: Solidarity and activism among Chinese sex workers in France¹⁵⁴

The emergence of Chinese sex workers in certain Parisian neighbourhoods, notably Belleville in east Paris, has been a response to shifts in the industry and increased policing. Facing intensified scrutiny and legal restrictions, many have transitioned from street-based work to online platforms. In 2014, in reaction to these challenges, Chinese migrant women in precarious situations and Chinese sex workers in France united to establish the association "Les Roses d'Acier" (Steel Roses). Beyond advocating for their profession, the group focuses on community initiatives to combat violence and isolation.

By migrating to France from China, these women aspired to support their families amid limited social protection in their home country. However, restrictive immigration policies and employment barriers hinder their endeavours. Stigmatised as women, migrants, and sex workers, they navigate complex situations, often engaging in street work, online solicitation, and massage parlours.

Les Roses d'Acier tackles various challenges, from linguistic barriers to access to healthcare, through tailored French language courses and emergency support funds. Although sex work is legal in France, legislative measures like client criminalisation¹⁵⁵ and racial profiling persist, disproportionately affecting Chinese sex workers. In the run up to the 2024 Olympics, repression has intensified and the police practice daily checks in Belleville. Likewise, checks at train stations outside of Paris (e.g. in regions) are almost systematic when the police see an Asian woman traveling alone.

The organisation employs strategic advocacy to counter discrimination, striving to elevate marginalised voices and secure dignity and equity.

153 FRA, 2021, [Police stops in Europe: everyone has a right to equal treatment](#)

154 Based on the intervention of Ting Chen (Roses d'Acier) during PICUM-Equinox legal seminar organised in November 2023. See also, Le Bail, H. 2022. [Les Roses d'Acier : précaires, stigmatisées et engagées](#), N° 133 de Plein droit, la revue du Gisti.

155 Client criminalisation refers to the criminalisation of the use of services provided by sex workers. This has been implemented in several countries such as Sweden, Norway, France and Ireland. For more information, see the European Sex Workers Rights Alliance [website](#).

CASE STUDY

Immigration raids and racist state violence in the United Kingdom¹⁵⁶

"It was around 7am in the morning. My children were getting ready for the school. I was with my two-year-old lying in bed. They [immigration officers] banged the door. Not sure whether it was my son or daughter who went to the door to answer. I heard them saying "we want to speak to your mum." Before they [children] come in to let me know, these officers already stormed into the flat. They were already screaming "you are under arrest blah blah." They came straight into my room. [They were] three women and four men. So, seven of them . . . They asked me: "do you know why we are here?" I said "I don't know; I had put an application." They said, "We will look into that later, for now you will need to come with us." They asked us to pack "fast, fast." I started packing. I was in shock. Like, I could not think, I was confused. My children were getting ready for school and now we are packing everything. We didn't have much time to pack. We didn't have much time even to have breakfast. We left pretty much everything behind [i.e. belongings]. They [officers] bought two/three bags, but it was not enough to put things inside. In less than an hour after they came, we packed whatever we could, and got put into that van. I could not call anyone for help, as they [officers] took my phone away."

(Interview with Mercy; in Bhatia and Burnett, 2022)¹⁵⁷

Migration raids, a key aspect of internal border policing, have become increasingly frequent since the late 1990s. In a one-year period (2019-2020) the UK Home Office allocated £392 million for immigration enforcement, including raids.

While the UK government justifies these actions as necessary for economic and community benefits, they primarily serve to create a hostile environment for irregular migrants, denying them access to essential services and basic rights. Dawn raids and workplace enforcement are common tactics used to enforce immigration laws, often leading to traumatic experiences for migrants and their families. These act as a form of migrant kidnapping and inflicting deliberate suffering. Mercy, for instance, clearly highlights the fear (of the unknown), along with elements of forcible entry, coercion, taking away the means of contact with the outside world, asportation, relocation and traumatisation. There is a degree of (fearful) acquiescence to authority, so as to avoid confrontation with seven officers. The children subjected to raids also experience a profound sense of separation, loss and confusion, and become acutely aware of race/ism.

¹⁵⁶ Based on Dr Monish Bhatia (University of York) intervention at PICUM-Equinox legal seminar organised in November 2023. See also: Bhatia, M & Burnett, J. 2022. [Immigration Raids and Racist State Violence](#). *State Crime Journal*. Vol. 11(1):33-51.

¹⁵⁷ Bhatia, M & Burnett, J. 2022. [Immigration Raids and Racist State Violence](#). *State Crime Journal*. Vol. 11(1):33-51., p. 46.

Raids not only create fear, but they operate in conjunction with strategies used to force those vulnerable to immigration enforcement to leave the country “voluntarily” so as not to be caught and deported. The purpose of *removal by attrition* is supposedly to increase the probability of irregularised migrants to “self deport” without the need of intervention from the immigration authorities. Nonetheless, such attrition does not work and Home Office data showed that there has been a steady decline in so-called ‘voluntary returns’ between 2015-2020.¹⁵⁸

However, resistance is emerging, with communities mobilising to disrupt raids and challenge the narrative surrounding immigration enforcement. Efforts like the Anti-Raids Network¹⁵⁹ aim to inform the public and raise awareness about the destructive impact of these operations, signalling a shift towards greater solidarity and advocacy for migrant rights.

158 Bhatia, M & Burnett, J. 2022. *Immigration Raids and Racist State Violence*, State Crime Journal. Vol. 11(1):33-51., p. 46-47

159 <https://antiraid.net/about/>

Externalisation of EU migration control

The EU and its member states' policies on "externalisation" aim to outsource border controls outside of the EU borders, to third countries.¹⁶⁰ The EU Pact on Migration and Asylum includes numerous measures designed to enhance operational cooperation and collaboration to advance this agenda.

Despite evidence suggesting the limited effectiveness of externalisation strategies,¹⁶¹ the EU has intensified its efforts to control migration by implementing 'conditionalities' across diverse policies and instruments. These conditionalities are tailored to specific countries and policy areas related to return and readmission. Key examples include visa and readmission, macroeconomic assistance and trade relations.

Visa and readmission

The EU Visa Code¹⁶² allows for the imposition of visa restrictions on nationals of countries deemed to be insufficiently cooperating with readmissions. The European Commission implemented restrictive measures towards The Gambia¹⁶³ in 2021 and threatened to do so with Iraq¹⁶⁴ and Bangladesh (2021)¹⁶⁵ Senegal (2022),¹⁶⁶ and Ethiopia (2023).¹⁶⁷

With the exception of the Eastern neighbourhood of the EU, even for nationals of cooperating countries, rhetoric around expanding regular migration and mobility has yet to translate into less burdensome visa requirements and substantial labour migration schemes.¹⁶⁸

160 Jones, C. Lanneau, R. and Maccanico, Y. 2022. [Access denied: Secrecy and the externalisation of EU migration control](#). Heinrich Böll Stiftung European Union Office and Statewatch.

161 Spijkerboar, T. 2023. [Asylum for containment: the bankruptcy of conditionality](#); Stutz, P. and Trauner, F. 2021. [The EU's 'return rate' with third countries: Why EU readmission agreements do not make much difference](#). *International Migration* Volume 60, Issue 3.; ECRE; 2020. [Migration Control Conditionality: a flawed model](#) ECRE's assessment of the flaws in attaching migration-related conditionality to EU development funding

162 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), Article 25a

163 Council Implementing Decision (EU) 2021/1781 of 7 October 2021 on the suspension of certain provisions of Regulation (EC) No 810/2009 of the European Parliament and of the Council with respect to The Gambia

164 Proposal for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Iraq, COM/2021/414 final

165 Proposal for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Bangladesh, COM/2021/412 final

166 Proposal for a Council implementing decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Senegal, COM(2022) 631 final

167 Proposal for a Council Implementing Decision on the suspension of certain provisions of Regulation (EC) 810/2009 of the European Parliament and of the Council with respect to Ethiopia, 2023/0344(NLE)

168 Mercator Dialogue on Asylum and Migration, 2020, [European and African perspectives on asylum and migration policy: Seeking common ground](#), 2020 MEDAM Assessment Report on asylum and migration policies in Europe, Kiel: IfW, p.28.

Macroeconomic assistance and trade relations

One of the EU's trade policy tools is the 'Generalised Scheme of Preferences' (GSP), which grants eligible developing countries preferential access to the EU market through reduced tariffs on their exports.¹⁶⁹ In 2021, the European Commission proposed updating this scheme to link trade preferences with cooperation on readmission. In other words, non-EU countries that agree to cooperate with readmission would receive preferential access to the EU market.¹⁷⁰ Recently, the EU has also

increased its use of financial aid and investments to gain cooperation from key countries along major migration routes. For instance, in 2023, the EU and Tunisia signed an agreement covering various areas, including migration. This agreement includes support for the return and readmission of Tunisian nationals irregularly residing in the EU, with the EU providing capacity building measures and funding to facilitate returns from Tunisia to their countries of origin.¹⁷¹

EU development aid

The Neighbourhood, Development and International Cooperation Instrument (NDICI) fund for the 2021-2027 programming period allocates ten percent of its funding to migration-related actions.¹⁷² Part of these resources, as outlined in the Commission's action plan on return and reintegration, will be utilised to

facilitate cooperation on readmission, voluntary returns, and sustainable reintegration.¹⁷³ However, research indicates that actions aligned with partner countries' interests, such as regular migration pathways, receive limited support.¹⁷⁴

169 European Commission website, [Generalised Scheme of Preferences](#)

170 [Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation \(EU\) No 978/2012 of the European Parliament and of the Council, COM/2021/579](#). See also: Bisong, A. 2023. [Square pegs in round holes: using trade conditionalities to foster migration cooperation between the EU and third countries](#), part of series of blog posts on migration and trade published under the supervision of prof. Elspeth Guild.

171 European Commission, 2023, [Memorandum of Understanding on a strategic and global partnership between the European Union and Tunisia](#), Press release.

172 [Regulation \(EU\) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, amending and repealing Decision No 466/2014/EU of the European Parliament and of the Council and repealing Regulation \(EU\) 2017/1601 of the European Parliament and of the Council and Council Regulation \(EC, Euratom\) No 480/2009 \(Text with EEA relevance\)](#)

173 [Communication from the Commission to the European Parliament and the Council enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, COM/2021/56](#)

174 Oxfam, 2023, [From Development to Deterrence? Migration spending under the EU Neighbourhood Development and International Cooperation Instrument \(NDICI\)](#), Briefing Paper, September 2023.

Conclusion

EU migration policies are built on historical injustices which result in unequal treatment based on nationality, ethnicity and gender. This is evident across present policies and legislation regulating who can enter the EU, as well as how the EU cooperates with non-EU countries to prevent people without EU nationality from entering EU territory by outsourcing border controls.

Furthermore, these policies criminalise migration and employ racial profiling, affecting how people live and work within the EU. Consequently, these practices further marginalise and stigmatise racialised communities.

Against this backdrop, the EU's anti-discrimination legal and policy frameworks fail to adequately protect racialised communities. They do not address differences in treatment based on nationality and statelessness, nor do they tackle issues related to immigration law or unequal treatment arising from residence status.

In order for the EU to ensure anti-discrimination in law and practice, the EU must take steps to radically change its approach to cross-border mobility, focusing on creating regular migration pathways, ensuring equal treatment for all, and ending discrimination based on residence status.

Recommendations

In light of the above, we recommend that the EU and member states:

Commit to addressing racial discrimination in migration policies, including by:

- Renewing the Anti-Racism Action Plan beyond 2025 and commit to addressing the link between structural racism, violence, and migration in EU asylum and migration policy.

Strengthen anti-discrimination legal frameworks, including by:

- Revising the Racial Equality Directive to address discrimination based on nationality and expand its scope to law enforcement, immigration, and border authorities.
- Adopting the 2008 proposal for equal treatment regardless of religion, belief, disability, age, or sexual orientation.¹⁷⁵

Decriminalise migration and support to migrants, including by:

- Refraining from narratives, legislation and practices equating irregular entry, transit and stay to security threats and recalling that under EU legislation, irregular entry, transit and stay are not crimes, and calling on member states to decriminalise irregular entry, transit and stay.
- Amending the Facilitation Directive to ensure that migrants and people acting in solidarity with them are not criminalised. In the context of the current revision process, this could be achieved by introducing a binding provision on non-criminalisation, deleting the offence of “public instigation” and “serious harm”, and making sure that facilitation of irregular entry, transit or stay is only criminalised if there is an undue profit.
- Shifting funds and resources from counter-smuggling efforts towards policies and practices that provide people with regular pathways to enter the EU, including to apply for international protection and for work, family, health, humanitarian and other reasons.

Ensure access to secure residence status, including by:

- Developing regular migration pathways on a range of grounds;¹⁷⁶
- Implementing regularisation programs;¹⁷⁷
- Ensuring affordable and accessible procedures for permits;¹⁷⁸
- Providing access to decent work permits, and ensuring that permits and statuses prevent people from falling out of status, by including accessible and affordable permit renewal or conversion procedures and criteria, and by making certain that people can access labour and social protection measures without endangering their residence permit. This should include ensuring that people migrating on the basis of family ties have access to independent permits, and that migrant workers can freely change their employment and access transitional permits if they experience rights violations.

¹⁷⁵ [Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation \[SEC\(2008\) 2180\] \[SEC\(2008\) 2181\]](#)

¹⁷⁶ See also PICUM, 2021, [Designing labour migration policies to promote decent work](#)

¹⁷⁷ See also PICUM, 2023, [Regularisation mechanisms and programmes: Why they matter and how to design them](#)

¹⁷⁸ See also PICUM, 2023, [The use of fees in residence procedures in Europe: pricing people out of a residence permit?](#)

- Promoting safety and protection for victims of crime without discrimination based on residence status, including by developing and ensuring access to special permits under EU and national law based on personal circumstances.

Protect human rights defenders, including by:

- Developing guidelines and legal tools to protect human rights defenders within the EU, especially those working with migrants and racialised communities;
- Invoking infringement proceedings for breaches of EU law;
- Allocating funding for humanitarian assistance and human rights monitoring, including strategic litigation and CSO monitoring.

Respect fundamental rights at external borders and on the territory, including by:

- Ending racial profiling and violent immigration enforcement practices combat discrimination, and implement strict data protection safeguards for immigration enforcement purposes.¹⁷⁹
- Ensuring that all EU-funded actions align with the EU Charter of Fundamental Rights.

Strengthen employment standards, including by:

- Making complaints mechanisms accessible for all workers;
- Advancing employment and health standards;
- Involving representatives of migrant workers in policy design and evaluation.

Ensure access to health and other services, including by:

- Building accessible, effective, and resilient health systems for all, regardless of residence status;
- Ensuring that undocumented individuals can access health and other services without facing immigration enforcement consequences by implementing strict data protection safeguards to prevent service providers' data from being accessible or used for immigration enforcement purposes.¹⁸⁰

Protect undocumented children, including by:

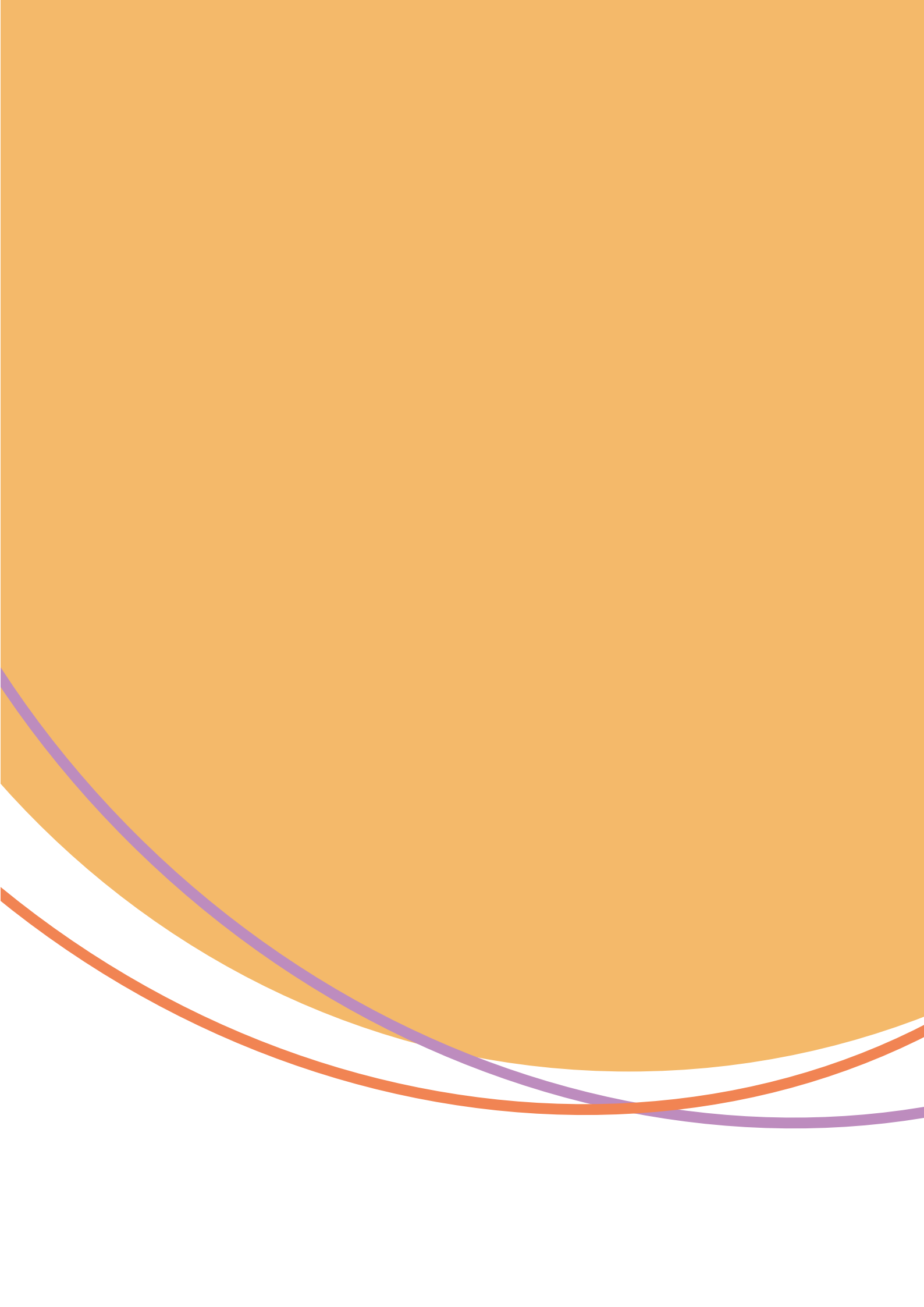
- Reforming regulations for access to key services;¹⁸¹
- Ensuring rights are explicit in law and accessible in practice for migrant children;
- Designing policies to prevent children who turn 18 from becoming undocumented as adults.¹⁸²

¹⁷⁹ See also PICUM and Statewatch, 2019, [Data Protection, Immigration Enforcement and Fundamental Rights: What the EU's Regulations on Interoperability Mean for People with Irregular Status](#)

¹⁸⁰ See also PICUM Briefing, [Data protection and the "firewall": advancing the right to health for people in an irregular situation](#); PICUM Briefing, [Data protection and the firewall: advancing safe reporting for people in an irregular situation](#)

¹⁸¹ For more detailed recommendations, see PICUM, 2023, [Access to early childhood education and care for undocumented children and families in Europe: Obstacles and promising practices](#)

¹⁸² See also PICUM, 2022, [Turning 18 and undocumented: supporting children in their transition into adulthood](#); PICUM, 2022, [Regularisation mechanisms and programmes: why they matter and how to design them](#)





PICUM

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