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SECURITY THROUGH DISCRIMINATION?

Addressing the risk of discriminatory ethnic profiling
in Europe's fight against irregular migration

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Abstract

The over-policing of minority groups in the scope of migration control is often downplayed as inevitable side effect of necessary law enforcement, rather than addressing it as a problem of racial discrimination. As such justifications result in an unwillingness to address these problems, this paper analyses the legality, legitimacy and risk of 'discriminatory ethnic profiling' in the scope of proactive law enforcement powers aiming at detecting irregular migrants within Europe. Such practices can amount to unjustifiable direct racial discrimination, and the analysis of the use of stop-and-search powers in three countries shows, that discriminatory ethnic profiling is widely used, but not even effective. As the over-policing of minorities indicates an impact of underlying legislation, a general proportionality test of migration law enforcement powers risking such profiling finds that they are disproportional and little doubt is left that the discriminatory effect is inherent to the norm, and not just a question of misuse. Despite the need to revise such policies, already basic safeguards are lacking. Moreover, the analysis of Joint European Police Operations shows, that States and the EU regardless the risk increasingly coordinate and formalise such methods, including electronic profiling technics, in an in-transparent way which lacks democratic scrutiny.

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Introduction

From the 1980s on, there has been a significant shift in the methods used in the criminal law enforcement area, which added to classical law enforcement tactics new proactive methods previously rather used as intelligence tools.¹ While classical criminal law enforcement focuses on identifying concrete perpetrators of crimes already committed and known to the police, new proactive profiling measures were increasingly developed to identify suspects likely to have committed a crime yet unknown, and to prevent future crimes. Such proactive profiling cannot just be carried out by officers when deciding whom to stop and search in public, but also at the electronic level by screening personal information stored in databases.

The added value of crime prevention through the screening of people for suspicious individuals goes however hand in hand with a risk of discrimination, which is inherent to the method if it is not adequately restricted by safeguards. As proactive profiling in law enforcement aims at identifying people likely to engage in criminal activity, the profiles are much broader than classical 'suspect profiles' based on descriptions of concrete perpetrators. Profiling does not treat or identify individuals on basis of their behavior, but as members of a group sharing similar characteristics. Even if not illegitimate or illegal per se, the inherent problem of the method is, that it always just produces generalised and probabilistic knowledge as it tries to predict the behavior of individuals based on a set of observable characteristics in a process, which equals stereotyping and risks that assumptions are drawn the wrong way. There is a general presumption that all individuals sharing the same 'relevant' characteristics will behave in the same way, but such assumptions do not describe reality, are non-representational and discriminate against those who do not act according to their 'generic profile'.²

¹ De Schutter & Ringelheim, 2008, p. 7.

² Fuster et al, 2010, p. 2.

It is especially concerning if the profiles include unchangeable or phenotypical criteria such as race,³ ethnic or national origin or characteristics presumed as related like skin color or religion.⁴ Such characteristics pose a high danger of being discriminated against on their basis, and they are therefore governed by especially rigid anti-discrimination and data protection norms. A classification of people based on 'sensitive characteristics' as supposed indicators for individual behavior always constitutes 'ethnic profiling'⁵ - which is not necessarily discriminatory or illegal, depending of the aim and use of the classification.⁶

This makes the use of ethnic profiling especially critical in the law enforcement and administrative sector. Decisions taken in those areas represent a behavior of the state. If law enforcement decisions are based on generalisations drawn from characteristics such as race, ethnicity or religion, the state is exercising its powers in an uncertain and possibly discriminatory way. Ethnic profiling can create harmful and incorrect stereotypes and lead to discrimination, when the assumptions are intentionally or unintentionally misused, as shown most illustratively by linking minority groups to a higher propensity of committing a crime and treating them accordingly. Instead of protecting the individuals, the state authority is negatively affecting the lives and dignity of the targeted groups and individuals and the way society looks at them. This makes discrimination a public matter rather than prejudices between individuals, reason why

³ This paper will use the term 'race' in accordance with the position taken by the European Commission against Racism and Intolerance (ECRI), which states "Since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races". However, ECRI uses this term in its work in order to ensure that those persons who are generally and erroneously perceived as belonging to "another race" are not excluded from the protection provided for by the legislation."

⁴ Discrimination is also forbidden on several other grounds including gender, age and disability. As this paper focuses on ethnic profiling in the context of the fight against irregular migration, it will therefore mainly refer to race, ethnicity, national origin, skin colour and religion, as people are mostly discriminated against on those grounds in the migration law enforcement context.

⁵ The EU Network of Independent Experts on Fundamental Rights defines 'ethnic profiling' generally as 'the practice of classifying individuals according to their 'race' or ethnic origin, their religion or their national origin, on a systematic basis, whether by automatic means or not, and of treating these individuals on the basis of such a classification.'

⁵ European Union Agency for Fundamental Rights (hereafter FRA), 2010, p. 15.

⁶ De Schutter & Ringelheim, 2008, p. 7.

the use of race, ethnicity or religion as a basis for law enforcement decisions is discriminatory and forbidden under anti-discrimination law.⁷

The discriminatory use of ethnic profiling became obvious and centre of discussion and studies in the United States since the early 1990s,⁸ when police officers proactively stopped and searched black people⁹ in an over-proportional way while putting them under a general suspicion of drug dealing and committing other criminal offences. Such practices, commonly referred to as 'racial profiling' or 'discriminatory ethnic profiling', were also put into question in Europe when a new wave of ethnic profiling was encouraged and increasingly formalised in order to prevent future terrorist attacks after the events of September 11, 2001. Stops of Muslim-looking people and raids of public places close to mosques became evident to the public and searches of British Asians reportedly increased five-fold after the 2007 attempted attacks in London.¹⁰ In the same wake, authorities trawled through the data of millions of German citizens from 2001 on and put all male Muslims born in 26 listed countries under a general suspicion of belonging to 'terrorist sleeper cells'.¹¹ Since then, new and broadened law enforcement powers demanding, or at least allowing, proactive ethnic profiling have been increasingly used to fight various forms of 'organised crime'.¹²

The resulting stigmatisation of minority groups is the most powerful expression of the risk posed by discriminatory ethnic profiling, as the probabilistic stereotyping manifests itself in linking certain minority groups to a propensity of committing a crime. Hence, many of the visibly discriminatory practices and discursive justifications in the area of counter-terrorism have caused public outcry and were rightly criticised as racist stereotyping drawing wrong assumptions, and many international and European bodies analysed and condemned the discriminatory use of ethnic profiling in this area.

⁷ European Union Network of Independent Experts on Fundamental Rights, 2006, p. 6.

⁸ De Schutter & Ringelheim, 2008, p. 5.

⁹ The author rejects the unnecessary mentioning of adjectives specifying the skin colour or religion of individuals and groups, or conclusions drawn from phenotypical appearance on the perceived religion, ethnic- or national origin. However, the paper will use such pronouns to analyse a reality and refer to case studies where people are classified and discriminated against on such grounds.

¹⁰ Open Society Justice Initiative, 2008, p. 1.

¹¹ De Schutter & Ringelheim, 2008, p. 5.

¹² European Union Network of Independent Experts on Fundamental Rights, 2006, p. 8.

At the same time, the development and use of ethnic profiling technics in the law enforcement of migration control has been widely ignored – and if noted, barely addressed or analysed any further.

The criminalisation and proactive fight against irregular migration¹³ does not only predate the ‘war against terrorism’, but ethnic profiling measures in the name of migration control are increasingly used and formalised in Europe with little or no scrutiny, not just at the national- but also the European Union (EU) level. Some political orders and concrete law enforcement powers explicitly demand, or at least allow, the use of ethnic profiling in different areas related to migration control. Those instruments can take discriminatory forms similar to the ones used in the name of counter-terrorism, for example if members of minority groups are in an over-proportional way stopped-and-searched by police officers, when national police mandates or Joint European Police Operations aim at proactively detecting suspected irregular migrants in public places and transport. At the external borders, minority groups are subjected to further controls while entering a country. At the same time, the EU is pushing forward proposals and rapidly implements and interconnects databases containing not only personal data of asylum applicants, but of almost all people seeking to enter or leave the EU. Through automated decision making processes and with the help of EU agencies, these databases will be increasingly mined and pre-screened to identify ‘high risk’ travelers not only to prevent terrorism, but also to sort out people who are suspected to be likely to over-stay their visas. Such technics identify individuals who ‘deserve special attention’ and further surveillance based inter alia on characteristics such as national origin.¹⁴

It is striking, that the general acceptance of using ethnic profiling in the enforcement of migration law seems much higher and less contested than its use in counter terrorism

¹³ In this paper, the term ‘irregular migrant’ is used to avoid the negative labelling of ‘illegal migrant’, which carries a connotation of criminality that in many cases may be inaccurate. However, if referring to legislation or other sources, other terms may be used. The Office of the United Nations High Commissioner for Refugees defines ‘irregular movements’ in the Excom Conclusion 58 (1989) as involving “entry into the territory of another country, without the prior consent of the national authorities or without an entry visa, or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation by people who have already found protection.”

¹⁴ For an in-depth analysis, see Bigo et al, 2012.

measures. This is not only visible in the unwillingness of police officers and politicians to accept court rulings condemning discriminatory ethnic profiling measures in the enforcement of migration law,¹⁵ but also in public opinion. Many claim that using race, ethnicity or skin colour as proxies to detect irregular migrants is more effective and the law enforcement otherwise not possible, especially since the abolishment of systematic border controls within the Schengen area and increasing public anxiety of being overran by an influx of refugees. Linking minority groups to a propensity of being an irregular migrant, and certain nationalities to a likelihood to abuse asylum systems, seems easier to justify than stigmatising them to be involved in another criminal offences – and discrimination in this area seems to be treated rather as a policing technic than racial discrimination.

This paper argues that such arguments however miss crucial points, as discriminatory ethnic profiling in this area is not only also illegal, but equally harmful to the individuals and society. Hazarding the severe negative effects of discriminatory ethnic profiling is especially questionable if compared to the doubtful efficiency of the technics and possibilities of less-harmful policies of migration control.

The absence of comprehensive research and public acknowledgement of the use, risks and harmful consequences of discriminatory ethnic profiling in the migration law enforcement shows the utmost importance of questioning the rapidly developing trend of ethnic profiling in the fight against irregular migration in Europe, especially as profiling methods will be of increased weight in the future.

Scrutinising discriminatory law enforcement decisions through the concept of discriminatory ethnic profiling makes it possible to frame and classify the discriminatory scope and impact not just of individual decisions, but also of political and law enforcement orders, as well as automated profiling mechanisms and statistical evaluations. The effects of such underlying structures should be taken into consideration, not just to question current action, but especially as basis for a well-informed critique and decision on new ethnic profiling trends and proposals, which due

¹⁵ Deutscher Bundestag, 18/3654, 22 December 2014, paras. 20-21; Amnesty International, 2011, p. 22.

to their complexity or not immediately visible discriminatory effects may escape the attention, as a racist intention is denied or unforeseen. Focusing merely on the racist intention of individual officers, which is often happening in the European discourse, risks - even if true in many cases - to obscure and deny possible responsibility and corresponding accountability at higher levels.

There is no single and generally accepted definition of 'discriminatory ethnic profiling' or its synonym 'racial profiling'.¹⁶ In the European context, the closest to an official definition has been made by the European Commission against Racism and Intolerance (ECRI), which refers to 'racial profiling' as

*"the use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin, in control, surveillance or investigation activities."*¹⁷

This paper strongly advocates for broadening the ECRI definition to include other administrative and law enforcement actors as well, and to add for a comprehensive definition a paragraph used by the Open Society Justice Initiative, which recognises that

*"It can also include situations where law enforcement policies and practices, although not themselves defined either wholly or in part by reference to ethnicity, race, national origin or religion, nevertheless do have a disproportionate impact on such groups within the population and where this cannot otherwise be justified in terms of legitimate law enforcement objectives and outcomes."*¹⁸

Based on such a broader definition, this paper addresses the risk of discriminatory ethnic profiling in Europe's fight against irregular migration, whereby by 'risk' shall be understood as the risk that discriminatory ethnic profiling is used or likely to be used, as well as the risk resulting from an actual use of the practice. The aim of this paper is to identify general risks and trends at the national, as well as at the EU level, in order to

¹⁶ FRA, 2010, p. 6.

¹⁷ European Commission against Racism and Intolerance (hereafter ECRI), CRI (2007) 39, para. 1. The FRA definition focuses on basing a law enforcement decision *only or mainly* on race, ethnicity or religion. FRA, 2010, p. 15.

¹⁸ Open Society Justice Initiative et al, 2009, pp. 3-4. The Open Society Foundation specifically emphasise the problem of generalisation inherent to profiling practices by referring to it as "the use by law enforcement of generalizations based on impermissible grounds such as race, ethnicity, religion or national origin - rather than individual behaviour or objective evidence - as the basis for suspicion in directing discretionary law enforcement actions." Open Society Justice Initiative, 2013, p. 4.

make it possible to set single cases of discriminatory ethnic profiling into a broader political and institutional context, and profoundly question the widespread opinion of necessity, legality, efficiency and lack of alternatives of ethnic profiling practices in migration control.

The paper does not provide a quantitative study about the extent of discriminatory ethnic profiling, but existing quantitative studies are referred to, as well as political, discursive, social and legal analyses relevant to the question.

Due to the limited scope of the paper, the analysis is limited to discriminatory ethnic profiling in the law enforcement sector and excludes administrative areas of migration decision making and profiling in healthcare systems, leaving those equally important areas open for further research. Additionally, the paper focuses on discriminatory ethnic profiling on the ground and within the territory of the Member States of the EU. This area shows most illustratively the risks of ethnic profiling, as well as the general problem of increasingly blurred action and responsibilities between the Member States and the EU, and the connection of ethnic profiling on the ground with profiling and risks of discrimination at the electronic level. Once understood the general risks within the territories and on the ground, it is easier to frame and question the new developments and violations committed at the external borders and especially the worrying trend of electronic profiling, which should be urgently scrutinized and proved in further research.

As a basis, the first part of the paper clarifies which practices actually constitute discriminatory ethnic profiling, and in how far they violate human rights and are addressed by European bodies. A focus is set on the discriminatory scope of ethnic profiling, as an infringement with other rights such as the right to privacy or movement differ from case to case. The analysis of the legal protection frameworks applicable in Europe, such as international, Council of Europe (CoE) and EU provisions and jurisprudence, does not just show the seriousness of the violations as they can amount to racial discrimination, but also that discriminatory ethnic profiling is equally forbidden in the area of migration control.

Keeping in mind the legal provisions, the second part of the paper analyses if and in how far discriminatory ethnic profiling is actually used in the Member States and focuses hereby on the possible discriminatory use of police powers to stop-and-search people on the ground. As there is a lack of quantitative and comparable data, the exemplary analysis of the situation in two Schengen states and the United Kingdom is based on the assumption that the practice is likely to occur. The risk of its use is therefore assessed by analysing if the states provide necessary safeguards *against* it, such as a tightly subscribed reasonable suspicion standard for stop-and-search powers and adequate monitoring of the use of police force through the provision of disaggregated data. Despite the identified lack of safeguards in all three countries, quantitative data and case studies provided for suggest not only that the practice is actually widely used, but also that the safeguards improve the efficiency of policing.

As discriminatory ethnic profiling is found to occur and those practices should be read as indicators for a possible indirect or de facto discriminatory effect of broader policy measures and legislation, the third part of the paper scrutinises proactive law enforcement powers aimed at detecting irregular migrants on the ground through the lens of a proportionality test. Hereby, not a single case is analysed but such methods in general, taking into consideration also the socio-political context and discourse in order to discuss the often defended views of legitimacy, necessity, harmfulness and lack of choice. The general use of criminal law for migration control and impact of the abolishment of inner-Schengen borders in form of an increased pressure to proactively detect irregular migrants is taken into account, and set in relation to the inherent dilemma of proactively enforcing migration law in a non-discriminatory manner. Hereby, the negative effects of discriminatory ethnic profiling not just on the individuals, but the whole society are discussed and compared to the questionable efficiency and suitability of such means. The results of this proportionality test raise the question, if non-suspicion based stop-and-search powers to proactively identify irregular migrants on the ground are really just de facto leading to discrimination by misuse, or not either by the norm itself.

As combatting irregular migration is per se a transnational effort and strategies to control migration are increasingly Europeanised, the last part of the paper sheds light on the risk of discriminatory ethnic profiling in the scope of a Joint European Police Operations aiming at intercepting irregular migrants within the Schengen area. Due to a worrying lack of transparency, the analysis can just identify an impact of the Joint Operation on the risk of discriminatory ethnic profiling in the Member States and evaluate on the risk of possible effects of statistical discrimination through the use of the data collected at the EU level. Both levels are however accountable for violations within their scope of action. This raises general questions about the blurring of areas of competences and responsibilities in transnational and European efforts to control irregular migration, which show the utmost importance to counter a worrying lack of transparency and democratic scrutiny.

1. The legality of discriminatory ethnic profiling

1.1. The legal protection frameworks applicable

Even though there is no international or European legal provision explicitly defining and outlawing discriminatory ethnic profiling, such practices can interfere with several basic rights guaranteed in national, regional and international law, and different courts have set standards in their jurisprudence, against which the legality of ethnic profiling practices have to be tested.¹⁹ Ethnic profiling can most obviously violate the fundamental human right not to be discriminated against, depending on the purpose of the classification and the resulting treatment.²⁰ Depending on the practice, ethnic profiling also always interferes with another human right, a restriction that will then be compared to the treatment of others to assess if it has been discriminatory. Stops on the street for example can negatively interfere with the right to freedom of movement, searches can violate the right to privacy and if force is used, an infringement with the right to liberty and security is likely to occur. As a broader consequence, the experience and fear of ethnic profiling can also inhibit people from exercising their rights to participate in peaceful political activities or freely practice their religion.²¹ If ethnic profiling is carried out by electronic means, it is likely to interfere with the right to privacy and protection of personal data.

This part will examine the legal provisions applicable to discriminatory ethnic profiling and in how far they can be used to challenge such practices, with a focus on anti-discrimination norms provided for in European regional provisions, namely the legal frameworks of the CoE and EU.

Despite their legal obligations under international human rights treaties, all Member States of the CoE, which include all Member States of the EU, are legally bound by the basic human rights standards set by the European Convention on Human Rights (ECHR). They have to oblige to the binding judgements on those provisions by the

¹⁹ Open Society Justice Initiative, 2009, p. 5; De Schutter & Ringelheim, 2008, p. 9.

²⁰ European Union Network of Independent Experts on Fundamental Rights, 2006, p. 6.

²¹ Open Society Justice Initiative, 2013, p. 4.

European Court of Human Rights (ECtHR), which oversees as treaty body the compliance of the Member States with their obligations under the ECHR. Due to its binding character, accessibility for individuals and NGOs, as well as frequency of references to the case law by national courts, these standards – especially regarding the right to non-discrimination, liberty, privacy and freedom of movement - are highly important for the question of ethnic profiling, even if the ECHR does not explicitly contain a reference to such practices.²² The ECtHR is the only European regional court, which issued a binding decision addressing directly the unlawfulness of an ethnic profiling case in the light of anti-discrimination.²³ Additionally, some bodies of the CoE have also dealt with the issue of ethnic profiling in their recommendations, which are non-binding but nonetheless important as guiding principles.²⁴ These include for example the General Policy Recommendations directed to the policies and strategies of the Member States, which are issued by the ECRI as independent human rights monitoring body, and the thematic reports and opinions about human rights violations issued by the CoE Human Rights Commissioner.

At the EU level, several agencies, experts and bodies, such as the EU Agency for Fundamental Rights (FRA) and its precursor the EU Network of Independent Experts on Fundamental Rights, as well as the European Parliament have addressed discriminatory ethnic profiling in their non-binding reports, recommendations and opinions.²⁵ Acts of discriminatory ethnic profiling fall within the scope of the legally binding anti-discrimination norms contained in the Charter of Fundamental Rights of the EU (CFR). The CFR is applicable to the institutions, bodies and agencies of the EU, and its Member States only if they implement EU law.²⁶ As the EU specified the right not to be racially discriminated against explicitly in a legislative act in form of the ‘Race Equality Directive’ (RED),²⁷ the Member States are therefore implementing EU law as soon as they get involved in acts of discrimination, and are hence bound by the anti-

²² Ibidem, p. 6.

²³ *Timishev v. Russia* (ECtHR, 2005).

²⁴ Open Society Justice Initiative, 2013, p. 4.

²⁵ Ibidem, p. 4.

²⁶ European Union, 2012/C 326/02, 26 October 2012, art. 51.1; European Union, C/ 115/13, 9 May 2008, art. 5.3.

²⁷ Council of the European Union, Directive 2000/43/EC.

discrimination norms of the CFR.²⁸ Furthermore, the RED itself, which establishes the principle of equal treatment between people irrespective of ethnic or racial origin in EU law and sets the goal that all Member States must achieve, is of utmost importance for a protection against discriminatory ethnic profiling. However, the Court of Justice of the European Union (CJEU), which is tasked with overseeing the compliance of the EU bodies, instruments and its Member States with EU law, has not yet addressed ethnic profiling directly.²⁹ Additionally, discriminatory ethnic profiling contradicts several basic principles and legislative aims of the EU set forth in the Treaty of Functioning of the European Union (TFEU), which will be further discussed in the last part of this paper.

1.2. Anti-discrimination law

1.2.1. The absolute prohibition of direct racial discrimination

Practices of ethnic profiling violate in their very nature a basic principle of the rule of law, as law enforcement decisions should be based on the personal conduct of individuals and not on their perceived membership to a certain national, ethnic or religious group or their phenotypical appearance.³⁰ Baroness Hale of Richmond from the House of Lords mentioned the violation of this principle in a case concerning ethnic profiling practices:

“The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping.”³¹

²⁸ *Åkerberg Fransson* (CJEU, 2013), para. 28.

²⁹ Open Society Justice Initiative, 2013, p. 4.

³⁰ Open Society Justice Initiative et al, 2009, p. 5; Open Society Justice Initiative et al, 2013, p. 4.

³¹ *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* (UK House of Lords 55, 2009), para. 74.

Basing a law enforcement decision on stereotyping inherently risks a discriminatory effect. A legal protection against discrimination, and especially discrimination based on race, ethnicity or religion is not just offered in all EU Member States and contained in most of their constitutions,³² but the practice is also forbidden under international and European law. Respective legally binding clauses and definitions are contained in the main human rights treaties such as article 26 of the International Covenant on Civil and Political Rights (ICCPR) or the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).³³ At the European level, the ECHR contains a general anti-discrimination clause in article 14 prohibiting discrimination *inter alia* based on race, colour, religion, national origin, and association with a national minority, which can just be invoked in relation to a violation of another right protected in the convention.³⁴ Article 21.1. of the CFR forbids discrimination *inter alia* on grounds of race, colour, ethnic or social origin, genetic features, language, religion or belief, membership of a national minority or birth, and the RED prohibits discrimination on grounds of racial or ethnic origin in general.³⁵ Because of the high risk of being discriminated against on their basis, data revealing such ‘sensitive characteristics’ are also governed by especially rigid data protection rules, which are not discussed in this paper further.³⁶

As discriminatory ethnic profiling can affect not just citizens of Member States of the EU or CoE, but in the same way third state nationals or stateless people, it should be noted at this point, that third state nationals and stateless people are equally beneficiaries of the general non-discrimination protection based on characteristics including race or ethnic origin, which is even explicitly granted to them according to the Preamble of the RED, which states that “this prohibition of discrimination should also

³² Mc Colgan, 2013, pp. 13-23.

³³ The ICERD defines ‘racial discrimination’ as ‘any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life’.

³⁴ De Schutter & Ringelheim, 2008, p. 10.

³⁵ Council of the European Union, Directive 2000/43/EC, art. 2.

³⁶ Council of the European Union, Directive 95/46/EC, art. 8.1.

apply to nationals of third countries.”³⁷ Part three of this paper will further discuss the question of discrimination based on nationality and legal status, which is important for discriminatory ethnic profiling especially in the area of migration control.

The ICERD explicitly states that *direct* discrimination based on ethnic- or national origin, race, religion or skin colour can never be lawful or justified and is not even permitted in times of public emergency, including high security threats.³⁸ The UN Committee on the Elimination of Racial Discrimination (CERD) underlined that the prohibition of racial discrimination as eternal and non-derogable norm also applies in the context of threats posed by terrorism or attempts of ‘saving the life of the nation’.³⁹ In its concluding observations, the CERD explicitly recognises that ethnic profiling can amount to prohibited ‘racial discrimination’ and leads to ‘negative consequences for ethnic and religious groups, migrants, asylum seekers and refugees’.⁴⁰ The ECRI, as well as several bodies of the EU have come to similar conclusions.⁴¹ Therefore, all of those institutions and bodies, as well as several experts, recommend that discriminatory ethnic profiling should be explicitly defined and clearly outlawed in national legislation as a basic safeguard.

In the context of ethnic profiling, the form of discrimination courts deal with is usually a ‘direct’ one, which has to be differentiated from ‘indirect discrimination’ as discussed later on. According to the ECtHR, there must be a difference in the treatment of persons in relevantly similar situations in order for the treatment to qualify as direct discrimination.⁴²

A differential treatment does not have to be unacceptable per se, but ethnic profiling in the law enforcement area takes place in the ‘public’ context and can be based on

³⁷ Council of the European Union, Directive 2000/43/EC, Preamble, para. 13.

³⁸ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, art. 4.1.;

³⁹ United Nations Committee on the Elimination of Racial Discrimination (hereafter CERD), CERD/C/64, 2004, para.6; UN Human Rights Committee, UN Doc NRI/GEN/1, 2006, para. 8.

⁴⁰ CERD, CERD C/61/CO/3, 2002, para. 338; CERD, A/60/18, 2005, para.20.

⁴¹ ECRI, CRI(2007)39, p. 5; European Union Agency for Fundamental Rights (hereafter FRA), 2009, p.39.

⁴² The EU ‘Race Equality Directive’ makes a similar definition of direct racial discrimination, which ‘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.’

grounds explicitly listed as prohibited such as race, ethnicity or religion.⁴³ The right not to be discriminated against in general is not an absolute right such as for example the prohibition of torture. Therefore, this right can be limited with objective and reasonable justification, but as stated for example in article 52.1. CFR or article 19.2. of the German Constitution, such a limitation can just be legal as long as it is provided for by law and does 'respect the essence' or "Wesensgehalt" of the restricted right and freedom.⁴⁴

In order to assess the legality of discrimination cases in Europe, the principle test of legality of differential treatment established by the ECtHR under its jurisprudence on article 14 has to be used. The Court uses three scrutiny tests assessing the legitimacy of aim and proportionality of differential treatment.⁴⁵ If the treatment involves 'suspect categories' such as race, ethnicity or religion, the scrutiny is especially rigid.⁴⁶ If there is no objective and reasonable justification, the differential treatment amounts to discrimination prohibited under article 14 ECHR. This is the case if the measure did not pursue a legitimate aim or there is no reasonable relationship between the means used and the aim sought to be realised.

The case law of the ECtHR shows that the Court condemns direct racial discrimination posed by discriminatory ethnic profiling so harshly, that it did not even resort to the proportionality test. The most prominent case where the ECtHR found a case of discriminatory ethnic profiling to constitute a violation of article 14 in combination with the freedom of movement guaranteed in article 2 of Protocol Nr. 4 is *Timishev v. Russia*.⁴⁷ In the case, police officers stopped people at a checkpoint and denied the access to a certain region to any person of perceived Chechen ethnicity based on an oral instruction from the Ministry of the Interior. The Court clarified that the oral command not to admit 'Chechens' to a specific region lead to a restriction of people based merely

⁴³ FRA, 2010, p. 16.

⁴⁴ European Union, 2012/C 326/02, 26 October 2012, art. 52.1.; Germany, Basic Law for the Federal Republic of Germany, 8 May 1949, art. 19.2.

⁴⁵ Open Society Justice Initiative et al, 2009, p. 5.

⁴⁶ *Kozak v. Poland* (ECtHR, 2010), para. 92; for an interpretation of the hierarchy of grounds see also De Schutter, 2011, p.15.

⁴⁷ *Timishev v. Russia* (ECtHR, 2005).

on the perception of belonging to a specific ethnic group, which the Court found to constitute a form of direct racial discrimination, which is a “particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.”⁴⁸ Despite the fact that no justification for the difference in treatment was given in that case, the Court’s reasoning shows that direct discrimination based on race, ethnicity or religion cannot be justified and the proportionality test becomes irrelevant. It establishes a principle that

*“no difference which is based exclusively of to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures.”*⁴⁹

Thus, the ECtHR imposes an *absolute* prohibition on differential treatment based on race or ethnic religion, which is remarkable as the ECRI defines ‘direct racial discrimination’ as “any differential treatment based on a ground such as race, colour, language, religion, nationality or national or ethnic origin, which has *no objective and reasonable justification* [emphasis added]”.⁵⁰ The Court’s judgement also implies that not even a statistically proven correlation between characteristics such as ethnicity and the propensity to commit a specific crime would justify a direct discrimination on basis of such characteristics.⁵¹

1.2.2. Law enforcement decisions and proxies for a legal status

Out of the *Timishev* case follows that the ECtHR considers differential treatment, in this case through ethnic profiling, generally as discriminatory, unjustifiable and unlawful if the racial or ethnic origin is used *exclusively or to a decisive extent* for the law enforcement decision. This principle has been repeated in similar wording by referring to ethnicity as a ‘sole or main reason’. The CERD draws similar conclusions from the ICERD by stating that

⁴⁸ Ibidem, para. 56.

⁴⁹ Ibidem, para. 58.

⁵⁰ ECRI, CRI(2003)8, para. 1.b; De Schutter, 2011, p.21.

⁵¹ European Union Network of Independent Experts on Fundamental Rights, 2006, p. 11.

*“States parties should take the necessary steps to prevent questioning, arrests and searches which are in reality based solely [emphasis added] on the physical appearance of a person, that person’s colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion.”*⁵²

A similar but even more specific stance was also taken at the international level in a landmark case regarding the lawfulness of discriminatory ethnic profiling in migration control made by the United Nations Human Rights Committee (HRC) ruling on *Rosalind Williams v. Spain* in 2009.⁵³ Even if the term ‘discriminatory ethnic profiling’ is not explicitly used in the judgement, it is the first UN-level case dealing with identity checks based on race and ethnicity by the police.⁵⁴ Rosalind Williams had been stopped by a police officer in order to show her identity documents at a train station, and when she asked why she was the only one, the officer stated that the national police were under orders from the Ministry of the Interior to carry out identity checks of ‘coloured people’ in particular to detect irregular migrants.⁵⁵ Thus, the HRC found that the practice, motivated by ethnicity and race, constituted unlawful discrimination and therefore violated international anti-discrimination norms and the ICCPR. The HRC thereby rejected the previous ruling of the Spanish Constitutional Court, which confirmed in 2001 that the Spanish police is granted a broad discretion to “use the racial criterion as merely indicative of a greater probability that the interested party was not Spanish.”⁵⁶ In the opinion of the HRC,

*“the physical or ethnic characteristics of the persons subjected thereto [identity checks] should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should identity checks be carried out so that only people with certain physical characteristics or ethnic backgrounds are targeted. This would not only adversely affect the dignity of those affected, but also contribute to the spread of xenophobic attitudes among the general population; it would also be inconsistent with an effective policy to combat racial discrimination.”*⁵⁷

⁵² ICERD, A/60/18, pp. 98-108, 2005, para. 20.

⁵³ *Williams Lecraft v. Spain* (HRC A/64/40, 2009).

⁵⁴ FRA, 2010, p. 17.

⁵⁵ *Williams Lecraft v. Spain* (HRC A/64/40, 2009), para. 2.2.

⁵⁶ *Rosalind Williams* (Spanish Constitutional Court, 2001).

⁵⁷ *Williams Lecraft v. Spain* (HRC A/64/40, 2009), para. 7.2.

The FRA follows a similar approach when noting that this prohibition has to be obeyed generally “even when race, ethnicity or religion are relevant to the particular operation or policy.”⁵⁸ In Germany, the Rhineland Palatinate Higher Administrative Court also found a case of discriminatory ethnic profiling in migration law enforcement to violate the anti-discrimination provisions set forth in the German constitution.⁵⁹ In the case, a black student had been subjected to an identity check by the federal police, which used its power to stop-and-search suspected irregular migrants without reasonable suspicion to combat irregular migration in public places and transport. As the police officer admitted that the skin colour was decisive for the decision, the Court overruled a previous court decision and declared the practice for discriminatory and therefore illegal.

1.2.3. The complication of determining which criteria were decisive

It follows out of the case laws cited above, that for profiling including characteristics such as race or ethnicity to be in accordance with the law, the decision has to be based mainly on factors additional to ethnicity, race or religion, have a legitimate aim and to be proportional. However, already the assessment and proof that the differential treatment actually took place on basis of the prohibited criteria poses mayor problems.

Most of the practices, which could qualify as discriminatory ethnic profiling, are not codified in form of a written or oral command like in the *Timishev* case, but have the form of so-called ‘informal profiling’, as either they derive from unconscious or unintentional decisions, or the officers do not admit that they based their decision on prohibited grounds. An exceptional law case from the United Kingdom (UK) condemning discrimination by an informal ethnic profiling practice is *R. v. Immigration Officer at Prague Airport*.⁶⁰ In this case, immigration officers from the UK based at

⁵⁸ FRA, 2010, p. 22.

⁵⁹ Oberverwaltungsgericht Rheinland-Pfalz, 7 A 10532/12.OVG, 29 September 2012.

⁶⁰ *R (on the application of European Roma Rights Centre) v Immigration Officer at Prague Airport* (UK House of Lords, 2004).

Prague Airport controlled people of perceived Roma ethnicity in order to deny them to travel to the UK in such an obvious and openly over-proportional way that no circumstantial evidence was necessary, even if there was no direct order from superiors. The House of Lords found the officers guilty of discriminating against Roma by treating them as generally suspicious in a way, which was “inherently and systemically discriminatory on racial grounds.”⁶¹ Instead,

*“Immigration officials should have been given careful instructions in how to treat all would-be passengers in the same way, only subjecting them to more intrusive questioning if there was specific reason to suspect their intentions from the answers they had given to standard questions which were put to everyone.”*⁶²

Hence, this case also illustrates an important principle for systematic identity checks at national borders: All persons of the same nationality and legal status have to be treated the same except of for reasons of individual behaviour or history, and no differentiation can be made based on a perceived different ethnicity of people sharing the same legal status.

The ECtHR in turn has shown reluctant to judge cases of alleged informal ethnic profiling practices, as it is complicated to prove beyond reasonable doubt in how far ethnicity related characteristics were decisive for a decision. The case *Cissé v. France* suggests that the Court decides in doubt in favour of an additional reason other than race or ethnicity as decisive factor, and refers to the option that officers can stop people of a particular ethnic or religious group in circumstances not solely based on these criteria. In the case, the ECtHR dismissed a claim of being subjected to discriminatory identity checks based on skin colour at admissibility stage. The Court found, that a group of ‘black aliens’, which occupied a church in protest against the denial of their residence permits, were objectively in a different situation as they admitted to be illegal residents. Hence, the Court decided that the practice of the police to only verify the documents of black people with particular scrutiny during the eviction of the church, while letting white people go after a short questioning, did not necessarily constitute racial or ethnic discrimination, as the identity checks did not lack reasonable suspicion. Even if the

⁶¹ Ibidem, para. 38.

⁶² Ibidem, para. 89.

ruling implies that the same practice would have amounted to discrimination if the protesters had not admitted that they committed an offence,⁶³ the Court did not take the opportunity to declare a general point against the use of skin colour as a proxy for the illegal status of persons. Instead, it noted

“The system set up at the church exit for checking identities was intended to ascertain the identity of persons suspecting of being illegal immigrants. In these circumstances, it cannot conclude that the applicant was subjected to discrimination based on race or colour”.⁶⁴

Out of the complication of guaranteeing that the required additional factors to single out an individual are actually respected and upheld, various bodies and NGOs have recommended the introduction of a reasonable suspicion standard for law enforcement decisions as a fundamental safeguard against discriminatory ethnic profiling.⁶⁵ The Constitutional Court of Slovenia has issued a judgement in 2006 suggesting that the regulation of stop-and-search powers should be read similarly to the requirements set by the ECtHR on article 5 of the ECHR guaranteeing the right to liberty and safety.⁶⁶ In order to avoid arbitrariness and to comply with the principle of legality, law enforcement regulations have to have sufficiently precise indicators regarding the way and conditions under which they are exercised.⁶⁷ The safeguard of reasonable suspicion will be further explained and exemplarily analysed in three EU Member States in the second part of this work.

1.2.4. The burden of proof and obligation to unmask racial discrimination

It is not just necessary to prohibit discriminatory ethnic profiling and reduce its risk of happening through the introduction of a reasonable suspicion standard, but it is also crucial to make it possible for the victims to claim the violations of their rights.⁶⁸ It is generally already difficult to prove informal or unconscious racial discrimination, and –

⁶³ FRA, 2010, p. 21.

⁶⁴ *Cisse v. France* (ECtHR, 2001), on art. 14.

⁶⁵ ECRI, CRI(2007)39, paras. 3, 44; FRA, 2010, p. 23; Council of Europe Commissioner for Human Rights, July 2009.

⁶⁶ Constitutional Court of the Republic of Slovenia, U-I-152/03, 23 March 2006, para 16.

⁶⁷ *Enhorn v. Sweden* (ECtHR, 2005), para. 37.

⁶⁸ De Schutter & Ringelheim, 2008, p. 15.

as will be explained later on - even more complicated to substantiate claims of indirect racial discrimination, because victims would need circumstantial evidence to be considered as well. Canadian courts already acknowledged this need in discriminatory ethnic profiling cases and stated that

*“a racial profiling claim could rarely be proven by direct evidence. This would involve an admission by a police officer that he or she was influenced by racial stereotypes in the exercise of his or her discretion to stop a motorist. Accordingly, if racial profiling is to be proven it must be done by inference drawn from circumstantial evidence.”*⁶⁹

This conclusion is also related to the presumption that the applicant might not be the only one experiencing such discrimination. Canadian courts noted that even subconscious racial stereotyping can in sum constitute a systemic practice.⁷⁰ Such an assessment has not yet been made by any European level court for the area of law enforcement. Following the logic, Canadian courts allowed in alleged cases of discriminatory ethnic profiling, that circumstantial evidence operates a shifting in the burden of proof by presuming that it is more likely that discriminatory ethnic profiling occurred than not, and the accused has to demonstrate the additional reasonable reasons for stopping a person besides ethnicity, race or religion.⁷¹

At the European level, several CoE and EU bodies and experts have recommend to facilitate the proof in discriminatory ethnic profiling cases and propose options similar to the approach of Canada.⁷² The possibility of using statistics, and subsequently shifting the burden of proof has also been acknowledged by the ECtHR, especially in cases of indirect discrimination, as long as the presumption of guilt is not absolute and does not deprive the defendant of every possibility of defence.⁷³ Additionally, article 8 of the RED establishes the possibility of shifting the burden of proof initiated through circumstantial evidence in discrimination cases and the CJEU confirmed this possibility

⁶⁹*The Queen v. Campbell* (Court of Quebec, 2005), para. 35.

⁷⁰ *Ibidem*, para. 34.

⁷¹ European Union Network of Independent Experts on Fundamental Rights, 2006, p. 24.

⁷² European Union Network of Independent Experts on Fundamental Rights, 2006, p. 7. and 25;

⁷³ *Salabiaku v. France* (ECtHR, 1988), para 28; *Radio-France and Others v. France* (ECtHR, 2004); *D.H. v. Czech Republic* (ECtHR, 2007), para. 192; *Opuz v. Turkey* (ECtHR, 2009), paras. 192-200.

even based on a *statement* in a case of direct discrimination in relation to the RED in 2008.⁷⁴

However, it is not enough for victims that the possible use of statistics and possibility of shifting the burden of proof have been acknowledged in theory, but they need such statistics to practically rely upon. Therefore, several EU and CoE expert bodies recommended the monitoring of law enforcement activity as well as the collection and generation of statistics out of so-called 'disaggregated data' broken down by characteristics such as self-defined ethnicity and in accordance with data protection provisions to unveil discriminatory practices and back up the victims.⁷⁵

The monitoring of policing activities to reveal the impact and prevalence of ethnic profiling should also be seen as means to achieve accountability and 'well informed policy-making'.⁷⁶ This should be read in the light of the ECtHR's general position on the strong positive obligations of the states to unmask racial discrimination and the relating duty of public authorities to establish racially discriminatory motives underlying the action of public officers.⁷⁷ Part three of this paper will exemplarily analyse the safeguards of monitoring the exercise of stop-and-search powers and collection of disaggregated data in three Member States.

1.2.5. The obligation to revise and annul laws and regulations leading de facto to discrimination

Discriminatory ethnic profiling might as well be the effect of indirectly discriminatory policies or legislation, even if there is no European case law dealing with indirect

⁷⁴ *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn* (CJEU, 2008), para. 34.

⁷⁵ ECRI, CRI(2007)39, para.2. and paras 40-41; Council of Europe Commissioner of Human Rights, February 2012, p. 84; European Union Network of Independent Experts on Fundamental Rights, 2006, p. 7.

⁷⁶ ECRI, CRI(2007)39, paras. 40-41; European Union Network of Independent Experts on Fundamental Rights, 2006, pp. 6-7.

⁷⁷European Union Network of Independent Experts on Fundamental Rights, 2006, p. 25; *Nachova and Others v. Bulgaria* (ECtHR, 2004), paras. 158. ff.; *Bekos and Koutropoulos v. Greece* (ECtHR, 2005), para. 69.

discrimination specifically in the context of law enforcement practices. However, the ECRI acknowledged that discriminatory ethnic profiling can in principle take the form of indirect racial discrimination and discrimination by association.⁷⁸

Indirect discrimination is defined in the RED has been spelled out in the case law not just of the CJEU, but also of the ECtHR, which found in the case *D.H. and Others v. the Czech Republic* the result of a policy without discriminatory intent to constitute a form of indirect discrimination violating art 14 ECHR.⁷⁹ Such discrimination happens if an apparently neutral provision, policy or practice, which does not have to be designed with a discriminatory intent, results in practice to the disadvantage of a group of people based on their ethnicity, race or religion, “unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.”⁸⁰ It thus surpasses the question of the *objective* of an act or legislation, and judges on its *effect*. According to the jurisprudence of the CJEU and the ECtHR, the legislator has the duty to prevent *de facto* discrimination,⁸¹ and the ICERD states

*“Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.”*⁸²

Hence, the *effect* of policies and legislation can lead to *de facto* discrimination, and such policies should be scrutinised and annulled, also as infringing with the CFR.⁸³ This means that the states do not just have the obligation to address the individual behaviour of law enforcement officers through the establishment of adequate mechanism of sanctioning discriminatory ethnic profiling, but also to address the possible discriminatory effect of institutional policies and legislation behind.⁸⁴

⁷⁸ ECRI, CRI(2007)39, para. 38.

⁷⁹ Council of the European Union, Directive 2000/43/EC, art.2; *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz* (CJEU 1986); *D.H. v. Czech Republic* (ECtHR, 2007).

⁸⁰ Council of the European Union, Directive 2000/43/EC, art.2.

⁸¹ *D.H. v. Czech Republic* (ECtHR, 2007), paras. 175, 185, 193.

⁸² UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, art.2, para.1.c.

⁸³ *Åkerberg Fransson* (CJEU, 2013).

⁸⁴ ECRI, CRI(2007)39, para. 39.

2. The discriminatory use and impact of stop-and-search powers

The analysis of the legal protection frameworks has shown that it is necessary to assess the impact of policies, laws and provisions in order to judge on possible indirect or *de facto* discriminatory effects. Discriminatory ethnic profiling practices might be an indicator for the discriminatory effect of policies or legislation behind, and even if a norm itself might not lead to discrimination due to its objective, it has to be asked if its implementation does. There are not many court cases finding direct racial discrimination resulting from ethnic profiling in the migration law enforcement area, which might have to do with the complication of proving such discrimination before courts. This does however not mean that underlying policies or legislation are not having a discriminatory effect and cause in their application *de facto* racial discrimination by basing the law enforcement decision decisively on race, ethnicity or skin colour.

There have been many credible reports of NGOs and claims of affected individuals that people are stopped and searched based on their race, ethnicity or skin colour by the police in the proactive enforcement of migration law. Such claims of discrimination have been made especially related to ample stop-and-search powers aiming at detecting irregular migrants within the territory of the Member States. Some police forces are explicitly mandated with detecting irregular migrants within the national territories, or close to the borders, for example in the form of so-called Mobile Surveillance Operations in the Netherlands, France and Germany.⁸⁵

As it is suspected that proactive policing powers to detect irregular migrants are used in a discriminatory way, this part of the paper analyses exemplarily the existence and use of broad stop-and-search powers in three countries. Powers, which allow just stopping people and asking them for identification will hereby be include in the concept of 'stop-and-search', even if people might not directly been searched. An analysis of discriminatory ethnic profiling practices at the external borders, which are increasingly used and formalised, will be left open for further research.

⁸⁵ Van der Woude, 2012, p.2.

As the paper aims at discussing the risk of discriminatory ethnic profiling in migration control, it would be logical to compare just stop-and-search powers with the explicit mandate of detecting irregular migrants. However, many states perceive the question of discrimination within the police as an attack on the police institution,⁸⁶ reason why there is often a lack of will from the authorities to investigate on discriminatory ethnic profiling practices. Hence, there is an absolute lack of comprehensive and comparable data revealing and proving the use of police powers related to migration control.

Therefore, the UK will be included in the analysis, even if the proactive stop-and-search powers in this country, which counts on systematic controls at its external borders as not belonging to the Schengen area, are not aimed at detecting irregular migrants. As the country is the only one providing comprehensive data about the use and effects of stop-and-search powers, its analysis helps to shed light on the misuse and effect of such proactive powers in general. This is useful to assess the likelihood of such misuse in the case of stop-and-search powers aimed explicitly at migration control, such as existing in the country examples of Spain, which has external Schengen borders, and Germany, which belongs to the Schengen area but does not have external Schengen borders.

Thus, the analysis resorts to data and reports where they exist, and based on the thesis that broad proactive policing powers risk discriminatory ethnic profiling in their exercise, the likelihood that such practices are actually used is assessed by analysing if the countries provide safeguards *against* it. The focus is set mainly on the provision of a reasonable suspicion standard for national stop-and-search-powers, which can inhibit discriminatory ethnic profiling significantly, as well as on the possibility of monitoring and collecting data on the use of policing powers as a central starting point for acknowledgement and accountability in case that discriminatory ethnic profiling actually happens. Other important safeguards such as a specific education of police officers to avoid discriminatory behaviour, as well as adequate complaints mechanisms and access to justice for the victims are equally important, but are not discussed in detail due to the limited scope of this paper.

⁸⁶ ECRI, CRI(2007)39, p. 1.

2.1. Broad powers and the safeguard of reasonable suspicion

Law enforcement decisions have to be based on grounds other than ethnicity, race, religion or skin colour. This is especially relevant for a legal and non-discriminatory application of stop-and-search powers and the compliance with a basic principle of the European Code on Police Ethics, which states that “the police shall carry out their tasks in a fair manner, guided in particular by the principles of impartiality and non-discrimination.”⁸⁷ Out of the complication of guaranteeing that the required additional factors to single out an individual are respected in daily police practice, various bodies and NGOs, including the ECRI, CoE Human Rights Commissioner and FRA, have recommended the introduction of a reasonable suspicion standard for law enforcement decisions as “a particularly important tool in combating racial profiling”, which can significantly reduce the risk of discriminatory ethnic profiling.⁸⁸ This reasonable suspicion standard should be based on legislation and defined with the greatest clarity possible,⁸⁹ “whereby powers relating to control, surveillance or investigation activities can only be exercised on the basis of a suspicion that is founded on objective criteria”.⁹⁰ The FRA suggests that the additional reasons must be specific to the person, based on behaviour and consist for example in acting suspiciously, carrying an unusual object or standing out in some other way, like matching an existing specific description of a suspect.⁹¹

The requirements for stop-and-search powers contained in national regulations of the power of law enforcement differ a lot under national law and sometimes do not provide sufficient supplementary conditions to effectively guarantee a prohibition of ethnic profiling. Some are granting broad discretionary powers, such as allowing decisions to be based on professional intuition, which is not necessarily unlawful but nonetheless a

⁸⁷ Committee of Ministers of the Council of Europe, Recommendation Rec(2001)10, 19 September 2001, para. 40.

⁸⁸ ECRI, CRI(2007)39, para. 44; FRA, 2010, p. 23.

⁸⁹ Council of Europe Commissioner for Human Rights, 20 July 2009.

⁹⁰ ECRI, CRI(2007)39, para. 3.

⁹¹ FRA, 2010, pp. 21-22.

low standard.⁹² The broad discretionary powers are either granted in general, to achieve a specific aim, or can just be applied in specific circumstances such as for example in so-called designated 'high risk areas' or 'danger zones', where police is granted broader powers than normally.

2.1.1. The United Kingdom

The UK introduced in 1984 the *Police and Criminal Evidence Act (PACE)*,⁹³ which established as a response to the 'Brixton Riots' a general reasonable suspicion standard requiring from officers to have objective and reasonable grounds instead of generalisations for conducting stop-and-searches. However, from 2000 on a number of powers were introduced which allowed searches without reasonable suspicion. Section 44 of the *Terrorism Act* allowed searches of people and vehicles without reasonable suspicion within authorised areas to detect items, which could be used for terrorist attacks.⁹⁴ Huge areas such as the whole city of London were secretly and continuously defined as such zones,⁹⁵ and even if the measure did not lead to the detection of a single terrorist and the majority of the people stopped belonged to ethnic minority groups,⁹⁶ the Home Secretary never refused any approval.⁹⁷ The ECtHR overturned in the 2010 *Gillan and Quinton v. the United Kingdom* case several national court decisions and declared Section 44 as being "neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse".⁹⁸

After the ruling, Home Secretary Theresa May scrapped the use of Section 44 powers against individuals and limited the powers to only allowing searches of vehicles based on grounds of suspicion that they are being used in connection with terrorism.⁹⁹

⁹² FRA, 2010, pp. 20-21; De Schutter & Ringelheim, 2008, pp. 9-10.

⁹³ United Kingdom, *Police and Criminal Evidence Act*, 1984, Chapter 60.

⁹⁴ Human Rights Watch, *Without Suspicion: Stop and Search under the Terrorism Act 2000*, July 2010.

⁹⁵ *Gillan and Quinton v. the United Kingdom* (ECtHR, 2010), para. 10.

⁹⁶ Travis, A., 'European court condemns police misuse of stop and search', in *The Guardian*, 12 January 2010.

⁹⁷ Delsol, 2011, p. 20.

⁹⁸ *Gillan and Quinton v. the United Kingdom* (ECtHR, 2010), para. 87.

⁹⁹ Batty, D., 'Stop and search numbers fall after change to counterterrorism powers', in *The Guardian*, 24 February 2011.

Immediately, the use of the power reduced within two months at 98%,¹⁰⁰ but the police demanded to replace Section 44 with a similar stop-and-search power.¹⁰¹ Subsequently, the new Section 47A¹⁰² has been introduced by remedial order as a replacement to stop-and-search people and does not demand a reasonable suspicion, but merely a 'reasonable basis', while there is still no requirement for an independent judge to approve the designation of search zones.

Additionally, there are other broad discretionary powers contained for example in the *Criminal Justice and Public Order Act* of 1994. Created initially for the purpose of responding to violence in specific events such as football games, the Section 60 grants officers the power to designate areas where people can be stopped and searched for 24 hours without reasonable suspicion to anticipate violence. As there is no need for any external check, the use of these powers increased in ten years from 8,000 to 150,000 per year and entire inner city areas have been constantly declared to Section 60 areas.¹⁰³ This leads Rebekah Delsol conclude that the powers are "equally likely following the Gillan judgment to fall foul of the European Convention on Human Rights."¹⁰⁴

It is generally worrying, that the Conservative party favours since 2010 the removal of any reasonable suspicion standard from all stops-and-searches powers,¹⁰⁵ but the Home Secretary initiated a series of measures to restrict the broad powers in 2014. Even though compulsory reforms were impeded by Downing Street,¹⁰⁶ more than 20 police forces have agreed to implement immediately voluntary restrictions, which include that police officers must now believe that it is *necessary* to authorise Section 60 powers because violence *will* take place, and that those powers are only available for 15 hours.¹⁰⁷ In the light of an increased criticism of the discriminatory use of stop-and-

¹⁰⁰ Ibidem.

¹⁰¹ Dodd, V., 'Police demand new powers to stop and search terror suspects', in *The Guardian*, 29 December 2010.

¹⁰² United Kingdom, The Terrorism Act 2000 (Remedial) Order 2011, 16 March 2011.

¹⁰³ Delsol, 2011, p. 21.

¹⁰⁴ Ibidem.

¹⁰⁵ Ibidem.

¹⁰⁶ Dominiczak, P., 'Theresa May clashes with David Cameron over stop-and-search', in *The Telegraph*, 22 January 2014.

¹⁰⁷ Barrett, D., 'Theresa May introduces new restrictions on stop and search powers', in *The Telegraph*, 26 August 2014

search practices, the Labour party is also advocating to ban the practice of giving officers quantitative targets for stop-and-searches in certain areas.¹⁰⁸

2.1.2. Spain and Germany

Other than in the UK, where stop-and-search powers are at least on paper justified with combatting terrorism and other criminal offences, in Spain and Germany powers are aimed mainly or exclusively at combatting irregular migration.

According to the Spanish Law on Public Security, stops and identity checks can be carried out either in the situations of a raid in public places when a previous criminal offence caused 'serious social harm' in order to find the perpetrators,¹⁰⁹ or as general identity checks aiming at combatting irregular migration. The Spanish Law on Public Security sets the obligation of foreign nationals to carry their documents of identity and 'legal presence' and article 20 generally provides for the option of carrying out identity checks in public. Both powers can be exercised if "knowledge of people's identity is necessary for the exercise of their functions of protection of security."¹¹⁰ Generally, all police officers can stop and identify persons based on an undefined 'motive', and the Constitutional Court ruled that there is no need for a previous indication that a person has committed a crime as long as the stop is "within the framework of prevention and investigation of criminal activity."¹¹¹ The Supreme Court ruled that a 'simple suspicion' is enough as long as it is not 'illogical, irrational, or arbitrary'.¹¹²

The option of carrying out identity checks without reasonable suspicion and with the aim of detecting irregular migrants has not just to be read in the spirit of the Constitutional Court decision *Rosalind Williams*, which upheld the legality of basing a decision in migration matters solely on grounds of skin colour before it got contested by the HRC, but also in a context of a strict criminalisation of irregular migration in Spain.

¹⁰⁸ Travis, A., 'Labour offers backing for reform of police stop and search', in *The Guardian*, 18 February 2014.

¹⁰⁹ Spain, Ley Orgánica 1/1992 sobre Protección de la Seguridad Ciudadana, 21 February 1992, art. 19.

¹¹⁰ Amnesty International, 2011, p. 13; Spain, Ley Orgánica 1/1992 sobre Protección de la Seguridad Ciudadana, 21 February 1992, art. 10.1.

¹¹¹ Constitutional Court of Spain, decision 32/1991, 28 January 1991.

¹¹² Supreme Court of Spain, decision 4005/1991, 15 April 1993.

The Spanish Aliens Law qualifies irregular stay with the country as a serious administrative offence to be fined with up to 10,000 Euros or expulsion without allowance to re-enter the country within five years.¹¹³ Additionally, Police officers do not receive any instructions prohibiting checks on basis of race or ethnicity.¹¹⁴ Some police stations are instructed to detain irregular migrants and have according to leaked internal documents and official statements been assigned weekly or monthly detention quotas to meet.¹¹⁵ This leads Amnesty International to criticise that “setting such a quota leads to identity checks being carried out on the basis of perceived ethnicity as police officers assume that people belonging to ethnic minorities are not Spanish nationals and are likely to lack regular migration status.”¹¹⁶ This assessment is underscored by a statement of a representative of the Sindicato Unificado de Policía, *who explains that*

*“they tell you to identify 25 people, and you have to find one “good one”, that’s what they say. A “good one” is one that will have to be detained. The policeman himself knows that he cannot identify 25 Spanish people who have their documents in order because that would be of no use to him”.*¹¹⁷

This is especially worrying as the statistics about detentions and identity checks published by the Ministry of Interior do not distinguish between detention for other criminal offences and offences against migration law, which leads Amnesty International to conclude that

*“Police officers might be carrying out identity checks and detentions of migrants in order to increase the statistics on security and crime prevention. [...However] detentions solely for irregular migration status are not indicators of the efficiency (or inefficiency) of policies for dealing with crime. Treating them as such is not only inaccurate and misleading; it also contributes to the criminalization of irregular migration status.”*¹¹⁸

¹¹³ Spain, Ley Orgánica 4/2000 sobre Derechos y Libertades de los Extranjeros en España y su Integración Social, 11 January 2000, paras. 53, 55.1.b and 57.1.

¹¹⁴ Amnesty International Spain, 2010.

¹¹⁵ Amnesty International, 2011, pp. 21-22.

¹¹⁶ Ibidem.

¹¹⁷ Representative of the Sindicato Unificado de Policia SUP, cited through Amnesty International, 2011, p. 22.

¹¹⁸ Amnesty International, 2011, p. 23.

Even if the Secretary of State for Security assured in 2009 that the quotas had been removed, several police union representatives interviewed by Amnesty International said that the instructions are now given in form of oral instructions. Additionally, police officers receive extra money at the end of the year based on their 'productivity'.¹¹⁹

In Germany, Section 22.1 of the Federal Police Act grants the federal police the power to control without any suspicion ('verdachtsunabhängig') any person for the purpose of controlling irregular immigration. Hence, the legal provision does not only set migration control as the only aim of exercising stops and searches, but it does even explicitly not ask for any suspicion. Within the scope of Section 22, police is allowed to stop, question and demand identity documents from, and inspect objects of, any person in trains, railway stations and airports.¹²⁰

Even if the German Bundestag explains that the controls should be carried out on a random basis ('stichprobenartig'), there is no specified systematic control scheme and officers can freely choose whom to control. Together with the aim of controlling irregular migration, this leads the CERD and German Institute for Human Rights to conclude that the provision should be repealed as it leads de facto to racial discrimination¹²¹ "especially taking into account the delegation's explanation of the criteria used by police to carry out these checks which involve notions such as 'feel for a certain situation' or 'the persons' external appearance.'¹²² The Rhineland-Palatinate Higher Administrative Court dealt with a case of discriminatory ethnic profiling, in which a police officer admitted to have conducted the identity check in question based on skin colour. Hence, the court found that the control was violating anti-discrimination norms and that at least controls through the federal police within domestic train connections are unlawful if they are conducted with the aim of immigration control, as these train connections fall out of the scope of 'entering' the country. The German

¹¹⁹ Amnesty International Spain, 2010.

¹²⁰ Germany, Bundespolizeigesetz BGBI. I S. 2978, 19 October 1994, para. 22.1.

¹²¹ CERD, CERD/C/DEU/CO/19-22, 15 May 2015, para. 11; German Institute for Human Rights, 2015, p. 9.

¹²² CERD, CERD/C/DEU/CO/19-22, 15 May 2015, para. 11.

government has lodged an appeal against this judgement and denies the necessity to change the way controls are conducted in the future.¹²³

Even without quantitative data revealing their use, the legal powers and mandates of law enforcement officers in the three countries give a concerning basis making discriminatory ethnic profiling likely to happen, as the safeguards of reasonable suspicion are either completely lacking as in Spain and Germany, or being carved out increasingly as in the case of the UK. Even if the UK has a tradition of reasonable suspicion – which has been introduced explicitly as a response to the so-called Brixton-riots complaining about an over-policing of black communities, this long fought-for safeguard has been undermined in the name of counter-terrorism, and public pressure to reintroduce such a standard only lead to voluntary standards. In the case of Spain and Germany, powers without reasonable suspicion are even directly addressed to the aim of controlling irregular migration. Against this background quotas for stops or detentions as set in Spain – which are not a single case as similar quotas exist for example in France¹²⁴ - are more than dangerous.

The lack of safeguards in form of a prohibition of discriminatory ethnic profiling or detailed reasonable suspicion standards makes discriminatory ethnic profiling likely to happen, reason why it is of utmost importance to shed light on the use of the powers in reality and provide a basis for accountability.

¹²³ Deutscher Bundestag, 18/3654, 22 December 2014, paras. 20-21.

¹²⁴ Open Society Justice Initiative, 2009, p.22.

2.2. The discriminatory use of powers and safeguard of recording

The exercise of the use of policing powers and behaviour of the officers should be monitored and its effect displayed in statistics – not just to achieve accountability, but also as a basis for well-informed policymaking.¹²⁵ Additionally, it has been discussed above that it is complicated for victims to substantiate claims of being subjected to discriminatory ethnic profiling or indirect discrimination, and they thus need evidence of their stops and general statistics to practically rely upon.¹²⁶ The FRA points out that especially in cases of discriminatory ethnic profiling by indirect discrimination, it is necessary to rely on statistical data to prove the less favourable treatment of one group or disproportionality of the means.¹²⁷

Only the monitoring of police activities can reveal discriminatory practices, and therefore constitutes the first step towards effectively combatting discriminatory ethnic profiling based on an acknowledgement of the problem and provision of accountability, while at the same time providing victims with circumstantial evidence.¹²⁸ For this reason, expert bodies such as the ECRI, CoE Human Rights Commissioner and the FRA have recommended the monitoring of police activities, as well as the collection of data and statistics on people subjected to police powers, broken down on grounds such as ethnic origin, language, religion and nationality.¹²⁹ Such statistics should display the impact law enforcement practices on different ethnic groups, especially in situations where officers are granted broad discretionary powers, which can be used in an arbitrary or discriminatory way.¹³⁰ In order to reveal the effectiveness and unjustified over-policing, the suspicion and outcome of stop-and-searches should necessarily be included as well.

¹²⁵ ECRI, CRI(2007)39, paras 40-41; European Union Network of Independent Experts on Fundamental Rights, 2006, pp. 6-7.

¹²⁶ De Schutter & Ringelheim, 2008, pp. 15-16.

¹²⁷ FRA, 2010, p. 25.

¹²⁸ European Union Network of Independent Experts on Fundamental Rights, 2006, pp. 6-7.

¹²⁹ ECRI, CRI(2007)39, para.2. and paras 40-41; Council of Europe Commissioner of Human Rights, February 2012, p. 84; European Union Network of Independent Experts on Fundamental Rights, 2006, p. 7.

¹³⁰ European Union Network of Independent Experts on Fundamental Rights, 2006, pp. 6-7.

Many states claim that the gathering of so-called 'equality data' is legally not possible as it supposedly infringes with national and European data protection provisions. These arguments are rightly concerned with the fact that such data necessarily also include sensitive data of the affected groups and individuals, which are governed due to their high risk of misuse by especially rigid European data protection rules. However, several bodies and experts analysed the coherence of equality data collection with European data protection provisions and concluded that it is legitimate and legal if following several safeguards, such as the right aim and due regard to confidentiality, which are respected in the proposed form of disaggregated data, but have of course to be evaluated from case to case.¹³¹

2.2.1. The United Kingdom

The UK is currently the only European country to break down police behaviour on its impact on certain groups by monitoring the use of stop-and-search powers through so-called 'stop-and-search forms' and generating statistics out of the data broken down on ethnicity.¹³² The PACE Act of 1984 introduced next to a reasonable suspicion standard also minimum recording standards in order to inhibit officers from stopping people in an arbitrary way, and to allow for the monitoring and identification of where officers might use their powers incorrectly, as well as to make it possible to publish search statistics. In practice, the police is required to record every time when undertaking a stop-and-search the targeted person's self-defined ethnic background and reason for the questioning in an so-called stop-and-search form¹³³ of which a copy is handed in to the concerned person. Out of those documents, the anonymised data are used to generate statistics, which are accessible to the public. Since then, national statistics have not just shown how often which powers have been applied, but also on which ethnicities and with which outcome. This effort is not just unique in Europe, but had tremendous effects.

¹³¹ ECRI, CRI(2007)39, paras 40-41; European Union Network of Independent Experts on Fundamental Rights, 2006, pp. 6-7.

¹³² European Union Network of Independent Experts on Fundamental Rights, 2006, pp. 6-7.

¹³³ Ibidem.

The statistics revealed that in 2009/10, black people were at seven times, and Asians twice as likely to be controlled as white people,¹³⁴ and that the number of black people subjected to Section 60 searches of the still existing *Criminal Justice and Public Order Act* increased by more than 650 percent between 2005 and 2009.¹³⁵ In 2011/12, black people were still stopped at 6 times, and Asian people at the double of the rate of white people.¹³⁶ The increase of stops-and-searches disproportionately affecting minority ethnic groups was criticised by the CERD¹³⁷ and are objectively untenable in the context of data revealing the low hit-rate, and therefore ineffectiveness, of the stop-and-searches. In 2009, only 2% of the Section 44 stops of the Terrorism Act and 0,57 percent of the Section 60 stops resulted in arrests, and the arrest quota for Section 60 stops went in 2010 down to only 0,32 percent.¹³⁸

After the legislative changes following the prohibition of the stop-and-searches of people in the scope of the Terrorism Act in 2011, an ‘intelligence-led’ pilot project was established. As a result, the number of stops and searches in anticipation of crime were decreased by 89% within one year, while the number of arrests for recorded crimes just dropped by 12%.¹³⁹ Since 2012, non-suspicion stop-and-searches have been reduced by 90% in London, while the crime rate and complaints against the police went down and the arrest ratio improved.¹⁴⁰

These numbers show not only, that a significant decrease in non-suspicion based stop-and-searches did not harm the effectiveness of the police work, but also that an intelligence led approach is even more effective while targeting less innocent people. However, even with this improvement, the arrest-rate of such stops is still just 9%, most

¹³⁴ Ministry of Justice of the United Kingdom, October 2011, p. 34.

¹³⁵ Ministry of Justice of the United Kingdom, June 2010.

¹³⁶ Ministry of Justice of the United Kingdom, November 2013.

¹³⁷ CERD, CERD/C/GBR/CO/18-20, 14 September 2011, para. 18.

¹³⁸ Taylor, R., ‘Section 60: a most draconian stop-and-search law that plays the police to prejudice’, in *The Guardian*, 6 February 2014.

¹³⁹ Sedghi, A., ‘Arrests, stop and search and detentions: what do the latest police statistics show?’, in *The Guardian*, 4 April 2014.

¹⁴⁰ Abbott, D., ‘Theresa May is right to tackle stop-and-search’, in *The Guardian*, 2 May 2014.

of which for small amounts of cannabis¹⁴¹ - which puts into question the objective of preventing serious crime as initial justifications for the establishment of those police powers inflicting with fundamental rights. The proven inefficiency together with the damaging effect of the discriminatory use for police-community relationships makes a defence of the practice by police officials hard to understand.

But despite the public criticism following the reveal of the discriminatory and ineffective use of the powers, the PACE Act establishing the recording standards was amended in 2011 with the justification of reducing bureaucracy. The changes presented a severe setback in terms of accountability, which the CERD criticised as encouraging ethnic stereotyping, impunity and failing to promote accountability for abuses.¹⁴² Under the new amendment, police officers are granted the discretion to decide if they want to record stops which did *not lead to searches* and police forces are even allowed to abolish the recording of such stops altogether without public consultation.¹⁴³ The government also discontinued the issuance of related reports.¹⁴⁴ Rebekah Delsol points out that in the absence of recoding, communities cannot demonstrate the extent and effects of the use of police powers and pressure the police forces to re-introduce the recording.¹⁴⁵ Additionally, the amendment reduced the recording of stops *leading to searches* as well, and instead of a full record of stops, only receipts are issued by removing the obligation to record the name, address and possible injuries of the stopped person, as well as the outcome of the arrest.¹⁴⁶ Thus, it is more complicated for victims to prove complaints of injuries caused by the police, and it is impossible to substantiate the claim of being discriminated against because of repeated stops.¹⁴⁷ Additionally, the data broken down on nationality or self-perceived ethnicity cannot be weighed against the inefficient outcome anymore. As police forces of different parts of the country can opt out of the recording, but the government increasingly publishes crime-patterns in

¹⁴¹ Abbott, D., 'Theresa May is right to tackle stop-and-search', in *The Guardian*, 2 May 2014; Travis, A., 'Police stop-and-search powers: May to address Commons after consultation', in *The Guardian*, 30 April 2014.

¹⁴² CERD, CERD/C/GBR/CO/18-20, 14 September 2011, para. 18.

¹⁴³ Delsol, 2011, p.21.

¹⁴⁴ CERD, CERD/C/GBR/CO/18-20, 14 September 2011, para. 18.

¹⁴⁵ Delsol, 2011, p.21.

¹⁴⁶ BBC News, 'Police stop-and-search forms cut', in *BBC News*, 16 September 2009.

¹⁴⁷ Delsol, 2011, p.21.

maps related to the different regions, some communities might not be able to contest the police performance in relation to those crime statistics anymore and scrutinise the use of stop-and-search powers.¹⁴⁸

However, despite of this severe erosion of accountability from 2011 on, the stop-and-search forms and published statistics had a huge impact based on the recognition of the discriminatory and ineffective problem. These revelations were additionally supported by a recent report of the Equality and Human Rights Commission inspection which found that more than a quarter of the stops under the Police and Criminal Evidence Act in 2013 could have been illegal.¹⁴⁹ Based on this pressure, the voluntary reforms initiated by Home Secretary Theresa May do not only aim at reintroducing a reasonable suspicion standard, but make it compulsory for the police forces which agreed on the measures to record again whether or not a stop and search led to an arrest.¹⁵⁰ Other measures implemented since November 2014 allow community groups to observe stop and searches formally and trigger action by complaining misuse.¹⁵¹

It is complicated to assess at this point in how far the issued statistics revealing the discriminatory use of the stop-and-search powers will help victims to claim their rights in discrimination cases. Even if the possibility is given in theory, the Court of Appeal failed to consider the discriminatory scope of Section 60 in a 2014 case and refused to engage with the statistics provided for, which were showing its disproportional use against black Londoners.¹⁵² Regarding article 14, the judge held that the power is not itself arbitrary or ‘inherently discriminatory’ because of being limited to 24 hours and a specific territory. Instead, he stated that “it is true that the area covered by the authorisation has a sizeable proportion of black residents [...] I am sensitive to the fact that the use of stop-and-search powers, including those under section 60, attract criticism, particularly among some ethnic minority communities in London. That is a

¹⁴⁸ Ibidem.

¹⁴⁹ Abbott, D., ‘Theresa May is right to tackle stop-and-search’, in *The Guardian*, 2 May 2014.

¹⁵⁰ Barrett, D., ‘Theresa May introduces new restrictions on stop and search powers’, in *The Telegraph*, 26 August 2014.

¹⁵¹ Ibidem.

¹⁵² Press Association, ‘Court of appeal rejects challenge over legality of stop-and-search powers’, in *The Guardian*, 4 February 2014.

proper subject for debate elsewhere.”¹⁵³ Hence, the judgement was criticised because it considered “the issue in an absolute vacuum, and failed to show any appreciation of the reality of the impact on those subjected to stop and search.”¹⁵⁴

The example of the UK shows how important the monitoring and collection of data is to reveal the discriminatory scope and inefficacy of stops-and-search powers without reasonable suspicion. The Sections allowing for non-suspicion based crime prevention are not just used in a discriminatory way against individuals, but also to over-police entire areas with minority populations. These findings are especially striking, as the mandates for which the stop-and-searches are conducted in the UK are not even related to migration control. This leads to a worrying foreshadow, that the use of non-suspicion based stop-and-searches, which are explicitly aimed at migration control, such as the ones in Germany and Spain, may have an even worse discriminatory impact on minority groups.

2.2.2. Spain and Germany

In Spain and Germany, authorities constantly deny the existence of identity checks based on ethnicity, race, skin colour or religion,¹⁵⁵ and the Spanish government is of the view that statistics including the self-identified ethnicity of a person would itself lead to discrimination.¹⁵⁶ Hence, measures to reveal and address discriminatory ethnic profiling by police forces in those countries barely exist. There is a lack of official data to map the scale and nature of such practices and no related monitoring of police behaviour and outcomes. However, both examples are also worth looking at as inquiries made by other bodies and NGOs support the claim that the immigration control related powers actually lead to discriminatory ethnic profiling, and some data provided in

¹⁵³ *The Queen on the application of Ann Juliette Roberts v. The Commissioner of Police of the Metropolis & ors* (UK Court of Appeal, 2014), para. 33.

¹⁵⁴ Taylor, R., ‘Section 60: a most draconian stop-and-search law that plays the police to prejudice’, in *The Guardian*, 6 February 2014.

¹⁵⁵ An exception is a circular issued by the Spanish Ministry of Interior in 2012, which called for an end of the practice. Bradford, B., ‘Police stops in Spain’ in *Criminology at Oxford*, 18 October 2013.

¹⁵⁶ Amnesty International, 2011, p.2.

Germany put the claimed efficiency of proactively searching for irregular migrants into question.

In Spain, the only statistics available through the Ministry of the Interior show that there have been almost 8,000,000 identity checks in 2012 alone, but there is no information on the subjects to searches, numbers of police operations per area, their frequency or motive and outcome of controls.¹⁵⁷ Additionally, Amnesty International investigated that people who document or observe identity checks have been intimidated by the police and sometimes even been charged with offences of ‘disobedience’ and ‘restricting the police’s work’.¹⁵⁸ Hence, there are barely any measures to enforce accountability or prove the extent of discriminatory ethnic profiling practices, even if the discriminatory use of the broad policing powers has been documented and widely criticised by several international bodies and NGOs.

A 2013 report on ethnic profiling based on a survey in Spain found that in two years, 16 per cent of ‘Caucasian’ people born in Spain had been stopped, compared with 21 per cent of ‘non-Caucasian’ people born in Spain and 45 per cent of ‘non-Caucasian’ people born outside Spain.¹⁵⁹ Reports from the ECRI, CERD, the Spanish Human Rights Ombudsman, the UN Special Rapporteur on contemporary forms of racism, the Committee of Ministers of the CoE, the CoE Human Rights Commissioner and Amnesty International all documented and criticised a consistent picture: Large-scale ethnicity-based identity checks and raids aiming at detaining irregular migrants are being carried out with increasing frequency especially in places with a high percentage of ethnic minority groups.¹⁶⁰

Within the Strategies for Effective Police Stop and Search Project (STEPPS), the Open Society Justice Initiative documented stop-and-search practices in some police forces, which were not even explicitly tasked with immigration control, nor did they have

¹⁵⁷ Bradford, B., ‘Police stops in Spain’ in *Criminology at Oxford*, 18 October 2013.

¹⁵⁸ Amnesty International, 2011, p. 19.

¹⁵⁹ García Anón, J. & Bradford, B. et al, 2013. pp. 115-145.

¹⁶⁰ ECRI, CRI (2006)4, para. 20; ECRI, CRI (2011)4, para. 204; CERD, CERD/C/ESP/CO/18-20, March 2011, para 10; Bradford, B., ‘Police stops in Spain’ in *Criminology at Oxford*, 18 October 2013; Amnesty International, 2011, p. 22.

quotas.¹⁶¹ In a comparison with other countries participating in the project, the organisation found that “evidence suggests this ethnic profiling is most systematic for immigrants in Spain.”¹⁶² While at the beginning of the project ethnic minorities were stopped up to 10 times more, after the introduction of stop forms indicating the grounds of the stop and nationality of the person, the number of minority groups stopped declined to 3,4 times more in comparison to ‘Spaniards’.¹⁶³ The project thus shows, that the introduction of recording standards can also by itself and directly reduce the risk of discriminatory ethnic profiling.

In Germany, there is also a lack of comprehensive and disaggregated data of persons targeted by the random checks. However, many persons affected by the controls and NGOs claim that the power is used in a discriminatory way¹⁶⁴ and since the Rhineland-Palatinate Higher Administrative Court condemned a discriminatory stop-and-search practice carried out in the scope of migration control there is an increasing number of other court cases dealing with cases of discriminatory ethnic profiling.¹⁶⁵ Despite the absence of comprehensive data, some general statistics provided by the Federal Government after questions raised by the opposition show that out of the 443,838 controls conducted in 2014 on the basis of Section 22.1, just 2,27 per cent of the cases lead to a *suspicion* of irregular entry or stay.¹⁶⁶ This low ‘hit-rate’ alone reveals the inefficiency of the proactive searches for irregular migrants, but the actual number of ‘guilty’ people seems to be even much lower. The statistics do not specify who did or wanted to claim asylum, even if those who were under suspicion of illegal entry came in an overwhelming majority from countries like Syria, Eritrea and Afghanistan,¹⁶⁷ which are at the same time the main nationalities granted asylum to in Germany.¹⁶⁸ If the police identifies people with legitimate asylum claims, these numbers should be

¹⁶¹ Open Society Justice Initiative, 2009 (3).

¹⁶² Ibidem, p.18.

¹⁶³ Ibidem, pp. 40-50.

¹⁶⁴ Deutscher Bundestag, 17/6671, 25 July 2011, p. 1; Amnesty International Germany, 2014, pp.6-8.

¹⁶⁵ Oppong, M., ‘Die Fälle vor Gericht häufen sich’, in *Medien Dienst Integration*, 15 April 2014.

¹⁶⁶ Deutscher Bundestag, 18/3654, 22 December 2014, pp. 5 ff

¹⁶⁷ Deutscher Bundestag, 18/4149, 27 February 2015, pp. 5-10.

¹⁶⁸ German Institute for Human Rights, April 2015, p.8.

subtracted from the 'hit-rate', and show that profiling in migration law enforcement is at least in Germany not effective at all.

The three country examples discussed do not only show an de facto discriminatory impact of broad policing instruments without reasonable suspicion on minority groups wherever data is available, but also that such proactive attempts to detect criminals in general and irregular migrants are ineffective, at least in the cases analysed. At the same time, the practice of discriminatory ethnic profiling is even supported by quotas and political orders to strictly enforce immigration laws in the two countries within the Schengen area. Several studies reveal that discriminatory ethnic profiling is similarly used by law enforcement in many EU Member States.¹⁶⁹

It is worrying, that despite the case of the UK, which is also making steps backwards, there is an absence of any monitoring of the behaviour of the police and statistical data, which creates not just a sense of impunity within the police, but also powerlessness amongst the affected. No country provides any statistical data revealing the discriminatory impact of policing operations aiming at combatting irregular migration specifically, which is foreboding. Against the background of an unwillingness to provide information about the extent of discriminatory ethnic profiling, especially in the area of migration control, it is almost impossible to develop strategies to address the problem. This general ignorance is also reflected in the absence of explicit definitions or specific legal prohibitions of discriminatory ethnic profiling in the Member States and the EU. This puts the willingness to address and revise legislation with indication of a de facto discriminatory impact profoundly into question, even if the states have not only the legal obligations to do so, but should also have an self-interest to either contest claims of discrimination, or combat discriminatory practices where existing due to their tremendous detrimental and counter-productive costs, like it was rightly done in the UK despite the setbacks.

¹⁶⁹ Garcia Anón, J. & Bradford, B. et al, 2013; see also the FRA EU-MIDIS European Union minorities and discrimination survey, available at <http://fra.europa.eu/en/project/2011/eu-midis-european-union-minorities-and-discrimination-survey> (consulted on 20 May 2015).

3. The proportionality of discriminatory migration control methods

In the *Timishev* case, the ECtHR condemned a law enforcement decision based solely on ethnicity as direct racial discrimination, which is absolutely prohibited, reason why a proportionality test in such a single case is redundant. At the same time, European or international bodies or experts never made a proper assessment of the necessity and proportionality of policies or legislation in migration law enforcement presumably leading to discriminatory ethnic profiling, but just of ethnic profiling technics related to counter-terrorism measures.¹⁷⁰

A legal evaluation of single cases gives important guiding principles to define which practices constitute discriminatory ethnic profiling and is of utmost importance for victims to claim their rights. However, focusing just on the legality of single cases, or even the evaluation of single legislations, might not be able to address a broader problem, which is in this case the proactive enforcement of migration law on the ground and within the external borders. Such an approach is necessary not just to enable a well-informed policy-making, but also to address responsibility and accountability at higher political levels. A policy or legislation leading de facto to racial discrimination has to be revised and annulled, and this might have to be done also for legislations where no statistical evidence of a discriminatory impact exists yet. If a policy itself intrinsically perpetuates the use of discriminatory ethnic profiling practices, even a perfect legal protection against single cases will just calm the effects but not tackle the root causes.

Hence, this part of the paper is taking the findings of an discriminatory application of the stop-and-search powers in the three country examples analysed above as a reason to question if policing powers to proactively combat irregular migration on the ground have an objective and reasonable justification considering their impact.

¹⁷⁰ CERD, CERD/C/64, 2004, para. 6; UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/4/26, 29 January 2007, pp. 6-16; Council of Europe Commissioner for Human Rights, 20 July 2009; Council of Europe Commissioner for Human Rights, 29 May 2007; ECRI, CRI(2004)26; Open Society Justice Initiative et al, 2009, p. 6; De Schutter & Ringelheim, 2008, pp. 11-15.

This discussion will be based in general on a two-tiered analysis focusing first on the legitimacy of the aim pursued, and then on an assessment if the means used are proportional in relation to the violation of rights, and adequate to achieve the aim sought to be realised, with no more lenient means possible.¹⁷¹ Against the background of rapidly developing proactive policing instruments to control and combat irregular migration, this general discussion is not limited to policing powers of the country examples analysed above. Instead, it discusses proactive policing powers in the scope of migration law enforcement on the ground in general, which include varying policing powers in different countries. It therefore goes beyond a purely legal proportionality test and includes a socio-political dimension as well in order to also discuss the arguments often raised in defence of such means and practices.

3.1. The legitimacy of law enforcing the criminalisation of migration

The very first step of analysing if proactive enforcement measures to combat irregular migration have an objective and reasonable justification is the assessment of the legitimacy of the aim sought to be realised. This question is legally speaking short and easy to answer, as it is comparatively simple to invoke a legitimate aim for law enforcement efforts, such as national security, or in this case controlling irregular migration. As shown above, the ECtHR as well as the HRC recognised in their case law that “the control of illegal immigration is a legitimate objective, and that police identity checks are an acceptable method of achieving that objective.”¹⁷² Combatting and controlling irregular migration is thus generally a legitimate aim for law enforcement practices such as stops and identity checks.

However, even without disputing the need and legitimacy of migration control in general, the restrictive developments in the migration field, which brought inter alia proactive stop-and-search powers for this aim to existence, should be reason to re-open

¹⁷¹ *Karlheinz Schmidt v. Germany*, (ECtHR, 1994), para. 94.

¹⁷² *Williams Lecraft v. Spain* (HRC A/64/40, 2006), para. 5.2.

a discussion if the use of criminal law instruments in the current extent is a legitimate tool to control migration in general, especially if human rights violations are committed by using such means. Even if this is in its basis a question regarding the means used to achieve the legitimate aim of migration control, the legitimacy of both, aim and general method, are inherently connected.

There has been a dramatic shift towards criminalising migration within the Member States since the mid-70s, which does not only take place at the discursive level, but is defined and formalised in the criminal law, immigration law, and policies of the Member States and the EU.¹⁷³ A general discourse linking immigration to crime, and treating it thus as security question, lead to an increased legal criminalisation of irregular migration and blurring of the boundaries between classical migration law and criminal law. The so-called 'cimmigration' trend is based on an increased anxiety on the part of public opinion, media and political establishment regarding migrant criminality, and embodied by different, while connected, developments in the enforcement of border controls, tightened conditions of entry, increased criminal sanctions for migration offences and expanding regimes of detention and deportation.¹⁷⁴ Within this punitive trend of criminalisation and regulation, the group of irregular migrants constitutes the main target of restrictive migration policy tools used in the EU and their Member States, which construct their illegal status and use criminal sanctions, detention and deportation more and more systematically.¹⁷⁵ The exclusive and restrictive approaches taken resulted in a trade-off of certain democratic and liberal values, supported by most of the citizens due to a willingness to compromise their rights and freedoms for the sake of security, and this willingness has deepened since the events of September 11, 2001 demanded security from terrorism.¹⁷⁶ Since the perceived threat posed by terrorism, the field of immigration regulation has additionally changed fundamentally as powers are established which address both, migration and terrorism.¹⁷⁷ However, countering terrorism is at least in theory based on the legitimate aim of

¹⁷³ Parkin, 2013, p. 1.

¹⁷⁴ Ibidem.

¹⁷⁵ Ibidem.

¹⁷⁶ Lahav, 2003, p.1.

¹⁷⁷ Ibidem.

preventing an immediate threat to the life of third persons posed by terrorist attacks. In a huge contrast, the legitimacy of the use of criminal law to punish and counter migration in general, as well as the proportionality of many laws criminalising migration, have been questioned in their basis by many scholars.

Migration control is traditionally regulated in the civil sphere and deals with decisions on whom may cross a border and reside in a territory. Criminal law in turn addresses harm to individuals and society, which stems according to Stumpf from 'fraud, violence and evil motive.'¹⁷⁸ However, both fields have been merged and the boundaries between criminal justice and migration control have been blurred increasingly within the Member States as well as the European level.¹⁷⁹ Ana Aliverti sums this problem up as follows:

*“Criminal law as a specific mode of legal regulation should be reserved for the most serious wrongs. Further, because the goal is to eject immigration offenders from the country, criminal sanctions against immigrants are emptied of any normative function and are unjustified. Not only is the formal enactment of immigration offences in conflict with various criminal law principles, the actual enforcement of these offences is discretionary and random, casting doubts on the alleged generalised feature of the criminalisation of immigration and making criminal law highly unpredictable.”*¹⁸⁰

Instruments, which are designed to counter 'most serious wrongs stemming from fraud, violence and evil motive', are thus used to criminalise and punish offences which do not harm others and which nationals by their very definition cannot even commit. An extreme example for such criminalisation is for example Spain, which punishes irregular stay within the country with up to 10,000 Euros fine and expulsion for years. This evaluation, which is widely supported in criminal law literature, should fundamentally affect the assessment of the proportionality of measures resorting to discriminatory ethnic profiling as direct human rights violations for the sake of enforcing restrictive policies and legislation enacted within the criminalisation regime. The contested strict criminalisation of irregular migration suggests that even the

¹⁷⁸ Stumpf, 2007, p. 379.

¹⁷⁹ An analysis of the legal criminalisation of migration in the legal frameworks of the EU and Member States has for example been made by the FRA research project 'fundamental rights of irregular migrants on an irregular situation' and Aliverti, 2012, pp. 417-434.

¹⁸⁰ Aliverti, 2012, p. 418.

legitimacy and proportionality of the laws establishing criminal offences, for whose law enforcement officers might conduct discriminatory ethnic profiling, is in itself contested.

3.2. The necessity and suitability of proactive migration control

3.2.1. The Schengen borders code: a necessity of proactive means ?

In order to be proportional, the measure used has to be necessary and suitable to achieve the aim sought to be realised and there cannot be any less onerous means to achieve this aim. However, the necessity and suitability of proactive policing instruments to detect irregular migrants on the ground in order to achieve the aim of migration control should be put into question.

The necessity of proactive profiling especially within the Schengen area is a central point raised by many defendants of policing methods such as stop-and-searches to control and combat irregular migration. While the necessity of external border controls in form of systematic identity checks is something that almost all societies agree on, the Member States of the Schengen area feel confronted with an additional 'threat' posed by irregular migration, which is embodied by the European integration model. Since the establishment of the Schengen area, systematic identity checks and other forms of intra-Schengen border controls have been abolished to allow a free traffic flow and movement of people within the Schengen area.¹⁸¹ Hence, there is no possibility for single Member States anymore to conduct comprehensive and systematic border controls at their own national borders to combat irregular migration right at the entry point to their territories. The abolishment of inner-European border controls is the main achievement for the free movement of people within the EU and key to the European integration. However, it is conceptually easier to prevent discriminatory ethnic profiling in the migration law enforcement if there are systematic identity checks of all individuals trying to enter a country, as such controls are in their basis not

¹⁸¹ European Union, 2008/C 115/01, 13 December 2007, art. 67.1 and 77; Van der Woude, 2012, p1.

discriminatory if the principle is followed that everybody should receive the same attention. The decision to let a person enter should just be based on the nationality and residence permit of the person and individual history such possible involvement in crime, and according to the principle established in the *Prague Airport* case, all members of the same legal status should be treated the same without differentiation based on ethnicity. As systematic border controls have been shifted to the external borders of the Schengen area, those controls have to follow those established rules, but even there discriminatory ethnic profiling practices, as well as a vast amount of other human rights violations are committed and violate as well article 6.2. of the Schengen Borders Code, which prohibits discrimination on suspect grounds while carrying out border checks.¹⁸² As this paper is focusing on the risks of profiling within the Member States of the EU, an analysis of discriminatory ethnic profiling practices, which are increasingly used and formalised at the external borders, is left to further research.

The free movement of people within the Schengen area had a considerable impact on the justification of proactive profiling practices within the Member States. Security and police experts drove forward a discourse underlining that the abolishment of border controls would lead to a major security deficit by increased trans-border crime and movements of criminals.¹⁸³ This general discourse has been connected to a perception of threat posed by increasing immigration waves. In the absence of effective legal ways and possibilities to enter the region, the omnipresence of reports picturing flows of refugees seeking to enter the EU via illegal ways has perpetuated a one-sided discourse of being overrun by foreigners, and lead to the blaming of states with external Schengen borders for not being capable of controlling the common borders effectively. In this ambit, xenophobic and anti-migration attitudes have been constantly raising within the EU¹⁸⁴ and are supported by a political discourse and policy instruments increasingly tightening the criminalisation of irregular migration.

Hence, the European integration was used as justification for a variety of compensatory security measures, not only at European level as will be discussed in the fourth part of

¹⁸² Council of the European Union, Regulation (EC) No 562/2006, 15 March 2006, art. 6.2.

¹⁸³ Parkin, 2013, pp. 3-6.

¹⁸⁴ CERD, A/60/18, 2005, para. 20.

this paper, but also at the national level.¹⁸⁵ Many states increasingly use proactive profiling technics within their territories to identify irregular migrants, which might have escaped the external border regime. As a result, some police mandates, as for example the ones analysed in Spain and Germany which were established right before the Schengen II agreement came into force, explicitly aim at detecting irregular migrants within the national territories or close to the internal borders.¹⁸⁶ It can thus be argued that their very mandate seeks to fill the perceived security gap resulting from the abolishment of systematic border controls. Hence, such proactive measures seem generally necessary in the security discourse, as they add to the general necessity of migration control at the external borders and in administrative procedures the possibility of detecting irregular migrants, which already escaped the first control system. The added value is thus *combatting* irregular migration within the territory, additionally to the necessity of *controlling* it. However, it is unlikely that this added value is actually a *necessity* of such extent, that it could justify an infringement with individual rights especially if considering the principle established by the ECtHR, which states that where differential treatment is based on a ‘suspect ground’,

“the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought to be realised but it must also be shown that it was *necessary in the circumstances* [emphasis added].”¹⁸⁷

It is hard to imagine a situation, where stopping and identifying people who could possibly be irregular migrants, and thereby not only risking but often using discrimination, is necessary in the circumstances, as there is not even a suspected security threat posed by the person in this moment, even if the identified individual turns out to be an irregular migrant. The high risk of discrimination is hereby the main difference to systematic identity checks at the external borders, and the absence of serious crime the difference to proactively searching for terrorists, which is not proportional neither.

¹⁸⁵ For an in-depth analysis of the impact of the Schengen Agreement and Conventions on the development of other forms of control, see Atger, 2008.

¹⁸⁶ Van der Woude, 2012, p. 2.

¹⁸⁷ *Kozak v. Poland* (ECtHR, 2010), para. 92.

3.2.1. The questionable effectiveness of proactive migration law enforcement

The suitability of proactive policing instruments to achieve the aim of controlling and combatting irregular migration is questionable for two principal and connected reasons related on one hand side to an inherent problem of the technic of profiling, and on the other to the inefficient and in-effective outcome of the stops in reality.

Police officers cannot stop and identify everybody within the territory of the country, and stop-and-search powers neither prescribe a systematic control scheme whereby for example every tenth person is stopped, nor is such a numeric system wanted as the powers aim at controlling 'suspicious' persons. Thus, some method of profiling is used, even if informally or unconsciously. Regarding the inherent problems of the method of profiling, the opinions and recommendations established by several bodies and experts regarding the proportionality of ethnic profiling practices in the context of counter-terrorism can give useful orientation, as these arguments can also be applied to ethnic profiling aiming at combatting irregular migration. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, analysed in his 2007 report that the profiles to proactively detect terrorist suspects use criteria of national origin and ethnicity as proxies for religion, which is ineffective and unsuitable. The profiles are over-inclusive as many targets will not be Muslims, and even if they are, the overwhelming majority is not involved in terrorism. At the same time, the profiles are under-inclusive because terrorists, which do not fit into the profile, escape the attention. In the end, thousands of people are targeted without concrete results.¹⁸⁸ This assessment is similar to the ones made by the CoE Human Rights Commissioner and CERD, who condemned the practice *inter alia* because of targeting people in an over- and under-inclusive way,¹⁸⁹

¹⁸⁸ UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *A/HRC/4/26*, 29 January 2007, pp. 6-16; De Schutter & Ringelheim, 2008, pp. 11-12.

¹⁸⁹ Council of Europe Commissioner for Human Rights, 20 July 2009; Council of Europe Commissioner for Human Rights, 29 May 2007; CERD, *CERD/C/64/Misc.11/rev.3*, 2004, para. 6.

and the Open Society Justice Initiative found that the measures relying on ethnic profiling have thus a limited success in actually preventing terrorism.¹⁹⁰

The general problems of inefficiency and under- and over-inclusiveness of the profiles also apply to profiling practices in the fight against irregular migration. When profiling people for suspected irregular migrants, officers are likely to use phenotypical characteristics as proxy for foreign nationality, but many targets will not be foreign nationals, and even if they are, the overwhelming majority is not illegal within the country or committed in any other way a migration related offence. Irregular migrants of different characteristics are likely to escape the attention. The profiles are thus in the same way under-inclusive, while affecting a huge amount of innocent people (if irregular migrants are stigmatised as 'guilty').

However, defendants of ethnic profiling practices in the area of migration control claim that ethnicity and related phenotypical characteristics do actually serve as an effective proxy for the probability that a person might be illegal in the country. While it is easier accepted that there is no proven statistically significant correlation between ethnicity and the likelihood to commit a certain crime such as drug trafficking, murder or terrorism (which still many believe),¹⁹¹ the crime of being illegally in a country is a crime, which just foreign nationals can commit. Thus, using characteristics such as ethnicity or race as proxies seems to many more reasonable and effective in the case of migration enforcement policies.

First of all, this argument is legally speaking not valid and such practices are simply unlawful. Besides this legal argument, all indicators and data available show that ethnic profiling to detect irregular migrants, as to detect suspected terrorists, is actually ineffective. The data available for the UK proves that proactive profiling through stop-and-searches – in this case to combat and prevent terrorism and other crimes such as drug dealing – are generally ineffective with just 0,32 to maximum 2 percent of the stops resulting in arrests, a large majority of which were for minor offences. The example of Germany also shows, that profiling to detect irregular migrants is not just

¹⁹⁰ Open Society Justice Initiative et al, 2009, p. 6.

¹⁹¹ European Union Network of Independent Experts on Fundamental Rights, 2006, p. 6.

ineffective in terms of numbers with just 2,27 per cent of the identity checks leading to a *suspicion* of irregular entry or stay, but that those intercepted people come in a large majority from countries with a high propensity of a reasonable asylum claim. In the scope of the Operation Mos Maiorum which will be further analysed in the last part, more than half of the intercepted individuals claimed asylum anyways. The police is thus likely to proactively identify people, which aim at using the legal and administrative way anyways.

3.3. The high risk of discrimination based on 'suspect grounds'

3.3.1. The dilemma of discrimination in migration control

Having discussed the questionable suitability and efficiency of the identification measures, it has to be assessed if these measures are reasonable considering the competing interests. Therefore, this part scrutinises the risk that discriminatory ethnic profiling as direct human rights violation is used to achieve the aim, and the negative effects resulting from such use.

In the proactive enforcement of migration law, an infringement with individual rights touching the area of 'suspect' grounds in form of discriminatory ethnic profiling seems not only very likely to occur. It has also been proven before courts in the single cases referred to above and been underlined statistically by the comprehensive data and case studies related to the use of stop-and-search powers in the country examples discussed above. However, the proven discriminatory effect might not just be a question of misuse of the norm, but the norm itself might lead de facto to discrimination, even if it is not its objective.

The aim of controlling and combatting irregular migration poses an intrinsic problem of legally treating individuals differently on basis of their nationality and legal status, while at the same time not being allowed to discriminate against them based on sensitive characteristics. Migration control and decision-making are per definition based

on a differential treatment of people on grounds of their nationality and legal status. This divide is lawful, and EU anti-discrimination law therefore excludes a protection against discrimination on grounds of *nationality and legal status*, hence not providing for an equal treatment of third country nationals in the *legal conditions of residence and entry*. These explicit exceptions are stated in article 19 TFEU and article 3.2. RED. The prohibited grounds of discrimination go, as explained in the first part, beyond nationality and include inter alia race, ethnic and national origin, skin colour, religion.

The inherent risk of resorting to discriminatory ethnic profiling practices in the proactive enforcement of migration law is most illustratively shown when officers proactively try to detect suspected irregular migrants in public places. In the absence of systematic controls, is impossible to identify a physically non-apparent legal status or the nationality of a person without using informally or unconsciously profiling to approach the legal status by the use proxies such as skin colour or ethnicity. Officers might be tempted to do so especially if they are granted broad discretionary powers reflected in ample stop-and-search powers and weak reasonable suspicion standards, and the risk intensifies if they are given 'hit quota' to meet, as has been shown in the case of Spain. As analysed in the first part, there is legally no doubt that the use of such proxies is illegal and amounts to direct racial discrimination if the law enforcement decision is based on them to decisive extent.¹⁹² However, despite of being forbidden, several academics put into question if it is possible to pro-actively law enforce migration law without using discriminatory ethnic profiling at all. Arian Schiffer-Nasserie calls this intrinsic problem 'the inevitable connection between police and racism' and argues against the approach of scandalising discriminatory ethnic profiling by police officers as single incidents driven by racist intention, while at the same time not addressing the intrinsic danger of fuelling and promoting such racist behaviour through the duty of exercising policing functions set by the legislator.¹⁹³ The execution of the right of residence by the police is per se based on the criteria of citizenship or

¹⁹² *Timishev v. Russia* (ECtHR, 2005), para. 58; *Williams Lecraft v Spain* (HRC, CCPR/C/96/D/1493/2006, 2010), para.7.2.

¹⁹³ Schiffer-Nasserie, A., 'Polizei und Rassismus. Über einen unschönen, aber unvermeidlichen Zusammenhang', in *LabourNet Germany*, 10 November 2014, pp. 1-3.

residence permit, which constitutes an in its basis exclusionary measure prescribed by the legislator, that the police has to set forth in practice. The police thus suspects foreigners of committing a crime, which leads officers to search for foreign looking people, which in their opinion and assessment do not belong there. This perspective similar to racist prejudice itself. Hence, the legislative statutory requirement is in Schiffer-Nasserie's opinion translated within the policing practice necessarily into a process of selection and suspicion based on external characteristics such as skin colour, hair structure, or language – in short racial profiling. Taken from this perspective, a clear differentiation between discriminatory behaviour based on on intention and the mere execution of the political- and legal mandate is simply not possible for law enforcement officers. This suspicion is underpinned by several comments made by law enforcement officers and authorities rejecting court rulings upholding the illegality of ethnic profiling in this area. The chairperson of the German Police Union for example commented on the decision of the Rhineland-Palatinate Higher Administrative Court that the courts just “exercise aesthetic administration of justice, but fail to consider the practice.”¹⁹⁴ Similar responses have been given in reaction to other cases, such as *Rosalind Williams v Spain*.

The proposals made by expert bodies and academia regarding additional behavioural factors to base a law enforcement decision on are complicated to translate to the purpose of migration enforcement. The FRA suggests characteristics which must be specific to the person and consist for example in acting suspiciously, carrying an unusual object or standing out in some other way, like matching an existing specific description of a suspect.¹⁹⁵ Other reasons would be carrying unusual suspect objects like weaponry, but how can those characteristics be linked to a legal status without putting every person of an ethnic minority taking a train or carrying luggage under general suspicion?

These conceptual considerations prompt the suspicion, that in the proactive enforcement of migration law, at least on the ground, discriminatory ethnic profiling is so likely to happen, that there is no need for an official order. It is likely to happen informally or

¹⁹⁴ Rainer Wendt, cited through *ibidem*, p. 4.

¹⁹⁵ FRA, 2010, pp. 21-22.

subconsciously as soon as the police is granted a broad enough power, and even if the power is limited through a reasonable suspicion standard, this might maybe decrease the controls, but not solve the problem of finding other proxies for a legal status. This should not be an excuse for the use of discriminatory ethnic profiling in migration enforcement or downplay that such practices are also certainly often based on xenophobic and racist intention of the officers, who can hide behind the argument of not knowing better how to enforce their mandate. Many European and international bodies generally observe that discriminatory ethnic profiling is widely used in the migration area and are therefore calling for an end of the practices in identity checks, border checks and administrative procedures.¹⁹⁶ The CERD recognised in 2005 an increase in the use of ethnic profiling “partly as a result of the rise in immigration and population movements, which have prompted prejudice and feelings of xenophobia or intolerance among certain sections of the population and certain law enforcement officials.”¹⁹⁷ It is not just complicated to proactively enforce migration law without using proxies for a legal status, but the risk of mixing up legal and illegal grounds of differential treatment can raise vice versa, if the allowed differential treatment based on nationality or legal status, which justifies the stop-and-search powers in this area, is used to obscure discrimination on basis of race, ethnicity or religion.

Proactive policing measures like ample stop-and-search powers to detect irregular migrants are thus de facto leading to discriminatory ethnic profiling and thus human rights violations which do not just per se touch the area of ‘suspect grounds’, but often constitute direct racial discrimination if law enforcement decisions are to a decisive extent based race, ethnicity or skin colour. Such violations are unjustifiably forbidden as infringing with the essence of the right not to be racially discriminated. Additionally, such serious human rights violations seem not just to result of a wrong implementation of the measures, but are reinforced by, and to a certain extent result of the conceptual dilemma posed by the combination of the mandate and associated method of enforcement. Thus, it can be argued that not just the implementation, but the norm

¹⁹⁶ Council of Europe Commissioner of Human Rights, 2012, pp. 81-82; Open Society Justice Initiative et al, 2009, p. 12; European Union Network of Independent Experts on Fundamental Rights, 2006, p. 8.

¹⁹⁷ CERD, A/60/18, 2005, para. 20.

itself, even if not objectively aiming at discrimination, leads to discrimination based on race, ethnicity, skin colour or religion. Such means should thus be annulled already because of the inherent nature of the risk.

Even if following the proportionality assessment, the risk of infringement with human rights touching 'suspect grounds' leaves little doubt that such measures are unproportional as having 'wide negative consequences for the society', which do not just directly follow out of direct racial discrimination, but are enhanced even further through the weight of policing within the criminal justice system.

3.3.2. The wide negative consequences for society

It is important to understand which effects discriminatory ethnic profiling can have not just on the individuals, but also on society and the broader migration policy. The discrimination of people subjected to controls does not just at the very moment of happening horribly affect the individuals, but also detrimentally impacts the relations between communities and the police by leading to a lack of trust in the institution and officers,¹⁹⁸ which has also been proven in a survey in Spain.¹⁹⁹ It is more than questionable if risking such a lack of trust for the sake of migration control weights against the resulting loss of cooperation that the police would need to combat actual serious crimes.

Discriminatory ethnic profiling on the ground also fuels xenophobic attitudes, feeds the growing marginalisation, discrimination and resentments against ethnic minority groups and the criminalisation discourse linking migrants to crime, and minority groups to both of that. It therefore underpins the society's construction of 'suspect populations' and support for tightened migration policies on one hand side, and collective exclusion of ethnic groups as constituting a threat on the other.²⁰⁰ These effects violate the very idea of a multi-ethnic Europe based on equality and non-discrimination, and cannot just

¹⁹⁸ Council of Europe Commissioner for Human Rights, July 20, 2009.

¹⁹⁹ Garcia Anón, J. & Bradford, B. et al, 2013, pp. 177-214.

²⁰⁰ European Union Network of Independent Experts on Fundamental Rights, 2006, p. 11.

directly happen if witnesses of discriminatory stops-and-searches draw the wrong conclusions of what they saw, but also at a statistical level.

Ethnic profiling as a tool willingly or unconsciously used by law enforcement officers in order to proactively detect irregular migrants plays an important role within the criminalisation regime of irregular migration, as it is not just driven by its dynamics, but constitutes often the main entry point and first step towards criminal sanctions, detention and deportation. There has not just been a lot of academic research questioning the criminalisation trend from a moral and legal point of view, but also significant statistical evidence and research revealing a paradox of an overrepresentation of foreigners in the criminal justice system,²⁰¹ while there is a lack of trustworthy evidence for a statistical correlation linking immigration figures and crime rates. The *Timishev* case makes it clear that even a statistically proven correlation between ethnic characteristics and the propensity to commit a crime would not justify the use of discriminatory ethnic profiling practices resulting in racial discrimination. However, this does not mean that the attempt of providing such a statistical proof is not harmful. Attempts are made of artificially backing up the claim linking migration to crime by changing the notion of 'crime' and including immigration-related criminal offences, which nationals cannot commit, into the statistical representation.²⁰²

At the same time, the over-policing of minorities not involved in irregular migration as a 'side effect' of the proactive search for irregular migrants can lead to a higher rate of detection of non-migration related crimes committed by minorities, which are not detected if committed by other people as they are not stopped and searched in this frequency. Stop-and-search powers aiming at detecting irregular migrants or serious crimes can also be misused as tactical tool with the same effect to police defined inner state micro spaces to anticipate 'trouble' posed by 'suspect populations'.²⁰³ Such a use is made for example in the case of Spain, where officers use the broad powers and mandates to over-police areas with a high percentage of ethnic minorities in general.

²⁰¹ See for example the statistical review of the FIDUCIA project charting the statistical landscape about the criminalisation of migration and ethnic minorities provided by Allodi et al, 2013.

²⁰² Ibidem.

²⁰³ Peterson et al, 2014, p. 2.

Ethnic profiling as a form of discriminatory treatment by the police paying over-proportional attention to minority groups at the entry point to the criminal justice system forms thus one important part of the biased statistical correlation between minorities and crime.

In the longer term, the effect of backing up the construct of the figure of the migrant as criminal, and minorities as irregular migrants and criminals serves to justify not just further restrictive measures against irregular migration, but also minority groups in general. This is an additional reason why discriminatory ethnic profiling should be judged in its broader context of stigmatising entire minority groups rather than as single incidents, and shows the importance of collecting equality-data to reveal over-policing and contest biased statistics and perceptions.

3.4. The disproportionality of the means employed

Considering the analyses made above, there is little doubt that the means employed to achieve the aim sought to be realised are disproportional and infringe with anti-discrimination standards. Even if migration control has been recognised by the ECtHR and HRC as legitimate aim for border controls and identity checks in general, and it could be argued that proactive policing instruments aiming at detecting irregular migrants which escaped the first control system constitute an added value in the security discourse, it is more than questionable that such measures reach the threshold of being *necessary in the circumstances*. At the same time, the means used do not just in their implementation lead de facto to discrimination based inter alia on race, ethnicity or skin colour, but the combination of the mandate and enforcement method reinforces and arguably inherently leads to racial discrimination wide negative consequences for the individuals and society.

This has to be read in a general hierarchy of grounds as established in the case law of the ECtHR²⁰⁴ and equally used by UN and CoE bodies and expert groups in the assessment of counter-terrorism measures.²⁰⁵ If differential treatment is based on 'suspect grounds', a justification by 'very weighty reasons' is required,²⁰⁶ which cannot be made for the added value of possibly identifying some irregular migrants. The means used do not just lead to discrimination based on 'suspect grounds' and have 'wide negative consequences for society', but actually constitute in many cases direct racial discrimination in the form of basing a law enforcement decision mainly on those grounds, which cannot be justified. The negative consequences of the differential treatment based on ethnicity or race overweight already in theory the (claimed) effectiveness of a measure, which is in this case even proven not to be adequate or suitable to achieve the aim sought to be realised and de facto not effective.

ECRI underlines that "racial profiling is not an acceptable or valid response to the challenges that the *everyday reality of combating crime*, including terrorism, pose [emphasis added]."²⁰⁷ Therefore, "the notion of objective and reasonable justification should be interpreted as restrictively as possible with respect to differential treatment based on any of the enumerated grounds."²⁰⁸ If countering terrorism is qualified as 'everyday reality of combatting crime', a justification for violating substantial human rights like the prohibition of racial discrimination in the context of an in its basis administrative question like migration control should not only be interpreted restrictively, but not be acceptable at all.

Proactive policing measures like ample stop-and-search powers aiming at combatting and controlling migration on the ground do in general not meet the necessary

²⁰⁴ Kozak v. Poland (ECtHR, 2010), para. 92; for an analysis of the significance of the prohibition of discrimination and the question of a hierarchy of grounds in the case law of the ECtHR see De Schutter, 2011, pp. 15-20.

²⁰⁵ CERD, CERD/C/64/Misc.11/rev.3, 2004, para. 6; UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/4/26, 29 January 2007, pp. 6-16; Council of Europe Commissioner for Human Rights, 20 July 2009; Council of Europe Commissioner for Human Rights, 29 May 2007; ECRI, CRI(2004)26; Open Society Justice Initiative et al, 2009, p. 6; De Schutter & Ringelheim, 2008, pp. 11-15.

²⁰⁶ De Schutter, 2011, p. 15

²⁰⁷ ECRI, CRI(2007)39, para. 25.

²⁰⁸ ECRI, CRI(2007)39, para. 30.

proportionality requirements, as soon as they cause discrimination based on suspect grounds, even if the question of more lenient means to achieve the aim is complicated and urges further research. Not having more lenient means is no justification to keep them. Based on this evaluation, stop-and-search powers aiming at proactively detecting irregular migrants on the ground and within the national territories should urgently be revised by the competent authorities or courts in order to annul legislation such as for example the broad non-suspicion based stop-and-search powers aiming at detecting irregular migrants in Spain and Germany.

4. The risk of discriminatory ethnic profiling at the EU level

4.1. The transnational scope of combatting irregular migration

The area of controlling and combatting irregular migration is fundamentally linked to the construction and policies of the EU and can therefore not just be read as separate national phenomena. This is not just due to the abolishment of intra-Schengen border controls resulting in an (at least on paper) burden sharing between the Member States while shifting the controls to the external borders. Combatting irregular migration is accompanied and enhanced by a discourse emphasising the 'external' dimension of threats, which pressures for corresponding inter-state and transnational cooperation to combat those trans-national threats. Peterson points out an important difference between what Garner calls 'policing ethnicity', which is in the broadest sense responding with inclusion or exclusion to perceived threats posed by ethnic minorities to stability, order and social cohesion in general; and what Weber and Bowling define as 'policing migration'. Policing migration is per se a transnational effort based on the construction of flows of immigrants and asylum seekers as security question.²⁰⁹ By making border control a security problematic, irregular migrants are per definition connected to criminal activities, terrorism or human and drug trafficking.²¹⁰

Hence, additionally to the EU specific phenomena of new forms of disguised intra-Schengen border controls and proactive identification attempts carried out by single states, the perceived transnational scope of the threat led to EU-wide compensatory measures embodied by transnational cooperation in border enforcement and policing.²¹¹ The Lisbon Treaty introduced constitutional changes significantly broadening and transforming the EU police cooperation and criminal law matters, by strengthening the EU's integration process and competences in criminal law, developing the field of EU Police Cooperation, and giving the EU more and more competences to legislate and

²⁰⁹ Peterson et al, 2014, p. 3.

²¹⁰ Bigo, 1994, p. 163.

²¹¹ Atger, 2008, p. 10 ff.

regulate operational cooperation.²¹² These approaches influenced the whole organisation of security and Wennström points out that

*“The maintenance of security and order as well as the works of the organs responsible for carrying out these tasks has shifted from a national and vertical paradigm to a layered, modular system composed of legal orders, organs and procedures.”*²¹³

In this wake, new European security agencies such as Frontex and Europol, as well as different European surveillance systems including the Visa Information System, Schengen Information Systems and Eurodac have been newly established or broadened and interconnected in order to monitor and control the movement of third state nationals. At the same time, the discourse stressing links between migration and terrorism, human trafficking and other serious crimes is fuelled at the EU level and manifests itself in an enormous output of risk analyses for strategical and operational purposes produced by agencies such as Frontex, which influence the security strategies developed at the EU level.²¹⁴ ‘Illegal immigration’ has been constructed as one of the ‘most important criminal threats’ facing the EU.²¹⁵ Cooperation to tackle this threat is therefore a central part of the increasingly formalised mechanism for policing Europe, which is embodied by the ‘policy cycle for organised and serious international crime’ created on basis of the Internal Security Strategy called for in the 2009 Stockholm Programme.²¹⁶

Based on this Europeanisation of strategies and mechanisms to control and combat irregular migration and crime, there has also been an increased interest to use proactive profiling technics in the law enforcement sector, as displayed in the EU’s Internal Security Strategy 2010, which aims in general at “prevention and anticipation, which is based on a proactive and intelligence-led approach.”²¹⁷ This proactive approach should be of special concern in the light of a heightened risk of using discriminatory ethnic

²¹² For an in-depth analysis and interpretation of the changes introduced by the Lisbon Treaty, see Bergström et al, 2014.

²¹³ Wennström, 2014, pp. 179-184.

²¹⁴ Parkin, 2012, pp. 2-5.

²¹⁵ Ibidem.

²¹⁶ For a detailed analysis, see for example Jones, 2014.

²¹⁷ Council of the European Union, Internal Security Strategy for the European Union: Towards a European Security Model, 5842/2/10, 23 February 2010, p. 11.

profiling practices in the scope of proactive policing measures, which are aimed at detecting ‘risks unknown’ instead of an identification based on a particular suspect description.

4.2. Joint European Police Operation Mos Maiorum

Within the scope of the transnational governance of security and crime, the area of cooperation between the Member States to target irregular migrants is increasingly broadened and the operational cooperation between the national governments and EU institutions more and more formalised, as for example in the form of European Joint Police Operations.²¹⁸

This paper will exemplarily analyse the risk of discriminatory ethnic profiling posed by the Joint Police Operation ‘Mos Maiorum’ conducted for two weeks in October 2014. This operation can be taken as one of the most illustrative examples showing the risk of discriminatory ethnic profiling in European cooperation carried out in the name of the fight against irregular migration, as it constituted a EU-wide police crackdown on irregular migrants.²¹⁹ Joint Police Operations are also an expression of proactive profiling within the territories of the Member States and are therefore illustrative for the direct connection of efforts at the EU-level and the Member States. Even if the operation Mos Maiorum does not regard directly the risks of discriminatory ethnic profiling at the external borders, its analysis still raises general questions about responsibility, transparency, involvement, accountability and protection, which similarly apply to other operations at the external borders. It also shows general problems posed by the increasing weight and use of profiling technics at the electronic level. The analysis will focus on the discriminatory effects of the operation, as well as the accountability for violations committed within its scope and responsibility for such operations in general. Due to the general lack of transparency and documents available, this evaluation will not be able to provide evidence for all aspects raised, but a general

²¹⁸ Jones, 2014, pp. 2 ff.

²¹⁹ Council of the European Union, Joint Operations “Mos Maiorum”, 10 July 2014. Operations such as Mos Maiorum are prepared based on the guidelines set out in the Council of the European Union, Guide for Joint Police Operations (JPOs), 23 November 2010.

indication of problems will still be possible and should serve as a starting point for discussing the risk of ethnic profiling involving the European level in general.

Mos Maiorum as Joint Police Operation is conceptually located within the 'policy cycle for organised and serious international crime' created on basis of the Internal Security Strategy 2010. The operation was implemented under the coordinating authority of the Italian Government under the country's presidency of the Council of the EU, and is therefore not an exceptional operation as almost all EU countries initiate during their rotating presidencies similar operations. But even if the operation was carried out by 27 countries of the Schengen area and one Schengen Associated Country in their respective territories,²²⁰ and the operation is therefore officially labelled as multi-lateral, it is strongly linked to the EU. Joint Police Operations are generally "aimed at reinforcing internal security of the EU and preventing and combating crime."²²¹ Within the scope of the operation Mos Maiorum, more than 20.000 national police officers were deployed to seek for illegal immigrants with the general aim of "weakening the capacity of organized crime groups to facilitate illegal immigration to the EU and [...] focusing on illegal border crossing."²²² To achieve this aim, the operation was carried out to

*"apprehend irregular migrants and gather relevant information for intelligence and investigation purposes, regarding the main routes followed by migrants to enter in the common area and the modus operandi used by crime networks to smuggle people towards the EU territory, focusing also on the secondary movements."*²²³

Hence, the nature of the operation was twofold. It included the area of intra-Schengen police cooperation in which national police was tasked with detecting, detaining and questioning irregular migrants within the national territories, and therefore not constituting an external border control operation. Additionally, the data collected should be evaluated with *full support* from Frontex in the area of statistics, risk analyses, and evaluation of migratory flows.

²²⁰ Council of the European Union, Final report on Joint Operation "Mos Maiorum", 22 January 2015, p. 2.

²²¹ Council of the European Union, Guide for Joint Police Operations (JPOs), 23 November 2010, p. 4.

²²² Council of the European Union, Joint Operations "Mos Maiorum", 10 July 2014, p. 2.

²²³ Council of the European Union, Italian Presidency 2014, What is "Mos Maiorum" joint operation?, 15 October 2014.

4.2.1. The risk of discriminatory ethnic profiling on the ground

The focus of the operation stressing the aim of weakening organised crime and crime networks to smuggle people, while not putting the detention of irregular migrants themselves too much into focus, followed a general rhetorical approach of the EU centring the question of irregular migration around the need of combatting facilitators of illegal immigration networks, which are equalled with human traffickers.

However, the operation was highly criticised as constituting de facto an operation to hunt down and arrest as many irregular migrants as possible within the timeframe of the implementation.²²⁴ The area focus included increased checks in airports, stations, main roads, trains, highways and house raids. At the end, almost 20.000 irregular migrants were intercepted within the scope of the operation within just two weeks. The operation was accompanied much criticism by the public, media and within in the European Parliament, pointing out the quasi intrinsic danger of discriminatory ethnic profiling in this EU-wide police operation, next to doubts regarding the coherence of such operations with the Schengen accord and a criticism of contra productive symbolic politics pushing forward a further criminalisation of undocumented migrants in the wake of the growing number of refugees in Europe.²²⁵ Many NGOs published credible reports revealing cases of discriminatory ethnic profiling in the scope of the operation.²²⁶ Even in the European Parliament, a Swedish Member of Parliament described the operation as 'shameful' as "persecuting those who don't have legal papers is carried out because of their appearance."²²⁷ The vice president of the Green/EFA group wrote a letter to the Council asking how the Member States will ensure that their police officers refrain from discriminatory ethnic profiling and respect EU law when

²²⁴ Maramag, S. K., 'Migrante International condemns criminalization of undocumented migrants in EU-wide crackdown', in *Migrante Europe*, 20 October 2014.

²²⁵ For a summary of the web and media coverage see for example: Statewatch, '13-26 October 2014: EU-wide "sweep" undocumented migrants: The Joint Operation (JO) "MOS MAIORUM": Summary of some of the Web, media coverage', 13 September 2014.

²²⁶ Maramag, S. K., 'Migrante International condemns criminalization of undocumented migrants in EU-wide crackdown', in *Migrante Europe*, 20 October 2014.

²²⁷ Swedish MEP Malin Bjork, cited through News Africa, 'MEPs condemn crackdown on irregular migrants, ask Italy to present results of Mos Maiorum', in *News Africa*, 4 November 2014.

carrying out the operation.²²⁸ There was no official mentioning on sides of the coordinating country or the Council of the EU on how to achieve the aim of proactively detecting irregular migrants without resorting to discriminatory ethnic profiling. The final report does not address this question neither despite of a general clause asking the states to “avoid discriminatory treatment on the basis of any ground such as sex, race, ethnic or social origin, religion.”²²⁹

As no Schengen country provides disaggregated data, there is no possibility of proving the indication given by many credible claims of widely used discriminatory ethnic profiling within the scope of the operation in a comprehensive and statistical way. What is logical though is that the lack of safeguards against discriminatory ethnic profiling at the national levels and inherently discriminatory risk of broad policing powers in many countries did not inhibit discriminatory ethnic profiling within the scope of the operation. The Joint Operation did not demand any recording standards showing how many people, and of which ethnicity, were subjected to stops *not* leading to apprehension neither. In Germany for example, where the government released some information on the operation afterwards, the police and government denied claims of racial profiling in the scope of the Joint Operation and stated that controls under the contested Section 22 were carried out in form of “random sample checks applied in an event-related way based on the experiences of the federal police.”²³⁰ Such a weak standard equally risks discriminatory ethnic profiling, and several credible claims by NGOs²³¹ and a video of those controls broadcasted in public television suggest that many decisions were primarily based on skin colour.²³²

²²⁸ Ska Keller, Vice-President of the Greens/EFA Group, cited through News Africa, ‘MEPs condemn crackdown on irregular migrants, ask Italy to present results of Mos Maiorum’, in *News Africa*, 4 November 2014.

²²⁹ Council of the European Union, Final report on Joint Operation “Mos Maiorum”, 5474/15/LIMITE/FRONT 22/COSI 8/ASIM 2/COMIX 35, 22 January 2015, p. 3 ff.

²³⁰ Media statement of the German Federal Police, cited through Deininger, D., ‘Hauptbahnhof Köln: Demonstration gegen EU-weite Polizeiaktion "Mos Maiorum"’, in *Report-K*, 13 October 2014.

²³¹ Angelika von Loeper, cited through Schwarze, ‘Die fragwürdige Jagd auf Flüchtlinge’, in *Zeit Online*, 16 October 2014.

²³² Schurr, ‘25 Länder suchen illegal Einwanderer’, in *Tagesschau*, 13 October 2014, video available at <http://www.tagesschau.de/ausland/mos-maiorum-101.html> (consulted on 20 June 2015).

Even if there are no comparative data available substantiating the suspicion that the mandate given by the operation, and the increase in controls, resulted similarly to the setting of ‘target quotas’ in Spain in an increased use of discriminatory ethnic profiling, logic suggests that this has been the case. Additionally, the pan-European aim demanded that police forces proactively searched for irregular migrants, even if some national police forces do not have this mandate normally in their national context.

The final report on the operation gives a hint on the effectiveness of the operation, as more than half of intercepted migrants came from the countries Syria, Afghanistan, Eritrea and Somalia.²³³ However, the report does not elaborate on the outcome of the asylum claims, which were however reportedly made by more than half of the people during or after their interception. It celebrates the detention of 257 ‘facilitators’ in the wake of the operation as evidence showing the success of the whole operation, which intercepted more than 20.000 individuals without providing data on how many had been controlled in total. Many national politicians declared therefore, that the operation had failed as being ineffective and disproportional.²³⁴

The Member States are, as explained in the first part, accountable for the human rights violations in form of discriminatory ethnic profiling committed by the police within their national territories, and Joint Police Operations are explicitly “carried out by several Member States, while they are conducted in their respective territories, in general on the basis of the respective national law.”²³⁵ However, as the second part of the operation aimed at analysing information given by the intercepted individuals, this part of the operation should be scrutinised as well.

²³³ Council of the European Union, Final report on Joint Operation “Mos Maiorum”, 22 January 2015, pp. 9-10.

²³⁴ Deutscher Bundestag, 18/3654, 22 December 2014, pp. 1-4.

²³⁵ Council of the European Union, Guide for Joint Police Operations (JPOs), 23 November 2010, p. 5.

4.2.2. Data collection and Frontex involvement

The final report of the operation lists the gathering of information as ‘main aim of the operation’ and states that the analysis of those data had been carried out by the Frontex Risk Analysis Unit.²³⁶ An involvement of Europol was in the first document foreseen, but does not appear in the final report or any other documents anymore. The initial declared aim for the data collection was to

“gather relevant information for intelligence and investigation purposes, regarding the main routes followed by migrants to enter in the common area and the modus operandi used by crime networks to smuggle people towards the EU territory.”²³⁷

Taken this, it seems that the national controls have been justified with weakening crime networks at the external borders. However, the liability of the information given by the intercepted individuals regarding their way of entry into the EU and crime networks is questionable especially in countries without external Schengen borders, since the Dublin regulations make the possibility of an asylum claim in a specific country depended on what the first country of entry to the EU was. Questioning the individuals seems an uncertain tool to achieve the aim of mapping illegal ways of entry to the EU, leaving alone certainty about the personal data of individuals apprehended. It seems that rather the information collected by Frontex at the external borders outside the scope of the operation was used for this purpose, while the information collected by the police in the national territories aimed according to the German government to map *secondary movements* within the Schengen area. This aim just appears in the final report, thus retrospectively.²³⁸

Here already a general problem arises, as the data used are most likely collected by the police forces in a way already biased by discriminatory ethnic profiling on the ground, when targeting specific minority groups based on their perceived national origin. Thus,

²³⁶ Council of the European Union, Final report on Joint Operation “Mos Maiorum”, 22 January 2015, p. 30.

²³⁷ Council of the European Union, 2014 Italian Presidency, What is “Mos Maiorum” joint operation?, 15 October 2014.

²³⁸ Council of the European Union, Final report on Joint Operation “Mos Maiorum”, 22 January 2015, p. 30.

certain nationalities are from the beginning likely to be over-represented in the data collection because of being over-policed.

Additionally, in the official paper stating the aims and means of the operation, there is no mentioning on which data exactly and how they are to be collected, but the final report reveals that they included at least information on the nationality of the people, while the word 'comprehensive data' prompts the suspicion that more 'sensitive data' were likely collected as well.²³⁹ The German government stated that it just forwarded anonymised information, but that the governments did not have any information on what exactly would happen to the data afterwards. There is also no information available on the evaluation process on sides of the EU, the coordinating country or Frontex and thus and an absolute lack of transparency. Hence, the possible use of the data and effect of such use can just be assessed, but not substantiated.

Since the amendment of the Frontex Regulation in 2011, the agency can process personal data collected inter alia during joint operations, transmit them to other Union law enforcement agencies, and 'further process' the personal data by preparing risk analyses for strategic and operational purposes, whereby data 'shall be depersonalised'.²⁴⁰

In the operation *Mos Maiorum*, the use of *relevant*, including probably sensitive, personal data for 'a holistic view of illegal immigration flows'²⁴¹ and not further defined 'intelligence and investigation purposes' is not only worrying in terms of data protection and the right to privacy, but especially because risk analyses can have a broad impact. At first sight, the evaluation of data including nationality and presumably national origin other sensitive data in anonymised form seems similar to the collection of disaggregated equality-data as explained above, but there is an important difference. As opposed to equality-data collection, the processing of such data does here not aim at revealing discriminatory behaviour, but to make a categorisation, where different nationalities can be stigmatised as posing a 'risk'. Such risk analyses are not necessarily

²³⁹ Ibidem.

²⁴⁰ Council of the European Union, Regulation (EU) No 1168/2011, 22 November 2011, art. 11.

²⁴¹ Deutscher Bundestag, 18/3654, 22 December 2014, p. 2.

illegal in terms of data protection, but can still have a broad indirect and negative impact on minority groups and certain nationalities.

Most illustratively, risk analyses might be used for profiling on the ground to decide the likelihood of certain ethnicities as presumed nationalities to belong to ‘illegal immigration flows’, and the whole operation *Mos Maiorum* had been based on risk analyses made by Frontex.²⁴² Also at the external borders, risk analyses can be further used, for example to decide through automated decision making processes based on ethnic profiling technics, which nationalities should be further scrutinised or subjected to surveillance if seeking to enter the EU area, for example as ‘suspected over-stayers’. This possibility is far from being merely utopian, as the Joint Police Operation ‘Amberlight’, which followed *Mos Maiorum*, was mainly aiming at collecting information on people overstaying their visas.²⁴³ Analyses out of those data are more than likely to influence the development of profiles in the wake of the ongoing development of automated decision making processes to identify ‘suspected over-stayers’ at the external borders. Even if this paper cannot explain the technical details of ethnic profiling methods used at the electronic level in detail due to its limited scope, such technics are increasingly used and proposed especially in the scope of the ‘smart borders initiative’ for the external borders, which involve data sharing with and analyses by Frontex. An excellent research pointing out the profiling methods and risks of discrimination in the new proposals regarding external border control has been made by Didier Bigo.²⁴⁴

The further processing of the anonymised data by Frontex in the scope of *Mos Maiorum* is unlikely to constitute direct discrimination. However, it is often ignored that not just personal data, but also anonymised data can cause discriminatory harm through ‘statistical discrimination’, which has a huge impact on the policy-making and measures addressed to the minority groups and nationalities labelled as ‘risk categories’. The aim of data analysis like the one in *Mos Maiorum* ‘to allow for more efficient planning at

²⁴² Council of the European Union, Final report on Joint Operation “*Mos Maiorum*”, 22 January 2015, pp. 1-5.

²⁴³ Council of the European Union, Presidency activity AMBERLIGHT 2015, 22 January 2015, p.3.

²⁴⁴ Bigo et al, 2012.

European level²⁴⁵ has in the past led to ‘tailored risk assessments’, which were used to plan further ‘High Impact Operations’ aiming at directly combatting irregular migration at the internal and external borders.²⁴⁶ The resulting ‘proof’ of a linkage between nationality, migration and crime by the creation of statistics and assessment of ‘risk categories’ is also increasingly consolidated in the official discourse of the EU, which qualifies actions to combat the ‘urgent challenge’ of irregular migration as strategic priority within the EU’s Internal Security Strategy.²⁴⁷

This shows the urgency not just to prevent that certain groups are from the beginning over represented in the data used through an over policing on the ground, but to make the following evaluations transparent and scrutinise them. Joanna Parkin shows in her studies that the analyses made by Europol and Frontex in general lack transparency, accountability and scrutiny. The statistics lack not just prove to be evidence-based, but Parkin points out that especially the spurious statistics regarding irregular migration should be put into question, as Frontex and Europol continuously stress links between migration and threats such as terrorism, human smuggling and terrorism in a non-evidence based way.²⁴⁸ In the end, Joint Police Operations to crack down on irregular migrants are not just based on and legitimised by risk analyses of Frontex and Europol, but those EU organisations are directly involved with an monopoly on analysing the information gathered. The monopoly on the Europe-wide overview over data of those agencies lets Parkin to conclude, that their power has in general been de facto broadened constantly beyond their legal powers circumscribed by the member states’ sovereignty.²⁴⁹

The further processing of depersonalised data is thus not a question of direct discrimination though the act of risk analysis itself, but of possible statistical discrimination resulting of a further use of those analyses. At this point, it seems unlikely that Frontex violates anti-discrimination norms by the processing of the data itself, but the lack of information and possible high impact shows the utmost importance

²⁴⁵ Deutscher Bundestag, 18/3654, 22 December 2014, p. 2.

²⁴⁶ Jones, 2014, p. 4.

²⁴⁷ Parkin, 2013, p. 7; Parkin, 2012, pp. 2 ff.

²⁴⁸ Parkin, 2012, pp. 4 ff.

²⁴⁹ Parkin, 2012, pp. 4 ff.

of making the exact scope and further processing of data transparent. The question of accountability is here still interesting as often confused, also regarding violations in the scope of action of Frontex on the ground.

If violations are committed by Frontex directly in the processing of data, Frontex as EU agency established under article 77 TFEU is de jure accountable for such violations committed within its scope of action.²⁵⁰ Its Regulation further stresses that it has to act in accordance with the CFR, which is applicable to all acts of the bodies and institutions of the EU, and that the agency has to respect fundamental rights such as the principle of non-discrimination and data protection provisions in general,²⁵¹ as well as the principles of necessity and proportionality in the further processing of personal data.²⁵² Any limitation of fundamental rights contained in the CFR has to be provided for by law and respect the essence of the right, as well as the principles of proportionality and necessity to meet objectives of general interest recognised by the EU.²⁵³ If Frontex as EU agency is believed to violate those provisions, the CJEU has the competence to revise such legislation and acts, which are violating the CFR.²⁵⁴

However, in order to make use of the de jure accountability, it would be necessary to first of all provide transparency to see what Frontex is actually doing, in order to be able to assess then if this action is in accordance with Frontex' legal obligation. Such transparency should be in the interest not just of possible victims, but also to legitimise the whole approach of the policy circle to give information to and use the databases of those agencies. Member States are forwarding data, even if they are not sure what happens with them.

Discrimination in the scope of action of the EU, including at the electronic level, would contradict specific legislative aims of the EU, which according to the TFEU “shall frame a common policy on asylum, immigration and external border control, [...] which

²⁵⁰ Pascouau et al, 2014, p. 3.

²⁵¹ Council of the European Union, Regulation (EU) No 1168/2011, 22 November 2011, art. 29

²⁵² Ibidem, art. 11.c.5.

²⁵³ European Union, 2012/C 326/02, 26 October 2012, art. 51.1. and 52.1.

²⁵⁴ European Union, 2008/C 115/01, 13 December 2007, art. 263.

is fair towards third-country nationals”,²⁵⁵ and whose initiatives in the area of freedom, security and justice are to be carried out in accordance inter alia with the principle of proportionality.²⁵⁶ The TFEU explicitly provides that stateless persons and third state nationals - and therefore irregular migrants - are to be treated with respect for their fundamental rights and in a fair manner, and demands for policies combatting inter alia racism and xenophobia, and a general respect for fundamental rights.²⁵⁷

4.2.3. The questions of responsibility and competences

It is thus legally clear where the accountability for human rights violations committed in the scope of the operation lie, as Frontex is accountable if violations are committed within its scope of its action, and the Member States are accountable for discriminatory ethnic profiling on the ground. Despite the question of who is de jure accountable, there is a lot of confusion about who is actually *responsible* for the whole operation that sets an EU-wide aim with a high risk of discriminatory ethnic profiling by demanding to proactively search for irregular migrants without providing any safeguards.

According to the official Guide on Joint Police Operations, they “have a clear EU dimension and are carried out by several Member States, while they are conducted in their respective territories.”²⁵⁸ However, a differentiation of the responsibilities and operational competences is not as clear as it seems, and even if responsibility can per definition be shared, it is important to see between whom and to which extent. Already the direct involvement of Frontex and its monopoly of data analysis shows that the operation is not just merely a multilateral cooperation, but at least in parts even exclusively conducted at the EU level. Describing the involvement of Frontex as ‘support’ seems at odds with the reality and a contradiction to the evaluation of data as the (in retrospect) declared main aim of the operation.

²⁵⁵ Ibidem, art. 67(2).

²⁵⁶ Ibidem, art. 67(3) and 69.

²⁵⁷ Ibidem, art. 67.1.

²⁵⁸ Council of the European Union, Guide for Joint Police Operations (JPOs), 23 November 2010, p. 5.

The operation is located within area of Freedom, Security and Justice, which is a shared competence between the EU and Member States,²⁵⁹ and part of the ‘policy cycle for organised and serious international crime’ created on basis of the Internal Security Strategy.²⁶⁰ Such strategies are defined by the European Council.²⁶¹ The Standing committee on operational cooperation on internal security (COSI), which was established as a Council working party by Article 71 of the Lisbon Treaty, ensures that operational cooperation on internal security is promoted by facilitating coordination of the action of Member States' competent authorities.²⁶² This makes it however not entirely clear, if Joint Operations such as Mos Maiorum are *organised* within Council bodies like the COSI and Customs Cooperation Working Party, such as for example Jones interprets it,²⁶³ or if COSI just *facilitates coordination*. It is clear that Mos Maiorum had been approved by the Council of the EU in July, and was implemented under the *coordinating authority* of the Italian Ministry of Interior. This still leaves uncertainty about who actually set the aim and chose the means for the operation, as a EU body *facilitates* coordination and Italy has coordination *authority*, but coordination per definition does not involve command but just a consultation relationship. The terminology is highly confusing here, but it seems that the operation was organised in the COSI.

After an in depth analysis of the organisation of Joint Police Operations in general, Jones concludes that the COSI has the ultimate responsibility for and oversight of the policy cycle, but points out illustratively that “while a number of public documents are available on the policy cycle, none make clear to the average person how it functions and who exactly is responsible for it.”²⁶⁴ This problem has been analysed in broader terms regarding the whole area of EU Police Cooperation after Lisbon by Anna Jonsson Cornell, who finds that while the EU is increasingly competent to regulate and legislate operational cooperation within the policing sector, the main operational responsibility is

²⁵⁹European Union, 2008/C 115/01, art. 4.

²⁶⁰ Jones, 2014, p. 2 ff.

²⁶¹ European Union, 2008/C 115/01, art. 68 and 74.

²⁶² European Union, 2008/C 115/01, art. 71.

²⁶³ Jones, 2014, p. 2 ff.

Ibidem.

²⁶⁴ Ibidem, p. 4.

– at least on paper - still within the competence of the Member States.²⁶⁵ At the same time, the evolving regulatory framework and increasing data sharing between the Member States and EU agencies such as Frontex, Europol and COSI – as in the case of Mos Maiorum - makes it increasingly difficult to differentiate influences from the EU from independent actions of the Member States.²⁶⁶ Bo Wennström similarly concludes after analysing the shift towards a multi-layered and modular system of maintaining security in the EU, that one should rethink the issues of allocation of responsibility and accountability.²⁶⁷

The discussion and different analyses on Joint Police Operations show, that there is a need of discussing even the question of ‘competence’, as many interpret operations such as Mos Maiorum as overstepping the EU’s competence and therefore acting in a legal grey area. Interestingly, there is not even information available to clarify on which legal basis Mos Maiorum was justified. There are two possibilities under which an operation like this could be established, both of which raise questions but are not impossible in the case of Mos Maiorum. Article 77 TFEU explicitly regards checks and monitoring at the external borders and outlaws internal border checks,²⁶⁸ which is not directly suitable as Mos Maiorum was carried out within the Schengen area, but also not impossible considering Frontex role in the operation, which focused on analysing illegal border crossing.

The other option is article 87 TFEU, which gives the EU the competence to

*“establish police cooperation involving all the Member States’ competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.”*²⁶⁹

However, in this case the special legislative procedure demanding for a prior consultation with the European Parliament was, as will be explained later, not followed. As this option seems however more likely taken that the operation is part of the policy

²⁶⁵ Jonsson Cornell, 2014, pp. 147-162.

²⁶⁶ Ibidem.

²⁶⁷ Wennström, 2014, pp. 179-184.

²⁶⁸ European Union, 2008/C 115/01, 13 December 2007, art. 77.

²⁶⁹ Ibidem, art. 87.

cycle for organised and serious international crime, the questionable legitimacy of equating migration with serious criminal offences should be raised here again. A justification under article 87 was already criticised regarding Frontex lead operations in the Mediterranean, as “such operations pursue primarily an immigration objective and should not be considered as missions which purposefully side with maintenance of law and order and the safeguarding of internal security.”²⁷⁰ Taken the whole EU approach, this seems to be however the case, which is not less questionable.

The discussions and different conclusions made by academics regarding responsibility and competences show, that the increasing EU involvement in migration control, which goes beyond purely external border control, should be made transparent and clarified, also to the average person. Even if EU involvement in the planning and coordination of such operations is arguably legal and within its competences, clarification would at least help to get rid of the perception that the only way to prevent discriminatory ethnic profiling in future operations seems to be either convincing national authorities not participate in such operations, or taking the aim unquestioned as given and focusing on national safeguards against a discriminatory impact.

4.2.4. Transparency and democratic scrutiny

Mos Maiorum lacks basic principles of transparency and democratic scrutiny, as neither national parliaments nor the EU parliament seem to have been involved by scrutinising this operation. The operation was clandestine until *statewatch* made a leaked document of the Council of the EU public,²⁷¹ and this secrecy goes hand in hand with an unawareness of the public when the operation was already in execution, which is explicitly wanted. According to the final report, participating countries were “requested not to provide any kind of information to the media/press about the activities carried out

²⁷⁰ Pascouau et al, 2014, p. 4.

²⁷¹ Council of the European Union, Joint Operations “Mos Maiorum”, 10 July 2014.

in the operational area.”²⁷² This is on one hand side understandable as the operation aimed at detecting people who could otherwise hide, but there should still be any scrutiny at least at the political level involving the parliaments.

Despite the in-transparency, there seems to be a general lack of democratic scrutiny of the entire new policing spectrum introduced since the Lisbon treaty, of which the operation is part. Out of Peter’s analysis follows that the majority of the national parliaments, whose authorities participate in the policy cycle operations, did not subject the policy cycle and the policies it introduces to democratic scrutiny and “the majority of national parliaments do not appear to have so much as noted its existence.”²⁷³

Democratic scrutiny was apparently not just lacking at the national levels, but in the specific case of *Mos Maiorum* also at the EU level. The Treaty of Lisbon and TFEU include duties to report such operations to the European Parliament and keep it informed.²⁷⁴ However, the European Parliament was seemingly not informed about the operation before it started, and after the clandestine documents had been published by *statewatch* during the operation was underway, Members of Parliament called in a Parliamentary debate for more information on the operation as such, the role of Frontex and what happened to the people apprehended, as they doubted on how to reconcile the need to gather information on criminal networks with fundamental rights and non-discrimination of migrants.²⁷⁵ According to a Member of Parliament, the Council of the EU refused to reveal further documents on the operation because it would undermine public security.²⁷⁶

The lacks of transparency and democratic scrutiny seem not to be single cases, and have been generally criticised by many academics. Lahav analyses this problem in general and finds that the transnational approach of policing migration can be seen as a response

²⁷² Council of the European Union, Final report on Joint Operation “Mos Maiorum”, 22 January 2015, p. 2.

²⁷³ Jones, 2014, pp. 2 ff.

²⁷⁴ European Union, 2008/C 115/01, 13 December 2007, art. 71 and 87; European Union, 2007/C 306/0113, December 2007, art. 9B(6).

²⁷⁵ News Africa, ‘MEPs condemn crackdown on irregular migrants, ask Italy to present results of Mos Maiorum’, in *News Africa*, 4 November 2014.

²⁷⁶ Schram, 21 January 2015, p.2.

of the states to the cross-pressure posed by the dilemma of effectively controlling their borders and immigration in the wake of growing political and security pressure, while at the same time trying to maintain a liberal ethos and rights-based norms within the state.²⁷⁷ With this background, states try to extend their burden of implementation away from the national governments and borders to increase efficiency and reduce the costs by increasing transnational collaboration within the EU and resorting to private actors hence reinventing modes of 'remote control'.²⁷⁸ Lahav and Guiraudon conclude out this that "the devolution of immigration regulation to these actors beyond the State level has served to extend State control over immigrant rights, and in certain cases, have enabled States to regain some control that may have been lost because of national jurisprudence."²⁷⁹ The case of *Mos Maiorum* shows, that this devolution of regulation to the EU level regards however not just immigrant rights, but also general questions of law enforcement methods risking discrimination, which are arguably not invented at the EU level and also used at the national levels, but implemented there outside the focus of the public and parliaments, which should therefore demand for more transparency and scrutiny of such measures.

²⁷⁷ Lahav, 2003, p. 90.

²⁷⁸ *Ibidem*, p. 90.

²⁷⁹ *Ibidem*, p. 100.

Conclusion

It has been shown, that discriminatory ethnic profiling – no matter for which aim and including migration control - infringes not just with anti-discrimination norms, but depending on the case also with several other rights, and is therefore forbidden, even if not explicitly defined in European or national legislation or recognised as a problem. Discriminatory ethnic profiling can amount to racial discrimination, which is outlawed by international, European and national law. Moreover, the ECtHR found that basing a law enforcement decision decisively on a person's ethnicity constitutes direct racial discrimination, which can never be justified. This should be kept in mind if arguing that discriminatory ethnic profiling could be acceptable as there might be a high statistical propensity that members of minority groups are irregular migrants. It is simply absolutely prohibited.

There seems to be however a general problem in the whole way discriminatory ethnic profiling in migration law enforcement is addressed by the courts and in the discourse. Not just the courts, but especially authorities and the public seem reluctant, if not unwilling, to identify 'racial discrimination' in the proactive enforcement of migration law in the absence of a positive proof, which might have to do with the severity of such an accusation. However, just because practices are complicated to prove before courts, or even seem acceptable or inevitable to some people, this does not mean that they are legal or less harmful or address-worthy. In the contrary, the problem should be the more subject to discussion if it is likely to constitute direct racial discrimination but is at the same time defended by many.

There is not even an official definition or legislation explicitly outlawing such discriminatory practices, neither in the Member States nor the EU, and the mere existence of the problem is mostly denied or downplayed as incidents of racist behaviour of single officers. In the enforcement of migration control, there is even less understanding for the unlawfulness and consequences of discriminatory ethnic profiling, to an extent that even national courts upheld the legitimacy and legality of cases were

law enforcement decisions were based merely or solely on ethnicity or skin-color to detect irregular migrants, until they were overruled by higher courts.

At the same time, the analysis of the country examples has shown, that in all three countries, non-suspicion based proactive stop-and-search powers actually result in an over-policing of ethnic minority groups through discriminatory ethnic profiling, which is in the case of the UK and Spain even statistically proven. These indicators and proofs of a discriminatory effect based on characteristics such as race, ethnicity, or skin colour should be reason enough to revise and possibly annul such powers. Even more, there is a legal obligation to do so as the states have a strong obligation not just to refrain from racial discrimination, but also to actively prevent, uncover, combat and remedy such discriminatory action if it happens within their respective territory. This obligation also includes the revision and annulment of legislation or policy instruments, which unintentionally or not lead de facto to discrimination, it does not matter if national or EU legislation.

One could argue that the de facto discriminatory effect of broad proactive and non-suspicion based police powers is the result of a misuse of those powers by stereotyping or racist officers, which is surely true in many cases, especially if the mandate is related to counter-terrorism or preventing other crimes often unjustifiably associated with ethnic minorities or specific religion. This would still not be any excuse not to revise and annul the legislation, as it leads de facto to discrimination, if intentionally or not.

However, the analysis has shown, that especially in the migration law enforcement area, the resulting discrimination might not just be a question of misuse, but that the mandate to proactively identify irregular migrants, and thus a crime that nationals per definition cannot even commit, might itself in combination with the means used in form of non-suspicion based stop-and-search powers, intrinsically lead to racial discrimination. There is an intrinsic dilemma of proactively detecting irregular migrants on the ground in a non-discriminatory manner, together with a complication of using other than the prohibited characteristics as proxies, and the unwillingness to accept numeric control schemes. This leads to the conclusion, that such norms itself, and not just their misuse,

lead to racial discrimination and should thus be generally revised and annulled, even without comprehensive data proving their application.

If still in doubt, the scrutiny of the legitimacy of the aim pursued and proportionality test of the means used shows, that there is little doubt that proactive policing means to enforce migration law on the ground are disproportional and infringe with anti-discrimination standards. The necessity and very weighty reasons for stopping people for a proactive detection of irregular migrants on the ground is already questionable. Such means not just lead to discrimination based on 'suspect grounds' and have 'wide negative consequences for society', but actually constitute in many cases direct racial discrimination. The negative consequences of the differential treatment based on ethnicity or race outweigh already in theory the (claimed) effectiveness of a measure. In this case however, the measure is not adequate or suitable to achieve the aim sought to be realised, due to the under-inclusiveness of such profiling and the questionable outcome of proactively identifying individuals which are likely to claim and expectedly gain asylum anyways. Additionally, a de facto ineffective outcome is proven wherever data are available.

The question of less lenient means, even if not decisive for the proportionality test in this case, rather supports the view that the norm of proactively identifying irregular migrants on the ground is inherently leading to racial discrimination, as all proposals made for reasonable suspicion indicators are hard to translate to the migration control purpose without putting any person with luggage under suspicion. Here, further research is necessary to find a more lenient method, but in general it seems that more lenient ways to achieve migration control are not connected to proactive profiling on the ground anymore.

Hence, those legislations should urgently be revised by the competent courts or authorities in order to annul disproportional and discriminatory legislation and police powers, such as for example the broad non-suspicion based stop-and-search powers in Spain and Germany.

In the meantime, and at the very minimum, the basic safeguards against a discriminatory misuse of stop-and-search powers have to be introduced for all such non-suspicion based stop-and-search powers, regardless the mandate. Such safeguards do not just include a clear definition and explicit prohibition of discriminatory ethnic profiling by law and appropriate training of law enforcement officers. The introduction of a clearly defined reasonable suspicion standard prescribed by law and based on objective and reasonable criteria related to behaviour is of utmost importance. The (re)introduction of a reasonable suspicion standard has proven in the UK to reduce the discriminatory use of the stop-and-search powers significantly, while improving the rate of effectiveness and reducing mistrust and complains against the police and not resulting in higher crime rates. It follows out of this, that the setting of detention quotas to meet for officers is contra productive and unacceptable, and such a pressure is also contra productive if posed by an EU wide aim of detecting irregular migrants within Joint Police Operations.

Additionally, monitoring of the police and basic recording standards demanding the collection of data of the police stops and searches, including the self-defined ethnicity, initial suspicion and outcome of the stop is of importance and against claims not against European data-protection norms if safeguards are followed. Stop-and-search forms do not just reduce a discriminatory misuse of the powers directly, as shown in the case of Spain, but are necessary to reveal the discriminatory effect by the compilation of statistics out of disaggregated and anonymised data broken down on ethnicity and outcome. Furthermore, such recording is the basis for addressing the misuse by certain officers and contesting biased crime statistics, but also to help the victims to claim their rights by providing statistics, which can enable a shift in the burden of proof in discrimination cases. Such recording standards should also be introduced for EU Joint Police Operations aiming at detecting irregular migrants.

In order to help the victims to claim their rights, effective independent complaints mechanisms should be established where not existing yet. The use of statistics before courts and following shift of the burden of prove has indeed already been in theory

recognised by the ECtHR and CJEU, but still needs to be applied in suspected discriminatory ethnic profiling cases.

Having noted these risks of use and de facto use of discriminatory ethnic profiling in Europe's fight against irregular migration and pointed out the need for safeguards and accountability, it should be said that even those safeguards can just calm the effects of the problem, but not tackle the root causes. This should however be seriously taken into consideration considering the severe negative consequences of discriminatory ethnic profiling in the proactive enforcement of migration control.

Ethnic minority groups are discriminatorily profiled as suspected irregular migrants through a strict and proactive enforcement of migration law, which harms the human dignity of the individuals over-proportionally affected and contributes to an atmosphere of exclusion. Such an atmosphere is not just harmful to society, but creates in a counterproductive way mistrust of minority groups towards the police and state, although trust and cooperation would be important to combat and prevent actual serious crime.

Additionally, irregular migrants themselves are not just on a discursive, but increasingly also formalised level linked to serious crimes such as terrorism, organised crime and human- and drug trafficking. The proactive and even public over-policing of minority groups through a blurred and parallel use of broad policing powers established to combat on one hand irregular migration, and on the other serious crimes such as terrorism, thus perpetuates and increases this dangerous perception, as nobody can clearly differentiate under which power minorities are stopped and searched. This extremely harmful creation of a connection between irregular migration and serious crime, and the association of minority groups with both of that, is further consolidated through over-policing, even if it does not objectively aim at such an effect. It also leads to an over-proportional representation of foreigners and minority groups in the criminal justice system, and the corresponding statistics do often not visibly differentiate between serious crimes and offences against migration law. The spurious statistics and 'risk analyses' made by agencies such as Frontex suspiciously and in-transparently seem to favour and stress a relation between irregular migration and serious crime as

well, and thus additionally reinforce this dangerous trend at the EU level with little scrutiny. This claim should be followed up before forwarding data contained in Joint Police Operations like *Mos Maiorum* to such agencies as long as their 'further processing' is not transparent. In either way, at national and EU level data and statistics are needed to prove the over-policing of minority groups in order to contest biased statistics and the dangerous trend of connecting migration, crime and minority groups.

Having said that, there is not just little doubt that the costs of discriminatory ethnic profiling outweigh the benefits of such measures, but there is also a clear need to rethink in general the approach of controlling irregular migration by such restrictive means of criminal law enforcement. This basic question – as unpleasant it might be – should come back to the centre of discussion, especially if Member States of the EU increasingly decide to institutionalise and formalise exclusionary measures at an in-transparent European level, which lacks democratic scrutiny and the responsibilities and competences are barely understandable to the average person.

At the time being, the fear of migration and terrorism already resulted in an acceptance to trade-off of general basic human rights and democratic values, such as treating an individual according to his or her behaviour and individual history instead of belonging to a group. If citizens are willing to give up basic democratic values with the conviction that this trade-off is necessary for the sake of security, a general question should be asked, which is so basic that it shifted out of the focus of discussions: Security of whom and from what?

If the aim of the trade-off is actually migration control, this question has to be fundamentally untangled from the question of security from immediate threats and terrorism, even if such trade-off is not less useless and dangerous there. Migration does not pose a threat to life of third persons and does not derive from evil intention, and should therefore not be combatted by criminal law enforcement methods. This does not mean that migration control is not legitimate, but regards the means used.

One might argue that a rejection of proactive profiling in migration control justifies a further tightening of the EU's external border regime or even the reintroduction of intra-

Schengen border controls – but such a radical denial of the basis of the European integration is not even likely to stop irregular migration. The only effective and less discriminatory and cruel methods of migration control – taken aside the whole question of combatting the causes for migration and flight - are accessible administrative procedures revising each case individually, and not the use of proactive profiling, criminal law enforcement or even, as recently proposed, military means. Such a system however requires of possible and feasible ways to apply for residence and work permit and seek asylum, and irregular migration flows within the Schengen area are probably better prevented if asylum seekers had the choice in which country to claim asylum, than by proactively hunting down on them.

If migration is equated with questions of national security, law enforced like serious crimes and combatted by discriminatory means, the aim of those means risks to turn from migration control to maintaining an exclusive social order. Proactive enforcement measures do not just affect irregular migrants, but the whole society by not just linking migration to crime, but discriminatorily over-policing and suspecting minorities as being involved in both, crime and migration. A willingness to accept such methods risks that the trade-off of the democratic values, which was presumed necessary for the sake of security from migration, results actually in a trade-off for the sake of security from a multi-ethnic society and multi-ethnic Europe, based on equality and non-discrimination. This not just wrong, but especially senseless if the method used is not even effective to secure security from migration, but prevails just in its negative effect.

In its basis, this is a question of exclusion or integration, not just regarding irregular migrants but also towards ethnic minorities, which are part of Europe. Choosing exclusion has since always proven to lead to less security rather than more, not just for the affected minority groups, but society at large. Discrimination does thus not lead to security, neither to combat terrorism, nor irregular migration, and both are therefore no legitimate reasons to trade-off the basic principle of rule of law and democracy, which is treating an individual according to his or her behaviour and individual history, especially not if this leads de facto to racial discrimination, which is the opposite of a multi-ethnic and democratic society.

Abbreviations

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| CFR | Charta of Fundamental Rights of the European Union |
| CoE | Council of Europe |
| COSI | EU Council's Committee for operational cooperation on internal security |
| CERD | United Nations Committee on the Elimination of Racial Discrimination |
| CJEU | Court of Justice of the European Union |
| ECHR | European Convention of Human Rights |
| ECRI | European Commission against Racism and Intolerance |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| FRA | European Union Agency for Fundamental Rights |
| FRONTEX | European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union |
| HRC | United Nations Human Rights Committee |
| ICCPR | International Covenant on Civil and Political Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| RED | 'Race Equality Directive' Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin |
| TEU | Consolidated Version of the Treaty of the European Union |
| TFEU | Consolidated Treaty on the Functioning of the European Union |
| UK | United Kingdom |
| UKHL | United Kingdom House of Lords |
| UN | United Nations |

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