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THE EU AND U.S. APPROACHES TOWARDS IRREGULAR IMMIGRATION[1]

Summary: The aim of this paper is to present and discuss the approaches of the European Union and the United States of America towards the phenomenon of irregular immigration after 2010. Our analysis is based on official documents and other works published by the EU and U.S. federal government as well as on the literature in this field. This study is a continuation of our comparative papers from 2016-2018 devoted to different aspects of complex migratory reality in the EU and U.S. as well as corresponding public policies. We conclude that the high concentration in recent years on securing the borders and strengthening the policy of their control is similar for both entities. However, the effectiveness of the U.S. in defining and implementing a single approach to irregular migration is possible to a greater degree than in the EU – an international organization grouping sovereign states having their own national interests.

Keywords: European Union (EU), United States of America (USA), irregular migration, illegal migration, border management.

JEL Classification: F2, J1, K3.

Introduction

Since the inauguration of Donald J. Trump as the president of the United States in 2017, the U.S. begun to re-orientate its immigration policy. Although several groups were affected, it were the irregular immigrants constituting 25% of the immigrant population in this country that were hit the hardest. The so-
-called zero tolerance policy towards irregular migrants in the U.S. represents

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a radical move aiming both to limit the size of current irregular immigrant population and to decrease future inflows. Meanwhile, the European Union, which due to its geographic location, size, and socio-economic opportunities is also experiencing inflows of irregular immigrants, is not as preoccupied with this kind of immigration as the current U.S. administration, or at least in different context. In case of the EU, the issue of irregular migration is recently mostly linked to the so-called migration and refugee crisis in Europe. Some authors stress that irregular migration can be an important challenge for European democracy [Kużelewska, Weatherburn & Kloza (eds.), 2018].

In this paper we aim to present and discuss the approaches of the European Union and the United States of America towards the phenomenon of irregular immigration after 2010. Our analysis is based on official documents and other works published by the EU and U.S. federal government as well as on the literature in this field. This study is a continuation of our comparative papers from 2016-2018 [Misiuna & Pachocka, 2016, 2017, 2018] devoted to different aspects of complex migratory reality in the EU and U.S. as well as corresponding public policies.

1. The EU approach towards irregular immigration

Recent years have brought an increasing interest and discussions at different levels (international organizations, European Union, national governments, local actors such as local authorities or communities) about the irregular migration in Europe. The biggest focus was on the so-called migration and refugee crisis characterized by the large-scale immigration to European countries, including some of EU member states as frontline, transit or destination ones. So far 2015 and 2016 are considered to be two peak years of the crisis with the highest numbers of both arrivals to the EU and applications for international protection submitted in one of the EU countries.

Even though irregular migration is a truly global phenomenon and it puts a lot of pressure on many (im)migration policies in various regions of the world, such as the EU and the U.S., there still exists no universally accepted and commonly used definition here. However, the International Organization for Migration (IOM) proposes a common reference glossary for the terms connected to international migration. According to the IOM approach, irregular migration denotes a movement taking place "outside the regulatory norms of the sending, transit and receiving countries". In case of the target country it may encompass

entry, stay or work on its territory without "the necessary authorization or documents required under immigration regulations", while in case of the sending country, the irregularity may refer to a situation in which an individual crosses an international border not having a valid passport or any travel document or he or she "does not fulfil the administrative requirements for leaving the country" [Perruchoud & Redpath-Cross (eds.), 2011, p. 54]. Consequently, an irregular migrant is understood as "a person who, owing to unauthorized entry, breach of a condition of entry, or the expiry of his or her visa, lacks legal status in a transit or host country" [Perruchoud & Redpath-Cross (eds.), 2011, p. 54]. Also, there is no one legal definition stipulated in EU official documents or any working one commonly used in this regard at the EU level. However, instead of terminological vacuum, there is a variety of expressions interchangeably applied to describe this phenomenon. These include, among others: irregular, illegal, unauthorized, undocumented or clandestine (im)migration and (im)migrants [European Migration Network [EMN], 2018, p. 226]. Only EU legal definition in this field is provided in the Directive 2008/115/EC (Return Directive) of 2008 devoted to common standards and procedures in EU member states for returning third-country nationals illegally staying, where 'illegal stay' means "the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State" [European Union [EU], 2008, art. 3(2)].

When browsing EU official documents, but also the contents of websites in the official europa.eu domain, it is not difficult to notice that for a long time the terms 'illegal' or 'illegally' in relation to entry, stay or (im)migration were widely used by the EU institutions, especially the European Commission. Recent years, especially since the migration and refugee crisis, have brought an increase in the frequency of use of words related to irregularity. It is in line with the approach of other international organizations, e.g., the United Nations and the Council of Europe [Misiuna & Pachocka, 2017, pp. 162-166; EMN, 2018, pp. 225-227, 229]. Already more than a decade ago, the Parliamentary Assembly of the Council of Europe (PACE) stressed in its Resolution 1509 from 2006 that it "prefers to use the term 'irregular migrant' to other terms such as 'illegal migrant' or 'migrant without papers'" as it is "more neutral and does not carry, for example, the stigmatisation of the term 'illegal'", and, in addition, it is "favoured by international organisations working on migration issues" [Parliamentary Assembly of the Council of Europe, 2006]. Even if the evolution in the EU lan-

guage is noticeable towards more politically correct and ethically appropriate, and consistent with the PACE approach, it does not change the fact that, for example, the term 'illegal(ly)' often appears in relation to the issue of EU border management, e.g., in Regulation (EU) 2016/399 (Schengen Borders Code) [EU, 2016] – 'illegal immigration' is mentioned repeatedly – and in publications of the European Border and Coast Guard Agency (Frontex). In conclusion, the practice of the EU's political language has been changing recently with the tendency to replace the word 'illegal' with the term 'irregular', while in legal acts the expressions referring to the illegal context still prevail. Ultimately, it seems acceptable to talk about irregular or illegal immigration and irregular migrants, where the latter can also be referred to interchangeably as unauthorized/ undocumented. Using the term illegal to refer to people may incorrectly introduce the criminal context, therefore it is avoided.

Definitional dilemmas and the complex nature of irregular migration translate into challenges in data collection, measurement and analysis, both at global and regional levels, including the EU. Measurement of this phenomenon covers in fact both irregular migrant flows (considered as a process and its circumstances, including the context of the legality of the migratory movement) and stocks (referring to status of persons). The point is that (ir)regularity reflects people's migratory status which can change over time and is often conditioned by the place, and more precisely by the regulations and legislation of a given country/ region (e.g., EU and Schengen area) in terms of entry, transit, departure, but also stay, residence or access to labor market. In this regard one has to remember that statistics on irregular migration flows and stocks are usually based on "administrative sources relating to enforcement of immigration legislation (e.g., border apprehensions, applications for regularization programs, employer sanctions, among others), which reflect policies and practices of immigration control rather than the reality of the phenomenon" [Ardittis & Laczko, 2017, p. 2]. So far there are no EU comprehensive and coherent statistics to precisely reflect the situation around irregular migration (flow approach) and irregular migrants (stock approach). However, several data sets can be used to estimate numbers in both cases. Vespe, Natale and Pappalardo [2017, p. 28] propose to zoom in through the prism of data provided by IOM, UNHCR, Frontex and Eurostat what is shown in their summary Table 1.

Table 1. Data sets on irregular border crossings, mixed flows arrivals to the European
Union and enforcement of immigration legislation[a]

Data source	Description	Frequency	Coverage
Frontex[b]	Detections of irregular border crossings	Monthly	EU land and sea external borders
IOM[c]	Mixed migration flows in the Mediterranean and beyond	Monthly	EU land and sea routes
UNHCR[d]	UNHCR refugees' operational data portal	Monthly	Mediterranean situation
Eurostat – asylum applications	Asylum and first-time asylum applications, by citizenship, age and sex, including unaccompanied minors (migr_asyapp)	Monthly	EU–European Free Trade Association (EFTA)
Eurostat – asylum decisions	Decisions by citizenship, age, sex and type of status (migr_asydec)	Yearly	EU–EFTA
Eurostat – recognition rate statistics[e]	First-instance decisions by outcome and recognition rates	Quarterly	EU–EFTA
Eurostat – enforcement of immigration legislation	Third-country nationals refused entry at the external borders (migr_eirfs), found to be illegally present (migr_eipre) and ordered to leave (migr_eiord)	Yearly	EU–EFTA

[a]   The European Asylum Support Office (EASO) has a data collection system gathering information on all key stages of the Common European Asylum System; however, it does not disseminate raw data publicly. Key indicators are released in monthly reports (cf. www.easo.europa.eu/information-analysis/analysis-and-statistics/latest-asylum-trends).
[b]   Cf. http://frontex.europa.eu/trends-and-routes/migratory-routes-map/.
[c]   Cf. http://migration.iom.int/europe/.
[d]   Cf. https://data2.unhcr.org/en/situations.
[e]   Cf. http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report.

Source: Vespe, Natale & Pappalardo [2017, p. 28].

In this light one can look at the migratory and asylum situation in Europe in recent years as a mixed migration crisis, where large-scale flows of people have been composing of different categories of migrants, including, among other things: refugees, economic migrants, those moving for environmental reasons, but also smuggled migrants, victims of trafficking, or unaccompanied minors [International Organization for Migration [IOM], s.a.; Pachocka, 2017, p. 21]. To a different extent, they form part of the irregular migrants' category. Table 2 is a proposal to approximate the scale of the irregular migration phenomenon between 2014-2017 in terms of selected indicators. The presented data only show how large is the disproportion in numbers that are used in the estimation of irregular migrant flows and stocks. Of course, the quantitative picture of the discussed phenomenon can also be supplemented with the numbers of smuggled migrants and victims of human trafficking.

Table 2. The scale of irregular migration phenomenon in Europe/the EU through the prism of selected indicators

Level (stage of the phenomenon)	Global level (on the move)	EU level (at the border)	EU level (in the territory)	EU level (in the territory)	EU level (in the territory)
Stakeholder/ Data source	UNHCR	Frontex	EASO/Eurostat	Eurostat	Eurostat
Definition	the number of sea arrivals across the Mediterranean to Europe *the number of people considered 'dead' or 'went missing'*	detected cases of illegal crossing of the EU's external borders between border crossing points	the number of asylum applicants in the EU member states (asylum applications submitted by non-EU citizens in the EU-28)	third-country nationals found to be illegally present in the EU	third-country nationals ordered to leave the EU
2014	216.1 thousand *3.5 thousand*	0.3 million	0.63 million	0.67 million	470.1 thousand
2015	1 million *3.8 thousand*	1.8 million	1.32 million	2.15 million	533.4 thousand
2016	362.8 thousand *5.1 thousand*	0.5 million	1.26 million	0.98 million	493.8 thousand
2017	172.3 thousand *3.1 thousand*	0.2 million	0.71 million	0.62 million	516.1 thousand

Source: M. Pachocka's elaboration based on: Eurostat [2018abc]; European Border and Coast Guard Agency (Frontex) [2018, p. 43]; UNHCR [2018].

Taking into account aforementioned discussions on terminology relating to irregular migration and deliberations about its measurement in case of the EU, it is possible to identify some challenges and problems, which are associated with it. These are, among others:

– forced migration versus voluntary migration – to address root causes of immigration from third-countries and to prevent irregular migration,
– fight against migrant smuggling (and other forms of organized crime including terrorism and human trafficking) versus strengthening respect and protection of immigrants' human rights,
– effective EU external border management – security issues versus access to international protection,
– effective return policy and admission agreements and their consequences.

To face irregular immigration to Europe, the EU needs to be interested in the causes, course of the phenomenon and its consequences. To address this issue in an appropriate and effective way, the EU has so far at its disposal two main packages of tools – legal and policy ones that are strongly interconnected. Legal solutions can be understood as any law related steps such as new acts of law or its amendments or at least the action of initiating and conducting work on

new legislation. The examples can encompass development of anti-smuggling of migrants and anti-trafficking in persons legislation, new regulation concerning Frontex in 2016 and ongoing reform of the Common European Asylum System. Among policy tools there is a wide choice of different specific policies, activities or interventions, of which more emphasis has been placed on border manage- ment and return policy in recent years than on asylum policy.

2. The U.S. approach towards unauthorized immigration

Irregular immigration[2] and the necessary steps to limit the inflow of unau- thorized migrants have been major subjects of public debate in the United States for a long time. However, it is within the last few years that the attitudes towards irregular migrants among wider groups of U.S. society have become particularly hostile. This change is simultaneously surprising and not surprising at all. The surprise lies in the fact that although at least since the beginning of this century subsequent presidential administrations have been acting consistently to limit irregular immigration (with Barack Obama even being called 'the deporter in chief' [Chishti, Pierce & Bolter, 2017]), it was still possible for the successful presidential candidate in the 2016 election campaign to claim that the U.S. effec- tively has no control over immigration and that the official immigration policy is that of 'open border' [Garcia, 2016]. While a radical critique of immigration policy of a president from an opposing political party is to be expected, a vilifi- cation of immigrants to the point of calling some of them 'animals' or 'worst of the worst' is not [Lind, 2018]. However, in the light of complicated racial rela- tions in the United States and ethnic and racial characteristics of the new immi- gration, including irregular immigration, this radicalization of opinion is not surprising at all.

Although there are no precise data on the inflow of irregular migrants to the United States, it is nonetheless possible to estimate its scale using, e.g., the data on apprehensions[3] of unauthorized migrants both on the U.S. borders and on the U.S. territory (Figure 1) and analysing it in the context of U.S. Census Bureau's data on unauthorized resident population of the United States. According to the

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[2]   The absence of a binding unified definition of who an irregular/unauthorized/illegal immigrant
      is within U.S. regulation and ensuring multitude of definitions was discussed in one of our pre-
      vious papers [Misiuna & Pachocka, 2018].
[3]   *Apprehension* is defined by the Office of Immigration Statistics at the U.S. Department of
      Homeland Security as "an action by a law enforcement agency to take physical control of a per-
      son" – in this case of an unauthorized migrant [2016, p. 2].

statistics provided by the U.S. Border Patrol, which go back to 1925, the number of apprehensions of aliens trying to enter the U.S. irregularly reached its peak in the two decades between 1983 and 2006. During these decades in most years the number of apprehensions exceeded the 1 million mark and climaxed twice: first in 1986 and then in 2000. In both cases almost 1.7 million apprehensions were recorded. During the following decade the number of apprehensions dropped to just above 300 thousand in 2017, which was the lowest level since 1971 [U.S. Border Patrol, 2017]. The data on apprehensions of migrants trying to enter the United States irregularly translate to the increase in unauthorized resident migrant population. Pew Research Center estimates that between 1990 and 2006 the unauthorized immigrant population rose from 3.5 million to 12.2 million, and by 2014 it fell to 11.1 million [Passel & Cohn, 2016]. At the same time the total immigrant population rose from 19.8 million in 1990 to 40.7 million in 2014 and general population increased from 248.7 million in 1990 to 313.4 million in 2014 [U.S. Census Bureau, 1999, 2014]. In other words, in that quarter of a century the total population of the United States rose by 26%, while the total immigrant population rose by 205% and the unauthorized immigrant population rose by almost 350%[4].
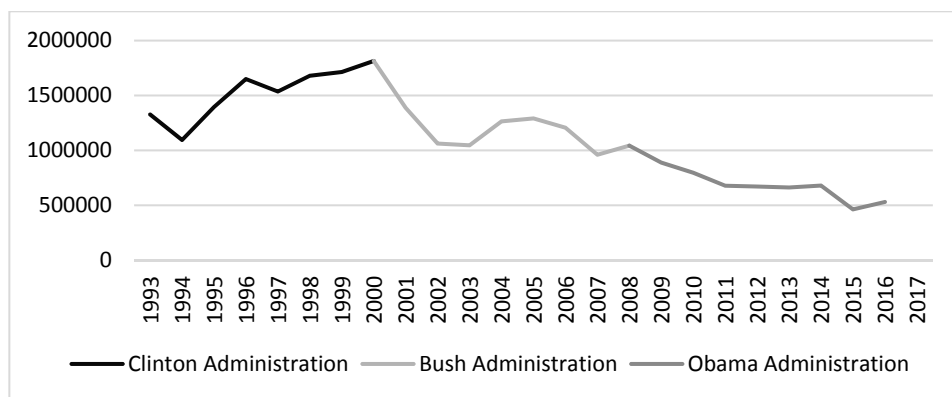
Figure 1. Apprehensions of unauthorized migrants in the USA (fiscal years 1993-2016)

Source: Based on: Chishti, Pierce & Bolter [2017].

The U.S. policy towards unauthorized immigrants before the change of presidential administration in 2017 relayed on three policies to control the inflow of people and the stock of irregular immigration. Immigration Enforcement

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[4] For a discussion of data on irregular migration and methodology of its collection, consult: [Warren & Warren, 2013] and [Capps et al., 2018].

Actions conducted by the U.S. Department of Homeland Security (DHS) were the first element of policy aimed at limiting unauthorized immigration. These actions differed substantially in character: from inspections of all aliens at the points of entry up to apprehensions of aliens "for suspected immigration violations", which could be followed by detentions, voluntary returns, and removals to their country of origin [Baker, 2017, p. 1-3]. The second policy aimed at controlling the inflow of irregular immigrates, authorized by the Congress in 1996, was fortifying the U.S. southern border, through which traditional routes of unauthorized immigration lead. The Department of Homeland Security was "required to construct reinforced fencing along at least 700 miles" of the 1933-mile-long border [Garcia, 2017, p. 1], and by 2017 it completed most of the task [Jacobo & Marshall, 2017]. The third policy consisted of various initiatives aimed at legalising the status of some categories of unauthorized immigrants. Deferred Action for Childhood Arrivals (DACA), one of the initiatives, was a policy introduced by the administration of Barack Obama. Its aim was to provide unauthorized residents who were brought to the United States as children and fulfilled a set of criteria (such as absence of criminal record) with deferral of deportation proceedings for a period of two years (renewable) and a work permit [U.S. Citizenship and Immigration Services, 2018]. While the policy provided neither a path to citizenship, nor a status of authorized immigrant, it allowed for some form of regularization of status.

The election of Donald Trump to the presidency of the United States on an anti-immigrant platform was interpreted as a sign that the immigration policy was going to be changed. However, almost two years after Trump's inauguration, no new policies aiming at limiting irregular immigration were put in place, although some changes were introduced to the policies towards unauthorized immigrants. The most publicized of those changes was adopting a 'zero tolerance' policy towards all immigrants irregularly crossing the southern border of the United States, introduced in May 2018 [U.S. Department of Justice, 2018]. The new approach meant that unauthorized migrants apprehended by the DHS, including asylum seekers and immigrants with children, who by custom were not persecuted for illegally crossing the border, were to be mandatorily referred the Department of Justice for persecution. Global news media covered the new approach towards immigration enforcement in detail, as it led to mass forced separations of children from parents for the duration of the proceedings, which was widely deemed violation of human rights. The policy was reversed by presidential executive order in June 2018 under pressure from public opinion [Shear, Goodnough & Haberman, 2018]. While this punitive approach to immigration

enforcement, combined with more restrictive immigration enforcement on the whole territory of the United States, was meant to deter unauthorized immigration, its effectiveness is questionable at best [Miroff, 2018].

One of the main slogans of the Trump's election platform during the 2016 presidential elections was 'building the wall' on the border with Mexico, even though 700-miles of a barrier was already in place. The aim of the new fortified border wall is to block unauthorized immigrants better and to deter immigrants from crossing to the United States. By October 2017 prototypes of border wall were build and tested by U.S. Customs and Border Protection [2017], and within a year work on replacing the old barrier with a new wall elements started in several locations [U.S. Customs and Border Protection, 2018]. However, it remains to be seen how long the new wall will be, whether it will be completed at all and if it will be much more effective than the barrier already in place.

Another prominent element of the Trump's anti-immigration platform was a repeal of DACA program, which was announced by September 2017. The program was supposed to be phased out by March 2018 [Shear & Hirschfeld Davis, 2017]; however, legal challenges to the presidential order ending it suspended the implementation of the repeal [Rose, 2018]. The attempt to repeal DACA underlines Trump administration's new approach to immigration policy, not only to the policy towards unauthorized migrants, particularly well: the number of immigrants within the United States is to be reduced, even though a case against immigration cannot be build.

Conclusions

The mixed migration crisis in Europe played an important role in highlighting the issue of irregular migration, starting from definitional dilemmas, through the problem of measuring its scale and data collection, to facing various challenges using available tools, mainly of legal and policy nature. At least since mid-2015, the priority of measures aimed at limiting the scale of irregular migration to the EU seems to have been significantly increasing. This is visible in the efforts to strengthen external borders management and control and intensify the return policy. At the same time, it is much more difficult to reach a compromize at EU level on a full and comprehensive reform of asylum policy. This may have a negative impact on the situation of migrants who arrive to Europe because it is difficult to explicitly distinguish between forced and voluntary ones, and irregular ones may include both groups. This, in turn, may lead to negligence in granting access to the asylum procedure and even a violation of human rights. Finally,

Bendel [2018, p. 292] points to "'outsourcing' of the European responsibility to provide protection" and notes a shift in EU approach "from protecting persons in need to preventing these persons from reaching the territory of the member states" [p. 302]. This leads to the conclusion that the EU is becoming a 'fortress Europe'.

The U.S. policy toward irregular immigrants is characterized by a high degree of continuity, and yet at the same time it is evolving. Of the last three presidents, each left his mark in the form of policies that were passed to his successors. Barack Obama inherited a barrier on the U.S.-Mexico border and, in turn, Donald Trump received DACA from his predecessor. However, this is where similarities between the Obama and the Trump administrations with regard to policies related to unauthorized immigration end. While Barack Obama enforced the immigration law, he also actively looked for legal solutions that were to enable the inclusion of at least some of the irregular immigrants in the U.S. society. At the heart of the Trump's approach to irregular immigration lies a conviction that the number of all immigrants to the U.S., both authorized and unauthorized, needs to be reduced. This attitude makes the character of immigration law enforcement punitive and prompts aggressive steps aiming to increase deterrence against potential immigrants.

The analysis of irregular migration approaches in two different world regions shows that they are slightly different in the EU and the U.S. What is similar is the high concentration in recent years on securing the borders and strengthening the policy of their control. In the case of the EU, this is due to the mixed migration crisis after 2010, while in the U.S. it is rather a continuation of the previous political line. The effectiveness of the U.S. in defining and implementing a single approach to irregular migration is possible to a greater degree than in the EU – an international organization grouping sovereign states. The EU members, regardless of the common EU migration policy (based on shared competence), also run their own national policies and it often leads to the deadlock.

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EU I USA WOBEC IMIGRACJI NIEREGULARNEJ

Streszczenie: Od momentu prezydenckiej inauguracji D.J. Trumpa w 2017 r. USA rozpoczęły reorientację swojej polityki imigracyjnej. Dotknęła ona wielu grup, ale najdotkliwiej imigrantów nieregularnych. Radykalnym krokiem w stronę ograniczenia wielkości ich populacji i ograniczenia napływu nowych imigrantów jest „polityka braku tolerancji". Z kolei w UE, do której w związku z jej położeniem geograficznym i potencjałem społeczno-ekonomicznym, również docierają nieregularni imigranci, wzrost zainteresowania tym zjawiskiem nastąpił wraz z kryzysem migracyjnym i uchodźczym. Celem artykułu jest przedstawienie podejścia UE i USA do zjawiska imigracji nieregularnej po 2010 r. W opracowaniu wykorzystano dorobek prawny i wybrane materiały publikowane przez instytucje UE oraz przez amerykańskie instytucje rządowe, a także literaturę przedmiotu. Artykuł jest kontynuacją publikacji autorów z lat 2016-2018 poświęconych wybranym aspektom migracji międzynarodowych w UE i USA.

Słowa kluczowe: Unia Europejska (UE), Stany Zjednoczone Ameryki (USA), migracja nieregularna, migracja nielegalna, zarządzanie granicami.