

REGINE

Regularisations in Europe

Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU

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CONTENTS

Acknowledgements.....	i
Preface	ii
1. Terms, definitions and scope.....	1
2. Previous comparative studies on regularisations and their impact	11
3. Regularisation practices across the EU	30
4. Government positions on policy	57
5. Positions of social actors	59
6. International organisations	92
7. The EU policy framework – relevant legislation and principles	102
8. Policy options	109
9. Conclusions – preferred options	129
10. References – primary sources	138
11. References – secondary sources.....	143

APPENDICES (separate volumes)

Appendix A – country studies (Spain, Italy, Greece, France, UK, Switzerland)

Appendix B – country profiles (22 EU states and USA)

Appendix C – statistical annex

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Preface

In December 2007, the European Commission (DG Justice, Freedom and Security, Directorate B – Immigration, Asylum and Borders) commissioned the International Centre for Migration Policy Development (ICMPD) to undertake a *Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU*. The study was commissioned subsequent to the Commission's Communication on policy priorities in the fight against illegal immigration of third-country nationals (COM(2006) 402 of 19 July 2006), in which the Commission announced that it would undertake a study on regularisation, the purpose of which was to collect concrete factual, statistical, economic and legal information on issues related to regularisations, in order to inform future EU policy in this area.

Thus, the aim of the study is to provide a thorough mapping of practices relating to the regularisation of third country nationals illegally resident in the 27 EU Member States, with comparative reflections on regularisation practices elsewhere. In addition, the study investigates the relationship of regularisation policies to the overall migration policy framework, including the diverse interlinkages between regularisation policies, protection issues and refugee policies and also the role of regularisation regarding the framework for legal migration. Moreover, the study examines the political position of different stakeholders towards regularisation policies on the national and the EU levels. Finally, the study examines potential options for policies on regularisation on the European level, incorporating Member States as well as other stakeholders' views on possible instruments on the European level.

This study would not have been possible without the support it received from a wide range of individuals and institutions, including the European Commission, individual Member States, NGOs and trade unions and colleagues at ICMPD. However, the opinions expressed in this study are entirely those of the authors and cannot be taken to reflect any official views of the European Union, individual Member States or ICMPD.

It is organised as follows: §1 introduces relevant terms and definitions and also sets the parameters of the study. §2 looks in some detail at earlier comparative studies of regularisations and their impact; §3 presents the empirical findings of the report, with a particular emphasis on policy outcomes. §4 is a summary of Member State positions on regularisation, as identified from ICMPD questionnaire responses, while §5 is a more detailed analysis of the positions of various social actors – mostly derived from questionnaire responses. §6 outlines the major provisions relevant in international and regional (Council of Europe) law, and also identifies the policy stances of relevant international organisations. §7 is a synopsis of the relevant EU legislation and principles.

In §8 we present twelve detailed policy options and sub-options. Finally, in §9 we draw together some of the most important policy lessons to be learned from the EU, USA and Switzerland. Taking account of the expressed positions of stakeholders across the EU, we advocate adoption of those policy options that seem most likely not only to be effective in better managing irregular third country national populations across the EU but are also supportable by Member States and European social actors.

Additional supporting material is provided within three Appendices. Appendix A contains detailed country studies of five Member States plus Switzerland; Appendix B contains short country profiles for the remaining EU Member States plus the USA; and Appendix C consists of summary statistical data in spreadsheet format on regularisations for the EU(27) that were compiled during the course of this study.

1 Terms, definitions and scope

1.1 The problem of negative definition

Defining ‘illegal stay’ is notoriously difficult and globally, states’ practices vary widely in regard to whom they regard as illegally resident. In the European Union, the recently-agreed Return Directive¹ adopts a common definition of illegal stay, which also has been used in other relevant draft directives from the European Commission.² Thus, Article 3(b) of the Return Directive stipulates:

"[I]llegal 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 Code³ or other conditions for entry, stay or residence in that Member State

Despite this common definition, however, the national definitions used in Member States still vary widely and may need to be adapted when transposing the Directive. The problem of the real meaning of such a definition arises at least partly because it constitutes an attempt to define something in a negative sense⁴ – that certain persons are **not** legally staying on the territory – with insufficient clarity concerning the specific laws, or specific aspects of law, that may have been infringed.⁵ An alternative definition such as ‘lawful residence’⁶ also has a number of meanings in different national legal systems, ranging from a very narrow interpretation in the UK, Spain and Portugal,⁷ to a broader concept of ‘legal stay’.⁸ Thus, varying national immigration and labour laws (amongst others) lead to

¹ Art. 3(b), *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals*, Council of the European Union, Brussels, 25 June 2008, 10737/08.

² E.g. *Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals*, COM(2007)249 final; *Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in member states for returning illegally staying third country nationals*. COM(2005)391 final.

³ Article 5 of the Schengen Border Code (Regulation (EC) No 562/2006 of The European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)) lists the following entry conditions: (a) possession of a valid travel document or documents giving authorisation to cross the border; (b) possession of a valid visa, if required; (c) justification of the purpose and conditions of the intended stay, sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or onward travel; (d) no SIS alert has been issued for the purposes of refusing entry; (e) persons entering are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States.

⁴ Exceptions lie with the Netherlands and Ireland, both of which have an official definition of illegal residence. For more details, see European Migration Network (2007): *Illegally Resident Third Country Nationals in EU Member States* (synthesis report), p. 11.

⁵ One major source of heterogeneity in the definition of illegal stay as set out by the Return Directive is Article 5 (1) (c) of the Schengen Border Code referred to in the directive. In the absence of a common admission policy, it is Member States who define purposes and conditions of stay and who have the power to withdraw a right to stay if conditions are not (or are no longer) met, unless the Third Country National is covered by Community legislation on long-term residence, the rights of EU citizens and their families, or the family reunification directive. Because of the power of Member States to specify purposes and conditions of stay, the concrete definitions of illegality will naturally vary accordingly.

⁶ Note particularly the use of this concept by the ECJ in *Singh* (C-370/90), although the case is not about illegal stay *per se*.

⁷ Excluding those with temporary legal stay, but not the right of residence.

⁸ “*séjour légal*” in France, “*rechtmäßiger Aufenthalt*” in Germany, and *soggiorno legale* in Italy.

varying types of illegal stay. Although *illegal stay* includes all types of stay which do not conform to notions of ‘legal stay’ (as defined in different national contexts), persons without residence status but ‘known’ and tolerated by the authorities may not be included in national definitions of illegal stay.⁹

For its part, the Commission seems to take a very broad view of what constitutes ‘illegal stay’: “e.g. expiry of a visa, expiry of a residence permit, revocation or withdrawal of a residence permit, negative final decision on an asylum application, withdrawal of refugee status, illegal entrance”.¹⁰ Furthermore, the Return Directive includes specifically those third country nationals “who no longer fulfil” the conditions of legal entry, stay or residence. Thus, holders of expired residence permits are *de jure* illegally residing, apparently regardless of the circumstances that led to this.

The Return Directive’s discussion¹¹ states that there is no attempt to “address the reasons or procedures for ending legal residence”; at present, there is also no Community instrument for addressing the reasons or procedures for *beginning* legal residence. Given that both of these issues are germane to the phenomenon of ‘illegal stay’, it would seem that regularisation of illegally staying third country nationals must logically remain, for the time being, as a matter for national policy.

1.2 Types of illegal or irregular status

The terminology used in the literature is extensive, inconsistent and generally problematic through lack of definition. Such terms include ‘clandestine’, ‘irregular’, ‘illegal’, ‘unauthorised’, ‘undocumented’, ‘*sans papiers*’; we do not find it useful here to rehearse the arguments for and against any particular terminology.¹² Suffice it to say that we are essentially concerned with conformity or non-conformity with legal requirements: an individual’s degree of ‘compliance’¹³ with national legislation is complex and multifaceted, and in practice is more complex than the definition embraced by the Return Directive would suggest. Table 1 gives an indicative typology of the complex range of actualities of conformity with national immigration and labour legislation. We distinguish four main aspects of legality/formality¹⁴:— **entry, residence, employment (legal) and employment (formal)**. The dimension of ‘entry’ merely refers to the legality of entering the territory, with a crude distinction of legal or illegal; the dimension of ‘residence (nominal)’ identifies the formal residence

⁹ There is a tendency for some Member States to define third country nationals who are unlawfully staying, but known to the authorities, as being outside of the population of illegal residents. In a strictly legal sense, documented immigrants whose residence is unlawful should be considered part of the wider population of irregular or illegal residents. Thus, Germany does not consider tolerated persons as illegally staying whereas the Netherlands includes tolerated persons in its national definition of illegally resident persons (see REGINE country fact sheets on Germany and the Netherlands).

¹⁰ *Proposal for a Directive ... for returning illegally staying third country nationals, op. cit, p.6.*

¹¹ See Fn. 1

¹² For a more extensive discussion see Jandl, M., Vogl, D. and Iglicka, K. (2008): ‘Report on methodological issues’, Unpublished Draft Report for the project *Clandestino - Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe*.

¹³ For the concept of ‘compliance’, see Ruhs, M. and Anderson, B. (2006): *Semi-compliance in the migrant labour market*, Working Paper 30. COMPAS, University of Oxford.

¹⁴ We do not document here, for simplicity, the cases of withdrawal of residence permits consequent to criminal conviction, assessment of public policy risk, or breach of the conditions of residence.

Table 1: Types of illegal or irregular status

Entry	Residence (nominal) ¹⁵	Legal Status of Employment	Nature of Employment (formal – taxed, social security contributions)	Documented?	Examples
Illegal	(illegal)	-	-	-	Undocumented migrants transiting a country without actual residence
Illegal	Illegal	Illegal	None	No	Illegal immigrants not working; family members reunified without authorisation and not working (includes children)
Illegal	Illegal	Illegal	Informal	No	Illegal immigrants who are working
Illegal	Illegal	Illegal	Formal	Semi-documented (tax authorities, social security bodies)	Illegal immigrants illegally employed, but paying taxes and social security contributions (in countries where legal employment status and nature of employment are not systematically cross-checked)
Illegal	Legal	Illegal	Informal	Documented	Asylum seekers without access to work who work informally, <i>post hoc</i> regularised persons without the right to work
Illegal	Semi-legal	Legal/illegal	Formal/informal	Documented	Persons in respect of whom removal order has been formally suspended (e.g. tolerated status)
Illegal	Legal	Legal	Formal/informal	Documented	Formally regularised persons; persons with a claim to legal status due to changed circumstances (e.g. marriage with a citizen, <i>ius soli</i> acquisition of citizenship by offspring)
Legal	Legal	Illegal	Informal	Semi –documented (if visa obligation)	Tourists working without permission
Legal	Legal	Illegal	Informal	Documented	Legal immigrants without the right to work (e.g. students in some countries, family members in others)
Legal	Illegal	Illegal	Informal	Semi-documented (if visa obligation)/ undocumented	Visa overstayers, citizens of new EU MS without access to work who overstay the 3 months period
Legal	Illegal	Legal	Formal/informal	Semi-documented	Overstayer in permit-free self-employment (e.g. business persons, artists, etc.)
Legal	Illegal	Illegal	Formal	Semi-documented	Persons whose residence/ work permit has expired but who continue to be formally employed
-	Illegal	Illegal	Informal	Semi-documented/ undocumented	Children of illegal immigrants born in country of residence; children of legal immigrants born in country of residence with expired/ without legal status

Adapted from Gächter *et al.* (2000:12) and Van der Leun (2003: 19)

¹⁵ The title of legal residence may be subject to observance of certain restrictions, such as access to employment, and is likely to be removed upon discovery of any serious breach. State response to infractions varies according to country and category of immigrants, with greatest toleration generally of family members.

status granted to an immigrant – this may change over time, and also in the case of breach of conditions (see Table 1, Fn. 15). The dimension of ‘legal status of employment’ refers to whether non-nationals are legally entitled to work, as defined by regimes for work and/or residence permits. By contrast, the category ‘nature of employment’ refers to compliance with wider employment regulations, notably tax and social security (payment) regulations (hence this covers the distinction between declared/undeclared work). A fifth, cross-cutting dimension (which we do not consider to be a defining element of legality/illegality) is whether illegally staying persons are ‘documented’, i.e. known to the authorities.

Taking first the variable of legality of entry, it can be seen that there exist seven variants of illegal entrants and five variants of legal entrants (plus one special case of children born on the territory). A similar examination of statuses concerning legality of residence reveals eight illegal types, four legal and one semi-legal. Across the EU (27), immigration and employment laws (along with their actual policy implementation) vary so widely, that the determination of exactly which of these categories should be cast as ‘illegally staying’, and which should not, will inevitably turn into a lottery.

As can be noted from Table 1, certain categories consist of persons who presumably are not intended as the targets of policies such as the Return Directive. Of particular note are the bottom two rows – children of varying statuses, and those with expired residence permits who continue in employment (and usually also in taxation). Other categories, such as visa-overstayers and illegal entrants, might appear to be suitable targets for return: in practice, a large number of Member States have relied upon these categories for their immigrant labour policy. Most of these types of illegality can be considered suitable for regularisation¹⁶ – at least, under certain conditions such as length of residence.

Table 1 is not to be interpreted as definitive of the concept of ‘illegal stay’, but rather as an elaborating device used to deconstruct the extraordinarily wide and (arguably) open-ended definition used in the Return Directive. For example, taking **legality of entry** as a condition (note the Return Directive definition, given above), we exclude four subcategories of persons with legal entry but illegal residence; similarly, taking (nominal) **legality of residence** as a condition, we exclude five subcategories of persons (of which three are illegal entrants). Furthermore, one of the major subcategories (illegally working persons who entered with a tourist visa) has both legal entry and residence, but is in breach of conditions of the visa. Such a breach is likely to lead to termination of legal stay, although the practices of Member States vary widely. Here, again, we find a significant heterogeneity across the EU (27) which warrants further study: apart from legal constraints on terminating the residence of a third country national (see in more detail below, § 1.3), not all breaches of immigration regulations are sanctioned with termination of stay. However, relatively little is known about Member States’ practices in this regard.

¹⁶ Possibly, working tourists constitute an exception; however, a tourist visa is a ‘normal’ work migration route into many EU countries.

1.3 Freedom of movement rights and protection of residence status of third country nationals under European Community legislation

There are some important categories of non-nationals for which the above typology of illegality/irregularity does not apply, or applies only in a very limited sense. These are: third country nationals holding the EU long-term residence status¹⁷ and third country nationals who are family members of EU nationals.

Third country nationals who are long-term residents of a Member State, that is third country nationals who legally and continuously resided within the territory of a Member State for five years and have been granted long-term residence status according to Directive 2003/109/EC, enjoy more or less unrestricted freedom of movement and far-reaching protection from expulsion and withdrawal of residence status. Not only do long-term residents enjoy full access to Member States' labour markets, but additionally their failure to meet certain conditions (e.g. lack of means, or engaging in undeclared work) may not lead to withdrawal of the status and a consequent move into illegality. As in the case of EU citizens, freedom of movement rights may be waived only on major grounds of public policy, public security and public health.¹⁸

A second category of third country nationals, which enjoys substantial residence rights and hence far-reaching protection from expulsion under EU legislation, is that of family members of EU nationals who have exercised freedom of movement rights.¹⁹ Under the directive, the powers of Member States to waive freedom of movement rights is limited to major grounds of public policy, public security and public health. Under Article 28 of Directive 2004/38/EC, Member States' power to initiate removal procedures against EU citizens and their family members are not only limited to serious grounds of public policy and security, but the scope for enforcement measures should "be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin."²⁰ Thus, neither lack of means, unemployment nor engagement in undeclared work may lead automatically to termination of residence and consequent illegal stay.

However, third country nationals who are not long-term residents enjoy limited protection from expulsion under EU legislation and also under the European Convention of Human Rights (ECHR). By implication, third country nationals staying less than five years but enjoying certain protection

¹⁷ In the meaning of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents.

¹⁸ See also Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States for the definition of freedom of movement rights of EU nationals and their family members, from which freedom of movement rights granted under Directive 2003/109/EC are derived.

¹⁹ Directive 2004/38/EC. The personal scope of the directive is restricted to EU citizens *who use mobility rights* and their family members (emphasis added). This excludes EU nationals who reside in their country of citizenship and their (third country national) family members, unless (1) the EU national has previously resided in another Member State; (2) the family unit already existed at that time; and (3) the EU national in question and his/her family members have thus acquired freedom of movement rights under the directive. Indeed, in several Member States family reunification rights of nationals are more restricted than those of EU nationals (on the beneficiaries of the rights awarded under the directive see Article 3, *passim*).

²⁰ Preamble, para 23, Directive 2004/38/EC.

under EU legislation or international law may similarly become nominally illegally resident only on more serious grounds, despite any infractions of immigration conditions.

In particular it is family members of third country nationals who enjoy a certain protection from loss of residence status and expulsion under both the ECHR and EU legislation, with the ECHR potentially providing much more extensive protection from expulsion than does the family reunification directive.²¹

Generally, the family reunification directive²² provides only limited security of residence and protection from expulsion to third country nationals who have been admitted as family members. This reflects above all the fact that the family reunification directive is more concerned with regulating conditions of admission of third country nationals for the purpose of family reunification than defining the rights enjoyed by (*de facto*) family members already resident – on whatever terms – in a Member State. Reflecting this, family members have to be explicitly admitted as family members to enjoy any rights under the directive. Similarly, family members are – as a general rule – required to submit applications for family reunification from abroad.²³ However, all Member States except Cyprus provide for in-country applications in cases where family members already enjoy a right of residence, however limited, i.e. essentially in cases of permit switching.²⁴ Indeed, the possibility to switch to a family based permit may be considered an important safeguard to avoid the situation that persons no longer meeting the conditions of residence on other than family grounds lose their right to residence and become liable to be deported, or otherwise lapse into illegality.²⁵

In addition to procedural requirements (such as submitting an application from abroad), the right to family reunification is conditional upon meeting housing, income and integration conditions according to Article 7 of the Family Reunification Directive. Despite the (arguably) limited scope of the directive, recent ECHR case law suggests that the power of states to withhold a legal status is increasingly limited, in particular in cases where family members do not meet all, or some, of the requirements or when *de facto* family members have never been admitted as family members or have been illegally resident.²⁶

²¹ See Thym, D.(2008): ‘Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?’ *International and Comparative Law Quarterly*, 57, 1, pp.81-112.

²² Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

²³ See article 5(3) Directive 2003/86/EC. Two states (Ireland and Poland) allow for in-country applications. See Groenendijk, K., Fernhout, R., van Dam, D., van Oers, R., Strik, T. (2007): *The Family Reunification Directive in EU Member States. The First Year of Implementation*. Nijmegen: Wolf Legal Publishers, p.48f.

²⁴ *Ibid.*

²⁵ The results of an analysis of post-regularisation trajectories of immigrants in Italy on the basis of residence permit data indicate that about 10% of women, who had been regularised on the basis of employment in the 2002 regularisation programme and still had a work related permit in 2004, had switched to a family based permit by 2007 (1.2% in the case of males), while 11.6% of males had switched to a permit on the grounds of self-employment. See Carfagna, S., Gabrielli, D., Sorvillo, M. P., Strozza, S. (2008): *Changes of status of immigrants in Italy: results of a record-linkage on administrative data sources*. Presentation given at the International Seminar on Longitudinal Follow-up of post-immigration patterns based on administrative data and record-linkage, Belgian Federal Science Policy, Brussels, 23 June 2008.

²⁶ See Chapter 6, for details.

1.4 The meaning of ‘regularisation’

The term ‘regularisation’ has no clearly defined meaning, either legally or through general usage. Historically, legalisation or amnesty for those in an irregular status has very different origins across countries. Differing patterns include corrective or accommodating measures related to changes in post-colonial nationality laws (the UK, the Netherlands), similar recent changes for some Baltic countries, post-hoc legalisation of non-recruited (but needed) illegal labour migration flows (southern Europe and France), legalisations for humanitarian reasons (most of western Europe), legalisation of rejected asylum-seekers by virtue of the length of procedure (Belgium, the Netherlands), for family reasons (France), and ‘earned’ regularisation²⁷ by virtue of duration of residence, employment record, etc. (the UK, France, Spain *et al.*).

For the purposes of the REGINE project:

Regularisation is defined as any state procedure by which third country nationals who are illegally residing, or who are otherwise in breach of national immigration rules, in their current country of residence are granted a legal status.

This broad definition covers all procedures through which third country nationals in breach of national immigration rules may acquire a legal status, whether or not these are explicitly intended to offer a legal status to migrants in an irregular situation. In some cases, we categorise as regularisations certain procedures which the Member State involved does not consider to be such. Specifically, these include the *de facto* regularisation of 2006 in Italy, the various regularisation programmes of Germany for long-term ‘tolerated’ persons, and an employment-based regularisation in Austria implemented in 1990. We also take account of a process that we call ‘normalisation’²⁸ by which a short-term residence status is awarded to persons already with legal (but transitional) status: this includes categories such as students or asylum-seekers who change their status (e.g. exceptional grant of a non-transitional legal status on grounds of marriage).²⁹

The definition provided above does not specify the dimensions covered by such procedures, i.e. whether it pertains to residence (residence permits), access to employment (work permits/ residence permits giving access to employment) or compliance with employment and social security regulations (possession of a formal work contract; compliance with tax and social security obligations).

²⁷ Our usage of the term ‘earned’ regularisation is different from its specific meaning of the concrete proposals for an earned regularisation scheme as developed by MPI president Demetrius Papademetriou (see *infra*, chapter 2, for a description of the scheme).

²⁸ This is our own terminology (although it is taken from the Spanish *normalización*, as used in Spain’s 2005 legalisation), used in the very specific sense of ‘adjusting’ the status of persons, rather than actually granting a legal status to those without. It is not, therefore, a regularisation as defined above.

²⁹ Various regularisation programmes and mechanisms provide, or have provided, for the regularisation of long-term asylum seekers, including in Belgium, Germany, the Netherlands, Sweden and the UK, often targeting specific categories of long-term asylum seekers. In particular in the 1990s, such programmes were often intended to provide complementary protection to persons not covered by the Geneva Convention, notably refugees from the former Yugoslavia. According to Koen Dewulf (Centre for Equal Opportunities and Opposition to Racism, Belgium, comment, International Seminar on Longitudinal Follow-up of post-immigration patterns based on administrative data and record-linkage, Belgian Federal Science Policy, Brussels, 23 June 2008) existing regularisation mechanisms have been extensively used to award unrestricted legal statuses to other persons with liminal legal status, notably students who had developed ties to Belgium.

Although the most significant regularisation programmes usually address both residence and work status, there are important examples of programmes that seek only to address the work status of non-nationals in an irregular situation or their compliance with broader employment regularisations. For example, the current amnesty for irregularly employed care workers in Austria primarily seeks accommodation of the specific nature of care work by amending employment regulations; indeed, non-compliance with employment and social security provisions (rather than rules regulating non-nationals' access to employment) were identified as the main issue of concern. While such programmes (as well as programmes targeting non-nationals without access to employment) may appear to be outside the scope of a study whose remit is to map and analyse "practices in the area of regularisation of *illegally staying third-country nationals*",³⁰ in fact, the three dimensions – legal residence, access to employment and legal employment [compliance with employment, tax and social security regulations] – are closely intertwined. Not only do regularisation programmes designed to reduce the number of illegally resident third country nationals typically specify current employment (or an employment record) as a condition for regularisation, but non-nationals in breach of work permit or wider employment regulations are usually also in breach of conditions for legal residence: technically, non-nationals not covered by freedom of movement rights may be viewed as illegally resident if found in an irregular work situation.³¹

1.5 Programmes and mechanisms for regularisation

Although there exists a wide range of policies across Member States for granting a regularised status, two broad and fairly distinct procedures can be identified for this purpose. For these, we employ the terminology of 'programmes' and 'mechanisms' – the former indicating a time-limited procedure (frequently, but not necessarily, involving a large number of applicants), and the latter indicating a more open-ended policy that typically involves individual applications and, in most cases, a smaller number of applicants.³²

Thus, the following definitions have been developed and Member States' practices analysed in accordance with this framework.

Regularisation Programme

A regularisation programme is defined as a specific regularisation procedure which (1) does not form part of the regular migration policy framework, (2) runs for a limited period of time and (3) targets specific categories of non-nationals in an irregular situation.

³⁰ The Austrian programme in fact explicitly excludes third country nationals without a residence title or with a restricted residence title not entitling work and thus does not qualify as a regularisation programme.

³¹ Thus, a long-term resident as defined by Council Directive 2003/109/EC may lose his/her right to residence only if "he/she constitutes an actual and sufficiently serious threat to public policy or public security" [Article 12 (1), 2003/109/EC].

³² One of the main exceptions is France, where 101,479 persons were regularised between 2000 and 2006 on the basis of personal and family ties (80,401) and regularisation after 10 years of residence (21,078). Altogether, regularisations in France account for more than 8% of all admissions during this period. The total number of regularisations between 2000 and 2006 is therefore substantially higher than the estimated 87,000 persons regularised in the 1997/98 regularisation programme (see REGINE country study on France).

Regularisation Mechanism

A regularisation mechanism is defined as any procedure other than a specific regularisation programme by which the state can grant legal status to illegally present third country nationals residing on its territory. In contrast to regularisation programmes, mechanisms typically involve ‘earned’ legalisation (e.g. by virtue of long-term residence), or humanitarian considerations (e.g. non-deportable rejected asylum-seekers, health condition, family ties etc.), and are likely to be longer-term policies.

1.6 Methodology

Data have been collected and collated from the following sources:

- existing comparative and national studies of regularisation programmes and policies
- statistical and legal data from state data sources, via the REGINE questionnaire
- questionnaire survey to non-governmental organisations
- interviews with social actors active on the European level
- survey of government positions, via the REGINE questionnaire
- external expert input for in-depth study of seven selected countries

We have sought to achieve overall breadth of analysis, by covering all EU Member States, in parallel with detailed case studies of five EU countries and two non-EU – namely, Spain, Italy, Greece, France, UK, Switzerland, USA. Summary statistical and legal data for the EU (27), where available, have been collated in spreadsheet format for comparative reference.

For the purposes of this report, we have developed several analytic instruments and gathered a broad range of data, including

- A multi-faceted depiction of forms of illegality, as given in Table 1, allows for a more detailed breakdown of the problematic concept of ‘illegal stay’.
- Through questioning of Member States (using the REGINE questionnaire) alongside our own research, more precise data concerning application numbers, actual grants of legal status and acceptance rates within programmes have been assembled for 17 countries: these are summarised in Table 2 (§3) and represent a real advance on previously published data.
- For the first time, statistical data on regularisation mechanisms (as defined) are published for 10 countries. Despite being incomplete, and missing several countries, this also represents a real advance in knowledge.
- Utilising previously-compiled data on estimated irregular TCN stocks, supplemented by ICMPD evaluations for missing data, we classify each Member State as having per capita stocks ranging from low (less than 0.5% of total population) to very high (more than 2%). (See Table 5, (§3))
- Using the new data on programmes and mechanisms, we identify six ‘policy clusters’ with regard to regularisation, and suggest some broad defining characteristics of the countries comprising each cluster.

Policy outcomes have been evaluated primarily through the detailed case studies (Spain, Italy, Greece, France, UK, Switzerland, USA) although with reference to the pre-existing literature. Through the detailed comparative study, we identify both good and bad practices in the areas of regularisation programmes and mechanisms, and immigration policies generally (see §3.3 – Policy issues). These are then used to address specific policy issues and formulate policy proposals with the objective of promoting ‘good practices’ and bringing to the attention of Member States some of the ‘bad practices’ that we believe have been identified.

The positions of Member States, social partners (trade unions, employers organisations, immigrant associations and migrant advocacy organisations) and international organisations are described in Chapters 4, 5 and 6. These are based on questionnaire responses, interviews and publicly available policy positions.

Chapter 8 lists a wide range of policy options, all derived from the issues identified in Chapter 3. Our recommended policy options, based on international experiences and readings of the positions of Member States, social actors and international organisations, are presented in Chapter 9.

2 Previous comparative studies on regularisations and their impact

2.1 Introduction

This chapter reviews selected previous comparative studies on regularisation policies in EU Member States and elsewhere. It considers how existing studies conceptualise regularisation and how they classify different regularisation measures in comparative perspective. It evaluates existing studies' findings regarding the characteristics of regularisations and their main rationales, while enquiring into how regularisation measures fit into the overall migratory framework. Finally, the chapter reviews existing studies' findings on the implementation of regularisation measures and their impact.

Although research on regularisation practices of individual countries has now a long tradition – a growing number of studies began to appear as long ago as the early 1980s, when regularisations became more common in the context of growing restrictions on immigration³³ – it is only relatively recently (specifically, since the publication of the seminal study on regularisation practices in selected European states, carried out by the Odysseus network³⁴ and published in 2000³⁵) that regularisation policies have received serious attention from a comparative perspective. That the increased interest in regularisation policies from a comparative perspective roughly coincided with the communitarisation of migration policy through the Amsterdam Treaty is not simple coincidence: the role of the European Community has been a major rationale for the majority of studies. Indeed, the Odysseus study on regularisation practices was financed by the European Commission and the study was actually the network's very first multi-country study on migration legislation of Member States from a comparative legal perspective.³⁶ This suggests that regularisation policy, although outside the actual scope of migration policy-making on the European level, has been a core concern from the very beginning of the development of a common European migration and asylum policy.

Since then, the literature on regularisation policies has multiplied, and now includes a variety of comparative mapping exercises of regularisation practices³⁷ as well as numerous studies investigating

³³ See, for an early study on France, Marie, C.V. (1984): 'De la clandestinité à l'insertion professionnelle régulière, le devenir des travailleurs régularisés'. In: *Travail et Emploi N°22*, décembre, pp. 21-32. In Italy, first studies on regularisation programmes began to appear in the mid-1990s (see for example Massi, E. (1995): *La sanatoria per i cittadini extracomunitari, Diritte e pratica del Lavoro*, pp.3033f); In Spain, the first studies were published from the 1990s onwards (see for example A. Izquierdo Escribano (1990): *Immigration en Espagne et premiers résultats du programme de regularisation*, Rapport par l'OECD. Group de Travail sur les Migrations. Paris: OECD). In the US, numerous studies have been published following the 1986 Immigration Reform and Control Act (IRCA).

³⁴ See on the Odysseus network <http://www.ulb.ac.be/assoc/odysseus/>

³⁵ De Bruycker, P. (ed) (2000): *Les regularisations des étrangers illégaux dans l'union européenne. Regularisations of illegal immigrants in the European Union*. Brussels: Bruylant; A summary report of the study was also published as Apap, J., De Bruycker, P., Schmitter, C. (2000): 'Regularisation of Illegal Aliens in the European Union. Summary Report of a Comparative Study', *European Journal of Migration and Law*, 2, pp. 263–308. Because this summary has been more widely disseminated and is more accessible than the original French summary contained in the book, we will mainly refer to this version.

³⁶ De Bruycker, P. (2000): 'Présentation d'ouvrage'. In: De Bruycker, P., op. cit., pp.xxvii-xx1.

³⁷ Blaschke, J. (2008): *Trends on Regularisation of Third Country Nationals in Irregular Situation of Stay Across the European Union*. PE 393.282, Brussels: European Parliament, Directorate General Internal Policies of the Union, Policy Department C, Citizens Rights and Constitutional Affairs; J. Greenway, (2007): *Regularisation programmes for irregular migrants*. Report: Council of Europe. Committee on Migration,

specific aspects of regularisation policy, including to what extent regularisation is an effective policy tool,³⁸ the socio-economic impact of regularisations³⁹ and a large number of broader reviews of migration policy that also cover regularisations.⁴⁰

2.2 Illegal migration, the informal economy and regularisation as an instrument to combat illegal employment

A second important impetus for research on regularisation has come from the **Organisation for Economic Cooperation and Development (OECD)**. The OECD has consistently been reporting on major regularisation programmes (or amnesties, the term preferred by the OECD) in selected OECD member states in its annual SOPEMI reports since the mid-1990s.⁴¹ In contrast to the Odysseus study (discussed below) and various other mapping studies that have been published since, the focus of the OECD writings on regularisation has been less concerned with legal aspects. Indeed, none of the major OECD publications on the topic have much to say on either the conceptual or the legislative aspects of regularisation, nor has the OECD considered regularisation practices in the wider sense (as done by this study). In addition, OECD studies essentially cover only regularisation programmes. The statistics published by the OECD on regularisations, moreover, do not systematically distinguish between applications and actual grants of regularisation.

Refugees and Population. Strasbourg: Council of Europe, online under <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11350.htm>; Levinson A. (2005): *The Regularisation of Unauthorized Migrants: Literature Survey and Country Case Studies*, Oxford: Centre on Migration, Policy and Society, University of Oxford.

<http://www.compas.ox.ac.uk/publications/Regularisation%20programmes.shtml>; Sunderhaus, S.(2006): *Regularization Programs for Undocumented Migrants. A Global Survey on more than 60 Legalizations in all Continents*. Saarbrücken. VDM Müller. A summary of the study has also been published as Sunderhaus, S. (2007): Regularization Programmes for Undocumented Migrants. *Migration Letters*, 4, 1, pp.65-76

³⁸ Papademetriou, D. (2005): *The "Regularization" Option in Managing Illegal Migration More Effectively: A Comparative Perspective*. MPI Policy Brief, September 2005, No.4, available at:

http://www.migrationpolicy.org/pubs/PolicyBrief_No4_Sept05.pdf, Papadopoulou, A. (2005): 'Regularization Programmes: An effective instrument of migration policy?' *Global Migration Perspectives Nr.33*. Geneva: Global Commission on Migration, available online at <http://www.gcim.org/attachements/GMP%20No%2033.pdf>,

³⁹ Papademetriou, D., O'Neil, K., Jachimowicz, M. (2004): *Observations on Regularization and the Labor Market. Performance of Unauthorized and Regularized Immigrants*. Hamburg: HWWA

⁴⁰ Heckmann, F., Wunderlich, T. (eds.) (2005): *Amnesty for Illegal Migrants?* Bamberg: efms; Migration Policy Institute (with Weil, P.) (2004): *Managing Irregular Migration*. Presidency Conference on Future European Union Cooperation in the Field of Asylum, Migration and Frontiers Amsterdam, 31 August - 3 September, 2004 Policy Brief Nr. 4. Washington: Migration Policy Institute. Available at

http://www.migrationpolicy.org/events/2004-08-31.euroconf_publications.php; OECD (2000): *Combating the Illegal Employment of Foreign Workers*. Paris: OECD.

⁴¹ See OECD (1994): *Trends in International Migration. Annual Report 1993*. SOPEMI. Paris: OECD, p.47; OECD (1997): *Trends in International Migration. Annual Report 1996*. SOPEMI. Paris: OECD, p.57; OECD (1998), *Trends in International Migration. Annual Report. 1998 Edition*. SOPEMI. Paris: OECD, p.60-62; OECD (1999): *Trends in International Migration. Annual Report. 1999 Edition*. SOPEMI. Paris: OECD, p.75-77; OECD (2001): *Trends in International Migration. Annual Report.2000 Edition*. SOPEMI. Paris: OECD, p.82 and ff. OECD (2001): *Trends in International Migration. Annual Report. 2001 edition*. SOPEMI. Paris: OECD, pp.80-81; OECD (2003): *Trends in International Migration. Annual Report. 2002 edition*. SOPEMI. Paris: OECD, pp.89-91; OECD (2004): *Trends in International Migration. Annual Report. 2003 edition*. SOPEMI. Paris: OECD, pp.69-72; OECD (2006): *International Migration Outlook. 2006 edition*. SOPEMI. Paris: OECD, pp.81-83; OECD (2007): *International Migration Outlook. 2007 edition*. SOPEMI. Paris: OECD, pp.106-108.

Generally, the focus of SOPEMI reports, as well as more specialised OECD publications,⁴² is on social and economic aspects of regularisation policies. In particular, OECD reports have gone the furthest in assessing the impact of regularisation exercises on labour markets, most notably the informal economy and migration patterns. In so doing, the OECD studies have provided important insights into specific aspects of regularisation policy not sufficiently covered by most other studies. In the recent 2007 *International Migration Outlook*⁴³, the OECD sees the persistence of regularisation as an actual or potential policy tool in a number of its Member States. However, it also observes a shift from general amnesties to targeted regularisations which, according to the OECD, also muster more support than general amnesties.⁴⁴

The OECD points out several possible advantages of regularisation programmes. First, they provide information to the authorities, for example, “on the number of immigrants meeting the required conditions, on the networks which have enabled undocumented foreigners to remain illegally and in the economic sectors most concerned.”⁴⁵ Secondly, regularisation programmes “provide an opportunity to accord a status and rights to foreign workers and residents who have been in the country for several years in an illegal situation.” Thirdly, “where numbers of illegal immigrants reach critical dimensions, regularisation can meet public security objectives”, in particular where the prevention of exploitation and the taking-up of illicit or criminal activities by illegal immigrants is concerned.⁴⁶ Thus, by opening up broader employment opportunities, regularisation programmes may discourage the pursuit of unlawful activities.⁴⁷

However, the OECD notes also various disadvantages and negative consequences of regularisation programmes. First, they may encourage future illegal immigration. Secondly, they can inadvertently reward law-breaking and queue-jumping, thus disadvantaging lawful immigrants. Regularisation programmes may also have negative policy impacts in that frequent recourse to large-scale regularisation programmes may inhibit the elaboration and improvement of formal admission systems. Finally, the OECD observes that large scale employment-based regularisation programmes have often been associated with massive fraud – notably in Spain and Italy – indicating that key objectives of employment based programmes, namely the formalisation of informal work, have not

⁴² OECD Secretariat (2000): ‘Some Lessons from Recent Regularisation Programmes’. In: OECD (ed.): *Combating the Illegal Employment of Foreign Workers*. Paris: OECD, pp.53-69. See also Garçon, J.P. (2000): ‘Amnesty Programmes: Recent Lessons’. In: Çinar, D., Gächter, A., Waldrauch, H. (eds): *Irregular Migration: Dynamics, Impact, Policy Options. Eurosocial Reports*. Volume 67. Vienna: European Centre for Social Welfare Policy and Research, pp.217-224.

⁴³ OECD (2007): *op.cit.* p.106.

⁴⁴ It is debatable, however, to what extent the perceived shift towards targeted regularisation programmes is actually a consequence of the shift away from the almost exclusive focus on employment based regularisations in most earlier publications by the OECD and particular its neglect of regularisations on humanitarian grounds, family ties, reasons linked to length of asylum procedures, complementary protection, etc. In other words, the perceived shift towards targeted regularisations may be the consequence of change in perspective on regularisations as much as it reflects changes in actual practice.

⁴⁵ OECD (2000): *op. cit.* p.81

⁴⁶ *Ibid.*; for a recent review of European studies on regularisations as a tool to address vulnerability, social exclusion and exploitation of irregular migrants see A.Kraler (2009), *Regularisation of Irregular Immigrants - An Instrument to Address Vulnerability, Social Exclusion and Exploitation of Irregular Migrants in Employment?* Paper written on behalf of the Fundamental Rights Agency (FRA), forthcoming at <http://fra.europa.eu>

⁴⁷ OECD (2003): *op. cit.* p.89

always been achieved to the extent hoped for.⁴⁸ The OECD also points to various lacunae regarding knowledge on the qualitative and quantitative outcomes of regularisation programmes, including the employment situation of applicants, both at the time of regularisation and after, the impact of regularisation on employment patterns (i.e. whether regularised migrants moved up the job ladder and whether jobs previously done by regularised migrants were taken by new, undocumented migrants), and the possible and actual impact on family related migration, amongst others.

Cognisant of the fact that most large-scale regularisation programmes by OECD Member States have been employment-based, the OECD points to several fundamental challenges of employment-based regularisations. First, higher labour costs resulting from formalisation of work contracts may mean that employers have difficulty in paying higher wages and will again resort to hiring illegally employed workers, depending on the economic situation. This is something that the OECD sees as being exacerbated by the inadequacy of quota programmes, for example in Spain and Italy, in providing a flexible tool to respond to labour shortages. In situations of stagnation or recession, regularised migrants – and also legal immigrants – may risk becoming unemployed and losing their legal status if the situation does not improve.⁴⁹

In a more systematic **OECD review** of “lessons from recent regularisation programmes” published in 2000,⁵⁰ the OECD notes that employment-based regularisation programmes that target irregular employment of immigrants are constrained by the overall size of the informal economy. Thus, for regularisation policies to be successful, they need to be part of far broader policies tackling undeclared work – and not just undeclared work done by immigrants. Reflecting on the 1998 regularisation programme in Greece, the review argues that “[t]o grant permanent status to amnesty beneficiaries without at the same time radically overhauling labour relations would profoundly alter labour market flexibility and would no doubt trigger an immediate increase in unemployment for Greeks and [formally employed] foreigners alike.”⁵¹

On the basis of post-regularisation studies conducted between the 1980s and mid-1990s, the review by the OECD secretariat notes that regularised migrants are on the whole significantly younger than the average working population and are located in sectors with a high concentration of foreign labour. In an earlier review of profiles of migrants regularised in 1991 in Spain and 1986 in the US, respectively,⁵² the OECD found interesting differences between the profiles of regularised immigrants in the two countries. Whereas irregular migrants benefiting from the 1991 Spanish regularisation were mostly young, unmarried and male, had a good standard of education and spoke Spanish well, the percentage of males was much smaller in the US (58%), about half were married and about 43% lived with their wives. The average family size was 3.5 persons and usually included one person with legal status. While educational levels were significantly below average for the US population, the labour force participation rates were significantly higher. More recent data on Spain shows that the profile of regularised immigrants has changed considerably since: in particular, the share of female immigrants

⁴⁸ *Ibid.*

⁴⁹ OECD (2003): *op. cit.* p.68

⁵⁰ OECD Secretariat (2000): *op. cit.*

⁵¹ *Ibid.* p.57

⁵² OECD (1994): *op. cit.* p.47

benefiting from regularisation has significantly increased, as has the number of family members. Suffice it to say that the different profiles above all indicate different structural conditions and migration patterns in the two countries and in the case of Spain, significant changes of structural conditions and migration patterns over time. In more general terms, the limited comparison of data on Spain and the US suggests that outcomes of individual regularisation programmes cannot be easily extrapolated to different periods of time and different programmes. In a similar vein, comparisons of outcomes of different programmes in different countries need to take into account possible structural differences between countries which might explain the particular characteristics of one or another programme.

These caveats notwithstanding, the OECD survey of 2000 suggests that, despite country specificities, regularised migrants can generally be found in the same sectors as the legal migrant workforce – notably agriculture, small industry, tourism, hotels and catering, and household and business services. The highest concentration of irregular immigrants, however, can be observed in agriculture, manufacturing, construction and public works and certain categories of services.⁵³ The review concludes that the high concentration “reflects the systematic attempts by firms to minimise labour costs (wages and social insurance contributions) and maximise labour flexibility (with highly intensive work for limited periods in time).”⁵⁴ Put in somewhat different terms, there are important structural factors contributing to illegal employment that lie in the very nature of the sectors concerned – namely high competition, low profit margins, and cyclical fluctuations in labour demand. In France and Italy, the review reports, there is a major concentration of regularised workers in manufacturing, with textiles/garment and construction/public works employing the bulk of illegal immigrants in France. The review argues that the decline of these industries, rather than leading to their outright disappearance, leads companies to systematically resort to “subcontracting, and in some cases, to cascading subcontracting”, both of which are closely associated with illegal employment.⁵⁵

The OECD review further notes that “[t]he development of subcontracting is part of a process whereby labour management is totally or partially externalised by encouraging salaried workers to acquire self-employed status.” In this context of “concealed dependent employment” it is often “small and medium-sized enterprises that enhance the flexibility of the production system and adjust to economic shifts”. Illegal work carried out by illegal migrants is – in some sectors – an essential ingredient to successful flexibilisation of production processes and regularisation potentially reduces the flexibility achieved by using irregular work. In other sectors, notably in personal services, and in particular in domestic services, other processes are at work and illegal migrant employment often goes along with a broader rise in employment in this sector. Thus, many of the jobs created have only been created because of the availability of cheap and flexible migrant labour: were costs to increase (for example by requiring employers to pay minimum wages, taxes and social security contributions in the context of regularisation programmes), a certain share of jobs could be lost.

⁵³ OECD Secretariat (2000): *op. cit.* p.59

⁵⁴ *Ibid.*, p.60

⁵⁵ *Ibid.*, p.61

2.2.1 Outcomes of regularisation programmes

The 2000 OECD review of regularisation programmes also collected various data on the outcomes of regularisation programmes.⁵⁶ One issue that the survey highlights is the problematic issue of retention of a legal status. Thus, data collected for the 1996 regularisation programmes in Italy and Spain suggests that the main beneficiaries of the programmes were immigrants who had obtained a legal status in earlier regularisations. Various studies that have been produced since, however, suggest that this problem has been largely overcome in more recent programmes. For Italy, unpublished research on the 1998 regularisation programme suggests⁵⁷ that applicants for this programme had not previously submitted application. In addition, data on the most recent regularisation programmes in Italy (2002) and Spain (2005) shows that some 80% of all regularised migrants had managed to retain their legal status (see country studies on Spain and Italy). Data presented in the OECD review on the 1991 regularisation – 82,000 of altogether 110,000 immigrants regularised still retained a legal status in 1994 (i.e. close to 74.5% of regularised immigrants retained their status) suggests that the retention rate has since improved; equally important, however, it also points to the fact that the assessment whether a programme which achieves a 74.5% retention rate three years after its implementation should be considered a success or a failure is partly also a matter of perspective.⁵⁸ Generally, the review stresses that – if the “disappearance” of more than 25% of regularised immigrants, as in the case of the 1991 Spanish regularisation, can be attributed to non-renewal of permits (rather than emigration), “administrative procedures that grant short-term work permits to amnestied immigrants [do] contribute, in the event those permits are not renewed, to an increase in the number of illegal immigrants, in particular when manpower needs persist in certain sectors of the economy.”⁵⁹

Two OECD studies on Italy conducted in the mid-1990s and cited by the review identified that two main reasons for the persistence of illegal immigration in Italy, namely the persistent patterns of non-renewal of permits of migrants regularised during earlier regularisations, in other words, deficiencies in the management of migration and secondly “the growth of the underground economy and benefits it generates for those who have an interest in migratory flows, providing those flows remain illegal.” According to the OECD, between 1991 and 1994, over 300,000 foreigners were unable to renew their residence permits, with an unknown share presumably falling back into illegality.⁶⁰ Against the background of the general growth of the informal economy the review recommends to “reconsider the issue of illegal immigration [and tie] it more closely with economic and social changes in host countries.”⁶¹

By contrast, data on the US reviewed by the report suggests that most regularised immigrants were able to retain the residence visa issued to them and a large majority was able to gain permanent residence status after four years. The change to permanent residence enabled immigrants, among others, to take up job opportunities outside the sectors they were employed in at the time of the

⁵⁶ OECD Secretariat (2000): *op. cit.*, p.63

⁵⁷ Domenico Gabrielli (ISTAT), personal communication

⁵⁸ OECD Secretariat (2000): *op. cit.*, p.63. As the survey correctly points out the data available do not allow us to distinguish between non-retention of a permit because of emigration on the one hand and loss of status on the other hand.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*, p.64

⁶¹ *Ibid.*, p.64

amnesty and moreover involved (limited) rights to family reunification. Data on post-regularization trajectories in the US indeed reveal a significant geographical and occupational mobility of regularised migrants. Anticipating significant occupational mobility farm workers regularised under IRCA's scheme for employees in the agricultural sector, the US government introduced new schemes for the recruitment of agricultural workers to prevent additional illegal inflows. By contrast, occupational mobility was not anticipated in the 1981—82 regularisation in France and vacant positions seem to have been filled with new illegal immigrants.⁶²

In a review of the effects of regularisation programmes and employer sanctions published in 2000⁶³, ILO researcher **Manolo I. Abella** identifies several reasons why states engage in regularisation programmes. First, “tolerating (...) unauthorized stay and employment of large numbers of foreigners weakens a state's ability to impose the rule of law in other spheres” and thus regularisation (or removal) ultimately can be seen as a measure strengthening the rule of law.⁶⁴ Second, regularisation often aims at preventing exploitation of foreign workers and enforcing – by way of regularisation – relevant employment regulations. A third objective is to avoid the creation of a dual labour market and thus to prevent “allocative inefficiencies (...) [whereby] the same labour can command different prices in different segments of the labour market” and hence also, to prevent illegitimate competition.⁶⁵ In a survey of selected research findings Abella finds that the impact of regularisation programmes is clearly mixed. Based on the US (and contrary to findings reported by the OECD) Abella does not see marked occupational mobility and, hence, no significant improvement of the employment situation of regularised immigrants and argues that overall, experience, qualification and language skills are more important predictors of occupational mobility.⁶⁶ Similarly, he finds little clear evidence of a positive impact of regularisation on migrants' wages, with the possible exceptions also discussed by the 2000 OECD study.⁶⁷ Generally, he argues that the wage differentials between citizens and legal migrants, on the one hand, and irregular migrants, on the other, which have been observed in the US can be explained by shorter duration of employment, average lower educational levels and other human capital factors characterising irregular migrants in the US. However, it is unclear to what extent these findings can be transferred to the European context with highly regulated labour markets and a much more significant impact of legal status on the social position of immigrants.⁶⁸

⁶² *Ibid.*, p.63

⁶³ Abella, M.I. (2000): ‘Migration and Employment of Undocumented Workers: Do Sanctions and Amnesties Work?’ In Çinar, D., Gächter, A., Waldrauch, H.(eds.), *Irregular. Migration: Dynamics, Impact, Policy Options*. Eurosocal Reports. Volume 67. Vienna: European Centre for Social Welfare Policy and Research, pp.205-215.

⁶⁴ *Ibid.*, p.206

⁶⁵ *Ibid.*

⁶⁶ However, research on post-regularisation trajectories in the US quoted by Abella suggests that regularisation had a positive impact on human capital accumulation, in particular on acquisition of language skills. See S. Kossoudji, S.A., Cobb-Clark, D. A.(1992): *Occupational Mobility or Occupational Churning? Pre-Legalization Occupational Change for Male Hispanic Legalization Applicants*. Paper presented at the 1992 Annual Meeting of the Population Association of America)

⁶⁷ i.e. mobility from the farm sector to low-wage manufacturing and service work in the US, and similar movement away from agricultural work to urban based service and low wage manufacturing work in France

⁶⁸ See Van der Leun, J. (2003): *Looking for Loopholes. Processes of Incorporation of Illegal Immigrants in the Netherlands*. Amsterdam. Amsterdam University Press. Most research, however, has focused on the economic

In terms of the impact of regularisation on fiscal revenues and state expenditures Abella highlights that the overall balance of regularisation is difficult to establish. Although it can be reasonably expected that regularisation does contribute to higher state revenues (tax revenues and social security contributions), evidence from the US quoted by Abella indicates that two thirds of undocumented workers had already paid social security contributions prior to regularisation to avoid detection.⁶⁹ Indeed, a study on the impact of regularisation programmes commissioned by DG Employment quotes evidence from a survey among Mexican migrants showing that 66% of all unauthorised migrants were paying taxes, while 87% among those legalised under IRCA's provisions for agricultural workers and 97% of those regularised under the law's general provisions had already paid taxes prior to regularisation.⁷⁰ This also suggests that the possible fiscal gains from regularisation measures depend not insignificantly on the legislative framework in the country in question and in particular on the extent to which illegal residence is associated with irregular work. As the data cited by Papademetriou show, a majority of illegal migrants in the US seem to work in the formal economy. In Southern Europe, by contrast, illegality is closely associated with irregular employment, although irregular employment is at the same time a much broader phenomenon. In many other European countries, by contrast, the proportion of legal immigrants and EU citizens (in particular from new Member States) who are engaged in irregular work seems to be relatively large and more important than illegally staying third country nationals.

Abella further argues that the gains through increased social security and tax payments may be – to some extent – offset by additional expenditures following from an increased use of public services, including welfare entitlements, education, health services etc.⁷¹ Finally, Abella emphasises the need to distinguish between different types of irregularity and to design regularisation programmes accordingly. Quoting Böhning's review of early ILO studies of regularisation programmes,⁷² he distinguishes three types of irregularity: (1) institutional irregularity, “where aliens become irregular because there is [a] lack of explicit policies in the country they enter, or the laws are ambiguous, or because of administrative inefficiency”; (2) statutory irregularity, which “arises where non-nationals violate restrictions imposed on them that contravene customary international law”; and (3) proper irregularity “where non-nationals violate national laws and regulations that are compatible with basic human rights”. Each of the different types of regularisation requires a different design because different target populations are being addressed. In our terminology (see introduction), measures targeting institutional irregularity would generally be subsumed under what we call ‘normalisation’, whereas we would not regard relaxation of restrictions (statutory irregularity) as constituting regularisation. Finally, it is ‘proper irregularity’ which is the actual target of regularisations in the narrow sense.

impact of citizenship and there is relatively little research on the impact of different legal statuses (or the lack thereof) on earnings, occupational status and occupational mobility.

⁶⁹ Abella, M.I.: *op. cit.*, p.207f

⁷⁰ Papademetriou *et al.*: *op. cit.* p.18. Papademetriou explains the higher tax paying rate among regularised migrants by their longer residence in the US and possible positive self-selection.

⁷¹ Abella M.I.: *op. cit.* p.208

⁷² Böhning, W.R.(1983): ‘Regularizing the Irregular’, *International Migration*, 21, 2.

2. 3 The Odysseus study on regularisation practices in eight European countries

Eight years after its publication, the Odysseus study⁷³ still remains the main point of departure and reference work for most recent studies on regularisation, despite several limitations. Its continuing relevance warrants a more detailed discussion. The study is still the most comprehensive legal study of regularisation practices up to this date and few of the studies that have appeared since provide a similarly detailed analysis of relevant legislation and administrative procedures. The study covers the legal bases of regularisation practices, eligibility criteria and other conditions for regularisations, the nature and form of administrative procedures and the costs of regularisation procedures for applicants.

Apap *et al.* define regularisation as “the granting, on the part of the State, of a residence permit to a person of foreign nationality residing illegally within its territory.”⁷⁴ They exclude from their definition persons who have in principle a right to residence (however temporary), such as asylum seekers or non-nationals waiting for a renewal of their permit but temporarily without a status; and they exclude non-nationals against whom removal procedures have been initiated but whose removal has been temporarily suspended (‘toleration’). Thus, in general, the definition developed by the Odysseus study is very close to our definition, although it is less specific as regards the definition of ‘illegal migrants’. In particular, the study does not reflect on different dimensions of illegality and the consequences that a breach of the conditions of residence (e.g. by engagement in illegal or undeclared work) has on the residence status of immigrants. In contrast to this study, the Odysseus study does not consider processes of what we call ‘normalisation’, i.e. the transformation of a restricted or transitional temporary residence status, which cannot be converted into a regular residence status, into a regular residence permit (the latter, in principle, convertible into a long-term status).

The study’s main contribution lies in the comparative analysis of regularisation practices, and in particular in the elaboration of a typology of regularisation programmes and mechanisms which has remained the most influential ‘typology’ up to this date. However, rather than providing a systematic typology that might be a basis for a systematic classification of regularisation practices, the ‘typology’ developed by the Odysseus study defines five major axes along which regularisations can be analysed. The ‘typology’ thus essentially defines variables for a (potential) matrix classifying regularisations along these criteria. The following dimensions are distinguished:

- (1) **Permanent vs. one-off regularisations:** This distinction is roughly equivalent to our distinction between regularisation mechanisms and regularisation programmes.
- (2) **Individual vs. collective regularisations:** Apap *et al.* mainly differentiate individual vs. collective regularisations by the degree of administrative discretion in awarding a legal status to an illegally staying alien. In other words, regularisation measures based on a tight and detailed eligibility criteria which clearly define the target population would be classified as collective regularisation; Apap *et al.* contrast criteria-based regularisations to cases where authorities have considerable

⁷³ De Bruycker, P. (2000): *op. cit.* and Apap, J. *et al.* (2000) *op. cit.*

⁷⁴ Apap, J. *et al.* (2000): *op. cit.*, p.263.

discretion, no entitlement to regularisation exists and authorities judge cases on the individual merits of a case.⁷⁵

(3) Fait accompli vs. protection grounds: ‘Fait accompli’ regularisations refer to what is today sometimes discussed as “earned regularisation”, i.e. regularisation on the basis of integration in the host society, notably on the grounds of long residence. Apap *et al.* do not clearly distinguish ‘fait accompli’ regularisations from regularisations on grounds of protection; although they mainly include medical grounds and forms of subsidiary protection in this category, they also classify regularisation for family related reasons as protection related regularisations.

(4) Expedience vs. obligation: This distinction refers to the degree to which a state is obliged to regularise certain illegally staying non-nationals under constitutional and national human rights laws or under international law, notably regarding article 3 ECHR (prohibition of inhumane, cruel or degrading treatment) and article 8 ECHR (respect for private and family life).⁷⁶

(5) Organised vs. informal: This distinction refers to what degree formalised regularisation mechanisms and programmes exist. Informal regularisations thus would refer to cases where individuals staying irregularly would petition immigration authorities to get regularised, i.e. to be issued a permit within the existing legal framework, irrespective of whether there are specific provisions for regularisations.

The ‘typology’ developed by the Odysseus study still provides a useful point of departure. It covers various important dimensions of regularisation measures, including administrative and organisational aspects of regularisation policies (1, 3 and 5) and regularisation criteria (3 and 4). However, neither the Odysseus study nor subsequent studies which have made use of the Odysseus typology have actually attempted to comprehensively classify regularisation measures according to the five dimensions identified by the study.

In addition, the typology also has a number of weaknesses. First, broader objectives of regularisation measures, including regaining control, addressing undeclared work and the informal economy, improving the social situation of immigrants, carrying out regularisations as an accompanying measure to increased immigration restrictions, etc. are not reflected in the typology. Secondly, dimensions (3) and (4) essentially cover some grounds on which the stay of illegal immigrants might be regularised. These distinctions inadequately cover employment-based regularisations, but also family related reasons seem to constitute a distinct reason for regularising the status of illegally staying non-nationals and cannot be easily subsumed under either “Fait accompli” or “protection”. In addition, the fourth dimension (expedience vs. obligations) seems to be both too broad and too narrow. The understanding of obligation is relatively broad in that analytically it also would include classical protection grounds (refugee status) and other statuses which have emerged more recently (subsidiary and temporary protection, protection for victims of trafficking) – all of which need to be distinguished analytically from regularisation (even if overlaps exist). Conversely, the distinction

⁷⁵ Apap, J. *et al.* (2000): *op. cit.*, p.267.

⁷⁶ See also Thym, D. (2008): Respect for Private and Family Life under Article 8 ECHR in ‘Immigration Cases: A Human Right to Regularize Illegal Stay?’ *International and Comparative Law Quarterly*, 57, 1, *passim*

between expediency and obligations can also be considered as too narrow, as it inadequately reflects the entitlements of residence to long-term residents and thus the obligations of states to persons with a ‘consolidated’ residence status. Long-term residents also enjoy considerable protection and their residence may be terminated only on exceptional grounds and not automatically, if initial conditions for admission or temporary residence are no longer met.⁷⁷

The Odysseus study also identifies a number of criteria used by the relevant countries to establish the regularisation of illegal staying third country nationals, namely

- a geographical criterion (physical presence of the applicant before regularisation),
- an economic criterion (employment status);
- a humanitarian criterion (persons unable to return to their country of origin for reasons other than those linked to the status of refugee under the Geneva Convention)
- a criterion relating to asylum procedures (e.g. undue length of the procedure)
- health reasons
- family related reasons
- a quantitative criterion relating to the number of regularizations granted;
- nationality of the applicant
- integration
- qualifications of the applicant

The focus of the Odysseus study on the analysis of regularisation practices from a comparative law perspective is arguably also its main weakness. The study has relatively little to say about the implementation of regularisation. At the same time, the detailed statistical information collected for the study (applications submitted, persons regularised and acceptance rates), which provides some (albeit limited) indicators for the implementation of regularisation programmes, still has to be regarded as a major achievement. The study also identified major deficiencies of data collection, many of which remain valid today.

The study says little on the rationale of regularisation policies and on the target groups for regularisation, although some reasons (long-term residence – *fait accompli*, or regularisation on protection grounds) are covered by its typology. Finally, the study also has little to say on the impact and effectiveness of regularisation policies in terms of achieving wider goals. In both respects – the rationale and impact of regularisation policies – the study essentially provides conclusions based on normative reasoning rather than empirical analysis: it thus maintains that regularisations are a crucial mechanism to both help integrate, and to reduce the stock of, illegal immigrants. Regularisation may also, therefore, be a more humanitarian alternative to enforcing return.

⁷⁷ Although the long-term residence directive (2003/109/EC) was adopted only 3 years after the Odysseus study on regularisations, a majority of Member States covered by the study provided for a long-term (permanent) residence status with a similar scope. See Groenendijk, K., Guild, E. & Barzilay, R. (2000): *The Legal Status of third country nationals who are long-term residents in a Member State of the European Union*. Nijmegen: Centre for Migration Law.

Finally, the study does not provide a comprehensive evaluation of regularisation policies. In particular, it lacks a broader comparative perspective. Neither does it embed its analysis of regularisation practices in a broader analysis of policies on irregular migration, nor does it discuss any links between regularisation and broader policies on asylum and legal migration.

2.4 Subsequent comprehensive reviews of regularisation practices

Three recent comprehensive comparative studies on regularisation practices – Jochen Blaschke’s study on regularisation practices in the EU27 commissioned by the European Parliament,⁷⁸ Amanda Levinson’s comparative study of regularisations in 8 European Union Member States and the US,⁷⁹ and Sebastian Sunderhaus’s⁸⁰ global survey of regularisation programmes take an approach very similar to that of the Odysseus study, in that all three basically map regularisation practices in the countries that the studies cover, albeit with varying levels of detail and, generally, in much less detail than the Odysseus study. Levinson’s study covers 9 countries (8 EU Member States and the US), Blaschke covers all the 27 EU countries, although he provides little detail on individual countries and few comparative conclusions, while some of the information contained in the report is of questionable veracity. Sunderhaus undertakes a global survey covering a total of 16 countries in Africa, Asia, South, Central and North America, and Europe, but covers only regularisation programmes and does not consider regularisation mechanisms. All three studies adopt the typology developed by the Odysseus study, although Blaschke actually makes very limited use of the typology.

In general, Levinson’s study stands out among the three studies in that she goes furthest in evaluating the rationale, implementation and the wider impact of regularisation programmes. Like Sunderhaus, however, she effectively focuses on regularisation programmes and does not consider regularisation mechanisms.

Generally, all three studies suffer from the same limitations as the Odysseus study. In particular, none of them adequately discuss regularisation in connection with other policies on irregular migration and asylum, nor do they link their analyses of regularisation practices to a broader analysis of immigration policies, or do so only in a very limited manner. Sunderhaus and Levinson base their studies on an extensive survey of the literature. **Blaschke**’s study is based on limited information gathered from administrative authorities and experts in individual countries; the main value of the study lies in its broad coverage of all EU Member States, but he has little to add in comparative perspective. In addition, he largely ignores the existing literature and thus largely fails to engage in conceptual and analytical debates surrounding regularisations.

Sunderhaus, although providing a useful overview over global patterns of regularisations, only provides limited comments on the links between regularisation policy and the wider policy framework. In particular, he asserts that the lack of immigration channels open to unskilled migrants are a major reason for undocumented migration which regularisation measures then have to correct.

⁷⁸ Blaschke, J. (2008): *op. cit.*

⁷⁹ Levinson, A. (2005): *op. cit.*

⁸⁰ Sunderhaus, S. (2006): *op. cit.*

Sunderhaus identifies several rationales for carrying out regularisations, including the economic benefits (formalisation of employment), humanitarian considerations as well as regaining control of migration through regularisation programmes. In addition, he suggests that regularisation programmes are usually implemented in want of other policy options. In a way, Sunderhaus argues, regularisation policies thus can be seen as an attempt to redress the negative outcomes of previous migration policies and thus are generally of a corrective nature. Apart from the limitations the study by Sunderhaus shares with the Odysseus study, Sunderhaus' survey is problematic on two additional grounds. Methodologically, the inclusion of developing countries without consideration of the implications of different histories and unfamiliar systems of migration management, as well as the more limited capacity of some of these countries to control migration (or the wider population), is problematic. Secondly, and more important for this study, the focus on large-scale programmes in selected countries leads Sunderhaus to ignore the role of smaller scale programmes as well as that of regularisation mechanisms, which, as this study shows, can involve substantial numbers of people. Crucially, his focus on selected large-scale regularisation programmes leads him to a rather negative assessment of regularisation programmes in general, although he concedes that they may be useful policy tools if their design and implementation are improved.

Of these three studies, only **Levinson** pays much attention to wider questions linked to regularisation policies, including the role and position of regularisation policy in the context of the wider policy framework. For Levinson, regularisation is an indicator of wider policy failures, notably the failure of internal and external controls; unfortunately, she does not go into further detail of what exactly these failures consist of. In particular, she pays little attention to broader patterns of deficient practices, including deficiencies in the administration of legal migration and asylum which, as we show, can be identified as one of the sources of the need for regularisation programmes, or deficiencies in the design of both asylum and migration regulations.

In addition, Levinson discusses several issues neglected by the Odysseus study in more depth, notably the rationale for regularisation programmes, issues relating to the implementation of regularisation programmes and mechanisms and the impact of regularisations. Referring to a previous IOM study⁸¹, she identifies four major reasons why states engage in regularisations, namely (1) to regain control over migration and to reduce the size of the irregular migrant population; (2) to improve the social situation of migrants, a goal often embraced in response to immigrant advocacy coalitions and public pressure to undertake regularisations; (3) to increase the transparency of the labour market and combat illegal employment; and (4) foreign policy goals.⁸² Neither humanitarian considerations nor legal obligations (notably, protection obligations held by states regarding certain categories of immigrants) are considered by Levinson. Levinson observes several limitations and problems of regularisation programmes – namely, lack of publicity, overly strict requirements, application fraud, corruption of public officials, lack of administrative capacity to process applications, massive backlogs and delays, and ineffectiveness of employer sanctions.⁸³

⁸¹ Mármora, L. (1999): *International Migration Policies and Programmes*. Geneva: IOM.

⁸² This is essentially limited to Portugal's programme for Brazilian undocumented workers.

⁸³ Levinson, A. (2005): *op. cit.* pp. 5-6.

In her assessment of the impact of regularisation programmes, Levinson distinguishes four dimensions: (1) political impact; (2) economic impact; (3) impact on patterns and stocks of undocumented migration; and (4) socio-economic impact.

(1) Political Impact: Levinson observes that most regularisation programmes have been preceded and accompanied by extensive public debate. In various countries, immigrant advocacy coalitions composed of migrant organisations, NGOs, religious organisations and trade unions have emerged through public debate on regularisation programmes which have in some cases decisively influenced the policy debate on regularisations, as well as the design and implementation of relevant programmes. This line of argument has been pursued in more detail by Barbara Laubenthal, whose recent study on the emergence of pro-regularisation movements in Europe traces the emergence of such movements in France, Spain and Switzerland.⁸⁴ Laubenthal shows that in the context of the three countries studied, it was specifically the imminent revocation of (limited) rights of undocumented migrants that triggered large-scale mobilisation of pro-immigrant groups, as well as undocumented migrants themselves. In addition, she shows that in all three contexts, preceding changes in civil society, notably the increasing attention paid to social exclusion and marginalisation, were important factors enabling regularisation to be successfully framed as an instrument against discrimination and social exclusion.

(2) Economic Impact: Levinson concludes from her literature survey that large-scale regularisation programmes may actually lead to increased informality in the labour market and thus – as a stand-alone measure – may be insufficient to combat undeclared work and reduce the size of the underground economy. The main reasons for these at best mixed results are the unwillingness of employers to pay higher wages for legalised workers and the resulting structurally embedded high demand for irregular migrant work, along with migrant networks that channel immigrants into certain sectors of the economy and not others. Levinson stresses that regularisation – in combination with other instruments – may still be useful: The challenge is “integrating migrants well enough into the social and economic fabric so that the underground economy does not remain a large pull factor.”⁸⁵ Finally, large-scale regularisations may be an excellent tool for obtaining information on labour market participation and the position of irregular migrants in the labour market.

(3) Impact on undocumented migration: Levinson points out that the success of regularisation programmes to reduce the stock of undocumented migrants has been mixed. On the basis of research on the US Levinson argues that undocumented migration has, contrary to the objectives of the Immigration Reform and Control Act (IRCA) 1986, not been reduced and has further grown after the 1986 legalisation programme carried out under the act. However, she does not discuss whether the growth of irregular migration to the US has been coincidental or

⁸⁴ Laubenthal, B. (2006): *Der Kampf um Legalisierung. Soziale Bewegungen illegaler Migranten in Frankreich, Spanien und der Schweiz*. Frankfurt: Campus; the main findings of the study have been published also as Laubenthal, B. (2007): ‘The Emergence of Pro-Regularization Movements in Europe’. *International Migration* 45/3, pp. 101-133.

⁸⁵ Levinson, A. (2005): *op. cit.* p.9.

whether it can be attributed to pull effects of the 1986 regularisation. In addition, Levinson observes that a fairly large number of regularised persons fail to meet the conditions for renewing their permits and thus fall back into illegality.

(4) Socio-economic impact: Again, Levinson finds that the impact of regularisation programmes has been mixed. In principle, well-organised regularisation programmes can have a positive impact on wages, occupational mobility and the wider integration of immigrants. However, in practice, regularisation programmes have often failed these objectives. Drawing on Reyneri's studies on irregular employment in the Mediterranean countries of the EU⁸⁶ she observes that because of structurally embedded high demand for irregular (undeclared) work in those sectors in which regularised migrants are concentrated, few regularised migrants managed to keep regular employment; on the contrary, regularisation in some cases reduced migrants' chances for employment, including remaining in employment.

On the basis of her literature survey, Levinson makes a number of recommendations, in particular regarding relevant ingredients of a successful regularisation programme (see Box 1, below). In addition, she recommends additional measures that would reduce the need for large-scale regularization programmes, including flexible work visas that would allow for more extended periods of unemployment and job seeking, stronger or better implementation of labour protection laws, and expanding the scope of long-term residence.

Box 1: Elements of a successful regularisation programme

Preparatory Stage	Consensus building among all stakeholders on scope, terms and target groups of regularisation programmes. Involving all relevant stakeholders, notably advocacy groups, employers, trade unions, political parties and immigrant associations Clear definition of application process/ procedure Active campaigning involving all relevant stakeholders
Implementation stage	Training of officials implementing regularisation Involving NGOs and immigrant associations in implementation
Post-regularisation stage	Compiling and analysing data on outcomes of programmes, in particular regarding demographic composition of regularised population and labour market position

Source: A. Levinson (2005:11-12)

Building on previous research and extensive hearings of both academic and NGO experts, the recent **Council of Europe** report on regularisation programmes⁸⁷ probably provides the most systematic evaluation of regularisation programmes undertaken so far. The report identifies five major types of

⁸⁶ Reyneri, E. (2001): *Migrants' Involvement in Irregular Employment in the Mediterranean Countries of the European Union* [online]. Geneva: International Labour Organization; www.ilo.org/public/english/protection/migrant/download/imp/imp41.pdf

⁸⁷ Greenway, J. (2007): *op. cit.* The report is based on extensive hearings of both academic and NGO experts as well as background research by Amanda Levinson.

programmes (1): exceptional humanitarian programmes; (2) family reunification programmes; (3) permanent/ continuous programmes regularising irregular migrants on a case-by-case basis; (4) one-off, employment based programmes aimed at regularising large numbers of irregular immigrants; and (5) earned regularisation programmes. The Council of Europe typology thus does away with some of the inconsistencies of the earlier Odysseus typology and provides a typology that lends itself more easily as the basis for a systematic classification of regularisation schemes in individual countries. In particular, two points are noteworthy.

First, the typology stresses that family based programmes constitute programmes in their own right and need to be seen as different from humanitarian programmes. As our own study shows (see *infra*), family based regularisations are indeed an important phenomenon in a number of Member States and also point to deficiencies in regard to access to the right to family reunification. Secondly, the Council of Europe typology adds a new category of regularisations, namely ‘earned regularisation’, a term that has emerged in the US context and also has made its way into British debates on regularisation programmes.⁸⁸ According to the report, “the idea behind these programmes is to provide migrants with a provisional, temporary living and working permit and to have them “earn” the right to have the permit extended or become permanent through the fulfilment of various criteria, such as knowing the language of the host country, participating in community activities, having stable employment and paying taxes.”⁸⁹ A concrete proposal how such a scheme could look like has been developed for the US by MPI President **Demetrios G. Papademetriou** and is presented in Box 2, below.

In its review of characteristics of regularisation programmes, their rationale, their implementation and their possible impact, the Council of Europe report repeats many of the points already made by the Odysseus study and Levinson. It differs in that it takes a more comprehensive view of regularisation and explicitly discusses regularisation as part of broader policies on irregular migration. Thus, the report recommends that “Regularisation programmes should be examined as one policy tool that, in conjunction with other measures (protecting the rights of migrants, increased internal and external migration controls, individual return programmes and development partnerships with countries of origin) could be a valuable tool for managing migration.”⁹⁰

⁸⁸ See Papademetriou, D. (2005): *op. cit.*

⁸⁹ It should be noted, however, that in public debates on ‘earned regularisation’, the term is often used in a different meaning, notably in the sense that integrated, long-term resident illegal migrants should be considered as having earned a right to residence.

⁹⁰ Greenway, J. (2007): *op. cit.*, p. 2.

Box 2: 3-tier earned regularisation scheme

Overall objectives of an earned regularisation programme	<ul style="list-style-type: none"> • Alternative to one-off large-scale regularisation programme • Reduce the stock of illegal migrants, and in particular illegal immigrants working in the informal economy • Reduce the size of the informal economy
Tiers/ Characteristics	Purpose/Advantages
Tier 1 <ul style="list-style-type: none"> • Applicants would qualify automatically for probationary status and would be issued a residence and work permit 	<ul style="list-style-type: none"> • Registration of illegal immigrants, bringing illegal immigrants under the control of the state, • Through low thresholds to registration programme would reach the largest possible number of irregular migrants • Through low thresholds to registration biggest social problems associated with irregular residence and work would be removed, including violations of labour regulations, exploitation, disregard for social protection, evasion of taxes
Tier 2 <ul style="list-style-type: none"> • After 3-5 years applicants regularised under Tier 1 would be able to obtain permanent residence (tier 2) • Subject to a number of criteria, including stable formal sector employment, paying taxes, language skills, civic participation, etc. • Applicants would be awarded credits/ points for meeting each (or some) of these criteria; • Permanent residence would be awarded after acquiring a number of points in a given time frame (3-5 years), plus a bonus year for those who have met most, but not all points yet • (Substantial) fees would be covered by immigrants 	<ul style="list-style-type: none"> • Would make administration more orderly and manageable, • Would reduce some of the problems associated to large-scale programmes carried out in a short span of time (backlogs, fraud, etc.) • Applicants would be able to apply once they have attained the number of points • Would offer a flexible tool to reward irregular migrants wishing to remain on a longer term basis for their incorporation into the host society • Would provide a transparent and clear mechanism to award residence rights • Creates incentives for ongoing “positive behaviour”
Tier 3 <ul style="list-style-type: none"> • Would target for those who failed to pass the test under tier 2 • Persons under tier 3 would be granted a two year extension of their residence and work permit and be required to their home country within this period 	<ul style="list-style-type: none"> • Temporary extension of the work and residence permit would increase the likelihood of voluntary return • Would reduce the negative consequences of immediate enforcement of return

Source: Papademetriou, D. (2005: 12-13)

The report remarks critically that “[r]egularisation programmes have been largely designed and carried out as standalone policy efforts to control irregular migration, and then often paid little attention to the realities of the labour market needs of employers or to the behaviour of migrants. As a stand-alone policy to control migration, regularisation programmes are doomed to failure, since they

deal with current and possibly future flows of migrants, not the control mechanisms that prevent them from entering.”⁹¹

In addition, the report recommends co-operation with countries of origin on facilitating the orderly return of failed migrants and developing development-return schemes that would make return a more viable and attractive option for failed migrants themselves. The Council of Europe report, however, also recognises that overly strict immigration policies may be a cause of illegality and recommends to expand the scope for legal immigration, including labour immigration for lower skilled categories of immigrants. Furthermore, the report stresses human rights considerations, notably in terms of the respect for private and family life. The report thus notes that ‘spontaneous’ family reunification seems to be an important source of irregular migration, but family considerations are a rare criterion in most large-scale regularisation programmes. Finally, the report also sees a need for a common position on regularisation of both the Council of Europe and the European Union that would incorporate its recommendation.

Aspasia Papadopoulou’s review of regularisation practices written for the Global Commission on Migration⁹² essentially covers much of the same ground as the Odysseus study and in particular, as Levinson’s review and the Council of Europe report. However, she places more emphasis on the relationship between regularisation policies and asylum and stresses that regularisation has in the past often been granted as a form of complementary protection. As the Council of Europe, she emphasises the general need to undertake regularisations in agreement with existing human right norms under international law, including the Universal Declaration of Human Rights, the UN 1990 Convention on the Rights of Migrant Workers and Members of their Families, the European Convention on Human Rights, the European Social Charter, the ILO Migration for Employment Convention 1949 (C97), and the Convention on the Rights of the Child.

In contrast to the Council of Europe report, Papadopoulou does not endorse ‘earned regularisation’ schemes. The main problem, she argues, is that regularisation would then be treated as an award, rather than as a right, and would undermine equal-opportunity and equal-rights-based understandings of integration. In addition, an earned regularisation scheme would favour more highly skilled, resourceful and well-connected migrants and thus would have a clear bias against more vulnerable and less resourceful groups.

2.5 Conclusion

This survey of the literature suggests that there are two broad strands of research on regularisation practices. One major strand of research, including most studies written on regularisation practices in the European Union which – in one way or another – build on the seminal Odysseus study, has a broad, comparative impetus and focuses on the policies as such. The main focus of this strand of research is on identifying types, criteria and objectives of regularisation measures and on providing indications for which objectives, in which form and under what circumstances regularisation may be an appropriate policy tool. This strand of research thus focuses on the overall design of regularisation

⁹¹ *Ibid.* p.13. See also Migration Policy Institute/ Weil, P.: *op. cit.* for systematic assessment on policies on irregular migration.

⁹² Papadopoulou, A. (2005): *op. cit.*

measures; it does address questions of implementation to some extent, but is less interested in the overall impact of regularisation.

By contrast, a second strand of research, which includes the OECD studies on regularisation (as well as work done by Papademetriou, amongst others) is less interested in conceptual issues, the criteria and conditions used in regularising illegal migrants or the specific objectives of regularisation measures, but instead places the focus on the wider (fiscal and economic) impacts of regularisation measures. In addition, a secondary focus is on possible conclusions that can be derived from the assessment of past regularisation exercises for the design of new regularisation programmes or mechanisms. Generally, this strand of research focuses on large-scale employment-based regularisation programmes and does not cover regularisation measures in their entire breadth. Nor is this strand of research interested in regularisation as a policy tool to address the presence of illegal migrants *per se*. Rather, the main interest is in establishing to what extent, and under what conditions, regularisation can be an appropriate policy tool to address illegal migrant employment and the informal economy at large. In the European context, the focus of this strand of research thus essentially is on those countries which have conducted large-scale employment based regularisation programmes – notably, the southern European countries (in particular Spain and Italy) and to a lesser extent, France. Because of this specific focus on the nexus of illegal migration and the informal economy, the conclusions drawn from this type of research cannot really be transferred to other European countries without comparable patterns of irregular migrant work. The available evidence suggests that in these countries – broadly speaking, the western and northern European countries – illegal migration is to some extent dissociated from illegal migrant work and that the largest share of persons engaged in irregular work consists of legal immigrants, EU citizens (in particular, citizens from new EU Member States) and nationals.⁹³ Similarly, because the target populations of regularisation programmes and mechanisms in these countries – where regularisations are largely carried out for humanitarian or family reasons or where programmes target specific categories of third country nationals (rejected asylum seekers, tolerated persons) – are starkly different from countries with regularisation programmes targeting illegal migrant workers, the overall economic and fiscal impact of regularisation measures is likely to be different as well.

The two strands of research, however, also suggest that it is indeed useful to distinguish between two distinct objectives of regularisation measures: namely

- (1) regularisation as a tool in addressing irregular employment and the informal economy, i.e. as a labour market policy, and
- (2) regularisation as a rectification of illegal or semi-legal residence and as an alternative to removal

In the first instance, regularisation is a means to achieve wider objectives and essentially is an attempt to re-regulate the informal economy. In the second instance, regularisation is a goal in itself and is used to address policy and implementation failures (e.g. in the asylum system) and to respond to specific situations and needs (e.g. humanitarian concerns, etc.).

⁹³ In Austria, 56.8% of the persons found illegally employed in 2007 were citizens of new EU Member States. See Table II.7 in Kraler, A., Reichel, D., Hollomey, H. (2008): *Clandestino Country Report: Austria*. Unpublished Draft Report for the project Clandestino - Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe.

3 Regularisation practices across the EU

3.1 General patterns of programmes and mechanisms

Following the division of regularisation processes into programmes and mechanisms (as defined in Chapter 1), we have attempted to collect and collate statistical data on both of these procedures for all Member States. Despite our best efforts, and the provision of information by 22 countries (out of 27 requested), the data are in general far from satisfactory. For regularisation programmes, we requested numbers of applications and grants of legalisation: only five countries⁹⁴ were able to provide both figures for their relevant programmes, with the majority (ten countries) cognisant of only one of the two figures. The situation with regularisation mechanisms is considerably worse, with many countries simply not recording the data. Thus, the data provided considerably understate the award of regularised statuses by mechanisms, and to a lesser extent through programmes: for this reason, we have supplemented official data with figures taken from available research. Furthermore, it is evident that *de facto* regularisations of persons with ethnic ties have been completely excluded from Member States' evaluations of their own policies. Even though, typically, 'co-ethnics' are awarded citizenship, the transition from an irregular status to legality is, in our view, a regularisation. The number can only be crudely estimated, but for just one country (Greece), is at a minimum of 350,000 persons awarded either citizenship or documented as legally resident on the basis of ethnicity.⁹⁵

Given the above caveats, we can state that over the period 1996-2007, just under 4.2 million persons applied for regularisation through programmes in 16 Member States.⁹⁶ If we include the 2006 *de facto* regularisation in Italy, the total number of applications exceeds 4.6 million.⁹⁷ Data on applications in the framework of regularisation mechanisms are not generally available: about 305,000 persons are known to have been awarded legal status through mechanisms in eleven countries.⁹⁸ Another six countries seem to have no data on their awards of legal status through mechanisms. Thus, a total of almost 5 million persons are recorded as having applied for regularised status during this timeframe – either through time-limited programmes or through case-by-case regularisation mechanisms. Taking into account the substantial missing data,⁹⁹ the total is easily 5.5 million. Adding to this, the 'missing' data on co-ethnics (Greece, Germany, Hungary *et al.*), the total number of persons involved in transitions from irregularity to a legal status may exceed 6 million.

⁹⁴ Hungary, Italy, Luxembourg, Poland, Spain.

⁹⁵ A similar, although analytically distinct, category of persons consists of descendants of emigrants of Member State who may have a claim to citizenship of a Member State, and thus, European Union citizenship. In particular in regard to Italy (where nationality legislation was changed to expand the population eligible for Italian citizenship prior to the 2005 elections), Portugal and Spain this involves considerable numbers of persons. It is unclear, to what extent *ex-post* status adjustments (i.e. registration of citizenship) takes place in their country of citizenship.

⁹⁶ Belgium, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain, Sweden and the UK.

⁹⁷ Figures for the 2006 Italian *de facto* regularisation are taken from Cuttitta, P. (2008): 'Yearly quotas and country-reserved shares in Italian immigration policy', *Migration Letters*, 5/1, pp. 41-51.

⁹⁸ Austria, Belgium, Denmark, France, Finland, Germany, Greece, Hungary, Ireland, Poland, Slovakia.

⁹⁹ Official data on applications or grants through programmes are missing completely for Denmark, Estonia, Lithuania and the UK; data on individual programmes are missing for Germany, Greece, Poland and Portugal.

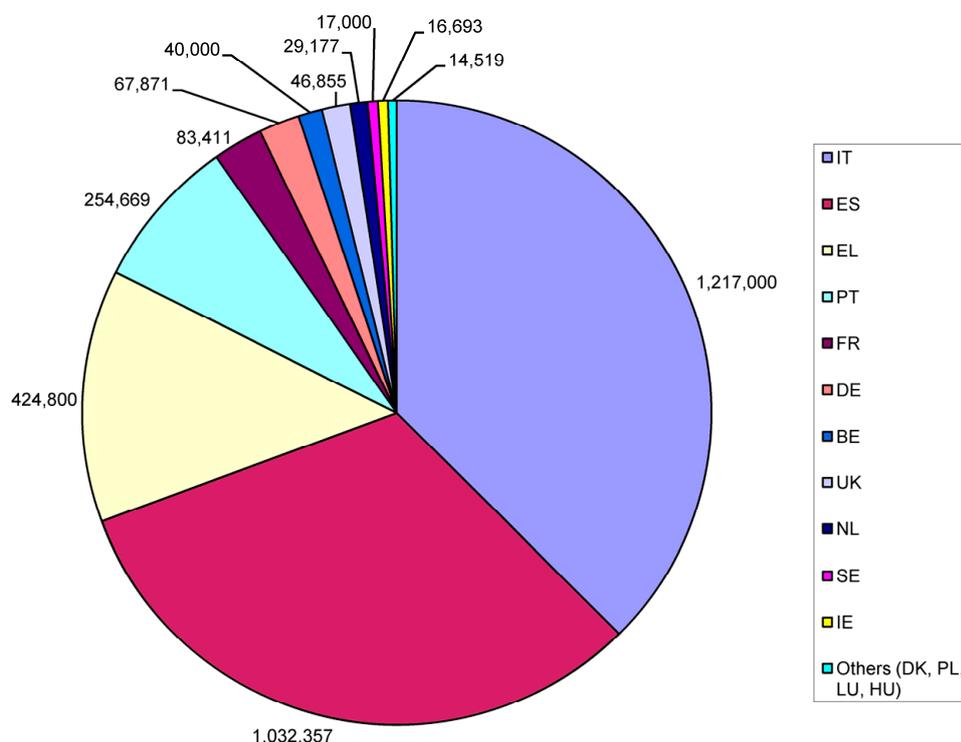
3.1.1 Regularisation Programmes

Over the period 1996-2007, data from 42 regularisation programmes show a total of about 4.2 million applicants in 17 countries, of which at just under 2.9 million were granted legal status.¹⁰⁰ Including the Italian *de facto* regularisation of 2006, the total number of programmes is 43, involving 4.7 million applicants, of which more about 3.2 million were granted a status. Table 2, overleaf, shows summary data for each of the programmes, ordered by total applications over the period. Italy (including the *de facto* regularisation of 2006) appears in first place with just under 1.5m applications; Spain is second, with 1.3m, and Greece is in third place with just under 1.2m (although this is overstated by about 230,000 owing to a 2-stage process in 1997-8). These three countries account for 84% of known applications in regularisation programmes.

In the 42 regularisation programmes, the number of applicants varied considerably between programmes ranging from 51 applicants in Lithuania in 1996 to over 700,000 in Italy in 2002.

From the data available, regularisation rates of individual programmes are typically over 80% in southern countries, with lower rates for Germany, Belgium and Luxembourg and extremely low rates for France (21% and 53%). The weighted mean regularisation rate (only for those programmes where both application and grant numbers are known) is 80%. Figure 1, below, shows the distribution of known regularisation awards, by country.

Figure 1
Grants of regularised status through programmes, EU (27), 1996–2007



Note: missing data for EL (1997, 2001) and LT resulting in an undercount of at least 500,000

¹⁰⁰ The real figure is higher, owing to missing data from Greece (1997, 2001) and the countries listed in Fn.99

Table 2: Regularisation programmes in the EU (27), 1996-2008

Year/Period	Country	Number of applicants	Country total	Regularisations granted	Country Total	% regularised
1998	IT	250,747		217,000		86.5%
2002	IT	702,156		650,000		92.6%
2006	IT	500,000		350,000		70.0%
			1,452,903		1,217,000	
1996	ES	25,128		21,382		85.1%
2000	ES	247,598		199,926		80.7%
2001	ES	351,269		232,674		66.2%
2005	ES	691,674		578,375		83.6%
			1,315,669		1,032,357	
1997	EL	371,641				
1998-2000	EL	228,200		219,000		96.0%
2001	EL	350,000				
2005	EL	96,400		90,000		93.4%
2005	EL	96,400		95,800		99.4%
2007	EL	20,000		20,000		100.0%
			1,156,241		424,800	
1997	FR	143,948		76,459		53.1%
2006	FR	33,535		6,952		20.7%
			177,483		83,411	
1996	PT	35,082		31,000		88.4%
2001	PT	185,000		185,000		100.0%
2003	PT	19,408		19,408		100.0%
2004	PT	40,000		19,261		48.1%
			279,490		254,669	
1999	DE	18,258		18,258		100.0%
2006	DE	71,857		49,613		69.0%
			90,115		67,871	
1999-2000	BE	55,000		40,000		70.0%
			55,000		40,000	
1999	UK	12,415		11,140		89.7%
2000	UK	11,660		10,235		87.8%
2004	UK	9,235		9,235		100.0%
2005	UK	11,245		11,245		100.0%
2006	UK	5,000		5,000		100.0%
			49,555		46,855	
1999	NL	7,604		1,877		24.7%
2004	NL	2,300		2,300		100.0%
2007	NL	30,000		25,000		83.3%
			39,904		29,177	
2005-2006	SE	31,000		17,000		83.3%
			31,000		17,000	
2005	IE	17,900		16,693		98.1%
			17,900		16,693	
2000	DK	3,000		3,000		100.0%
1992-2002	DK	4,989		4,989		100.0%
			7,989		7,989	
2003	PL	3,508		2,747		78.3%
2003	PL	282		282		100.0%
2007-2008	PL	2,022		177		8.8%
			5,812		3,206	
2001	LU	2,882		1,839		63.8%
			2,882		1,839	
2004	HU	1,540		1,194		77.5%
			1,540		1,194	
1996	LT	51				
1999	LT	385				
2004	LT	103				
			539			
TOTAL		4,684,022		3,244,061		80.4%
Average		111,524		87,677		[weighted mean]

No programmes: AT, BG, CY, CZ, EE, FI, MT, RO, SI, SK

KEY:

Official Estimate

Own Estimate

Incomplete Process

Missing Data

Nine Member States provided details on criteria used in 26 regularisation programmes. The importance of various criteria or conditions is shown in Table 3 below.

Table 3: Importance of selected criteria in regularisation programmes

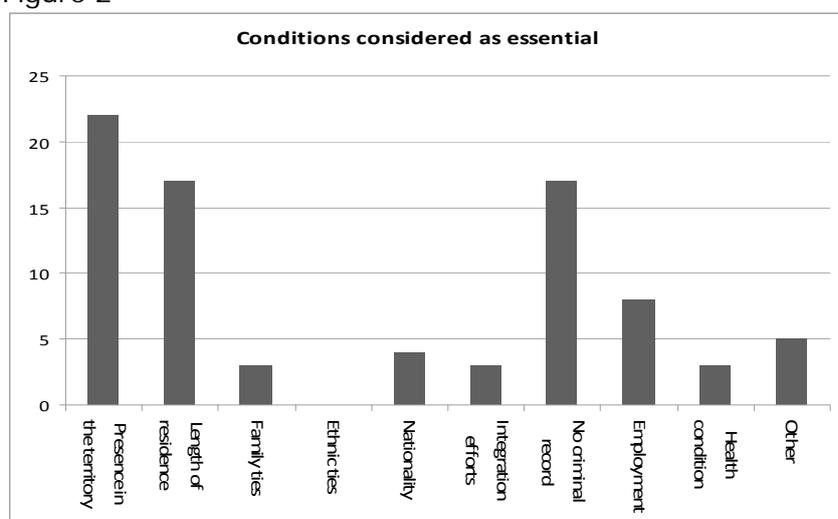
Specific criteria	Essential	Desired	Not relevant
Presence in the territory	22	0	3
Length of residence	17	3	6
Family ties	3	11	11
Ethnic ties	0	0	25
Nationality	4	1	20
Integration efforts	3	3	20
No criminal record	17	5	3
Employment	8	11	7
Health condition	3	0	22
Other	5	0	20

‘Presence in the territory’ before a certain date stands out as the most important criterion used and has been seen as essential in 22 programmes. **Length of residence** and **lack of criminal record** both have been regarded as essential in 17 programmes and desired in three and five programmes, respectively.

Employment is another important criterion, being mentioned in respect to 19 programmes as either essential or desired. However, only eight programmes viewed employment as an essential criterion. **Family ties** – mentioned altogether as important in 14 programmes (although only three times as essential) is another frequently cited criterion. Other criteria are much less often mentioned as essential or desired, with **integration efforts** (six times, three times as essential) and **nationality** (five times in total, in which four as essential) are more important. **Health reasons** are only cited in three programmes, while **ethnic ties** are considered as irrelevant in respect to all programmes on which information was reported.

Figure 2, below shows the criteria seen as ‘essential’ by frequency of occurrence in the 26 programmes for which information was provided.

Figure 2



Regularisation Mechanisms

As noted above, many statistics on regularisation mechanisms are either not collected or not available. Therefore, the following statistics show a non-random sampling of all regularisations through mechanisms. Since 2001 around 305,000 regularisations were recorded for this project: however, the grounds for regularisation differ significantly between countries and various mechanisms. The general common rationale is that persons are allowed to change from an irregular status to a regular status according to various legally-defined reasons (mainly humanitarian).

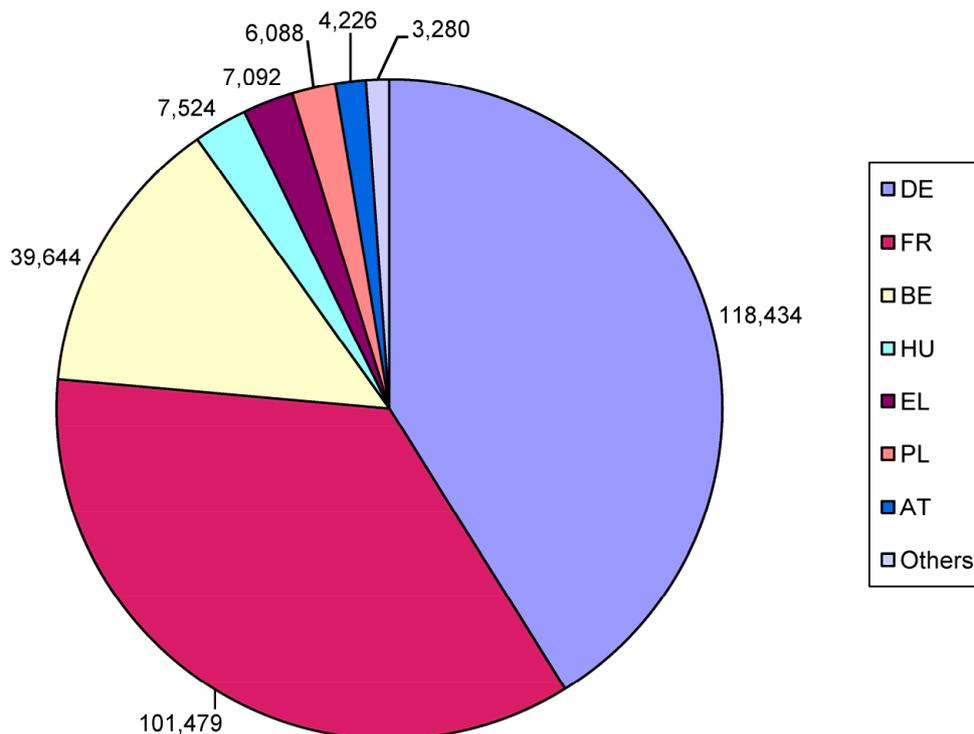
The largest number regularised in the course of a mechanism is reported for Germany, at 118,434 (making up 41% of known regularisations by mechanism in this study).¹⁰¹ If the number of tolerated persons (110,000 as of September 1, 2008) and the 23,500 persons with a leave to remain (*Aufenthaltsgestattung*)¹⁰² are included, the total number of persons ‘regularised’ through permanent mechanisms exceeds 251,000 persons. However, in contrast to persons regularised under the various regularisation mechanisms existing in Germany, the status of tolerated persons is only temporarily adjusted through toleration or leave to remain. Conversely, however, a majority of tolerated persons and persons on leave to remain are subsequently regularised – indeed, possession of toleration or a leave to remain is a pre-condition for most mechanisms and similarly has been in regard to the various programmes conducted in Germany.

France reports large numbers of regularisations through mechanisms and in terms of using regularisation mechanisms to award fully fledged legal statuses, has been the most significant and consistent user of mechanisms in the EU. Over 2000–06, more than 100,000 persons were regularised either for personal reasons or family ties (80,000) or by virtue of 10 years of residence (21,000). Countries where considerable numbers of regularisations were reported are Belgium (2001–2006: 40,000), Hungary (2003–2007: 7,524), Greece (2005–2007: 7,092), Poland (2006–2007: 6,088) and Austria (2001–2007: 4,226). Figure 3, below, shows these graphically.

¹⁰¹ The figure represents the sum of various individual mechanisms. See, for more details, the German country profile in Appendix B.

¹⁰² Figures of tolerated persons and persons on a leave to remain have been taken from *Migration und Bevölkerung*, 10/2008, p.3

Figure 3
Grants of regularised status through mechanisms, EU (27), 1996–2007



16 Member States provided information on 28 mechanisms existing in those countries, although only 13 countries gave details on criteria used in respect to 23 mechanisms. The importance of various criteria or conditions in these mechanisms is shown in Table 4 below:

Table 4: Importance of selected criteria in regularisation mechanisms

Specific criteria	Essential	Desired	Not relevant
Presence in the territory before a certain date	6	0	14
Length of residence	5	4	10
Family ties	6	7	8
Ethnic ties	1	2	16
Nationality	1	1	17
Evidence of integration efforts	1	13	6
Lack of a criminal record	13	4	5
Employment	6	6	8
Health condition	5	3	13
Other	8	0	2

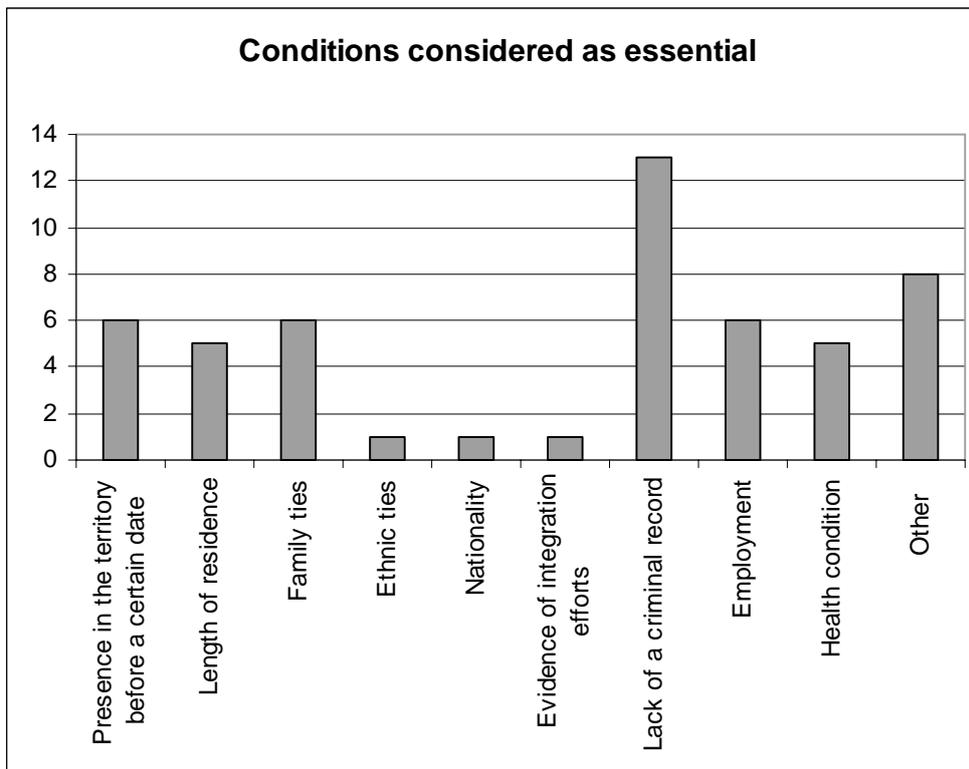
For most mechanisms ‘a lack of criminal record’ is seen as essential to benefit from regularisation. Moreover, ‘length of residence’ and ‘presence in the territory before a certain date’ are seen as essential. Additionally, ‘employment’, ‘family ties’ and ‘health condition’ are frequently cited.

‘Evidence of integration efforts’ is definitely the most important issue which is seen as ‘desired’ for regularisation through a mechanism. It was by far mentioned most often as ‘desired’ but only once as ‘essential’ and only 6 times as ‘not relevant’.

‘Nationality’ and **‘Ethnic ties’** are definitely not relevant for benefiting from regularisation mechanisms, as they are mentioned most often as ‘not relevant’ and hardly at all as ‘desired’ or ‘essential’. In general, ‘length of residence’ and ‘presence in the territory before a certain time point’ are essential only for five mechanisms, but are seen as not relevant in 10 and 14 mechanisms respectively.

Figure 6, below, shows the criteria or conditions seen as ‘essential’ by frequency of occurrence in the 21 mechanisms for which information has been provided.

Figure 6



Box 3: Regularisation policy in Switzerland

From 1945, Switzerland followed a temporary worker immigration programme to fill its economic demand for unskilled labour, with rotation of workers to avoid settlement of migrant groups. Until very recently, Switzerland denied the existence of long-term immigrant residents – even though the phenomenon had started to appear in the 1970s. Immigration practice was changed in 1991 and again in 1998 to conform to EEA (European Economic Area) rules, such that persons from countries outside the EU or EFTA (European Free Trade Area) could not be given work permits, unless they were highly qualified. A 2005 immigration law, replacing the previous one of 1931, strengthened the restrictions on immigration from outside EFTA (by setting quotas) and increased the maximum detention term for illegal immigrants and asylum-seekers from one to two years, while also introducing criminal and other sanctions for human smuggling, irregular employment, and marriages of convenience. At the same time, draconian rules on asylum were introduced (effective from 2007) along with reduced benefits for asylum-seekers – making it the harshest asylum law in Europe, according to UNHCR.

The 2000 Census recorded 22.4% of the population as foreign-born and 20.5% with a foreign nationality; the principal immigrant group is now citizens of the former Yugoslavia (24% of foreigners) followed by Italians, at 22%. Illegal residents (the term used is *sans papiers*) are thought to number between 50–300,000 according to government estimates, which averages 2.4% of total population. (This makes Switzerland, according to our classification in Table 5, a country with a very high (VH) stock of irregular migrants.) According to expert opinion, these irregular migrants are mostly from Latin America, former Yugoslavia, Eastern Europe, and Turkey; they tend to be of prime working age (20–40), with unequal distribution across the country of genders and family status. Some entered Switzerland on tourist visas; others lost or failed to renew their legal residence status. However, the term *sans papiers* is most frequently used to denote temporary workers who have lost their legal status, family members of these, and rejected asylum-seekers who have remained and work informally.

It was not until a particular situation occurred in the latter half of the 1990s – involving nationals of the former Yugoslavia – that regularisation became a matter of political contention and public interest. Since 1991, seasonal workers from countries outside of the EEA had been denied work permits: the Yugoslav seasonal workers were threatened with deportation as they could not complete the four years required for a one year residence permit. In 1998, the government rejected a proposal made by the National Council for a mass amnesty; instead, they opted for individual regularisation on the basis of ‘hardship’. In 2001, a circular was issued (the ‘Metzler’ Circular) outlining the criteria used for case-by-case regularisations. Since the cantons are responsible for case-by-case regularisations (subject to approval by the Confederation) and also execute federal deportation orders, the position adopted by each canton is crucial. Over the period 1996–2000, the French-speaking canton of Vaud supported regularisation of Bosnian migrants on the basis of hardship, although the federal government refused to do so. In 1997 the canton refused to implement deportation orders; eventually, in 2000, 220 families were granted permits by the federal government. A second political mobilisation also involved the canton of Vaud, and concerned Kosovar migrants; they were former seasonal workers who had applied for asylum at the outbreak of the Kosovo war and were now threatened with deportation. Again, the political mobilisation – which involved trade unions and publicity campaigns – was successful and the Swiss Federal Council regularised 6,000 Kosovars who had spent more than eight years in the canton. Although these regularisations are ostensibly case-by-case, in reality they are collective programmes.

Since 2001, there have been 14 parliamentary inquiries into the matter of *sans papiers*. Left politicians demanded large-scale amnesties, while most centre parties insisted on case-by-case regularisation on the grounds of ‘hardship’. The latter is seen as the only solution to the problem, although there have been criticisms of the lack of transparency of the process. Since 2001, 3,694 persons from various countries of the world applied, with an acceptance rate of 57%. A regularisation campaign aimed at non-deportable rejected asylum-seekers in 2000, with onerous criteria for applications, benefited 6,500 Sri Lankans: each case was reviewed individually by the Federal Office for Refugees (FOR). Rejected asylum-seekers from other countries were not eligible, and had to ask their canton to request the FOR to re-examine their cases. In 2006, the Federal Commission for Foreigners called for harmonisation across the cantons of treatment of cases of hardship; whilst in December 2007, a new call for mass regularisation of irregular migrants has been made by socialist politicians in Zurich.

The official position on regularisation taken by the Federal Council is unstintingly one of opposition to large-scale amnesties, on the grounds that they promote future illegal migrations, encourage illegal employment, reward illegality, and might increase recorded unemployment (*inter alia*). Thus, they insist on case-by-case evaluations on the humanitarian basis of ‘hardship’. Many cantons, Swiss trade unions and other sectors of civil society take a different view, tending to emphasise the important economic role of undocumented workers and their integration in society. Thus, there is no consensus on policy, except at the federal political level.

SOURCE: REGINE country study on Switzerland

Box 4: Regularisation policy in the USA

Most of the legal immigration into the USA, typically totalling 600—900,000 each year, consists of family reunification, with a smaller share for employment reasons, and very small numbers for humanitarian reasons. Unauthorised immigration flows are thought to be of a similar magnitude – i.e. in excess of 500,000 a year – and estimated irregular migrants stocks since the last major regularisation of 1986 have shown a massively increasing trend. In 1990, the estimated stock of irregular migrants was around 2 million; by 2000 it was 8 million; and by 2006 it had climbed to circa 12 million. Of these, the majority (57%) are from Mexico, followed by El Salvador (4%), Guatemala, the Philippines, Honduras, India, Korea and Brazil. In contrast, over the last two decades the legal immigrant stock has been falling continuously, since the number of persons being naturalised (plus deaths and emigrations) is greater than the number being admitted.

The last major regularisation in the USA was in 1986 – the *Immigration Reform and Control Act (IRCA)*. It granted permanent residence status to four categories of unauthorised migrants – those who could prove that they had been continuously resident since 1982 (a general amnesty); seasonal workers who could demonstrate that they had worked more than 90 days in the last year, or more than 30 days for each of the three previous years, in the perishable agricultural crops sector (Special Agricultural Workers – SAW); and two much smaller groups for humanitarian reasons, consisting of Haitian and Cuban immigrants and any illegal immigrant who could show continuous residency since 1972. The programme was notable in that, for the first time in US history, it criminalised the hiring of illegal migrants and imposed a system of sanctions to target employers. However, this provision held employers liable only if they “knowingly” hired an unauthorised immigrant – thus initiating a lucrative new business of document fraud and use of middlemen and subcontractors. IRCA also called for better border enforcement, but this saw little action until a decade later.

1.7 million applied for the general amnesty and 1.3 million under SAW; of these, 1.6 million and 1.1 million respectively were legalised, that is, with acceptance rates of 94% and 85%. Those rejected were able to appeal the decision, and even as late as 2004 there were two pending class-action suits affecting 100,000 people denied legal status on the technicalities of ‘continuous residence’. The programme left large categories of people outside of its remit: these included those who had arrived between 1982 and 1987; agricultural workers who fell short of the minimum working days requirement; and various other irregular situations. In total, an estimated three million unauthorised migrants were unable to participate in the regularisation – roughly the same number as those who did apply. Thus, the programme was ineffectual in terms of its actual coverage and thereby failed to solve even temporarily the problem of irregular migrant stocks.

The US government collected data on the impact of IRCA through two ‘Legalized Population Surveys’ in 1989 and 1992, asking a random sample of around 6,000 applicants a range of questions relating to the labour market and human capital. These data are particularly important, since it is rare to have such reliable information on irregular populations. Several secure conclusions on the impact of IRCA have been derived: (1) regularisation increased the earning power of those legalised, usually through occupational mobility; (2) the link between earnings and the human capital of migrants strengthened post-legalisation, implying better resource allocation; and (3) legalised migrants invested more heavily in their own human capital, probably because of increased returns of such investment, allied with greater security and easier access to education and training programmes. However, there is no reliable information on the impact of IRCA on the informal employment sectors, or on unemployment and labour force participation rates. Since the status accorded those legalised was a permanent one, there could be no lapse back into illegality. This does not mean, though, in the weakly-regulated US labour market, that all of those regularised worked in the formal economy.

Since IRCA, other than some small-scale humanitarian programmes, the only programme of note is the *Late Amnesty* of 2000 whereby some 400,000 irregular migrants were granted amnesty under the IRCA general provisions of illegal and continuous residence prior to 1982. There are no known studies of the impact of this smaller programme. Subsequently, the regularisation proposed by President G. W. Bush (the Fair and Secure Immigration Reform, 2004) set out a new vision of offering three-year temporary work permits, renewable once, to irregular migrants in the USA as well as to potential migrants outside of the country. This programme would thus have established mass guestworker migration, without the possibility of permanent residence or citizenship, as the official immigration policy of the USA. Another proposed bill of 2004, the Immigration Reform Act, continued along more traditional lines of US policy. This bill offered permanent residency to those who could meet all of six requirements: (1) presence in the USA for more than 5 years; (2) employment for at least 4 years; (3) passing security and criminality checks; (4) no outstanding tax debts; (5) demonstrated knowledge of English and understanding of American civic citizenship; (6) payment of a fine of \$1,000. Neither of these bills was passed, nor any of nine other detailed proposals made since 2003 and dealing directly or indirectly with regularisation of irregular migrants. Thus, since 2000 the USA has had no policy for the management of irregular migration – culminating in its current stock of over 12 million unauthorised migrants, probably more than the combined stock of all other developed countries of the world.

SOURCE: REGINE country profile for the USA

3.2 Regularisation as a policy response to stocks of irregular migrants

In examining regularisation policy across the EU (27), one of the first questions that springs to mind is whether or not there is any correlation with a Member State's propensity to regularise and the extent of its irregularly resident third country national population. Using all available datasources, with particular emphasis on quantitative data, Table 5 (overleaf) provides estimations of the extent of irregular migrant stocks (as a proportion of total population). Even when allowing for the difficulty of making such evaluations, it does seem that certain Member States are more affected by illegal stocks than others. From Table 5, we can say that two countries have had extremely high illegal migrant stocks – Greece and Cyprus. Another eight countries (Spain, Italy, Portugal, Belgium, Hungary, the UK, Germany, the Czech Rep.) have high stocks; six countries are evaluated as having medium-level stocks (the Netherlands, Luxembourg, Estonia, France, Austria and Sweden).¹⁰³

Is there any obvious relation between irregular migrant stocks and regularisation practices? Of the two countries with very high stocks, one (Cyprus) has never held a regularisation programme. Of the eight countries with high stocks, all but one have undertaken programmes since 1996 (although Germany denies that its policy is a regularisation), all but two had programmes prior to 1996, and all but two also have regularisation mechanisms. We might also posit a counterfactual: are there any countries with low (or medium) irregular migrant stocks that have undertaken regularisations? Of the 12 countries evaluated as having low stocks, five have undertaken programmes since 1996 but only one had a programme prior to 1996; all five also have regularisation mechanisms. Thus, there seems to be a rough but highly imperfect correlation of regularisation policies with the extent of irregular migrant stocks. Clearly, other intervening variables play important roles in shaping policy responses.

In Table 5, we have tried to categorise Member States' policies into various clusters of policy approaches. These are explicated below, along with some suggestions as to what might be the intervening variables that mediate the linkage between the policy problem (illegal migrant stocks) and the differing policy responses.

3.2.1 Policy clusters of regularisation behaviour across the EU (27)

The southern European countries

(Greece, Italy, Spain, Portugal)

These countries are distinguished by their reliance on regularisation as an alternative to immigration policy: the great majority of legal TCN workers have acquired their legal status through regularisation programmes,¹⁰⁴ as opposed to being recruited from abroad (as their immigration laws require). As

¹⁰³ However, one should add, that most estimates refer to the period before 2004, i.e. before the two waves of EU enlargement. As a consequence of EU enlargement and the *de facto* regularisation of a large number of citizens of new EU Member States who were irregularly staying in a EU(15) Member State, the number of illegally staying third country nationals has since decreased significantly (Michael Jandl, personal communication).

¹⁰⁴ This is absolutely clear for the period 1980—2000 (see e.g. Reyneri, E. (2001): 'Migrants' Involvement in Irregular Employment in the Mediterranean Countries of the European Union', *International Migration Paper 41*, Geneva: International Labour Organization, p. 4; Simon, G. (1987): 'Migration in Southern Europe: An

noted above, Spain, Italy and Greece dominate the figures for regularisations by programme – with Portugal showing a slightly lower rate. In contrast to most other EU countries, these four countries until recently experienced large growth in labour demand – especially in unskilled work. Some of the demand is in seasonal agricultural work, but even that has proven difficult to manage: employers rely on illegal labour in all sectors, owing to the inability of the state to facilitate orderly immigration.

The four countries are also distinct in not having an obvious asylum-regularisation nexus, i.e. regularisation for rejected asylum-seekers. Regularisation mechanisms have existed in three out of the four, since 2000 in Spain, 2001 in Portugal, and 2005 in Greece. The utilisation of these is not known, except for Greece where quite large numbers have been regularised (mainly for reasons of health).

Regularising on humanitarian grounds

(Belgium, Denmark, Finland, Luxembourg, the Netherlands, Sweden)

The main common characteristic of this group of countries is that regularisation is granted primarily on humanitarian grounds; overall, regularisation is closely connected with the asylum system and, in particular, with subsidiary and temporary protection. Other than Finland, all countries in this group have had small to medium-scale regularisation programmes in the last decade and all but the Netherlands have mechanisms. In addition, Belgium has a relatively transparent framework for awarding regularisation through mechanisms. Thus, regularisation measures in these countries are largely conceived as forms of complementary protection rather than as a response to irregular migration, with the possible exception of Belgium, which in addition to regularisations on complementary protection grounds has frequently granted regularisation on grounds of family ties.

The regularising ‘new’ Member States

(Estonia, Hungary, Ireland, Lithuania, Poland, the Slovak Rep.)

This is a diverse group of countries, whose main common characteristic is that they have actually regularised. All but Estonia and the Slovak Rep. have had programmes, and all have mechanisms which appear to have been utilised to some extent. Relative to their population sizes, they are small-scale regularisers. Much of the activity has been related to ‘adjustment’ of their resident populations to the new post-Soviet order, and the creation of ‘illegal’ residents that resulted from political and territorial changes. Ireland is the exception to this, as its regularisation is characterised by managing (illegal) labour migration flows (although it has not followed the pattern of southern Europe).

Overview’. In: OECD: *The Future of Migration*. Paris: OECD, p. 287), and is mainly owing to policy deficits (Baldwin-Edwards, M. (1997): ‘The Emerging European Immigration Regime: Some Reflections on Implications for Southern Europe’, *Journal of Common Market Studies*, 35/4, p. 507). The emergence of family reunification channels, especially in Italy and Spain, has permitted more legal immigration but for most (non-seasonal) labour migrants the primary route to legality remains regularisation (see e.g. Cangiano, A. (2008): ‘Foreign migrants in Southern European countries: evaluation of recent data’. In: Raymer, J. and Willekens, F. (eds): *International Migration in Europe: Data, Models and Estimates*. New Jersey: John Wiley & Sons, pp. 96–7).

Table 5: Comparative table of regularisation practices in the EU (27), 1996-2008

	Illegal TCN population ¹	Estimated illegal immigrants [000s] ²		total population [000s]	mean estimate/ total population [%]	Number of programmes since 1997	Previous programme ?	Regularisation mechanism ?	Role of asylum process ?
		low	high						
Greece	VH	150	400	11,006	2.5	6	N	Y	Y
Spain	H	150	700	41,551	1.0	5	Y	Y	?
Italy	H	200	1,000	57,321	1.0	3³	Y	N	?
Portugal	H	30	200	10,408	1.1	3	Y	Y	?
Belgium	H	90	150	10,356	1.2	1	Y	Y	Y
Netherlands*	M	60	225	16,193	0.9	3	Y	N	Y
Sweden*	M	15	80	9,182	0.5	1	Y	Y	Y
Denmark	L (?)	n.d.	n.d.		n.d.	2	Y	Y	Y
Luxembourg	L-M (?)	n.d.	n.d.		n.d.	1	N	Y	Y
Finland	L	n.d.	n.d.		n.d.	0	N	Y	Y
Hungary	H	150	150	10,142	1.5	1	N	Y	Y
Estonia	M	5	10	1,356	0.6	1	Y	Y	N
Ireland	L	9	20	3,964	0.4	1	N	Y	Y
Poland	L	45	50	38,219	0.1	3	N	Y	Y
Lithuania	?	n.d.	n.d.		n.d.	2	Y	Y	N
Slovak Rep.	L	n.d.	n.d.		n.d.	0	N	Y	Y
UK*	H	430	1,000	59,329	1.2	5	Y	Y	Y
France	M	300	500	59,635	0.7	2	Y	Y	Y
Germany	H	500	1,500	82,537	1.2	4⁵	Y⁵	Y	Y
Austria	M	40	100	8,102	0.9	0	Y⁴	Y	Y
Cyprus*	VH	40	40	715	5.6	0	N	Y	Y
Czech Rep.	H	195	195	10,203	1.9	0	N	N	Y
Bulgaria	L	n.d.	n.d.		n.d.	0	N	N	Y
Latvia	L	n.d.	n.d.		n.d.	0	N	Y	N
Malta*	L	n.d.	n.d.		n.d.	0	N	Y	Y
Romania	L	n.d.	n.d.		n.d.	0	N	Y	Y
Slovenia	L	n.d.	n.d.		n.d.	0	N	N	N

* indicates that this country has failed to return the ICMPD questionnaire

Notes

¹These should be read as a cautious assessment of the approximate size of the irregular migrant population. Where estimates of irregular migrant stocks are available (cols. 2,3), these have been used as a proportion of total population (col. 5). A ratio of less than 0.5% is considered to be low (L); 0.5—0.9% is medium (M); 1—1.9% is high (H); and >2% is very high (VH). Otherwise, qualitative and other indicators have been utilised for this evaluation.

²The data source for cols. 2, 3 and 4 is GHK (2007), except for Sweden, which are taken from Blaschke and the REGINE country reports (see bibliographic references)

³Includes the *de facto* regularisation (residence permits for illegal residents) of 2006, which the Italian government does not consider to be a regularisation

⁴Includes an employment based regularisation (via work permits) which effectively amounted to the regularisation of illegal residence

⁵Covers specific regularisation programmes for long-term tolerated persons, which the German government does not consider to constitute regularisation

The ‘reluctant regularisers’

(France, the UK)

These ‘old immigration countries’ with colonial histories and, in the case of France, large post-war labour recruitment programmes, have struggled to manage immigration over many decades, occasionally resorting to regularisation programmes as a policy instrument (but with fairly small numbers, although overall numbers in France are higher). They have developed extensive and sophisticated regularisation mechanisms, which are used to a significant degree although (particularly in the case of France) with a serious lack of transparency.¹⁰⁵ In both countries, the asylum process is caught up in the issue of illegal immigrant stocks, although a considerable proportion of irregular migration takes place outside of the asylum nexus. Policy responses include more aggressive deportation of failed asylum-seekers, toleration, and regularisation of some on humanitarian grounds. The extent to which medium-level stocks of illegal migrants are actually managed is open to debate – especially in the UK, which we classify as having high irregular TCN stocks.

The ideological opponents of regularisation

(Austria, Germany)

These are distinguished by their political opposition to regularisation as a policy instrument, even though Germany uses mechanisms that amount to regularisation (awarding ‘tolerated’ status) and in addition several small-scale programmes for specific target groups; generally, both Germany and Austria extensively utilise regularisation mechanisms.¹⁰⁶ In both countries, the asylum system is thought to be linked to the creation of illegal immigrant stocks, although the number of asylum applications in both countries has sharply decreased recently: this is particularly true in Germany, where asylum applications have constantly decreased since the early 1990s. In both countries, stocks of irregular migrants have significantly decreased as a result of EU enlargement. Despite this, the stock of irregular migrants in Germany is considered to be relatively high, resulting in significant social exclusion and labour market segmentation.

The non-regularising ‘new’ Member States

(Bulgaria, Cyprus, the Czech Rep., Latvia, Malta, Romania, Slovenia)

To some extent, the principal characteristic shared by these countries is transition from state-driven to market-based economies, with the implicit larger role for the informal economy. With the major exceptions of Cyprus and the Czech Rep., all have low stocks of illegal migrants, with little policy to manage these. The situation is acute with Cyprus, which has high immigrant stocks on temporary permits: there is an interaction with the asylum system, going in the opposite direction from the usual

¹⁰⁵ The data for France (see Fig. 3) show this; the UK is unable to provide data, but we believe that the figures are very high.

¹⁰⁶ Germany is the foremost country in awarding legal status through mechanisms – see Fig. 3

case in Europe, alongside the more normal immigration— asylum input. Malta also has an asylum system problem, but one stemming from illegal immigration feeding directly into the asylum process and applicants forbidden to work. None has had any regularisation programme, and none has a functioning regularisation mechanism:¹⁰⁷ there is, therefore, no policy for the management of irregular migrant stocks in these countries.

3.2.2 Intervening variables that might explain policy differences

This is necessarily speculative, but we do need some sort of theoretical explanation of why some countries respond to irregular migration with a particular policy instrument, or indeed do not respond. Proceeding from the Member State responses to the ICMPD questionnaire (see also §4), the following observations can be made:

- (1) The ideological opponents of regularisation (Germany and Austria) believe that it constitutes a ‘pull factor’ for future illegal migration flows. This view is also shared by France and Belgium (and possibly the UK)
- (2) The Nordic countries, Belgium, Luxembourg and the Netherlands emphasise humanitarian reasons as a primary issue for regularisation policy
- (3) The southern countries emphasise managing the labour market (including labour recruitment problems), combating the large informal economy, and trying to maintain the legality of residence of TCNs
- (4) The regularising new MS put forward a variety of reasons for regularisation, including humanitarian reasons, managing illegal residence, bringing immigrant workers within the tax and social security regime, and securing long-term integration
- (5) The non-regularising new MS appear not to have formulated policy positions, and some (at least) might be described as agnostic on the issue.
- (6) Family reasons constitute an important reason for regularisation, especially in France; family reasons (often converging with the notion of ‘strong ties’) have also been important grounds for regularising migrants in an irregular situation in various other countries, including Belgium and Sweden.

On the basis of the above observations, we can posit the following as possible intervening variables that can explain policy differences:

- (a) Differing labour market structures – particularly concerning informal employment
- (b) The role of ideology and sanctity of law in policy formulation
- (c) The degree of pragmatism in policy formulation (contradicts point (b))
- (d) The extent and phase of migration – i.e. recentness and lack of state infrastructure
- (e) The role of asylum policy, i.e. managing rejected asylum-seekers after extended processes

¹⁰⁷ To be accurate, Cyprus, Latvia, Malta and Romania have regularisation mechanisms that amount to temporary ‘toleration’; it is not known if these have been utilised. See Appendix B country profiles, for more information.

- (f) The design of the framework for legal migration, notably concerning admission channels

Given that these variables show very different values across the EU (27), it is important to bear them in mind when formulating possible policy options for the region. Furthermore, we have presented here a static picture of different policy approaches. In reality, policy is dynamic and constantly evolving: in particular, we note a trend toward the greater use of regularisation mechanisms across most of the older EU Member States. In some cases, this trend runs parallel with the use of programmes (as in Spain and Greece, for example); in other cases, it seems to have been adopted as a conscious alternative to programmes (as in Belgium, France and the UK).

3.3 Policy issues identified in this study

Table 5 (along with the policy regime clusters) shows something of the diversity of approaches to regularisation across the EU. This diversity is, in our view, explained by the intervening variables listed above.

3.3.1 Policy effectiveness of regularisation programmes since 1996

In evaluating policy effectiveness in all EU countries, we are faced with an appalling lack of data, systematic follow-up or research. Only two countries (Spain¹⁰⁸ and France¹⁰⁹) seem to be able to produce an estimate of budgetary costs (for 2005 and 1997, respectively). Only one country (Spain) monitors the progress of legalised immigrants in the social security system; France had a follow-up survey for its 1997 programme, but nothing for its 2006 small-scale programme.¹¹⁰ Italy recently commissioned a large-scale survey¹¹¹ which is a sophisticated evaluation of the 2002 regularisation, while Belgium has commissioned an in-depth evaluation of labour market outcomes of persons regularised during the 2000 programme.¹¹² Greece and Portugal have no evaluations of policy outcomes.

3.3.1.1 Retention of legal status

The Italian mid-2005 survey estimated that regularised migrants represented 28% of the immigrant population, and that 98% retained their legal status. 88.5% renewed their permits with an employer, although loss of employment appears as a significant risk. For Spain, Arango and Finotelli¹¹³ report

¹⁰⁸ Spanish government reply to ICMPD questionnaire.

¹⁰⁹ Not included in the French government reply to ICMPD questionnaire: see REGINE country study for France, for details.

¹¹⁰ See REGINE country study for France.

¹¹¹ Published (in English) as Cesareo, V. (2007): *Immigrants Regularization Processes in Italy*, Milan, Polimetrica.

¹¹² Centrum voor Sociaal Beleid, Universiteit d'Anvers, Groupe d'études sur l'ethnicité, le racisme, les migrations et l'exclusion, Université Libre de Bruxelles, 2008 : *Before and After La situation sociale et économique des personnes ayant bénéficié de la procédure de régularisation en 2000 (Loi du 22 Décembre 1999)*, available at <http://www.ulb.ac.be/socio/germe/documentsenligne/BAfr.pdf>,

¹¹³ REGINE country study for Spain.

that a year after regularisation some 80% were still in the social security system and were able to renew their residence permits. In both Spain and Italy, expert reports conclude that regularisation has had a significant effect in reducing illegality. This is probably less true for the regularisations in Greece, although no reliable data or studies are available.¹¹⁴

For Spain, our report concludes that transition back into the informal sector was low for those migrants working in construction and restaurants, but very high (up to 90%) for agriculture and housekeeping. There is also an observable trend for a change of employment sector after regularisation – from agriculture to construction (males) and from domestic work to restaurants (females). For Italy, the study cited concludes that migrants' actual employment often differed from that shown on the residence permit;¹¹⁵ on the other hand, it calculates that in the South of Italy employment opportunities for legalised workers were roughly doubled in construction and agriculture. Again, for Greece and Portugal there are no data.

We should note the European practice in regularisations of granting work visas, temporary cards (e.g. 6 months) or very short-term permits (1 or 2 years). This is in contrast to the amnesties of the USA and elsewhere, which grant long-term residence rights with a view to citizenship. The European policies are of two broad types: those that are predicated on immigrants as workers, and tend to recreate illegal statuses where labour market conditions are poor; and those that are predicated on humanitarian or social inclusion issues. In both cases, 6-month or 1-year permits are the norm, with onerous (and frequently different) conditions for their renewal or conversion to a normal residence permit. There are also some serious problems of a bureaucratic nature in implementing the transition from work visas, temporary cards or permits to normal residence permits. Thus, the award of longer-term statuses would seem to be an obvious route to improving retention rates; equally, setting different criteria for permit renewals is counterproductive and should be avoided.

3.3.1.2 Criteria for eligibility

Most of the regularisation programmes have similar criteria, although with different emphases on health status, ethnicity, family connections etc. The principal variable criterion of note is that of employment contract or employment record (as distinct from social insurance payments); a pattern is evident that requiring employers to actively participate in the regularisation process leads to a more successful outcome. When the programme is run in parallel with enforcement of labour laws by the Labour Ministry (i.e. a clampdown on the informal economy), and the dual Ministry approach also actively involves all the major social partners, the policy is more securely effective. The Spanish programme of 2005, as well as the Italian one of 2002, shows superior results over previous programmes (particularly compared with the Greek programmes) apparently for these reasons. The

¹¹⁴ For an explanation of why this is likely to be the case, see REGINE country study for Greece.

¹¹⁵ This is also shown by Reyneri's study of earlier Italian regularisations, where falsified employment contracts and complex mixes of formal, informal and even fraudulent employment were common. See Reyneri, E. (1999): "The mass legalization of migrants in Italy: permanent or temporary emergence from the underground economy?", in Baldwin-Edwards, M., Arango, J. (eds): *Immigrants and the Informal Economy in Southern Europe*, Routledge, 1999, pp. 83—104.

conclusion would seem to be that regularisation programmes are suitable for irregular migrants in secure employment situations, whereas general or unfocused amnesties should be avoided.

3.3.1.3 Possible encouragement of illegal migration flows to or from the territory

The existing research, including government answers to the ICMPD questionnaire, does not support the claim that legalised migrants subsequently move to other EU countries. Indeed, it is counter-intuitive to suppose that migrants with a recently-acquired legal status in one country would choose to re-migrate and lose that status.

On the other hand, there is evidence that irregular migrants make their way through northern European states to those in the South, and also vice versa.¹¹⁶ This is the consequence of the Schengen system, and has no relation to regularisation opportunities, but rather to those in national labour markets. Such a consideration is outside the remit of this project.

Insofar as encouragement of future migration flows is concerned, on the basis of available evidence it is impossible to quantify to what extent large-scale regularisations might play a role; in the case of the USA, there seems to be a very limited effect.¹¹⁷ As mentioned elsewhere, irregular migration is in many countries a substitute for legal, organised labour migration flows: again, it is employment opportunities and information networks related to those which are pertinent. One particular type of flow has been empirically related to regularisation (specifically to that of Spain in 2005): this is the stimulation of former illegal residents actually outside of the country at the time of the regularisation programme.¹¹⁸ This effect is the result of regularisation criteria focused on past residence, rather than continuous and current residence: reformulation of criteria may well be appropriate in the light of this new evidence.

3.3.1.4 Bureaucratic management of programmes

The management of large-scale programmes has been a significant problem for almost all countries, with unexpectedly large numbers of applicants, insufficient machinery to receive and process applications, staff shortages and various unpredicted difficulties. The consequence, in almost every country, has been long queues of applicants, massive delays, and (in many cases) continuous extension of deadlines and postponement of decisions.¹¹⁹ Variable interpretations of the regularisation legislation across regions or prefectures appear as a significant problem resulting in highly unequal

¹¹⁶ This is specifically noted in the case of East Europeans migrating to Spain via Germany – see REGINE country study for Spain.

¹¹⁷ Orrenius, P., and Zavodny, M. (2001): 'Do amnesty programs encourage illegal immigration? Evidence from IRCA', Federal Reserve Bank of Dallas, Working Paper 0103.

¹¹⁸ Elrick, T. and Ciobanu, O.: 'Evaluating the Impact of Migration Policy Changes on Migration Strategies: Insights from Romanian-Spanish migrations', *Global Networks* (forthcoming).

¹¹⁹ The Greek programme of 1998 (Green Card) was particularly notable for its delays and deadline extensions, with very slow processing of applications. See REGINE country study for Greece.

treatment according to nationality, or region of application. This latter problem is perhaps worst in the case of regularisations in France.¹²⁰

One issue that has scarcely been addressed is the procedure through which applications are made. Several factors emerge as both crucial and variable in the way they are implemented across countries (and sometimes, as in the case of France, even within a country). These are:

- The importance of involving civil society and migrant associations in the process, from the planning stage and throughout the implementation phase
- The need to guarantee protection from expulsion to applicants during the process
- The mechanism(s) by which the applications are evaluated – i.e. through documents and other checks or requiring personal interview

In the last case, the scant evidence suggests that personal interview alters regularisation programmes such that they start to resemble mechanisms: thus, a lack of strict evaluation criteria tends to emphasise subjective (more personal) judgements about applicants. Equally, the administrative burden associated with personal interview (and any appeal rights) adds considerably to the costs of such a programme. Thus, the personal interview approach – at least on the face of it – would seem to promote uncertainty, inequality of treatment, and delayed implementation of the programme.¹²¹

Of all programmes examined in any detail, best practices are most easily identified in the Spanish programme of 2005. The organisational aspects of the programme, even when encountering unexpected problems, are exemplary: they consisted of 742 information points, recruitment of 1,700 temporary staff, support from trade unions and migrant associations, and strong management techniques. These latter included a clear administrative division between social security offices for collecting applications and the Interior Ministry for processing them. In addition, the Labour and Interior Ministries established electronic systems for information exchange between ministries and for automatic renewal of residence permits.¹²²

3.3.1.5 General summary

The overall impact of regularisation programmes is positive, with apparently small but permanent reductions in illegal residence and/or employment, and little evidence to support the claims of increased illegal migration flows in any direction. What is clearly missing, however, is systematic evaluation of policies and appropriate corrective responses. Even the most basic data, such as total number of applications, total number regularised, and subsequent renewals, are missing from the great majority of MS programmes. This data deficit should be a priority issue, since without even basic data, policy analysis is at best speculative and, at worst, futile.

Related proposal(s): Options 1, 2, 3, 4, 5,

¹²⁰ See REGINE country study for France.

¹²¹ This last point seems to be one of the main factors in the poorly-managed 1998 Green Card programme in Greece. See REGINE country study for Greece, for details.

¹²² See REGINE country study for Spain.

3.3.2 Policy effectiveness of regularisation mechanisms

Most Member States do have at least limited mechanisms in general immigration legislation under which illegally staying persons can be regularised on specific humanitarian grounds.¹²³ The grounds for awarding humanitarian stay are varied (see §3.1.2) and may include family or other ties to the country of residence, medical grounds, ‘hardship’ (which may include both of the former), and protracted asylum procedures. In addition, some Member States also utilise such mechanisms to ‘rectify’ problems resulting from legislative changes.¹²⁴ However, humanitarian mechanisms are often used to award more secure permits to persons who otherwise do not meet the conditions for a superior legal status or who are residing on restricted, temporary permits and have, contrary to expectations and the terms of their stay, developed substantial ties with their country of residence.¹²⁵ This also suggests that the target population of regularisation mechanisms in EU Member States actually includes a variety of categories of persons who are, strictly speaking, not illegally staying.¹²⁶

In sum, regularisation mechanisms provide a flexible legal means to address specific situations that cannot easily be solved otherwise. This suggests that regularisation mechanisms play an important functional role as a corrective measure supporting comprehensive strategies of managed migration and allowing a flexible accommodation of humanitarian and other concerns.

Gauging the policy effectiveness of regularisation mechanisms is an impossible task, given the massive deficit of data noted above (§3.1.2). Whereas there are data deficits and other problems with regularisation programmes, varying according to country, the situation with mechanisms is far worse. In particular, we note problems in the following areas:

- i. lack of transparency in procedures, often with arbitrary outcomes
- ii. issues of resource allocation – unknown costs of the process

¹²³ We exclude the issuing of (temporary) residence permits under Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who co-operate with the competent authorities. First, like asylum, subsidiary and refugee status, this is primarily a protection related permit. Secondly, and perhaps more important, permits issued under the directive do not create an entitlement to legal residence and are explicitly of a temporary nature. Thus, the permit caters only for immediate protection needs and in a sense, in particular as smuggled migrants are concerned, has a functional role, namely to support legal proceedings against traffickers and human smugglers.

¹²⁴ For example, the UK domestic worker regularisation programme implemented between July 1998 and October 1999 aimed at rectifying expected problems following an amendment of the Overseas Domestic Workers Concession announced on 23 July 1998 (See REGINE country study for the UK). However, anecdotal evidence suggests authorities often use also other, informal mechanisms to rectify ‘practical’ problems resulting from changes of immigration legislation including awarding residence permits despite conditions not being met. There is also evidence that in cases where applications from abroad have been made mandatory in the case of family reunification, authorities have been advising applicants already in the country how to best apply from “near abroad”. (Informal information gathered in the ICMPD-led project on “Civic stratification, gender, and family migration policies in Europe”. On the project, see <http://research.icmpd.org/1233.html>).

¹²⁵ For example, in Belgium a significant number of students, who had developed family or other ties to Belgium, apparently benefited from regularisation mechanisms under article 9.3 of the law of December 15th 1980 "Betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen." (Information provided by Koen Dewulf (Centre for Equal Opportunities and Opposition to Racism) in the framework of the International Seminar on Longitudinal Follow-up of post-immigration patterns based on administrative data and record-linkage, Belgian Federal Science Policy, Brussels, 23 June 2008.)

¹²⁶ Apart from persons on temporary, restricted permits, this also includes asylum seekers who, for the duration of their asylum procedure, are legally staying.

- iii. issues of advance planning
- iv. lack of involvement of stakeholders and social partners

Provided that mechanisms are used as a policy complementary to programmes, these problems are not perhaps so serious. However, we do question the policy effectiveness of the experience of large-scale users of mechanisms (e.g. France). Individual applications are time-consuming, may be costly, and without careful (and even more costly) review procedures can have highly variable outcomes for apparently similar cases. As a result of the lack of clear criteria and procedural rules, it is often left to the courts to define the scope of and criteria for regularisation mechanisms. Although sometimes established as a substitute for regularisation programmes (as in Belgium or France), the functions and *modi operandi* of regularisation mechanism and programmes are different, and the distinctive successes of each policy instrument should be noted and used appropriately.

3.3.2.1 A functional argument for limited regularisation mechanisms in all MS

Against this background, the lack of regularisation mechanisms in some Member States is a reason for concern. The following countries do not have any legal mechanism¹²⁷ by which they can regularise on an individual basis:

- Bulgaria
- The Czech Republic
- Italy
- The Netherlands
- Slovenia

Furthermore, there is a similar number of countries that appear to have restricted ability or tendency to regularise. In terms of setting minimum standards across the EU, it would seem desirable to specify that every MS has at its disposal a basic continuous regularisation mechanism. It is inconceivable that there is no need for humanitarian and other considerations for the individual granting of legal status in every Member State. As noted above, such mechanisms are probably more appropriate instruments for regularisation of illegal residents in vulnerable employment or financial situations or with health problems.

Of those countries which do grant legal status through such a mechanism, many award temporary statuses that cannot be renewed or provide non-statuses (temporary suspension of removal orders) that are not considered a legal status, although beneficiaries of such non-status are usually not considered illegally resident either. Some principles setting out minimum standards on the type and renewability of such permits would also seem to be a legitimate area of legislation.

The procedures for awarding humanitarian statuses vary. In some countries, there is a fully-fledged application procedure, including the right to appeal against negative decisions, whereas in others a humanitarian status/a non-status is awarded *ex officio* without application and without any legal

¹²⁷ One could argue that short-term humanitarian permits for asylum seekers are a substitute for a regularisation mechanism, but we do not do so for the purposes of the REGINE project.

remedies against administrative decisions. In addition, in some Member States (notably in Germany, and, outside the European Union, in Switzerland), special bodies (so-called ‘hardship commissions’) have been charged to adjudicate ‘hardship cases’ or to advise authorities on decisions on humanitarian stay. In some cases, commissions with an advisory mandate or otherwise informally include other stakeholders from the NGO community.¹²⁸ The implications of different institutional set-ups and procedural variations have not been investigated in this study. There is some evidence, however, that ex-officio procedures without any possibilities for legal redress are problematic and may result in arbitrary and inconsistent decisions. Generally, the effects of different institutional designs call for further study and might be a suitable issue for the identification and exchange of good practices.

Related proposal(s): Options 1c, 1d

3.3.3 Avoiding the creation of illegal immigrants

The assumption is frequently made that immigrants with an irregular status are in such a situation through crossing a border illegally, breach of visa conditions, or rejection of asylum applications. Table 1, above, gives an indication of the main categories of illegal entry, residence and employment. Although the majority of irregular residents participating in regularisation programmes are in the above categories, a significant minority (varying by country of residence and origin) is in an irregular status for other reasons. These are shown in Table 2, as the bottom two rows. We classify these categories as ‘created illegal immigrants’, for which state policy is primarily responsible. Below, we identify some specific cases.

3.3.3.1 Persons whose residence permits have expired, but they remain in employment

This occurs for a variety of reasons directly emanating from state procedures. First, weak bureaucracy and inefficiency in residence or work permit procedures can result in long delays and irregular status – particularly where permits are of short duration (1 or 2 years). Secondly, onerous obligations for the renewal process may lead to immigrants being unable to satisfy those conditions; such obligations include

- i. the requirement of a full-time employment contract
- ii. the payment of social insurance as if in full-time employment¹²⁹
- iii. very high application fees for residence/work permits¹³⁰

¹²⁸ In Austria, for example, NGOs, alongside other stakeholders, are represented in the Advisory Council on Asylum and Migration Affairs which (as two separate institutions) was first created by the 1997 Aliens Law. The Advisory Council was involved in decisions on humanitarian stay in an advisory role between 1998 and 2005. Apparently its recommendations were largely followed by the Ministry of the Interior (Interview, Karin König, Vienna City Administration, 27 February 2008).

¹²⁹ In Greece, the average annual payment of social insurance by TCN workers in the construction sector exceeds that made by Greek workers, but is still insufficient to satisfy the criterion of full-time employment.

¹³⁰ Application fees for residence permits range from €15 in Italy, €50 in Germany up to €900 in Greece (long-term) and €1,078 in the UK (indefinite leave to remain). Excessive fees for residence permits are proscribed in both the *European Convention on Establishment* (ETS 019) and the *European Convention on the Legal Status of Migrant Workers* (ETS 093). Article 21(2) of ETS 019 states that the amount levied should be “not more than the expenditure incurred by such formalities”. ETS 093 goes further, and states in Article 9(2) that residence permits should be “issued and renewed free of charge or for a sum covering administrative costs only”. Article

- iv. the requirement to appear in person, or to queue, taking up many working days when the employee is not granted permission to do so by the employer
- v. unnecessary documentation, often requiring costly official translations and copies, when the state bureaucracy either already has such documentation or does not need it.

In our view, such causes of illegal residence are needless and require immediate corrective action in policy and bureaucratic implementation.

Related proposal(s): Option 10a

3.3.3.2 Persons who migrated as minors or were born on the territory

In a considerable number of EU countries (and our surveys did not specifically focus on this issue), it is evident that there is a serious problem with children who have been born on the territory and could not receive the citizenship of the host country, who migrated as children accompanying their parents, or who arrived as unaccompanied minors and were institutionalised. In the Greek regularisation of 2005, 13.1% of illegal immigrants awarded legal status were children under 16, and 3.9% of recipients of 1-year individual humanitarian cases were under 16.¹³¹ In France, residence permit data for 2006 show that 53% of those granted a permit on the basis of residence >10 years were aged 18-24: presumably, they had migrated to France as children <14.¹³² Similarly, a preliminary analysis of regularisation data on persons regularised in Belgium in 2005 and 2006 on the basis of article 9 of the Law of 15 December 1980 (as amended) shows that roughly 30% of all persons regularised were in the age group 0-19 of which about 23% were in the age group 0-14.¹³³

In all cases, upon reaching the age of majority such children are required to have their own residence permit: in many EU Member States, this results in an illegal status and even deportation orders against individuals who grew up or were actually born in the country. In our view, given that all Member States have ratified the UN Convention on the Rights of the Child, this is a prime area for EU legislation to protect the following:

- i. the rights of children born in the territory who reach the age of majority
- ii. the rights of children of irregular migrants, or who arrived as unaccompanied minors

Related proposal(s): Option 6b

10 of the Proposal for a Council directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (COM (2007) 638 FINAL) contains a similar clause.

¹³¹ See REGINE country study on Greece.

¹³² See REGINE country study on France

¹³³ Fernando Pouwels, 'Data aanvraag KSZ-DVZ', presentation at International Seminar on Longitudinal Follow-up of post-immigration patterns based on administrative data and record-linkage, Belgian Federal Science Policy, Brussels, 23 June 2008

3.3.3.3 Persons whose refugee status has been withdrawn

By its very nature, refugee status is a temporary, transitory status which eventually should lead to either 'local integration' (including acquisition of citizenship) or repatriation.¹³⁴ Against this background, article 11 of Council Directive 2004/83/EC¹³⁵ ('Qualification Directive') defines a set of conditions under which refugees cease to be refugees.¹³⁶ These include return to the country of nationality or previous residence from which he or she has fled, re-acquisition of his or her former nationality, acquisition of a another states' nationality and, importantly, if the reasons for granting a refugee status cease to exist. In the latter case, the expectation is that (former) refugees will leave the country of asylum, either voluntarily or under compulsion.¹³⁷ Withdrawing refugee status without consideration of the feasibility of return, however, risks systematically creating a semi-legal (non-deportable) category of aliens.¹³⁸ The Commission proposal to extent the scope of the Long-term Residence Directive to persons under subsidiary protection and refugees can be seen as a sensible first step, but it does not provide any mechanism for persons resident for less than five years (see also below, §3.3.5).

Related proposal(s): Option 8

3.3.3.4 Retired persons with limited pension resources

Third country nationals who are dependent on pension arrangements external to the EU are particularly vulnerable to exchange rate fluctuations, as well as to inadequate uprating of benefits for satisfying cost of living increases in their country of residence. These problems are further compounded when Member States set minimum resources levels at a high rate, thus disqualifying retired TCNs with low pensions from lawful residence. In the case of future migration flows, the high personal resources requirement may well be prudent public policy; a distinction has to be drawn between potential migrants and those with many years of residence. There is little to be gained from

¹³⁴ The Commissions Policy Plan on Asylum underlines the importance of resettlement the third 'durable solution' as an instrument of EU asylum policy (see *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Policy Plan on Asylum: An Integrated Approach to Protection across the EU*. Brussels, 17 June 2008, COM(2008)360). Although resettlement is an important instrument of asylum policy in a global perspective, it mainly applies to insecure or overburdened first countries of asylum outside the Union context. Analytically, it is in itself not a durable solution in the same sense as the other two durable solutions; also at the end of resettlement, there should be either repatriation or local integration.

¹³⁵ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

¹³⁶ Article 14 in turn defines conditions for the revocation of refugee status on exclusion grounds (as defined by Article 12).

¹³⁷ It should be noted that although most Member States do have rules on the loss of refugee status, it seems that few countries systematically review refugees' status in respect to whether the grounds for granting refugee status still exist.

¹³⁸ In Germany, for example, refugee status is granted for three years, after which a case is reviewed as to whether the grounds of granting refugee status still apply. In a significant number of cases, refugee status is withdrawn, because of changed circumstances in the country of origin. However, the majority of former refugees apparently remain in the country under toleration status (comment, Harald Lederer, Federal Office for Migration and Refugees, asylum and refugees working group, 2nd official PROMINSTAT workshop, 12-13 June 2008, Bamberg).

denying residence permits to existing residents over the age of retirement: it merely creates yet another category of ‘illegally staying’ that is probably non-deportable anyway. In line with ECHR jurisprudence conferring rights on legal or illegal residents (see §6.2), the minimum resources provision of the EU long-term permit should be dropped for pensioners already residing on the territory.

Related proposal(s): Option 6a, 10

3.3.4 Regularisations in lieu of labour migration policy

In the expert studies commissioned for this project, but also generally in the academic and professional literature, most of the countries engaging in large-scale regularisation programmes have done so partly through their failure to recruit sufficient TCN workers (other than seasonal labour) through official channels.¹³⁹ In particular, Greece, Italy, Spain and Portugal exhibit this characteristic, although illegal labour migration can also be seen as structurally embedded throughout highly developed capitalism, including the USA and Northern Europe.¹⁴⁰

The result of simple abandonment of regularisations would be to increase the extent of informal employment and the size of the informal sector. The problem of illegal employment has already been addressed in a Commission study of 2004,¹⁴¹ which noted the apparent disinterest of MS in identifying and dealing with the issue of the enlarging informal sector: furthermore, the economic sectors primarily affected (construction, services, tourism, agriculture) are those in which illegal immigrants are almost exclusively employed.

One solution, carried out on a small scale under the Spanish *Contingente* of the 1990s, is to permit illegal residents to apply for work permits as if they were not resident – in other words, allocating a quota for overseas recruitment to illegally-resident TCNs. This has also been done on a large scale in 2006 by Italy,¹⁴² whereby some 350,000¹⁴³ illegal TCN workers were granted residence permits. Thus, a *de facto* regularisation was carried out and mostly evaded public and political scrutiny. In the long run, however, more pro-active and open labour recruitment schemes are required, with the objective of shifting illegal migration flows into formal processes.

Related proposal(s): Option 10b

¹³⁹ See: Reyneri, E. (2001) *op. cit.*, and Baldwin-Edwards, M. and Arango, J. (eds) (2000): *Immigrants and the Informal Economy in Southern Europe*, London, Routledge. This policy failure is also openly acknowledged by the relevant MS returns of the ICMPD questionnaire, although geographical location and other factors are also relevant for the magnitude and characteristics of irregular immigrant stocks and flows.

¹⁴⁰ Baldwin-Edwards, M. (2008): ‘Towards a theory of illegal migration: historical and structural components’, *Third World Quarterly*, 29/7

¹⁴¹ Renooy, P. *et al.*: ‘Undeclared work in an enlarged Union’. Final Report, DG Employment, May 2004

¹⁴² The questionnaire return by the Italian government makes no mention of this issue: see REGINE country study on Italy. For a detailed study of the use of annual quotas as regularisation policy in Italy, see Cuttitta, P. (2008): ‘Yearly quotas and country-reserved shares in Italian immigration policy’, *Migration Letters*, 5/1

¹⁴³ *Ibid.*, p. 48

3.3.5 The role of national asylum systems

The relation of asylum systems to the irregular status of resident TCNs is central to the debate, yet has attracted hardly any serious research. One thing that has always been evident is that while applying for asylum represented a relatively easy migration route into Northern European countries starting in 1982,¹⁴⁴ the underdeveloped asylum systems of the southern European countries were eschewed in favour of clandestine migration.¹⁴⁵ With accession of more MS, the variation in protection and reception conditions accorded by national asylum systems has increased to the point that a few countries have recently stopped automatic implementation of Dublin II returns (notably, to Greece). Thus, in some countries migrants gravitate towards the asylum system, whereas in others they mostly shun it. In both cases, there is an impact on irregular migrant stocks.¹⁴⁶ Table 1 indicates, in a crude evaluation, those countries where the role of the asylum system in terms of regularisation issues appears to be significant.

Three strands of the asylum process stand out as being problematic, and all three would benefit from Community instruments for their regulation:

- i. Variable chances of receiving protection, according to MS
- ii. Access to long-term residence for those receiving asylum or subsidiary protection status
- iii. The length of asylum procedures, which practically and legally require limitation

As with other issues, more effective management of this area would reduce illegal migrant stocks and make regularisation less needed as a policy instrument.

Various studies and reports have highlighted the highly variable chances of receiving protection in the European Union. The variation in recognition rates is probably most evident in the case of Chechen refugees. Recognition rates for Chechens vary between 74.8% in Austria (average 2002–06), 28.3% in Belgium (average 2004–06), 26.2% in France (average 2000–07), 23.2% in Germany and 5.2% in Poland.¹⁴⁷ The recent Policy Plan on Asylum recognises the problematic of heterogeneous administrative practice in spite of harmonised legislation and proposes several measures to make access to protection more equitable across Europe.¹⁴⁸

In addition, in the context of mass refugee flows following the Bosnian and Kosovo crises in the 1990s, war refugees, a majority of whom had entered their destination countries illegally,¹⁴⁹ were often accommodated by ad hoc measures outside the asylum system which often amounted to de facto regularisation. Thus, in response to the refugee crisis, Austria issued temporary permits to Bosnian

¹⁴⁴ Baldwin-Edwards, M. (1991): 'Immigration after "1992"', *Policy & Politics*, 19/3.

¹⁴⁵ Baldwin-Edwards, M. (2002): 'Semi-reluctant Hosts: southern Europe's ambivalent response to immigration', *Studi Emigrazione*, 39/145.

¹⁴⁶ The complex nexus between regularisations and asylum is by a recent comparison of German and Italian approaches towards irregular migration. See Finotelli, C. (2007): *Illegale Einwanderung, Flüchtlingsmigration und das Ende des Nord-Süd-Mythos: Zur funktionalen Äquivalenz des deutschen und des italienischen Einwanderungsregimes*. Hamburg: Lit

¹⁴⁷ Reichel, D. Hofmann, M. (2008): *Chechen Migration Flows to Europe - a statistical perspective*. Forthcoming

¹⁴⁸ COM(2008) 360, *op.cit.*

¹⁴⁹ In Germany, for example, an estimated 80% of Bosnian war refugees entered the country illegally. See K. Buchberger, Die Repatriierung von Kriegsflüchtlingen in Europa nach Bosnien-Herzegowina in den ersten drei Jahren nach dem Daytoner Abkommen unter besonderer Berücksichtigung der deutschen Rückführungspolitik. Unpublished Masters thesis. University of Münster, 1999, p.31

refugees under the provisions of the Aliens Act, the Netherlands and Italy introduced a novel status explicitly designed for temporary protection purposes, and Germany, Sweden, and France and the UK changed or used existing humanitarian statuses.¹⁵⁰ Finally, following the Kosovo crisis, a temporary mechanism was established on the European level,¹⁵¹ which harmonises the different ad-hoc responses taken by EU Member States during the 1990s but so far has not yet been put into practice. However, as the objective of the temporary protection mechanism was not so much to define a legal status for war refugees, but rather to provide a mechanism for ‘burden-sharing’ among EU Member States, subsidiary protection status as defined by the qualification directive (Council Directive 2004/83/EC)¹⁵² is the much more relevant legal provision, not least since the thresholds to identifying a situation calling for the putting into force of the temporary protection mechanisms are quite high and quite unlikely to be invoked but in the most exceptional circumstances.

Related proposal(s): Option 11

3.3.6 The lack of coherent policy on non-deportable aliens

There exists a small but significant number of persons who, for various reasons, cannot be deported: they are left in a sort of limbo of long-term toleration, varying in extent and treatment across MS. This includes, in certain MS, refugees not entitled to asylum because of persecution by non-governmental groups; unsuccessful asylum-seekers who cannot be deported; illegal immigrants of unknown provenance; and TCN family members of EU citizens with a transitional or restricted status before marriage, for whom several MS require application from outside the territory.¹⁵³

Some guiding principles on limiting the number of such cases to an absolute minimum, by specifying formal procedures for the legalisation of certain ‘tolerated’ statuses, would aid a small reduction in the extent of illegal residence across the EU. In some cases, temporary residence permits might be appropriate; in others, such as family members of EU nationals, clearly more permanent statuses are needed.

Related proposal(s): Options 7, 8

3.3.7 Regularisation for family-related reasons

There appears to be a significant extent of ‘spontaneous’ family reunification – that is, children and spouses of TCNs who reunite with their families outside the legal framework of family reunification. This occurs for a variety of reasons, including: serious delays with the formal process, lack of

¹⁵⁰ Van der Selm, J. (2000): ‘Conclusions’, in Van der Selm, J. (ed): *Kosovo’s Refugees in the European Union*. London and New York, Pinter. See also Van Selm-Thorburn, J. (1998): *Refugee Protection in Europe. Lessons of the Yugoslav Crisis*, The Hague, Boston, London, Martinus Nijhoff Publishers.

¹⁵¹ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof

¹⁵² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

¹⁵³ Presumably, travel to another EU country to make that application, with a return of the entire family invoking Treaty principles of free movement, could be an option. Nevertheless, it is an unnecessary impediment to the right of family unity, and the situation creates problems for little purpose.

understanding of the procedure itself, difficulty in meeting the often stringent income and housing requirements laid down by Member States. Regardless of the desirability, or otherwise, of this phenomenon, the consequence is that there are stocks of ‘illegally staying’ resident TCNs whose presence poses a policy problem for Member States.

As with the regulation of labour immigration (see §3.3.4), family reunification requires application from outside the territory. Regardless of their ability to meet other criteria (e.g. housing and income), migrants are unable to apply for family reunification without leaving the territory and risk being refused readmission. Given the current trends in ECHR jurisprudence, particularly involving family rights, we recommend that exceptions to the extra-territorial requirement be permitted. It is highly unlikely that any MS would try to deport such family members (particularly as the legality of doing so is questionable), therefore it seems desirable to amend the family reunification rules to permit what amounts to legalisation of *de facto* family reunification.¹⁵⁴

Related proposal(s): Option 12

¹⁵⁴ This has been done in several regularisation programmes; here, we recommend that it should be a permanent (albeit unadvertised) policy.

4 Government positions on policy¹⁵⁵

4.1 Views on national policies for regularisation

Concerning the need for policy on regularisation at the national level, 10 Member States either did not express an opinion or failed to return the questionnaire. Three Member States (the Slovak Rep., Romania, Bulgaria) emphasise that a mechanism is sufficient policy; four (Belgium, Portugal, Spain, Greece) identify management of informal employment as a key factor in the need for programmes; and four (France, Greece, Italy, Poland) see regularisation programmes as an important tool in migration management. One Member State (Austria) considers that humanitarian reasons are the only legitimate reason for regularisation; six other Member States emphasise humanitarian reasons, along with several other factors (Belgium, Hungary, Luxembourg, Poland, Portugal, Spain). One Member State (France) considers a regularisation mechanism to be an important tool in dealing with non-deportable aliens; one (Greece) emphasises the criterion of social integration of immigrant populations for its recent regularisation policy. The Member States' positions more or less correspond with actual practice over the last decade, i.e. with a majority using the policy instrument (albeit with slightly different objectives).

Of those Member States expressing extreme reservations about regularisation policy, four (Austria, Belgium, France, Germany) claim that programmes constitute a pull-factor for future illegal migration; one (the Czech Rep.) has the view that it is not an effective policy, or is a last-resort policy (Bulgaria), while Finland is of the opinion that it is not a suitable policy instrument for managing migration. Slovenia considers that regularisation cannot reduce illegal flows, but might cause them to increase. Overall, there are eight expressions of extreme reservation compared with 25 expressions of support for some sort of regularisation policy instrument(s): these total more than the number of MS respondents, owing to complex positions adopted by many MS.

4.2 Views on policy impact on other EU MS

There is an important claim, made by several Member States, that regularisation programmes impact heavily on other MS. Despite our insistence in the questionnaire that evidence or research be provided to back up any claims, only three were able to do so. These were the Czech Republic, Ireland and Poland. The Czech Rep. notes that it is a transit route to Italy; Ireland notes new inflows in order to benefit from its regularisation policy for parents of children; Poland notes an impact from Germany's policy on 'tolerated persons'. Four countries have no view on the matter; four more (Italy, the Slovak Rep., Slovenia, Spain) are of the opinion that there is no impact. Three Member States (France, Greece, Hungary) state that they "assume" that there is an impact on other countries of such policy.

¹⁵⁵ This chapter relies solely on the official positions stated by Member States that returned the REGINE questionnaire. 21 countries returned the questionnaire, although not all stated their policy positions. There remain, therefore, substantial gaps concerning MS views.

4.3 Views on the operation of the information exchange mechanism

Five Member States expressed no opinion on this issue; one (Belgium) considers the mechanism to be working well; three (Estonia, Latvia and Slovenia) consider that it is not working well, as does Italy which considers that the activities within regularisation mechanisms need to be covered. Generally, the majority of respondents approve of the information exchange and would like to see its scope of operations improved and extended.

4.4 Views on possible EU involvement in the policy area

Five Member States expressed no opinion on this issue. Three (France, Italy, Greece) would support an EU legal framework so long as it respected national policy needs; two (Estonia and Latvia) advocate the need for a common approach; and three (France, Poland, Spain) suggest the need for information exchange concerning good practices, statistical data techniques, etc. Five countries (Austria, the Czech Rep., Finland, Germany, Slovenia) express opposition to any regulation of this area, on the grounds that it is not needed or is outside the legal competence of the EU. Overall, there is no visible support for strong regulation of this policy area, but a great deal of interest in the development of research, identification of good practices, policy innovations etc. within the framework of information exchange.

5 Positions of social actors

5.1 Introduction

This chapter reviews the positions of non-state stakeholders towards regularisation policies, including trade unions, employers organisations, NGOs and migrant organisations. In so doing, the chapter draws on desk research on the positions of organisations towards regularisation, and if these are lacking, on their overall positions towards recent EU policy proposals on both illegal and legal migration as well as on irregular work; on questionnaires sent out to NGOs and trade unions; on interviews with representatives from selected organisations; and on documents provided by NGOs and other interested parties in response to our questionnaires.

All of these actors have, either in practice or in principle, and to varying degrees, stakes in regularisation processes. Thus large-scale regularisations based on employment criteria naturally fall naturally within the mandate of interest organisations (i.e. employers' organisations and trade unions) as they are designed to have a major impact on the labour market and to correct certain labour market deficiencies, notably informal employment and the resulting exploitative labour conditions. However, employment-based regularisations might also be implemented to redress problems resulting from inadequacies of legal migration channels, as a result of which some employers resort to informal channels of recruitment and to post-immigration adjustments of migrant workers.¹⁵⁶

Non-governmental organisations working on migration issues, most of which are engaged both in advocacy and provision of services to immigrants, are involved in both employment-based regularisations and those based on family, humanitarian, protection or other grounds. Employers organisations and most trade unions, by contrast, rarely consider non-employment based regularisations as falling within their mandate.

Both types of organisation – those with vested interests on the one hand and advocacy NGOs and migrant organisations on the other – have been involved in regularisation processes in several stages of the policy making process and in a number of ways. These include interest formulation, advocacy, lobbying and thus policy formulation in the broadest sense; and in terms of campaigning – disseminating information, mobilisation and monitoring of implementation during regularisation processes. Both trade unions and NGOs usually also provide legal counselling and representation to individuals, while employers organisations provide legal information on employer related aspects of employment-based regularisations. Finally, social actors too have an important role to play in regard to the evaluation of the implementation and outcome of programmes and regularisation mechanisms. Indeed, in the absence of systematic post-regularisation evaluations carried out or commissioned by

¹⁵⁶ In most continental European states, except perhaps the Nordic countries, post-immigration status adjustment was the rule, rather than the exception. In the early 1970s, for example, more than 60% of immigrants to France obtained a permit only after arrival, despite state efforts to clamp down on informal recruitment (Hollifield, J. (2004): 'France: Republicanism and the Limits of Immigration Control'. In: Cornelius, W.A., Tsuda, T., Martin, P. L., Hollifield, J. F. (Eds): *Controlling Immigration. A Global Perspective*. 2nd edition. Stanford: Stanford University Press, pp. 183-214. In other countries, such as Austria, informal recruitment mechanisms and post-immigration status adjustments have been relevant until the early 1990s.

those states that have implemented regularisation processes, NGO and trade union evaluations often provide the only source of information on outcomes of regularisations.¹⁵⁷

Over the past decade or two, there has been a marked shift in the framing of public debates on regularisation processes. Generally, the earlier focus on economic, labour market and welfare policy related aspects of regularisations has given way to more human rights based debates, reflecting wider changes in regularisation practices, along with important changes in the very nature of migration policy.¹⁵⁸ Thus, even in those countries in which regularisations were, and still are, primarily employment-based (trade unions and business organisations have mainly, and traditionally, been the interested parties), debates are increasingly centred on human rights. Where the focus is on employment, regularisation is largely seen as a possible tool against social exclusion, marginalisation, exploitation and discrimination;¹⁵⁹ family considerations or protection concerns otherwise dominate. Reflecting the shift away from labour market and economic considerations, employers organisations today are on the whole much less involved in debates on regularisation policy than they were in the 1980s and 1990s.

The remainder of this chapter is organised as follows: Section 5.2 discusses the role of trade unions and trade union positions vis-à-vis regularisations. Section 5.3 discusses positions of employers organisations and finally, section 5.4 describes positions of non-governmental advocacy organisations and migrant organisations.¹⁶⁰

5.2 Trade union positions

Generally, trade unions across Europe have had, and to some degree continue to have, ambiguous positions on regularisation policy which partly reflect a more fundamental ambiguity towards migrant workers generally, although immigrants are increasingly accepted as a core constituency by trade unions – a process which in some countries dates back as far as the 1970s and 1980s.¹⁶¹

¹⁵⁷ See for example on the 2006 (family based) regularisation in France the excellent report by the French NGO CIMADE: CIMADE (2007): *De la loterie à la tromperie. Enquête citoyenne sur la circulaire du 13 juin 2006 relative à la régularisation des familles étrangères d'enfants scolarisés*. Rapport d'observation. Avril 2007. available at: <http://www.cimade.org/boutique/3-De-la-loterie-a-la-tromperie>

¹⁵⁸ Reflecting, among others, the increasing importance of human rights norms in migration policy and the growing importance of rights-based immigration streams (asylum, family related migration) since the 1980s. On the growing importance of human rights norms see Joppke, C. (1998) (ed.): *Challenge to the Nation-State. Immigration in Western Europe and the United States*. Oxford: Oxford University Press

¹⁵⁹ See for an analysis of national frames of regularisation debates in France, Spain and Switzerland by Laubenthal, B. (2006): *Der Kampf um Legalisierung. Soziale Bewegungen illegaler Migranten in Frankreich, Spanien und der Schweiz*. Frankfurt: Campus. For an analysis of political mobilisation around the issue of irregular migration in the European Union more generally see Schwenken, H. (2006): *Rechtlos, aber nicht ohne Stimme. Politische Mobilisierung um irreguläre Migration in die Europäische Union*. Bielefeld: Transcript

¹⁶⁰ Generally, relatively few migrant's organisations have the resources to formulate their own policy positions, comment on policy proposal or get involved in lobbying to the same extent as larger advocacy organisations. Thus, the overwhelming majority of NGO responses come from established NGOs rather than migrants' organisations.

¹⁶¹ See Penninx, R., Roosblaad, J. (2000): *Trade Unions, Immigration and Immigrants in Europe 1960-1993*. New York. Oxford: Berghahn Books.

Since the 1990s – and in some countries much earlier – trade unions have also become more responsive to the needs of irregular migrants.¹⁶² In certain countries (notably France, Italy, Portugal, Spain, Greece and the UK), trade unions have been major driving forces in recent and ongoing campaigns for regularisation. From a trade union viewpoint, two main problems are associated with irregular migration and in particular with irregular work: first, the situation of irregular migrants is characterised by a lack of protection, vulnerability to exploitation and victimisation, and lack of access to welfare and other rights; secondly, low salaries and the evasion of taxes and social security contributions may lead to marginalisation and ‘social dumping’, thus causing a lowering of social standards. Regularisation, from this perspective, offers an opportunity to re-regulate informal sectors of the economy and thereby protect the interests of irregular migrants working under conditions of informality and illegality, while also protecting the interests of both legal migrants and the native population. In several instances, trade unions have also taken up a broader human rights agenda and engaged in advocacy on behalf of groups excluded from the labour market or who are only marginally employed.¹⁶³

5.2.1 National level trades union positions

Regularisation policy has been a core issue for trade unions in various countries, including Belgium, France, Italy, Portugal, Spain and the UK, and more recently in Germany and Ireland. Outside the European Union, trade unions have taken an interest in regularisation in the USA and Switzerland.¹⁶⁴ In some countries, including Portugal, trade unions were formally involved in the planning and implementation of regularisations.¹⁶⁵

Generally, unions consider regularisation as an employment-related issue, or at least potentially so. Unions’ policies on regularisation are thus closely tied to their policies regarding irregular work. At the same time, regularisations for other than on employment grounds are generally seen as not falling within the mandate of trade unions. In other countries, regularisation as such has received less attention from unions, partly reflecting the lack of experiences with employment-based regularisations and/ or the relatively low profile of illegal migration in these countries. In countries where

¹⁶² See Bauder, H. (2006): *Labor Movement. How Migration Regulates Labor Markets*. Oxford: Oxford University Press, p.23 and 200; Watts, J. (2002): *Immigration Policy and the Challenge of Globalization. Unions and Employers in Unlikely Alliance*. Ithaca. London: Cornell University Press.

¹⁶³ For example in Germany in the context of recent regularisation of long-term tolerated persons, but also in Switzerland and France (see Laubenthal, B. (2006): *op. cit.*).

¹⁶⁴ See Laubenthal, B. (2006): *op. cit.*; On Switzerland see also the response by the Swiss Trade Union “Syndicat interprofessionnel des travailleuses et travailleurs (SIT) - Response, ICMPD NGO Questionnaire, 17 May 2008. The union has successfully rallied the government of the canton of Geneva to ask for a collective regularisation of irregular workers. So far, however, the request has not been acknowledged by the federal government.

¹⁶⁵ For example, in the 1996 regularisation programme unions could – in lieu of employers – certify that applicants did have jobs, if employers refused to do so. As a member of the Consultative Council for Immigration Affairs (COCAI – “Conselho Consultivo para a Imigração”) the union was effectively involved in planning the 2001 regularisation programme. In the 2005 programme it disseminated information among potential beneficiaries of regularisation. [Source: Confederação Geral dos Trabalhadores Portugueses Intersindical Nacional (CGTP), Portugal, Interview with Carlos Trindade (Executive Committee, Migrations Department), Manuel Correia (President of “Sindicato das Indústrias Eléctricas do Sul e Ilhas”), Yasmin Arango Torres (União dos Sindicatos de Lisboa), Lisbon, 26 February 2008.]

employment-based regularisations have not received much attention, the focus generally is on irregular (undeclared and illegal) work and related issues (vulnerability of workers, exploitation, social dumping), as, for example, in Denmark, Slovenia and Sweden. Here the focus is on both legal and illegal residents, with the former (including nationals) being generally considered the quantitatively more important group.¹⁶⁶ In a variety of other MS, trade unions often have no clear position on either irregular work or illegal migration – even in cases where the extent of irregular migration is thought to be substantial, as for example, in Austria (where estimates range between 50,000 to 100,000 employed non-nationals)¹⁶⁷ and the Netherlands (where estimates range between 60,000 and 120,000).

Whether or not clearly articulated positions on regularisations exist, trade unions' policies on irregular migration generally focus on employer sanctions, better enforcement and increased work-site inspections. Thus, although unions across Europe maintain that the rights of irregular migrants should be equally protected, regularisation on employment grounds seems not to be a prominent concern for trade unions except in a relatively small number of countries.

Nevertheless, several unions have formulated explicit positions on irregular migrants – often focused, however, on irregularly employed non-nationals, covering both legally and illegally staying third country nationals. In June 2007 the Swedish trade union TCO adopted a policy concerning irregular migrant workers based on the principle that “irregular migrants, despite lack of work permits, shall enjoy the same labour protection as other employees.”¹⁶⁸ The union further called for the decriminalisation of illegal work and, as a corollary, for an increase in penalties for employing migrants without work permits. Finally, the union's new policy also stipulated that unions should avoid actions that may lead to the deportation of irregular migrant workers. In the UK, unions have played an important role during discussions leading to the adoption of the *Gangmasters (Licensing) Act 2004*, which focused on exploitation of illegal migrants by specific types of temporary work agencies. In its response to the ICMPD questionnaire, UNISON, a British trade union, stresses that it is particularly irregular migrants who become subject to exploitation.¹⁶⁹ It also supports regularisation and is a member of the UK pro-regularisation alliance “Strangers into Citizens”.¹⁷⁰

In Ireland, the Irish Congress of Trade Unions has elaborated its own proposal for a regularisation scheme. In its policy paper ‘A fair way in’, the Irish Congress of Trade Unions argues that “[e]xperience in Ireland and abroad shows that unscrupulous employers exploit the situation of undocumented workers and often intimidate them into accepting less than decent treatment and unsafe working conditions.” The report further reasons that “it is detrimental and unjust for a society to create an underclass of individuals without the opportunity to bring their lives out of the shadows and

¹⁶⁶ See questionnaire responses to the ICMPD TU Questionnaire, the REGINE country studies on France and the UK, and on Germany : Deutscher Gewerkschaftsbund - Bundesvorstand vom 15.05.07: Stellungnahme zum Entwurf des Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, beschlossen vom Bundeskabinett am 28. März 2007, http://www.migration-online.de/beitrag_aWQ9NTMzNA_.html,

¹⁶⁷ Kraler, A., Reichel, D., Hollomey, C. (2008): *Clandestino Country Report Austria*. Unpublished Project Report, Clandestino project.

¹⁶⁸ TCO, Response, ICMPD TU Questionnaire, 2008.

¹⁶⁹ UNISON, Response, ICMPD TU Questionnaire, 2008.

¹⁷⁰ See www.strangersintocitizens.org.uk

live their lives without fear.”¹⁷¹ In line with unions’ concerns over the vulnerability of irregular migrant workers, debates on irregular migrant work are often linked to forced labour and trafficking: several unions, among them the Irish Congress of Trade Unions and various British and Belgian unions, have demanded special protection measures, including access to legal status, for victims of forced labour and labour-related trafficking. The Greek Trade Union, GSEE, has the clearest preference for regularisation because of the sheer magnitude of the illegal migrant population in Greece and argues that a “mass regularisation programme of migrants in Greece is imminent because, according to the calculation of our trade union, 50%-60% of migrants in Greece remain undocumented”.¹⁷²

The benefits of regularisation

The trade unions that have responded to the ICMPD TU questionnaire generally cautiously support regularisations. Indeed, in several EU Member States, trade unions have been involved in campaigns for the regularisation of irregular migrants. Similarly, ongoing campaigns for regularisation programmes in Belgium, France, Ireland and the UK are strongly supported by trade unions. Thus, the Belgian trade union LBC-NVK (a white collar trade union) considers regularisations to be an appropriate measure “under certain conditions (...) [that is] as long as it offers social protection to all employees/active people in Belgium, as long as it affects social dumping policies in a positive way and as long as there is severe control of companies selling fake job contracts to illegal migrants.” However, “it is clear (...) that a regularisation policy (on a national level) will not be enough (...) to combat illegal employment.”¹⁷³ Accordingly, the union is currently, along with other unions, in negotiation with the Belgian government on selective, targeted regularisations. The scheme foresees that migrants who reach a certain level on a points scale which is composed of parameters such as legal work, language skills and integration, among others, would be regularized. Another Belgian union, CGSLB, stresses the positive potential impact of regularisation on occupational mobility and working conditions and, from the government perspective, the additional income it would generate for public funds.¹⁷⁴

In Portugal, the trade union CGTP emphasises that regularisation programmes are potentially highly effective tools to combat social exclusion, insecurity, and poverty and prevent marginalised immigrant groups from becoming involved in petty crime.¹⁷⁵ In addition, the union stresses that previous regularisation programmes in Portugal did have a major impact on the economy, and increased tax payments, social security contributions and decreased the informal sector. Another Portuguese trade union, UGT, also stresses the social benefits of regularisation programmes, in particular for the protection of migrant workers’ rights. However, it rejects extraordinary regularisation programmes and stresses the need for well-managed, controlled migration as the

¹⁷¹ Irish Congress of Trade Unions (2007): *A Fair ‘Way In’. Congress Proposal for a Fair Regularisation Process for Undocumented Workers in Ireland*, p.2 Document provided to the authors.

¹⁷² GSEE, Response, ICMPD NGO Questionnaire, 30 May 2008.

¹⁷³ LBC-NVK, Response, ICMPD TU Questionnaire, 2008.

¹⁷⁴ Centrale générale des syndicats libéraux de Belgique (CGSLB), Response, ICMPD TU Questionnaire, 2008

¹⁷⁵ Confederação Geral dos Trabalhadores Portugueses –Intersindical Nacional (CGTP), Portugal, Interview with Carlos Trindade (Executive Committee, Migrations Department), Manuel Correia (President of “Sindicato das Indústrias Eléctricas do Sul e Ilhas”), Yasmin Arango Torres (União dos Sindicatos de Lisboa), Lisbon, 26 February 2008.

preferred alternative option.¹⁷⁶ Similarly, the Spanish trade union, UGT,, rejects mass regularisations and advocates individual regularisations. Accordingly, it was involved in negotiations leading to a tripartite agreement between trade unions, employers' associations and the government on the establishment of regularisation mechanisms. According to the union, the success of the most recent Spanish regularisation programme of 2005 is largely due to the fact that it regularised the status of migrants as residents and their employment status *and* included measures targeting employers; the union sees the programme's success in particular in terms of its impact on the labour market.¹⁷⁷ In a similar vein, the British trade union UNISON argues that a regularisation would have a positive impact on the labour market: "The evidence so far shows that migration increases the number of jobs in the economy, and we believe regularisation would have a similar effect. Additional tax income generated through regularisation would improve public service provision. And regularisation would stop exploitation of paperless workers who had been regularised."¹⁷⁸

In two non-EU countries from which responses were received – Switzerland and Norway – on the whole, similar views prevail. The response by the Norwegian Federation of Trade Unions stresses, however, that the employment gaps between low and middle income countries, on the one hand, and high income countries, on the other, create particular challenges which must be taken into account when designing labour immigration policies: "In Norway a more actual problem than illegal/ clandestine migration, is work in the informal/illegal sector by immigrants as well as the problem of social dumping. This represents a threat against the Nordic labour market model, characterized by, among others, high standard of wage and work conditions and fair income distribution. The size of the challenges is not necessarily linked to the legal status of the immigrants. Labour immigration from low-cost countries creates particular challenges. Our experience tells us that as long as there are great differences with regard to the conditions of work and pay in the countries of emigration and immigration, the short-term gains of untidy employer conduct will be so considerable that the possibilities will be exploited where available. This indicates that the rules on labour immigration from low-cost countries should be more carefully designed than rules for other countries."¹⁷⁹

Towards a European policy on regularisation?

The position of trade unions towards a possible Europeanisation of regularisation policy is divided. Thus, the Spanish trade union UGT voices its concerns that a Europe-wide harmonisation of regularisation policies would risk the establishment of lower standards than currently exist at the national level. This might mean less protection for irregular migrant workers than they currently enjoy under Spanish legislation.¹⁸⁰ Other unions are more positive towards European-level policies concerning regularisation, although European measures envisaged by unions would not necessarily consist of regulating regularisation as such, but broader measures – including improving and harmonising policies on legal migration and adopting effective measures concerning irregular work. Thus, the Belgian trade union CGSLB argues that a first step needs to be the harmonisation of

¹⁷⁶ União Geral dos Trabalhadores (UGT), Portugal, Interview with Mr. Cordeiro, Lisbon, 27 February 2008.

¹⁷⁷ Union General de Trabajadores (UGT), response, ICMPD TU Questionnaire, 2008.

¹⁷⁸ UNISON, *op. cit.*

¹⁷⁹ Norwegian confederation of trade unions, response, ICMPD TU Questionnaire, 2008.

¹⁸⁰ IGT, *op. cit.*

admission policies.¹⁸¹ The Danish Union of Electricians, by contrast, suggests more limited measures, including Europe-wide regulation of (temporary) work agencies.¹⁸² The Belgian LBC-NVK calls for a comprehensive approach and argues that “an adequate response to the current problems on a European level requires a wide range of measures and policies, addressing undeclared work, precariousness of work and the need to open up more channels for legal migration” and considers the employers sanction directive to be an important first step. It sees major advantages in the fact that European level policies would increase transparency, reduce social dumping and competition between Member States and would prevent “country shopping”. Finally, such measures would promote the protection of (irregular) migrant workers.¹⁸³ Similarly, a comprehensive approach towards regularisation is advocated by the Portuguese union CGTP, including enhancing control mechanisms against companies employing illegal migrants. However, it also has more concrete suggestion regarding regularisations. Thus, regularisation programmes could be carried out on the European level at the same time, which would reduce unsolicited inflows from other Member States.¹⁸⁴ UGT, another Portuguese union, similarly suggests a harmonisation of regularisation procedures and generally supports the harmonisation of admission policies.¹⁸⁵

UNISON, the British trade union, suggest that “Europe might have a role in supporting common principles and a legal framework”, the advantage being that it would bring a more consistent approach “at a time when the role of Europe is being recognized in terms of regulating Europe’s borders.” However, a European policy on regularisation might also “detract from the role of national governments in delivering a coherent regularisation programme at a national level”.¹⁸⁶ In a similar vein, the Greek trade union, GSEE, argues that given the significant economic and social differences between Member States, the natural locus of regularisation policy should remain the national level: every country has different structures concerning the labour market and a different immigration history. For instance, Greece since 1990 has been receiving third country nationals on a large scale for the first time in its history. In addition, the size of the informal economy is large. Consequently, Greek regularisation policy must be part of a general effort to combat illegal or flexible employment in the country, while in Germany or in France the social inclusion of ethnic minorities and migrants or the fight against discriminations should be the priority.¹⁸⁷

Finally, the Slovenian Association of Free Trade Unions emphasises the positive (potential) role of the *UN Convention on the Protection of the Rights of All Migrant Workers and Their Families* and recalls the recommendation of the European Economic and Social Committee (2004/C 302/12) calling upon the Commission and the Council Presidency to undertake the necessary political initiatives to ensure speedy ratification of the Convention.¹⁸⁸

¹⁸¹ CGSLB, *op. cit.*

¹⁸² Danish Union of Electricians, Response, ICMPD TU Questionnaire, 2008.

¹⁸³ LBC-NVK *op. cit.*

¹⁸⁴ ¹⁸⁴ Confederação Geral dos Trabalhadores Portugueses –Intersindical Nacional (CGTP), Portugal, Interview with Carlos Trindade (Executive Committee, Migrations Department), Manuel Correia (President of “Sindicato das Indústrias Eléctricas do Sul e Ilhas”), Yasmin Arango Torres (União dos Sindicatos de Lisboa), Lisbon, 26 February 2008,

¹⁸⁵ União Geral dos Trabalhadores (UGT), Portugal, Interview with Mr. Cordeiro, Lisbon, 27 February 2008.

¹⁸⁶ Unison, *op. cit.*

¹⁸⁷ GSEE, *op. cit.*

¹⁸⁸ Association of Free Trade Unions of Slovenia, Response, ICMPD TU Questionnaire, 2008.

Conclusion

The review of trade union positions suggests that in those countries with a history of (employment-based) regularisations, they are generally positive – in principle – towards regularisation, if managed well and designed carefully. In several other countries that do not have a significant history of employment-based regularisations such as Ireland (which has become a country of immigration only recently), the UK and Germany (which both used regularisation mainly for long-term asylum seekers (the UK) or rejected asylum seekers and other ‘tolerated persons’ (Germany)), unions have recently become a significant part of broader alliances calling for implementation of regularisation programmes and mechanisms. In most other countries, the main issue of concern for trade unions is irregular work carried out by both citizens and legal immigrants as well as by irregular migrants. However, the common element in all countries is that unions call for measures that help to combat irregular work and the problems associated with it, including vulnerability to exploitation and adverse working conditions on the level of the individual migrant and evasion of taxes and social security payments and hence social dumping and unfair competition on the macro-economic level. In some countries with particularly strong involvement of irregular migrants in undeclared work, such measures may include regularisations. On the whole, however, a broader set of measures is desired, including (as the Slovenian trade union respondent emphasises) the adoption of relevant legal instruments that would help to strengthen protection standards across the European Union.

The sparse response to the ICMPD questionnaire – altogether only 11 trade unions, out of which two are from non-EU countries, responded to the ICMPD questionnaires¹⁸⁹ – suggests, however, that regularisation is not a very prominent concern for trade unions in Europe. To some extent, this reflects the fact that only in a handful of countries, and in particular in the four southern European countries (Greece, Italy, Portugal and Spain), regularisation is directly linked to broader labour market issues, whereas in the majority of Member States regularisation processes usually have been implemented for humanitarian and other reasons. Although such regularisations ultimately also have effects on the labour market, they are not seen as an issue of primary interest for trade unions. In a way, illegal immigration in general is increasingly seen in humanitarian terms (and also in terms of border management and migration control) rather than as an issue more directly linked to labour market dynamics. Instead, the current focus is on irregular work – irrespective of whether it is performed by illegal residents, legally staying third country nationals, EU citizens or nationals.

5.2.2 The European Level: Positions of the ETUC towards regularisation

On the European level, the European Trade Union Confederation (ETUC) does not have an explicit common position on regularisation policy. This reflects, on the one hand, divergent views of its constituent organisations on regularisations and, on the other, the lack of common European policies on regularisations. However, in an interview with members of the research team for this study, the representative of ETUC’s Working Group on Migrants and Ethnic Minorities noted that overall the ETUC has a pragmatic position and acknowledges that regularisation programmes may be necessary

¹⁸⁹ 8 responses to the ICMPD TU questionnaire (of which one summary response per e-mail) were received, of which one came from a non-EU country (Norway); 3 NGO questionnaires from trade unions were received, of which one came from a Spanish Trade Union which also completed the TU questionnaire. Another came from a Swiss trade union.

and useful, if planned and implemented well. Generally, integrating irregular migrants into the “legal structures” of society – notably as regards formal employment and legal residence – must be a main priority. This said, the ETUC prefers a more open admission policy that includes low-skilled migrants over regularisations (see below). States must accept that it is the prospect of employment in general that constitutes a pull factor for migration and that illegal migration can only be combated if possibilities for legal labour migration exist.¹⁹⁰

The Confederation’s commentaries on recent Commission proposals on legal migration and irregular work, although not commenting on regularisation as such, suggest certain prerequisites for well-managed migration, which, by implication would reduce the need for (employment-based) regularisation and would entail a certain measure of harmonisation of regularisation practices.¹⁹¹ Thus, the ETUC recommends (i) the creation of possibilities for the admission of economic migrants; (ii) the development of a common EU framework for the conditions of entry and residence; (iii) reaching a clear consensus between public authorities and social partners about real labour market needs; and (iv) avoidance of a two-tier migration policy that favours and facilitates migration of the highly-skilled while denying access and rights to semi- and low-skilled workers. Essentially, the ETUC argues for an opening of legal channels for migration for **all** categories of immigrant workers and strongly discourages a focus on highly skilled migrants. In this respect, the ETUC appreciates the Commission’s proposal of a directive on admission for high-skilled workers,¹⁹² accompanied by a proposal for a general framework directive on rights for all third country nationals who are legally residing in an EU Member State.¹⁹³

However, the ETUC observes a slightly contradictory approach. Thus, although a proposal for a directive on sanctions for employers employing irregular migrants¹⁹⁴ has been adopted by the Commission, which in a way targets lower-skilled third country nationals (as undeclared work mostly occurs in the low-skill and low-wage segments of labour markets), there is little or no initiative in the legislative programme of the Commission in offering legal channels for migration for medium or low-skilled labour, other than the initiative on seasonal workers. In the opinion of the ETUC, “without such legal channels, sanctions for employers employing irregular migrants may not only turn out to remain largely ineffective, but may also lead to further repression, victimisation and exploitation of irregular migrant workers”. Furthermore, the ETUC argues, “it is an illusion to think that EU Member

¹⁹⁰ Interview with Marco Cilento (ETUC), Brussels, 20 May 2008.

¹⁹¹ The following documents were considered: ETUC position regarding European Commission’s proposals on legal and ‘illegal’ migration. Available at: http://www.etuc.org/a/4415?var_recherche=position%20papers, 30 April 2008; - Illegal immigration: ETUC calls for enforcement of minimum labour standards and decent working conditions as a priority. Available at: <http://www.etuc.org/a/2699>, 30 April 2008.; Towards a proactive EU policy on migration and integration. Available at: http://www.etuc.org/a/1159?var_recherche=legal%20migration, 30 April 2008; Action Plan for an ETUC policy on migration, integration, and combating discrimination, racism and xenophobia. Available at: http://www.etuc.org/a/1944?var_recherche=legal%20migration, 30 April 2008.

¹⁹² Proposal for a COUNCIL DIRECTIVE on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment COM (2007) 637 FINAL

¹⁹³ Proposal for a COUNCIL DIRECTIVE on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State. COM (2007) 638 FINAL

¹⁹⁴ Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL providing for sanctions against employers of illegally staying third-country nationals. COM (2007) 249 FINAL

States can solve the problem of illegal migration by closing their borders and implementing repressive measures”. Consequently, the ETUC proposes “more proactive policies to combat labour exploitation” including (i) provision of “bridges out of irregular situations for undocumented migrant workers and their families, and enabling them to report exploitative conditions without fear of immediate deportation”; (ii) establishment of common criteria for the admission of economic migrants, thus reducing ‘illegal’ migration; and (iii) strengthening co-operation and partnership with third countries, in particular developing countries and the European neighbourhood countries. Thus, the ETUC, without advocating large-scale regularisations, recommends the limited use of regularisation mechanisms, or “bridges out of illegality”.

In addition, the ETUC insists that “the Commission and the Council recognize the social policy dimension of economic migration, and establish adequate procedures and practices for consultation of the European social partners in the legislative process.” If the Commission develops policies on regularisations, “unions should be strongly involved in policy-shaping”.¹⁹⁵

5.3 Employers organisations¹⁹⁶

5.3.1 Introduction

Like trade unions, employers organisations are largely indifferent vis-à-vis regularisation and – on the whole – do not regard regularisation as a particular issue of concern. This is in stark contrast to the 1970s and 1980s, when employers (in particular, in France and the USA), were major proponents of regularisation. Only in exceptional circumstances, it appears, do employers support, or indeed call for, regularisation procedures. It is interesting to note, therefore, that the current pro-regularisation campaign in the UK “Strangers into citizens” is supported by various business groups.¹⁹⁷ In France, a broad range of businessmen, predominantly from small and medium sized companies, have joined calls for regularisation of illegal immigrants following a strike by illegal immigrants.¹⁹⁸ Various macro-economic and structural factors explain the relative indifference of employers towards regularisation. These include: economic restructuring and decreasing reliance on a flexible, low-skilled labour force and the consequent reduced likelihood that major employers will resort to illegal migrants as a significant source of labour; the fact that illegal migrants tend to be employed in small and medium sized businesses in certain sectors with small profit margins that are not well represented in employers associations; and the fact that major employers’ association, in particular those which are also organised on the European level, tend to represent larger firms whose profitability does not

¹⁹⁵ Interview with Marco Cilento (ETUC), Brussels, 20 May 2008.

¹⁹⁶ The following documents were consulted for this summary: BUSINESSEUROPE position on Sanctions against employers of illegally staying third-country nationals, submitted 25 October 2007. Available at: <http://www.bussinesseurope.eu>; BUSINESSEUROPE position on Commission Communication on Circular migration and mobility partnerships between the EU and third countries, submitted 26 October, 2007. Available at: <http://www.bussinesseurope.eu>; UNICE position on the Commission policy plan on legal migration, submitted 10 May 2006. Available at: <http://www.bussinesseurope.eu>

¹⁹⁷ Liberation, 18 Avril 2008: ‘L’appel de Londres à une amnestie’.

¹⁹⁸ Liberation, 18 Avril 2008, ‘Les patrons avec leurs sans-papiers’; Following these protests, 741 migrants with regular employment but illegally staying have received residence permits according to the General Confederation of Labour (see *Migration News Sheet*, August 2008, p.11).

depend on (unskilled) immigrant labour.¹⁹⁹ Indeed, illegal labour migration today primarily seems to concern sectors such as agriculture, tourism, hotel and restaurants, and domestic services, all of which are characterised by a relatively low degree of organisation of employers (or the complete absence of employers associations in the domestic sector), decentralised production and small production units. This said, employers have been involved in regularisation policy making in Spain and other countries and thus, in particular in countries with employment-based regularisations, do play a significant role.

Limitations of time and resources have not allowed a systematic enquiry into employers' positions on the national level. In our analysis of employers' positions, we thus focused on the European level. On the European level, we contacted the Confederation of European Businesses (BusinessEurope, formerly UNICE²⁰⁰) and the European Association of Craft, Small and Medium-sized enterprises (UEAPME). Of these, only BusinessEurope replied to our requests to provide information on the organisation's views on regularisation, indicating that the organisation had no official position on regularisation policy.²⁰¹ In accordance with our view that regularisation policy must not be analysed as a stand-alone policy and that any analysis needs to consider related policy aspects (including admission policy, policies on settled immigrants, broader policies on illegal migration as well as policies on undeclared work), we will review commentaries by BusinessEurope and UEAPME, respectively, on the European Union's policies on legal and illegal migration in the following section of this paper. This review suggests that employers organisations do have positions on particular issues related to regularisation – even though none of the organisations have formal views on regularisation as such.

5.3.2 Positions of the Confederation of European Business (BUSINESSEUROPE)

Our review of relevant BusinessEurope positions is based on BusinessEurope commentaries on recent Commission proposals for new instruments in managing legal migration, including 'mobility partnership', 'circular migration' and the proposal for a framework directive on rights of third-country nationals workers. In addition, we discuss the position of BusinessEurope regarding EU policies on illegal migration and irregular work – in particular, the Commission proposal for employers sanctions regarding illegally working third-country nationals.

According to BusinessEurope, the negotiation of mobility partnerships "constitutes an important new strategy in the field of immigration policies at EU-level".²⁰² In particular, BusinessEurope acknowledges that the proposed new instruments – mobility partnerships and circular migration – are a reasonable and innovative response to the growing numbers of illegal migrants arriving through the Eastern and South-Eastern borders of the EU. While BusinessEurope acknowledges that the EU has an important role to play in co-ordinating and improving the relations of Member States with third-

¹⁹⁹ Watts, J. (2002): *op. cit.* pp.81—100

²⁰⁰ UNICE stands for 'Union des Industries de la Communauté européenne'. The organisation became BusinessEurope in 2007

²⁰¹ E-mail response, D'Haeseleer, S. (BusinessEurope), 16 April 2008

²⁰² BusinessEurope (2007): *Position on Commission Communication on Circular migration and mobility partnerships between the EU and third countries*, submitted 26 October, 2007. Available at: <http://www.businesseurope.eu> (p.5)

countries to develop common strategies to better manage migration flows, it insists that any EU initiative should respect the principle of subsidiarity. Thus, the decisions on the number of economic migrants to be admitted in order to seek work, the types of their qualifications and skills as well as their country of origin are the responsibility of the Member States. Given the differences between labour market needs, companies' requirements and skills gaps across Europe, the EU should refrain from any attempt to quantify needs at EU level. This is neither feasible nor desirable. Labour market needs should be assessed in Member States at the appropriate level as close to the ground as possible."²⁰³ In addition, Member States must be able to decide freely whether or not to participate in a mobility partnership and "employers should be fully involved in the discussion and decision on the number of economic migrants to be admitted to seek work and the types of their qualifications and skills"²⁰⁴

The principle of subsidiarity, particularly in admission of economic migrants, is further related to the flexibility of EU actions – that "will allow national administrations to apply a wide range of admission mechanisms in order to respond quickly to the needs of companies and especially SMEs".²⁰⁵ Thus, although BusinessEurope sees a value in developing common instruments for labour migration on the European level, it cautions against their uniform application on the Member State and stresses the need for flexibility at the level of the individual Member State. By implication, BusinessEurope's position on admission policy, and in particular its strong emphasis on the principle of subsidiarity, suggests that it would oppose policies on regularisation on the European level which would contradict the principle of subsidiarity.

In the opinion of BusinessEurope, the Commission proposal for a general framework directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State, and on a common set of rights for third country workers legally residing in a Member State, is in part unwarranted. Defining a common set of rights is "not necessary since workers' rights are already adequately covered by existing national and/or EU legislation."²⁰⁶ In relation to the specific directives on the admission selected categories of economic migrants, BusinessEurope argues that this indeed is a sensible step and corresponds to "the changing economic needs over time and the difference in labour market needs, companies' requirements and skills gaps across Europe"²⁰⁷. Furthermore, European employers welcome the idea of a single application for a joint work/residence permit as it promotes "unbureaucratic, rapid and transparent procedures at national level and [should] simplify administrative procedures."²⁰⁸

In relation to illegal migration, European employers agree with the Commission that, "if well conceived, mobility partnerships and circular migration could be useful instruments to fight illegal

²⁰³ *Ibid.*, para.10

²⁰⁴ *Ibid.* para. 11 and 13

²⁰⁵ UNICE (2006): *UNICE position on the Commission policy plan on legal migration*, submitted 10 May 2006. Available at: <http://www.bussinesseurope.eu>

²⁰⁶ *Ibid.* para. 32.

²⁰⁷ *Ibid.* para. 32-35

²⁰⁸ *Ibid.*, summary

migration”.²⁰⁹ In the opinion of BusinessEurope, a key challenge to ensure the long-term benefits of circular migration is the need to design policies in such a way that circular migration remains circular and does not become permanent. In this sense, European employers express doubts concerning the effectiveness and/or feasibility of some of the actions proposed by the Commission – such as the requirement for a written commitment by migrants to return voluntarily, support to help the partner country create sufficiently attractive professional opportunities locally for the highly skilled etc. The Confederation makes note of the “potential contradiction between the strong emphasis put simultaneously on both circular and return migration on the one hand and the efforts to foster integration of third country nationals on the other hand”.²¹⁰

Regarding measures against illegal migration, the Confederation supports the objective of the proposed sanctions for those employing illegal workers. Generally, BusinessEurope acknowledges that employment is one of many pull factors for illegal migration.. However, in the opinion of BusinessEurope, the Commission proposal does not comply with the subsidiarity principle: “By introducing EU-wide legal definitions of ‘employment’ and ‘employer’, the proposal directly interferes with national social and labour law. In addition, Member States are best placed to decide on and set effective sanctions for non-compliance with the provisions of the Directive.”²¹¹ According to European employers, the draft directive also fails to respect the proportionality principle: “It would impose overly burdensome and costly administrative requirements on EU companies”.²¹² Furthermore, there should be a qualitative element to distinguish between criminal and administrative sanctions.²¹³

Finally, in the view of BusinessEurope, action against illegal migration must be accompanied by measures aimed at facilitating legal migration – sanctions against those employing illegal workers should not be taken in an isolated way but accompanied by measures such as effective co-ordination with migrants’ countries of origin, action to fight against organised crime, and speedy repatriation of illegal migrants (consistent with their legitimate rights).²¹⁴ Furthermore, “to avoid a situation where an employer recruits workers with irregular status due to the lack of qualified or specific human resources and limited possibilities for legal migration, BusinessEurope reiterates the importance of creating unbureaucratic, rapid and transparent procedures at national level to recruit migrant workers”.²¹⁵

For the purpose of this study, four points are worth pointing out. First, BusinessEurope strongly emphasises the basic principle of subsidiarity. For the development of regularisation policies on the European level this suggests that any policy that would reduce the flexibility of Member States to design national solutions to national problems is likely to be opposed. Conversely, setting quantitative

²⁰⁹ BusinessEurope (2007): *BusinessEurope position on Commission Communication on Circular migration and mobility partnerships between the EU and third countries*, submitted 26 October, 2007. Available at: <http://www.busesseurope.eu> , para.9

²¹⁰ *Ibid.* para. 15-16

²¹¹ BusinessEurope (2007): *BusinessEurope position on Sanctions against employers of illegally staying third-country nationals*, submitted 25 October 2007. Available at: <http://www.busesseurope.eu> , p.1.

²¹² *Ibid.*

²¹³ *Ibid.* para. 18

²¹⁴ *Ibid.* para. 8

²¹⁵ *Ibid.* para. 8-9

targets at the European level is opposed by business organisations. This notwithstanding, BusinessEurope positions also suggest that it is not opposed, in principle, to elaborating common procedural standards and similar measures. Secondly, BusinessEurope's position on proposals for new instruments regarding legal migration places a certain emphasis on the reduction of bureaucracy and other practical obstacles, which, as BusinessEurope argues, often leads businesses to irregularly employ migrant workers. This suggests that BusinessEurope is likely to support measures that help to avoid what we discuss (in §3.3.3) under the heading of the 'creation of illegal immigrants'. Thirdly, however, BusinessEurope opposes strengthening and uniformly regulating the rights of legal migrants admitted as workers – an option which we view as important in terms of avoiding that legal migrants (or their family members) lapse into illegality. Fourthly, BusinessEurope calls for comprehensive measures on illegal migration, including employer sanctions, facilitated recruitment of migrant workers, enforcement of return and, if not prominently, regularisation as a possible alternative to return, should return not be enforceable.²¹⁶

5.3.3 European Association of Craft, Small and Medium-Sized Enterprises (UEAPME)

The main basis for our review of policy positions of the European Association of Craft, Small and Medium Sized Enterprises (UEAPME) is policy papers commenting on: (i) the proposal for a directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State; (ii) the proposal for a directive for sanctioning employers employing illegal immigrants; and (iii) the Green Paper on an EU approach to managing economic migration.

According to UEAPME, the role of the EU in managing legal migration in general relates to the development of a “step-by-step harmonisation of criteria and procedures”, “while respecting the sovereignty of Member States.”²¹⁷ The concept of legal migration is further narrowed to economic migration. The principle of sovereignty means that the Member States should have the exclusive competence to decide on the number of immigrants to be admitted from third countries.²¹⁸ In this context, UEAPME agrees with the proposal for a single procedure for third country nationals to reside and work in the EU and particularly with the creation of a ‘one-stop-shop’ system, “as this will help to make the immigration process more transparent and less burdensome.”²¹⁹ In addition, UEAPME

²¹⁶ In our interpretation, the formulation “quick repatriation of illegal migrants respecting their legitimate rights” does suggest regularisation if “legitimate rights” can only be upheld by regularising irregular migrants.

²¹⁷ UEAPME (2007): *UEAPME position paper on the proposal for a directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third country workers legally residing in a Member State*. Available at: http://www.ueapme.com/docs/pos_papers/2007/071205_pp_framework_directive_immigration.pdf, 23 April 2008, p.1.

²¹⁸ UEAPME (2005): *UEAPME's position paper on the Green Paper on an EU approach to managing Economic Migration COM (2004) 811*. Available at:

http://www.ueapme.com/docs/pos_papers/2005/EconomicMigration.doc, 23 April 2008, p.1

²¹⁹ *Ibid.*

stresses that “economic immigration to the EU has to be conceived as a win-win situation for the three parties involved, the host country, the country of origin and, of course, the immigrant worker.”²²⁰ Illegal migration is referred to in the context of economic migration. UEAPME supports addressing illegal migration through a mix of policies, which according to UEAPME should include (i) stronger sanctions and controls; (ii) better implementation of decisions (iii) addressing incentives for illegal employment (such as overregulation of the labour market, excessive tax and social security obligations etc) and (iv) planning of a general awareness raising campaign.²²¹

Regarding EU measures against illegal migration in the labour market, UEAPME agrees with the European Commission’s proposal for sanctioning employers that employ illegal immigrants. However, it stresses that the primary responsibility for combating illegal employment lies with public authorities. Although UEAPME considers it reasonable to give employers a certain responsibility in regard to work permits, it opposes the proposal that employers should have a more far-reaching role in controlling the residence status of third country national workers – for example, by obliging them to keep a copy of the residence permit. “Basically the necessary action in order to pursue companies which employ illegal immigrants must not lead to more administrative burdens for those companies, in particular SMEs which comply with the law.”²²² Furthermore, the Association agrees generally with the usefulness of proportionate and dissuasive financial sanctions but opposes the principle that the employer should cover the return costs of the illegally employed third country national.²²³ In addition, UEAPME is strongly opposed to the Commission’s proposal for an automatically -triggered procedure for claiming back outstanding remuneration and the standard assumption in calculating back-payments, that the employment lasted for a minimum of 6 months. According to UEAPME this would put illegally-employed migrants in a better position than legal workers and would constitute an additional pull factor and incentive (on the part of immigrants) to take up illegal work.²²⁴ Similarly, UEAPME is also strongly against putting illegally-employed migrant workers who co-operate with authorities in a better position, arguing that this would similarly constitute an incentive, rather than a disincentive, to engage in irregular work.

Regarding the needs and capacities of SMEs to combat illegal employment, UEAPME recognises that micro enterprises have more difficulties in getting easy access to and a clear understanding of information on existing social and legal obligations for third-country nationals. For this reason, it proposes a three-step approach for the sanctioning of employers who employ illegal immigrants: (i) prevention and information; (ii) warning: authorities should clearly distinguish between cases where the illegal employment is the result of disinformation or lack of awareness of relevant regulations and other cases where the employer willingly employs illegal immigrants in full knowledge of the law;

²²⁰ UEAPME (2005): *UEAPME’s position paper on the Green Paper on an EU approach to managing Economic Migration COM (2004) 811*. Available at:

http://www.ueapme.com/docs/pos_papers/2005/EconomicMigration.doc , 23 April 2008, p.2

²²¹ UEAPME (2007): *UEAPME position paper on the proposal for an EU directive for sanctioning employers employing illegal immigrants*.

Available at: http://www.ueapme.com/docs/pos_papers/2007/070919_pp_sanctioning.pdf , 23 April 2008, p.1

²²² *Ibid.* p.2

²²³ *Ibid.* p.3

²²⁴ *Ibid.* p.4

such cases should be treated differently; (iii) sanctions should only be the last resort if it is clear that the employer acts repeatedly and fully aware that his employment practices are in breach of the law.²²⁵ On the whole, UEAPME has a much more pronounced position on EU policies vis-à-vis irregular migration, reflecting the fact that it is small and medium sized businesses that are the main employers of irregular migrant workers and would be most affected by measures adopted at the level of the European Union. The negative evaluation of the incentives for irregular migrants to co-operate with authorities and the protection provisions in the proposal for a directive on employers' sanctions suggests a possible negative attitude towards regularisation measures aimed at addressing informal work and combined with sanctions and increased obligations for employers. However, like BusinessEurope, UEAPME welcomes the procedural elements of the proposed framework directive on a single application procedure as potentially greatly increasing transparency and reducing bureaucracy.

5.4 Positions of Non-Governmental Organisations and migrant organisations

5.4.1 Introduction

Non-governmental organisations have long had a pivotal role in representing migrants' interests, promoting migrant rights and providing services to migrant communities, and in particular also undocumented migrants with or without limited access to public services. In many European countries, NGOs also are the most active actors regarding campaigns for regularisation,²²⁶ notably in Belgium, France, Portugal and Spain, where NGOs have successfully mobilised around regularisation programmes. Similarly, the current pro-regularisation campaign "Strangers into Citizens" in the UK is led by an alliance of NGOs, although it also includes other societal actors. In Ireland, NGOs, together with trade unions, currently campaign for regularisation, as do NGOs in Belgium²²⁷ and Germany.²²⁸ Although NGOs in other EU Member States have been less successful in promoting regularisation campaigns, they nevertheless have played and continue to play an important role in providing legal counselling and advice to irregular migrants. Migrant organisations – organisations run by and for immigrants – have, on the whole, a much lower profile and only a few migrant organisations have taken on a more pronounced role in promoting regularisation or providing legal advice. However, as advocacy NGOs, migrant organisations have played an important role in disseminating information about ongoing regularisation campaigns. An overview of current NGO activities with regard to regularisation is presented in Table 6. Their role – actual and desired – in regard to regularisation policy is described in Table 7.

The following review of NGO positions is based mainly on responses to a short questionnaire developed by the research team and disseminated among NGOs specialised or otherwise working on

²²⁵ *Ibid.*, pp.1-2

²²⁶ See Laubenthal, B. (2006): *op. cit.* on the emergence of pro-regularisation movements, mainly led by civil society organisations, in France, Spain and Switzerland.

²²⁷ See for example the activities undertaken by the Belgian NGO *Coordination et Initiatives pour et avec les Réfugiés et Étrangers* (CIRE) on regularisation under <http://www.cire.irisnet.be/appuis/regul/accueil-regul.html>

²²⁸ See for example the „Bleiberechtsbüro“, an initiative of the Bavarian refugee council (Bayrischer Flüchtlingsrat e.V.), online at <http://www.bleiberechtsbuero.de/>

undocumented migrants by the Brussels-based NGO *Platform for International Cooperation on Undocumented Migrants* (PICUM).²²⁹ Altogether, 36 responses were received, two of which were from trade unions and one from a research institution (the latter are not considered here). In addition, various NGOs provided us with position papers and other documents on which we also draw in the following. In total, we received responses from 10 EU countries. In addition, we also received responses from three NGOs organised at the European level and one NGO and a trade union in Switzerland. The relatively largest number of responses was received from Greece and Spain; of the countries with significant experiences of regularisation measures, NGOs from two countries – Italy and the UK – did not provide any responses to the questionnaire.²³⁰

Since the mid-1990s, when a new stage in the Europeanisation of migration and asylum policies was reached with the Maastricht and Amsterdam Treaties and the parallel development of an EU agenda on non-discrimination and the fight against xenophobia and racism, several umbrella organisations of NGOs and faith based organisations that are specialised or otherwise working on migration issues have been formed at the European level.²³¹ These include various Church organisations such as Caritas Europa, the Churches Commission for Migrants in Europe (CCME), the Commission of the Bishops' Conferences of the European Community's Working group on Migration (COMECE), the International Catholic Migration Commission (ICMC), the Jesuit Refugee Service Europe (JRS-Europe) and the Quaker Council for European Affairs (QCEA). The European Council on Refugees and Exiles (ECRE), the European Network Against Racism (ENAR), the European Coordination for Foreigners' Rights to Family Life, the Platform on International Cooperation on Undocumented Migrants (PICUM), Solidar and the campaign for the adoption of the UN Migrant Convention - December 18 - are probably the most relevant non-denominational European level NGOs focusing on migrant issues. Most of these organisations have adopted positions on EU approaches and possible alternative approaches to undocumented migration, including regularisation, which we will examine in the last section of our review of NGO positions.

²²⁹ For more information, see www.picum.org; we are grateful to Don Flynn and Michèle LeVoy and the enthusiastic interns at PICUM for readily supporting us in disseminating the NGO questionnaires and getting the support of NGOs for this part of the study.

²³⁰ Questionnaires were translated into Greek and Spanish which explains the high turnout for these two countries. In addition, questionnaires were also translated into French. The lack of an Italian version probably explains why no responses were received from Italy.

²³¹ See on the emergence of European NGOs working on migration issues Geddes, A. (2000): *Immigration and European Integration. Towards Fortress Europe?* European Policy Research Series. Manchester: Manchester University Press, in particular pp.131-151

Table 6: Current and past activities of NGOs concerning regularisation

	NGO/Country	Main activities in regard to regularisation
AT	Krankenhaus (Hospital) der Barmherzigen Brüder – AT	<ul style="list-style-type: none"> - Acting as intermediary between undocumented migrants and state authorities - Lobbying - Membership in official commissions - Membership in official commissions adjudicating individual regularizations - Commercial brochures - Providing anonymous, unconditional and free medical assistance - Care for 120,000 persons without insurance per year (6,000 stationary)
AT	Organisation Diakonie Flüchtlingsdienst (Refugee Service) - AT	<ul style="list-style-type: none"> - Lobbying - Public relations
AT	Asylkoordination	- Campaigning and lobbying
BE	Centre des Immigrés Namur-Luxembourg ASBL (Antenne de Libramont)	<ul style="list-style-type: none"> - Campaigning and lobbying, - intermediary between irregular migrants and authorities, particularly in regard to access to health care
BE	Samahan ng mga Manggagawang Pilipino sa Belgium - BE	- Info dissemination, assisting and advising in the constitution of dossiers of applicants.
CZ	Counselling Centre for Citizenship / Civil and Human Rights - CZ	- Lobbying
CZ	Counselling Centre for Refugees / Organization for Aid to Refugees - CZ	<ul style="list-style-type: none"> - Launch of a public debate on regularisation in the Czech context. - Organisation of projects lobbying for regularisation
DE	Flüchtlingsrat im Kreis Viersen e.V. - GE	- Position papers and involvement in discussions
NL	Stichting LOS(Landelijk Ogedocumenteerden Steunpunt) - NL	- Campaigning and lobbying for regularisation
NL	University Medical Centre St Radboud - NL	- Not directly involved in any activities. The centre works together with Pharos / Lampion and their role is important as pressure factor and as knowledge centre
PT	AMI (International Medical Assistance) - PT	- Support of juridical issues when requested
PT	Jesuit Refugee Service (JRS) - PT	- Direct involvement as an intermediary between undocumented migrants and state authorities when it comes to regularisation matters.
ES	ACCEM: Atención y Acogida a Refugiados e Inmigrantes - ES Madrid	<ul style="list-style-type: none"> - Participation in all regularisation processes - Info contact point for TCNs and employers during 2005 regularisation programme - Submission of evaluation reports to the state Administration regarding the last regularisation programme - Membership in <i>Foro para la Integración Social de los Inmigrantes</i> (Forum for the Social Integration of Immigrants)
ES	Fundación Andalucía ACOGE - ES	<ul style="list-style-type: none"> - Provision of information during regularisation processes (collection of applications) - Advocating for the rights of TCNs - Consulting – contribution at the planning phase of legislation (changes) concerning TCNs
ES	Asociación Vida y Salud al Inmigrante Boliviano (AVISA) – ES Madrid	- Membership in Consejo de Inmigración de España
ES	Iglesia Evangélica -ES	<ul style="list-style-type: none"> - Mediation in the process of contacting undocumented TCNs - Participation in parliamentary commissions - Support regarding social needs of TCNs

	NGO/Country	Main activities in regard to regularisation
ES	Interculturalia – ES Madrid	- Advocating the rights of undocumented TCNs
ES	Movimiento por la Paz, el Deasarme y la Libertad en Canarias (MPDLC) - ES	- Membership at Foro Canario de la Inmigración – a consultative body at the level of the provincial government on issues concerning immigration - Provision of integral support to immigrants (socio-economic integration) - Consulting of undocumented TCNs during the last process of normalisation
ES	Asociación Salud y Familia, UGT - ES	- Development of programmes focusing on the social integration of immigrants - Support and attendance in relation to health issues
IE	Migrant Rights Council of Ireland, Dublin (MRCI)	- Directly supporting undocumented migrant workers in accessing services; regularisation of status - Lobbying the government for greater protections for undocumented migrant workers - Research on the experience of being undocumented in Ireland
FR	FR - SNPMPPI – LA PASTORALE DES MIGRANTS	- Preparing files for asylum cases; - Campaigning as part of a broader network of civil society actors, notably church groups
GR	ANTIGONE	- Campaigning, - Awareness raising - Production of reports concerning the problems and the violations of rights of migrants
GR	DIAVATIRIO	- Provision of information to undocumented TCNs regarding the regularisation process - Exercising pressure for the change of procedures
GR	HLHR	- Elaboration of specific policy and legislative amendments' proposals - Organisation of 3 National Migration Dialogues - Annual and international reports and conferences.
GR	Greek Migrants Forum	- Demonstrations, memos, interviews in the Press, updates for the regularisation programmes - Support of immigrants without proper documentation to organise themselves, to learn the Greek language
EU	Europäische Vereinigung von Juristinnen und Juristen für Demokratie und Menschenrechte in der Welt e. V. (EJDM)	- Dialogue and information exchange with other similar organizations, - Participation at statements and position papers, common conference projects
EU	European Council on Refugees and Exiles (ECRE)	- Advocacy and lobbying at EU institutions and Council of Europe regarding asylum seekers and recognised refugees, including the issue of regularisation
EU	La Strada International (LSI) – Europe (domicile in NL)	No special activity has been indicated.
CH	FIZ (Fraueninformationszentrum für Frauen aus Afrika, Asien, Lateinamerika und Osteuropa, Fachstelle zu Frauenhandel und Frauenmigration)	- Participation in round-tables regarding regularisation and advocating in favour of the measure - Discussion of regularisation relevant issues in the working groups and commissions on human trafficking
CH	Schweizerischer Evangelischer Kirchenbund SEK (Nationale Geschäftsstelle der Evangelischen Kirchen der Schweiz)	- Membership at the Eidgenössischen Kommission für Migrationsfragen and in the platform „für einen runden Tisch zu den Sans-Papiers“ („for a round table on undocumented migrants“).

Note: not all respondents completed the relevant sections of the questionnaires.

Table 7: Actual and desired role of NGOs in regularisation processes/ design of regularisation policies

	NGO/Country	Assessment of own role/ role of NGOs
AT	Krankenhaus (Hospital) der Barmherzigen Bürger – Austria	<ul style="list-style-type: none"> - Compensates for lack of state policies (access to health care) - - NGOs should help straightforward and spontaneously without asking
AT	Organisation Diakonie Flüchtlingsdienst (Refugee Service) - AT	<ul style="list-style-type: none"> - NGOs should be involved in the process of identifying target groups of regularisations and in bodies adjudicating or advising on regularisations
BE	Centre des Immigrés Namur-Luxembourg ASBL (Antenne de Libramont)	<ul style="list-style-type: none"> - NGOs should highlight problems regarding the asylum system and regularisation practices, e.g. through engaging in a dialogue with the responsible minister, critical analysis of policy measures, pointing out alternatives - NGOs need not be formally involved in decision-making
BE	Samahan ng mga Manggagawang Pilipino sa Belgium - BE	<ul style="list-style-type: none"> - NGO successful track record of providing advise to applicants, as all 20 persons assisted by the NGO have been regularised - NGOs being a civil society initiative can support, supplement and complement efforts of other civil society actors and government so as to make sound policies that take into account the different specificities of groups at the grassroots level. - NGOs can be actors for the implementation, monitoring and follow-up and eventually in evaluation of the policy, programme and/or mechanisms of regularisation.
CZ	Counselling Centre for Citizenship / Civil and Human Rights - CZ	<ul style="list-style-type: none"> - NGO have a monitoring function - NGOs should play an active role in formulating migration policy
CZ	Counselling Centre for Refugees / Organization for Aid to Refugees - CZ	<ul style="list-style-type: none"> - NGOs should monitoring, evaluate and criticize government policies - Not much success to change policies but major success to initiate a parliamentary debate on regularisation and irregular migration - Government authorities see NGOs as unequal partners despite their knowledge on the issue - NGOs should be seen as serious partners by the government
DE	Flüchtlingsrat im Kreis Viersen e.V. - GE	<ul style="list-style-type: none"> - Contribution to the public debate - NGOs play an important role as a counterbalance to arguments of the government authorities which are related to regulatory issues - NGOs should be more involved in the process of legislation
NL	Stichting LOS(Landelijk Ongedocumenteerden Steunpunt) - NL	<ul style="list-style-type: none"> - Crucial role for the implementation of the last regularisation programme - regularisations are not possible without NGOs as partners
PT	AMI (International Medical Assistance) - PT	<ul style="list-style-type: none"> - NGOs should be an instrument of mediation between the interests of immigrants and the policies to them created. - As non governmental entities, nor controllers, relatively to regularisation policies and immigrants in irregular situation, NGOs should assume an educative and sensitising role

	NGO/Country	Assessment of own role/ role of NGOs
PT	Jesuit Refugee Service (JRS) - PT	- contribute to policy development. - monitor the implementation of regularisation policies - provide guidance to migrants regarding the process of regularisation.
ES	ACCEM: Atención y Acogida a Refugiados e Inmigrantes - ES Madrid	- NGOs should be intermediators between immigrants and administration - NGOs should point out violations of recognised immigration laws - The proposals of NGOs should be taken into account regarding the formulation of regularisation policies
ES	Fundación Andalucía ACOGE - ES	- The practical experiences of NGOs within their daily work should be taken into account - NGOs should point out if immigration laws are not respected
ES	Asociación Vida y Salud al Inmigrante Boliviano (AVISA) – ES Madrid	-NGOs play a fundamental role with respect to the formulation of regularisation policy, as we are the ones who have contact with the immigrants. - NGOs should be involved at an early stage of policy development
ES	Iglesia Evangélica -ES	- Through their daily practical experiences NGOs know the consequences of policy measures very well and should be consulted by government agencies
ES	Movimiento por la Paz, el Deasarme y la Libertad en Canarias (MPDLC) - ES	- NGOs are doing the work different public administrations should do - NGOs should be more involved in respect to the formulation of immigration policies
ES	Asociación Salud y Familia, UGT - ES	- It's not possible that all Spanish NGOs play an important role in respect to the formulation of regularisation policy
IE	Migrant Rights Council of Ireland, Dublin (MRCI)	- Overall aim: promote the conditions for social and economic inclusion of undocumented migrant workers and their families, - through: direct support to undocumented migrant workers; lobbying at national and international level also by cooperating with other organisations; - research. - awareness raising and representation of the interests of undocumented migrant workers
FR	FR - SNPMPPI – LA PASTORALE DES MIGRANTS	- Own role/position is a sensitive issues, since irregular migration is a highly contested issue also within the Church; - General role. Involvement of NGOs by government agencies often done as an alibi, not a dialogue, but a monologue.
EU	Europäische Vereinigung von Juristinnen und Juristen für Demokratie und Menschenrechte in der Welt e. V. (EJDM)	- Only little influence due to neglect of regularisation as a policy option on the one hand and due to a lack of involvement of NGOs. - NGOs should be involved in formulation and evaluation of regularisation policies
EU	European Council on Refugees and Exiles (ECRE)	- own lobbying regarding regularisation has not had a large impact, due to refusal of EU to address the issue of regularisation - NGOs are often the only actors providing services to undocumented migrants and hence have a major role to play - NGOs are well placed to provide inputs in policy debates and to monitor the effective and fair implementation of policies

Note: not all respondents completed the relevant sections of the questionnaires.

5.4.2 A survey of national level NGO perspectives

Why regularise? Arguments pro-regularisation

Irregular migration is seen as a significant problem by virtually all NGOs that responded to the ICMPD NGO questionnaire and the majority of NGOs, in principle, support regularisation measures. The target population of regularisation is complex and varies from one country to another: it might be illegally resident migrants without any documentation in the narrow sense, but might also include person with an unclear or precarious legal status such as tolerated persons in Germany.²³² In addition, as one Czech NGO points out, “The boundary between a legal and an illegal stay is often blurry and a foreign national with a legal status can easily slip into an illegal status.”²³³

The NGOs that have responded to the ICMPD questionnaire do support regularisation for various reasons, although opinions are divided on the extent to which regularisation should be pursued to offer irregular migrants a pathway out of illegality. Some organisations, for example NGOs primarily providing medical care, often do not feel competent to assess whether regularisation should be promoted as an option or not but emphasise the negative consequences of illegality (such as lack of access to healthcare, schooling and other basic social rights) and welcome any measures that help to promote providing irregular migrants with basic access to care services – including regularisations.

Others are explicitly agnostic vis-à-vis regularisations and see their role primarily in upholding the basic human rights of irregular migrants, as the response of a German NGO illustrates: “The Catholic Forum Life in Illegality [Katholisches Forum Leben in der Illegalität] does not wish to evaluate the German regularisation policy for principled reasons. However, [the Forum] is convinced that also in the future, illegal migration won’t be prevented. It therefore calls for an adaptation of the legislative framework in a way that irregular migrants are able to realise basic social rights without having to fear detection and subsequent removal. Against this background the Forum would welcome regularisation measures insofar as they would reduce the number of irregular migrants and hence the number of migrants without access to rights.”²³⁴

A Dutch NGO emphasises that any responses to the social problems associated with illegality need to take into account migrants’ migration projects and, by implication, the likely persistence of illegal migration, whatever measures governments may adopt to combat irregular migration: “As long as their 'project' didn't succeed, irregular migrants will stay and struggle on. In this way they often harm themselves (living on the fringes of society, deprived, vulnerable) and society as well (a source of cheap labour, criminality, precarity).”²³⁵ La Strada, an international NGO working on trafficking issues, equally highlights the vulnerability arising from lack of status: “[T]here are large numbers of people in a irregular situation whose position is very vulnerable due to their status. It is generally

²³² See Europäische Vereinigung von Juristinnen und Juristen für Demokratie und Menschenrechte in der Welt e. V. (EJDM), response, ICMPD NGO Questionnaire, 4 May 2008

²³³ Counselling Centre for Refugees/ Organization for Aid to Refugees, response, ICMPD NGO Questionnaire, 30 April 2008

²³⁴ Katholisches Forum Leben in der Illegalität, response, ICMPD NGO Questionnaire, 23 April 2008

²³⁵ Stichting LOS (Landelijk Ongedocumenteerden Steunpunt), response, ICMPD NGO Questionnaire, 21 April 2008

known that this makes them vulnerable to exploitation, violence and abuse which are the main indicators for trafficking.”²³⁶

Several NGOs also point to racism and xenophobia which partly arises out of the ‘demonisation’ of irregular migration, as a Greek NGO stresses: “In many cases the fact that a great number of irregular immigrants reside in the country ‘poisons’ the public opinion which is unaware that immigrants want to be regular in the country of residence. The stereotype of the illegal immigrant frightens public opinion and creates xenophobic reflexes which act as a deterrent as far as the solution of the problem is concerned.”²³⁷ Similarly, a Czech NGO argues that “[n]on-regularized migrants residing in the Czech Republic are often the victims of discrimination, xenophobia, hostility and intolerance. Although they are aware of their position, they lack the resources and the ability to deal with it (...) Those foreign nationals that are staying in the country illegally are people who should be guaranteed certain minimal rights in a democratic system. And, besides fundamental human rights, certain other factors should also be taken into consideration – such as those related to the right to enjoy a family life or the availability of healthcare services.”²³⁸

Like other NGOs which responded to the ICMPD NGO Questionnaire, the German Refugee Council/Viersen (*Flüchtlingsrat im Kreis Viersen e.V.*) sees the main problem of irregular migrants in their limited and precarious access to basic social rights, which, as it argues, has been virtually ignored by the wider public: “Hitherto, [irregular migrants] are barely visible in public debates and have almost no possibilities to satisfy their basic needs. At least, there are some regional and national actors who raise the issue from time to time in public debates (...). However, concrete support is available at most in respect of basic health care provided by NGOs (...). Apart from schooling, however, where there are special provisions, access to most basic rights is practically impossible because of sanctions that irregular migrants have to fear if they try to access such rights.”²³⁹

Several NGOs – notably, the NGOs from Greece, Portugal and Spain which answered the questionnaire – do not want to limit regularisations to particularly vulnerable groups but argue in favour of broadly-conceived regularisation measures, which would be beneficial both for the integration of migrants as well as for society at large. This said, they also stress the role of regularisation in fighting social exclusion, exploitation and improving the situation of vulnerable groups.

Thus, a Portuguese NGO argues in favour of regularisation “so that the process of social and cultural integration develops easily.” Regularisation would also help to reduce illegal immigration and would help fight the exploitation of workers, sexual exploitation and the exploitation of children. “This way, [one would promote] their rights to better [living] conditions, with better employment opportunities and [fairer] salaries.”²⁴⁰ A Greek NGO speaks in favour of regularisation of immigrants, because “this is the only way to estimate the exact number of immigrants who live in Greece, to counter any form

²³⁶ La Strada International LSI, Response, ICMPD NGO Questionnaire, 8 May 2008

²³⁷ DIAVATIRIO (Greece), Response, ICMPD NGO Questionnaire, 30 May 2008

²³⁸ Counselling Centre for Refugees, *op. cit.*

²³⁹ Flüchtlingsrat im Kreis Viersen e.V., Response, ICMPD NGO Questionnaire, 21 April 2008

²⁴⁰ AMI (International Medical Assistance), Response, ICMPD NGO Questionnaire, 5 May 2008

of criminality which stems from immigrants, to eliminate any of the phenomena of xenophobia and racism and finally this is necessary, as a basic pre-condition for the smooth social integration of immigrants.”²⁴¹

A Belgian immigrant association similarly argues in favour of regularisation “because it is important for migrants to have a stable legal status in the host country. Regularisation is one way of recognizing the contribution of the informal undocumented sector in building the economy and socio-cultural richness of the host country, thus bringing them to the formal sector.”²⁴²

Several NGOs argue that regularisation is needed because of the inadequacy of existing immigration regulations or failures of existing immigration policies. Thus, a Spanish NGO argues that “the legal mechanisms regulating the entry of Third Country Nationals do not correspond to the needs of a flexible labour market” and that Spain needs foreign workers. Regularisation thus is needed “to avoid [the] marginalization [of irregular migrants] and to respond to the needs of the labour market.”²⁴³ A Czech NGO sees major deficiencies in the design and immigration legislation: “Besides the existing legal obstacles, the Czech Republic is also known for its restrictive policies towards third-country nationals, its confusing and frequently updated legislation, as well as the unfriendly attitude of public officials communicating with the foreign nationals. As a result, many of the foreign nationals residing in the country have an illegal status.”²⁴⁴

In summary, NGOs argue that

- regularisations would be an appropriate measure to **reduce the number of persons illegally residing** in a country of the EU
- regularisations are **beneficial to the economy**
- they **reduce the exploitation** of irregular migrants
- regularisation **reduce social exclusion**
- they **promote the integration** of irregular migrants into the society
- they improve the **access to basic social rights**, notably **access to health care**
- they can be a **corrective** to administrative or legislative deficiencies
- regularisations are an appropriate means to protect the rights of particularly vulnerable groups, including children and elderly, victims of serious crimes and victims of trafficking/forced prostitution

Why regularisation might not be the ideal solution

As the above survey of NGO principal positions on regularisation shows, NGOs generally are in support of regularisation measures. Nevertheless, several NGOs express reservations on the use of regularisation measures. Among the arguments put forward is that regularisations essentially can be read as indicators for policy failure. Although the conclusion cannot be not to implement regularisation measures, if the need for regularisation arises, several NGOs stress that more far-

²⁴¹ Greek Migrants Forum, Response, ICMPD NGO Questionnaire, 30 May 2008

²⁴² Samahan ng mga Manggagawang Pilipino sa Belgium, Response, ICMPD NGO Questionnaire, 13 May 2008

²⁴³ Movimiento por la paz, el desarme y la libertad, Canarias (M.P.D.L.C.), Response, ICMPD NGO Questionnaire, 25 April 2008

²⁴⁴ Counselling Centre for Refugees, *op. cit.*

reaching reforms of the overall framework governing migration and asylum have to be undertaken to address some of the root causes of the presence of irregular migrants.

Thus, a Belgian NGO argues that “one-off programmes generally reflect a failure of immigration policies. Indeed, pursuing a policy of closure and tight border controls in an era of globalizing economic and social interactions and exchanges must be regarded as inappropriate.”²⁴⁵ A Spanish NGO similarly argues that “in principle, regularisation measures are measures of last resort and indicate that there has been no effective management of migration flows” and recommends that ultimately, “various legal migration opportunities should be opened” which should be based on research on the real migration needs and which should take account both of the situation (and needs) of the Spanish labour market and the goal to promote development through migration and to reduce the enormous disparities between South and North.”²⁴⁶ The position that more legal migration channels should be developed is also supported by another Spanish NGO, which in addition sees a certain foreign policy rationale in the last major Spanish regularisation programmes which, according to the NGO, does not reflect the migratory reality.²⁴⁷ Another Spanish NGO recommends co-operation agreements with third countries to promote legal and “orderly” migration.²⁴⁸

A Swiss NGO, by contrast, suggests that there are limits to migration reform: that there will never be “perfect” migration policies and regularisation measures therefore will always be needed as a corrective instrument: “Regularisation measures complement admission systems, because immigration legislation will always have deficiencies. In addition, in spite of preventive measures taken against irregular migration, there will always be a limit as to how migratory flows can be controlled and effectively managed. It is against this background that the *Global Commission on International Migration* (GCIM) also recommends making use of regularisation measures.”²⁴⁹ Similarly, the Czech Counselling Centre for Citizenship argues that “the principle to regularise [irregular situations] is a self-evident complementary measure, not only in immigration legislation but (...) in many other legal domains, too (for example leniency programmes in anti-trust legislation).”²⁵⁰ La Strada, an NGO with branches in several EU countries, adds “(...) that regularisations are needed as long as the restrictive EU immigration policies do exist, but in fact regularisations are not the solution for the real problem and do tend to be ‘not fair’. It is mostly about groups and there will always be groups and individuals that are not included.”²⁵¹ As an alternative it suggests a comprehensive approach, which would go beyond finding remedies to immediate problems and would also address some of the root causes of migration. Although several of the NGOs acknowledge that regularisation, especially large-scale regularisation, might act as a pull factor, they don’t see this as a sufficient reason not to undertake regularisations.

²⁴⁵ Centre des Immigrés Namur-Luxembourg ASBL (Antenne de Libramont), response, ICMPD NGO Questionnaire, 5 May 2008

²⁴⁶ ACCEM, response, ICMPD NGO Questionnaire, 13 May 2008

²⁴⁷ Federacion Andalucia ACOGE, response, ICMPD NGO Questionnaire, 6 May 2008

²⁴⁸ Iglesia Evangélica Española, response, ICMPD NGO Questionnaire, 15 April 2008

²⁴⁹ Schweizerischer Evangelischer Kirchenbund SEK, response, ICMPD NGO Questionnaire, 5 May 2008

²⁵⁰ Counselling Centre for Citizenship/ Civil and Human Rights, response, ICMPD NGO Questionnaire, 4 May 2008

²⁵¹ La Strada International LSI, response, ICMPD NGO Questionnaire, 8 May 2008

Regularisation practices in individual countries and NGO recommendations

As has been shown above, NGOs generally criticise the absence of legal migration channels and the restrictive nature of existing immigration legislation, which create the need for regularisation.

However, NGOs also see major deficiencies in the use of regularisation measures in individual Member States. Thus, in Austria, NGOs generally criticise the very restrictive use of humanitarian stay to regularise migrants. Similarly, the Czech NGOs lament the absence of any serious regularisation mechanisms which implies that regularisation is only possible in very few individual cases, by using general provisions in immigration legislation.

Box 5: Migrants Rights Centre Ireland – Bridging Visa

What is it? A temporary 6-month permission to remain

Target group: Migrants from outside the EU who have entered Ireland lawfully but have become undocumented for reasons beyond their control (workplace exploitation, deception, or unexpected redundancy).

Needs

- Estimation of the eventual size of the target group
- Lack of official mechanism for temporary permission to remain dealing with the situation
- Dealing with bureaucratic procedures: some individuals have been able to petition the DJELR for a temporary permission to remain and have received it, but this is slow and torturous and can take up years or more. There are no defined criteria or transparency regarding decisions.

Expected results

The Bridging Visa will allow beneficiaries to

- Have a new work permit application processed;
- Access social benefits and services for which they have contributed;
- Feel free to come forward and report exploitation and abuse without fear of deportation;
- Have the opportunity to visit their families back in their home countries and
- Get back into the system and on course to living and contributing to Irish society

Source: Migrant Rights Centre Ireland, Leaflet and FAQs on the Bridging Visa campaign, online at:

http://www.mrci.ie/policy_work/IrregMigrant_UndocuMigrant.htm

Although Dutch NGOs which have responded to the questionnaire welcome the latest regularisation programmes for rejected asylum seekers in the Netherlands, they note that the programme targeted only a specific group of persons. In addition, they severely criticise the restrictive use of humanitarian stay – the only permanent regularisation mechanisms in the Netherlands – which, they argue, leaves a sizeable number of persons in an irregular situation: “The new regularization of ex-asylumseekers (pardon) in our country is a very generous project, unfortunately it is only for a specific target group (not 'general', as most non-asylumseekers complain). (2) We used to have a three-year rule, meaning that when an admission-procedure took more than 3 years, the applicant was granted a stay permit: unfortunately this rule has been abolished. No other regularization mechanism exists nowadays, apart from the application 'on humanitarian grounds' which is only seldom granted.”²⁵² A Belgian NGO complains that the new criteria on individual regularisations that were announced in the government

²⁵² Stichting LOS (Landelijk Ongedocumenteerden Steunpunt), response, ICMPD NGO Questionnaire, 21 April 2008.

Accord of March 2008 have not yet been put into practice.²⁵³ A German NGO notes that “as regularisation policy in Germany is limited to providing a right to stay to persons who have been in a toleration status for a long period of time, that is persons without a right to stay but who are documented, a large number of persons fails to get access to their most fundamental rights.”²⁵⁴

In Greece, the main problems associated with current regularisation practices are found to be bureaucratic procedures, high fees, and onerous documentation requirements: “The most recent regularisation has been strict and with too many formal requirements, a hybrid of a general and a very limited regularisation. In fact, less than 200,000 people have applied, despite the favourable measures adopted for migrant youth and children after pressure by NGOs and the Ombudsman. All the past 3 regularisations have in common the amnesty of the employers and the paradox of obliging exclusively migrant workers to pay [significant] and not refundable social security contributions and hefty fees in order to regularise themselves.”²⁵⁵ Another Greek NGO adds: “[R]egularisation [policies] in Greece [can be] characterised as ineffective. The main reason of this ineffectiveness is the incoherence of the measures and the absence of systematic information of those eligible. Although we agree in general with the connection between the regularisation and the time of presence of the immigrants in the country we are convinced that the ways with which the Greek laws call the immigrants to prove their presence in the country create more problems than they solve. In addition, over the last years there has been no information campaign for immigrants nor any mechanism for their information. This political choice of the state shows that its target is not the ‘regularisation’ of those who normally have a right to it.”²⁵⁶

In Portugal and Spain, NGOs generally positively evaluate government policies on regularisation, but see some room for improvement, including reducing some of the documentary requirements for regularisation programmes or doing away with fines that regularised migrants have to pay in Portugal. However, there are also more fundamental concerns. Thus, ACCEM, a Spanish NGO, observes that “although the Spanish immigration law foresees different paths to regularisation, in the praxis they are not sufficient.” Among the problematic areas it identifies are: a) eligibility criteria; b) required documentation; c) conditions of continuous stay; d) delays in processing the applications; and e) regional differences resulting from different implementation of regularisation measures by provinces. The NGO responses suggest various ways forward. First, NGOs argue that they – along with other stakeholders – should be involved in designing any policies on regularisation at the national level, not least since NGOs are closest to migrants in an irregular situation and have the best knowledge of the needs of irregular migrants. Generally, NGOs do support (permanent) regularisation mechanisms, in particular for hardship cases. An interesting proposal for a ‘bridging visa’ that would be available for irregular migrants who have been legal residents (but have lost their legal status for reasons beyond their control) comes from an Irish NGO. The proposal, which is supported by the Irish Confederation of Trade Unions, is presented in Box 5 (above).

²⁵³ Centre des Immigrés Namur-Luxembourg ASBL (Antenne de Libramont), response, ICMPD NGO Questionnaire, 5 May 2008

²⁵⁴ Flüchtlingsrat im Kreis Viersen e.V., response, ICMPD NGO Questionnaire, 21 April 2008

²⁵⁵ HLHR, response, ICMPD NGO Questionnaire, 29 May 2008

²⁵⁶ ANTIGONE, response, ICMPD NGO Questionnaire, 29 May 2008

Suggested target groups for regularisation measures

Table 8, overleaf, summarises NGO suggestions of potential target groups for regularisation measures. The target groups are presented country-by-country, rather than as a synthesis – as the target groups indicated by NGOs can also be read as broader indications of particularly problematic categories of third country nationals in individual countries. Switzerland has been included in the table, since the context for irregular migration – generally speaking – resembles that of countries of the European Union.

As can be seen from the table, the most often-cited category is that of rejected asylum seekers, followed by particularly vulnerable groups, notably victims of trafficking, minors and other family members, including family members of nationals. This indicates that NGOs consider irregular migrants liable to be deported (if we generalise the notion of rejected asylum seekers) as being a major category of concern in virtually all countries from which we have received responses. Furthermore, it suggests that current state practices, notably reliance on return as the only viable policy option, is seen as seriously wanting from the perspective of NGOs. Similarly, vulnerable persons, although probably relatively insignificant in quantitative terms, are seen as an important (suggested) target group for regularisation measures, and indeed have been an important category of beneficiaries of past regularisations for humanitarian reasons. What is perhaps most surprising is the extent to which family members, including family members of legal residents and nationals, and particularly minors have been identified as a major group of concern.

Towards a European policy on regularisations?

In general, NGOs are supportive of adopting policies on regularisation at the EU level. According to the responses collected in the questionnaires, a policy on regularisation potentially could enhance the rights of irregular migrants, could define minimum standards and provide common definitions of regularisation and could help fight social exclusion and exploitation. However, there are also various concerns. Thus, NGOs argue that there is the danger that any EU level regulations could lead to more restrictive policies actually preventing, rather than promoting the use regularisation as a policy tool. In another respect, EU level policies might be problematic in that they might risk insufficiently taking into account the specificities of individual countries.

Table 8: Suggested target groups for regularisation measures

Austria	Long-term asylum seekers, irregularly staying spouses of Austrian nationals, victims of legal changes
Belgium	Long-term asylum seekers (4-5 years), persons with strong attachments to Belgium (families with children at school, integration, local ties), persons with long residence in Belgium (5 years and longer)
Czech Republic	Long-term asylum seekers, persons with long de facto residence who were unable to renew their permits, irregularly staying spouses of Czech citizens, persons who lost their status as a result of restrictions following from Act No. 326/1999 Coll. on the residence of aliens in the Czech Republic, persons who lapsed into illegality because of gaps in immigration legislation and/or because of administrative errors
France	Rejected asylum seekers
Germany	Traumatized war refugees (e.g. from Iraq and Afghanistan), unaccompanied minors, minors in an irregular situation who were born on German territory and raised in Germany, victims of serious assaults, victims of forced prostitution and trafficking, exploited persons, tolerated persons
Greece	War refugees, persons fleeing racism in country of origin; children born and raised in Greece and in an irregular situation, persons who have resided in Greece for long periods of time and are integrated, persons who failed to renew their permits – often for reasons beyond their control, rejected asylum seekers, family members of Greek nationals
Ireland	Third country nationals who have fallen out of the employment permit system for reasons beyond their control; persons from non-visa countries who work irregularly because of unavailability of employment permits; failed asylum seekers
Netherlands	Persons effectively unable to return to their country of origin, persons with long residence in the NL, in particular persons with family members in the NL, vulnerable groups (physically or mentally ill persons, minors)
Portugal	Victims of trafficking, persons with long residence in Portugal who are integrated in Portugal and are employed
Spain	Rejected asylum seekers who are unable to return to their country of origin, persons who have developed ties to Spain, family members of legal residents, victims of human trafficking, persons with serious health problems which cannot be treated in the country of origin/ who don't have access to health care in the country of origin, vulnerable persons, minors who either have no possibility to return or in whose cases return is not advisable, victims of criminal abuse
Switzerland	Vulnerable persons (victims of violent crimes, victims of trafficking, pregnant women, women in general, elderly persons, children); long-term asylum seekers, persons who cannot be returned; domestic workers and their children, persons who lost their legal status

Source: ICMPD NGO questionnaires

Thus, NGOs argue, Member States should have some flexibility in responding to irregular migration and migration more generally. Antigone, a Greek NGO, emphasises that any legislation to be developed on regularisations needs to be based on a ‘good practice’ model: “A common European policy should take place only if the best practices (...) and the maximum standards of protection of migrants could be guaranteed as a content of a possible EU directive on regularisation.”²⁵⁷ In a similar vein, another Greek NGO warns of developing strong regulations at the European level and instead argues in favour of evaluatory structures: “The great variations between many EU Member States, especially between North/South, create contradictions which often lead to compromises with the result that important national measures are missed. Nevertheless, there is a need for common policies. These policies should put great emphasis on the evaluation and the creation of structures which can be registered and intervene where appropriate.”²⁵⁸

Measures suggested by NGOs include: defining the legal status of regularised persons, providing minimum standards for regularisation procedures, a permanent regularisation commission that would be composed of various stakeholders (including the judiciary and NGOs), promotion of regularisation mechanisms, exchange of experiences and best practices, the definition of basic regularisation principles, strengthening access to international protection and improving the asylum procedure (for example, by setting limits to the length of the procedures), and finally, agreements on regularisation mechanisms for particularly vulnerable groups.

Generally, NGOs support a debate on regularisation policies on the European level – a debate in which NGOs should have a crucial role. However, NGOs do not necessarily see a need for developing strong legislative instruments on the EU level. As one Czech NGO argues; “issues related to regularisation programs and mechanisms must be discussed at a European level – especially with respect to the specific impact (both positive and negative) of regularisation policies that have already been implemented and with respect to the mutual sharing of experiences. In our opinion, it isn’t necessary to have a common approach for regularisation programs and mechanisms on a Europe-wide level and we believe that these issues should fall within the competency of the individual member states. Our view is that the adoption of a common European approach to the issue of regularisation could well end up having a rather negative impact consisting of the attempt of the opponents of regularisation to minimize the range of options, which regularisation provides, or the opponents could end up being able to effectively find support for a general ban on regularisation programs across Europe.”²⁵⁹ The need for a thorough debate on regularisation is also stressed by a Belgian immigrant association: “I think the keyword here is participation by all the stakeholders (including the undocumented themselves) not just the host countries in formulating, implementing (monitoring and follow-up) and evaluating policies, programs and mechanisms. Migrants have something to contribute.”²⁶⁰

In conclusion, NGOs clearly see a role for the European Union in regularisation policy and welcome a debate on regularisation on the European level. Although there are concrete proposals for possible

²⁵⁷ ANTIGONE, *op. cit.*

²⁵⁸ Greek Migrants Forum, response, ICMPD NGO Questionnaire, 30 May 2008

²⁵⁹ Counselling Centre for Refugees/ Organization for Aid to Refugees, response, ICMPD NGO Questionnaire, 30 April 2008

²⁶⁰ Samahan ng mga Manggagawang Pilipino sa Belgium, response, ICMPD NGO Questionnaire, 13 May 2008

policy measures that could be adopted on the European level, NGO responses suggest that the main priority at this stage should be to open a debate on regularisation practices, which should focus on the exchange of experiences, the evaluation of past and ongoing regularisation measures and on the development of common principles and guidelines for regularisation practices.

5.4.3 Position of NGOs on the European level

In addition to national level NGOs, there are a number of organisations on the European level which have formulated policies and recommendations regarding regularisations. Among these, PICUM – *Platform for International Cooperation on Undocumented Migrants* – is probably the best-known organisation and one which sees advocacy for the rights of undocumented migrants as its core mandate.

In its extensive 2005 report on “10 ways to protect undocumented migrant workers”,²⁶¹ PICUM argues that regularisation is in itself not a sufficient but a necessary tool to comprehensively protect undocumented migrant workers and improve their rights. This said, the report argues that undocumented migrant workers do have, and should have, basic social, employment and human rights and are in a position to assert these rights: “Nonetheless, there are many benefits for undocumented workers – as well as for society on the whole – if they obtain legal residence status.”²⁶² Regularisation is beneficial to society at large because “[h]aving a large group of people working in an informal economy undermines the economy as a whole. Regularizing undocumented workers is a way of combating the informal economy while at the same time improving the lives of these workers. Furthermore, regularization creates more visibility of the target group that social policies are meant to protect but who, because of their irregular status, are denied this protection.”²⁶³

Since, as the report argues, lack of legal status is a “license to abuse”, regularising migrants in an irregular situation is a necessary, if insufficient, step to fight some of the consequences of illegality. However, “[a] comprehensive solution goes beyond the regularization of workers by tackling the reason why these low wage sectors always rely on undocumented workers.”²⁶⁴

In a joint statement on the Commission’s communications on policy priorities in the fight against illegal immigration of third country nationals, European Christian Churches and Church organisations²⁶⁵ argue for a comprehensive approach towards illegal migration. While acknowledging the role of border control and return, the organisations warn against the exclusive reliance on enforcement measures and, amongst other proposals, recommend the opening of legal avenues for immigration and the use of regularisation as an alternative to return. In addition, the joint statement

²⁶¹ Platform for International Cooperation on Undocumented Migrants (Picum) (2005): *Ten Ways to Protect Undocumented Migrant Workers*. Brussels: Picum, available online at <http://www.picum.org/LABOR/PICUM%20Ten%20Ways%20to%20Protect%20Undocumented%20Migrant%20Workers.pdf>

²⁶² *Ibid.* p.99

²⁶³ *Ibid.* p.102

²⁶⁴ *Ibid.* p.100

²⁶⁵ Caritas Europa, Churches Commission for Migrants in Europe (CCME), Commission of the Bishops' Conferences of the European Community's Working group on Migration (COMECE), International Catholic Migration Commission (ICMC), Jesuit Refugee Service Europe (JRS-Europe) and Quaker Council for European Affairs (QCEA) (2006): *Comments on the European Commission's Communication on "Policy priorities in the fight against illegal immigration of third county nationals" COM (2006) 402 final*. Brussels

calls for the rapid adoption of the 1990 UN *Convention on the Protection of All Migrant Workers and Their Families*, stressing the need to protect the rights of irregular migrants and combat discrimination and racism targeted at undocumented migrants. Finally, the statement critically reviews the lack of involvement of social actors in developing policies on irregular migration: “Unfortunately cooperation with civil society does not seem to be in the focus of this communication and the distinctive role and experience of churches and church related agencies in addressing complex issues resulting from migration are not fully acknowledged. It is striking that NGOs are only mentioned as information-providers on undocumented workers, not as partners in ensuring a human rights-based policy approach. We are deeply concerned about the misconception regarding the role of NGOs, churches and church agencies in the context of setting up a common European migration policy.” In an earlier statement of March 2006, European Churches voice their concern that provisions of the ‘Return Directive’ might render it impossible to carry out regularisation campaigns, which, according to Churches, “have proved to be an important instrument for tackling the complex issue of irregular migration.”²⁶⁶ The Churches also note that return can only be an element in a comprehensive approach and particularly note the importance of ensuring equal access to international protection in the territory of the Union. In the current context, the Churches see a danger that access to protection depends on mere chance, depending on whether persons in need of protection reach a country with high or low recognition rates, as the example of Chechnyan refugees shows.²⁶⁷

In a similar vein, the European Council on Refugees and Exiles (ECRE) highlights the need to ensure equal access to international protection across the EU. As a tool to access protection, ECRE supports the introduction of EU Protected Entry Procedures (PEPs): these are arrangements that would permit an individual to: (i) approach the authorities of a potential host country outside its territory with a view to claiming recognition of refugee status or another form of international protection; and (ii) be granted an entry permit in case of a positive response to that claim, be it preliminary or final.²⁶⁸ According to ECRE, success in such a procedure should not depend on any particular links with the country of destination. ECRE also stresses that the specific procedures “should not undermine the situation of those with protection needs who arrive in Europe in an irregular manner and should not be considered as an alternative to resettlement. Furthermore, making a PEP application should also not prevent a person from seeking asylum on EU territory in the future.”²⁶⁹

In a review of Member States’ practices vis-à-vis persons who cannot be deported, ECRE observes that many people who cannot be returned may find themselves in ‘limbo situations’ – irregular situations with few or no rights and without any possibility of receiving support or permission to work. Thus, ECRE notes that in practice a return decision or procedure is often suspended but rarely

²⁶⁶ Caritas Europa, Churches Commission for Migrants in Europe (CCME), Commission of the Bishops’ Conferences of the European Community’s Working group on Migration (COMECE), International Catholic Migration Commission (ICMC), Jesuit Refugee Service Europe (JRS-Europe) and Quaker Council for European Affairs (QCEA) (2006): *Comments on the European Commission’s Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals COM (2005) 391*, Brussels, p.2

²⁶⁷ *Ibid.*

²⁶⁸ ECRE (2007): *Defending Refugees Access to Protection in Europe*, Available at: <http://www.ecre.org/files/Refugees%20Access%20to%20Protection%20in%20Europe%20FULL.pdf>, p.50

²⁶⁹ *Ibid.* p.52

followed by the granting of any status.²⁷⁰ Against this background, ECRE recommends to provide rejected asylum seekers with the opportunity to apply for a permanent legal status if they “have lived in the receiving country for 3 years or more and consequently started to put down roots.”²⁷¹ Referring to the Council of Europe report on regularisation programmes for irregular migrants,²⁷² ECRE notes that the report “has found that regularisation programmes can provide a solution for the human rights and human dignity of irregular migrants, as well as respond to labour market needs and promote increases in social security contributions and tax payments”.²⁷³

²⁷⁰ ECRE (2005): *The Return of Asylum Seekers whose Applications have been Rejected in Europe*. Available at: <http://www.ecre.org/files/return.pdf> , p.26

²⁷¹ ECRE (2007): *Submission from the European Council on Refugees and Exiles in response to the Commission's Green Paper on the Future Common European Asylum System (COM (2007) 301)*. Available at: http://ec.europa.eu/justice_home/news/consulting_public/gp_asylum_system/contributions/ngo/european_council_on_refugees_exiles_ecre_en.pdf , May 28 2008, p.20

²⁷² Council of Europe (CoE) Assembly, Regularisation programmes for irregular migrants, Doc 11350, 6 July 2007. Available at: <http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc07/edoc11350.htm> .

²⁷³ ECRE 2007, Submission ... p.20

6 International organisations

6.1 The scope of international law

6.1.1 UN Conventions

Despite the sovereign right of each state to regulate immigration of non-citizens into its territory, the provisions of ‘customary international law’ are binding even on non-signatories: such law pertaining to migrants includes the *Universal Declaration on Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Cultural and Social Rights*, and the *Optional Protocol to the International Covenant on Civil and Political Rights*. However, these instruments have little to say concerning non-nationals without legal residence: only the *International Convention on the Protection of the Rights of All Migrant Workers and Their Families* (ICRMW) extends basic human rights to undocumented aliens.

ICRMW, as of October 2008, had been ratified by no EU country. The Convention identifies some core rights that apply to all aliens, with an extended set of rights for those legally present. In this, it continues the approach taken in *ILO Convention 143* (see below). The core rights include such things as protection of personal property rights (Art. 15), basic legal and personal security rights, including the right to trial (Art. 16), rights of liberty and legal treatment upon its deprivation (Art. 17), basic legal rights (Arts. 18-21), conditions of lawful expulsion (Art. 22), employment and social security rights (Arts. 25-28), and the rights of children of migrants (Arts. 29-30). On the other hand, Art. 35 expressly precludes that the Convention implies any “regularization of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularization of their situation”. Furthermore, Art. 69 does have some specific directions to states on how to deal with irregular migrants, amounting to the policy choice ‘regularise or expel’:

Article 69

1. States Parties shall, when there are migrant workers and members of their families within their territory in an irregular situation, take appropriate measures to ensure that such a situation does not persist.
2. Whenever States Parties concerned consider the possibility of regularizing the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the States of employment and other relevant considerations, in particular those relating to their family situation.

In an extended analysis of the obstacles to ratification of ICRMW,²⁷⁴ the authors note specific national objections to the rights accorded to irregular migrants in the convention. Particularly, Italy would be obliged to deliver the substantial rights already guaranteed in other legislation (but largely unenforceable); the UK does not accept the principle of equal treatment of irregular workers (their contracts are viewed as illegal and unenforceable); the idea of rights for irregular immigrants is a taboo in Germany’s public discourse; Poland and the UK consider that the Convention would be a ‘pull-factor’ for illegal migration flows; Spain is concerned about public reaction to announced rights

²⁷⁴ MacDonald, E. and Cholewinski, R. (2007): *The Migrant Workers Convention in Europe*, Paris: UNESCO

for irregular migrants, while Italy seems to consider the Convention to be irrelevant or outdated as a policy issue.

For its part, the European Commission is taken to task in the report, for its ‘criminalisation’ of irregular migrants, with an overemphasis on security and labour market protection and a correspondingly de-emphasised context of social and fundamental rights for those caught up in what is now a common pattern of informal employment and/or residence across the developed world.

One further UN Convention that is relevant for this study is the 1989 *Convention on the Rights of the Child*. This has been ratified by all members of the United Nations other than the USA and Somalia. The Convention is probably part of customary international law, but regardless has an annual reporting mechanism and periodic scrutiny of states parties’ practices regarding compliance with the Convention. Of particular note, Article 2(1) forbids discrimination against any child on the basis of his parents’ ...status, including illegal status; Article 3(1) states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Thus, there are clear limitations imposed on states in their management of the children of irregular migrants and the treatment of families with an irregular status: access to schooling and healthcare are primary areas of concern, along with state practices concerning regularisation and expulsion.

6.1.2 ILO Conventions

The principal instruments of relevance are the *Migration for Employment Convention (Revised)* (C 97) of 1949 and the *Migrant Workers (Supplementary Provisions) Convention* (C 143) of 1975. The Conventions are binding only on those countries that have ratified them. As of July 2008, for the 1949 Convention, there are 47 states parties, including Belgium, France, Germany, Italy, the Netherlands, Portugal, Spain and the UK. For the 1975 Convention, there are 23 states parties, including EU members Cyprus, Italy, Portugal and Sweden.

The 1949 Convention essentially deals only with legally recruited migrants, although it does have various provisions that may conflict with existing policies on migrant returns (e.g. repatriation of migrants with more than five years of residence should “in principle” not occur). The 1975 Convention was drawn up specifically to address the growing problem, evident even in the 1970s, of irregular migration. In particular, Part I deals with illegal work, requiring prosecution of employers as well as workers, and stipulating equality of treatment for illegal migrants. Also, loss of employment is not seen as an adequate ground for withdrawal of a work or residence permit. Most of the provisions of this Convention are, more or less, replicated in the UN Convention of 1990.

6.2 Regional legal instruments

The Council of Europe, formed in post-war European cooperation, was established partly to maintain and reinforce human rights after the horrors of Nazism. The Council functions mainly as an

intergovernmental organisation for (currently) 47 European states. Treaties, either conventions or agreements, are concluded within a multilateral framework: once opened for signature, they constitute straightforward international treaties and not legal instruments of the Council of Europe. Furthermore, the treaty rights are conferred solely on nationals of other contracting parties. The exception to this is the *European Convention on Human Rights* (ECHR), whose control machinery includes a commission and a court to whose jurisdiction members have agreed.

The ECHR has without doubt had the most impact; for migrants, however, other important legislation includes the *Convention on Establishment*, 1955; the *European Social Charter*, 1961; the *European Convention on Social Security*, 1972; and the *Convention on the Legal Status of Migrant Workers*, 1977. With the exception of the ECHR, the conventions are applicable only to legally resident migrants who are nationals of contracting states: however, they do set standards concerning the conditions and maintenance of legal status, such as state procedures for the issuing of residence permits.

What is important for EU policy on irregular migrants is that not only has the *European Court of Human Rights* (ECtHR) recently started to address the rights of such migrants, but that the Convention itself (and implicitly the jurisprudence of the Court) is, according to Article 6(2) of the (Consolidated) Treaty on the European Union, to be considered as part of the *Acquis Communautaire*. Indeed, the gap between EU and ECHR laws has narrowed substantially in recent years, such that some sort of symbiotic relationship – rather than uneasy competition – is gradually emerging.

Recent ECHR case law has “considerably extended the protective scope of Article 8 ECHR by granting autonomous human rights protection to the long-term resident status independent of the existence of family bonds...effectively granting several applicants a human right to regularize their illegal stay.”²⁷⁵ This new direction of the Court’s jurisprudence has come about partly through having to address the rights of long-term ethnic Russian residents of several Baltic states, who had been refused citizenship of Latvia and Estonia. After the case of *Sisojeva et al. v. Latvia*,²⁷⁶ various administrative courts in Germany relied upon the new case law to oblige the authorities to regularise the illegal stay of rejected asylum-seekers who had been living in a ‘tolerated’ fashion for many years.²⁷⁷ However, it has also been extended to the legal and social situation of immigrants in western Europe. The cases of *Mendizabal v. France*²⁷⁸ and *Da Silva & Hoogkamer v. Netherlands*²⁷⁹ concern, respectively, the conditions for granting residence permits and the regularisation of illegal stay.

Two recent instruments of European Union policy on migration – the directives on family reunification and on long-term residence – are in need of human rights standards, since the directives themselves are little more than instructions for Member States. The recent case law of the ECtHR, particularly that concerning Article 8, is almost certain to be the guiding force in any ECJ

²⁷⁵ Thym, D. (2008), ‘Respect for private and family life under Article 8 ECHR in immigration cases: a human right to regularize illegal stay?’, *International and Comparative Law Quarterly*, 57, p. 87

²⁷⁶ ECtHR, judgement of 15 January 2007 (GC), No. 60654/00

²⁷⁷ Thym, D. (2008.), *op. cit.* p. 105

²⁷⁸ ECtHR, judgement of 17 January 2006, No. 51431/00, *Ariztimuno Mendizabal v. France*

²⁷⁹ ECtHR, judgement of 31 January 2006, No. 50435/99, *Rodrigues Da Silva & Hoogkamer v. The Netherlands*

interpretations of the EU directives and perhaps can lead to “structural alignment of ECHR standards and EU legislative instruments”.²⁸⁰

In a first ruling on the family reunification directive (case C 540/03 (judgment of 27 June 2006), the ECJ dismissed an action brought by the European Parliament for annulment of the directive. The ECJ considered the directive as being consistent with the provisions of the *European Convention of Human Rights* and the jurisprudence of the ECtHR. Thus, the ECJ found that that the directive cannot be regarded as running counter to the fundamental right to respect for family life, to the obligation to have regard to the best interests of children or to the principle of non-discrimination on the grounds of age. The court argued that the attacked provisions preserve a limited margin of appreciation for Member States which is no different from that accorded to them by the ECtHR in its case law relating to the right to respect family life, for weighing competing interests in each factual situation.

6.3 The positions of international organisations on irregular status and migration policies

Several of the international organisations whose mandate covers the protection of migrants have issued various statements in the form of reports, resolutions and recommendations on regularisation practices and related issues, which we review in the following. The organisations whose positions are reviewed are: ILO, GCIM, CoE and UNHCR.

6.3.1 Regularisation and irregular employment

According to the *International Labour Organization* (ILO), regularisation programmes can serve to combat the informal labour market and can bring economic benefits for the host country in terms of increased taxes and social security contributions. Nevertheless, they are “complex undertakings” as “authorities must convince the migrants that it is to their advantage to become regularized, but they cannot divulge their plans too far in advance, since this might immediately encourage more immigration”.²⁸¹

The *Global Commission on International Migration* (GCIM) also supports the view that regularisation programmes are “complex undertakings” – they can promote additional irregular migration, if states establish them on an ongoing or rolling basis; however, regularisation measures have provided many migrants with irregular status with a chance to find a place in the economies and societies of their host countries.²⁸² The Commission makes a distinction between selective regularisation programmes (offering legal status to migrants with irregular status, who have been present in a country for significant periods of time, who have found employment and whose continued

²⁸⁰ Thym, D. (2008.): *op. cit.*, p. 111

²⁸¹ International Labour Organization (2004), *International Labour Conference. Report 6. Towards a fair deal for migrant workers in the global economy*. Geneva. Available at: <http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/rep-vi.pdf>, p. 122, para. 401-402

²⁸² Global Commission of International Migration (2005), *Report. Migration in an Interconnected World: New Directions for Action*, Available at: <http://www.gcim.org/attachements/gcim-complete-report-2005.pdf>, p. 38, para. 34

participation in the labour market is welcomed by the state and private sector) and amnesties, in which migrants with irregular status are given legal status in an across-the-board manner.²⁸³ GCIM recommends that regularisation should take place on a case-by-case basis. The successful achievement of the aims depends on a “transparent decision-making process” with “clearly defined criteria for migrants to qualify for regular status”. The criteria may include (i) applicant’s employment record; (ii) language ability; (iii) absence of a criminal record and (iv) the presence of children who have grown up in the country; “in other words, those who have already achieved a substantial degree of integration in society”.²⁸⁴

The *Council of Europe* (CoE) notes as well that regularisation programmes may have a subsequent ‘pull effect’ for further irregular migration.²⁸⁵ However, these concerns may be exaggerated if other factors contributing to irregular migration are not taken into account. These factors refer to: geographical location, colonial history and linguistic ties, high level of demand for unskilled labour, narrow front-door for regular migration and difficulty in returning irregular migrants.²⁸⁶ The Assembly also recognises that regularisation programmes offer the possibility to protect the rights of irregular migrants, to tackle the underground economy and to ensure that social contributions and taxes are paid.²⁸⁷

Similarly to the Global Commission on International Migration, the CoE distinguishes between regularisation programmes for specific groups of irregular migrants (exceptional humanitarian programmes, family reunification programmes, permanent or continuous programmes, earned regularisation programmes) and general amnesties, which apply to all irregular migrants.²⁸⁸ The Council advocates particularly for employer-driven regularisation programmes as a means of meeting the needs of a large number of irregular migrants, employers, trade unions and society in general. It supports also a process of earned regularisation, the benefits being that this

- i. will provide a pathway to permanent residency or citizenship for migrants through a points system (points would be awarded on an individual basis to migrants through knowing the language of their host country, paying taxes, having stable employment, participating in community life, etc);
- ii. has the potential to be self-selecting, since only those migrants who were truly motivated to stay would earn enough points, while those who were not would be forced to return home;
- iii. eliminates the need for large-scale one-shot programmes, since each individual country would determine who would be regularised on a case-by-case basis. Earned regularisation is

²⁸³ GCIM (2005): *op. cit.* p.38

²⁸⁴ GCIM (2005): *op. cit.* p.38, para. 35

²⁸⁵ Council of Europe (CoE) Assembly (2007): *Recommendation 1807. Regularisation programmes for irregular migrants*, para. 4

²⁸⁶ Council of Europe (CoE) Assembly (2007): *Resolution 1568, Regularisation programmes for irregular migrants*, para. 13

²⁸⁷ Council of Europe (CoE): *Assembly Recommendation, op. cit.*, para. 4

²⁸⁸ Council of Europe (CoE): *Assembly Resolution, op. cit.*, para. 9

considered to be “flexible, adaptive and responsive to local labour market needs and demographic realities”.²⁸⁹

Furthermore, a regularisation process should be seen as part of a comprehensive strategy and “not as a measure of last resort when all other measures have failed”.²⁹⁰ That refers to improvement of bureaucracy of regularisation programmes, including:

- i. Comprehensive review of best practices and impacts;
- ii. Taking into account both the concerns of employers and migrants;
- iii. Improvement of publicity efforts (ensuring that publicity for the programmes reaches irregular migrants and that their benefits are explained carefully to the media and to the public in general);
- iv. Administrative preparedness – strengthening the administration to be able to deal with the potential number of applicants for regularisation; minimum administrative requirements; guarantees against fraudulent procedures.²⁹¹

The ILO also advocates an individual right to ‘earned adjustment’ as an alternative, or complement, to more general ‘unique’ regularisation measures. It targets irregular migrant workers who cannot be removed for legal, humanitarian or practical reasons and who have demonstrated that they have a prospect of settling successfully in the host country: “Migrant workers with irregular status may be said to earn a right to legal status if they meet certain minimum conditions: they must be gainfully employed, they must not have violated any laws other than those relating to illegal or clandestine entry and they must have made an effort to integrate by (for example) learning the local language”.²⁹² ILO notes that the successful achievement of aims depends on the involvement of all groups that will be affected: that includes migrants themselves through publicity and information programmes via channels that migrants trust, such as civic and religious organisations.²⁹³ Furthermore, regularisations work best when the process is “straightforward” – if the requirements are too demanding, time-consuming or costly, they will discourage many of those who are eligible. “Regularization should instead take the form of a simple act at the lowest possible level of administration, demanding very little documentation and requiring neither the support of a lawyer nor recourse to the courts.”²⁹⁴

The Council of Europe has also defined measures accompanying regularisation programmes, which refer to the following:

²⁸⁹ Council of Europe (CoE) Assembly (2007): *Regularisation programmes for irregular migrants*. Report Committee on Migration, Refugees and Population. Rapporteur: Mr John Greenway, United Kingdom, European Democrat Group. Doc. 11350. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11350.htm>, para. 120

²⁹⁰ Council of Europe (CoE) Assembly (2006): *Human Rights of Irregular Migrants*. Report Committee on Migration, Refugees and Population. Rapporteur: Mr Ed van Thijn, Netherlands, Socialist Group. Doc. 10924. Available at: <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10924.htm>, para. 127

²⁹¹ CoE Assembly 2007, Report, *op. cit.*, para. 107-111

²⁹² ILO (2004): *op. cit.* p. 120, para. 399

²⁹³ ILO (2004): *op. cit.* p. 120

²⁹⁴ ILO (2004): *op. cit.* p. 120

- i. Combating irregular employment and informal economy (reinforcing the labour inspectorate and establishing systems of fines and punishments);
- ii. Strategies to encourage the integration of irregular immigrants who have been regularised;
- iii. Working co-operation with countries of origin (tackling the push factors of irregular migration, whether these be economic or environmental, including co-development and other measures);
- iv. Tightening visa and/or border controls;
- v. Widening the front door to regular migration (more open admission policies that increase legal access to labour markets);
- vi. Considering impact on families (impact of migration enforcement on families; perpetuation of irregular status on the second generation of immigrant families and its effects on the educational attainment, potential income earnings, health, and integration of children into the host country);
- vii. Co-operation with other governments to harmonise policies: “the Council of Europe and the European Union should work toward establishing a common principle of regularisation”;²⁹⁵
- viii. Protecting the victims of trafficking;
- ix. Enabling the regularisation of irregular migrants and ensuring full integration into society when they are unable to return to their country of origin.²⁹⁶

6.3.2 Migration management strategies and irregular migration

According to the ILO, the prevention of irregular migration depends on the creation of more legal migration opportunities. In this sense, intensification of border controls – “more policing” instead of “better policies” – is not the solution.²⁹⁷ There is a recognised need for a “comprehensive and co-ordinated policy approach which attempts to tackle all dimensions of the phenomenon”, engaging “not merely the participation of governments, but also the social partners and civil society”.²⁹⁸ The proposed approach incorporates measures to reduce irregular labour migration at all stages of the migration process:

- i. Activities in countries of origin, as well as inter-state co-operation (public information/educational campaigns that inform potential migrant workers on the risks of irregular migration; capacity building to strengthen institutional structures - policies and measures adopted by countries to protect their workers while seeking more employment opportunities abroad, negotiation of bilateral labour agreements.
- ii. Border controls and the articulation of a viable visa policy (a minimum of bureaucratic obstacles and/or red tape enabling migrants to enter and take up employment.

²⁹⁵ Council of Europe (CoE) Assembly 2007: *Report, op. cit.*, para. 112-119

²⁹⁶ Council of Europe (CoE) Assembly 2007: *Resolution, op. cit.* para. 20-21

²⁹⁷ ILO (2004): *op. cit.*, p. 61, para. 199

²⁹⁸ OSCE, IOM, ILO (2006): Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination. Vienna. Geneva. Available at: http://www.ilo.org/public/english/protection/migrant/download/osce_handbook_06.pdf, p. 161, 165

- iii. Measures and sanctions against those who facilitate irregular migration.
- iv. Protection for irregular migrant workers (minimum guarantees for the protection of irregular migrants as an integral aspect of a preventive approach).
- v. Opening up more legal channels for labour migration –policies to establish legal migration methods and procedures that are equitable and sufficiently attractive to deter potential migrants from travelling by irregular means.²⁹⁹

GCIM observes that “strengthened border controls and visa restrictions have not always been effective in preventing irregular migration”.³⁰⁰ It recognises the need for a long-term approach based on a combination of measures. Border control policies should be accompanied by:

- i. additional information programmes, providing prospective migrants with a better understanding of the risks entailed in irregular migration;
- ii. guidance in finding regular migration opportunities;
- iii. capacity-building programmes, involving training and institutional development;
- iv. introduction of new legislation, policies and practice, especially in countries that have only recently been confronted with the issue of irregular migration;
- v. interstate co-operation.³⁰¹

GCIM has consequently now proposed several activities. States and other stakeholders “should engage in an objective debate about the negative consequences of irregular migration and its prevention”; regional consultative migration processes should include irregular migration in their agendas; states should provide additional opportunities for regular migration (when gaps in the labour market need to be filled, for example, and to establish clear and transparent criteria for the recruitment of foreign workers); appropriate measures taken against employers who engage migrants with irregular status; states “should establish fast, fair and efficient refugee status determination procedures, so that asylum seekers are quickly informed of the outcome of their case”; and in situations of mass influx, “states should consider offering the new arrivals *prima facie* refugee status”.³⁰²

For the Office of the **United Nations High Commissioner for Refugees (UNHCR)**, the primary point of interest in irregular migration and its management is the intersection between refugee protection and irregular migration. In the UNHCR’s view, the main challenge for refugee protection derives from two interrelated facts. First, most contemporary refugee movements today consist of *mixed flows*; what is more, the motives for migrating individuals are also mixed, and increasingly so. A second challenge is related to the nature of refugee movements, which are increasingly irregular, take place without the requisite documentation and frequently involve human smugglers and traffickers. In this context the Office recognises the need for a legal and procedural framework

²⁹⁹ *Ibid.*, pp. 174-175

³⁰⁰ GCIM (2005): *op. cit.* p. 35

³⁰¹ GCIM (2005): *op. cit.* p. 35, para. 17-18

³⁰² GCIM (2005): *op. cit.* pp. 33-41

that can combine migration management with the protection of refugees: “[M]igration management must take due account of international refugee protection obligations, including the importance of identifying people in need of international protection and determining appropriate solutions for them”³⁰³. According to UNHCR, mixed migration towards the European Union’s borders cannot be addressed by “enhanced border and migration control measures alone”, but should involve “close co-operation among states within the European Union, as well as with governments of countries of transit and origin.”³⁰⁴

In 2006 the Office developed a ten-point action plan of protection tools, especially relevant for refugees who are at risk of refoulement, human rights violations and other potential hazards. The framework could be developed into broad migration strategies and could have an impact on the introduction of regularisation measures. The action plan proposes mechanisms to make asylum proceedings more flexible and transparent and which could, subsequently, reduce backlogs in applications. The measures include: (i) the establishment of protection-sensitive State entry systems (training of border guards on how to respond to asylum applications); (ii) the development of appropriate reception arrangements (registration of new arrivals and provision with temporary documentation) and (iii) the launch of mechanisms for profiling and referral (initial determination and counselling in order to establish whether people wish to seek asylum, and to identify other available options, including return, regularisation or regular onward migration).³⁰⁵

In some situations, the UNHCR argues, refugees and other relevant persons of concern could profit from migrant-worker programmes or temporary work permits. Similarly, refugees could benefit from legal onward movement from the host State to a third country through regular migration channels.³⁰⁶

Regarding persons who do not meet the criteria for refugee status, UNHCR proposes to take into consideration alternative temporary migration options: “these could variously allow them to stay legally in the country of arrival, or to move to a third country for humanitarian reasons, or for the purposes of work, education or family reunion. Efforts to address mixed population movements should also explore a place for regular migration options, temporary or even longer term.”³⁰⁷

In its commentary on the Commission’s 2007 Green Paper on the future common European asylum system also sees a need for a common European policy on regularisation: “While it is beyond the scope of UNHCR’s mandate to comment on regularization measures for persons who are not in need

³⁰³ UNHCR (2007): *Observations on the occasion of the First Euro-Mediterranean Ministerial Meeting on Migration Algarve, 18-19 November 2007*. Available at:

<http://www.unhcr.org/protect/PROTECTION/473d554b2.pdf>, p.1

³⁰⁴ UNHCR (2007): *Implementing the Ten-Point Plan of Action in Southern Europe: Activities Undertaken by UNHCR to Address Mixed Migration in the Context of the Mediterranean/Atlantic Arrivals*. Available at: <http://www.unhcr.org/protect/PROTECTION/452ce4cd4.pdf>, p.1

³⁰⁵ UNHCR (2007): *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, revised January 2007, <http://www.unhcr.org/protect/PROTECTION/4742a30b4.pdf>, p.3

³⁰⁶ UNHCR (2007): *Global Appeal 2008-2009*; Available at: <http://www.unhcr.org/publ/PUBL/474ac8c12.pdf>, p.28

³⁰⁷ UNHCR (2007): *Refugee Protection and Mixed Migration, op. cit.*, p.3-4

of international protection, it is clear that this is an area in which increased EU coordination is needed.³⁰⁸

Finally, the Office observes that there is considerable confusion in the European media about terms such as “refugees”, “asylum-seekers”, irregular (or “illegal”) migrants, and “economic migrants”. Moreover, asylum-seekers and refugees are often cited in close association with crime and terrorist acts. Consequently, UNCHR calls on mass information campaigns in countries of origin, transit and destination, in order to discourage irregular migration, warn of the dangers of smuggling and trafficking, and focus on legal migration options.³⁰⁹

³⁰⁸ UNHCR (2007): *Response to the European Commission’s Green Paper on the Future Common European Asylum System*, available at <http://www.unhcr.org/protect/PROTECTION/46e53de52.pdf> , p.27

³⁰⁹ UNHCR (2007): *Implementing the Ten-Point Plan of Action*, *op. cit.*, p.9

7 The EU policy framework – relevant legislation and principles

7.1 Introduction

With the Amsterdam Treaty of 1997, the European Union was granted wide-reaching powers with respect to immigration. Thus, Article 63 (3) of the Treaty stipulates, among other things, that the Council “shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt...measures on immigration policy within the following areas: (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion, (b) illegal immigration and illegal residence, including repatriation of illegal residents.”

Regularisation, defined as any state mechanism through which third country nationals who are illegally residing or who are otherwise in breach of national immigration rules in their current country of residence are granted a legal status – clearly falls within the scope of the powers granted to the European Union. Given the close link of regularisation practices with international protection in a majority of EU Member States (including asylum, subsidiary and temporary protection), the Union’s powers regarding refugees and asylum provide an additional rationale for considering regularisation as a policy area falling in principle under the competence of the European Union, as defined by the Treaty. However, to date, the European Union has not explicitly dealt with regularisation. Against the background of the history of policy development in the area of migration and asylum, this is not at all surprising, as regularisation touches the core of immigration policy – namely, defining the conditions and procedures for admission of third country nationals, even if regularisation admits third country nationals in an exceptional and post-hoc manner.³¹⁰

In the absence of an explicit policy on regularisation, the following discussion will undertake a review of the existing policy framework. Rather than providing a comprehensive overview of relevant legislation and its interlinkages with regularisation, which is beyond the scope of this chapter, we will review general objectives of European policies on migration and international protection and will identify basic normative principles enshrined in the existing policy framework which relate to regularisation or on which European policies on regularisation could be built. We will start with a brief review of European Union policies and thinking on illegal migration, mainly on the basis of various communications adopted by the European Commission and then will identify a number basic normative principles underlying the current policies on migration and asylum.

³¹⁰ So far, Member States have largely resisted any attempts for harmonising rules and procedures for admission of third country nationals outside the context of family reunification and international protection. Not unsurprisingly, the ambitious proposal for a directive “on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities”, which the Commission adopted in 2001 (COM(2001) 386 final), did not find sufficient support from Member States.

7.2 European Union approaches to illegal migration and the regularisation option

The following review³¹¹ does not purport to provide a comprehensive review of European Union policies on illegal migration. Certain aspects of broader European Union policies on illegal migration, notably return policies, have already been addressed in the preceding chapters and will be taken up again in §8. The objective of this chapter is more limited: it aims to provide an overview of the evolution of Commission thinking on the role of regularisation as a policy tool and thus essentially is intended as a background to the current discussions. Suffice it to say that the interlinkages between broader policies on illegal migration and regularisation have so far received rather little attention and, in particular, this issue has not been addressed explicitly in any of the communications on EU policies concerning illegal migration.

As has been noted in §2, the Commission has for some time taken an interest in regularisation policy. Thus, the first major comparative study on regularisation practices in selected EU Member States (conducted by the Odysseus network) was financially supported by the European Union and indicated that regularisation was, if not an issue regulated at the European level, clearly an issue of concern in the context of the development of European Union migration policy. However, the interest in regularisation did not immediately translate into an explicit and open consideration of regularisation as a policy option in the Commission's proposals for the elaboration of policies on illegal migration.

In its 2000 Communication on a community immigration policy formulated subsequent to the Tampere council conclusions, the Commission stressed that efficient management of migration “requires action at all phases of movement of persons, in order both to safeguard legal channels for admission of migrants and for those who seek protection on humanitarian grounds while at the same time combating illegal immigration.”³¹² The Communication thus sees policies on illegal migration as a prerequisite for the development of more open policies on legal migration. The communication highlights the complexity of illegal migration and stresses the need for a comprehensive approach, without, however, mentioning regularisation as part of a possible policy approach: “The phenomenon of illegal immigration consists of a number of interlinked phases and each has to be tackled systematically with specific measures. These include action in source and transit countries, police co-operation to pool knowledge of trafficking operations which by their nature are international, action at the point of entry including border controls and visa policies, legislation against traffickers, help for victims and their humane repatriation.”³¹³

Although repeatedly referring to regularisation practices of Member States, the communication refrains from an evaluation of whether regularisation can be an effective policy tool to address irregular migration. By contrast, the Commission communication on a common policy on illegal migration adopted a year later seems to suggest that, generally, regularisations are not an appropriate

³¹¹ See for an earlier review Verbruggen, N. (2005): ‘General Policy Trends Regarding Undocumented Immigration in the EU’. In: Heckmann, F., Wunderlich, T. (eds.): *Amnesty for Illegal Migrants?* Bamberg: efms pp. 33-37

³¹² *Communication from the Commission to the Council and the European Parliament on a Community immigration policy*. COM (2000) 757 final, p.12

³¹³ *Ibid.*

policy instrument and provides a principled argument that “[i]llegal entry or residence should not lead to the desired stable form of residence.”³¹⁴ In the Commission’s view, demand for low skilled workers and ready access to undeclared work are major factors driving illegal migration. Nevertheless, the communication argues, “illegal residents cannot be considered as a pool to meet labour shortages.”³¹⁵ As a corollary, the emphasis of the communication’s policy proposals lies in strengthening border management, including strengthening the common visa policy and adopting other preventative measures, improving and strengthening information exchange mechanisms and the development of common policies on readmission and return.

However, the Communication stresses that the fight against illegal migration should not compromise the ability to provide protection to those in need of international protection and observation of the rights of particularly vulnerable groups. “Measures relating to the fight against illegal immigration have to balance the right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those genuinely in need of international protection.(...) [W]hatever measures are designed to fight against illegal immigration, the specific needs of potentially vulnerable groups like minors and women need to be respected.”³¹⁶

Whereas a subsequent Communication on policies on illegal migration adopted in 2003 basically follows the same line of thinking,³¹⁷ the Commission Communication on Immigration, Integration and Employment³¹⁸ adopted in the same year explicitly discusses regularisation as a possible policy option and thus diverges from the stance adopted in the two previous communications. In particular, it discusses regularisation in the context of broader policies on integration, arguing that “integration policies cannot be fully successful unless the issues arising from the presence of [illegal immigrants] are adequately and reasonably addressed.” Thus, the Communication values the possible role of regularisation to integrate illegally resident third country nationals but also warns that regularisation may encourage future illegal immigration.³¹⁹ This – more positive – approach towards regularisation is also adopted in the Commission’s Study on the links between legal and illegal migration, published in 2004.³²⁰ The study acknowledges that “for pragmatic reasons the need may arise to regularise certain individuals who do not fulfil the normal criteria for a residence permit.” The study notes the different grounds on which regularisation measures have been implemented and observes the close connection of regularisations on protection grounds and for humanitarian reasons with the asylum system, while noting that “large-scale” regularisation on employment grounds, amongst others, also indicates the presence of a certain demand for unskilled workers that cannot be satisfied by legal

³¹⁴ *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration* COM (2001) 672 final, p.6

³¹⁵ *Ibid.*, p. 6

³¹⁶ *Ibid.*, p. 7

³¹⁷ *Communication from the Commission to the Council and the European Parliament in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents* COM(2003)323 of 3 June 2003

³¹⁸ *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment*, COM (2003) 336 final

³¹⁹ *Ibid.*, pp. 25-26

³²⁰ *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Study on the links between legal and illegal migration*. COM (2004) 412 final

immigration.”³²¹ Finally, the study notes some positive implications of regularisation programmes, including better population management, reducing undeclared work, and increasing tax revenues and social security payments. The study, however, also notes that the (long-term) effectiveness of regularisation measures has been questioned and that there may be other negative consequences. Despite these words of caution, the overall evaluation of regularisation measures in the study is positive.

In its Communication of 2006³²² on policy priorities in the fight against illegal immigration of third-country nationals, within which the present study was announced, the approach towards regularisation, by contrast, is again more reserved. The Communication notes that large-scale regularisations, in the context of the abolition of internal controls in the Schengen area and the introduction of a right to freedom of movement for long-term residents, may have implications for other Member States and proposes the establishment of a Mutual Exchange Mechanism (subsequently established). While generally indicating a more reserved approach towards regularisation, the relevant section of the Communication also provides an important justification for developing a policy on regularisation at the European level, which would leave open the option of undertaking regularisation measures. Thus, the Communication states that it is “the difficulties in *tolerating the sustained presence of significant numbers of third-country illegal immigrants* on their territories”³²³ (our emphasis) which have led some Member States to implement regularisation measures. By implication, the Communication recognises that the *sustained presence of undocumented migrants* should indeed be considered a problem. Although the Communication, like previous communications and measures adopted by the European Union, clearly signals a preference for return, at the same time it suggests that inaction – in the event that return cannot be effected – is clearly not a viable option.

In the most recent Communication on principles, actions and tools for the further elaboration of a common European immigration policy of June 2008,³²⁴ however, the reservation about large-scale regularisations is repeated and phrased in an unusually open manner, while regularisations are otherwise not discussed in any of the concrete measures suggested under the heading “Security – effective fight against illegal immigration”. Thus, the Communication argues that “[i]ndiscriminate large-scale mass regularisations [sic] of immigrants in an illegal situation do not constitute a lasting and effective tool for migration management and should be prevented.”³²⁵

A similar attitude towards regularisations – on the whole – also prevails in opinions expressed by the European Parliament. In the opinion of the Civil Liberties Committee, regularisations are “quite often a signal of lack of appropriate measures in place to deal with a phenomenon which forms part of

³²¹ *Ibid.*, p. 10

³²² *Communication from the Commission on Policy priorities in the fight against illegal immigration of third country nationals*, COM (2006) 402 final, pp. 7-8

³²³ *Ibid.*, p. 7

³²⁴ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common Immigration Policy for Europe: Principles, actions, and tools*. Com (2008) 394/4.

³²⁵ *Ibid.*, p. 11

societies in most Member States.”³²⁶ The European Parliament thus believes that “en masse regularisation of illegal immigrants should be a one-off event since such a measure does not resolve the real underlying problems.”³²⁷ Furthermore, effective return policy is seen as one of the factors liable to deter illegal migration. In this sense, the Committee clearly supported the adoption of the ‘Return Directive’, defining at the European level the rules and conditions governing a policy on return.³²⁸ Regarding the readmission of irregular migrants, it calls on the Council and the Commission to develop agreements with third countries concerned.³²⁹

The European Parliament report also includes the opinions of the Foreign Affairs and the Development Committees. According to the Foreign Affairs Committee, “Member States should not adopt national measures regularising the situation of illegal immigrants because this creates a suction effect.”³³⁰ The Development Committee does not have any direct position on regularisation, but it asks the Commission and Member States, “in partnership with countries of origin, to invest resources in information campaigns in the countries of origin of illegal immigrants in order to warn them of the physical risks and dangers of migrating illegally and of subsequent marginalisation in countries of destination.”³³¹ Thus, regularisation is clearly not a preferred option for the Parliament.

This said, the current shift towards a more negative attitude vis-à-vis regularisations, which is also reflected in the discussions surrounding the debate on the European migration pact, seems to insufficiently take into account the two contrasting ‘logics’ of regularisation measures that we have identified in the review of earlier studies on regularisation practices. In our conclusions to §2 we distinguished between (1) an employment and labour market policy driven logic (which often involves the regularisation of large numbers of persons) and (2) regularisation used as a corrective policy instrument, which often follows a human rights based and protection-oriented rationale or broader considerations of legal principles and due process of the law. The current discussions, however, mainly seem to refer to large-scale regularisation implemented on employment grounds. Indeed, as our review of policy positions of relevant civil society actors in §5 has shown, there is a broad consensus that ultimately, large-scale regularisations used in lieu of labour market and labour migration policy indicate policy failure and, in principle, should be avoided. However, there is disagreement whether regularisation as a policy tool can be simply disposed of, as long as alternative approaches – for example, fighting undeclared work and systematically returning failed migrants – do not lead to the desired results.

With regard to the second logic – regularisation as a complementary measure used as redress against administrative deficiencies (e.g. lengthy procedures) and for humanitarian and protection-related reasons – the issues at stake are, we argue, quite different. First, regularisations can, but need not,

³²⁶ EP, Committee on Civil Liberties, Justice and Home Affairs, 17 September 2007, Report on policy priorities in the fight against illegal immigration of third-country nationals (2006/2250(INI)), Rapporteur: Javier Moreno Sánchez. Available at:

<http://www.europarl.europa.eu//sides/getDoc.do?type=REPORT&language=EN&reference=A6-2007-0323>, para. 58

³²⁷ *Ibid.*

³²⁸ *Ibid.*, para. 67-68

³²⁹ *Ibid.*, para. 70

³³⁰ *Ibid.*, para. 16

³³¹ *Ibid.*, para. 11

involve large numbers. Secondly, the use of regularisation is not necessarily indicative of broader policy failures³³² but essentially reflects the need for complementary, corrective instruments which allow states to respond to particular situations in a flexible manner. Thirdly, and most importantly, this type of regularisation typically involves regularising persons in an irregular situation as a matter of principle and rights. This perspective on regularisation has been largely ignored in current debates on regularisation policy in the European Union. Indeed, as we argue in the following, there are certain principles built into European migration policy which would lend themselves as guiding principles for developing European Union policies on regularisation.

7.2 General objectives and normative principles underlying the European Union framework for migration and international protection

We argue that many of the same principles which have underpinned the development of European Union migration policies under the Tampere and the Hague agendas could inform the development of policies on regularisation – whether in the form of strong measures (including the elaboration of primary legislation) or in the form of ‘soft measures’ (e.g. the identification of common principles upon which Member States should base their policies of regularisation). The following brief review of relevant principles, however, should not be taken as an elaboration of criteria and principles for regularising persons in an irregular situation, but principles that should inform the identification of relevant normative standards.

The Commission Communication on a Community Immigration Policy of 2000³³³ outlined several basic principles on which Community migration policies should be built and that would provide similarly useful principles to build a policy on regularisation, including **transparency and rationality, clear and simple procedures, and differentiating the rights of third country nationals by length of stay**. With respect to regularisation, this could mean that regularisation should be conceived of as a secondary alternative to return, should return not be feasible within a set time limit (and thus as a *rational* and *transparent* option directly tied to return). Setting a time limit, in turn, would be based on the notion that a form of residence-based rights should also be available for irregular migrants and that social and family ties that irregular migrants have developed in their Member State of residence should be taken into account, as is actually the case in several European Union Member States. Precisely because an irregular status is undesirable from a policy perspective and constitutes an ‘irregularity’ that needs to be addressed, the status of irregular migrants must be taken into account within the overall architecture of legal statuses: exit options for persons in such a condition need to be devised – either in the form of return or through regularisations, should return not be a viable option. Other key principles addressed in the same Communication are the **right to family reunification** and the **right of persons in need of international protection to access protection**.

³³² However, regularisations of asylum applicants on the grounds of length of the procedure clearly indicate policy failure.

³³³ COM(2000) 757 final, *op. cit.*

As the Commission communication on immigration, integration and employment of 2003³³⁴ has reasoned, **regularisation** may indeed also be **used to promote the integration of third country nationals in an irregular situation** into mainstream society and, by implication, as **a measure against social exclusion and marginalisation**. Although regularisation and thus integration may not be the preferred option in dealing with the presence of irregular migrants, irregular migrants should not be – a priori – excluded from the agenda of promoting the integration of immigrants and fighting social exclusion. This is not least since the sustained presence of marginalised groups without clear rights is clearly undesirable and may contribute to discrimination, racism and xenophobia.³³⁵

Moreover, several more fundamental legal principles and principles of good governance equally could be invoked in the development of regularisation policies, including **legality** (that is, that administrative decisions should be taken after due process of the law, should follow clear and transparent procedures and should be based on clear criteria), the **availability of legal remedies** against administrative decisions, **reasonable duration of administrative procedures**, **non-discrimination**, and **proportionality**, amongst others.

Finally, in addition to following certain basic principles that have informed the development of European Union migration policy under the Tampere and Hague agendas (as well as more general legal principles), the development of regularisation policy on the European level could also aim at some of the same **general objectives of migration policy development** in the European Union. In particular, it could aim at harmonising procedures and procedural standards and harmonising the legal statuses of regularised migrants along with the attached rights and obligations.

³³⁴ COM(2003) 336 final, *op. cit.*

³³⁵ In recognition of the diverse interlinkages of legal status (or lack thereof) and social exclusion, a forthcoming study on minorities, migrants and employment which was recently commissioned by the European Union's Fundamental Rights Agency will include a section on undocumented migration and vulnerability. See A. Kraler, S. Bonjour, A. Cibeá, M. Dzhengozova, C. Hollomey, T. Persson, D. Reichel (2009), *Migrations, Minorities and Employment*. Study regarding discrimination on grounds of race and ethnicity in the area of employment. Forthcoming at <http://fra.europa.eu>

8 Policy Options

OPTION 1: REGULATION OF REGULARISATION ACTIVITIES OF MEMBER STATES

Description: Such a proposal for a directive or regulation would set common standards for regularisation across the EU

Option 1a: Blanket ban on mass regularisations

Rationale and possible impact: In the context of freedom of movement and the gradual emergence of a common labour market, it is sometimes asserted that large-scale regularisation programmes potentially negatively affect other Member States, contribute to unsolicited secondary movements of regularised migrants and unintentionally regularise third country nationals who are illegal residents of another Member States. Such programmes are also thought likely to provoke new illegal immigration from third countries. This, one could argue, undermines the common position of EU Member States to combat illegal migration and breaches the principle of solidarity on which policies on migration are based. However, there is little evidence to support the claim that regularised immigrants are likely to move on to other Member States as any legal status granted under regularisation schemes is confined to a single Member State.

There is limited evidence that regularisation in one Member State has led to immigration of irregular immigrants from (or transiting) other Member States, although the magnitude of in-migration is likely to be small.³³⁶ Not unsurprisingly, regularisation programmes (or rumours about pending regularisation programmes) are likely to reduce voluntary returns of failed migrants,³³⁷ but are unlikely to have an overall effect on returns. However, there is hardly any evidence for a pull effect from third countries, although pull effects might be more important for selected groups of immigrants. Thus it is not obvious why such a strong measure is warranted. In addition, such a proposal ignores possible rationales for regularisation programmes and would reduce the flexibility available to Member States in responding to particular problems. If implemented, a blanket ban is likely to have unexpected effects (e.g. *de facto* regularisations as in Italy 2006, rise in asylum applications and increased costs for the asylum system, increase in the irregular migrant population, increased informal employment etc.). A ban on large-scale regularisations would still permit the operation of individual, temporary and humanitarian mechanisms. However, the implementation costs of these are high, and mostly unknown: ruling out this policy option would severely limit Member States' policy options in their management of the problem.

³³⁶ In order to prevent unsolicited inflows of irregular immigrants from other Member States, Belgium, for example, temporarily reinstated border controls during its 2000 regularisation programme (MS response Belgium).

³³⁷ According to a memorandum by the Belgian minister responsible for migration and asylum, persistent rumours about an imminent regularisation programme is, along with other factors (notably the most recent enlargement of the European Union and the accession of Bulgaria and Romania) a major reason for the decline of voluntary returns from 2006 to 2007 (see Chambre des Représentants de Belgique, Note de Politique Générale de la Ministre de la Politique de Migrations et d'Asile. 21 Avril 2008, DOC 52 0995/020, p.12).

What supports EC action? There is a minority of Member States who are strictly against large-scale regularisations and have reservations against other Member States using large-scale regularisation programmes as a policy tool. In a similar vein, the migration pact which drafted on the initiative of the French government recommends that Member States “use only case-by-case rather than general regularisation for humanitarian or economic reasons, within national legislation.”³³⁸

What works against EC action? The great majority of Member States are opposed to such regulations, as are all NGOs and other stakeholders. In addition, an effective blanket ban would require the drafting of a directive or regulation, agreement over which will be difficult to achieve, given the negative attitude of major Member States (see §4) to adopt strong regulatory frameworks.

Option 1b: Requirement for consultation with the Commission and the Council on planned regularisation programmes

Rationale and possible impact: This would require more serious planning and consideration of regularisation programmes, notably in the context of potential impact on other MS. Given the extent to which a few MS have utilised regularisation mechanisms, there is a case for including notifications of policy in that respect as well as for programmes.

Such a consultation procedure would facilitate transfer of expert knowledge gained from other MS regularisations, at the same time as allaying the fears of other MS concerning such programmes. One concrete recommendation would be to confine regularisation programmes to employment-based criteria and directly involve employers and civil society; irregular residents without strong earning capacity should then be addressed with individual applications under regularisation mechanisms (focused on humanitarian issues, long residence, integration efforts, health condition, lengthy asylum procedures etc.). Although various Member States have resorted to regularisation programmes in the case of asylum seekers and rejected asylum seekers, as in the Netherlands (2007) and Sweden (2005/6), we recommend the integration of such programmes into the regular legal framework and establishment of permanent mechanisms for regularising similar cases. [See Option 1d, below]

What supports EC action? This would have to be a new component of EC policy and also would require setting up a legal basis or incorporating such a requirement in the Mutual Information Exchange Mechanism (Council Decision 2006/688).³³⁹

What works against EC action? It is unlikely that many MS will support this action, even though it might be welcomed by NGOs and other stakeholders.

Option 1c: Definition and notification system for regularisations

Rationale and possible impact: Although this would not constrain MS in their policy management, it would provide a very clear definition of what actually constitutes a regularisation programme or mechanism on a formal basis, and would require MS to provide advance notice of any regularisation

³³⁸ *European Pact on Immigration and Asylum*, version II, dated 4th July 2008, section II, (a).

³³⁹ *Council Decision 2006/688/EC of 5 October 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration*

initiative. In the case of permanent mechanisms, Member States should provide regular reports on nature and outcome of regularisation mechanisms and any relevant legislative changes. The process should also include improved statistical data collection and *post hoc* provision of those data to other MS. Thus, this would represent a small step towards some degree of harmonisation in the European management of illegal residents.

Any definition of regularisation should aim to define the meaning of regularisation as precisely as possible. To do so, we suggest not only to define regularisation in the narrow sense, i.e. in the way we have defined regularisation for the purposes of this study, but also to define status adjustments that strictly speaking do not qualify as regularisations, because they a) do not result in the award of a fully fledged legal status (but only formalise documented illegal stay pending removal) or b) target persons who were strictly speaking not illegally resident.

A systematic categorisation of regularisations and other status adjustments should thus consider at least three dimensions, namely (1) the nature of the status adjustment; (2) the nature of the adjustment procedure and (3) the target population, i.e. criteria for regularisation. Based on the definitions developed by this study, two basic types of regularisation procedure should be distinguished.³⁴⁰

(1) Regularisation programmes

(2) Regularisation mechanisms

In addition, two other forms of status adjustment should be distinguished, namely

(3) ‘Normalisation’, i.e. the adjustment of a limited or transitional status (asylum applicant status or other limited temporary statuses) to a more permanent regular status, which could be further distinguished by the type of procedure used (programme or mechanism).

(4) Suspensions of removal decisions and residence bans not addressing the illegality of stay but providing some limited access to rights and protection from expulsion.

Defining reasons for regularisation will require careful examination of Member States’ regularisation practices, in particular insofar as grants of residence permits on ‘humanitarian grounds’ through regularisation mechanisms are concerned. Here our study suggests that authorities enjoy a wide range of discretion and it is often not clear on which criteria regularisation is based.

We suggest distinguishing the following basic criteria:

- Length of residence
- Employment
- Family ties
- Health
- Length of the asylum procedure

³⁴⁰ See the definitions in §1

- Failure to enforce return³⁴¹
- Complementary protection³⁴²
- Individual ties to a country/ integration³⁴³
- Exclusion criteria
- Other

Table 9: Classification of regularisations (status adjustments)

Nature of Status Adjustment	Nature of the procedure	Criteria/ Reasons for regularisation	Status Granted ³⁴⁴
Regularisation: <i>any state procedure by which third country non-nationals who are illegally residing, or who are otherwise in breach of national immigration rules are granted a legal status in their current country of residence</i>	Programme Mechanism	Length of residence, employment, family ties, health, length of the asylum procedure, failure to enforce return, complementary protection, individual ties to a country/integration, other	Temporary permit Permanent residence
Normalisation: <i>any state procedure by which third country-nationals who are legally residing but who are in a restricted or transitional status are granted a superior legal status</i>	Programme Mechanism	Length of residence, employment, family ties, health, length of the asylum procedure, failure to enforce return, complementary protection, individual ties to a country/integration, other	Temporary permit Permanent permit
Suspension of removal order (toleration)	Programme Mechanism <i>De facto toleration</i> ⁱ	Failure to enforce return, complementary protection, other	Temporary permit 'Toleration' status <i>De facto toleration</i> ⁱ

ⁱ *de facto* tolerations refers to cases where a removal order is not formally suspended but simply not enforced.

³⁴¹ This is different from length of residence in that regularisation on the basis of duration of stay may be granted without any enforcement action having been initiated. Length of residence thus is a defining feature for both reasons for regularisation, but captures different sections of the illegally resident population.

³⁴² Subsidiary protection as defined by the qualification directive (2004/83/EC) does not cover all protection grounds, for example, protection from individual harm and threats from non-state actors in situations not involving indiscriminate violence.

³⁴³ Several countries use 'integration' as a criterion, often involving other criteria such as family ties, education and upbringing in a country, employment, etc. This composite criterion would have to be developed and distinguished clearly from other grounds.

³⁴⁴ The classification of permits should be in line with the classification used in view of the implementation of Regulation 862/2007 on Community Statistics on Migration and International Protection. However, in view of the enormous complexity of legal status, ultimately a similar typology as developed for the acquisition of nationality by the NATAC project should be developed for residence permits [see on NATAC: Bauböck, R. Ersbøll, E., Groenendijk, K., Waldrauch, H. (2006): *Acquisition and Loss of Nationality*|Volume 1: *Comparative Analyses, Policies and Trends in 15 European Countries*. IMISCOE Research. Amsterdam. Amsterdam University Press]

Ultimately, a comprehensive definition and documentation of regularisations would also require us to delimit regularisations more clearly from other instances of de facto status adjustments following *regular* provisions for legal migration. Thus, most countries require applications for first permits to be made from abroad, which, as we have shown in chapter 3, bears a certain risk that immigrants already resident in a country fail to comply with requirements and become illegal. Eventually, such situations may be remedied by regularisations. By contrast, in countries which are more flexible in allowing in-country applications, the need for regularisations in these specific cases may never arise. To assess the role and need of regularisations, systematic information on first permits issued by place of application and by persons covered seems clearly warranted.

What supports EC action? In the context of the Mutual Information Exchange Mechanism (Council Decision 2006/688/EC) a limited information exchange already takes place. In addition, Council Regulation 862/2007 on Community Statistics on Migration and International Protection already obliges Member States to provide a (limited) set of statistical information on residence permits granted, following a certain minimal harmonisation of definitions. Provision of statistical data could be incorporated into the Mutual Information Exchange Mechanism, and would then be available for MS to utilise within the reporting under Regulation 862/2007.

What works against EC action? There may be opposition from MS, depending on the presentation and exact nature of such a policy proposal. In particular, the history of the negotiation of the Regulation 862/2007 and the elaboration of definitions by NGOs and other stakeholders seem indifferent on such an issue.

Option 1d: Setting minimum standards for the granting of residence permits for illegally residing TCN, on a case-by-case basis (regularisation mechanism)

Rationale and possible impact: five Member States do not have available any small-scale regularisation mechanism; others have constrained ability or tendency to grant legal status. Given that most of these states are recently acceded or southern European, it would seem desirable to ensure that relevant policy mechanisms are available. Equally, for those MS with regularisation mechanisms, the criteria for granting legal status are vague and non-transparent. Without ruling out a catch-all provision for exceptional cases, it would seem desirable to specify the circumstances under which this instrument should be used. The most common criteria used (see §3.1.2) are: no criminal record, family ties, employment and health condition; on the other hand, some MS mechanisms seem to be indistinguishable from the criteria used in programmes. Thus, setting EU standards for a common approach to this issue could help to clarify the precise objectives of each MS in its policy. Given the almost complete absence of any research on regularisation mechanisms prior to this study, and the lack of transparency of most Member States' practices in this area, it would be unwise to attempt to define such standards here. There is a need for a detailed follow-up study specifically focused on that aspect which, in particular, should investigate practices of awarding residence permits on humanitarian and other exceptional grounds, including relevant case law.

We also strongly recommend review procedures, to ensure equal treatment of applicants and accountability of the relevant state agencies in their processing of applications. Some MS have review boards, although the effectiveness of their operation is often questioned. Again, minimum standards

across the EU in this matter would be appropriate. The third aspect that deserves attention is the actual duration of permits issued. With the exception of temporary protection granted specifically to asylum applicants (who may be able to return in the not-too-distant future), short-term permits create uncertainty. If the long-term objective is the social integration of the recipients of permits, then permit durations of 6 or 12 months are not desirable. For this, and reasons of bureaucratic management, we suggest a 2-year minimum duration of permits.

What supports EC action? MS positions on this are not clear; presumably, there would be some support for such legislation, particularly from those MS on whose practices the minimum standards would be based. NGOs and other stakeholders would welcome such legislation.

What works against EC action? Some of the southern MS may resist this intrusion into national policy management, although the newer MS may not object.

OPTION 2: DEVELOPMENT OF PRINCIPLES AND BENCHMARKS FOR REGULARISATION PROGRAMMES AND MEASURES (IN CO-OPERATION WITH STAKEHOLDERS: SOCIAL ACTORS, GOVERNMENTS AND ACADEMIC RESEARCHERS)

Description: Building on existing recommendations of international organisations and bodies – including the *International Labour Organization (ILO)*, the *Global Commission on Migration (GCIM)*, and the *Council of Europe (CoE)*, amongst others – the Commission could formulate a number of key principles and benchmarks for both regularisation programmes and measures.

Rationale and possible impact: Such guidelines could define under which conditions a specific type of regularisation might be an appropriate measure, how regularisation should be planned, implemented and evaluated and which alternatives there are. These principles and benchmarks could inform Member States' evaluation of their own policies and the formulation of future policies in this field. Principles and benchmarks should be practical, supported by illustrative 'good practices', and cognisant of the fact that under certain conditions 'good practices' can turn out to be 'bad practices'. Some of these indicative practices are identified in §3.3, but a future focused advisory project is needed for the development of benchmarks.

What supports EC action? There are several recommendations, including those of the CoE, the ILO and the GCIM, formulating a common position on agreed key principles of regularisation programmes and practices. However, these have not benefited from detailed critical evaluation of individual programmes nor do they take account of the relevant EU policy framework, hence the guidelines are general and of limited use to Member States in developing policy measures. Preliminary contact with national responsible ministries suggests that expert guidance in policy formulation – learning from each other's experiences – would be generally welcomed. Also various other stakeholders, including NGOs and the European Trade Union Confederation (ETUC) are in support of general guidelines. Elaborating guidelines would not require any legal measures and could follow the model of the Handbook on Integration. A handbook on regularisation would not question the sovereignty of Member States to undertake regularisation programmes or establish mechanisms,

nor need it be seen as an endorsement of regularisation as a preferred policy option. The handbook would probably garner most support if elaborated in a broad consultation process which includes relevant stakeholders from all sectors of society.

What works against EC action? Guidelines on regularisation could be seen as endorsing regularisation as a policy tool and might be opposed by various Member States, in particularly those which are known to oppose regularisation in principle. Opposition might be addressed by providing (financial) support for the elaboration of such guidelines by third parties.

OPTION 3: ENHANCED INFORMATION EXCHANGE IN THE FRAMEWORK OF THE MUTUAL EXCHANGE MECHANISM

Description: One set of options consists of strengthening the obligation to pre-inform other Member States about major projects in migration policy by enhancing the mutual information mechanism established by Council Decision 2006/688.³⁴⁵ To date, the Mutual Information Mechanism consists essentially of a web-based information mechanism and seems to have been little-used. This option is essentially a weaker form of Option 1c (which may be too demanding for widespread support from MS).

Both sub-options would require upgrading of the mutual information mechanism by obligatory modes of information exchange and possibly by broadening the scope of exchange methods to non-web-based mechanisms. On the other hand, there is almost unanimous support from MS for enhanced exchange of information, provided it does not replicate existing measures. It could be strengthened in two ways:

Option 3a: Systematic evaluation of policy impact on other EU Member States

Member States could be asked to systematically evaluate planned measures concerning migration policy in terms of their potential impact on other EU MS at the national level (and thus diverging from the current set-up) in the way financial implications and conformity with EU legislation or human rights standards are systematically evaluated in individual countries before passing a legislative proposal or adopting a non-legislative measure. The Commission could support such systematic pre-legislative evaluation through guidelines on the criteria and the methods to be used.

Rationale and Possible Impact: Council Decision 2006/688 requests Member States to inform other Members on planned policy measures that might have an impact on other EU Member States. By incorporating a systematic impact assessment in national legislative procedures, the evaluation of the impact on other EU MS would be done on a systematic rather than a case-by-case basis. To make such systematic evaluations a useful tool, however, the Commission would need to develop guidelines and a set of criteria to be followed in evaluating the possible impact of national measures on other MS. In addition, such systematic evaluation will have to be restricted to selected aspects of migration policy which potentially have the largest impact on other MS – notably, admission policy

³⁴⁵ Council Decision 2006/688/EC of 5 October 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration.

(including regularisation), acquisition of citizenship, and others (including flows of ‘privileged aliens’).

What supports EC action? The basic structure in the form of the mutual exchange mechanism already exists and would only have to be amended. In addition, there is generally broad support for enhanced exchange of information among Member States.

What works against EC action? The measure would create a new obligation under EC legislation, which might be opposed in principle.

Option 3b: Enhance the right for Member States to request information on planned policy measures

A right to request information from other MS states on planned and adopted measures and their possible impact on other MS exists in principle in Council Decision 2006/688, Art. 2(3). This has apparently not been utilised, its use should be promoted as part of information exchange.

Rationale and possible impact: Establishing a clear procedure for information requests and obliging MS addressed by a request to answer the request, following a certain format and guidelines would allow MS to specifically request information on policy measures by other MS which are problematic or contentious in the view of another. In addition, the MS making the request would be able to formulate concrete criticism concerning potential negative effects of policies on other MS which ideally should be supported by evidence and would thus contribute to a more focused information exchange based on concrete evidence than is hitherto the case.

What supports EC action? The principle has already been incorporated into Council Decision 2006/688, but needs to be fleshed out. There is great interest in enhanced information exchange and provided that the obligation to provide information is sensibly circumscribed, the great majority of MS are likely to support it.

What works against EC action? Enquiries about specific measures in national migration policies might be seen as questioning the sovereignty of MS with regard to framing policies according to national priorities and needs; on the other hand, the principle is already established in the Decision.

OPTION 4: IMPROVING STATISTICAL INFORMATION ON REGULARISATION PROGRAMMES AND MECHANISMS

Description: Member States should systematically collect statistics on the number of applications, number and type of permits issued (and persons regularised, if different from cases) and legal grounds of regularisation; divided by sex, age, country of birth and citizenship. For regularisation programmes, Member States should be encouraged to collect additional information, notably on employment status, education and other relevant socio-economic and demographic variables including length of stay, family ties, etc.. As data on regularisation programmes and, in particular, mechanisms is often derived from residence permits databases and thus formally integrated into the administration of residence

permits, Member States should take measures to ensure that persons regularised can be distinguished from persons granted a residence permit for other reasons.

Rationale and possible impact: Statistical information is essential for evaluating migration policy. In respect to regularisation a number of issues may be relevant. First, a common definition of regularisation or, more generally, status adjustment, needs to be elaborated. This needs to be a generic definition that covers all cases principally constituting regularisation, whether a Member State currently views it as regularisation or not. Such a definition may distinguish between regularisation mechanisms and exceptional regularisation programmes with a specific time limit. Related to this, Member States need to account for permits issued under regularisation as such and be able to produce statistics on regularised persons following such a definition. Second, to assess the relative importance of regularisation as an admission channel vis-à-vis other channels, good information on permits issued in the framework of a regularisation is crucial. This not only includes number of permits issued and applications received, but also data on length of stay³⁴⁶ (to better evaluate the importance of regularisation as an admission channel over a longer time period). In addition, various other demographic data, notably age, country of birth, etc. should be collected, which will allow to have a better understanding of the composition of regularised persons and migration histories, and to some degree, reasons for an illegal status. Third, information on regularised persons should ideally be linked to other records on the history of a person's stay in a country, including whether and when the person has lodged an asylum claim, whether he or she previously had a legal status, including whether he or she has previously been regularised, etc. As to the former, this will allow a better understanding of why persons end up in an irregular situation. Data ideally should be kept as register data to be able to trace a person's 'career' after regularisation. Fourth, to effectively improve statistical data on regularisation, any measures need to be closely linked to improving residence permit data, of which regularisation data frequently are part (in particular, in the case of regularisation mechanisms).

What supports EC action? Regulation (EC) No 862/2007 on Community statistics on migration and international protection³⁴⁷ and its implementing measures would provide a framework establishing standards for collecting information on regularisation practices.

What works against EC action? There is broad evidence suggesting that residence permit data are among the most complex and heterogeneous data of statistical data collection on migration related issues.³⁴⁸ In addition, there has already been significant resistance to the requirements of the regulation on migration statistics in its current form and there may be limits to further harmonisation of data collection. Finally, there is an enormous heterogeneity in the technical set-up of residence

³⁴⁶ Although it is likely that information on length of stay as reported by applicants may be problematic. However, alternative information might be available in some cases (e.g. enforcement data on non-deportable aliens or long-term asylum seekers whose recorded residence is known).

³⁴⁷ Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers.

³⁴⁸ This reflects the enormous diversity of Member States' immigration policies in terms of legal statuses awarded, grounds of admission, terminology etc. For a full harmonisation of statistics generic definitions of modes of admission and legal statuses would have to be generated that could follow the model of NATAC which achieved a similar synthesis for nationality laws.

permit databases and, for example, not all Member States may be able to collect data in a way that would allow to trace the history of a person and to trace the person post hoc. To address this, the Commission may opt for defining core principles of data collection and opt for soft measures such as exchange of good practices and technical information exchange.

OPTION 5: IMPROVING INFORMATION ON THE IMPACT OF REGULARISATION PROGRAMMES

Description: The Commission should formulate proposals for minimum standards for impact related data on regularisation programmes. Such a proposal should be output oriented and leave it to Member States how to best achieve the desired results. The proposal should define minimum information required to assess the impact of regularisation programmes: this would include persons regularised, the impact on the state budget (both in terms of costs and incomes), the labour market and the welfare state. Data for (statistical) impact assessments on regularised immigrants may derive from register data if longitudinal data is available and registers may be linked to registers holding socio-economic and other information relevant to assess the impact of regularisation programmes both on persons themselves (labour market performance, retention of legal status, etc.) and the labour market in general. If such data is not available, Member States should be encouraged to use post-hoc surveys to follow up regularised persons. In terms of budgetary impact, Member States generally should be able to produce data or estimates on costs for implementing a programme and estimated benefits from income taxes or social security contributions paid by regularised persons. Measures that could be proposed could also include other studies, including quantitative studies on labour market effects of regularisation or an assessment of pull effects.

Rationale and possible impact: Information on the wider impact of regularisation programmes is extremely patchy and in only two states (Spain and Italy) do reasonably good data exist. However, evidence on impact of regularisation programmes is extremely important in assessing efficiency, whether they have reached their desired objectives or whether concerns about negative effects, including those raised by other Member States, are warranted.

What supports EC action? No legal basis for EU action exists, apart from the general powers granted to the Commission under the Treaties. The Commission may thus want to opt for ‘soft measures’ and formulate guidelines, for example, in the framework of a communication on regularisation data. However, such a measure could be easily linked to proposals listed under Option 1.

What works against EC action? As stated above, no legal basis for EU action exists. In addition, there seem to be generally little capacity in Member States to systematically evaluate the impact of their policies in the field of migration and international protection in more sophisticated terms. As evaluation involves costs and may require reorganisation of national data collection and accounting systems or allocating resources to evaluation research, some resistance to such proposals can be expected.

OPTION 6: STRENGTHENING THE PRINCIPLE OF LONG-TERM RESIDENCE AS A SOURCE OF RIGHTS BY EXPANDING 2003/109/EC³⁴⁹ TO PERSONS NOT COVERED BY THE DIRECTIVE AND BY PROPOSING AUTOMATIC ACQUISITION OF THE LONG-TERM RESIDENCE STATUS

Description: The Commission should, by analogy with the proposed expansion³⁵⁰ of the scope of Directive 2003/109/EC to TCN beneficiaries of international protection, specify conditions under which the long-term residence directive should be applicable to other legal immigrants on short-term bases not currently covered. Such provisions should ensure that Member States do not circumvent the provisions of the directive (by using temporary statuses for *de facto* long-term purposes) by specifying conditions under which the status has to be awarded. In addition, an amendment should establish under which conditions Member States should permit a change from a temporary to a permanent status that would make a permit holder (eventually) eligible for long-term residence. Rules are also needed regarding the award of credits for years of residence on temporary permits that **must**, in turn, be taken into account when considering entitlements to long-term residence status. Possible criteria could include changes of personal circumstances, humanitarian concerns, *de facto* length of residence, etc. As a corollary, the Commission could propose to establish automatic acquisition of the long-term status after legal residence has exceeded a certain *de facto* duration.

Rationale and possible impact: Exclusion from access to the long-term residence status may encourage unlawful activities, particularly with vulnerable persons. Expanding the scope of the directive and introducing an automatic acquisition of the status would also increase security of residence for persons who were admitted on a short-term basis.

What supports EC action? The legal framework in principle already exists and would only have to be amended. The Commission should also be concerned to develop a rights-based approach towards long-term residents, in line with the jurisprudence of the ECtHR (see §6.2)

What works against EC action? There is likely to be strong resistance by Member States to extending the personal scope of the directive to persons not yet covered. Similarly, establishing an automatic right to acquisition of long-term status is also likely to meet with resistance. The Commission could counter such resistance by commissioning research on practices and experiences of persons not covered by the directive, suggesting best practice models and alternatives for minimum standards, e.g. automatic acquisition if no further information is needed by authorities, more than five years residence requirement for persons outside the scope of the directive, etc.

Option 6a: Facilitating access to long-term residence status: reconsidering or limiting the use of conditions with respect to acquiring the status

Description: Member States should reconsider conditions for acquiring long-term resident status and elaborate a set of criteria under which conditions the requirements may be waived

³⁴⁹ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

³⁵⁰ COM (2007) 298 final.

Rationale and possible impact: Currently, various conditions are attached to the acquisition of the status of long-term residence in the meaning of Directive 2003/109/EC, including integration requirements, continuous residence and a requirement of sufficient income. In addition, Member States have considerable scope for setting fees for acquiring a permit. The conditions for acquiring the status of a long-term resident, as well as related fees, may thus exclude certain categories of persons from the benefits of the Directive. This may affect in particular vulnerable persons who are unable to comply with either the integration or income requirements, or are unable or unwilling to pay the fees and expenses associated with acquiring the status. These persons are also the most likely to fall into illegality, e.g. because of non-renewal of a short-term permit on the basis of lack of means. In addition, highly mobile persons who have difficulties in meeting the condition of uninterrupted residence as defined by the Directive, may similarly be denied access to the status. The Commission should elaborate a set of criteria under which conditions the requirement should be waived. In addition, the Commission may consider to propose a time limit after which all third country nationals, having been resident in a Member State for more than five years, should be entitled to long-term status either without any conditions or at best only limited conditions (for example, exclusion on public policy and public security grounds) attached to the acquisition of the status. Minimum residence requirements in Member States' nationality legislation (between 5 and 10 years)³⁵¹ might be taken as a general timeframe in which an automatic right to long-term residence status should be granted.

What supports EC action? The legal framework in principle already exists and would only have to be amended

What works against EC action? There is likely to be strong resistance from MS to lowering or waiving conditions, as the view that each Member States has the right to select immigrants and to award rights selectively is a majority opinion. Similarly, automatic acquisition for non-complying aliens is unlikely to be supported by many Member States, but may nevertheless be discussed as an informal proposal. A possible solution would be to define some minimum standards on the use of fees, income requirements and integration requirements to make access to long-term residence status easier across the Union. Many NGOs and other stakeholders view such a development as essential in the management of problems of illegal residence.

Option 6b: Automatic acquisition of the status of long-term residence (109/2003/EC) for children born on the territory and minors with 5 years' residence

Description: This would give the status of long-term residence to children reaching the age of majority who were born on the territory, and also to minors with 5 years' residence on the territory upon reaching majority.

³⁵¹ 7 (EU 15) Member States have minimum residence requirements between 3 and 5 years, the remainder between 6 and 10 years, with the latter being the most frequent among this group. See Harald Waldrauch (2006): Acquisition of Nationality. In: Bauböck, R., Ersbøll, E., Gronendijk, K., Waldrauch H. (eds.): *Acquisition and Loss of Nationality. Policies and Trends in European Countries*. IMISCOE Research Series. Amsterdam. Amsterdam University Press, extended chapter available at: http://www.imiscoe.org/natac/acquisition_bookchapters.html

Rationale and possible impact: Upon reaching the age of majority, second generation migrants in countries without some form of *ius soli* are obliged to apply for residence permits. Similarly for minors who migrated, either unaccompanied or with their family, their residence as children is disregarded in many MS. Thus, at 18 they are classed as illegal immigrants if they are unable to acquire a residence permit – often requiring either employment or registered student status. This legislation automatically confers a secure residence status on deserving recipients, and eliminates a whole class of ‘created illegal immigrant’.

The legal status of the child, or of its family, should be disregarded for the purposes of this proposal. The *UN Convention on the Rights of the Child*, in Art. 2 (1), forbids discrimination against any child on the basis of his/her parents’ status, including illegal status. The criterion of residence should be interpreted generously: for children born on the territory, some registration of birth plus some limited evidence of residence (e.g. school registration); for migrant children, school registrations or other official documentation. What should **not** be required is hard evidence of *continuous* residence, even for only five years, as this may be difficult to provide.

What supports EC action? The legal framework in principle already exists and only would have to be amended. NGOs are advocating this policy very strongly in certain EU countries.

What works against EC action? The position of MS on this is not known, but it is likely to be supported by many (possibly with a public policy derogation).

OPTION 7: SYSTEMATIC EXCHANGE OF INFORMATION ON MS PRACTICES CONCERNING ILLEGALLY STAYING THIRD COUNTRY NATIONALS WHO CANNOT BE DEPORTED

Description: The Commission could set up an information exchange mechanism or a working group, possibly for a limited period of time, to collect and exchange information on Member States practices with regard to illegally staying persons who cannot be deported on grounds other than those defined in Art. 15 in the Qualification directive (Council Directive 2004/83/EC).³⁵² This includes persons threatened with individual harm by non-state actors, including ‘strong discrimination’ and other forms of more subtle harm (e.g. on the grounds of sexual orientation).

Rationale and possible impact: Although a majority of MS practice some type of regularisation, often in the form of selective case-by-case regularisations, return clearly remains the preferred option in most Member States. However, as the Commission Memo on “New Tools for an Integrated European Border Management Strategy” (Memo 08/85)³⁵³ makes clear, only an estimated 40% of the roughly 500,000 persons apprehended annually in the European Union are removed from the territory

³⁵² Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

³⁵³ European Commission (2008): *New Tools for an Integrated European Border Management Strategy*. Memo 08/85. 13 February 2008. Brussels.

of the European Union. If the evidence collected by Joanne van der Leun for the Netherlands³⁵⁴ is indicative of broader trends in the European Union, it seems that a substantial share of effected returns actually concern persons who have been sentenced for a criminal offence, implying an even higher share of persons found illegally present on a Member State's territory who are not deported. Although there can be doubts about the quality of the quantitative information available, there is enough evidence to suggest that the effectiveness of return policies is, for various reasons, inherently limited and can at best be a partial response to the presence of irregularly staying third country nationals. These limits of enforced return and the reluctant or selective use of regularisations ultimately leads to a build-up of the number of persons illegally staying who cannot be deported. Ignoring the discrepancy between actual capacity to enforce return and the presence of illegal residents ultimately also risks the undermining of wider policy objectives, notably with regard to social cohesion and integration and thus needs to be addressed explicitly.

While the qualification directive provides a legal basis for awarding a legal status for persons in need of protection but not qualifying as a refugee under the Geneva Convention,³⁵⁵ there are no consistent policies in EU Member States on other persons who cannot be deported. Such an ad-hoc consultation and/or working group could investigate:

- a. the extent of non-enforcement (annual number of persons whose removal is suspended; total stock of persons not removed) and the characteristics of persons not removed in terms of time elapsed since first apprehension/ first removal order (i.e. duration of "suspension" status)
- b. the existence and nature of policies on such persons (informal non-enforcement, formal non-status, eligibility for regularisation...) and
- c. the collection and collation of best practices with the aim of formulating common principles as to how non-deportable aliens should be treated.

The information exchange/ working group could also be supported by related studies on the subject. As there seems to be little comprehensive information on state practices in this area, the inclusion of major stakeholders, notably NGOs, or organisations such as ECRE, and UNHCR as well as advocacy groups such as PICUM or CCME in such a process would be warranted.

What supports EC action? Undertaking a limited information exchange/ collection exercise can be seen as a logical corollary to the elaboration of a common EU return policy. If there is to be a common return policy, there needs to be a systematic and regular assessment on what happens if return cannot be effected. The advantage of collecting and exchanging information is that it is low profile and does not *per se* involve policy harmonisation and the elaboration of common standards on practices regarding non-deportable aliens, although it might contribute to the formulation of a policy if Member States wish to do so. At the same time, incorporating a "good practice" element in the

³⁵⁴ Van der Leun, J. (2003): *Looking for Loopholes. The Process of Incorporation of Illegal Immigrants in the Netherlands*. Amsterdam: Amsterdam University Press.

³⁵⁵ According to Article 15 of the Directive, persons qualify for subsidiary protection if they are subject to the following potential harms: (1) Death penalty or execution; or (2) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or (3) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

information exchange could contribute to developing principles in treatment of non-deportable aliens and diffusing good practices in dealing with this category of persons.

What works against EC action? Establishing a focused information exchange mechanism on “failed returns” would highlight uneasy dilemmas of current approaches towards illegal migration and might be seen as a first step towards minimum standards in the rights and treatment of non-deportable aliens which in turn might be seen as undermining the priority to return illegal migrants; it could also be seen as supporting regularisation as an alternative solution through the backdoor.

OPTION 8: PROVISIONS ON PRACTICES CONCERNING NON-DEPORTABLE ALIENS

Description: The Commission should propose a review of standards and procedures in Member States for returning illegally staying third-country nationals, with regard to practices concerning non-deportable aliens.

The Commission could propose definitions of different categories of non-deportable aliens, positively defining the legal status of such persons. Definitions should be based on an analysis of Member States’ practices with regard to different categories of non-deportable aliens in comparison to persons under subsidiary protection. On the basis of the analysis of state practices, the Commission should propose a harmonisation of such practices, including the definition of minimum rights (e.g. access to health, access to the labour market, etc) and possible expansion of rights after a certain timeframe in analogy to the proposal to extend the application of 2003/109EC to subsidiary protected persons and in accordance to the concept of ‘civic citizenship’.

Provision on minimum standards concerning practices concerning non-deportable aliens should also explicitly consider the rights of minors, in particular access to education. Secondly, a proposal should set certain time limits for renewal of decisions whereby return is temporarily suspended (see Article 13 (2) of the ‘Return Directive’) and provide for procedures that need to be taken if return is repeatedly postponed. Thirdly, there need to be provisions in the event that authorities negatively assess the prospects of returning an illegally staying third country national. If return cannot be effected within a reasonable time period, or is otherwise not feasible, there is need for a temporary legal status which ultimately should lead to a long-term resident status. Such provisions could be incorporated in a future amendment of the Return Directive and would provide for a three-step procedure. First, non-deportable aliens should be granted labour market after six months of *de facto* stay. According to our proposal, they would thus enjoy rights similar to those of asylum seekers as proposed in recent Commission proposals to amend the directive on minimum standards for the reception of asylum seekers.³⁵⁶ Rather than is the case in countries providing for a ‘toleration’ status, the status should be considered as a legal one, although restricted and limited. Secondly, the duration of ‘toleration’ should be strictly limited and Member States should at any time have the possibility to fully regularise non-deportable aliens. Thirdly, after a certain duration (we recommend five years of *de facto* residence, analogously with the time-frame used in the Long Term Residence Directive),

³⁵⁶ Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers. COM(2008) 815 final, 3.12.2008

non-deportable aliens should have an *absolute right to residence*, abrogated only on serious grounds of public order and security. Access to fundamental rights, notably education and health care, should be guaranteed irrespective of such provisions.

Rationale and possible impact: As noted above in Option 7, state practices concerning non-deportable aliens are extremely heterogeneous. However, there needs to be a harmonised approach to the treatment of such persons. One positive aspect of comprehensively regulating the treatment of non-deportable aliens would be that the need for responsive regularisation programmes would be reduced (as, apparently, occurs in France). At the same time, such a policy might imply the regularisation of considerable numbers of TCNs. Nevertheless, this would be an altogether more realistic policy and would also be more compatible with notions of combating social exclusion, civic citizenship, and ‘legal integration’, i.e. the progressive acquisition of rights by non-nationals.

What supports EC action? The ‘Return Directive’ already includes limited provisions related to non-deportable aliens and regularisation (paragraph 12 in the Recital; Articles 6 (4), 9, 10, 13 (2)). A limited administrative harmonisation of practices (definitions of different cases, documentation, etc) may actually be welcomed by Member States,

What works against EC action? A positive definition of minimum rights of non-deportable aliens, e.g. the extension of the personal scope of the reception conditions directive, is unlikely to get much support. On the other hand, the Directive includes some references to such basic rights, including education. Finally, although there seems to be some support for harmonising practices, defining a pathway for the ‘legal integration’ of non-deportable aliens (e.g. defining a time limit after which Member States must award a legal status, and a time limit after which such persons should have access to long-term status) is unlikely to receive much support.

OPTION 9: IMPROVING DATA COLLECTION ON IRREGULAR MIGRATION (STATISTICS ON APPREHENSIONS, RETURNS, ADMINISTRATIVE COSTS)

Description: The Commission should propose, and in particular through its statistical agency Eurostat and academic experts working in this area, ways to improve the collection of statistical data on irregular migration. These measures should include

- a) collection of personalised data (rather than simple counts of cases), notably in regard to refusals, returns, and apprehensions;
- b) build-up register based apprehension datasets which can be linked to other relevant databases (visa database, asylum databases, Eurodac, return database, databases on persons held in detention pending deportation)³⁵⁷ ;
- c) if the Council decides to opt for a comprehensive border traffic register system³⁵⁸, all relevant datasets should be integrated into this system;

³⁵⁷ It needs to be stressed that detention pending deportation does not necessarily result in the removal of the detained person after the end of the detention period. Thus, multiple detentions and apprehensions (that may or may not be counted as such) are likely to be the case.

- d) apprehension data should distinguish between illegally resident immigrants and illegal migrants (persons illegally crossing a border) and in the case of the latter, between in-bound and out-bound flows. Because such distinctions are inherently difficult to make in the case of persons in an irregular situation, proxy variables that may indicate that a person has just or recently entered a country or has been residing in the country for a longer period of time shall be elaborated. Direct measures include length of stay, previous apprehensions or registrations in other databases. Indirect measures include assessments of the authorities, etc.

Rationale and possible impact: The usefulness of currently collected statistical information on irregular migration for drawing conclusions on the magnitude and patterns of irregular migration is extremely limited.³⁵⁹ Thus, to some extent, data collected, notably data on apprehensions, is actually misleading. Personalised data-collection and a linkage to other databases would allow to assess the extent of multiple apprehensions, the share of asylum seekers and thus of persons with a (principal, if perhaps temporary) claim to legal status, etc and thus would also provide a basis for better estimating the size of the irregular migrant population in Europe. In the context of regularisation, comprehensive and systematic data collection is necessary to provide accurate data on enforcement practices, effective duration of residence of persons apprehended and awaiting removal and the actual share of effected returns. Such information is crucially important to evaluate return policy and for considering possible alternatives, including regularisation.

What supports EC action? Regulation (EC) No 862/2007 on Community statistics on migration and international protection³⁶⁰ and its implementing measures would provide a framework establishing enhanced standards for collecting statistical information on irregular migration and the Commission might consider incorporating stronger standards on data collection in a future review of the regulation.

What works against EC action? Given the difficulties of Member States in complying with existing standards and against the background that few Member States' data collection systems allow the systematic linkage of different datasets to each other, considerable difficulties in implementing such a proposal and resistance are to be expected. This suggests that informal mechanisms, such as technical information exchange, the elaboration of good practices and pilot studies with countries with good information systems, may be more appropriate.

³⁵⁸ See European Commission (2008): *New Tools for an Integrated European Border Management Strategy*. Memo 08/85. 13 February 2008. Brussels.

³⁵⁹ See Jandl, M. Kraler, A. (2006): 'Statistics on refusal, apprehensions and removals: An analysis of the CIREFI data'. In: Poulain, M., Perrin, N., Singleton, A. (eds.): *Towards the Harmonisation of European Statistics on International Migration (THESIM)*. Louvain-La-Neuve: UCL Presses Universitaires de Louvain, pp.271-285. In the framework of the Prominstat project (www.prominstat.eu) a more detailed analysis of statistical data on irregular migration is being conducted (to be finalised by February 2009).

³⁶⁰ *Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers.*

OPTION 10: ESTABLISHMENT OF COMMON STANDARDS FOR THE PROCEDURE OF GRANTING AND RENEWING A NATIONAL RESIDENCE PERMIT

Description: This would broadly define a range of conditions, documents and procedures that are required by Member States for the acquisition of a residence permit, without impinging on MS autonomy in the actual granting of such permits. The precise instrument that could be used is left open; ideally, it would specify at least maximum application and renewal fees.³⁶¹

Option 10a: Specification of documents and fees required for application for a residence permit

Rationale and possible impact: The purpose of the provision is to limit the number of illegal residents left outside the residence permit system by virtue of excessive (and often pointless) bureaucratic and financial requirements. This includes: translations of a large number of official documents, social insurance contributions above the level of those of nationals', high application fees, and various other bureaucratic demands. Interestingly, all of the MS with high application fees for permits have high (or very high) stocks of illegal residents: fiscal barriers are an important aspect of policy effectiveness, and should not be ignored.

What supports EC action? The provisions of the Council of Europe *European Convention on Establishment* (ETS 019) and the *European Convention on the Legal Status of Migrant Workers* (ETS 093) specify that fees, if levied, should cover administrative costs only. Constraints on the unreasonable demands of MS in residence permit procedures are a consistent feature of NGO positions communicated to us.

What works against EC action? It is likely that certain MS will oppose limitations on their levying of high fees.

Option 10b: Permitting applications for employment/residence from within the territory

Rationale and possible impact: The failure of a considerable number of countries (especially of southern Europe) to adequately recruit (unskilled) workers from outside their territory is a cause of large stocks of illegal residents. This is partly the result of restrictive legislation, partly through weak administration, and partly through the reluctance of employers to hire unskilled persons without personal contact. Allowing workers to apply for work permission from within the territory (as has been practised by Italy and, earlier, Spain) is a temporary solution to the problem of managing labour migration. It should not be cast as a legalisation, but as a legitimate route to legal employment and residence in the territory.

What supports EC action? Those MS with difficulty in constructing labour migration policies may find this a convenient temporary solution that avoids the alleged 'pull-effect' of large-scale regularisation programmes. The policy should be set as an option, rather than an obligation for MS.

What works against EC action? It is possible that certain northern EU MS will object to the flexibility implicit in this approach, on the grounds that it might encourage more illegal immigration.

³⁶¹ These standards could be included in the Commission's *Proposal for a COUNCIL DIRECTIVE on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State*, COM (2007) 638 final.

OPTION 11: REVIEW OF ADMINISTRATIVE PRACTICE IN REGARD TO ASYLUM AND SUBSIDIARY PROTECTION AND ELABORATION OF PROCEDURES ENSURING EQUAL ACCESS TO INTERNATIONAL PROTECTION ACROSS THE EUROPEAN UNION.

Description: To improve the equal access to asylum and subsidiary protection across Europe, a European asylum review board should be established, which should be charged to evaluate administrative practices in EU Member States. The Commission should elaborate proposals for addressing lack of harmonised practices despite harmonised legislation, including the establishment of a European asylum appeals board whose decisions would have direct effect, or other options. Such an appeals board could be integrated with the proposed European Asylum Support Office (which has a more limited mandate, including possible review).

Rationale and possible impact: NGO responses to the ICMPD NGO questionnaire have highlighted that one of the reasons for the presence of illegal immigrants are major protection deficiencies of the asylum system. In turn, addressing these deficiencies would also reduce the need for regularisation, while generally improving the asylum system. According to NGOs, deficiencies are not so much due to gaps in legal protection than to major difficulties in administrative practice, which result in uneven access to international protection in the European Union. Various other evidence, including ECRE reports, UNHCR opinions and highly varying recognition rates for specific groups of asylum seekers³⁶² corroborates this view. Innovative measures which would focus on the administrative level could potentially have a major impact on improving equal access to international protection

What supports EC action? There is, in principle, commitment among Member States to create a common European asylum system.

What works against EC action? The implementation of the directives in the area of asylum, in line with the principle of subsidiarity, is a matter of Member States. Harmonisation of administrative practices by contrast could be seen as breaching this principle. In addition, an asylum review board or a European appeals board may be opposed in principle.

OPTION 12: STRENGTHENING THE RIGHT TO FAMILY REUNIFICATION (DIRECTIVE 2003/86/EC)

Description: the idea of this proposal is to close gaps with respect to the right to family life. This would include strengthening the rights of *de facto* family units already resident (i.e., extend rights to persons not formally admitted as family members), permitting family reunification for unmarried partners,³⁶³ setting precise conditions of housing requirements and minimum income (which, are non-existent in some MS, and set very high in others). The actual operation of the Directive should be reviewed, and policy proposals developed from detailed examination of the highly variable practices across the EU.

³⁶² For example, Chechen asylum seekers with high recognition rates in Austria (one of the main receiving countries for this category of refugees) and low recognition rates in Germany.

³⁶³ Unmarried partners are already admitted on this basis by Belgium, Denmark, Finland, France, the Netherlands, Sweden and the UK.

Rationale and possible impact: The operation of the Family Reunification Directive is highly variable across the EU, leaving many families with the choice of either living apart or residing as illegal aliens. Given the trend in case law of the European Court of Human Rights, especially concerning the concept of family life (Art. 8), it is reasonable for the Commission to adopt a more active role in pushing for legal status of family members and easier access to family reunification procedures (see §6.2). It is unlikely that there would be increased migration inflows: it is very likely that there would be increased numbers of *legal* residents from this policy proposal.

What supports EC action? Many Member States actually do carry out good practices and minimal restriction on family reunification rights.

What works against EC action? Certain MS appear not to favour family unity as a policy objective, or at least consider that setting high minimum standards for this is their national prerogative.

9 Conclusions and preferred policy options

9.1 Regularisation practices in the EU(27)

As has been demonstrated throughout this study, there is a wide range of specific causes of ‘illegal stay’ across the EU: Table 1 (§1) shows that there is a complex constellation of legal/illegal entry, legal/illegal residence, legal/illegal employment and whether a person is registered (and known to public authorities) or not. A recent Commission memo estimates that about half of the overall stock of illegal migrants results from illegal entry into the territory of a Member State, while another half is due to overstaying of visas and residence permits.³⁶⁴ Our study, by contrast, suggests that withdrawal and loss of legal status – that is, illegality as a consequence of administrative procedures – is a third and important, albeit difficult to quantify, source of illegal resident populations.³⁶⁵ Thus, irregular migration is not driven by a single logic, nor can there be simple responses to irregular migration. Most importantly, irregular migration is inextricably intertwined with the overall migration policy framework.

There is also a variety of opinions across EU Member States regarding what actually constitutes regularisation of third country nationals who are illegally staying. This diversity of approaches toward, and understanding of, regularisation to some degree reflects the considerable complexity of irregular migration as a social phenomenon: unsurprisingly, there is also a wide range of policies designed to address the problem. Table 5 (§3) summarises the policy positions of Member States, and §3.2.1 hypothesises six clusters or policy groupings – some of which are in ideological competition with others. Nevertheless, few Member States (five out of 27) have absolutely no policies or practices of regularisation – and of these five, three have recently acceded to the EU. Over the last decade, three southern Member States have engaged in large-scale regularisation programmes, all of which seem strongly related to deficits of formal labour immigration channels, although this view is challenged by those Member States. Other (mostly northern) countries have engaged heavily in case-by-case regularisations – usually in order to address a different set of problems, such as rejected asylum-seekers or non-deportable aliens. Yet others have attempted to normalise a transition situation, moving from state socialism within the Soviet bloc to western liberal democracies. In total, our conservative estimate for the EU(27) of the number of persons involved in regularisation of one sort or another over the period 1996-2007 is between 5 and 6 million.³⁶⁶ The sheer magnitude of this figure indicates the importance of regularisation policy for the EU.

³⁶⁴ European Commission (2008): *New Tools for an Integrated European Border Management Strategy*. Memo 08/85. 13 February 2008. Brussels

³⁶⁵ It is safe to assume that the largest share is made up of rejected asylum seekers. However, as our report shows, there are numerous other cases in which third country nationals lose their previous status and lapse into illegality. Although relatively unimportant in quantitative terms (as compared to rejected asylum seekers), some of these cases highlight important gaps of legislation and deficiencies of administrative procedures regarding issuing and renewing residence permits.

³⁶⁶ See §3.1 *et seq.*

9.2 Regularisation practices in Switzerland and the USA

As part of this study, we have examined two federal governance systems external to the EU – namely, Switzerland and the USA.³⁶⁷ Both have extensive experience with irregular immigrant residence, albeit with very different immigration structures and histories. Switzerland is now considered to be a country with not only high immigrant stocks, but also high irregular immigrant stocks (>2% of total population); the USA for some time has had declining legal immigrant stocks whilst illegal stocks have risen continuously, currently constituting over 4% of total population. By most estimations, these stocks are high enough to be considered serious policy failures – certainly, they are higher proportions than exist in all but two EU Member States. It only remains for us to pose the question: ‘Does the EU have anything to learn from those experiences’?

Taking first the case of Switzerland, the most pronounced aspect of its policy approach is a disjuncture between the federal and canton levels. The federal government pursues an extremely conservative approach to the issue of regularisation, emphasising the negative consequences that (allegedly) arise from large-scale programmes and choosing to restrict its activities to case-by-case humanitarian regularisations. (In this, it follows a policy approach very similar to that of Germany.) Some of the cantons, on the other hand, are less concerned with ‘high policy’ and instead emphasise the twin issues of economic and social integration of the irregular migrants. What follows is a structural conflict between the policy competences of the federal government and the cantons – with relatively small numbers of irregular migrants being regularised. Superimposed on this, is a more usual Left-Right political debate, with the Left (and trade unions) canvassing for regularisation programmes, while the centre-right opposes them.

In the case of the USA, the federal structure appears not to have played an important role in the deficit of policy. The last ‘proper’ large-scale regularisation³⁶⁸ was in 1986, and although it was a general amnesty it set a long period of residence (5 years) in order to qualify. Thus, it failed to address about half of the estimated irregular population. Since 1986, primarily owing to the unwillingness (or inability) of the federal government to permit either temporary or permanent unskilled labour immigration, the labour market needs of the US economy have been filled by mass illegal immigration, primarily from Mexico. Unlike European labour markets, the weakly-regulated US labour market readily employs illegal migrants within the formal economy: thus, the informal economy is not a significant factor and most illegal immigrants in the USA are working in a documented capacity.³⁶⁹ Since 2003, there have been eleven attempts to legislate on immigration reform – all have failed. The primary cause is ideological dispute over what the immigration policy of the USA should actually be, and how regularisations or other specific policies would fit into that framework.

There are some potential lessons for the EU from these two cases. First, the issue of governance: if a common immigration policy were to be established at the European level, it is likely that some of the problems of Switzerland would become evident. The appropriate policy instruments for the

³⁶⁷ See Boxes 3 and 4

³⁶⁸ Since 1986, the US has implemented various small-scale programmes. In 2000, some 400,000 irregular migrants benefited from a “late” regularisation under IRCA’s general provisions.

³⁶⁹ For clarification of this, see Table 1. The relevant category is row 4 of the table.

management of irregular migration should be chosen, and used, by the MS in order to avoid such conflicts. Secondly, where there are issues of principle, or ideology, such as the ‘known’ consequences of regularisation programmes, we insist on relying on evidence as opposed to formulating policy positions on the bases of unsubstantiated beliefs. The existing literature, and our own research, provides no evidence of the ‘pull factor’ for regularisation programmes: the situation is far more complex, and involves many more variables which are typically not under political control. Thirdly, the policy impasse of the USA – accompanied by massive increases in irregular stocks – is not such a catastrophe within the US system. Indeed, we might even argue that it supports a particular form of capitalism that relies upon a plentiful supply of low-cost flexible labour. Such a policy impasse within the EU would create much more trouble: we thus advise against setting out ideological political positions on this difficult topic. Evidence-based policy is more likely to engender cross-party (and cross-national) political support, and it is this approach that we have followed in our study. In particular, we want to emphasise that any policy debate on regularisation needs to be based on a thorough understanding of different rationales for undertaking regularisation measures as well as an understanding of the forms, volume and frequency of such measures.

9.3 Policy positions of Member States and social actors³⁷⁰

9.3.1 Views on national policies for regularisation

There is no consensus within the EU(27) concerning the need for regularisation policies. Nine Member States express extreme reservation about the policy instrument – mostly in the belief that it constitutes a pull-factor for future illegal migration flows. Three newly-acceded MS believe that a case-by-case mechanism is sufficient. MS generally posit a variety of policy objectives associated with regularisation – including managing informal employment, immigration management, humanitarian issues, dealing with non-deportable aliens, *inter alia*. On the whole, government positions correspond closely with past practices.

Trade unions tend to see regularisation as an employment-based issue, and in some countries (France, Italy, Portugal, Spain, Greece and the UK) have been important driving forces for regularisation campaigns. Current campaigns in Belgium, France, Ireland and the UK are strongly supported by unions; in general, trade unions are cautious supporters of regularisation policies. Employers organisations currently seem to be largely indifferent to the issue of regularisation, in contrast to their position in previous decades; exceptions lie with current campaigns in France and the UK, where business groups belong to broad coalitions of social partners demanding regularisation programmes.

NGOs are the most active actors concerning mobilisation and campaigns for regularisation programmes – most notably in Belgium, France, Portugal, Spain, the UK, Ireland and Germany. However, the sheer diversity of NGO activities is reflected in their differing objectives and target groups, making it difficult to characterise a ‘typical’ NGO position. Nevertheless, all are agreed that regularisation is an appropriate policy instrument – whether to manage the extent of illegal residents,

³⁷⁰ The detailed sources for identification of these positions are given in §4 (for Member States) and §5 for trade unions, employers associations and NGOs.

to protect vulnerable groups, to compensate for deficiencies in immigration management, to improve access to basic social rights, or to promote the integration of migrants. Principally, NGOs believe that they should be more involved in the policy design of regularisation programmes, as they are the best-informed on the situation of irregular migrants. NGOs also seem to be supportive of permanent regularisation mechanisms, particularly in cases of hardship.

9.3.2 Views on an EU role in regularisation policy

Five Member States are, in principle, opposed to any regulation of this policy area: interestingly, these are all countries that are opposed to regularisation programmes, and two of these do not even have a regularisation mechanism. Three Member States support an EU legal framework that would respect national policy needs. Overall, there is little support for a strong EU role in this policy area: what does seem to command enthusiasm among Member States is a stronger information exchange mechanism and the development of policy expertise. The latter might consist of identification of good (and bad) practices, the use of statistical data techniques, and generally learning from other countries' experiences.

National trade unions – perhaps surprisingly – express views not so very different from those of Member States: few favour strong EU regulation, some would support a package of broader measures (such as regulation of legal migration), and most are supportive of a limited role for the EU whilst respecting different national policy needs. The ETUC, whilst not stating a clear policy position, implicitly favours a broad Europe policy approach that would reduce the actual need for employment-based regularisations: this would include the promotion of economic migration channels, with a common EU framework for entry and residence; establishing a clear consensus between states and social partners about labour market needs; and moving away from the current two-tier migration policy approach that favours high-skilled labour migration and denies the need (and legal recruitment channels) for low-skilled workers. The ETUC also recommends the limited use of regularisation mechanisms, or “bridges out of illegality”.

The positions of two major European-level employers associations (BusinessEurope and UEAPME) are not identical. BusinessEurope, while stressing the principle of subsidiarity, is not opposed to the elaboration of common procedures and other measures; its emphasis seems to be on the reduction of bureaucracy and other practical obstacles, which tend to push businesses into irregular employment of migrant workers. BusinessEurope does seem to be opposed to strengthening and regulating the rights of legal immigrant workers, while supporting measures against illegal migration – including employer sanctions, returns, and possible regularisation where return is not possible. UEAPME³⁷¹ represents SMEs, whose involvement with irregular employment of immigrants is undoubtedly greater than for large enterprises: furthermore, bureaucratic hurdles (both practical and fiscal) represent greater problems for their members. Thus, UEAPME strongly supports the EU framework directive on a single application procedure for migrant workers, emphasises the need for national authorities to determine labour market need for immigrant workers, and considers that over-regulation of the labour market is a primary cause of irregular employment. Their position on employer sanctions is rather

³⁷¹ *European Association of Craft, Small and Medium Sized Enterprises*

more reserved than that of BusinessEurope, and opposed to any increased obligations on employers and also to existing policy on employers bearing the return costs of illegally employed third country nationals.

European NGOs with positions in this policy area include PICUM,³⁷² various Church organisations (e.g. Caritas, CCME³⁷³) and ECRE.³⁷⁴ PICUM sees regularisation as a necessary but insufficient policy tool, while emphasising the need to address the underlying causes of informal employment and irregular status. Church organisations also argue for a comprehensive approach in tackling illegal migration, whilst asserting the value of regularisation programmes within such a broad approach. They are critical of the lack of consultation with NGOs in the formulation of policy in the area of irregular migration, are fearful of the possible impact of the ‘Return Directive’ which may impede future regularisation campaigns, and advocate the rapid adoption of the UN 1990 Convention. ECRE is broadly supportive of regularisation (citing the 2007 Council of Europe report), with particular emphases on the status of rejected asylum-seekers with three years’ (or more) residence and on suspended return decisions that leave persons on European territory without any legal status.

9.4 The role of international law in shaping EU policy

Finally, we draw attention to the rights-based legal issues previously outlined in §6.1. In our view, the emphasis on security aspects of irregular migration and residence needs to be adjusted – for reasons of European political consensus and also of foreign relations. The recent jurisprudence of the *European Court of Human Rights* (ECtHR) has ventured into new territory concerning the rights of irregular migrants, and the case-law constitutes the EU *Acquis*. In particular, the principle of proportionality is paramount in addressing the issue of irregular residence: this principle is barely visible within the Return Directive (notably, paras. 6, 13, 16 of the Recital) even though Member States have the apparently unrestricted possibility to regularise under Art. 6 (4). Thus, arbitrary administrative practice (as opposed to rights-based policy) has been built into current legislation; various factors – e.g. duration of stay, integration into the labour market, social integration, links with country of origin (or of nationality), criminal record – are relevant for assessing the proportionality of forced return rather than regularisation.³⁷⁵ It is to be expected that such cases will burden the ECtHR for years to come, since Member States appear reluctant to concede any principled rights to irregular migrants.

This latter issue is, in fact, one of the major obstacles to ratification of the UN 1990 *Convention on the Rights of All Migrant Workers and Their Families*. The Convention actually grants less strong rights to irregular migrants than recent ECtHR jurisprudence, yet has been ratified by no Member State. In

³⁷² *Platform for International Cooperation on Undocumented Migrants*

³⁷³ *Churches Commission for Migrants in Europe*

³⁷⁴ *European Council on Refugees and Exiles*

³⁷⁵ For a discussion of the possible development of the ‘*Boultif* criteria’, see Thym, D. (2008): Respect for Private and Family Life under Article 8 ECHR in ‘Immigration Cases: A Human Right to Regularize Illegal Stay?’ *International and Comparative Law Quarterly*, 57, 1, pp. 93-5

particular, the clear policy choice expressed in Article 69 – regularise or expel – is a reasoned and fair dictum that would have been well-heeded by the framers of the Return Directive.³⁷⁶

Finally, the rights of child migrants constitute a matter of paramount importance that has yet to be adequately addressed within the EU framework. The UN 1989 *Convention on the Rights of the Child* represents a clear legal and moral guiding force, while most European policy has relegated it to perfunctory recital alongside rare practical adherence.

9.5 The logic of policy choices

In formulating the policy options of §8, we have been guided by three discrete sets of information. These can be categorised as policy principles that are appropriate for this specific policy area; policy issues that have been identified in §3.3 and policy positions (of Member State governments, of civil society, and of international law) as previously identified in this chapter. Each is briefly discussed below.

9.5.1 Policy principles

The main principle that we deduce from research within this study is that single measures (e.g. outlawing one form of regularisation or encouraging another) cannot be an appropriate response in tackling regularisations. Rather, any state or EU response must consist of several measures in different areas that take account of this diversity. For regularisation policy, this means that ‘one-size-fits-all’ solutions are not only ineffective but are also likely to provoke or exacerbate related problem areas. Thus, we reject the concept of a simple common policy, and recommend that a coherent, flexible set of measures be adopted: this might include a legislative component, although ‘soft’ measures are likely to yield better results in this complex area.

The second principle – derived as a conclusion from earlier analysis and guiding our policy options – is that regularisation policy cannot be formulated in isolation from other policies, i.e. as stand-alone policy. It is vital for its effectiveness that it is fully integrated with broader policies on illegal migration: these include, at the very least, policies on border management, return, asylum and subsidiary protection. These in turn must be integrated with policies on legal migration, including visa policy. Thus, the following policy options are explicitly framed in this broader context. As a corollary, one should note that the proposed options largely consist of strategies that are not mutually exclusive but, rather, complementary.

³⁷⁶ The view of the European Commission is that the Directive applies only after a Member State has determined that a third country national is illegally staying, therefore the policy choices prior to such a determination lie outside of the purview of the Directive.

9.5.2 Policy issues

Previously (in §3.3) we examined in some depth various policy issues that emerged as problematic during the course of our research. These can be summarised as follows:

- 1) Policy effectiveness of regularisation programmes, including:
 - i) Retention of legal status
 - ii) Criteria for eligibility
 - iii) Encouragement of illegal migration flows
 - iv) Bureaucratic management
- 2) Policy effectiveness of regularisation mechanisms
- 3) Avoiding the creation of illegal immigrants
 - i) expired residence permits
 - ii) persons who migrated as minors or were born on the territory
 - iii) withdrawn refugee status
 - iv) retired persons with limited pension resources
- 4) Regularisations in lieu of labour migration policy
- 5) Role of national asylum systems
- 6) Lack of coherent policy on non-deportable aliens
- 7) Regularisation for family-related reasons

The policy proposals have been formulated to address each of these problematic areas, with specific linkages shown in §3.3

9.5.3 Policy positions

These are outlined above, in §9.3. Overall, there is little support from Member States or from civil society for extensive regulation of this broad policy area: there is considerable enthusiasm, however, for technical support, policy guidance, and information exchange. In some specific policy areas, we believe that there is limited support for minimum standards regulation; in other areas, we believe that there will be considerable interest in solving ‘technical problems’ – often bureaucratic or structural in origin – whereby the ‘accidental’ creation of illegally staying third country nationals can be minimised.

Thus, our preferred policy options – shown below in §9.6 – are grouped into four categories. Category 1 consists of policies that leave Member States with exclusive responsibility for the policy, with the Commission playing the role of facilitator. Category 2 policy options give the Commission some role in co-ordination and development of policy. Category 3 consists of some specific policies that, in our opinion, will command support from both Member States and civil society: in particular, we address issues pertaining to ‘created illegal immigrants’. Finally, category 4 policies constitute ‘strong’ regulation for the achievement of minimum standards in some crucial policy sub-areas: again, it is our belief that these specific policy issues are important enough for Member States, as well as civil society, to concur with the need for common standards across the European Union.

9.6 Preferred policy options

9.6.1 Policies for information exchange, policy development and technical support

The following options are designed to assist MS in the development of their own national policies, on a range of issues pertaining to illegal residence. The role of the Commission is predominantly that of facilitating information exchange and providing access to expert advice.

Option 2

Development of principles and benchmarks for regularisation programmes and measures (in co-operation with stakeholders: social actors, governments and academic researchers)

Option 3a

Systematic evaluation of policy impact on other EU member states

Option 3b

Enhance the right for member states to request information on planned policy measures

Option 4

Improving statistical information on regularisation programmes and mechanisms

Option 5

Improving information on the impact of regularisation programmes

Option 7

Systematic exchange of information on MS practices concerning illegally staying third country nationals who cannot be deported

9.6.2 Policies for notification and policy elaboration

These options place more responsibility for policy development in the hands of the Commission, with obligatory notifications and consultations.

Option 1b

Requirement for consultation with the Commission and the Council on planned regularisation programmes

Option 1c

Definition and notification system for regularisations

Option 9

Improving data collection on irregular migration (statistics on apprehensions, returns, administrative costs)

9.6.3 Policies for minimising ‘created illegal immigrants’

These options we consider to be amongst the most important, not only in minimising the extent of unnecessary irregularity, but also in the promotion (and a role for the Commission) of rights with the EU. The areas covered are children reaching majority (Option 6b), pensioners and others with long-term residence claims but having difficulty in maintaining legal status (Option 6a); and family units that have reunified without authorisation or otherwise have difficulty in fitting within the system.

Option 6a

Facilitating access to long-term residence status: reconsidering or limiting the use of conditions with respect to acquiring the status

Option 6b

Automatic acquisition of the status of long-term residence (109/2003/EC) for children born on the territory and minors with 5 years' residence

Option 12

Strengthening the right to family reunification (directive 2003/86/EC)

9.6.4 Policies for the regulation of minimum standards

The following are our recommended options for guaranteeing minimum standards. Although it is listed (as Option 1a) we advise strongly against the removal of such an important policy instrument as the regularisation programme: we do advise against unfocused amnesties, but this issue should be covered by policy development mechanisms and exchange of good practices. The regulation of some other areas is advised: the need for a regularisation mechanism, with clear criteria (Option 1d); extending the coverage of the long-term residence permit (Option 6); practices on non-deportable aliens (Option 8); procedures and standards for the issuance of residence permits (Options 10a, 10b); and asylum and temporary protection administrative practices (Option 11).

Option 1d

Setting minimum standards for the granting of residence permits for illegally residing tcn, on a case-by-case basis (regularisation mechanism)

Option 6

Strengthening the principle of long-term residence as a source of rights by expanding 2003/109/EC to persons not covered by the directive and by proposing automatic acquisition of the long-term residence status

Option 8

Provisions on practices concerning non-deportable aliens

Option 10a

Specification of documents and fees required for application for a residence permit

Option 10b

Permitting applications for employment/residence from within the territory

Option 11

Review of administrative practice in regard to asylum and subsidiary protection and elaboration of procedures ensuring equal access to international protection across the European Union

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11.2 European Union documents

11.2.1 Primary legislation

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Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Article 12 (1) on Protection against expulsion

Council Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

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

Council Decision 2006/688/EC of 5 October 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration

Council Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers

11.2.2 Commission Communications

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11.2.3 Legislative proposals

European Commission, Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in member states for returning illegally staying third country nationals; COM (2005) 391 final, Brussels, 1.9.2005

European Commission, Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals; COM (2007) 249 final, Brussels, 16.5.2007.

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11.2.4 Other European Union documents

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European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2007): Report on policy priorities in the fight against illegal immigration of third-country nationals (2006/2250(INI)), Rapporteur: Javier Moreno Sánchez. Available at: <http://www.europarl.europa.eu//sides/getDoc.do?type=REPORT&language=EN&reference=A6-2007-0323>

11.3 Relevant instruments under international law

11.3.1 Council of Europe Conventions

Council of Europe – ETS no. 019 – *European Convention on Establishment*, Article 21(2), Chapter VI on taxation, compulsory civilian services, expropriation, nationalisation

Council of Europe – ETS no. 093 – *European Convention on the Legal Status of Migrant Workers*

11.3.2 European Court of Human Rights – judgements

European Court of Human Rights (ECtHR) judgement of 17 January 2006, No. 51431/99, Aristimuño Mendizabal v. France

European Court of Human Rights (ECtHR): judgement of 31 January 2006, No. 50435/99, Rodrigues Da Silva & Hoogkamer v. The Netherlands

European Court of Human Rights (ECtHR): judgement of 15 January 2007 (GC), No. 60654/00, Slivenko *et al.* v. Latvia

11.3.3 Other relevant instruments under international law

International Labour Organization – C97 – *Migration for Employment Convention (Revised) of 1949*

International Labour Organization – C143 – *Migrant Workers (Supplementary Provisions) Convention of 1975*

United Nations – *Convention on the Rights of the Child of 1989*

United Nations – *International Convention on the Protection of the Rights of All Migrant Workers and Their Families of 1990 (ICRMW)*