Regularisation:
A misguided option or part and parcel of a comprehensive policy response to irregular migration?

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Preface

This working paper offers a well-written and most comprehensive overview on regularisation. 'Regularisation' is defined as any state procedures through which non-nationals who are illegally residing or are otherwise in breach of national immigration rules in their current country of residence are granted a legal status. The paper is divided into six sections: an introduction, a historical overview on the emergence of regularisation policy, a discussion on the meaning of regularisation and illegality, a discussion on the contrasting logics of regularisation, an overview of regularisation practices in the EU and conclusions.

In this paper, Albert Kraler offers us a useful typology for the different forms of regularisations and illegality, and characterises the various logics of regularisation programmes. On one end, we find a regularisation based on a broad set of humanitarian criteria. This approach is generally understood as a way for asylum seekers and refugees to adjust their status in the country of residence, though without the option to transfer back to their home country or, for that matter, go anywhere else. On the other end, regularisation is presented as a strategy by the state to re-regulate the labour market and to re-establish formal regularity. As such, the state allows irregular workers to repair their status, so long as they comply with tax and social security obligations.

Perhaps the most interesting aspect of this paper is based on a systematic empirical analysis of all regularisation programmes in the EU-27. Kraler shows how between 1973 and 2008 some 68 programmes were conducted. Including both official regularisations as well as 'normalisations' targeting temporary protected migrants. these programmes saw the submission of over six million applications – 73 per cent of which were submitted within the last decade. This statistic reflects the weight thrown by several large-scale programmes carried out in southern European member states (Greece, Italy, Spain and Portugal). Altogether, over 4.3 million regularisations were granted through programmes in these 35 years; this amounts to about one-fifth of all foreign citizens in the EU and one-tenth of all foreign-born.

The paper demonstrates how regularisation programmes have become part of a 'toolbox' used by the contemporary migration management system, especially in countries unable to implement a more rigid system of migration management and control. Kraler questions the oft-quoted opinion that regularisation is a magnet for further irregular flows. He argues that regularisation programmes could be a relevant factor to flows within the EU in instances whereby irregular migrants go to countries with their own regularisation programmes. The reverse case and the emergence of new inflows, however, cannot be proven with empirical evidences.

Vagueness and consequent speculation tend to shroud our understanding of regularisation and its consequences. This paper offers facts and figures to help us see a more realistic picture of the issue.

Heinz Fassmann
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Contents

1. Introduction[1]

Over the past several decades states have repeatedly resorted to regularisation as a response to the presence of migrants in an irregular situation. In the European Union context, the largest number of irregular migrants have been regularized in Southern European countries; regularisation measures involving significant numbers of irregular migrants have also been implemented elsewhere in the EU, notably in Belgium and France and to a lesser extent in Germany, The Netherlands and Sweden; other EU member States, including new EU Member States have also regularized, albeit in much smaller numbers and mostly on humanitarian grounds. Outside the European Union, the most well known and largest regularisation programme has been implemented in the US, under the 1986 Immigration Reform and Control Act. It was followed by several smaller scale programmes targeting specific groups of irregular migrants (Levinson 2005). Regularisation programmes have also been carried out in Australia and in various developing states, including Argentina, Costa Rica, Gabun, Thailand and Venezuela amongst others (Sunderhaus 2007). Recently, regularisation has also become a major issue in various countries of the CIS region, including the Russian Federation (which has undertaken regularisation programmes) and Belarus, Moldova, and the Ukraine, which currently consider regularisation as a possible option or else have stakes in regularisation as a policy issue, for example as important countries of origin of irregular migrants in EU Member States, like Ukraine and Moldova.

In the European Union, regularisation has recently come under increasing pressure, both from political actors within the countries concerned as well as from other EU Member states. In particular the last Spanish regularisation programme, which resulted in the regularisation of more than 578,000 illegally staying third country nationals, has raised concerns in other Member States concerning the implications of mass regularisations for other states and the consistency of regularisation policy with wider policies on illegal migration. In particular, it is the general focus on prevention, border controls, surveillance and return which renders regularisation a problematic option. Although the criticism of regularisation has largely focused on large-scale regularisations in the Southern European countries, it is regularisation in general, which has become the subject of principled opposition.

On the EU level, there have been repeated proposals to limit the freedom of Member States to opt for regularisation programmes, and in particular, to implement large-scale regularisation without considering the potential impact on other Member States, leading, in 2006 to the establishment of a "mutual information exchange system" on the EU level (Council decision 2006/688). Under this mechanism, Member States are required to provide information on planned policy measures that potentially affect other Member States in advance.

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[1] This paper is based in part on research conducted in the framework of the project REGINE – Regularisations in Europe. on practices in the area of regularisation of illegally staying third-countrynationals in the Member States of the EU (Baldwin-Edwards & Kraler 2009)

First drafts of the recently adopted European "pact on immigration and asylum" went a step further and proposed to outlaw large-scale regularisations altogether, although the final version of the pact only contains a much weaker formulation. At the same time, regularisations whether in the form of low profile, ongoing regularisation mechanisms (such as awarding residence permits on humanitarian grounds) or in the form of programmes continue to be used as policy tools to address the presence of illegally staying migrants across the European Union.

Although the arguably most significant recent legal instruments regarding irregular migration on the EU level, the return directive,[2] does authorize states to grant an independent residence permit or some other form of an authorization of a right to stay for compassionate, humanitarian or other reasons (Article 6, para 4), the directive clearly regards regularisation as an exceptional measure. However, it is silent on the permissibility of large scale regularisations.

Against the background of the increased attention given to regularisation on the European level, this paper has four basic aims: (1) to discuss the broader historical and political context of regularisation and provide a definition of regularisation, based on current state practices; (2) to provide a mapping of regularisation practices in Europe; (3) to analyse objective and rationales of regularisation measures; and (4) to investigate the interlinkages between regularisation policy and migration policy in a broader perspective and to identify major issues that should be of concern in the context of the possible development of policies on regularisations at the European level.

2. The emergence of regularisation policy – a history

Generally, irregular migration cannot be discussed outside the context of state regulation of migration. Only in a world neatly divided into nation-states which define explicit rules on legal (and hence illegal) entry and stay of immigrants, is there "illegal migration" (cf. Joppke 1998: 5; see also Baldwin-Edwards 2008, passim and Doomernik et. al. 2005: 35-36).). In historical perspective, the fact that states define such rules is a relatively recent phenomenon. Not only has something like "illegal migration" and "illegal migrants" as objects of a set of distinct state policies emerged in a nascent form only in the latter half of the 19th century, in tandem with the birth of modern migration policies. But the understanding of what exactly constituted "illegal migration", "illegal residence", "illegal work" or "illegal border crossing" has been subject to great variation, both historically and geographically ever since (see Schrover et al, 2008). Similarly, state responses to irregular migration have varied, both in terms of the nature of the response (turning a blind eye; forcible returning irregular migrants, tolerating their presence, regularising irregular migrants or providing other pathways to legality)

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[2] 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

and in terms of the broader rationale and objectives of state responses. For much of the 20th century, "illegality" was defined *ex negativo* and only after the fact – once an alien was explicitly deemed "unwanted" (for whatever reason) and *declared* illegally staying and hence liable to be deported, although actual enforcement did not always follow. Indeed the mere lack of an explicit authorization to stay did not necessarily make such persons "illegal", as rules and/or enforcement were often, but not always flexible enough to allow "unauthorised" migrants to regularise their stay after entry or no explicit authorization to stay was required altogether. Thus, entry and initial stay on tourist visa and post-hoc "regularisation" was a standard mode of entry in the 1960s and 1970s and in some instances, remained fairly common until the 1990s.

The emergence of regularisation as a new and distinct policy option in Belgium, France, The Netherlands and the UK in the early 1970s reflects a more fundamental transformation of often ad-hoc-ish and informal systems of migration governance to more systematic and rigid forms of migration management. To some extent, the emergence of regularisation can be seen as a consequence of the reduced scope for "informal" ex-post regularisations, brought about by a general restriction of (labour) migration in the wake of the oil crisis and the recruitment stop. In other context, notably in Britain, the emergence of regularisation is related to the restriction of post-colonial migration and the increasing barriers to entry erected for former subjects. However, the restriction of post-colonial migration had, by and large, effects very similar to the recruitment stop in continental Europe, namely a shift to increased migration control based on control of entry and residence. However, in both instances this did not necessarily (and actually very rarely) imply systematic law enforcement against non-complying aliens.[3] In general, the shift towards control of entry and residence entailed the elaboration of more stringent and demanding procedural rules and substantive conditions for legal entry and stay, a transformation, it should be added, that remained incomplete until the 1990s, in particular, as the formal definition of explicit rules on entry and residence was concerned.

In retrospect, it was often the introduction of more stringent definition of rules on entry and residence which led states to implement regularisation programmes for those who did not meet or no longer met the (new) conditions of entry and residence. However, the reverse – that relaxation of rules may lead to regularisation measures – may also be true. Thus, successive regularisation programmes implemented in Australia in the 1970s were an indirect consequence of the relaxation of visa requirements and the rising number of overstayers resulting from that (North 1984). In both instances, however, regularisation

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[3] For example, the number of forcibly removed aliens in the UK in the 1970s were in the low hundreds per year. It was only during the 1980s that enforcement against irregular migrants was stepped up. Figures reached a new height in the 2000s. In 2007, 63,140 persons were forcibly removed from the UK at an estimated cost of £11,000 (just under EUR 14,000, see BBC news online, "Illegal worker prosecutions rise", 5 May 2008, http://news.bbc.co.uk/2/hi/uk_news/7383493.stm; For figures for the pre-2000 period see Cohen 2005: 367

emerged as a corrective instrument *following* a change in policy, underlining the important linkage between regularisation policy and immigration policy at large.

2.1. The "asylum crisis" and the emergence of regularisations on humanitarian grounds, family reasons and substantial ties to the country of reception

Until the 1990s regularisations in Europe were either implemented as general programmes in the sense that they targeted all foreign nationals meeting the specific criteria. Or they were designed as employment based programmes targeting specifically irregular migrant workers (see Papademetriou et al. 2004, table 1).

Although employment based regularisations continue to be important up to this date, notably in the Southern European countries which have repeatedly undertaken large-scale regularisation programmes in the recent past, novel forms of regularisation emerged in the 1990s in the context of the "asylum crisis" of the early 1990s. The perception of an asylum "crisis" is linked to various developments, including the collapse of the Soviet Block, the abolition of exit controls in former Communist countries and rising immigration from these countries, the diversification of countries of origin of asylum applicants and the changing perception of asylum in major receiving countries resulting from these developments. In addition, a range of new restrictions imposed on migration in the course of the 1990s transformed the asylum system into a major entry gate characterised by mixed-flows of persons in need of protection and large number of applicants with unfounded claims. In public discourse, but often also in the view of authorities, asylum was increasingly associated with irregular migration and often came to be seen as virtually synonymous with irregular migration. At the same time, the wars in the former Yugoslavia led to large inflows of conflict refugees, which created an additional pressure on already strained asylum systems. These developments led, amongst others, to mounting backlogs in processing asylum application, partly in response to which various measures restricting access to asylum were imposed. These included in particular the introduction of the notion of "manifestly unfounded" claims and accelerated procedures or the principles of "safe third country" and "safe countries of origin". A variety of European states, notably Denmark, France, Germany, Luxembourg, and the UK responded to the mounting backlogs of asylum applicants, the presence of war refugees (whose claim were often weak under a strict interpretation of the Geneva convention) and rising numbers of rejected asylum applicants with regularisations, both in the form of regularisation programmes and more permanent mechanisms in the form of permits on humanitarian or "exceptional" grounds. Typically, the numbers of persons regularised under such measures were much lower than in the case of employment based regularisations It is also in this context that a new form of protection – *temporary protection* – emerged. In a sense, the often ad-hoc-ish temporary protection mechanisms developed in the course of the 1990s can

be interpreted as a form of regularisation, as they aimed at regularising the stay of persons outside the scope of the Geneva convention.

At the same time, various countries implemented status adjustment programmes to adjust the status of persons who were not illegally staying, but who had temporary or transitional statuses. Thus, Austria and Germany adopted specific measures to allow persons accepted under temporary protection arrangements (Austria) or under "toleration" (Germany) to change into the regular residence regime. In a sense, these two countries thus implemented a two stage regularisation procedure, whereby in a first stage a limited legal status (ad-hoc temporary protection under short term residence permits), or, in the case of Germany, a non-status (suspension of expulsion order) would be granted which in a second stage procedure would be transferred into a regular legal status. To some extent, regularisations granted on humanitarian grounds during the 1990s and early 2000s provided specific forms of complementary protection such as temporary or subsidiary protection which have since been developed into distinct legal instruments on the European level, again highlighting the close interlinkage between regularisation patterns and the wider migration policy framework in place.[4]

Two other types of regularisation also emerged in the 1990s, namely regularisation on "substantial ties" with the country of residence, often defined in terms in length of residence and partly also targeting long-term asylum applicants or rejected asylum seekers, for example in France and the UK, on the one hand, and regularisation on family related reasons, on the other. The latter was particularly important in France, notably in the 1998 and 2006 programmes; and family ties have remained an important rationale in awarding residence on humanitarian grounds under permanent mechanisms.

3. The meaning of regularisation

The above discussion of the evolution of regularisation policy in the EU and elsewhere shows the enormous complexity of regularisation and a great degree of variation in terms of the specific rationale of regularisation measures, in terms of the form and target group of such measures as well as in the numbers regularised. It also points at one of the sources of this complexity, namely the changing meaning of "illegal migration", which, to a considerable extent, in turn is shaped by changing modes of the regulation of migration. So far, I have used the "regularisation" based on an implicit understanding of the term. In the following,

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[4] 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; 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

a more precise definition will be elaborated, drawing on the definition developed in a recent comprehensive study on regularisation patterns in the EU commissioned by the European Commission (Baldwin-Edwards & Kraler 2009).

In its most basic and broadest meaning, regularisation can be defined *as any state procedure by which non-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* (see Baldwin-Edwards & Kraler 2009: 7).

As we will see in the following, however, not all procedures that have a regularising effect are explicitly intended as regularisation measures. Nor do regularisation measures always exclusively target illegally staying non-nationals, but may include various categories of non-nationals with a transitional or liminal status. Adding to this, not all measures which effectively give illegally staying non-nationals a legal status (however liminal) and which are explicitly intended as corrective instruments addressing irregularity are considered regularisation measures by states.
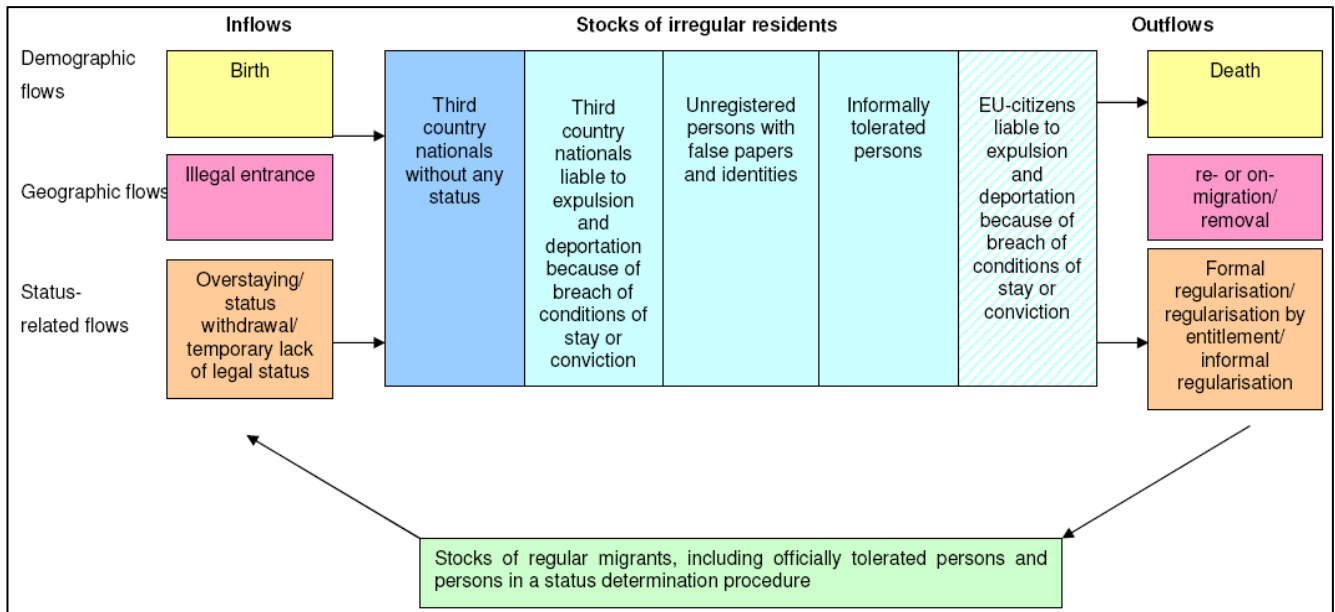
3.1 The meaning of illegality

Before going into more detail, a discussion of the meanings of "illegal migration" and related terms – illegal/ irregular stay, undocumented migration to name but a few is warranted.

Many of the definitional problems regarding regularisation stem, this paper argues, from the difficulties of giving a precise meaning to "illegal migration" and in indeed, from the difficulties of adequately understanding and conceptualising illegal migration.

Defining 'illegal stay' is notoriously difficult and globally, states' practices vary widely in regard to whom they regard as illegally resident. Indeed, few states use the concept of "illegal migration" or "illegal stay" etc. as a legal concept. If these terms feature in states' legal terminology, it appears, it is often only in specific contexts and meanings, which excludes a broad range of categories of persons which are, in state's practice, also considered as unlawfully resident. This said, the recent return directive incorporates a definition of "illegal stay", which has also been followed by other recent policy proposals adopted by the Commission.

Figure 1, schematically describes stocks and flows of irregular migrants in the European Union context and provides a useful heuristic model of irregularity from a dynamic, processual perspective. The figure describes irregularity as a process and distinguishes three dimensions: points of entry into irregularity ("inflows"), irregularity as a status condition ("stocks") and points of exit ("outflows").

Figure 1: Stocks and Flows of irregular migrants

Source: Adapted from Vogl and Jandl 2008, Figure 1

Three categories of flows are distinguished: demographic, geographic and status related flows (i.e. change from a legal to an irregular status and vice versa). Stocks are further differentiated into different categories of irregularly staying non-nationals. Irregular migrants without any (valid) documentation, which comprise overstayers, illegal entrants and persons born into irregularity represent only one of five categories distinguished in the figure and would be liable to expulsion – the main criterion to distinguish irregular from regular residents – on a prima facie basis if detected. Residents on false identities/ forged documents would only be liable to be deported if document forgery/identity is detected and proven. Informally tolerated persons are technically illegally staying, but documented and known to the authorities. Although the status of third country nationals who breach their conditions of stay may be withdrawn, they may be declared illegally staying only after due process of the law, and, in the case of long term residents, only under specific, grave circumstances. Whether EU citizens can be irregular residents at all is a contested issue. Suffice is to say that freedom of movement rights are neither unconditional nor unrestricted, in particular in the case of citizens of the EU-8 and EU-2 whose access to national labour markets of other EU Member States and hence rights to settlement are restricted in most Member States up to 2011 (EU-8) and 2014 (EU-2), respectively .

3.1.1. Pathways in and out of illegality

Figure 1 also highlights the complexity of irregularity as a process: Not only do stocks of irregular migrants comprise different categories of migrants with different "degrees" and conditions of irregularity. But the figure also shows that

overstaying and illegal entry are but two among several pathways into illegality. Withdrawal of status, e.g. in the course of a re-assessment of the status in the case of recognized refugees, being born into illegality or temporary lack of a legal status in the course of a renewal of a residence status are important additional pathways into illegality which are often neglected.

Although all pathways out of illegality that lead to a legal status can in principle be described as a form of regularisation, it is useful to distinguish different forms of regularisation by distinguishing the intention and rationale of procedures that have regularising effects.

Three types of regularising procedures can be distinguished:

(1) <u>formal regularisations</u>, where status adjustment is the explicit objective of awarding a legal status, whether such a policy is actually carried out informally or whether it is formally laid out in primary or secondary legislation;

(2) <u>regularisation by entitlement</u>, for example entitlement to a legal status by virtue of a marriage to a national/ an EU citizen, giving birth to a citizen-child in countries with a strong ius soli tradition[5] or as a consequence of EU-accession[6], and

(3) <u>informal regularisation</u>, the delayed and post-immigration acquisition of a residence permit, for example illegal entry or entry on a tourist visa and acquisition of a residence permit entitling to work from within the country.

Importantly, both the scope for regularisation by entitlement and informal regularisation has been greatly reduced since the 1990s (in the case of regularisation by entitlement) and the 1970s (informal regularisation), respectively, although when and how exactly these pathways to legality have been restricted has varied widely across Europe. And indeed, "informal" modes of regularisation have been used extensively by Spain until fairly recently and by Italy, so it appears, til the present date. To the extent to which states appear to informally use "normal" admission procedures to address irregular migration, informal modes of regularisation will be considered in the following. However, the focus will be on formal regularisations where status adjustment is an explicit rationale of measures employed.

3.1.2. Dimensions of illegality

Table 1, below, graphically shows the complexity of 'illegality' and provides a typology of irregularity along four major axes of legality/ illegality: **entry, residence, employment (legal)** and **employment (formal)**.

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[5] Notably Ireland until 2005.
[6] Although no good estimates of the size of the irregular migrant population from new Member States before accession are available, it can be safely assumed that enlargement led to the de facto regularisation of large numbers of persons.

Table 1: Types of Illegality

Entry	Residence (nominal)	Legal Status of Employment	Nature of Employment	Documented?	Examples
Illegal	(illegal)	-	-	-	Undocumented migrants transiting a country without real 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 is/was not systematically cross-checked)
Illegal	Legal	Illegal	Informal	documented	e.g. Asylum seekers without access to work who work informally, post hoc regularisation without access to work
Illegal	Semi-legal	Legal/illegal	Formal/ informal	documented	e.g. persons in respect to whom removal order has been formally suspended (e.g. tolerated status)
Illegal	Legal	Legal	Formal/informal	documented	Formally regularized persons; persons who have a claim to legal status due to changed circumstances (e.g. marriage with a citizen, ius soli acquisition of citizenship by an off-spring)
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 Baldwin-Edwards & Kraler 2009, Table 2

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 status granted to an immigrant – this may change over time, and also in the case of breach of conditions. 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 (and hence this covers the distinction declared/undeclared work).

Above all, the table shows the complexity of situations of irregularity. However, only a certain share of the situations described in table 1 actually describe an irregular status (i.e. stocks). Of these, only in some situations is the alien threatened with expulsion and/or forced removal – which, as posited above, can be seen as the main dividing line between illegality/legality. Indeed, the power of states to expel is constrained both by human rights and European Union legislation.

Most of the types of illegal stay as described in table 1 and/ or illegal employment can be considered suitable to regularisation. In actual practice, regularisations often target one or several specific types of "irregular migrants" as identified below.

As has already been indicated in section 2, there is a significant diversity of approaches towards regularisation across Europe. There is also a variety of opinions regarding what actually constitutes regularisation of third country nationals who are illegally staying or otherwise in breach of immigration rules. This diversity of approaches towards and understandings of regularisation is mirrored and indeed to some degree reflects the considerable complexity of irregular migration as a social phenomenon as a whole. As shown in Table 1, there are many causes and routes to irregular residence with 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. Thus, irregular migration is not driven by a single logic, nor can there be simple responses to irregular migration.

The main conclusion that can be derived from these observations is that single, stand-alone measures cannot be an appropriate response to tackle migrant irregularity. Rather, any responses must consist of several measures in different areas that take account of this diversity. In particular, regularisation is but one possible response to tackle the presence of irregular migrants; it may be useful to tackle particular forms of irregularity, but not others. And, importantly, regularisation may in itself not be a sufficient measure but should be seen as complementary (and not necessarily as an alternative) to other measures (and vice versa). Generally, "one-size-fits-all" solutions are not only likely to be ineffective but are also likely to provoke or exacerbate related problem areas.

3.2. A classification of status adjustments[7]

The introduction to section 3 has already introduced a broad, generic definition of regularisation *as any state procedure by which non- 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.*
In the EU context, the definition has to be further modified and restricted to *third-country nationals who do not enjoy freedom of movement rights or other rights granted by EU legislation,* thus excluding EU citizens (both old and new), third country nationals holding the EU long-term residence status[8]; and third country nationals who are family members of EU nationals and who are covered by Directive

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[7] This classification is developed in Baldwin-Edwards & Kraler 2009, based on previous work on regularisation, notably the seminal Odysseus study (Apap et al. 2000).
[8] Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents

2004/38/EC on the right of EU citizens and their family members to move and reside freely within the territory of the Member States.[9]

This definition does not specify the dimensions of illegality (identified in table 1) addressed by regularisation measures. Indeed, although past state practice has usually focused on adjusting the residence status of irregular migrants and was often combined with a focus on work status, there are examples of exclusively employment based programmes which resulted in the regularisation of residence by implication, rather than as the main effect or objective of the measure. In Compliance with broader labour and social security regulations may be an additional (or specific) target of employment based regularisation measures. An unusual, but exemplary case is the recent Austrian "amnesty" for irregularly employed care workers. Albeit most irregularly employed care workers (the majority of which come from new EU Member States) have technically also been in contravention of conditions of stay, the amnesty focused on non-compliance with broader labour and social security regulations, notably regulations on working time and working conditions, and on minimum incomes and social security obligations.[10]

However, not all regularisations or status adjustments necessarily involve the regularisation of *illegally staying third-country nationals*. Thus, Germany's 2006 regularisation programmes (and various smaller programmes before) largely targeted long term tolerated persons, who, although not possessing a regular legal status but only a suspension of removal are not strictly speaking illegally resident either. Also, long term asylum seekers still in the procedure have benefited from various regularisation programmes in different countries, as have various other categories with liminal or transitional statuses. Using the Spanish term for regularisation ("*normalización*") and putting it to a somewhat different usage these processes can be called *normalisation*. *Normalisation* thus can be defined as *any state procedure by which third country-nationals who are legally residing but who are in a restricted or transitional status are granted a regular or a superior legal status.*

Finally, various states have responded to the presence of irregular migrants who are liable to be deported but who are, for a variety of reasons, (temporarily) non-deportable by informally tolerating their presence. Although informal toleration cannot be considered a status adjustment as it does not change the immediate enforceability of removal from the territory, a formal suspension of removal – formal toleration – does and clearly constitutes an adjustment of irregular migrants' status, as a third-country national granted toleration does enjoy certain defined rights – above all, a temporary permission to stay until the case is reconsidered.

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[9] 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

[10] As EU citizens are in practice no longer considered unlawfully residents, even if in breach of conditions of stay, however, the programme does not qualify as a regularisation programme proper.

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:

(1)   *programmes,* which are time-limited procedures, exceptional measures on the basis of extraordinary legislation and frequently, but not necessarily, involve a large number of applicants, and

(2)   *mechanisms*, which are part of the regular migration policy framework and run on a continuous basis. Typically, mechanisms involve individual applications and, in most cases, a smaller number of applicants.

Permanent mechanism for regularising migrants in an irregular situation have developed over the 1990s in a variety of Member States. Thus, a survey by the European Migration Network conducted in summer 2008 on provisions for humanitarian stay showed that among the 14 EU Member States which had responded to the query only 3 had no regularisation mechanisms (EMN 2008).

The classification is summarised in table 2, below.

Table 2: Classification of regularisations (status adjustments)

Nature of Status Adjustment	Nature of the procedure	Criteria/ Reasons for regularisation	Status Granted
Regularisation: *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*	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: *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*	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 *De facto* toleration[i]	Failure to enforce return, complementary protection, other	Temporary permit, 'Toleration' status, *De facto* toleration[i]

[I] *de facto* tolerations refer to cases where a removal order is not formally suspended but simply not enforced.

Source: Baldwin-Edwards & Kraler 2009: Table 9

4. Two Contrasting logics of regularisation

Since the late 1990s, an increasing number of studies and reports have investigated the rationale, type, criteria and general impact of regularisation measures in a comparative perspective.[11] The results of previous research on regularisation suggest that two principle types of regularisations can be distinguished, namely

(1) regularisations driven by a humanitarian and human rights logic
(2) and non-humanitarian regularisations, driven by a regulatory, labour market oriented logic (see Baldwin-Edwards & Kraler 2009: 28f).

In the first instance regularisation is, in a sense, a goal in itself and is used to address policy and implementation failures (e.g. in the asylum system), to respond to specific situations and needs, and importantly, regularisation is often explicitly an alternative to removal.

In these cases, regularisation is typically based on a broad set of humanitarian criteria and generally is informed by human rights considerations. Regularisation may be granted on grounds of family ties or other substantial ties to the country of residence, on grounds of ill health, or to award complementary forms of protection not covered by the Geneva Convention, subsidiary protection or other existing instruments. To some extent, regularisation in such cases can be a response to exceptional circumstances existing policy is ill-equipped to deal with, as was, for example in the case of Bosnian and Kosovar war refugees who were targeted by regularisation measures in several Member States during the 1990s and early 2000s. Regularisation on humanitarian grounds, however, also points to wider policy failures and problems in the design of policies, notably in the case of family based modes of regularisation, which in a way are a consequence of overly strict family migration policies. A second rationale of regularisation on humanitarian grounds is implementation failure, for example the non-enforceability of return over an extended period of time or backlogs and lengthy asylum procedures. Regularisation on grounds of implementation failure may be based on principled reasoning, most importantly that state decisions on a person's status need to be made or enforced within a reasonable time period and that individuals should not remain in a state of limbo for an extended period of time.[12] From the perspective of the state, however, regularisation may also simply be a pragmatic response to a de facto situation which cannot be solved otherwise.

In the second instance, by contrast regularisation is a means to achieve wider objectives. Rather than targeting the status of the individual, the status of a particular segment of the resident population is the actual target of policies. In general, regularisations following a non-humanitarian logic can be seen as instruments of *re-regulation* and attempts to regain control.

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[11] Apap et al. 2000, Blaschke 2008, de Bruycker 2000, Greenway 2006, Levinson 2005, OECD SOPEMI (various years), OECD Secretariat 2000, Papademetriou 2005, Papademetriou et al. 2004, Papadopoulou 2005, Sunderhaus 2007
[12] See on this point ECRE 2005 and JRS 2007

In European countries regularising for non-humanitarian reasons in more recent periods the main target of regularisation measures were the informal economy and the overall goal was to re-regulate the labour market. Among the specific objectives are a) to combat undeclared work and ensure compliance with tax and social security obligations; b) to enforce social rights and labour standards, and thus, fight social exclusion, vulnerability and other ills associated with undeclared work and 3) to promote the integration of regularised migrants.

The most important conclusion that can be drawn from these considerations is that regularisation does not follow a simple logic. In the above, two main logics are distinguished. Within these two logics, however, the rationale and specific objectives of individual regularisation programmes may vary widely. This diversity of regularisation practices need to be taken into account when designing policies or policy principles on regularisation at the European level.

5. Regularisation practices in the EU

In section 2 I have already provided an overview of the evolution of regularisation policy in EU Member States. This section provides a quantitative overview of regularisation practices in the EU Member states.

5.1. Informal regularisations and regularisations by entitlement

As has been argued in the above, "pathways to legality" have been subject to major changes in the past 30 years or so. Thus, while the scope for informal regularisations has been greatly reduced – with a few exceptions – over the past 30 years or so, states have increasingly resorted to formal regularisations since about the late 1980s onwards.
Regularisations by entitlement are more complicated. On the whole, the scope for status adjustments as a result of marriage with a citizen – the main mode of regularisation by entitlement – has been greatly reduced following restrictions of family reunification across Europe.[13]
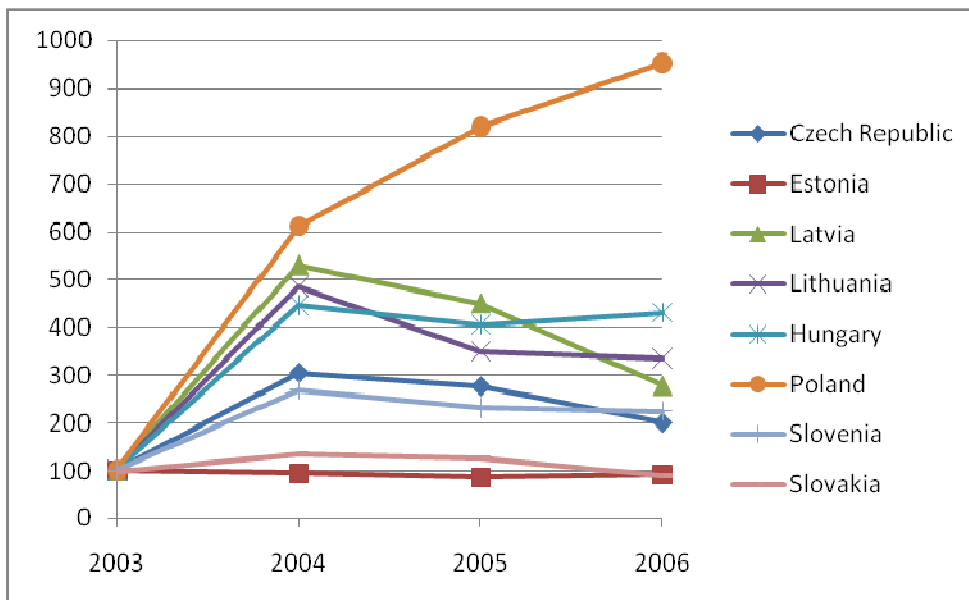
At the same time, the expansion of free movement rights of European Union citizens has strengthened the right of third-country nationals who are family members of a Union citizen or a national who has used his or her mobility rights to reside in the territory of the Union. A strong interpretation of freedom of movement rights has recently been considerably buttressed by a judgement of

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[13] Generally, it seems that "regularisation by entitlement" applies much less to illegally staying third country nationals who were or became family members of another third country national. However, since the 1980s both national courts and the European Court of Human Rights have in several cases ruled that expulsion of family members in contradiction with article 8 of the European Charta of Human Rights and thus, implicitly or explicitly, have ruled in favour of regularisation.

the European Court of Justice against Ireland.[14] The case involved four rejected asylum seekers who got married with EU citizens while resident in Ireland and who applied for residence permits on grounds of their marriage. In its judgement against the Irish Minister for Justice, Equality and Law Reform, who had denied the four applicants a permit on grounds that their asylum claims has been refused and that they were hence obliged to leave the country, the court held that the right of non-community family members to accompany or join their EU citizen family members must not be made conditional on prior lawful entry and residence.

The important role of European Union citizenship and freedom of movement rights has also been shown in the regularising effects of the two recent waves of enlargement in 2004 and 2007, respectively.

Figure 2: Change of Immigration from Selected New Member States into the EU27, 2003-2006 (2003 = 100)

Note: incomplete data, chart should be treated with caution and only indicating broad trends
*Source: own calculations based on data from Eurostat http://ec.europa.eu/**eurostat/***

Thus, an unknown but presumably large number of irregular migrants from new Member States have received at least a temporary right to reside in other EU Member States as a consequence of enlargement. Three of the new Member states – Poland, among the countries of the 2004 enlargement and the 2007 acceding countries Bulgaria and Romania – have in the past been important countries of origin of applicants for regularisation in major regularisation programmes in Greece, Italy, Portugal and Spain. In the UK, which granted full

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[14] C-127/08 Metock and Others v Minister for Justice, Equality and Law Reform, See the ECJ press release under http://curia.europa.eu/en/actu/communiques/cp08/aff/cp080057en.pdf.

access to UK labour markets to citizens from new Member States, subject only to registration, it is estimated that up to 30% of the 345,000 citizens from new EU Member States registering for the workers registration scheme had been resident in the UK prior to enlargement (Anderson et al. 2006, p.2). Similarly, it has been argued in respect to Austria that the rise in immigration from EU-10 countries in 2004 (figures rose from just over 10,000 to more than 16,300) has likely to be due to de new registrations of already present persons rather than actual immigration of new immigrants (Gächter quoted after Kraler et al. 2008). Given that immigration from new Member States has risen in most Member States after enlargement despite restrictions in all but three EU-15 Member States (Ireland, Sweden and the UK), a considerable share of the de facto regularisations can be expected.

5.2. Formal Regularisations – Regularisation Programmes
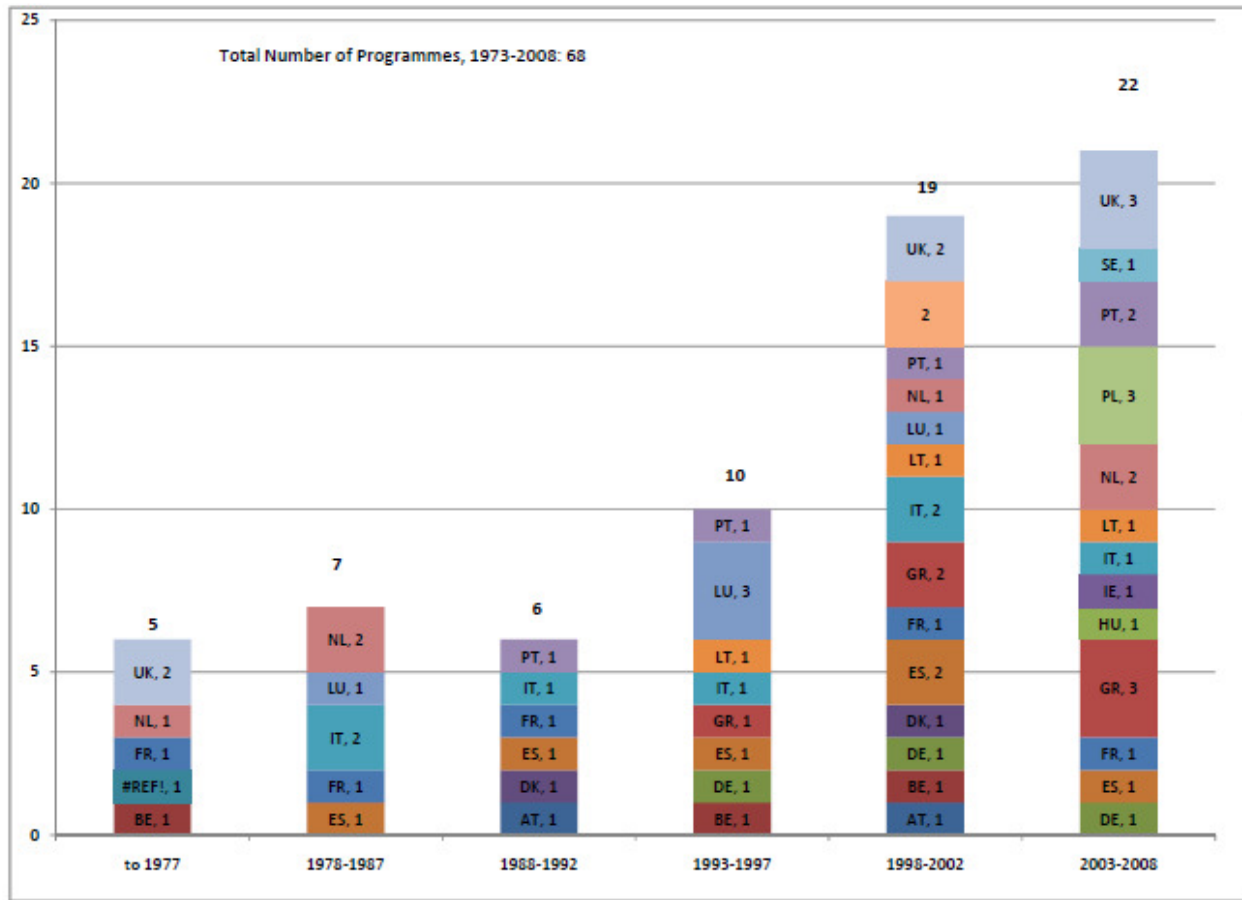
The main attention has always been on formal regularisations as defined in the above, and in particular on regularisation programmes. Between 1973 and 2008, about 68 programmes were conducted. In this count, programmes are included that have explicitly been designed by states as regularisation programmes as well as "normalisations" – programmes targeting migrants with some form of status and to some extent (in the 1990s) selected temporary protection programmes which have sometimes been described as regularisation programmes.

The majority of Member States – 18 – have had at least one regularisation programme in this period and only 9 (BG, CY, CZ, EE, FI, LV, MT, RO, SK) did not. Of these, all but Finland are new Member States and most – apart from Latvia and Estonia (with large populations of non-citizens) and the Czech Republic (with a relatively large immigrant population) – have a very low migrant population. This said, four of these states (CY, EE, FI, RO) have regularisation mechanisms to deal with migrants in an irregular situation (see EMN 2008).

Figure 3, below, shows the evolution of regularisation programmes in the European Union from 1973, when the first major programmes were implemented until 2008.

While in the 15 years until 1987 altogether 12 programmes were implemented, the number of regularisation programmes implemented in the EU27 increased to 16 in the period from 1988 to 1997. The majority of regularisation programmes- altogether 40 or 58.8 per cent of the total, however, were implemented in the last ten years.

Figure 3: Evolution of Regularisation Programmes in the EU and number of programmes implemented by individual countries, 1973-2008
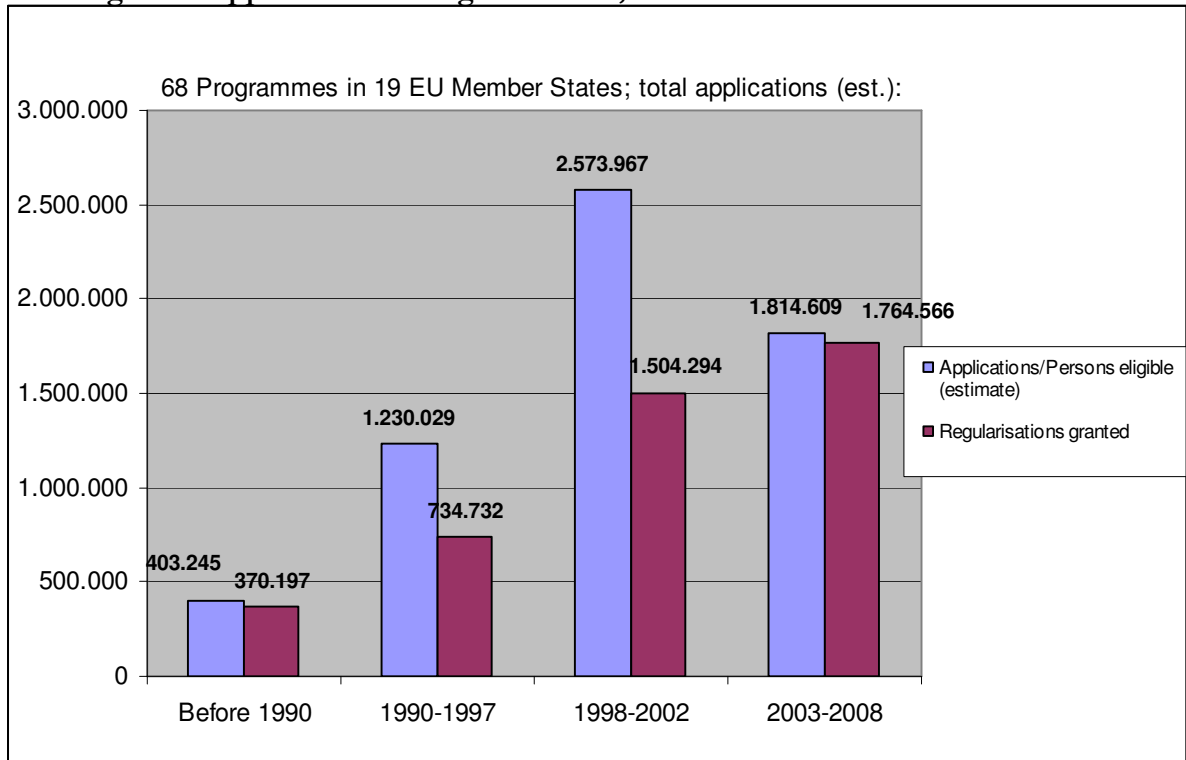
Note: data also include "normalisations" and non-residence based forms of regularisation
Sources: see annex 1

A similar picture obtains if one looks at the number of applications for and grants of regularisation between 1973 and 2008. [15]

Altogether, more than 6 million applications were submitted in this period, of which 73 per cent were submitted between 1998 and 2008. This, reflects above all the weight of several large scale programmes carried out in southern European EU Member States, notably Greece, Italy, Spain and Portugal. However, also several northern EU Member States, notably Belgium and France carried out relatively large programmes in this period – although they are much smaller compared to those in Southern Europe. Altogether, more than 4.3 million regularisations were granted through programmes between 1973 and 2008 (see figure 4).

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[15] The figure is an estimate. For those programmes for which no data on applications were available, the number of regularisations granted was taken as the minimum estimate.

Figure 4: Applications for regularisation, 1973-2008

Sources: see annex 1

It is no coincidence that the number of programmes increased precisely in a period when states across Europe increasingly moved towards more sophisticated forms of *migration management* and selective migration policies. Contemporary migration management typically operates through allocating differential rights to different categories of migrants. It does so through various mechanisms (classification and selection, admission procedures, conditions and restrictions). As a result, contemporary migration management involves a proliferation, fragmentation and polarisation of different statuses and related bundles of rights with regard to admission, residence, work, and social rights (Kofman/Kraler 2006). In many cases it is the mismatch between these formal conditions and various procedures tied to admission and admission procedures and reality which creates the need for regularisation measures. In a similar vein, that regularisation can be seen as an expression of an increasingly complex system of migration governance rather than an indicator of simple policy failure. Thus, regularisation programmes in a way has become part of the "toolbox" of contemporary migration management, precisely because states have refined objectives and mechanisms of migration management. In the Southern European countries which have the largest programmes, the frequent recourse to large-scale programmes is an indicator of the difficulty in implementing more rigid systems of migration management, but above all, it points at the mismatch between formal conditions for entry and residence concerning migrant workers and a reality which is characterised by widespread informality, which, by implication,
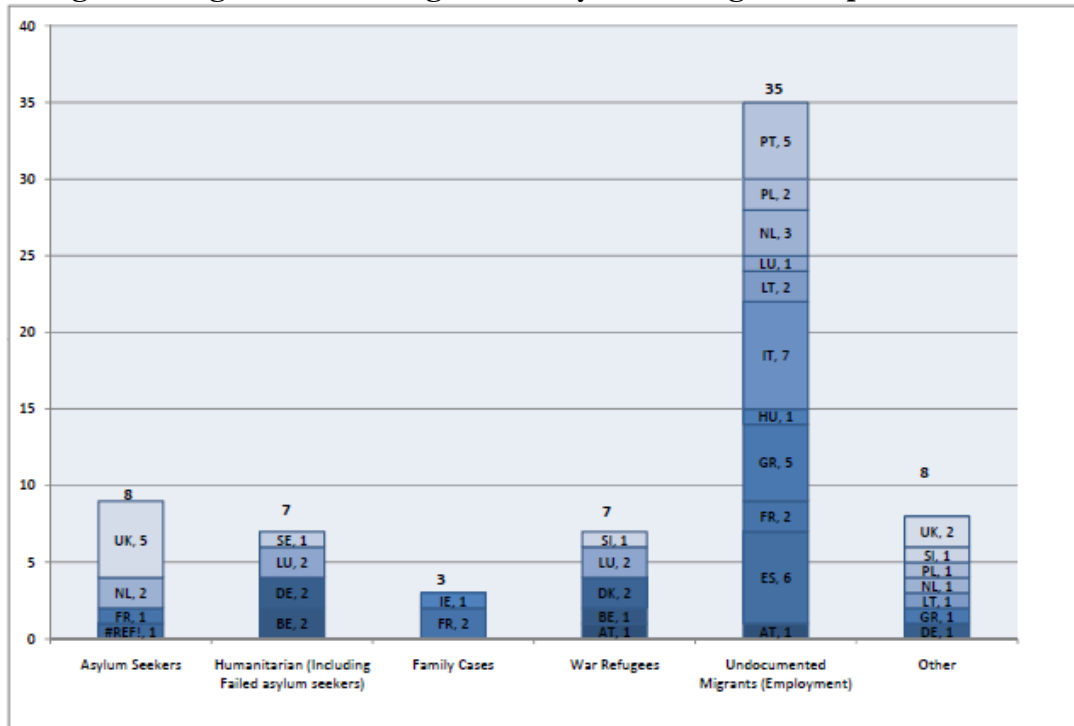
makes it relatively difficult for many immigrants to comply with the condition to be formally employed.

However, other factors have also been important, notably changing norms of international protection, the increasing consideration of human rights norms in the domain of aliens legislation and strong civil society lobbying, to name but a few.

The larger number of regularisation programmes from the turn of the 1990s, and especially since 1998, however, also reflects an increasing number of smaller programmes targeting specific groups like rejected asylum seekers, families or family members in an irregular situation and other humanitarian cases.

While a majority of regularisation programmes (35) implemented in Europe have been employment based that is, have mainly targeted irregular migrant workers, just under half have – broadly speaking – a more humanitarian impetus (See figure 5, below).

Figure 5: Regularisation Programmes by Main Target Group
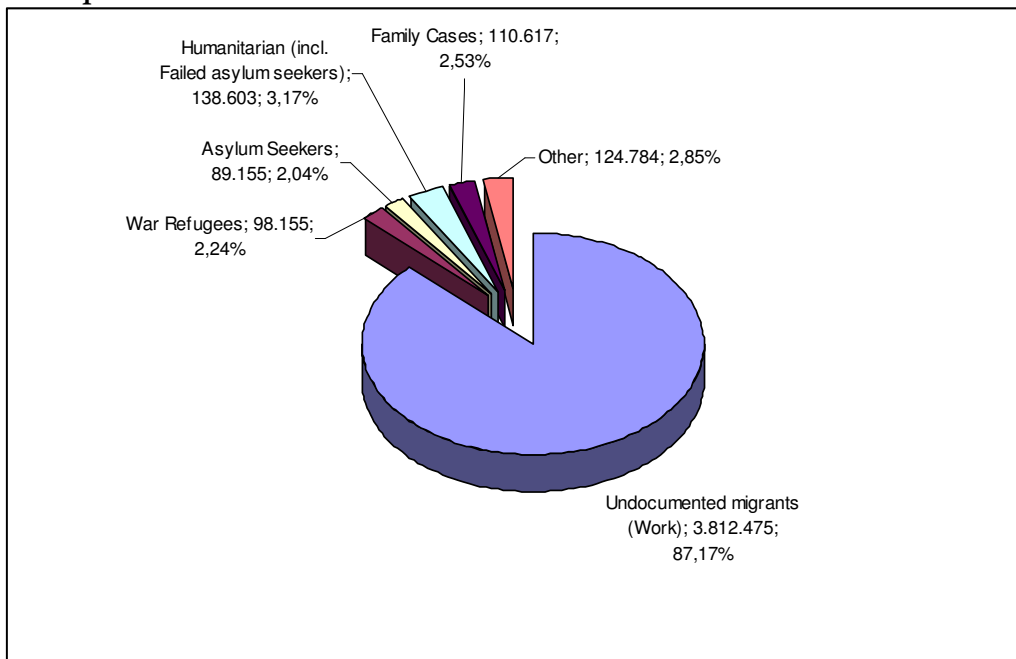
Sources: See annex 1

This said, most programmes have had more than one target group. In particular, many of the more recent employment based regularisation programmes also targeted humanitarian cases, rejected asylum seekers, family members and others, while many of the programmes labelled "humanitarian" included also failed asylum seekers and long term asylum seekers. .

As figure 6, below, shows, the numbers of persons involved in employment based programmes have been far higher than those applying or being regularised in programmes mainly based on humanitarian criteria. The

quantitative weight of programmes targeting undocumented migrants in general reflects above all the far higher number of persons involved in of programmes, with a broad, labour market oriented and regulatory impetus. In addition, it also reflects the large share of applications for regularisation submitted in Southern European countries in the European total. The four Southern European countries have largely implemented general programmes targeting undocument migrants rather than programmes of a humanitarian nature, although humanitarian cases broadly speaking (including long-term asylum seekers, rejected asylum seekers and family cases) have usually been eligible for those programmes. In addition, programmes in Southern European countries have involved far higher numbers of irregular migrants than programmes elsewhere in Europe (see figure 7, overleaf)
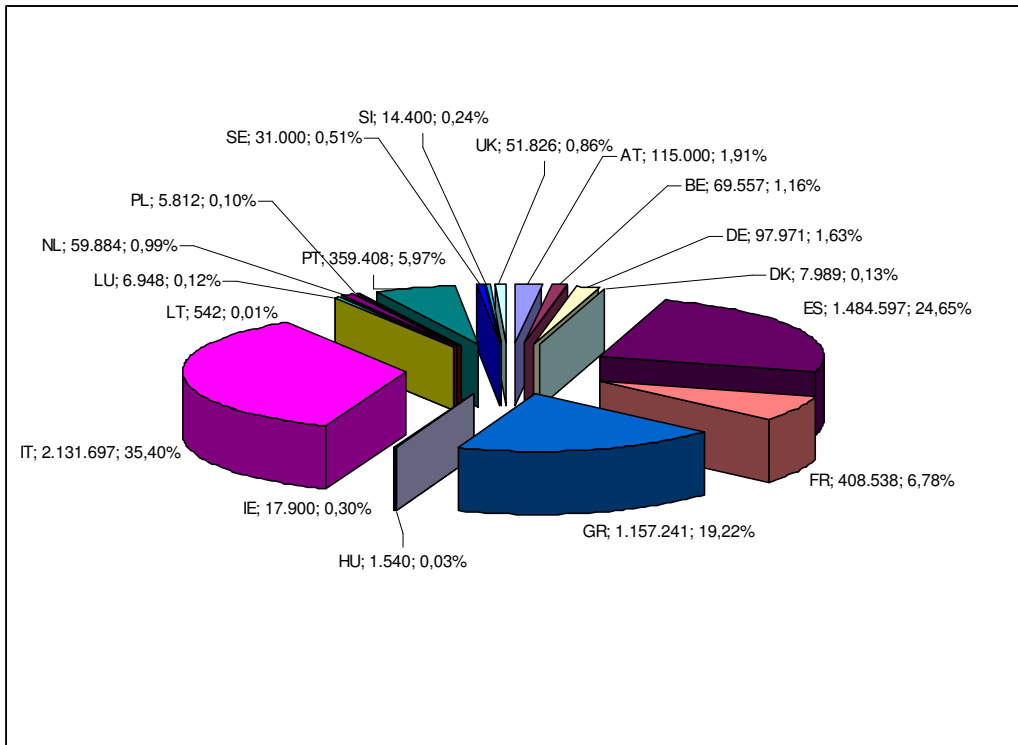
Figure 6: Granted Regularisations in EU MS, 1973-2008, by Main Target Group

Sources: See annex 1

Regularisation programmes in Southern Europe have to be seen in the broader context of the informal economy and their size above all reflects the – in contrast to Northern Europe – different labour market structures and the high share of irregularly employed migrants. In this context, a persistent problem has been that acquisition of ordinary residence permits for work purposes hinges on having a formal work contract. Regularisation thus can only be a partial and immediate response to irregularity and any successful approach needs to tackle the underlying structural conditions of irregularity.

Figure 7: Applications for Regularisations in EU MS, 1973-2008, by Country

Sources: See annex 1

5.3. Regularisation through Mechanism

Since the 1990s, an increasing number of EU-27 countries have established ongoing regularisation mechanisms. This development has to be seen in the context of the "asylum crisis" of the early 1990s, the inflows of conflict refugees from the former Yugoslavia not covered by the Geneva Convention and the development or elaboration of new forms of protection, notably temporary and subsidiary protection. In addition, states have introduced regularisation mechanisms as a corrective device used for various non-protection related cases. In the majority of these mechanisms regularisations are granted on humanitarian grounds (notably on grounds of family and other ties to a country, illness, age, etc.) and hence, such mechanisms are often better known as "humanitarian status" provisions or as "humanitarian right to residence".

A more limited form of regularisation is formal toleration – which as a formal practice seems to be limited to Germany, Poland, Slovakia and Romania (See EMN 2008; JRS Europe 2007). Some other states such as Austria also issue formal suspensions of expulsion orders. In the Austrian case, however, it is unclear how systematic this practice is; and, no data is published on suspensions of removal orders. Also, the suspension can be granted for a maximum of one year after which persons who still cannot be deported are presumably informally

tolerated. Indeed, informal tolerations – i.e. the non-enforcement of expulsion orders – seem to be a widespread practice across Europe, a practice which has recently been criticised by by a Council of Europe report (See CoE 2005). While persons informally tolerated enjoy no or explicit rights by virtue of their status, formally tolerated persons enjoy at least a limited residence right. However, as a recent report by JRS Europe on destitute forced migrants makes clear (JRS 2007), because toleration does not provide access to a fully fledged residence permit, the practice is fraught with considerable problems from a human rights perspective, in particular if persons are tolerated over long periods of time. Both JRS and the Council of Europe therefore recommend to award residence permits to tolerated persons once it has become clear that return cannot be effected in a certain time period.

All but five EU Member States do currently have provisions for some type of permanent regularisation mechanisms in their regular migratory framework, usually incorporated in immigration legislation. Only in the Netherlands, which abolished its permanent regularisation mechanism in 2003, the policy never was incorporated into law. Although most countries do have some type of regularisation mechanism, two countries only award "tolerations" and several other countries only award temporary permits in the case of which it is sometimes unclear what rights are associated with the status. Table 3, below, provides an overview of regularisation mechanisms in the EU 27 and the main criteria and target groups of these mechanisms.

Table 3: Regularisation Mechanisms in the EU-27

	Mechanism	Criteria/Target group
AT	yes	not explicitly defined; includes non-refoulement, conflict in home country; also: family reunification if quota is exhausted
BE	yes	health, long term asylum seeker, other humanitarian reasons (family, other ties)
BG	no	
CY	yes	non-deportability (practical or legal reasons), if other safe country is willing to process asylum claim
CZ	no	
DE	yes	general humanitarian grounds, obligations under international law, on grounds of national or public interest, hardship cases, non-deportability, integrated children of deportable parents, long term tolerated/ asylum seeker
DK	yes	asylum seekers in humanitarian situation (in particular health, young children, country of origin in conflict
EE	yes	as an exception to rule not to grant permits to persons against whom a SIS alert has been issued on humanitarian grounds. and in the case of persons of Estonian origin or aliens settled in Estonia before 1 July 1990 without a basis of stay
ES	yes	victims of certain crimes, health reasons, non-refoulement
FI	Yes	ties to Finland, health, if return would make persons vulnerable; by decision of Parliament,
FR	yes	personal and family ties; 10 years residence (until 2006 entitlement, since:

	Mechanism	Criteria/Target group
		discretionary), if employed in certain key professions (since 2007)
GR	yes	victims of crimes, minors hosted by Greek families, others hosted by charitable institutions, health reasons
HU	yes	includes asylum seekers; stateless persons, minors born in Hungary without legal guardian
IE	yes	parents of citizen children (strong ius soli until 2005), discretionary decisions on broader humanitarian grounds (e.g. marriage to a citizen), exceptional leave to remain for deportable aliens on grounds of employment, age of the person, duration of residence, family circumstances, other ties to Ireland
IT	No	
LT	yes	tolerated, non-deportable aliens
LU	yes	health, family ties and other humanitarian considerations
LV	yes	mainly for family related cases (exceptional family reunification)
MT	yes	includes asylum seekers, non-deportable aliens (only short term)
NL	until 2003	"3 years policy" - unduly length of immigration procedures (3 years, initially five years)
PL	yes	toleration of non-deportable aliens; short term permits on grounds of health, being victim of trafficking, national interest, etc.
PT	yes	persons otherwise having been legally employed and resident
RO	toleration only	non deportability
SE	yes	persons in exceptional distressing circumstances, incl. health,
SI	no	
SK	toleration only	non-deportability
UK	yes	largely equivalent to subsidiary protection, in addition: 14 and 7 years rule

Sources: EMN 2008 and own compilation

The table above does not comprehensively list all criteria that applicants (or persons considered for regularisations – not all states provide for the possibility to apply for regularisations under such mechanisms) have to meet. Usually a broad set of criteria and conditions are used in addition to the criteria listed above, often the same also used for ordinary residence permits, in particular where a permanent residence permit is awarded. Thus, in addition to belonging to a particular target group applicants may have to prove a stable income or employment, lack of a criminal record, integration efforts, amongst others. The table thus shows the main rationale and target groups of regularisation mechanisms but does not provide a comprehensive picture of eligibility criteria and conditions attached to the acquisition of a legal status through regularisation, which in any case, would be beyond the scope of this paper.[16]

   The description of the main rationale of regularisation mechanisms and target groups in table 3 suggests that five regularisation is granted through mechanisms on five major grounds:

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[16] For an analysis of elegibility criteria, both for programmes and mechanisms Baldwin-Edwards and Kraler (2009)

1) protection grounds
2) on grounds of family ties, including "normal" family reunification that cannot be accommodated otherwise
3) on grounds of non-enforceability of return
4) on grounds of health
5) hardship (variously called exceptional, humanitarian considerations and mostly involving one or more criteria listed under 1-4).

Apart from these five grounds, there are a number of other less frequent grounds on which regularisation is granted, notably long duration of immigration procedures (inlcuding asylum), in case of pending criminal procedures for victims of crimes (in which case mostly short term permits are issues, mostly, but not exclusively in the case of trafficking victims). Irregular migrant workers, although employment is often a precondition for regularisation on humanitarian grounds (as for example, in the case of Germany's mechanism for long term tolerated persons and long term asylum seekers), are a target group of regularisation mechanisms only in Portugal and France, while in the Netherlands undocumented migrant workers formally employed (the so-called "white illegals") have been a target group of regularisation mechanisms until 2003. In the latter case, the policy – the so-called "3 years policy"[17] initially was introduced as an informal administrative practice in 1991 and was only made public in 1994. It was put on a formal basis in 1996 and eventually abolished in 2003. The main target groups were illegally resident workers who were formally employed and had a social security number and thus the regularisation mechanism can be interpreted as a response to a mismatch between admission procedures and employment policies. The case of France again is special. Since 2007, there is a new regularisation mechanism through which irregular migrants in certain key professions can be regularised. The policy thus applies the principles of selective migration policy, or, as French policy makers frame it, of "*immigration choisie*" (which is contrasted to "*immigration subie*") to irregular migration. The deviation from France's principled opposition to regularisation in this case is significant (although it is entirely unclear to what extent the policy will be used). As French policymakers repeatedly have stressed, French (principled) opposition to regularisation is based on the principle that irregular migrants should not be awarded for trespassing the rules and "jumping the queue". Apparently, this does not apply to irregular in certain key professions in whose case France applies a peculiar type of "earned regularisation" scheme. In addition, France also has extensively used regularisation mechanisms in humanitarian cases, since it has moved from ad hoc programmes to permanent mechanisms in the late 1990s.

Generally, table 3 suggests that regularisation mechanisms, broadly speaking, follow a humanitarian logic. Conversely, programmes seem to be the preferred mode for regularising undocumented migrant workers and to address broader issues linked to the informal economy. This again highlights the

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[17] Spain had a similar policy, although for different reasons until quite recently

importance of clearly distinguishing the two broad logics of regularisation –
humanitarian vs. employment – identified in section 4.

Table 4: Regularisations through mechanisms in selected EU Member States, 2005-2006

	AT	BE	DE	DK	FI	FR	GR	LT	PL	SE	**Total**
2005	1.016	5.422	18.237	486	161	17.239	1.318	3	24	4.997	**48.903**
2006	403	5.392	17.759	223	164	25.553	1.041	5	62	18.480	**69.082**
Total	**1.419**	**10.814**	**35.996**	**709**	**325**	**42.792**	**2.359**	**8**	**86**	**23.477**	**117.985**

Note: For France and Germany the table presents the sum of various individual provisions for
regularisation; for Belgium the number represents cases – the number of persons regularised is
significantly higher (See Kraler et al. 2009)
*Sources: EMN 2008; except: FR: CICI 2007, table III-14; LT: Migration Yearbook 2005 and
2006, online atwww.migracija.lt, PL: Iglicka and Gmaj 2008*

Quantitatively, the scope of regularisation mechanisms is difficult to grasp
for various reasons. Not all regularisations are counted as such; figures may not
be published or are available for only a few years. In addition, in various cases
humanitarian permits are issued to new immigrants entering from abroad,
including resettled refugees or, as for example in Hungary, humanitarian permits
are not only issued in humanitarian cases in a narrow sense, but are also issued to
asylum seekers. In other casesm humanitarian permits are –as in the UK –
synonymous with subsidiary protection. Finally, several states, above all Germany,
but also Slovakia, Poland and Romania grant "toleration status", which, if
included, would increase the figures in the above table significantly. Generally,
although toleration has to be seen as a status adjustment, it falls short of a full
regularisation and thus is here not considered.

Leaving these caveats aside, the table shows that over the years
regularisations by mechanisms potentially can involve substantial numbers of
persons. Thus, in two years alone 2005 and 2006 almost 118,000 persons were
regularised in 10 EU Member States. Regularisation mechanisms are most
extensively used in France, which regularised 42,792 irregularly staying migrants
through mechanisms. Between 2002 and 2006 more than 85,000 persons were
regularised in France (see Sohler 2009), while in Belgium – another country which
has extensively used regularisation mechanisms – around 40,000 persons were
regularised between 2000 and 2007 (see Kraler et al. 2009).

5.4. Programmes vs. Mechanisms

Taking into account that programmes usually involve more cohorts of irregular
staying migrants (defined by year of arrival) several years of regularisations
through mechanisms would have to be compared to programmes to assess their
overall quantitative scope.

And indeed, comparing regularisations by mechanisms to regularisations non-employment focused regularisation programmes, the overall scope of regularisations does not differ much. This is clearly different in the case of employment based programmes. Although they need not involve large numbers, as, for example, most employment based programmes in northern EU Member States, employment based programmes usually are of a greater magnitude, especially in the Southern European states. This, points at different structural conditions underlying irregular migration in different contexts. Thus, rather than interpreting repeated large scale regularisations in southern European countries solely in terms of a failure of migration management, the evidence suggests that it is the mismatch between economic structures and migration policies geared towards the formal sector of the economy and hence, problems related to the informal economy and in particular the structure of labour markets which lies at the heart of irregular migration in the Mediterranean EU Member States. It is these underlying structural contradictions which explain the large numbers of irregular migrants and hence the large number of migrants involved in regularisations.[18] The specific logic of these programmes suggests that permanent mechanisms – the model implicitly preferred in the migration pact – are not an adequate substitute for programmes in these instances; rather, it is the reform of the overall migration framework in combination with a series of accompanying measures (employer sanctions, reforms of employment legislation, etc.) which seems the more appropriate alternative to regularisation, even if only in a medium and long term perspective.

The fact that all but five EU Member States provide for at least limited regularisation mechanisms suggests that permanent regularisation mechanisms as a corrective device seems to have become a standard element of contemporary migration management, even if the numbers involved are significant only in a relatively small number of states. Taking into account the fair number of regularisation programmes carried out in recent years – altogether 40 programmes have been implemented in 18 EU Member States between 1998 and 2008 – regularisation may be regarded as an extraordinary policy measure but it is far from exceptional.

But what is the most appropriate form of regularisation? Programmes or mechanism?

Unfortunately, apart from the seminal Odysseys study (Apap et al. 2000), which undertook a comprehensive analysis of regularisation practices in 8 EU Member States, regularisation mechanisms have hardly been reflected upon in the literature (but see Baldwin-Edwards & Kraler 2009 for a recent appraisal). The available evidence suggests certain key differences between programmes and mechanisms. First, programmes are an obvious format for regularisation

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[18] The case seems to be rather different in the case of Greece, where irregularity is to large degree a consequence of major bureaucratic deficiencies in the implementation of migration policy. Thus, a significant share of persons without valid residence permits is made up of persons whose applications for renewal of a residence persons are pending due to administrative overload (See Maroukis 2008)

measures in response to extraordinary circumstances, be it in response to specific inflows (as in the case of conflict refugees in the 1990s), in response to a sudden increase of asylum applications and the resulting administrative overload and mounting backlogs (again, the 1990s are a case in point) or in response to or rather, as an accompanying measure to changes in migration policy which are expected to increase the risk that certain categories of migrants lose their status as a result of policy changes. As discussed in the above, programmes seem also to be the more appropriate mode to address the large scale presence of irregular migrants in the context of the informal economy. Third, programmes may seem politically more opportune, as they can be presented as "one-off" and exceptional measures. Indeed, although regularisation mechanisms exist in all but five Member States, they are mostly used extremely reluctantly and involve relatively small numbers.

Mechanisms, by contrast, seem to be an appropriate corrective and flexible device in a range of humanitarian situations. Thus, mechanisms are based on the recognition that there will always be situations which cannot be accommodated through the regular legal framework for migration.

In a sense, mechanisms thus represent a "safety valve". Rather than being in contradiction to the overall system of migration management, they can be seen as underpinning the effective operation of migration management and potentially, as a source of legitimacy of migration control. The flipside of mechanisms designed as corrective and flexible instruments is the relatively broad scope for administrative discretion, lack of specific criteria, the absence of regular judicial review and thus relatively unsure and uneven outcomes of regularisation procedures.

On the other hand, regularisation mechanisms would lend themselves to a much more focused incorporation of more precisely defined principles, for examples, entitlements to legal status in case of long residence (as actually has been the case in France until recently) or long duration of administrative procedures.

The above suggests that none of the two modes of regularisations – programmes vs. mechanisms – is clearly superior. Rather, the two modes should be seen as complementary policy options, the choice of which should be governed by the specific problems that should be addressed. From the broader perspective of state responses to irregular migration, however, it is clearly desirable that permanent regularisation mechanisms are in principle available, in particular regarding non-deportable aliens and other irregular migrants in a similar situation (see CoE 2005). Indeed in several EU Member States non-deportable aliens are explicitly targeted by regularisation measures; in addition, non-deportable aliens are often implicitly targeted by more broadly designed humanitarian measures. In this specific context, regularisation is a rational and pragmatic alternative to return, should return not be a viable option. Here, permanent mechanisms based on clear rules are clearly preferable to one-off programmes which regularise the stock of non-deportable migrants which has piled up over a number of years from time to time. Similarly, "toleration" – the

temporary suspension of a removal order - can be an appropriate solution only for a limited time and should eventually lead to access to the regular residence regime. What is at stake here is to avoid the creation of "illegality traps" (Sohler 1999) and provide exits from irregularity or a transitory status such as toleration. Finally, the extent to which both regularisation mechanisms and regularisation programmes are used in cases involving families and sometimes, in cases more narrowly concerned with family reunification, suggests problem areas in the main body of regulations governing family migration. In these cases the use of regularisation mechanism is potentially problematic as regularisation is used as an alternative to more wide-reaching reforms of the migratory framework.

6. Conclusions: pragmatism vs. principles or both?

In a public discussion on the French sponsored immigration pact, Jean-Christophe Peaucelle, Head of the European Affairs Office of the French Ministry of Immigration, Integration, Nationality and Co-Development argued that the commitment of Member States to avoid mass-regularisations in the future (which has survived in the final version of the migration pact only in a considerably watered down version) was to a large degree based on principled considerations. In particular, he argued, regularisation would unduly favour irregular migrants over legal migrants observing "the rules". By contrast, the immigration pact is based on the stance that irregularity should not be rewarded, a line of thinking also reflected in various Commission communications on irregular migration.[19]
This paper, by contrast, suggests a far more nuanced perspective.

First, there are numerous ways non-nationals turn irregular. Often, the inability to comply with rules is a consequence of the way the rules are built rather than an outright attempt to bend or break the rules. Any policy responses thus should be based – above all – on pragmatic attempts to find adequate solutions to particular problems, rather than criminalising and moralising irregularity. And regularisation (in its different forms and rationales) may be one of the possible responses to irregularity.

Secondly, this diversity of causes of irregularity is mirrored by a broad range of objectives and specific rationales for regularisations, which need to be taken into account in any serious attempt to find common policy positions on the European level.

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[19] Statement at the joint ICMPD-EPC Migration Dialogue, The impact of the immigration pact. What future for amnesties in Europe?", Brussels, 7 October 2008; on the position of the European Commission see COM (2001) 672 final, p.6 and COM (2006) 402 final, pp.7-8. In an earlier version of the pact the main argument was a quasi-empirical one, namely that large-scale regularisations would constitute a major pull factor. Although widespread, the hypothesis, has so far been not been proven empirically

Third, the opposition of small scale to large scale regularisations not only fails to take into account different rationales of regularisation measures, notably the two logics identified in the above, but also fails to consider realistic alternatives. Apart from the fact that employment based regularisation programmes usually have broader objectives going far beyond the mere regularisation of illegal residence, not regularising illegally staying migrants seems much more unrealistic in the case of large numbers of persons involved than in smaller scale programmes and mechanisms, as the alternative, mass deportations, seem both economically and practically unreasonable, let alone from ethical issues involved.

In addition, it is questionable to what extent the use of large-scale regularisations in themselves are a sufficient factor (or a relevant factor at all) in influencing migration decisions of individuals, as regularisations are rarely granted indiscriminately and at a minimum require a certain minimum duration of residence. There is some evidence that the frequent use of regularisation programmes in certain countries are a relevant factor for internal migration within the EU (i.e. irregular migrants or migrants in transitory statuses migrating to a country with regularisation programmes), but for the reverse, that migrants get regularised only to migrate elsewhere in the EU no evidence exists and also seems to be illogical (see Baldwin-Edwards & Kraler 2009, chapter 3).

Thus, rather than a principled opposition to large-scale regularisations or regularisation as such what seems to be needed are realistic and pragmatic approaches to finding solutions to the presence of irregular migrants, which provide these with realistic exits from irregularity in a way that conforms with basic human rights standards. This said, principles do have a role to play, notably in the design of migration policies that are fair, effective and transparent.

7. References

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Annex 1: Regularisation Programmes in the EU-27, 1973-2008

Country	Year of Programme	Number Applied/ estimate	Regulari- sations granted	Acceptance Rate	Target Groups
AT	1990	30.000	30.000		Illegally employed foreigners;
	1998	85.000	85.000		Bosnian war refugees under temporary protection
BE	1973-1975	8.420	7.448	88,46%	Undocumented migrants
	1995-1999*	6.137	6.137		Long term asylum seekers, non-deportable, other humanitarian
	2000	55.000	37.900	68,91%	(i) long term asylum seekers (ii) non-deportable aliens; (iii) severely ill persons; (iv) other humanitarian cases/ persons with substantial ties
DE	1996	7.856	7.856		Hardship cases
	1999	18.258	18.258		Rejected asylum seekers
	2006	71.857	49.613	69,04%	Long-term tolerated persons ("Bleiberechtsregelung")
DK	1992-2002	4.989	4.989		War refugees from the former Yugoslavia
	2000	3.000	3.000		Kosovar refugees
ES	1985	38.181	34.832	91,23%	Undocumented migrants (employment)
	1991	130.406	109.135	83,69%	Undocumented migrants (employment)
	1996	25.128	21.382	85,09%	Undocumented migrants (employment)
	2000	247.598	199.926	80,75%	Undocumented migrants (employment)
	2001	351.629	232.674	66,17%	Undocumented migrants (employment)
	2005	691.655	578.375	83,62%	Undocumented migrants (employment)
FR	1973	40.000	40.000		Undocumented migrants (employment)
	1981-82	150.000	130.000	86,67%	Undocumented migrants (employment)
	1991	50.000	15.000	30,00%	Long Term Asylum Seekers who entered before 1989
	1998	135.000	87.000	64,44%	(1) family members/ established families; (2) foreigners without dependants; (3) refused asylum seekers and de facto refugees (4) ill persons
	2006	33.538	6.924	20,65%	Families with one or more children at school
GR	1997	371.641			Undocumented migrants
	1998-2000	228.200	219.000	95,97%	Undocumented migrants (social insurance)
	2001	351.000			Undocumented migrants (social insurance)
	2005	90.000	90.000		Persons with expired permits
	2005	96.400	95.800	99,38%	Undocumented migrants (social insurance)
	2007	20.000	20.000		Runon from 2005, aimed at school registrations, births in Greece, rejected ethnic Greek applicants, etc
HU	2004	1.540	1.194	77,53%	Undocumented migrants (employment & family)
IE	2005	17.900	16.693	93,26%	Parents of Irish born children
IT	1982	12.000	12.000		Undocumented migrants (employment)
	1986-1988	118.700	118.700		Undocumented migrants (employment)
	1990	234.841	234.841		Undocumented migrants (employment & students)
	1995-96	256.000	238.000	92,97%	Undocumented migrants (employment)
	1998	308.000	193.200	62,73%	Undocumented migrants (employment)
	2002-2003	702.156	650.000	92,57%	Undocumented migrants (employment)
	2006	500.000	350.000	70,00%	Undocumented migrants (employment) [De facto programme]

Country	Year of Programme	Number Applied/ estimate	Regulari- sations granted	Acceptance Rate	Target Groups
LT	1996	54	51	94,44%	Residents who arrived in LT after law on immigration/ did not meet requirements of new law
	1999	385	157	40,78%	Undocumented migrants
	2004	103	77	74,76%	Undocumented migrants
LU	1986	1.100	1.100		Undocumented workers (Spanish and Portuguese)
	1994	470	470		War refugees from ex-Yugoslavia under temporary protection
	1995	996	996		War refugees from ex-Yugoslavia
	1996	1.500	1.500		War refugees from ex-Yugoslavia
	2001	2.882	1.839	63,81%	Rejected asylum seekers. other undocumented migrants
NL	1975	18.000	15.000	83,33%	Undocumented migrants (employment)
	1978	180	180		Cases rejected under previous regularisation
	1979	1.800	1.800		Undocumented migrants (employment)
	1999	7.604	1.877	24,68%	Undocumented migrants (employment)
	2004	2.300	2.300		Long term asylum seekers
	2007	30.000	25.000	83,33%	Long term asylum seekers
PL	2003	3.508	2.747	78,31%	Undocumented migrants
	2003	282	282		Undocumented migrants wishing to leave Poland
	2007-2008	2.022	177	8,75%	Undocumented migrants (those failing to apply in '03
PT	1992-93	80.000	38.364	47,96%	Undocumented migrants (employed and non-employed)
	1996	35.000	31.000	88,57%	Undocumented migrants (employment). mainly Palop countries
	2001	185.000	185.000		Undocumented migrants (employment) [De facto programme]
	2003	19.408	19.408		Brazilian undocumented migrant workers (Lula agreement)
	2004	40.000	19.261	48,15%	Undocumented migrants (employment)
SE	2005-2006	31.000	17.000	54,84%	Rejected asylum seekers
SI	1999	12.000	12.000		"erased persons" (formerly permanent residents from other successor states of Yugoslavia who failed to obtain permanent residence after Independence
	2002	2.400	2.200	91,67%	Bosnian refugees under temporary protection
UK	1974-1978	1.809	1.809		Commonwealth and Pakistani Citizens
	1977	462	462		Commonwealth and Pakistani citizens
	1999	12.415	11.140		Long term asylum seekers (backlog criteria)
	2000	11.660	10.235		Long term asylum seekers (backlog criteria)
	2004	9.235	9.235		Long term asylum seekers (families)
	2005	11.245	11.245		Long term asylum seekers (families)
	2006	5.000	5.000		Long term asylum seekers (families)
Total	1973-2008	6.021.850	4.373.789		

Sources:

AT: 1990: Nowotny 1991; 1998: Fassmann and Fenzl 2003, 299-300;

BE: 1973-1975, 1995-1999: Papademetriou 2004, table 1; 2000: EMN 2005

DE: 1996, 1999: Papademietriou 2004, table 1; 2006: Deutscher Bundestag 2007
DK: Government of Denmark (REGINE Member States Questionnaires)
EE: EMF & EMN 2007
ES: González Enríquez 2008
FR: 1981-1983, 1998: Levinson 2005, 1973, 1991: Papademetriou 2004, 2006: Vannery 2007
GR: Baldwin-Edwards & Kraler 2009
HU: information provided by the Hungarian government (REGINE Member States Questionnaires)
IE: Government of Ireland
IT: 1982, 1986-1988, 1990, 1995, 1998: Levinson 2005; 2002-2003: Blaschke 2008; 2006:Cuttita 2008
LT: Migration Annual 2004, http://www.migracija.lt/index.php?-484440258
LU: Besch 2000; 2001: Levinson 2005
NL: 1975, 1978, 1979 Spijkerboer 2000; 1999: 1999: Dutch House of Representatives 2000; 2004: Dutch House of Representatives 2004; 2007: IND 2008
PL: Iglicka & Gmaj
PT: 1992-93, 1996, 2001: Levinson 2005; 2004: Fonseca et al.2005
SE: EMN 2006
SI: 2002: 1999: information obtained from the Ministry of the Interior; 2002: UNHCR 2004
UK: 1974-1978, 1977: Papademetriou 2004; 1999-2000, 2004-2006: Home Office 2007

Note: The Italian 2006 programme is a 'de facto programme' in which a large number of irregular migrants obtained a residence status formally through the quota system for labour recruitment. The figure in the table represents the total number of applications and grants under the quota system. A certain proportion of applications and status grants thus may be due to regular admissions from abroad (see Ruspini 2009). The situation in respect to the 2001 regularisation in Portugal is similar. Here, large numbers of irregular migrants were able to regularise themselves under a new temporary stay permit introduced in 2000. Also here, the figure in the table represents the total number of awards of such temporary permits (see Dzhengozova 2009).