Regularisation practices in the European Union

Results of a recent study (REGINE study)

Matinée d’études, „Politiques des régularisation. Quelles perspectives en Belgique et en Europe? Université Libre de Bruxelles, 9 December 2009
Current policy background (1)

- Principled opposition to regularisation
- Focus of debate on large-scale regularisations
- European Pact on Immigration and Asylum

- “Illegal immigrants on Member States’ territory must leave that territory”
- *The European Council agrees “to use only case-by-case regularisation rather than generalised regularisation, under national law, for humanitarian and economic reasons”* (p.7)
- Case-by-case vs. generalised regularisation – a useful distinction?
Current policy background (2)

– Novelty of the pact: regularisation an explicit issue of concern for EU migration policy

• Regularisation taken up by Commission in several communications
• Changing evaluation of regularisation
• It is only since recently that (large-scale) regularisation is rejected as an appropriate policy tool
• Again more nuanced COM view after REGINE study
2000 First major comparative study commissioned by EC (Odysseus study, de Bruycker 2000)
COM (2000) 757 final: mentions, but does not assess regularisation as a policy tool

2001 COM (2001) 657 final: “illegal entry or residence should not lead to the desired stable from of residence“

2003 COM (2003) 336 final: “integration policies cannot be fully successful unless the issues arising from the presence of illegal immigrants are adequately and reasonably addressed“

2004 COM (2004) 412 final (Study on the links between legal and illegal migration): “For pragmatic reasons the need may arise to regularise certain individuals who do not fulfil the normal criteria for a residence permit”. Also points at the demand for illegal migrant labour in certain countries

2006 COM (2006) 406 final: explains regularisation with the “difficulties to tolerate the sustained presence of significant numbers of third-country illegal immigrants on their territories.”

2008 COM (2008) 394/4: “Indiscriminate 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.”


2009 Stockholm Programme: only commitment to more information sharing concerning regularisation
The meaning of regularisation (i)

....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

Key distinction: regularisation programme vs. regularisation mechanism

BUT:

- not all procedures that have a regularising effects are intended to have such effects/ are explicitly designed as regularisation measures
  - Informal regularisations, regularisations by entitlement
- Nor do regularisation measures exclusively target illegally staying non-nationals (or TCN)
- And: states sometimes grant statuses short of a fully-fledged legal status (e.g. toleration)
The meaning of illegality (i)

• Return Directive (Art. 3 (b)):
  – "[I]Illega stay" means the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.

• But in practice, illegal stay is a complex concept
  – Conditions of residence and differences in sanctioning non-compliance major source of complexity
  – Protection from expulsion a second source of complexity
  – Differences in de facto enforcement another source
The meaning of illegality (ii)

Source: Clandestino (Vogl and Jandl 2008)
Estimated irregular residents in the EU

Geographic irregular inflows, 2003-2007

- Apprehensions at current external EU borders of PL, HU, SK, SI, BG, RO
- Apprehensions at southern shores Italy, sea borders Greece and Canary Islands Spain
- Asylum applications, EU25
- Apprehensions, EU25
## Types of regularisation

### Classification of regularisation mechanisms

<table>
<thead>
<tr>
<th>Nature of Status Adjustment</th>
<th>Nature of the procedure</th>
<th>Criteria/ Reasons for regularisation</th>
<th>Status Granted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regularisation: <em>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</em></td>
<td>Programme Mechanism</td>
<td>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</td>
<td>Temporary permit</td>
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<td>Permanent residence</td>
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<tr>
<td>Normalisation: <em>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</em></td>
<td>Programme Mechanism</td>
<td>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</td>
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<td>Permanent permit</td>
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<tr>
<td>Suspension of removal order (toleration)</td>
<td>Programme Mechanism</td>
<td>Failure to enforce return, complementary protection, other</td>
<td>Temporary permit</td>
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<td><em>De facto toleration</em></td>
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<td>‘Toleration’ status</td>
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1. *De facto* tolerations refer to cases where a removal order is not formally suspended but simply not enforced.
The two logics of regularisations

• Regularisations driven by humanitarian/rights based logic

versus

• Regularisations driven by non-humanitarian, regulatory and labour market oriented logic
Rights-based/humanitarian regularisations

- Regularisation (i.e. status adjustment) goal in itself
- To address policy and implementation failures
  - Non-enforceability of return, long asylum procedures, backlogs in asylum applications
- Principled grounds: to avoid „limbo“ situations, etc.
- To address specific humanitarian circumstances
- Broad set of humanitarian criteria
Regularisations driven by a non-humanitarian, regulatory, labour market oriented logic

- Status adjustment instrument to achieve wider objectives
- Aims at re-regulation of the economy
  - To combat undeclared work
  - To enforce social rights and labour standards
  - Promote the integration of irregular migrants through legal integration
- Often, but not necessarily, involves larger number of immigrants
Regularisation patterns in the EU

• Main conclusions
  – Regularisation, albeit an exceptional measure, is a widespread practice
  – Number of programmes and mechanisms in place increased especially in the past 10 years
  – 18 out of 27 MS have undertaken regularisation programmes at some point
  – 22 MS have ongoing regularisation mechanisms of some sort
  – Differences in policy approaches have to do with
    • Size of the irregular migrant population
    • Differing labour market structures and link of irregular migration and informal work
    • Degree of pragmatism
    • Role of asylum procedure in regard to irregular migration
    • Design of the policy framework for legal migration
Evolution of regularisation programmes

Total Number of Programmes, 1973-2008: 68

- UK, 3
- SE, 1
- PT, 2
- NL, 1
- LU, 1
- LT, 1
- NL, 2
- IT, 2
- GR, 2
- FR, 1
- IE, 1
- HU, 1
- GR, 3
- FR, 1
- ES, 1
- DE, 1
- BE, 1
- AT, 1
- SE, 1
- DE, 1

- to 1977: 5
- 1978-1987: 7
- 1993-1997: 10
- 1998-2002: 19
- 2003-2008: 22
Applications for regularisation through programmes, 1973-2008

68 Programmes in 19 EU Member States; total applications (est.): 6,021,850; total regularised: 4,373,789

- Before 1990: 403,245
- 1990-1997: 1,230,029
- 1998-2002: 2,573,967
- 2003-2008: 1,814,609

Applications/Persons eligible (estimate)
Regularisations granted
Programmes by Main Target Group

- Asylum Seekers: 8
  - UK, 5
  - NL, 2
  - FR, 1
  - CH, 1
- Humanitarian (Including Failed Asylum Seekers): 7
  - SE, 1
  - LU, 2
  - DE, 2
  - BE, 2
- Family Cases: 3
  - FR, 2
- War Refugees: 7
  - SI, 1
  - LU, 2
  - DK, 2
  - BE, 1
  - AT, 1
- Undocumented Migrants (Employment): 35
  - PT, 5
  - PL, 2
  - NI, 3
  - LU, 1
  - LT, 2
  - IT, 7
  - HU, 1
  - GR, 5
  - ES, 6
  - AT, 1
- Other: 8
  - UK, 2
  - SI, 1
  - PL, 1
  - NL, 1
  - LT, 1
  - GR, 1
  - DE, 1
Regularisation through mechanisms

• While programmes tend to address the nexus of informal work and illegal stay, mechanisms almost exclusively rights based/ following a humanitarian logic
  – Criteria: Protection grounds (complementary protection), Family ties, including „normal“ family reunification impossible under regular framework, Non-enforceability of return, Health Hardship cases (often involving any of the above), long duration of immigration/ asylum procedures, victim protection in criminal procedures (trafficking), long residence

• Quantitatively less important, but very little information on actual state practices
  – REGINE: an estimated 305,000 regularisations through mechanisms
  – In some countries (DE, FR, BE) relatively large numbers involved
Regularisations through mechanisms, EU(27), 1996-2007
Policy Issues identified

- Effectiveness of regularisation programmes
- Effectiveness of regularisation mechanisms
- Avoiding the creation of illegal immigrants
- Regularisations in lieu of labour migration policy
- The role of national asylum systems
- Non-deportable aliens
- Regularisation for family-related reasons
Effectiveness of regularisation programmes

(i) Retention of legal status

- Evidence from Italy & Spain that former problem of retaining legal status now improved – averaging 80-90% retention 1 year later
- Relapse into illegality high (up to 90%) in agriculture and housekeeping sectors, in Spain
- Serious lack of data elsewhere
- Issue of duration of legalised statuses awarded across EU – typically 6-12 months, rarely 2 years. Contrasts with long-term residence rights of USA amnesties.
(ii) Criteria for eligibility

- Variable use of employment criterion across programmes
- Where employment is principal criterion, active role of employer in process is associated with more successful programmes (e.g. Spain 2005)
- Social insurance is inadequate proxy
- Important role of Labour Ministries in dual approach, enforcing labour laws in co-ordinated policy
- Also important role for social partners in making policy work
(iii) Encouragement of illegal migration flows

- No evidence that legalised migrants move to other Member States

- Limited evidence of irregular migration movements North → South and vice versa, mainly related to irregular employment opportunities rather than anticipated regularisations

- Little evidence of stimulation of future migration flows caused by regularisation programmes

- Limited evidence of stimulation of flows of former residents, to participate in regularisation opportunities
(iv) Bureaucratic management

- Significant problems in all countries with the management of large-scale regularisation programmes
- Variable regional interpretation of legislation is a serious problem for some countries, with highly unequal outcomes
- Procedural issues are central. These include:
  - need to involve civil society and migrant organisations
  - need to guarantee protection from expulsion
  - type of evaluation mechanism – personal interview method most uncertain, most unequal and most costly
- Best practices identified clearly in Spanish 2005 programme
(v) General summary

- Overall impact positive, with an important reduction in illegal residence/employment (cf. Clandestino results)
- Systematic post hoc evaluation of policies is largely missing, making corrective responses difficult to achieve
- Even basic data are generally missing from MS programmes – notably, total number of applications, number regularised, subsequent renewals
- Priority need for remedy of data deficit
Effectiveness of regularisation mechanisms

- Important and flexible instrument for management of irregular migration, particularly humanitarian cases

- Problems of such mechanisms associated with:
  - lack of transparency in procedures
  - unknown resource allocation costs
  - issues of planning
  - lack of involvement of social partners

- Need for some sort of mechanism in all countries: 6 MS without such
Avoiding the creation of illegal immigrants

- Most irregular migrants are visa overstayers – estimated for Italy and Spain at 70-80%. In some MS, rejected asylum-seekers are high proportion; also, illegal border-crossings may be important for a few countries (e.g. Greece).

- However, across EU varying problem of “created illegal immigrants”, as the result of state policy. The following categories are significant, and identifiable from regularisation programmes and mechanisms:

  - Persons with expired residence permits, but remaining in employment
  - Persons who migrated as minors or born on the territory
  - Persons whose refugee status has been withdrawn
  - Retired persons with limited pension resources

- These categories of irregular residence require corrective policy measures, since they leave mostly non-deportable aliens in a state of limbo
Regularisations in lieu of labour migration policy

- Southern EU countries in particular (P, Es, It, El) have tended to legalise irregular workers as a result of inadequate recruitment of immigrant labour.

- Abandonment of large-scale regularisation is not a valid policy option: result would be massive increased in informal sector of economy.

- Specific policy option (in addition to employment-related regularisation) is to permit irregular residents to apply for work permits. This was done by Italy in 2006.

- Long-term policy preferable, with more open and flexible labour recruitment schemes.
The role of national asylum systems

- Important (and variable role) of national asylum systems in creation of irregular migrant stocks
- In some MS, migrants gravitate towards asylum application process as easy route of entry
- In other MS, they shun the process and enter as irregular migrants
- In either case, as rejected asylum applicants or as non-applicants, significant creation of irregular migrant stocks
- Need for better overall management of this area, including harmonised approaches and access to protection
Non-deportable aliens

- In every MS, small but significant number of persons who cannot be deported, for various reasons
- Includes: refugees not entitled to protection because of persecution by non-governmental groups; rejected asylum-seekers who cannot be deported; illegal immigrants of unknown nationality; TCN family members of EU nationals with restricted status (e.g. before marriage)
- Need for guiding principles in order to limit number of such aliens, and provide mechanisms for legal statuses, where appropriate
Regularisation for family-related reasons

- Evidence that there is significant “spontaneous” family reunification, outside of legal framework

- Occurs for a variety of reasons, including: delays with formal process, poor understanding of the process, difficulty in meeting income/housing criteria

- Generally, MS require applicants for family reunification to apply from outside territory: result is that already-unified families cannot apply

- According to ECHR jurisprudence, unlikely that family members can be deported, so are left as irregular stocks

- Need for more flexible approach to family reunification, to limit extent of such irregular stocks
Conclusions

- Complexity of phenomenon means that single policy instrument is insufficient – need for range of instruments to address variety of problems

Possible options on EU level:

- Policies for information exchange, policy development and technical support
- Policies for notification and policy elaboration
- Policies for minimising “created illegal immigrants”
- Policies for the regulation of minimum standards

Measures proposed by Stockholm programme insufficient!