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Regularization and Employer Sanctions as Means towards the Effective Governance of Labour Migration

Russian Federation and International Experience

International Labour Organization

**Regularization and Employer Sanctions
as Means towards the Effective Governance
of Labour Migration**

Russian Federation and International Experience

Moscow — 2009

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Introduction

Labour migration to Russia, mainly from the South Caucasus and Central Asia, is of major proportions. Two million migrant workers were registered in Russia in 2007. Legal labour migration however constitutes only a part of the total migration flows. The majority of migrant workers working in Russia are in an irregular situation. The presence of large populations of irregular workers is symptomatic of the need for better policies, not least because there are pressing concerns about the human and labour rights of the workers themselves. The migration authorities of the Russian Federation have made substantial efforts to regulate the situation of irregular workers. New laws aimed at facilitating the registration and legal employment of foreigners and reducing the number of irregular immigrants on Russian territory entered into force in January 2007. This has resulted in an increased number of migrant workers registering and applying for work permits. There has been a three fold increase in registration and two fold increase in employment authorisation due to simplification and liberalization of labour migration legislation. There has also been an increase in employer sanctions for unauthorized hiring of migrants. Despite such efforts, nevertheless most migrant workers in Russia are still in an irregular situation, vulnerable to labour exploitation and abuse. Some of the gaps that remain in are a very short registration period for migrant workers after arrival in the country, the fact that many migrants are not well informed of the new procedures and the lack of regulated intermediary services for matching job seekers and employers.

The effectiveness of the implementation of the new immigration legislation in Russia laws is vital for regularising the pool of irregular workers making a major contribution to the Russian economy as well as reducing future irregular migration. In this connection, steps to discourage the employment of irregular workers are equally important. The study on Russia in this volume will, therefore, look at regularization measures in the context of the new immigration legislation in the Russian Federation and measures planned to discourage employment of irregular workers. The second study will highlight international experience on the subject, relevant for policy-makers in Russia as it develops its labour migration policies and mechanisms.

The two studies have been prepared in the framework of the ILO project “Towards Sustainable Partnerships for the Effective Governance of Labour Migration in the Russian Federation, the Caucasus and Central Asia” financed by the European Union (EU).

The studies have been prepared by national and international experts (Elena Tyuryukanova, Feruccio Pastore and Jorrit Rijpma) and supervised by Nilim Baruah (ILO). The Levada-Centre (Moscow) assisted in the data collection. The drafts of the studies have been discussed at a national workshop in Moscow in May 2008. Natalia Scharbakova and Olga Ivanova provided administrative support to the organization of the studies.

Nilim Baruah

International Labour Organization, Moscow



The study has been prepared in the framework of the project “Towards Sustainable Partnerships for the Effective Governance of Labour Migration in the Russian Federation, the Caucasus and Central Asia” financed by the European Union (EU).

Views expressed in the report are those of the authors and contributors and do not necessarily represent those of the ILO or EU.

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***Regularization of Migrant Workers and Discouragement
of Employment of Irregular Migrants
in the Russian Federation***

***Assessment of the design and implementation of the
new immigration legislation in the Russian Federation
on regularization of migrant workers, reduction
of irregular migration, and the discouragement
of employment of irregular workers***

Prepared for ILO by **Elena Tyuryukanova**
Supervised by **Nilim Baruah (ILO)**

May, 2008

Introduction

Regularization of the status of irregular migrants poses a dilemma for host countries. On the one hand, regularization sends a signal that clandestine entry with a view to finding irregular employment, or overstaying, can be rewarded, and may thus serve to encourage further irregular migration. In fact, this outcome is frequently assumed, although there is not much evidence to support it. On the other hand, particularly when irregular migrants cannot be removed from the territory for regular, humanitarian or practical reasons (e.g., migrants who have established economic and social ties with the host society), regularization is a viable policy option and should be seriously considered, as it serves to prevent their further marginalization and exploitation. There are clear economic benefits for the host country in regularizing its irregular migrant labour force, in terms of increased taxes and social security contributions. Moreover, regularization can serve to combat the informal labour market by affording regular status to irregular migrant workers gainfully employed in the shadow economy (OSCE-IOM-ILO Handbook, 2006)¹. Regularization can also lead to an increase in employment of national workers, given that low wages and informal employment of migrant workers undermines the competitiveness of national workers.

The Russian Federation (RF) is a significant destination country for migrants. Labour migration to Russia, mainly from CIS countries and East Asia, is by far the most substantial migration inflow into the region. According to data from the Russian Federal Migration Service, employment of regular foreign workers in the national economy has greatly increased over the last 15 years. The number of work permits issued to foreign citizens rose from 129,000 in 1994 to 460,000 in 2004, and to 670,000 in 2005. Since the new immigration legislation was implemented in 2007, 1.1 million migrant workers have been registered. In spite of this growth, however, regular labour migration constitutes only a small proportion of the country's economically active population. The majority of migrant workers in the country are in an irregular position.

The presence of large populations of irregular workers is symptomatic of the need for better policies, not least because there are pressing concerns about the human and labour rights of the workers themselves. The migration authorities of the Russian Federation have made efforts to regulate the situation of irregular workers. In March 2005, ILO organised a round table discussion on policy options for dealing with irregular migration in the Russian Federation. The meeting introduced a draft concept of migrant regularization in the Russian Federation and acquainted Russian participants with international experience. This was followed by a pilot regularization of irregularly employed migrant workers who had entered Russian Federation on a visa-free basis (September-December 2005). Finally, new laws aimed at facilitating registration and regular employment of foreigners and reducing the number of irregular immigrants on Russian territory entered into force in January 2007.

The effectiveness of the drafting and implementation of the new laws is vital for regularizing the pool of irregular workers making a major contribution to the Russian economy as well as reducing future irregular migration. In this connection, steps to discourage the employment of irregular workers are equally important. The study will, therefore, look at regularization measures in the context of the new immigration legislation in the Russian Federation and measures planned to discourage employment of irregular workers.

¹ OSCE-IOM-ILO, Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination, Vienna and Geneva, 2006.

About the term regularization and its use in Russia

Regularization, also referred to as amnesty or legalization, is most generally defined as “any process by which a country allows aliens in an irregular situation to obtain regular status in the country” (IOM, 2004)². In practice, this generally means the granting of a permit to stay, either on a permanent or temporary basis, to a foreign national who already resides or works irregularly on the country’s territory (De Bruycker et al., 2000; Sunderhaus, 2006; Levinson, 2005)³. The most commonly proposed classifications of regularization programmes (De Bruycker et al., 2000) draw a distinction between permanent or one-time actions; individual or collective actions, employer driven or worker driven regularization, etc.

Thus, regularization is today perceived mostly as a state-run programme, designed to regularize certain categories of irregular migrants. As a rule, such a programme includes special legislative acts and administrative procedures beyond the scope of the general migration legislation that establishes the regular labour migration regime. Can a regularization programme be designed as a one-time action or as a regular procedure operating continuously? If it is not a one-offtime action but a continuous operation, the relevant regulatory norms could be made part of the general migration legislation. Yet they differ from the standard procedures for arriving migrants in that they concern irregular migrants who arrived in the country some time previously, and do not have a regular status, corroborated by appropriate documents.

In Russia the term *regularization or legalization* is applied not only with respect to the status of irregular migrants, but also to all migrants arriving in the country. In fact, it refers to the process of going through the established official regular labour migration procedures. In the present report, however, we use a narrower approach, with both terms — regularization and legalization (used as synonyms) applied basically in relation to irregular migrants and designating their transition to a regular position.

When the new Russian legislation, establishing a more liberal migration regime for arriving labour migrants, came into effect (January 15, 2007), the country had a large number of irregular migrants. There has been no amnesty for such migrants except for those covered by the above-mentioned pilot scheme, which was limited in time and scope (see *Introduction*). In adopting the new legislation, the Government decided it would cancel the previously planned amnesty. The new government legislation did provide a way (though with a delay) for irregular migrants staying on the territory of Russia with an opportunity to regularize their status without leaving the country, for a variety of reasons (fines, mistrust of official structures, etc.). Most migrants could not or did not want to avail themselves of this opportunity. The majority of such migrants retained their irregular status or had to leave the country, and then re-enter it in compliance with the new regulations. As a result of the difficulties involved in official regularization, quite a few informal agencies offering regularization services to irregular migrants emerged. The majority of labour migrants arrive to Russia from “visa-free” countries of the CIS, which makes departure from and entry into the country much easier for them under the new rules. Often migrants prefer this way of regularizing their status, rather than the established statutory procedure. In this study both ways — with or without leaving the country — are considered as avenues for regularization.

The effectiveness of the drafting and implementation of the new laws is vital for regularizing the pool of irregular workers making a major contribution to the Russian economy, as well as for reducing future irregular migration. In this connection, steps to discourage employment of irregular workers are equally important.

² IOM, Glossary on International Migration, Geneva, 2004

³ De Bruycker et al, Regularization of Illegal Immigrants in the European Union, Brussels, 2000; Levinson, The Regularization of Unauthorized Migrants: Literature Survey and Country Case Studies, Centre on Migration, Policy and Society, University of Oxford, 2005; Sunderhaus, Regularization Programmes for Undocumented Migrants — A Global Survey on more than 60 Legalizations in all Continents, New York, 2006.

Study objectives and methodology

The principle objective of the research is to assess the drafting and implementation of the new immigration legislation in the Russian Federation on regularization of migrant workers, reduction of irregular migration and discouragement of employment of irregular workers: and to develop recommendations for a sound regularization policy and procedures, and the discouragement of the employment of irregular workers.

Study target groups:

- Labour migrants in Russia from the CIS countries;
- Employers contracting foreign labour;
- Representatives of authorities involved in implementation of migration policies (officials of the FMS and its territorial bodies, labour and employment departments, Ministry of Internal Affairs, etc.).

Particular attention was focused on labour migrants who arrived in the Russian Federation after the new legislation was introduced, and those who were already there before this. We shall find out how difficult, or easy, the transition to the new system was for them and whether the opportunities for regularization it offers to migrants are sufficient. We will also identify specific features of the regularization process, depending on the migration model and duration of stay in the Russian Federation (seasonal, short-term, long-term).

Sectoral cross-section of the review.

The review will concentrate on labour immigration procedures in the following sectors, which have a high concentration of migrants:

- Construction
- Agriculture
- Industry
- Trade and services⁴

Regional cross section of the review.

The review covered three pilot regions: Moscow, Volgograd and Tambov regions. Moscow is a huge metropolis with a massive influx of migrants, and a relatively well-developed migration infrastructure. Volgograd is a medium-sized city in the south of the country with a relatively under-developed migration management infrastructure. The Tambov region is used as an example of a host agricultural area for the purposes of the study.

Data sources:

- Analysis of the regulatory acts (see the Appendix 1)
- Interviews with expert representatives of the following organizations (see the Appendix 4)
- the FMS and its territorial offices
- Rostrud and its territorial bodies (employment service)
- Ministry of Public Health and Social Development
- Ministry for Economic Development and Trade
- MIA and its territorial bodies
- Local authorities in the pilot regions
- NGOs
- Trades unions
- Business structures and employers' organizations
- IOM survey⁵
- Interviews with migrants employed in the specified economic sectors (see the Appendix 3)
- Focus-groups of employers contracting migrants in various sectors (see the Appendix 3)⁶

⁴ The review thus covers the spheres of mass labour migrant employment, and excludes the issue of regularization of top managers, scientists, academics and other highly-skilled experts.

⁵ The study utilises the results of the survey "Monitoring the application of the new migration legislation in the Russian Federation", carried out by the Office of the International Organization for Migration in Moscow with BDIPCH/OSCE support in 2007.

⁶ During the project, the "Levada-Centre" agency dealt with four focus-groups of entrepreneurs employing foreign workers in different branches — construction, trade and services, agriculture, transport, industry.

1. Migration legislation of the Russian Federation: broadening the regular scope of labour migration

From 2002, when the Law on the legal status of foreign citizens in the Russian Federation was adopted⁷, the whole system of migration regulation was orientated on preserving the rigid controls over the numbers and structure of migrants arriving, both for permanent residence and for temporary employment. Control was exercised through a system of numerous administrative procedures and barriers that often duplicated one another. The system proved to be inefficient. The bureaucratic barriers turned out to be virtually insurmountable for most migrants and led only to corruption and growing irregular migration.

By the middle of the decade, the old migration policy was acting as a brake on further development and resulted in serious problems: workforce shortages in some sectors, expansion of irregular migration and corruption, massive infringements of migrants' rights, growing xenophobia, etc. The migration policy needed to be changed. On January 15, 2007, a number of new legislative and regulatory acts came into force that seriously changed the migration control system in Russia. The main changes were contained in the amendments to the Law on the legal status of foreign citizens in the Russian Federation, and the new Law on the registration of foreign citizens in the Russian Federation⁸. The changes referred primarily to migrants from CIS countries arriving in Russia on a visa-free basis for temporary employment. The general purpose of these changes was to simplify employment procedures, and provide for temporary residence/stay permits and registration of foreign citizens. Adoption of the new laws, which simplified many of the administrative procedures that existed before 2007, that raised serious barriers to regularization of migrants, meant the introduction of a new, more liberal migration control regime.

The changes concerned the following main areas:

(1) Temporary stay of foreign citizens in the Russian Federation:

The duration of temporary stay of foreign citizens in Russia is established at 90 days (it can be prolonged up to one year). The Government can increase it to 180 days or reduce it at its own discretion in some constituent entities of the Russian Federation or in respect of certain categories of foreign citizens staying temporarily in the country. If the arriving migrant intends to stay for a period not exceeding this term, he/she can benefit from the simplified registration procedure (see below).

(2) Temporary residence of foreign citizens in the Russian Federation:

Temporary residence permits are granted within the limits of a quota established by the Government of the Russian Federation⁹. A temporary residence permit is valid for three years. To obtain a temporary residence permit, a foreign citizen arriving in the Russian Federation on a visa-free basis submits the following documents to the territorial migration office of the federal executive authority:

⁷ Federal law No. 115-FZ, of July 25, 2002, "On the legal status of foreign citizens in the Russian Federation" (<http://base.consultant.ru/cons/cgi/online.cgi?Req=doc;base=LAW;n=74057>).

⁸ Federal law of the Russian Federation, of July 18, 2006, No. 110-FZ "On amending the Federal law "On the legal status of foreign citizens in the Russian Federation" and recognizing as invalid some provisions of the Federal law "On amending and supplementing some acts of the Russian Federation"; Federal law of the Russian Federation, of July 18, 2006, No. 109-FZ "On migration registration of foreign citizens and stateless persons in the Russian Federation".

⁹ The 2008 quota for temporary stay permits to be issued to foreign citizens and stateless persons on the territory of the Russian Federation was fixed at 140,790, compared to 52,723 in 2007. (Decision of the Government of the Russian Federation of November 19, 2006, No. 1636-r).

- 1) Application for a temporary residence permit;
- 2) Personal identity document;
- 3) Migration card;
- 4) Receipt for payment of the state fees.

The migrant must also present:

- 1) A document certifying absence of drug addiction, certain infectious diseases and HIV — within thirty days of submitting the application for a temporary residence permit;
- 2) Certificate (notice) confirming that the given foreign citizen has been registered with the tax office — within one year of his/her entry into the Russian Federation.

A permit shall be granted to a foreign citizen who has arrived in the Russian Federation on a visa-free basis within *sixty days* of his/her application being accepted.

Each year, the temporarily residing foreign citizen needs to submit to an FMS office a notice confirming his/her continued residence in the Russian Federation, together with information regarding his/her income, and a copy of the tax declaration (or other document) confirming the amount and source of income in the current year.

(3) Employment of foreign citizens arriving in the Russian Federation on a visa-free basis:

A foreign citizen who arrives in the Russian Federation on a visa-free basis submits the application for a work permit in person, or through an intermediary organization or his/her representative.

The application is to be submitted in conjunction with:

- 1) A personal identity document;
- 2) Migration card;
- 3) Receipt for payment of the state fees;
- 4) Documents certifying absence of drug addiction and infectious diseases.

The FMS office informs the executive authority in charge of employment issues in the relevant constituent entity of the Russian Federation about work permits granted to foreign citizens.

The FMS office examines the foreign citizens' applications for work permits in consideration of the set quotas¹⁰. Within ten working days of receiving an application for a work permit from a foreign citizen, the office shall grant it or issue a notice of refusal.

Employers or works (services) commissioners are entitled to recruit and employ foreign workers who arrive in the Russian Federation on a visa-free basis and possess a work permit. They should provide the FMS office and the labour and employment authority with a special notice to this effect.

Therefore it is the migrant himself that obtains a work permit (not the employer, as was the case previously), so the legal grounds for the migrant being "bound" to the employer has been removed.

(4) Registration of foreign citizens:

Foreign citizens staying temporarily in the Russian Federation (not longer than 90 days) must register at their place of residence. The registration includes the address of the specific residence, which is to be entered in the residence permit or the temporary stay permit.

When submitting an application for registration at the place of residence, the foreign citizen or stateless person must present:

- a) A personal identity document;
- b) Residence permit or temporary stay permit;
- c) Documents confirming the right to reside at the given address.

¹⁰ For more detail on quotas, see section 2.3.

On the same day, the migration body responsible for the registration of foreign citizens at the place of residence makes an entry to this effect in the residence permit or temporary stay permit of the given foreign citizen.

Foreign citizens staying temporarily in the Russian Federation are to be registered at the place in which they are resident. The migration body registers the foreign citizens at the place of their temporary stay when it receives the notice of their arrival at the place of residence, as submitted to an FMS body by the host party personally or by mail, according to the established procedure.

So the registration procedure has become much simpler and has the character of a notification.

(5) Mechanisms for controlling the numbers and quality of recruited labour:

Each year, the Government of the Russian Federation determines the need for the recruited foreign workforce, including priority occupational categories, in consideration of the political, economic, social and demographic situation. The Government sets quotas for work permits to be granted to foreign citizens who arrive in the Russian Federation on a visa-free basis, granting them the right to work on the territory of one of the constituent entities of the Russian Federation or the whole country. Quotas can be set depending on the trade, specialisation and qualifications of foreign citizens (since 2008)¹¹, country of origin (currently not established), as well as other economic and/or social criteria in view of the regional specifics of the labour market. The quotas are not applied to foreign citizens who are qualified experts employed according to a specialisation included on the list of relevant trades (specialisation, job positions).

The Government of the Russian Federation has the right to set, on an annual basis, the proportion of foreign workers in different sectors employed by economic agents operating on the territory of one or several constituent entities of the Russian Federation or the whole country, taking into account the specifics of the regional labour markets, and the priority right to employment of citizens of the Russian Federation. Upper limits for foreign labour employment were set for 2008 in respect of certain occupations in the retail trade in alcoholic and pharmaceutical goods and street trading (salespersons, cashiers, etc.) at 0 percent, that is, the employment of foreign workforce in this sector was prohibited; in sports it was set at 25 percent¹².

¹¹ Decision of the Ministry of Public Health and Social Development of the Russian Federation, of February 18, 2008. No 73n g. Moscow. "On distribution of the quota for work permits to be issued to foreign citizens in 2008, as established by the Government of the Russian Federation".

¹² Decision of the Government, dated 15.11.2006, No. 683 and Decision of the Government of the Russian Federation, dated 29.12.2007, No. 1003.

2. Implementation of the Migration legislation: unrealized potential for regularization

This section reviews the migration legislation implementation practices in the Russian Federation concerning official procedures for newly arriving migrants and regularization procedures for irregular migrants, including the issue of stay/residence and employment. The specific legislative provisions and the practice of their implementation are examined from the perspective of the opportunities or obstacles they create for passing through regular corridors, and for regularization.

2.1. Crossing the border. The migration card

The statutory procedures for migrants start at the border crossing. To cross the border legally, one needs a valid personal identity documents (passport) and a migration card, which is supplied at the border crossing¹³. These documents are the main preconditions for successful regularization for newly arrived migrants. Lack of a migration card in fact deprives the migrant of any chance of becoming registered and obtaining a work permit, thereby virtually making him/her an “irregular” person.

The survey conducted by the IOM in 2007 demonstrated that 7 percent of the migrants who arrived before January 15 and 5 percent of those who arrived after January 15 did not have migration cards. This explains why they were not registered and why there was an ensuing chain of irregular arrangements.

Source: IOM sample survey, 2007

The current legislation provides an opportunity for those labour migrants who, for some reason, have no migration card and are therefore irregular, to regularize their status, that is, obtain a new migration card and then register with the migration service and get a work permit¹⁴. The fine for irregular residence is 2,000 roubles, and the state guarantees that no other penalty or punishment will be imposed (detention, arrest, expulsion). Yet this legislative act, providing a sort of “amnesty”, was adopted much later than the new migration legislation, and many migrants were compelled to leave the country or had, by this time, already suffered administrative penalties for being in the country irregularly. Moreover, the “amnesty” was often disregarded by local administrations, or was applied only partially. For example, in Moscow the “amnesty” was declared only in March 2008 and lasted one month; in that time, the migrant had to acquire a new migration card and register with the migration service, find a job and prolong his/her regular residence. If he/she failed to do so, he/she had to leave Moscow. This action had not been preceded by any effective public campaign informing migrants of the future action, so many “irregulars” simply did not know of this opportunity to regularize their status, or of the conditions of the action.

On the whole, the “amnesty” procedure was unpopular among migrants due to the way in which it was implemented. As interviews with migrants have demonstrated, quite a few of them did not know about this opportunity; others were afraid “to uncover” themselves to the police, or did not believe the business would be limited to payment of a fine, or were held back

¹³ The present review analyzes only the migration to Russia from CIS countries that requires of entrants no visa.

¹⁴ A legal act.

by the amount of the fine they would have had to pay; the regularization conditions did not suit others. Many migrants had become so accustomed to “lying low” that they saw no purpose in regularization.

What do I need regularization for? I've already been working for a long time without any formalities and it suits me. If I got a migration card, I'd have to return home every three months...

If I came to the police or migration service, they would fine me on the spot and deport me, or I'd have to pay 10 thousand roubles, instead of two, or give them a bribe...

I have no right to work where I work (salesman at a market — E.T.), so regularization is of no use to me, as I won't get a work permit.

(Excerpts from interviews with irregular migrants)¹⁵

So, the attitude of migrants towards the state's regularization actions demonstrates that, if these actions are to involve significant numbers of migrants, they should be scrupulously prepared. More attention should be paid to providing information and advice in order to provide migrants with relevant knowledge and mould their opinion, and reach out to employers and the general public. The question of preparation (information and training) is equally important for officials who are to implement the regularization.

Interviews with specialists suggest that not only migrants, but also the experts and policy-makers are, above all, reluctant to implement large-scale regularization campaigns. The expert community is divided on the amnesty issue (be it a one-time action or a legislatively established permanent procedure). So initiators and developers of future regularization programmes should take account of the fact that migrants and the expert community are not sufficiently prepared to implement such actions and need to be properly informed and trained.

2.2. Stay and Residence permits and registration

One more innovation in 2007 was the division of the registration procedure into two different ones: registration for temporary stay (*uchet*) and registration for temporary residence (for those intending to stay for a longer period). The short-term residence procedure is much simpler than that for long-term registration. Short-term registration can be prolonged for the duration of the employment contract, but for no longer than one year from entry into the Russian Federation.

Registration of temporary stay¹⁶. The second legal step for the migrant after the border crossing and obtaining a migration card is registration of temporary stay. Since January 15, 2007, the registration procedure for foreign citizens has been greatly simplified. These procedures are laid down in the Federal law of the Russian Federation, of 18.07.2006, “On migration registration of foreign citizens and stateless persons in the Russian Federation”, No. 109-FZ. A simplified new procedure for registration of migrants coming for up to 90 days has been introduced. Now, in order to be registered, the migrant can post to the FMS or deliver personally a completed form notifying of his/her arrival. The problem of registration for migrants who live at their place of work has thus been eliminated; now employers can register such migrants at their own legal address. In other words a three month period is provided to find employment.

A number of persisting problems slowdown and complicate the registration procedure. One of the main administrative barriers is the three-day period granted to the *host party* to post or bring personally to an FMS office the completed notification form informing of the arrival of the

¹⁵ This and other interviews below were conducted within the framework of the present ILO project.

¹⁶ Registration of temporary stay is *migratsionnyi uchet* in Russian law.

foreign citizen at the place of residence (so called “three-day rule”). As interviews demonstrate, most migrants found it difficult to meet the deadline and over half of them failed to do so.

I arrived in Moscow. For a week I looked for a job, lived with an acquaintance. They themselves had “bought” their registration. Then I found a job — building houses. The employer gave me an advance payment and said: Go and buy a registration, it will be more expensive to buy you out later. Three months have passed, so it’s time to buy a new one.

Nobody can get their registration arranged officially in three days. Even if you find a host party, three days is still not enough. We are busy and the queue at the post office is too long.

(Excerpts from interviews with irregular migrants)

Migrants who were unable to register within three days thought they had broken the law and, fearing possible punishment, did nothing to register later.

According to data provided by the IOM, 17 percent of migrants who arrived in the Russian Federation after January 15 and remained unregistered said the reason for this was inability to meet the three-day deadline and fear “of being discovered” (4 percent of all the migrants interviewed). This reason comes in second place after lack of a migration card and other documents (23 and 34 percent correspondingly).

Source: IOM sample survey, 2007

Thus, the “three-day rule” continuously contributes to replenishing numbers of irregular migrants.

Another problem hampering regularization of migrants’ residence in the Russian Federation is that of “finding a host party”. Under the current legislation, in order to be properly registered, the migrant must have “a host party”. It could be the owner of the house where he/she rents a room, an employer, employment agency, etc. Many migrants interviewed said that they could not find a host party (at all and not just in 3 days) that would agree to arrange the registration formalities. It is all the more difficult because they must do so within three days of arriving. Most migrants encounter this “host party” problem in one way or another.

I live on the construction site in a small bunkhouse. The employer says that registering me at his home address might not be a good idea.

I rent a room. The old lady who owns it is afraid to register me. Perhaps she thinks I’ll bring my baby here and oust her.

(Excerpts from interviews with irregular migrants)

The reasons for these difficulties are numerous. The migration infrastructure, including various mediation agencies, is underdeveloped. Few arriving migrants know beforehand where they intend to live and work, that is, know their future employer. Only some of them succeed in finding a host party, a job and place to live before they depart and can thus be sure of a normal-satisfactory situation for themselves right from the beginning of their residence in the Russian Federation. The majority of such migrants are “second-time” arrivals to a known employer. Many arriving migrants rely on relatives or people they know to accommodate them for the first few days after arriving. This temporary situation does not, however, amount to registration.

The official migration infrastructure, including various intermediary services helping migrants find a host party, is not sufficiently developed. Migrants are often better informed about various unofficial services that place advertisements on fences, in trains and other public places, than about registered firms. Development of migration and intermediary services helping them find work and housing could ease this problem, and maybe even resolve it.

Even if the migrant finds housing and work immediately after arriving in the country, he or she still has to have a “host party”, so, in many cases, continues to face problems with registration.

For various reasons, which will be considered later, many employers and house-owners refuse to go through the official procedures. The migrant has, in fact, no voice in such a situation:

“ ... I cannot demand that the employer post a letter or contact the FMS to get the registration. He will just sack me and take on another, more obedient worker ... ”

(Excerpt from an interview with an irregular migrant)

This problem could be called that of the “*shadow host party*”. To resolve this problem, that is, bring the real host party out of the “*shadows*” (be it the employer or house-owner), it is necessary, first of all, to conduct awareness-raising activities (information campaigns in the mass-media on the consequences of “*shadow*” employment and housing), with simultaneous adjustment of control mechanisms.

A mechanism to redress the rights of migrants should also be established. A migrant employee should be able to require that the employer put him on the migration register and formalise their labour relations (sign an employment contract); the migrant should also be empowered to demand that the landlord formalise a residence registration. In the event of failure by any of the parties to observe these requirements, the party whose rights have been infringed (migrant in this case), should be able to plead to a competent body for redress. None of the migrants interviewed had any idea where they could refer to in such a situation. Cases of non-observance of migrants’ rights in terms of refusal to register them and sign a contract are quite numerous. Such cases should be defined as violations of migrants’ rights. Direct complaints to a court of justice would hardly be effective in such a situation. A special structure needs to be established to consider complaints by migrants and other parties, effectively protect and redress their rights. This mechanism should be transparent and migrants should be aware of it.

Short-term stay prolongation. The normal period of a short-term registration, the purpose for which is to find a job, should not exceed 90 days; it can be prolonged for the duration of the employment contract, but for no more than one year from entry into the Russian Federation. The legislation also provides the government of the Russian Federation with the power to cut the duration of the temporary stay or increase it up to 180 days.

According to surveys, for many migrants labour migration is a long-term strategy; they stay in Russia for the greater part of the year.

Distribution of labour migrants according to duration of stay in the Russian Federation, %

About 3 months inclusive	5
4–6 months	24
7–12 months	37
13–24 months	10
25–36 months	12
Cannot specify term	12

Source: IOM sample survey, 2006 (published in: Prevention and combating of slavery and human trafficking in the Russian Federation. Final report by the research team of the EC project, carrying out by the IOM Office in the Russian Federation. Moscow, 2008, page 41).

The statutory prolongation of the term of temporary residence (in the event of an employment contract) beyond the 90-day period requires participation by the host party, which, as has been shown above, entails difficulties. The majority of migrants surveyed had experienced problems in trying to prolong their temporary stay. Quite a few migrants reported that they had been compelled to leave the country in order to come back and renew their temporary stay.

To avoid these inconveniences, which, in fact, result in irregularity, it is recommended that the procedure for prolongation of temporary stay is simplified. That is, the FMS is officially

notified of the required employment contract without the need for a personal application and presence of the migrant worker and employer.

Let us focus on regularization avenues for migrants who are not registered and are therefore staying irregularly. The reasons for non-registration are described above:

- the “three-day rule “ being so difficult to observe;
- absence of a host party or the latter’s refusal to register the migrant;
- the registration coupon is lost and the duplicate has not been obtained;
- the permitted term of temporary stay is overrun.

All these reasons, as interviewed migrants confirmed, are quite widespread. Regularization avenues for such migrants are similar to those for migrants lacking a migration card (see above). Having paid the penalty of two thousand roubles, the migrant can obtain a migration card and temporary stay registration, and then submit an application for a work permit. The state guarantees not to apply other sanctions (detention, arrest, deportation). As mentioned above, though a legal opportunity for regularization does exist in this case, if, for the specified reasons, this is not attained, no essential effect is exerted on the number and situation of irregular migrants.

Temporary residence permit. The migrant can also obtain a temporary residence permit allowing him to stay in the country for a longer period — up to three years. Many migrants, as interviews confirm, are eager to achieve such status. This interest is explained by several factors. In the first instance, the time expiration of the temporary stay expires when the migrant is obliged to leave the country, and then re-enter and start a new term is the most “painful” one from the personal perspective. It understandably has an adverse effect on his/her employment and earnings: the migrant might lose his/her job in the meantime and not get the back pay he or she had earned. Secondly, migrants interested in staying in the Russian Federation in the long term or who plan to settle here permanently would like to get a permanent residence permit, but they can do so only after holding a temporary residence permit.

According to an IOM survey of 2006, one third of labour migrants would like to live permanently in Russia and some were intending to stay in Russia for a long period of time. Less than 40 percent of migrants said they wished to earn money as soon as possible and return home.

Source: IOM survey of labour migration, 2006. The EC project “Prevention of human trafficking in the Russian Federation”.

In addition, migrants who worked until 2007 on retail trade in markets and other commercial facilities (not regular shops) as salesmen, cashiers and helpers, were deprived of that right in April 2007 under a Government decree. In 2008, such restrictions were expanded to cover “sports activities” (OKVED code 92.62), thereby reducing the permitted share of foreigners to 50 percent for the period of January 1 — April 1, 2008, and to 25 percent for the period of April 1 — December 31, 2008 (see below for details)¹⁷. As interviews in this study show, to keep their jobs, many migrants had to contact the FMS or “shadow” brokers in order to obtain a permanent residence permit granting them the right to work on similar terms as Russian citizens, including in the trade sector, which is closed for migrants with temporary status.

Yet settling all the necessary formalities (obtaining a temporary residence stamp in the personal identity document) involves a number of documents and obstacles (limited quotas, registration with the tax service, the obligation to confirm one’s residence annually, presenting

¹⁷ Resolution of the Government of the Russian Federation of November 15, 2006 No. 683 “On establishment of the permitted proportion of foreign workers employed by economic entities operating in the sphere of retail trade on the territory of the Russian Federation in 2007” and Resolution of the Government of the Russian Federation of December 29, 2007, No. 1003 “On establishment of permitted proportion of foreign workers employed by economic entities, operating in the spheres of retail trade and sports on the territory of the Russian Federation in 2008”.

an income certificate, copy of the tax declaration, abuses on the part of local authorities, (who often insist on receiving other papers not required by law, and numerous pretexts permitting authorities to reject the application). At the same time, some migrants are deterred by the need to pay the 1,000 rouble levy and wait for two months while their application for a temporary residence permit is considered.

For migrants coming to stay for more than 90 days and obtaining a temporary residence permit, the current legislation establishes a registration procedure that is somewhat more complicated than that for temporary stay. As in the case of temporary stay, the host party has to come in person to an FMS office to prolong it.

Many migrants, being intimidated by the difficulties of going through all the formalities needed to obtain a temporary residence permit, contact various middlemen who offer to do it for a certain payment. Such services are offered by many firms rendering services to migrants. Alongside the officially operating registered organizations, there are quite a few “shadow” intermediaries who often use corruption channels or deliver forged documents to migrants.

Despite these problems, the new legislation regulating temporary stay and residence of foreign citizens has had an impact: in 2007, the number of registrations greatly increased over the previous year.

Sanctions for violation of registration regulations

Foreign citizens, and stateless persons who have not observed the rules of residence in the Russian Federation, could be fined 2,000–5,000 roubles and expelled (or not expelled) from the Russian Federation in conformity with the administrative procedures.

Theoretically, within the narrow “gateway” left in the current legislation for regularization of migrants who stay irregularly on Russian territory (with expired temporary stay, without a migration card, without registration), having paid the fine, the migrant could regularize his/her stay, — that is, obtain a migration card and registration.

First of all, however, this procedure is not always observed. Secondly, effective regularization can happen when the reason that made the migrant abstain from registration disappears; for example, a host party has been found and is prepared to register the migrant. Even after paying the fine, the migrant has little chance of really regularizing his/her status. Infringements relating to the migration regime frequently, therefore, result in “relapses”, which are fraught with the risk of deportation and, according to recent laws, a five year ban on entry into the country¹⁸.

When I had no registration, I had to pay a fine several times a week. Then I bought a registration.

(Excerpt from an interview with an irregular migrant)

Administrative liability is also established for a host party that fails to register the migrant: a fine of 2,000–4,000 roubles is imposed on citizens, 40,000–50,000 rbls on officials, 40,000–50,000 rbls on legal entities. Legal entities have to pay this fine for each foreign citizen or stateless person. Although such heavy fines have undoubtedly helped reduce irregular migration somewhat, such repressive measures alone, as interviews with migrants have confirmed, cannot solve the problem. Employers and owners of apartments leased to migrants still refuse to register their stay. The situation will change if the Government provides migrants with an alternative in the form of rented housing with guaranteed registration, and establishes a mechanism for collecting information on dishonest employers and house-owners. For the time being, such a mechanism exists only for employers, who are required to inform the FMS of migrants not observing the law.

¹⁸ Federal Law Draft newly introduced to the State Duma of the Russian Federation (<http://www.akdi.ru/gd/PROEKT/097509GD.SHTM>)

2.3. Work permits for CIS migrants

The legislative amendments of 2007 have changed significantly the conditions for employment of foreign labour in the Russian Federation and their situation on the labour market¹⁹. The current legislation has freed the employer from the obligation to obtain permission to employ foreign workers, and workers from “visa-free” CIS countries of the requirement to have a work permit. Now the latter are to regularize their status entirely by themselves, in contrast to migrants arriving from other countries. Now the migrant himself must report to the local FMS office to get a work permit. When hiring a foreign citizen, the employer is now obliged only to check the work permit. Thus, the new legislation has made migrants equal parties to legal relations relating to their employment status.

These innovations have dealt a serious blow to the irregular employment of migrants. Since 2007, the number of work permits issued to migrants has more than doubled over 2006. Experts say that this growth was due not to a greater influx of migrants but to a changed ratio between regular and irregular employment in favour of the former. In the middle of the decade, the share of regular migrants was estimated at 5–10 percent²⁰, but now it is nearer to one third, though this is, of course, still insufficient.

The main concept incorporated in the new migration legislation has been shown to be correct, and we will now consider specific procedures for employment regularization for migrants in the Russian Federation, and the problems and obstacles reducing its effectiveness. These include barriers left over from the former period and new ones erected in the wake of the new legislation.

Simplification of employment authorisation procedures. Under the current legislation²¹, the procedure for obtaining a work permit is quite simple: after submitting an application to the FMS, the migrant receives a work permit within ten days. The procedure does not require the migrant to have an employment contract or know the name of a specific employer. The application to the FMS is to be accompanied by only a personal identity document, migration card, and a receipt for payment of the state fee (1,000 roubles). Thus, a migrant from a CIS country can, immediately upon his arrival, submit an application for a work permit and start seeking a job while waiting for the outcome. The application to the FMS can be filed not only by the migrant himself, but also by an employer, intermediary agency, or other authorised representative of the migrant in possession of a notarised power of attorney.

The current (relatively uncomplicated) procedure for the employment authorisation for newly arrived migrants is thus a result of the fact that it involves a limited set of requisite documents, short delays for processing the application, an affordable fee, and the possibility of using the services of an intermediary to register the documents. All this greatly facilitated regular employment of foreign nationals in the Russian Federation in 2007.

Migration quota mechanism. The legislation established a quota mechanism to regulate employment of foreign labour. The quota is fixed annually by the Government of the Russian Federation separately for “visa” and “visa-free” countries²². In 2007, the quota for migrants

¹⁹ Federal law of the Russian Federation of July 18, 2006. No. 110-FZ “On amendments to the Federal law “On the legal status of foreign citizens in the Russian Federation” and on recognizing as invalid certain provisions of the Federal law “On amendments and additions to some acts of the Russian Federation”.

²⁰ E. Tyuryukanova, “About the impact of migration on the labour market” in “Domestic notes”, No. 37 (4), 2007, page 59.

²¹ Federal law No. 115 of 25.07.2002 “On the legal status of foreign citizens in the Russian Federation” (in the collection of federal laws of 30.06.2003, No. 86-FZ, of 11.11.2003, No. 141-FZ, of 22.08.2004, No. 122-FZ, of 02.11.2004, No. 127-FZ, of 18.07.2006, No. 110-FZ (version of. 06.01.2007), of 18.07.2006, No. 121-FZ, of 29.12.2006, No. 258-FZ).

²² Resolution of the Government of the Russian Federation of December 22, 2006, No. 783 “On the procedure for evaluation by state executive authorities of the need for employment of foreign workers and fixing of for on labour activity by foreign citizens in the Russian Federation”.

from visa-free CIS countries was six million permits and it was not restrictive in character in the sense that it allowed work permits to be issued to all applicants (the 2007 quota for non-CIS applicants was set at 318,752). In 2008, the quota has been cut by more than two-thirds²³ and set at 1,155,941 for the CIS and 672,304 for non-CIS countries²⁴, in line with the estimated need for foreign labour. How effectively this quota will regulate, — that is, restrict migration — will become clear at the end of 2008. The results of the first four months of 2008 show that the quota is insufficient (even considering the opportunity granted for updating it): in many regions of the RF, by April it was already virtually exhausted. The 2008 quota is evidently much lower than the number of work permits in the previous year and is, in fact, equal to the figure for year 2006, when the former legislation was in force and the majority of labour migrants found themselves in the “shadow” or irregular zone.

The ILO has commissioned a study alongside this one to look at current methods for assessing the demand for foreign labour in the Russian Federation, with a view to making improvements. The quota mechanism should not constitute a brake on regularization of migrants for whom there is work in Russia. Such migrants are unlikely to leave Russia and will continue to work irregularly (without work permits) for “shadow” employers. This will result in a bigger proportion of irregular migrant employment, and stimulate development of the shadow economic sector. At the same time, for the longer term, steps should be taken to reduce the over-dependence on foreign labour.

In addition, authorisation of migrants’ employment is held back by the undeveloped migration infrastructure. It is often easier for migrants and employers to find an unofficial intermediary than apply for assistance to official structures. Moreover, it is often difficult for a migrant to distinguish between an officially operating firm and a “shadow” one. Firms rendering services to migrants should be monitored. Another question requiring further study is the possible accreditation of such firms with the FMS or a similar mechanism for controlling this activity. Development of official migration services is a viable alternative to “shadow” dealings in this sector. By turning to official intermediaries, migrants take the first step in regularizing their status (see below for more detail).

Another problem is the situation when “shadow” employers gain from keeping migrants in an irregular position, so they preserve it artificially, showing a demand for such informal work.

Sanctions for irregular work. Fines are imposed that are similar to those for irregular stay. The employment of a foreign citizen in the Russian Federation without a work permit is subject to a fine of 2,000 to 5,000 roubles, with administrative expulsion or without it from the Russian Federation (Administrative Code of the Russian Federation, Clause 18.10).

The engagement of a foreign citizen without a work permit to work in the Russian Federation can entail a fine for an individual employer of from 2,000 to 5,000 roubles; for officials — from 25,000 to 50,000 roubles; for an organization — from 250,000 to 800,000 roubles or administrative suspension of activities for 90 days (Administrative Code of the Russian Federation, Clause 18.15).

After paying the fine for irregular employment (without a work permit), migrants (if they are not expelled for repeated violations) can apply for a work permit in the usual manner. However the data provided in the application will, however, be checked and a problem might emerge for those who have violated the law in the past, resulting in denial of a work permit.

²³ Resolution of the Government of the Russian Federation of December 29, 2007, No. 984 “On evaluating the need for employment in the Russian Federation of foreign workers in 2008”. According to this act, in 2008 the need for foreign workers as a whole in the Russian Federation was 1 828 245 workers, including 672 304 entry permits, and 1 155 941 who did not need any visa (visa-free provision).

²⁴ Resolution of the Government of the Russian Federation of December 29, 2007, No. 982 “On approval of the quota for work permits to be issued to foreign citizens in 2008”.

3. Awareness of the new legislation, impact on migrant workers and employers and institutional capacity for implementing the legislation

3.1. Awareness, information and services

Surveys have demonstrated that the majority of migrants have a general idea about the main requirements of the Russian migration legislation but that this knowledge is very general and vague.

I know that I have to register, apply for a work permit...

I know that I have to come to the migration service with my passport and migratsionka [migration card] and, maybe, with my master [employer] ...

Well, I know that it is necessary to obtain a plastic card [migration card] and that the employer has to register me; but what good is this knowledge if it has nothing to do with reality ...

(Excerpts from interviews with irregular migrants)

Virtually no migrants know where they can apply for assistance, apart from consular establishments (and just in the event of a lost passport or similar occasions). Below are the skeptical migrants' answers to the question "Where would you apply if the host party refused to register you or the employer refused to sign a contract with you?"

Nowhere (the most frequent answer)

Will go to a firm and buy one

Information reached migrants mostly from informal channels — hearsay, from friends and acquaintances. Very few migrants contacted an official body for advice or read specialised publications (laws, migrants' guides, etc.). Informing migrants about the details of the migration legislation and organizations where they might find information, or get advice, is the first step towards successful regularization.

Many migrants think that it is less trouble to approach an intermediary agent to settle the formalities of registration, work permit issue, submission of the necessary documents, etc., than to do it by themselves. There are many reasons for this: shortage of time (many migrants have already a job or work overtime on a second casual job); inadequate knowledge of the Russian language; lack of confidence in communicating with official bodies, etc.

According to an IOM survey conducted in 2006, on average, 15 percent of the labour migrants working in Russia today have a very poor knowledge of Russian. In different regions, this indicator varies from 5 to 20 percent and continues to rise over time. The cultural gap between the local population and migrants is widening.

Source: IOM survey, 2007.

So there is no doubt that such intermediary and other services offered by the so-called "migration infrastructure" are much in demand, as studies have demonstrated.

Share of migrants and employers in need of various intermediary services, %

Services to migrants	Migrants in need of such services	Services for employers	Employers in need of such services
Employment assistance services	66	State services for employment and placing of migrant workforce	39
Housing and registration assistance services	52	Regular private employment and placement services for migrant workers	22
Information services	46	Registration services	54
Legal consultancy services	43	Housing agencies	33
Affordable health care services	27	Legal consultancy services on employment of foreign workers	30
Short-term vocational training courses	16	Services for monitoring observance of employment contract terms	7
More convenient bank remittance services	15	Legal services to protect employers' rights	13
Russian courses	15		
Russian culture courses	10		

Source: IOM survey, 2006 (within the framework of the IOM-ODIHR/OSCE Project "Information support for development of the Programme for regularization (immigration amnesty) of labour migrants in the Russian Federation")

With reference to the subject of the present review, it should be asked how much these services could help to increase the share of regular migrants and make regularization more efficient. This would include regularization of migrants' employment. In our opinion, development of the migration infrastructure is a way towards a more effective regularization, including by means of both official procedures for newly arrived migrants and regularization of those already staying on an irregular basis, and those who are working. The more advanced the official migration infrastructure, the less attractive to migrants and employers will be the idea of dealing with "shadow" intermediaries. Such an infrastructure should offer a wide range of services in various forms, targeting specific groups of migrants. Interviews with migrants have demonstrated the high demand for such services, but of different kinds. Some agree to pay for the services, others not; some want to get the whole service package at once, others need only information; some prefer to deal with an intermediary, others would like to consult an adviser, etc.

I would agree to pay money to an agency that finds me a job, an employer and housing, regularizes my documents. It would be still better if this could be done before my arrival, (migrant from Kyrgyzstan).

I can do it all myself: talk to the employer, fill in the documents, rent a room. I need only information: where to find a job, a rented room or a hostel, where to hand in the documents, etc. Well, yes, if there were access to such databases... I'd even be prepared to pay for such information, but not too much. But the State could offer it for free, since it has an interest in us working where it needs people (migrant from Tajikistan).

When I arrived, I did not know where to go. I passed the night at the station. Then, in about three days, I settled down at a place where other people just like me, whom I met at the station, were living. They were here for the third time and they knew where they would work. Then I found a job, filled out the documents. It's easier to find work than housing, which is important. As it is, we live like pigs. We have the registration, yet we still live like pigs. When I came here, I needed a place to sleep and leave my things safely — a cheap bed for the first few days, until I found work, would have been enough.

There is nobody to answer your questions; information is difficult to get. You must wait in a long line at the migration office, or they say: "Look up at the wall, all the information is there in writing", but you cannot make it out. So one has to deal with "sharks".

(Excerpts from interviews with irregular migrants)

Below is a list of the main services migrants and employers need in the initial stages of migration and regularization:

- Information and reference/consulting services (in the form of printed materials, information campaigns in the mass media, personal consultations, etc.);
- Completion of various documents (filling in of forms, applications, etc.);
- Intermediary services in seeking work (employment);
- Intermediary services in seeking accommodation;
- Legal services and assistance in protecting rights.

In addition, other various services are also required: social, cultural, financial, insurance, etc.

Efficient organizational forms need to be urgently designed for the various services. The services can be provided by state authorities (employment and migration departments, migration centres, specially created for the purpose, etc.), and private organizations (employment and realty agencies, other intermediary firms), and also by public organizations. They could provide the whole range of services (for example, migration centres), or specialised ones (selection of personnel or renting of accommodation). Such structures already exist in Russia today, both state, and private ones. The "Sverdlovsk regional migration centre" functions in Ekaterinburg²⁵. Moscow hosts an International association "Labour migration" (MATM); its members include private agencies concerned with labour migration from Russia and into Russia²⁶; and an Association of personnel selection consultants. Their activities contribute to creation of a regulated migrant labour market in the Russian Federation.

Special efforts need to be made to have the migration infrastructure (which means provision of the above-listed services) actually functioning and effectively addressing the problem of regularization. Firstly, these services (that is, their providers) must be officially established, not "shadow" ones. That is, they must be registered, keep correct records and accounts, and be subject to state control in accordance with the established procedures. Some experts hold the view that private organizations rendering such services (for example, employment agencies), should have a state licence in order to prevent infringements and make the supervision more effective. The ILO Convention (181) on private employment agencies and ILO's Guide to the private employment agencies (regulation, monitoring and enforcement) provide guidelines on the licensing of such agencies as well as the issue of fees.

Secondly, the activities of such organizations (be it State or private ones) must be so organised so that they contribute to regularization of the situation of irregular migrants. For example, the agencies providing various services (for example, intermediary employment services) could offer assistance to irregular migrants in passing through the regularization procedure. These agencies could also monitor the migrants' situation subsequently: conclusion of employment contracts, registration by employers, living conditions, etc. Such a practice already exists in Russia. The employment agency "TS consult" in Krasnoyarsk²⁷ and the public organization "Migration Integration Development" not only bring together employers and workers, but also assist in the conclusion of employment contracts ensuring both parties' rights.

Some experts propose establishing intermediary agencies offering a special "host party" service. There is also a proposal to license such intermediary agencies that could register migrants at their own legal address. This is a complex issue. On the one hand, it seems to be a reasonable proposition, as many migrants could regularize their residence through such agencies. Yet who would be the most likely consumers of such services? Primarily, those migrants who are

²⁵ <http://migraciaural.ru/>

²⁶ <http://www.ialm.ru/>

²⁷ <http://www.apsc.ru/>

“non-competitive” on the labour market and cannot find permanent employment, who earn their living doing casual jobs and are sometimes completely unemployed; second, “shadow” employers and house-owners would most likely use these agencies to dodge the obligation to register (“disclose”) migrants and make known their own address. Thus, such a service could encourage “shadow” relations on the labour and housing markets and cover up unlawful participants on these markets. The issue of the terms of reference of intermediary agencies providing registration services to migrants needs, therefore, to be explored still further. Mediation as such in the sphere of migration should, however, be developed. The main service provided by such agencies should be to find an employer and housing for migrants, assist in registration of documents, etc., rather than registration at the agency’s address.

3.2. Migrants’ rights

Many surveys in the last few years have demonstrated that labour and other rights of many migrants are often violated²⁸. This applies to both “regular” and “irregular” migrants.

Comparative characteristics of regular and irregular migrants, %

Characteristics of migrants	Fully Regular (n=223)	Fully Irregular (n=187)
Do not know official channels to find a job in Russia, %	36	56
Has a written contract (% of those who have an employer), %	51	3
Paid ex-payroll (“cash in envelope”), %	52	90
Working hours per week (hours)	61	64
Remuneration per month (USD)	499	336
Medical insurance	50	6
Employer can fire at will	40	76
Passport is kept by employer / used for stop the migrant leaving	8 / 8	27 / 19
Compulsion to work overtime without appropriate remuneration	24	43
Compulsion to do part of the work without remuneration	13	17
Compulsion to do all the work without remuneration	6	4
Compulsion to work too hard	24	29
Compulsion to work under inhuman conditions (cold, dirty, unhealthy) (% of those with an employer)	22	14
Restraints on movement (no possibility to move freely within the city or district)	7	19
Complete isolation	9	9
Physical violence (beating, etc.)	6	11
Psychological violence, threats, blackmail, deception, etc.	10	23
Know organizations to apply to for assistance	15	8
Addressed any organization for assistance	9	6
Would address police if found to be under conditions of slavery	38	9

* Fully regular — those who are registered and have a work permit. Fully irregular — those who are not registered and have no work permit.

Source: IOM sample survey, 2006 (published in: **Prevention and combating of slavery and human trafficking in the Russian Federation**. Final report by the research team of the EC project, carried out by the IOM Office in the Russian Federation. Moscow, 2008, pages 54–55).

²⁸ Elena Tyuryukanova. *Forced Labour in the Russian Federation Today: Irregular Migration and Trafficking in Human Beings*. International Labour Organization, Geneva, 2006. Pages 115–119.

A better mechanism should be created for redressing migrants' rights. A migrant employed in violation of the current legislation (no contract or substandard terms, refusal by the employer to register the migrant, etc.) should have access to an appropriate body to protect his or her rights (conclude a contract, become registered, etc.). None of the migrant interviewees had any idea where they could apply in such a situation.

As stated above, such infringements of migrants' rights are widespread. In view of this, a special structure should be set up for considering migrants' complaints, acting as an effective mechanism for redressing their rights. Such a structure could be established under FMS auspices and could not only help migrants in the event of infringement of their rights but also play a preventive role. Being aware of the existence of such a body, "shadow" employers and house-owners would not feel they can get away without sanctions, as is the case today.

The current legislation provides a mechanism for collecting information about infringements of employment contracts by migrants, including premature termination of the contract. Employers are obliged to inform the local FMS office of such cases. They are also obliged to inform the FMS or a competent security body if migrants "disappear" — leave their workplace and residence without prior notice. Many employers complain that they have spent time and money registering a migrant, while he can quit at any time and go to another employer, which happens quite often (see the conclusions to the discussion with employer focus-groups below).

...With the new legislation in force, it is now certainly easier — no need to go and settle all the formalities. But it also means less control. I register the migrant, get him the plastic card, spend my time and money. And then, when everything is in order, he runs away to work for a private house-owner who pays more. So I have to keep his passport, nothing else works...

(From an interview with the chief of a construction firm)

Complaints collected by the FMS concern "miscreant migrants", who will then be put on "the black list" and refused a work permit in future. Complaints by migrants to the FMS in respect of employers are not provided for.

The issues of regularization and protection of rights are closely related. Creation of an effective mechanism (including indemnification schemes) for redressing the rights of migrants and other parties (employers, intermediaries) will enhance the incentives to regularization of migrants, as it will primarily be regular migrants that have an opportunity to protect their rights effectively, while it will not be as easy for irregular migrants. Today, neither regular nor irregular migrants have access to an effective mechanism protecting their rights. Employers infringing labour rights of migrants — both regular and irregular — mostly do so with impunity. So the incentive for regularization is undermined.

3.3. Employers' perspective

To collect information on employers' behaviour and attitudes, this study used the method of focus-group discussions with employers who employ migrant labour. Three focus-groups were organised (two in Moscow and one in Volgograd) in January-February 2007 with the assistance of Russia's leading sociological agency "Levada-Centre". The participants included individual employers from sectors with a high concentration of migrants: construction, trade, services, transport and manufacturing, as well as managers of companies (owners, directors and personnel managers, or their deputies) employing migrants. The participants represented businesses of various sizes — small, medium and big companies. The list of participants and programmes of focus-groups are attached in the Appendix.

In addition, a number of employers in the Tambov region were interviewed by telephone in order to assess the situation in the agricultural sector.

In this section, we will look at the issue of migrants' rights from the employers' perspective, which is often ignored in various studies and surveys. On the one hand, it is the employers

who infringe migrants' rights, primarily labour rights. On the other hand, in many labour conflicts, employers are as much interested in an impartial investigation and resolution as are the migrant workers.

- *Are your workers dissatisfied with something, for example, the working conditions?*
- *If they are, let them write an application and off they go.*

(Excerpts from employers' focus-group discussion)

This is the most common approach taken by employers to this issue. As a rule, employers tend to get rid of "unruly" foreign workers.

The excerpts below demonstrate that failure to observe migrants' rights is due to the behaviour not only of employers but also migrants. According to some key informants, attempts by migrants to protect their own rights are but few, even among officially registered migrant workers. Their aim is to earn money and attempts to protect their rights, even when this is possible, means loss of time and money.

...In general they do not demand too much.

...Serious labour conflicts between workers and employers are a rare thing. Because migrants prefer to keep quiet and not start a conflict.

...There no examples of migrants fighting for their rights; but when their community reaches a critical mass, they will dictate both prices and quality.

(Excerpts from employers' focus-group discussion)

Nevertheless, employers have identified a few models for resolving conflicts between workers and employers with the assistance of a third party:

- Reference to the ethnic community, consulate
- Reference to a human rights NGO (for example, for migrants from Tajikistan)

The workers worked for some time and were to get paid. But they did nothing, I proved it, and they were not paid. They contacted their community and their guys came to wrest the payment. I had to call in my boys.

Every ethnic community has a sort of security service, charged with wresting the money. Particularly strong are the Armenian and Azerbaijani diaspora.

Every Tajik (I am a frequent guest at "the House of nationalities" and I know that similar situations also happen elsewhere) if he has been refused a job, reports to a relevant organization or consulate... And this organization will terrorize you and complain everywhere — why didn't you take on the man from Tajikistan? They supply him with all the documents and will do their best to make you take him on.

(Excerpts from employers' focus-group discussion)

- Filing a lawsuit (rare)

A Ukrainian girl was officially employed on a salary of 30 thousand roubles. She was dismissed. She was pregnant. She managed to hire a lawyer and her claim was upheld — she was paid the salary for the period of her pregnancy.

A worker fell to his death at a construction site; they just carried away the body so that nobody would see it. His family also filed a lawsuit. The investigation took place, but nobody was found responsible.

The manager in my shop (the respondent was the owner of the shop — E.T.) was from Ukraine and there was always a cash shortfall in the shop, and she always brought lawsuits against salesgirls. But it seems she herself was stealing the cash.

(Excerpts from employers' focus-group discussion)

As we can see, the majority of models for protection of migrants' rights are of non-judicial nature. Ethnic communities and NGOs tend to apply extra-judicial methods, probably considering them more efficient. Legal means of protecting migrants' interests are not common in practice.

The employers could not cite a single case of migrants addressing a trades union organization to protect their rights, though great potential lies in this area, though it is possible in theory. For example, there exists a trades union of construction workers with a department for migrants. It is particularly active in Moscow.

Application for next year quotas

Each year, before the first of May, employers have to submit an *application on the required foreign labour* that he/she wishes to employ in the coming year, and specify the number of foreign workers needed. The quota for the coming year is formed on the basis of these applications demonstrating the so-called "shown demand for labour migrants"²⁹.

According to Russian law, national workers have priority in filling vacant workplaces. So, as a rule, employers' applications are reviewed for "relevance". This procedure takes place in Russian regions during special meetings of the Local Interagency Commissions on Employing Foreign Workers. In some cases, the employer has to prove it has good reasons to employ foreigners, and that local workers suitable for the vacant posts are not available. If the lack of local workers cannot be proved (for example, by advertising the vacancy or declaring it at state or private job agencies as evidence), the application might be refused or the required quota cut.

In fact, the link between applications, and the actual recruiting and employment of workers, has not yet been formally established. Those employers who have not declared their need for migrant workers in advance can then hire them on the general basis. So, many employers prefer not to participate in the "application campaign" at all, for a number of reasons (to save time, to avoid corruption and bribery, to save money, to remain in the "shadows", etc.).

We tried to submit an application to Rostrud and got only a headache: vacancy advertisements in newspapers, registration with the state employment service, then inspections from everywhere...

... Until we applied officially, there were no inspections. Since we made an enquiry, there has been no end to them... for two years. A funny thing happened once — MoI economic crime division inspectors came and seized all the documents. They were just leaving when another group of inspectors arrive, and they naturally were after our money too. So the first ones were going out and the new arrivals were coming in — they looked at each other and then started laughing like mad.

(Excerpts from employers' focus-group discussion)

The majority of employers gave a positive assessment of the new legislative provisions, saying they made their life much easier. Yet, despite the serious shift in the legislation on migration towards liberalization, in fact any contact between employers and authorities involves means red tape and, often, under-the-counter deals. The first such contact, in chronological order, concerns the application for the required foreign labour that employers submit to Rostrud.

...When I came to arrange this quota thing I had 150 men for this year. You know how many officials I had to persuade? I had to get 18 signatures. Everyone wants something for himself. Well, I had all the signatures, and they asked — how much are you prepared to pay for it now?

(Excerpts from employers' focus-group discussion)

²⁹ Decree of the Government of the Russian Federation, December 22, 2006. No. 783, Moscow, "On the procedure for executive state authorities to determine the need for employment of foreign workers and form quotas for performance of labour activity by foreign citizens in the Russian Federation".

4. Employers' sanctions as an instrument for combating irregular migration

Employers are the second party (after migrants) in the migration interaction; they are party to a number of problems related to regularization of migrant workers. This section reviews the issue of sanctions on employers and their influence on the issue of irregular migration.

Since 2007, the role of employers in the process of regularization of CIS migrants has changed significantly. The new legislation released the employer from the obligation to seek permission to employ foreign citizens and obtain work permits for migrants. The responsibility for authorising employment of CIS migrants now rests fully with the migrants.

Statutory participation by employers in labour migration regulation procedures for migrants from CIS countries can include the following:

- 1) The law demands that employers submit, before the first of May, an application for the employment of migrant workers in the coming year;
- 2) When hiring a worker, the employer must ensure that the migrant has a work permit (the employer cannot employ a foreign worker that does not possess such a permit (plastic card));
- 3) The employer must conclude an employment or civil law contract with the worker in writing;
- 4) Individual employers (private individuals) who have not been registered as individual entrepreneurs must register the contract with the local government bodies, and withdraw the registration if the contract is annulled;
- 5) When the employer hires a foreign worker and signs an employment contract with the worker, the employer must duly notify the territorial bodies of the FMS and Rostrud to this effect;
- 6) An the employer who provides the migrant with temporary lodging obliged to register the migrant at this address or the legal address of the firm.

Moreover, the employer can participate (but is not obliged to do so, as in the above cases) in the following procedures relating to labour migrants: make sure that the migrant has a certificate of vocational training and qualification; contact official bodies to verify the migrant's diplomas and certificates; turn to an intermediary agency for registration of the requisite documents, etc.

For infringement of some of these obligations, employers may be subject to administrative sanctions (see Appendix 1). Below, we discuss these sanctions and analyse their effectiveness in accordance with the obligations presented above.

Sanctions for employing irregular migrants

An employer cannot employ an irregular foreign worker that has no work permit (plastic card). When hiring the worker, the employer must check that the migrant has this permit.

The legislation of the Russian Federation provides for stiff sanctions against employers that fail to observe this regulation.

Employment of a foreign citizen without a work permit in the Russian Federation can entail imposition of a fine on an individual employer of from 2,000 to 5,000 roubles; for officials — from 25,000 to 50,000 roubles; for an organization — from 250,000 to 800,000 roubles or administrative suspension of activities for 90 days. These sanctions are for each irregular worker hired. (Administrative Code of the Russian Federation, Clause 18.15 (part 1)).

According to expert estimates, such sanctions can bankrupt a big firm. The state authorities (MoI and FMS) are increasing the number of inspections in 2008 as compared to 2007.

Sanctions were increased substantially in 2007. Previous sanctions were only a tenth of the 2007 level (the maximum fine was 8,000 roubles for hiring any number of irregular migrants).

In Moscow, the penalties imposed on employers for using irregular migrants in the first quarter of 2008 has exceeded 329 million roubles, while the respective figures for the whole of 2007 was about 73 million roubles. From January to March 2008, about ten thousand employers were fined, while, for all last year, they numbered about six thousand. These fines have brought more than 3 billion roubles into the budget of the Russian Federation in just the first few months of 2008.

In the course of the group discussions, many employers mentioned that the new sanctions encourage them to observe all the regulations. But they also mentioned that it is virtually impossible to do so, because of lots of “unstatutory” relations with authorities. The employers complained about the number of different inspections and pressure on the part of various authorities. As a result of such inspections, however, they again mentioned “unstatutory” relations with authorities, and not official sanctions.

... There were some 100 workers at our site. And then a special police squad (OMON) arrives and takes them all away. What should I do, whom to call? I go to the one who took them away. As usual, you go down the chain — they all know. They tell me: pay money. And they want a pretty penny. I start thinking — should I agree or leave it as it is. Then I come and take this worker, and that one and that, let the rest fend for themselves. So I buy out four workers, and as for the rest, all of them will be released anyway in the long run. That’s the way we do business here.

(Excerpts from employers’ focus-group discussion)

Employment contract

The employer must sign an employment labour or civil law contract with the worker in writing. Refusal to sign a contract is qualified as a violation of the labour legislation.

According to clause 5.27 of the Administrative Code of the Russian Federation, infringement of the labour legislation can entail imposition of an administrative penalty on officials of from 500 up to 5,000 roubles. Infringement of the same rules by a person previously subjected administrative punishment for a similar offence entails causes disqualification for a term of from 1 to 3 years.

This provision is little applied to labour migrants. In general, employers, on the basis of their own experience, give different estimates of the level of formal employment among foreign workers, yet these assessments do not go above 20 percent.

...Perhaps only 20 percent of migrant workers have all their papers correct in the legal sense... (mechanical engineering).

...No more than 5 percent (transport).

... In general, no one settles the formalities through official channels. The work done and payment received, they (the workers) are just gone. As it happens, this is to everybody’s advantage. And if you do it officially, then 15 inspectors come to make checks — police, tax, fire brigade, medical safety service. (Employer in construction)

(Excerpts from employers’ focus-group discussion)

Discussions with employers have helped identify the main models by which foreign workers are hired:

- Signing an employment contract and social package (rare);
- Signing an employment contract, but without the social package (typical of big organizations — big trading networks, transport companies, industrial enterprises, etc.);

- Verbal contractual relations (majority of employers).

Quite often, managers have contracts only with some employees, and produce these in the event of a visit by a labour inspector, thereby hiding the other irregular workers.

...We do not make arrangements for all: five out of thirty workers have contracts — just in case of an inspection (small manufacturing enterprise)

(Excerpts from employers' focus-group discussion)

No employer during the focus-group discussion mentioned sanctions for refusal to sign a contract with labour migrants.

Notification about engaging a foreign worker

When the employer hires a foreign worker and signs an employment contract with the worker, they must duly notify the territorial bodies of the FMS and Rostrud to this effect.

Sanctions here are similar to those for hiring irregular migrants (without a work permit). According to clause 18.16 of the Administrative Code of the Russian Federation, refusal to submit notification of employment of a foreign worker to the migration and labour authorities can entail the imposition of an administrative penalty on an individual of from two thousand up to five thousand roubles; on legal entities — from thirty five thousand up to fifty thousand roubles; on an organization — from four hundred thousand up to eight hundred thousand roubles, or suspension of activities for about ninety days.

It is evident that refusal to send a notification is an indication that the migrant was employed informally, without a contract being signed. Lack of notification therefore indirectly testifies to the absence of a contract, so the above sanction may be considered as a penalty for refusing to conclude a contract.

According to statistical data for 2007, only 40–45 percent of employers sent notification in Russia as a whole. In Moscow, the FMS stated that only 30 percent of migrants in Moscow occupied their job in accordance with the official procedure and had a contract³⁰.

Lodging and registration

If employers provide the migrant with temporary lodging, they must register them at this address or the legal address of the firm.

According to clause 18.9 (part 4) of the Administrative Code of the Russian Federation, infringement by the host party of its obligations with respect to temporary stay registration can entail imposition of an administrative penalty on private persons of from two thousand to four thousand roubles; on legal entities — from forty thousand up to fifty thousand roubles; on organizations — from four hundred thousand up to five hundred thousand roubles.

The new legislation provides more opportunities for employers to register migrants. Now they act as the “host party” and can register migrants at the legal address of their firm. As focus-group discussions have demonstrated, however, not all employers know about the new arrangement and understand their new role. Many employers do not know that they can do the registration by post. In addition, migrants can be also registered by another host party (apartment owner for instance). The extent of the employer’s responsibility for this formal procedure is, therefore, not quite clear. The migrant, who is in a dependent position, often cannot request the employer to post the notice of registration and give him or her the receipt slip, as set in the law. So registration is still a problem for migrants, despite the liberal registration procedure.

³⁰ http://www.fms.gov.ru/press/publications/news_detail.php?ID=9420

Conclusions and Recommendations

1. The main result of the liberalisation of Russia's migration legislation has been the expansion of the legal component in labour migration, and the appropriate "compression" of the irregular component. This concerns all basic elements of the regularization process applicable to labour migrants: regularization of stay/residence and employment. The number of migrants who regularized their stay/residence in the Russian Federation in 2007 increased more than threefold in comparison with 2006, up to 7,855,774. As for regularization of employment, this indicator more than doubled — up to 2,259,823, including 1,846,071 citizens from CIS countries. Administrative barriers became more "penetrable" for both migrants and employers. Employers submitted 835 thousand requests for foreign labour from CIS countries. The legal component of labour migration became bigger than earlier. The share of migrant workers in regular employment in the middle of this decade was assessed at 5–10 percent; now it is nearer to 1/3, although that is undoubtedly not enough. Thus, on the whole, the new migration legislation has achieved its objective and demonstrated its efficiency: simplification of regularization procedures have resulted in a reduction in irregular labour migration and better control over migration.

2. On the other hand, there are still problems hampering the effective regularization of stay and the employment of migrants.

This review has helped identify the principal legislative, administrative, and other barriers at the main stages of the regularization process: those of crossing the border, registration, and regularization of employment (getting the work permit). In addition to these three main stages, problems also emerge in the process of employment proper — formalization of labour relations with the employer and access, where necessary, to legal redress of infringed rights. Alongside the significant liberalisation of regularization procedures, persisting older and newly emerging obstacles complicate successful passage through these procedures.

3. *At the stage of border crossing*, the migrant receives a migration card, which is a precondition for access to subsequent regularization procedures. At this stage, problems may arise if the migrants cross the border in an unconventional way (bypassing the regular border check-points or crossing the border irregularly, etc.). Even migrants who cross the border legally can, however, encounter problems in filling in the migration card. The first source of problems is the answer to the "purpose of visit" and "expected duration of stay" questions on the migration card. Often, migrants indicate "a private visit", even though, in fact, they intend to seek work. This may cause problems at the next stage, in view of "failure to observe the specified purpose of visit". Then, many labour migrants looking for work after arriving in Russia find it difficult to indicate on the migration card the information concerning the host party (name of organization, its location, name of the person, etc.). Finally, some migrants have difficulty filling in the card in Russian.

Migrants who arrived in the Russian Federation before the new legislation was adopted, so have no card or only an expired one, also face serious problems. The statutory procedure for obtaining a new migration card implies payment of a fine of 2,000 roubles; for a variety of reasons, this solution is unpopular among migrants: many do not know that such an opportunity exists, others fear that they will thus "give themselves up" into the hands of the police and that the trouble will not be limited to payment of a fine; others cannot afford to pay sum.

Recommendations:

- Information dissemination and pre-departure orientation in the country of origin on how to fill in the migration card and on subsequent procedures.

- Organization of information and awareness-building activities in the country of origin, in order to convince migrants that they should indicate the real purpose of their visit on the migration card.
- Migrants who have no host party should be identified at the border crossing stage. They should have access to information on employment agencies, temporary residence centres, Russian language courses, etc.
- Organization of a round-table discussion to clarify the issue, which remains unclear, with experts' participation, concerning the "consequences" of the situation when a migrant indicates a wrong purpose of visit, duration of stay or host party on the migration card.
- Statistical monitoring of migration cards, including the following indicators: sex, age, purpose of visit, duration of stay.
- The "amnesty" mechanism in relation to migrants who have been staying and working in the Russian Federation for a long time should be simple and clear. Migrants should be informed that they can obtain a new migration card, even if they never had one, without any legal consequences.

4. *Regularization of stay/residence* implies temporary registration (for migrants coming for less than 90 days) or registration at the address of stay (for those who have received a temporary stay permit or a residence permit). Today, the migration registration regime strictly involves only notification; in 2007, it was simplified considerably compared with before (migrants can now send the papers by post, be registered at the legal address of the employer, etc.). The practice of implementing the new rules has demonstrated that, on the whole, this new policy is correct; an efficient regularization of stay requires that the registration procedure be fast and easy.

Despite all this, there are still some remaining barriers to the regularization of migrants on the territory of the Russian Federation. Certain fundamental obstacles interfere with their effective registration; as a result, many migrants, even if regularly employed, continue to reside here, though unregistered, and are, in fact, in an irregular situation and perceived as "lawbreakers" by the police. The main problem is unwillingness on the part of the host party to register a migrant. This primarily concerns house-owners who rent out living quarters to migrants and employers, and do not wish "to uncover" the migrant to supervisory bodies. The existing law does not bind the employer to register the migrant, although it provides for such an opportunity.

Another legislative/administrative barrier on the way to residence regularization is the three-day period allowed by law for registration after arrival. During that time, the host party must register the migrant. This period should be increased.

Many migrants simply cannot find a stable job immediately and thus have no host party. This applies to those migrants who come without knowing their employer in advance, in the hope of finding work after arriving to Russia. For some time, such migrants often earn their living as casual workers and stay with their friends. In this case, the migrant remains unregistered. This is a common situation, in view of the fact that only a few migrants arrive knowing in advance who their employer will be.

Even if the migrant finds a more or less stable job, the employer often puts him on a trial period and does not regularize him, as the migrant may fail the trial.

Currently, most migrants have no idea where to go to redress their rights: for example, if they have been refused registration or an employment contract, have not been paid their wages, etc. An effective mechanism, both judicial and administrative, should be created for defending their rights.

Recommendations:

- The registration procedure should remain simple, fast and easy.
- The legislative obligation of the host party fixed to register the migrant should be formulated more clearly. If the foreign worker is not registered when he is hired, the obligation to register him should be laid on the employer.

- Employers and house-owners renting out premises to a foreigner must be informed of the need to register migrants. Such an awareness-raising campaign could be organised in the mass media or through housing and employment agencies.
- The delay allowed for registration should be increased to 10 calendar days.
- A migrant services infrastructure should be developed, to include, among other things, a registration service. For example, the services provided to migrants by housing agencies could also include registration at the address of the rented premises. The same registration service could also be provided by employment and placement agencies servicing migrants, but at the legal address of the employer. The proposal to register migrants at the legal address of an intermediary agency, and to license such agencies that render registration, and employment, etc. services, is open to expert discussion. Such a service could, on the one hand, resolve the problem of the host party for migrants, yet, on the other hand, it could encourage irregular relations on the labour and housing markets and let the parties to these deals hide themselves. In any case, regulated intermediary services in the job matching sphere of migration should be developed.
- The awareness-raising campaign and development of services for migrants should be accompanied by the establishment of an efficient control mechanism. A migrant who has been refused registration should have the right and the chance to appeal against this decision, obtain a registration, and redress his rights. The appropriate controlling authorities (the FMS, MIA, State labour inspectorate, GNI, the Ombudsmen office, etc.) and public organizations should monitor cases of refused registration and address this common problem.
- An effective mechanism of rights redress should be created for situations in which the host party refuses to perform the registration, conclude an (employment) contract, etc. A special body should be set up to consider complaints by migrants and other parties. Such a body could also have a preventive effect: knowing of its existence, unscrupulous “shadow” employers and house-owners would not feel they could act with impunity, as is the case nowadays. The rights redress mechanism should be created within the frameworks of both the judicial and administrative systems. Court cases and open legal investigations should be conducted against lawbreakers infringing labour rights, practising slave labour, etc.

5. The purpose of the simplified registration procedure and term of temporary stay of up to 90 days is to enable migrant workers to find employment and formalize an employment contract. This is a progressive and liberal measures. Yet the majority of migrants are not able to regularize their stay and employment within this period.

Recommendations:

- To avoid such inconveniences, which, in fact, result in irregularity, it is recommended that the procedure for prolongation of temporary stay is simplified. That is the FMS is officially notified of the required employment contract without the need for a personal application and presence of the migrant worker and employer.

A significant proportion of migrants intend to stay in Russia for a long time, and are interested in obtaining a temporary residence permit, valid for three years. Taking into account the limited term of the previous status — that of temporary stay, the significance of temporary residence status is very great. In addition, this status opens the way to obtaining a residence permit for those migrants (roughly 1/3) who would like to remain in Russia permanently.

Yet the procedure for obtaining a temporary residence permit involves obstacles and steps (quota restrictions; availability of document certifying registration of the specific foreign citizen with the tax service; the need to confirm one’s residence annually, supply information about incomes and submit a copy of the tax declaration; local authority abuses, often demanding some extra documents not required by law; numerous grounds for refusal to grant the permit) that either should be controlled or the migrant worker made aware of. These obstacles adversely affects the process of regularization of long-term labour migrants in the RF, encourages the market for irregular migration services — (many migrants, intimidated by the difficul-

ties involved in the official procedure, approach unregistered intermediaries offering temporary residence permits for a certain payment).

Recommendations:

- Experts have put forward a number of proposals to resolve the problem of “the bottleneck”, that is, of the temporary residence status, which closes to migrants the way not only to naturalisation, but also to legalisation of their residence in the country. The first proposal is to prolong the term of temporary stay to 180 days or even one year. The second is to expand the capacity for temporary residence by increasing quotas, simplifying the permit issue procedure, fewer grounds for refusal, etc.
- Make migrant workers aware of rights, as well as duties and obligations, with respect to temporary residence status.

6. *Regularization of migrants' employment* was made much easier by the new legislation, which limited the number of documents required, shortened the delay allowed for considering applications, made the state fee affordable, and permitted intermediary services for document registration. The responsibility for regularizing employment of migrants from visa-free CIS countries now rests entirely with the migrants themselves.

Some of remaining barriers to reducing or regular flows refer to the following mechanisms and procedures:

Evaluation of the need for foreign manpower and the quota-setting mechanism. The mechanism for evaluating foreign manpower needs is under development. From 2008 onwards, the quota must be broken down into occupations and qualifications. The legislation also provides for a possible breakdown, in future, into countries of origin. The complexity of this mechanism should be supported by appropriate techniques, and increased know-how, on the part of the staff of administrative structures, thus improving the quality of the forecast.

There currently exists a danger that insufficient quotas or their unbalanced structure may interfere significantly with the process of migrant regularization, and keep the masses of migrants within the zone of irregularity (the 2008 quota is considerably lower than the number of work permits issued in 2007 and is actually equal to the figure for 2006, when the former legislation was still in force, and the majority of labour migrants found themselves in the grey zone of irregularity). Such a situation will not only result in higher numbers of irregularly employed migrants, but will favour the development of the “shadow” sector of the economy.

7. Regularization of employment of foreign citizens is further complicated by the undeveloped migration infrastructure. It is often easier for migrants and employers to approach a unregistered intermediary than to address an official body. The demand by migrants and employers for various services is rather high and varies a lot: some are willing to pay for the services, others not; some want to buy the whole package of services at once, while others need only one kind of service (for example, consultation), etc. This infrastructure should, therefore, provide various services of different types and forms.

Recommendations:

- Techniques should be developed for evaluating the need for foreign labour that would be consistent with the complexities of the task and requirements of the legislation (including the breakdown into categories of migrants, mechanisms for calculating quotas on the basis of the needs of the economy, methods for expert evaluation and efficiency assessment of the performance of the foreign workforce and of the quota mechanism in the current year, etc.).
- The established indicators of the demand for migrants of certain vocational groups, and the corresponding quotas, should not put a brake on regularization of migrants who can fill vacant workplaces on the labour market. So far, the methodology for evaluating the demand for the migrant workforce has not been fully developed (2007 was the first year of its practical applications; quotas for vocational groups will be applied in 2008).

It would, therefore, make sense to use this mechanism as a sort of reference and recommendation, rather than an instruction.

- When migrants address an official intermediary body, even for consultancy services, they take the first step towards regularizing their status. Development of official services in the sphere of migration — be it by state, private or public organizations — can, therefore, facilitate migrant regularization and constitute an alternative to illicit activities in this area. Such organizations should provide different services meeting the demands of migrants, their family members and employers, ranging from a package of services to single services, both paid and free, in respect of employment, housing, and registration of documents.
- The level of knowledge of the Russian language by migrants is deteriorating by the year, and this is becoming one of the factors complicating effective regularization. Proposals are now being discussed to introduce testing of migrants in their knowledge of Russian in the process of issue of work permits and employment; under the current circumstances, however, this will make regularization still more difficult, rather than the opposite. To lower this barrier, migrants should have an opportunity to learn Russian according to different arrangements (for temporary migrants, long-term ones and those intending to reside permanently); employers should also be able to send workers to attend Russian courses. The main services the migrants need are:
 - Information and reference/consultancy services (printed materials, media information campaigns, individual consultations, etc.);
 - Registration of various documents (filling in forms, applications, etc.);
 - Assistance in finding a job (employment);
 - Intermediary services in the search for accommodation;
 - Legal/lawyers' services and assistance in redress of their rights.

In addition, they need other various services: social, cultural, financial, insurance, etc.

The services can be provided by state organizations (employment, migration services, special migration centres, etc.), private agencies (employment agencies, realty firms, other intermediary agencies) and public organizations. These can include those rendering the whole range of services (for example, migration centres), and specialised ones (agency for personnel selection or renting temporary housing).

The activities of these organizations (whether they be state or private) should be organised in such a way as to encourage regularization of the migrants' status. For example, agencies providing intermediary employment services could also monitor the regularization of the migrants' residence and employment (for example, conclusion of an employment contract and migration registration by the employer).

8. The labour and other rights of many migrants are often violated. Equal treatment with nationals and access to redress of rights and to justice is an important component of the migrants' regularization process. Creation of an effective mechanism for protecting and redressing rights (including compensation schemes) of migrants and other participants in migration interaction (employers, intermediaries) will contribute further to regularization of the migrants' status and labour relations.

Although, today, the situation of irregular workers is, understandably, much worse and they are often exploited, regular migrants are also still subject to serious infringement of their rights and to exploitation. Neither regular nor irregular migrants have adequate access to a mechanism of rights protection, this undermining the incentives to regularization.

Recommendations:

- An effective mechanism should be established for redress of migrants' rights. A migrant whose rights have been neglected (non-conclusion of the contract or inadequate contents thereof, non-payment of wages or overtime, refusal to register, etc.) should have access to

an appropriate body to redress his/her rights and receive compensation. Numerous infringements of migrants' rights remain "overlooked" by the state and the judicial system.

- The mechanism for reporting non-observance of rights should operate both ways — from the employer in respect of law infringements by the migrant, and from the migrant in respect of law infringements by the employer or other parties.

Some of the lessons learned and recommendations gleaned from international experience, particularly with regard to Italy and Spain, and to regularization, as highlighted in the second study in this volume, are particularly relevant to Russia, as well. These are:

1. Enhancing the legitimacy of regularization programmes through a consensus-building process (on the desirability of regularizing at least some of the existing irregular migrants) among social partners and politically.
2. Careful design of regularization programmes with the purpose of due consideration the following: of increasing the administrative capacity to cope with the extra work/load; broad publicity on the requirements and procedures; striking a balance between the need to control the eligibility criteria (and avoid fraud), and the need not to make qualification so difficult as to exclude irregular migrants by the mere fact of their inability to provide proof of their eligibility; and consideration of the needs of migrant workers and employers.

In both international and Russian experience, fraud (committed by workers, employers and officials) has been an obstacle. Some ways to combat this are to make immigration procedures as simple and transparent as possible, apprise migrant workers and employers, as well as their representative bodies, of their rights, and highlight abuses.

With regard to employer sanctions as a tool for combating irregular employment, there is a clear tendency, internationally, towards more severe penalties, increased inter-agency cooperation in government, and the use of computerization to alleviate the burden that verifying a worker's status might impose on a business. Increased enforcement, with the help of intelligence gathering (risk assessment) and modern technologies, may be able to remedy some of the most significant shortcomings in employer sanctions so far.

Accompanying measures

Perhaps the most important recommendation that can be made is that regularization and employer sanctions should not be considered in isolation. The fact that regulation is an "ex-post" measure means that other measures are required for avoiding a situation necessitating regularization arising anew, although practice shows the difficulty in achieving this.

The objectives of regularization generally overlap with those of immigration policy and social policy in general. In order for these objectives to be attained, regularization efforts should be accompanied by other instruments. Most important are instruments to combat the informal economy, such as labour inspections, but a country's visa policy, border controls and creation of more and better functioning channels for regular migration are also of significance.

Finally, regularization and employer sanctions are tools, and must be situated within an overall national migration policy. What is this policy and what are its objectives and priorities? This has not been elaborated in the Russian Federation and to do so, involving all stake-holders, should be a priority.

APPENDICES

Appendix 1

Main normative legal acts regulating labour migration in the Russian Federation

Federal laws

№ 115-FZ, of 25.07.2002, "On legal status of foreign citizens in the Russian Federation".

№ 266-FZ, of 30.12.2006, "On amendments to certain acts of the Russian Federation in view of improving the State control in border crossing check-points of the Russian Federation".

№ 189-FZ, of 05.11.2006, "On amendments to the Code of the Russian Federation on administrative offences (to the section on strengthening the responsibility for infringements concerning labour employment of foreign citizens and persons without citizenship in the Russian Federation)".

№ 110-FZ, of 18.07.2006, "On amendments to the Federal law "On legal status of foreign citizens in the Russian Federation" and recognizing as null and void certain provisions of the Federal law "On amendments and additions to some legislative acts of the Russian Federation".

№ 109-FZ, of 18.07.2006, "On migration registration of foreign citizens and persons without citizenship in the Russian Federation".

№ 121-FZ, of 18.07.2006, "On amendments to certain acts of the Russian Federation on improving State administration in the sphere of migration".

№ 2-FZ, of 03.01.2006, "On ratification of the Agreement between the Government of the Russian Federation and the Government of the Republic of Tajikistan concerning labour activity and protection of rights of citizens of the Russian Federation in the Republic of Tajikistan and citizens of the Republic of Tajikistan in the Russian Federation".

№ 2-FZ, of 06.01.2007, "On amendments to the Federal law "On amendments to the Federal law "On legal status of foreign citizens in the Russian Federation" and recognizing as null and void certain provisions of the Federal law "On amendments and additions to some legislative acts of the Russian Federation".

№ 43-FZ, of 08.03.2008, "On amendments to the Criminal Code of the Russian Federation".

Resolutions of the Government of the Russian Federation

№ 183 "On approving the Regulations on the rules of submission by employers or executors of works (services providers) of the notice on recruitment and employment for the purpose of labour activities of foreign citizens and (or) persons without citizenship who have arrived in the Russian Federation under the provision not requiring an entrance visa and who possess a work permit".

№ 97 "On registration of cases of labour activity performance by foreign citizen or person without citizenship, temporarily staying (sojourning) in the Russian Federation outside the confines of the Subject of the Russian Federation where they had been granted a work permit (with temporary residence)".

№ 91 “On the procedure of determining the monthly average income of a foreign citizen or person without citizenship and the monthly average income of a member of the family of a foreign citizen or person without citizenship”.

№ 10 “On determining the amount of payment for the services of agencies of the Federal Postal Service for processing notices of arrival of foreign citizens or persons without citizenship to the place of staying on the territory of the Russian Federation”.

№ 783, “On the procedure of establishing by executive bodies of State power of the need in foreign workforce and quotas on the performance of labour activities by foreign citizens in the Russian Federation”.

№ 779 “On amendments to the resolution of the Government of the Russian Federation of July 8, 1997, № 828”.

№ 681 “On the procedure of delivery to foreign citizens of permits to perform temporary labour activities in the Russian Federation”.

№ 682 “On establishing the quotas for year 2007 on work permits to foreign citizens who have arrived in the Russian Federation under the provision not requiring an entrance visa”.

№ 683 “On establishing for year 2007 the permitted share of foreign workers employed by economic agents in the sphere of retail trade on the territory of the Russian Federation”.

№ 665 “On establishing the quotas for year 2007 on invitations to foreign citizens to enter the Russian Federation for the purpose of labour activity”.

Appendix 2

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- Web-page International association “Labour migration” (IALM), Moscow <http://www.ialm.ru/>
- Web-page Association of personnel selection consultants, Moscow <http://www.apsc.ru/>

Appendix 3

Results of interviews with irregular migrants

Place of interview: Moscow

Date: January 2008

Number of interviewees: 50 irregular and informally employed migrants,

out of whom:

6 migrants had no registration / migration registration,

10 migrants had no work permits,

12 migrants had neither registration nor work permit,

22 migrants had no labour contract.

Characteristics of the interviewees:

Gender: women — 11, men — 39;

Age: 18–55 years;

Education: vocational training (higher and medium-level vocational) — 20;
General secondary education and lower — 30.

Countries of origin: Tajikistan — 12, Ukraine — 10, Uzbekistan — 8, Moldova — 8, Kyrgyzstan — 5, Armenia — 4, Azerbaijan — 3.

Spheres of employment: construction — 18, trade — 14, renovation in private houses — 3, tailor shops — 4, services (cleaning premises, guarding, warehouse services, advertising agents, car servicing, etc.) — 11.

Knowledge of Russian: good — 24, poor — 22, very poor — 4.

Lives in the Russian Federation with family — 4.

Expected terms of stay: about three months — 0; from 3 to 6 months — 6, from 6 months to one year — 15, more than one year — 20, undecided (“It may so happen we’ll not return home”, “we’ll live and see”) — 9.

Appendix 4

The list of experts/key informants who participated in the survey

Vlasova Natalya Ivanovna — assistant of the Chief of Department of external labour migration, FMS of Russia.

Boldyrev Sergey Ivanovich — assistant of the Chief of the Department of external labour migration, FMS of Russia.

Frolov Artem Maxovich — deputy Chief of the Moscow department, FMS of Russia.

Azarov Nikolay Petrovich — Chief of the Moscow Immigration control section, FMS of Russia.

Volokh Vladimir Alexandrovich — Chairman of the Public Council at the FMS of Russia.

Zharova Natalya Victorovna — Chief of the Employment policy section. Department of labour relations and State civil service, Ministry of Health and Social Development of Russia.

Malakha Irina Alexandrovna — Chief of Department of comprehensive problems of employment and labour migration, FSTZ of Russia (Rostrud).

An expert of the Main Department of Internal Affairs, Moscow.

Zayonchkovskaya Zhanna Antonovna — Scientific Director, Migration Research Centre.

Grafova Lidia Ivanovna — journalist.

Dzhuraeva Gavkhar Kandilovna — Director, Regional public fund “Tajikistan”.

Trade union of workers of construction and construction materials industry, FITUR.

Appendix 5

Acronyms

CE	– Council of Europe
CESPI	– Centre Strategic Political Science
CIS	– Community of Independent States
EU	– European Union
FMS	– Federal Migration Service
HIV	– Human immunodeficiency virus
IALM	– International association “Labour migration”
ILO	– International Labour Organization
IOM	– International Organization for Migration
MIA	– Ministry of Internal Affairs
NGO	– Non-Governmental Organisation
STP	– State Tax Police
USA	– United States of America

***Review of Current International Approaches
with Regard to Regularization and Disincentives
for the Employment of Irregular Migrant Workers***

Prepared for ILO by **Jorrit Jelle Rijpma**
and **Ferruccio Pastore (CeSPI, Rome)**

April, 2008

I. Introduction: Regularizations and Employer sanctions as a means of managing International labour markets

All countries share the basic goal of seeking to balance two factors: 1) meeting labour market needs through facilitating the recruitment of foreign workers and 2) controlling the in-flow of immigrants into the country. Over the next few years most OECD countries will increasingly notice the effect of the ageing of their societies, resulting in a decrease of the working-age population (OECD, 2007). The impact thereof is as yet unclear. First of all, since in every country there are sources of unused labour supply. Secondly, immigration policies, despite high levels of irregular migration in some countries, remain restrictive overall, and continue to have a significant impact on the magnitude of flows (OECD, 2007).

Despite the resistance of many receiving countries, worldwide migration flows have increased since the 1980s and the early 1990s (OECD, 1999). International migrants numbered 191 million in 2005, of which 115 million lived in developed countries. Between 1990 and 2005, high-income countries as a whole registered the highest increase in the number of international migrants (41 million) (UN, 2006a). This growth is unlikely to slow down in the near future.

Some of the industrialized states have met part of their need for additional labour by turning a blind eye to the employment of migrants with an irregular status. The practical tolerance as well as the introduction of periodic regularization programmes for unauthorized workers, can, in some respects, be regarded as a de facto liberalization of the global labour market (GCIM, 2005). The Global Commission on International Migration (GCIM, 2005) has considered that this resort to regularization programmes exposes a lack of coherence between national migration and labour market policies.

Regularization is hardly ever the preferred policy tool. Rather it constitutes a means of last resort where the presence of irregular migrants has become uncontrollable by other means. Regularization programmes are, almost, without exception, controversial. In the public and political debate surrounding them one can distinguish between those who support the virtues of regularization, (in response to the reality of increasing irregular migration flows and expanding underground economies) and those who take a traditional approach towards the state's right of control on entry and stay, and international labour market dynamics.

The lack of a unified approach toward regularization is also replicated at the international level. At the UN High Level Dialogue on Migration some participants argued for an increase in legal avenues for migration and for the regularization of migrants in an irregular situation (UN, 2006b). The Parliamentary Assembly of the Council of Europe has recently pronounced itself in favour of regulations as part of a larger set of policy tools for the management of migration (CoE, 2007). The GCIM (2004) reminds states it is in their interest to ensure that their demand for foreign labour is met in an authorized and organized manner, rather than through large scale regularizations. It nevertheless recalls the plight of those irregular migrants that have found a place in the economy and society of their host country and suggests states should consider the judicious application of two specific solutions – return and regularization – as ways of resolving the situation of irregular migrants in their territory (GCIM, 2004). More sceptical is the European Commission in its Communication on a Common Migration Policy: “Legal immigration policies and measures to combat illegal immigration lose much of their relevance when Member States mount large-scale legalisation operations” (European Commission, 2007). It calls for a genuine debate on the questions of regularizations. In this respect it is important to recognise, as did the Parliamentary Assembly of the Council of Europe, that each country will need to design a programme that meets its own needs. The European Parliament has supported the European Commission in its scepticism regarding large scale legalisations, arguing that it “is not a solution to the problem

of illegal immigration” and “should be a one-off event, since such measures do not resolve the real underlying problems” (EP, 2006).

It has been argued that in order to combat irregular migration, regularization needs to be combined with tighter border controls, employer sanctions and law enforcement (Papadopoulou, 2005). Indeed, one of the most prevailing policy measures adopted in tandem with regularization programmes, is the imposition of employer sanctions (Levinson, 2005). Policy makers consider employer sanctions as a critical complement to regularizations. The idea is that if one wants to start with the proverbial “clean slate”, employers should be given an incentive to participate in the regularization of their workers, and be prevented from substituting legalised workers with new irregular workers.

More in general, employer sanctions aim to limit of the possibilities for irregular employment, thus taking away one of the primary impetus for (irregular) immigration (OECD, 2000). Consequently, both in the United States and in the Member States of the European Union, there is a clear tendency towards the strengthening of employer sanctions as part of the wider policy goal of combating irregular migration. ILO Convention 143, approved in 1975 contains in Article 6(1) that “provision shall be made under national laws or regulations for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the illegal employment of migrant workers.”

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II. Regularizations

1. Introduction

1.1. Definition

Regularization, also referred to as amnesty, normalization or legalization, is most generally defined as “any process by which a country allows aliens in an irregular situation to obtain legal status in the country” (IOM, 2004). In practice this generally means the granting of a permit of stay, either permanent or temporary, to a foreign national who already resides illegally on its territory (De Bruycker et al., 2000; Sunderhaus, 2006; Levison, 2005).

In Europe, regularization has been usually associated with temporary residence and work permits, while in the Americas the same type of programmes are described by the term “legalization” and have usually facilitated the procurement of permanent residence permits at a later stage (Papadopoulou, 2005).

One can observe a fundamental intra-European divide between southern European states and the rest of Europe in the use of large-scale regularization programmes as a policy instrument. Around 85 percent of the roughly 4 millions foreigners who were regularised in Western Europe during the last three decades obtained their entitlement to stay in one of three Mediterranean countries (Greece, Italy and Spain) (Pastore, 2006). Although not easily explainable, it may be assumed that factors as diverse as the deep cultural differences in the conception of the rule of law, the different attitudes of national trade unions toward undocumented foreign labour, the different roles played by non-governmental actors (including churches) in the migration policy-making in each country play a role (Pastore, 2006).

Although the type of regularization that first springs to mind is the widely publicised large-scale program aimed at legalising a great number of undocumented foreigners, there are other regularization programmes even in countries that at first sight seem reluctant towards such policy.

1.2. Classification

The most commonly proposed classification of regularization programmes is that of De Bruycker et al. (2000) based on the following parameters:

a. Permanent or one-shot:

Permanent regularizations have no time limits, and are implemented on an on-going basis. Length of residence is often a determining factor for successful regularization.

More common are one-off or one-shot regularizations. These are one-time programmes with a limited application procedure aimed at irregular migrants who fulfil a set of conditions at a specific date. The group of potential beneficiaries is therefore limited and excludes future immigrants.

The recurring pattern of one-shot regularizations in certain countries may give these regularizations a more permanent character.

b. Fait accompli or protection

This distinction is based on the motive for regularization. Although a protection motive is of itself inherent to a regularization, a *fait accompli* regularization aims to legalise a factual situation, most often of social (residence in the territory) and economic nature (employment). Regularization for protection purposes is based on humanitarian reasons (e.g. family, medical).

c. Individual or collective

The difference between individual or collective regularizations refers to the margin of discretion the granting authority has in taking its decision on regularization. Collective regularizations are based on objective criteria aimed at regularising a larger group of migrants. Individual regularization procedures are more commonly linked to protection aims (Sunderhaus, 2006).

d. Expedience or obligation

Although the right to regularise, or more generally the right to control migration, is generally considered to be state's prerogative, one may speak of regularization by obligation when a State is obliged to regularise immigrants on the basis of court decisions or international obligations.

Certain rights contained in the European Convention on Human Rights may effectively prevent expulsion of foreigners (e.g. the right to family life). Although this of course does not equal a fully fledged regularization, it may be considered as a temporary legalisation of the alien's stay in the country of residence (Sunderhaus, 2006).

e. Organised or informal

Informal regularization may occur in the absence of clear procedures and criteria on the part of the State, leading individuals to petition for their regularization. A number of such petitions may eventually lead to a more organised programme.

It will be clear that the above categorisation is not exhaustive nor that the categories are exclusive. Often regularization programmes are a combination of the above (Levinson, 2005). Moreover, each regularization has a unique combination of features (Van Kessel, 2006). An addition to the aforementioned categories, although perhaps more of a sub-categorisation, may be the employer driven or worker driven regularization, depending on who initiates the procedure for regularization. The same holds true for the possibility for family members to be regularised together with the main applicant or whether a regularization is limited to workers in an employment relation or also independently established workers.

As a general categorization of regularization programmes, which helps also to illustrate the above mentioned intra-European divide, the following scheme is proposed. As will be shown in the country studies this scheme is an over-simplification, yet it does show the most important difference in regularization programmes observed in Europe to date.

Table 1: Stereo-type classification of regularizations in Europe

	Permanent	One-Shot
Humanitarian	France	Netherlands, Germany
Economic	UK	Spain, Italy, Greece

1.3. Arguments in favour and against regularization

A variety of reasons has been put forward in favour of regularizations. These can be roughly divided into social, economic, political and/or informational reasons (Levinson, 2005b). As Sunderhaus has noted however a calculated assessment of the likely results of a regularization programme, or the administrative feasibility thereof, has often been absent from the decision to initiate a regularization programme (2006).

a. Social

The regularization of irregular migrants can improve their social conditions by putting an end to the legal uncertainty in which these people find themselves. This legal uncertainty does not only put irregular migrants in a position in which they are more likely to become subject to exploitative living and working conditions, it also causes their more general marginalisation

within society. Regularization for humanitarian reasons such as for medical or family reasons or after (natural/man-made) disasters can also be put under this heading.

b. Economic

In many countries there is a real demand, if not heavy reliance, on the labour offered by migrants. The channels for legal migration being, however, judged ineffective and cumbersome, employers have resorted to the irregular hiring of labour migrants. This may result in unfair competition between businesses that do not hire illegal labour and those that do. Irregular migrant labour may also be in unfair competition with the domestic labour force.

The state may gain from regularization since it can increase tax revenues and social contributions for the future, but may also gain retroactively where this is a condition for regularization.

Lastly, regularization may be a more realistic and cheaper alternative for deportations (Sunderhaus, 2006), which can be socially and economically disruptive (MPI, 2004).

c. Political

Political motivations may be at the basis of a regularization programme.

First of all, there may be pressure from the public, press or non governmental organization interest groups, such as churches and immigrant organizations, to engage in a regularization programme for social and/or economic reasons.

Secondly, regularization is very often presented as an opportunity to “start with a clean slate” and as such has often been combined with the introduction of (restrictive) reforms of immigration policies.

A regularization programme may also serve as an instrument to achieve the foreign policy goals of a country, in particular where there are existing special ties with sending countries, e.g. where these are former colonies (e.g. between Portugal and Brazil and Spain and various Latin American countries).

d. Informational

An important advantage of regularization programmes is that they can provide valuable information about the stock of irregular migrants in a country, such as demographics and labour market participation. This information may inform future policy making in the field of migration. It must be noted however that, since regularization programmes are often aimed at a selective category of migrant, the data obtained from regularization procedures is largely limited to those categories. This also limits the importance of the security objective of such informational gathering in the post-9/11 world.

Regularization as a form of immigration management is rarely used as a first policy option. Regularizations may negatively affect the credibility of a country’s migration policies. First of all, the failure of the enforcement of existing immigration laws is implicit in a regularization. Secondly, where regularizations become a recurring feature of a country’s immigration policy and each of them is labelled the last programme of its kind, the government’s ability to manage immigration is easily put in doubt.

The main concern is that regularizations attract more irregular migrants (pull effect) who either hope to benefit from the regularization under false pretences or arrive in the expectation that they eventually will be legalised as well. Although there is a lack of reliable data, studies in the US have shown that the 1986 large scale amnesty created new migration flows through family ties and migration networks. Within an area without borders such as the EU, this fear, be it justified or not, may lead to strained relations with other countries.

Last, the lack of available data makes it hard to determine whether regularization programmes have actually been successful in achieving the advantages envisaged. It has been argued that while temporarily regularising large numbers of migrants, most programmes have had a relatively small impact on reducing long term irregular employment (Papadopoulou, 2005). This may be explained in part by problems related to the implementation or design of the regularization programme rather than the policy tool of regularization itself. It has also been argued

that economic factors rather than the regularization programme itself form the main pull factor for continued irregular migration.

A study carried out for the Commission concluded that regularization *ipso facto* does not alter the fundamentals of a nation's social and economic framework. While it can indeed open the door to the formal employment market, this may have little meaning for low-skilled immigrants if structural factors are hostile to low-skill jobs and native and other (legal) immigrant workers, too, are out of work (Papademetriou et al., 2004).

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2. Country Studies

2.1. Italy

2.1.1. Introduction

Italy, historically a country of emigration, became a country of immigration in the 1980s. Today it is one of the largest immigration countries in Europe, in terms of net migration (Pastore, 2007). The inflow of immigrants is fuelled by its demand for labour, specifically low-skilled, its large informal economy, its ageing population, and its geographical situation at Europe's immigration frontier.

The north-south divide in terms of economic development is also reflected in the distribution of migratory flows over the country (Paparella and Rinolfi, 2002). In particular in the north, immigrants, both regular and irregular, are relatively easily absorbed in the industrial activity, while in the south migrant labour is used mostly in the agricultural and building sector. In addition, many non-EU nationals, in particular women, work as caretakers of children, elderly, and disabled in private households (*badanti*). The most important countries of origin of non-EU migrants in Italy are Albania and Morocco, followed by China, Ukraine and Philippines (ISTAT, 2007).

Despite the daily reality of migration and the demand for immigrant labour, public opinion is hostile towards immigration and immigration legislation has been increasingly restrictive in nature. Migration is still treated as a new phenomenon and Italy's legal, institutional and administrative infrastructures dealing with migration remain underdeveloped (Pastore, 2007).

The use of large scale regularizations has since the 1980s been a constant factor of Italy's immigration policy (Carfagna, 2002). A large number of the residence permits in force have been issued on the basis of a regularization programme. For instance, the 60 percent increase in residence permits between 1992 and 2000 can be attributed to regularization programmes carried out in 1995 and 1998 (ISTAT, 2005).

Some consider the recourse to regularization programmes as a symptom of the inadequacy of consecutive governments to effectively deal with the influx of immigrants and the "emergency logic" underlying Italian policymaking in this regard (Zucchetti, 2004). Chaloff (2003) argues that the ease with which such programmes are launched reflects a general tendency in Italy to declare amnesties of all sorts when the level of non-abidance reaches critical levels. This notwithstanding, each regularization has been the object of heated political debates. They have succeeded only by justifying each new regularization as a corrective mechanism for the failures of the previous one, and by promising that it would be the last (Chaloff, 2003). Regularizations have generally been linked in with more general immigration policy reforms, which have entailed a tougher stance on irregular migration.

2.1.2. Early Regularization programmes

The first experience with regularizations as a policy tool was in the 1970s and 1980s, on the basis of four ministerial circulars. The relatively small number of successful applicants (around 5,000) could be attributed to the fact that these regularizations were not widely publicised and did not exempt employees from the payments of social security contributions and possible sanctions.

The first large scale regularization took place in 1986, on the basis of Law 943/1986. This law implemented ILO Convention 143/1975 on migrant workers' rights. It formed part of a larger legislative package which introduced stricter rules for entry and residence, as well as employer sanctions (Carfagna, 2002). The law applied to migrants present in Italy prior to 27 January

1987. It required irregular immigrant workers, as well as their employers, to report every irregular employment relation to the Labour Ministry's peripheral offices (*Ufficio Provinciale del Lavoro*), which provided work permits to those employed and registered those without work on employment lists established for this purpose. Both workers and employers received an amnesty for offences related to illegal entry and residence, and the payment of taxes and social contributions, but employers were nevertheless obliged to transfer the minimum contributions for the period of employment previous to regularization.

The programme initially ran until 27 April 1987, but this deadline was extended several times by legislative decrees and finally a law set the final date of 30 September 1988 was set by law. It regularised 105,000 people. Despite the extension of the deadline the number of beneficiaries has been considered small in relation to the estimated illegally resident population at the time. This could be attributed first of all to the strict conditions that applied, in particular as regards proof of presence in the territory, and the fear amongst irregular migrants for a possible refusal of their application. Secondly, the lack of an overall regulation of residence and entry. Thirdly, the conviction amongst employers that they would be able to continue to employ immigrant workers illegally after the regularization. Finally, the scarce publicity given to the programme and organizational problems (Dei, 2002; Levinson, 2005).

Law 39/1990 (*Martelli Law*) converted Legislative Decree 416/1989 and established the titles for entry in Italy, introduced the system of yearly entry quota, and provided for a new regularization programme. This programme addressed all foreigners present in Italy by 31 December 1989. In an attempt to have as large a number of persons as possible to emerge from irregularity, it was independent of a labour contract, and its only limitative condition was the absence of a criminal conviction. Foreigners had to present themselves before the 30 of June 1990 to the *Questura* (peripheral branch of the Ministry of the Interior at Province level). Applications were then forwarded to the Ministry of the Interior. Both workers and employers received an amnesty for offences related to illegal entry and residence and the payment of taxes and social contributions. There was no obligation for retroactive payment of social security contributions. Consequently, work carried out previous to the decree coming into force did not count for social security purposes, unless the required contributions were made retroactively by the worker in place of the employer. Immigrants who would not be entitled to health insurance on any other basis were included in the national health system, for the purpose of which the budget of the National Health Fund was increased with 22,880 million lire.

Around 218,000 applications were made successfully. The largest part of the residence permits for the purpose of employment was awarded to job seeking immigrants. This may partly be explained by the fact that many of these job seekers were women who could not be regularised as family members under the terms of the law (Carfagna, 2002).

Legislative Decree 489/1995 (*Dini Decree*), converted by Law 617/1996, amended the *Martelli Law* on rules concerning expulsion and sanctions, entry and residence, seasonal work and the determination of entry flows (Nascimbene, 2000). It also included a new regularization programme applicable to those irregular immigrants present in Italy on 18 November 1995. The programme's conditions were more restrictive than under the *Martelli Law*. Although the programme allowed for the regularization of family members, it was limited to immigrants in an employment relationship (or rather who were in possession of a job offer at the time of application). The job seeking immigrants who showed they had been working for at least 4 months in the previous year were also eligible and would be placed on the placement list.

Applications had to be made by the foreign national with the *Questura* who would then forward the application for further control to the Inspectorate of the Provincial Directorate for Labour, the INPS (National Institute of Social Security). Depending on the nature of the employment relationship (open/determined) the *Questura* issued a residence permit of a maximum duration of two years (renewable).

In order to discourage false declarations, employers were required to pay the INPS an advance of four or six months, depending on the nature of the employment relationship (open contract/fixed term). Employees placed on the placement lists had to pay an amount corresponding to

four months contributions. The law provided amnesty for regularised foreigners for offences related to illegal entry and residence. Employers could regularise their position regarding the non payment of social security contributions by paying these retroactively with a yearly interest rate of 5 percent.

The final date for applications, originally three months after the entry into force of the legislative decree, was set for 31 March 1996. The last residence permits were granted in 1998. In spite of its stricter conditions, 244,000 immigrants benefited from this programme.

In the same year that regularizations on the basis of the *Dini* Decree were concluded, the Italian legislator adopted the first consolidated law on immigration, Law 40/1998 (*Turco-Napolitano* Law). It furthermore foresaw a new regularization programme.

Law 40/1998 aimed at a planned management of immigration, refining the system of entry quotas. Each year a decree by the Prime Minister sets an overall “ceiling” to the volume of migration. This ceiling is established on the basis of a wide and complex consultation process (including Regions, local governments and the competent parliamentary Commissions) (Pastore, 2007)¹. The so-called *Decreto Flussi* (Literally: Flows Decree) follows the multi-annual guidelines set with the triennial document for migration policy planning adopted by the President of the Council and published as a decree of the Prime Minister. Such guidelines are usually vague and do not have a substantial binding effect on annual decrees (Pastore, 2007).

The first *Decreto Flussi* of 16 October 1998 reserved a share of 38,000 for immigrant workers already present in Italy before 27 March 1998, including the self-employed and family members. Applicants had to give proof of suitable housing and prove the existence of an employment contract, to be verified by the Provincial Directorate for Labour (unlike the previous regularization a job offer did not suffice) or the necessary skills to take up an activity as self employed. The terms of the contract could not fall below the standards set by collective agreements. Residence permits were issued for a maximum duration of two years renewable, or for the duration of the contract in case of contracts for a limited duration of more than two years. The Decree was silent on sanctions regarding offences related to illegal entry, residence and non payment of taxes and social security contributions.

The quota was soon filled and as lines were building outside the *Questure*, the Legislative Decree 113/99 of 13 April 1999 extended the regularization to all those that had applied within the time limits set by the Decree, and who fulfilled the conditions for regularization. Carfagna (2002) has noted that this regularization was characterised by a gradual softening of the conditions by way of Ministerial circulars. For instance, irregular migrants who had received an expulsion order were initially barred from applying. Later this was changed in the sense that the applicant could request the Prefect to repeal the order. Although this was a discretionary power of the Prefect, most orders were indeed repealed.

The deadline for the programme was 31 December 1998. The Programme resulted in 217,000 regularizations. The processing of applications took a very long time and the last permits under this programme were issued as late as 2001. The beneficiaries of these measures were mostly immigrants who had entered Italy irregularly and, to a much lesser extent, immigrants whose residence permits had expired (“overstayers” were 18 percent of the total in 1990, 13 percent in 1995 and percent in 1998 (EMN, 2005). From these figures Carfagna (2002) draws the conclusion that the number of persons who fall back into irregularity after having been regularised is limited, and that Italy’s regularizations have predominantly benefited newly arriving immigrants. Nevertheless, he does note that of the people who were in Italy for a longer period of time most had already received a prior amnesty, but had fallen back into a situation of irregularity (between 5 and 10 percent).

In 2001 a centre-right coalition government came to power. With immigration control high on its political agenda, the government proposed important changes to the *Testo Unico*, which

¹ See article 3(4) of the Unified Text (*Testo Unico*) of the legislation concerning immigration and the legal condition of foreigners (incorporating also Law 40/1998), Legislative Decree 286/1998.

were passed as the *Bossi-Fini* Law (Legge 189/2002). The law not only criminalised irregular migration and facilitated expulsion, it also abolished the visa for job hunting, making the principle of nominative call again the sole mechanism for matching demand and offer on the Italian market of foreign labour. It reintroduced a labour market test, for immigrant workers falling within the quota, in order to see whether there is no national/EU/EEA worker available for the job (carried out through the Provincial Employment Office)². It further introduced the concept of “residence contract” (*contratto di soggiorno*), a labour contract in which the employer binds himself to provide the worker with suitable housing and payment of a return journey.

The *Bossi Fini* Law also introduced the most recent regularization programme in Italy. It will be discussed in the next section.

2.1.3. The Bossi Fini Law

Despite the Centre-Right’s opposition to previous regularizations, the *Bossi Fini* Law included once again a regularization programme. This can be explained by the presence of strong advocates of regularization within the coalition, for either humanitarian (Catholic centre) or pragmatic reasons (Forza Italia) (Chaloff, 2003).

The *Bossi Fini* Law itself, in Article 33, only provided for the regularization of domestic workers and caretakers. In fact, the initial debate was very much framed in terms of family values and the important role of *badanti* in the care for the elderly. An additional Decree Law 195/2002, converted by Law 222/2002, however extended the regularization programme to all immigrants in an employment relationship.

Employer organizations have generally been favourable towards regularization programmes as a means of meeting labour demands. Initially, the regularization programme excluded *per se* migrant workers who had received an expulsion order. Employers organizations argued that this would make it impossible for them to regularise a large part of their irregular migrant workers who would fall in this category.

Trade unions have also been positive towards regularization programmes. Although they recognize the importance of immigration to meet labour shortages, they emphasize particularly the issues of rights and social integration (Pedersini, 2003). Regularization programmes allow migrant workers a better means to assert their rights and facilitate integration.

Table 2: Criteria for the 2002 regularization

	Domestic worker/Caretaker	Employment other than domestic/Caretaker
	Law 189/2002, Article 33 (as amended by Law 222/2002)	Decree Law 195/2002, converted in Law 222/2002
Applicant	Employer	
Period of employment	For the duration of at least the three months prior to entry into force of the Law (26 august 2002)	For the duration of at least three months prior to entry into force of the D.L. (10 September 2002)
Who can be regularised?	Non-EU/EEA irregular workers carrying out: – domestic work – care for elderly or disabled	Non-EU/EEA irregular workers
Deadline for application	11 November 2002	
Maximum number workers that can be regularised	One in case of domestic workers	No limit

² Article 22(4) of the Unified Text.

Residence Permit	1 year, renewable (fixed term contract), 2 year (open contract) on condition employment relation continues and social security contributions have been paid	1 year, renewable on the condition employment relation is to continue for at least one year and social security contributions have been paid
Application must contain:	1) Data of the employer, including a declaration Italian citizenship or regular stay in Italy 2) Data of the employee, including nationality 3) Data on type and nature of work 4) Data on salary (not below that stipulated in collective agreements in force)	1) Data of the employer or the company and its legal representative
Supporting documents required:	1) Proof of payment of a lump-sum payment for the three months of work declared 2) Copy of the employment contract (for a period of no less than a year) 3) In the case of a caretaker: a medical attest of the illness or disability of the family member for whom he/she is employed	1) Proof of a lump-sum payment of 700€ for each employee
Amnesty for the employer	For violations of rules regarding residence, labour, tax and social security until day of the issue of residence permit	
Retroactive payment of social security contributions	Lump-sum for the three months of work declared (see above). For work declared prior to the three months the normal social security contributions + legal interest (possibility of payment in 24/36 instalments)	
Regularization does not apply to:	Irregular migrants who: 1) have received an expulsion order, unless the revocation of such order is justified on the basis of objective criteria related to the degree of integration 2) who have been alerted in (international) databases as not to be allowed entry into Italy 3) who have been convicted of specific crimes	

2.1.4. Procedure

The 2002 regularization programme was employer driven. The employer had to apply at the Prefecture, Territorial Office of the Government³. It would be possible for one or more employers, in particular in the case of part-time work by domestic workers, to regularise a worker jointly.

In order to avoid long queues an agreement was made with the Italian Post which reserved special counters for this purpose. A special kit was made available containing the following forms:

- instructions
- stamp for the payment of the lump-sum
- (for domestic worker/caretaker: 290€ (of which 268 for the INPS and 22 for the administrative costs of the Ministries of the Interior and Labour, excluding 40€ postal costs), for other workers: 700€ (of which 669 for the INPS and 31 for the administrative costs of the Ministries of the Interior and Labour, excluding 100€ postal costs)
- an envelope for the declaration of the work to be regularised and the documents to be included
- a coupon, which once stamped by the Post Office would prove that the application was made, indicating name of employer and worker.

Within 20 days under the *Bossi Fini* law and 60 days under Decree Law 195/2002 the Prefecture had to decide on the admissibility of the application, checking the completeness of the application. The *Questure* would check whether there were any reasons preventing the issue of a residence permit of one year.

³ In Italy the prefecture is the state organ that represents the state in the province.

Within 10 days of the Prefecture being informed that there were no reasons preventing the issue of a residence permit, the worker and employer were required to sign a residence contract at the so-called “multi-functional counter”, after which the residence permit would be issued (administrative costs: 10.33€).

At the “multifunctional counter” the following agencies would be represented by an official:

- Tax Agency (*Agenzia delle Entrate*), for the issue of a fiscal code
- Prefecture, for a final examination of the application
- *Questura*, for the issue of the residence permit
- Provincial Labour Directorate for the conclusion of the “residence contract”

In some cases there would also be a representative of the INPS. The employer in any case had to register the worker with the INPS, as well as the INAIL (National Institute for Insurance Against Accidents at Work). This could be done through a special phone number, fax, internet or in person at one of the offices.

Failure to show up would result in the procedure being archived. The 20 and 60 days were binding, the 10 days were indicative and could vary depending on the amount of applications made. If in the meantime the worker had lost his/her job, (s)he would be placed on the allocation lists and have six months to find work. False declaration would be penalised with a maximum of two years and nine months imprisonment.

As an exception to the rules contained in the *Testo Unico* the employers declaration regarding suitable housing could be made until 11 November 2002 and fingerprints of the immigrant worker would be taken within a year or in any case at the moment of renewal of the residence permit. Children under 14 would be registered on the Residence permit of the parent. For children over 14 and other family members a separate request for family reunification would have to be made.

Until the end of the regularization procedure no expulsion orders were ordered against irregular migrant workers that were in the procedure, unless they represented a danger for the security of the state. The issue of a residence order implied the repeal of pre-existing expulsion orders. The irregular migrant would have to carefully keep the payment of the stamp and the coupon proving that the application was sent in case (s)he would be stopped by the police.

An important (informal) role in the procedure was played by charity and church organizations as well as trade unions in the support of both immigrants and employers. Their role ranged from giving advice on the procedure to helping with the actual compiling of all necessary documents, translating and filling out of forms. They also mediated between immigrant workers and employers where, for instance, the latter were unwilling or undecided on whether to regularise their irregular worker. (Ambrosini and Erminio, 2004).

The system of applications through the Post Office and the establishment of “multifunctional counters” was assessed positively and allowed for the conclusion of most cases within a year. It was however at the stage of renewals that the *Questura* become overwhelmed and were facing serious organizational problems. These problems were made worse by the fact that the same authority had to deal with an concomitant increase in requests for family reunification.

2.1.5. Outcome and comparison to previous programmes

Overall, around 702,000 applications for regularization were presented: some 190,000 concerned domestic workers, 140,000 caretakers and around 372,000 other workers. In total 646,829 workers were regularised of whom 316,489 domestic workers and 330,340 other workers. This is almost as much as in the three previous programmes together.

Of the *domestic* workers 81,2 percent were females of an average age of 37,3. Of the other workers 87,3 were male of an average age of 30,8. The average age of the regularised workers as a whole was almost 37 year. Of the regularised 40 percent were married.

The majority of applications were made in two regions, Lombardy (around 160,000) and Lazio (around 125,000). The majority of applications (52%) was made in the northern regions of the country, bearing witness of their position as economic heart of Italy.

In terms of nationality of the applicants, most came from Romania (20,4%), followed by Ukraine (15,2%), Albania (7,7%), Morocco (7,7%), Ecuador (5,2%) and China (5,1%). In total, over 50 percent of the applications was made by workers of a European nationality (eastern Europe or Balkans).

Table 3: Outcomes of the main Italian regularization schemes

Programme	End Date	No of Regularizations (percentage of successful applicants)		Categories (percentages)		Index of Irregularity ⁴
L. 913/86	30/9/1988	105,000	NA	Employment Job Search	35%	
65%	NA					
Martelli Law	30/6/1990	218,000	NA	Employment Autonomous Job Search	10% 4% 86%	120.9
Dini Decree	31/3/1996	244,000	93%	Employment Job Search Family	73% 21% 6%	45.9
Prodi Decree	31/12/1998	217,000	63%	Employment Autonomous Job Search Family	78% 14% 5% 3%	24.9
Bossi Fini	11/11/2002	647,000	93%	Domestic/Caretaker Em- ployment	49% 51%	47.8

Source ISTAT, 2005; Levinson, 2005, Anastasia et al., 2004.

The main difference with the previous regularization programmes was the fact that the employer had to make the application. It is interesting to note the considerable number of foreign employers regularising their irregular immigrant workers. This is particular the case for Chinese employers with 23,000 applications.

The regularization of 2002 was widely publicised. The advance announcement of an amnesty, as well as the restrictions imposed by the *Bossi Fini* law, may have had the effect of attracting new immigrants. As with previous regularizations, the 2002 regularization has primarily benefited immigrants that had recently arrived. In some cases the procedure to regularise domestic workers has been used to regularise family members that would not qualify for family reunification.

Not unlike previous regularizations, a great number of circulars issued by the involved ministries and social security institutions were needed in order to clarify and interpret the terms of the law. This did not necessarily result in a softening of the conditions. For instance the requirement of 3 months work before an application could be made was interpreted strictly. The uncertainty on the correct interpretation of the law resulted in some cases in a discretionary application of the rules by the involved authorities, or in a more lenient application of the rules in one place and stricter measures in others, resulting in forum shopping.

The fact that the application had to be made by the employer at his own expense has led in a number of cases to problems. Only at a relatively late stage of the programme an additional Decree was issued which enabled workers to denounce their employer for refusing to regularise them, which resulted in a late, but relatively small run on the post offices and in a number of court cases (Ambrosino and Erminio, 2004).

⁴ The index of irregularity used by the Italian Statistical Bureau (ISTAT) shows the percentage of regularised migrants in the total of regular migrants from the countries with a strong migration pressure on Italy.

In many cases the migrants themselves were made responsible for the filling out of the application and compiling the necessary documents. Often employers made the immigrants pay the cost of the regularization themselves. Other employers would ask for as much as 4000 euro in order to declare a fictitious labour contract. Fictitious labour contracts have also been declared, albeit at a relatively small scale, out of solidarity. About 3 percent of the interviewees in a 2006 study commissioned by the Italian Ministry of Labour indicated that they resorted to fraud in order to obtain their regularization. The recourse to fictitious contracts may explain the relatively high number of domestic workers that have been regularised (Zanfrini, 2006). A common irregularity was the declaration of a labour contract for a period shorter than the actual duration of the employment relation, in order to prevent retroactive payment of social security contributions.

When looking at the results of the regularizations in terms of continuing labour market participation, the 2006 study concluded that 74 percent of the regularised workers still worked regularly. A year after regularization, 98,5 percent of workers had obtained the renewal of their residence permit. About 48,3 percent was still in the same employment relation on the basis of which (s)he had been regularised, 40 percent had renewed its permit on the basis of a new contract.

The relatively high percentage of persons that received a renewal of their residence permit on the basis of a new employment relation can be explained from the fact that for many immigrants the problem is not as much to find a job, but rather to maintain it. In some cases the immigrant had resigned, or been made to resign, in order to continue to work irregularly, saving social security contributions, only to be hired on the books again right before the renewal date of the residence permit.

A further explanation may be the wish of the worker to improve their social position. It has been observed in the southern part of the country that regularised workers resigned in order to find better paid work in the economically stronger regions in the north. Other immigrants who, in view of their pending regularization had accepted disadvantageous labour conditions, took the opportunity to find better work elsewhere. As such Anastasia et al. (2004) reached the conclusion that the 2002 regularization has benefited the demand on the labour market more as a whole, rather than the specific employers who initiated the regularization process.

Although following the experience with the *Decreto Flussi* of 1998 a distinction has made between the arrival of workers provided for by the quotas (precautionary mechanism) and the recovery of workers interested in regularization (recovery mechanism) (EMN, 2005), some argue that the system of *Decreti Flussi* still serves as a means of hidden regularization. Theoretically future employers apply for an entry and residence permit under the yearly established quota for a future employee of theirs who is still physically outside Italian territory. It has been suggested however that many of the applications made are for immigrant workers already working irregularly in Italy.

This is a plausible scenario considering that the matching of offer and demand is much harder to take place outside Italy than within, in particular in the case of caretakers. These so-called hidden regularizations would lead to the rather surreal situation in which an irregular migrant worker must return to his/her country of origin in order to pick up her entry visa and return to Italy. In fact double applications have been growing, since persons that were accepted under the quota of previous years have not returned to their country of origin and must apply again. In addition the system seems to be increasingly used as an alternative means to family reunification.

In recent years, in reply to overwhelming numbers of applicants, the government has raised the quota. In 2007 applications could be made for the first time online, during the so-called "click-day". The relative ease thereof may have resulted in an even more overwhelming demand.

Italy, unlike some other European countries, does not have a permanent procedure for the regularization of individual workers. This was discussed in the preparation for the Reform of the *Testo Unico*, but not included in the Bill *Amato-Ferrero*⁵.

⁵ This Bill itself is put on hold by the downfall of the Prodi Government in January 2008.

2.1.6. Costs

A detailed study was carried out by the Italian Court of Auditors (2003) on the cost of the regularization for the Ministries of the Interior and Labour. The overall cost of the operation was estimated at 40,65 million euro, of which roughly half (circa 21,3 million) was spent on the employment of temporary staff. The costs for the Ministry of the Interior were estimated at 24,5 million euro. The Ministry of Labour spent 8,1 million euro. These costs were paid from a number of sources. First of all by the part of the lump-sum payment reserved for this purpose (totalling 18,567,591€ of which 2/3 for the Interior Ministry and 1/3 to the Labour Ministry). Secondly by the money reserved for by the financial provisions in Decree Law 195/2002, converted in Law 222/2002. Thirdly, by Ordinance of the Prime Minister (3242/2002). Finally, the Interior Ministry covered part of the costs from its normal budget.

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2.2. Spain

2.2.1. Introduction

Like Italy, Spain went through a transformation from being a country of emigration, to a country of immigration, albeit that this process started roughly a decade later. The number of migrants rose rapidly from 1980 to 1985, with a still faster increase from 1986 to 1991 (Reyneri, 2001). A period of slower increase was followed by a steep increase from the end of the 1990s onwards. This increase is visible both in the figures of foreign residents in possession of a residence permit, as well as in the figures of persons registered with the local population register (which includes also an important portion of the irregular migrant population) (Kostova, 2006). The country's 4.8 million international migrants, regular and irregular, make up 11 percent of Spain's population (UN, 2006).

By now Spain is one of the European Union's leading countries of immigration, if not the main one (Serra et al., 2005). A number of factors contributes to this. First of all, Spain's demand for low skill labour, fuelled by its growing economy and its ageing population. Secondly, the limited channel for regular migration, as well as the large informal economy have considerably contributed to the irregular nature of the inflow (Sandell, 2006). Lastly, there are Spain's historic ties with Latin America and geographic proximity to North Africa. The dominance of Latin American and Moroccan immigrants bears witness to the latter. Since 2000 however the percentage of Eastern European migrants, especially Romanians, has seen a considerable increase.

In many ways the Spanish situation can be compared to that of Italy. Spain's legal, institutional and administrative infrastructures have long ignored the reality of immigration as a permanent feature of social reality. Spain's first migration law of 1985, necessitated by its entry in the European Community, looked at migration as a temporary phenomenon (Gortázar, 2002). Not until the mid-1990s did migration become central to public and political debate and not until 2000 a comprehensive update of the 1985 law was adopted. The bipartisan political consensus with which the 2000 law was adopted stands in sharp contrast to the reform of this law in 2004, shortly after the Centre-Left government of Zapatero had replaced the Centre-Right Aznar government.

Spain has on a regular basis had recourse to large scale regularization programmes (also called "normalisations"), which have time and again been presented as "the last one", something which is reflected also in their definition as "extraordinary regularization procedures." They have likewise been interpreted as a result of the failure to provide for sufficiently capacious and efficient channels for legal immigration and the incapacity — and also unwillingness — of enforcement. Often these regularization have been accompanying broader immigration reforms or have been introduced to amend failures of previous programmes. Since 1993, the Spanish government has been operating an annual entry quota system, which has however failed as an effective instrument of matching offer and demand of migrant labour. These quotas did not differentiate between those already present in Spain or not, as migrants already living in Spain could apply for a residence and working permit after having found a regular job offer from an employer. As such, the quota system has served as an additional way of regularization⁶. Although since 2002, the quota system officially excludes immigrants already present, it has been argued that the system still serves as a way of regularization, albeit now "concealed".

⁶ It's telling that in the years in which extraordinary regularization programmes had place, there were no quotas established.

Two important differences with the Italian situation can be pointed out at the outset. First of all the existence of a permanent regularization scheme, which allows for the regularization of individuals who have been in Spain for a number of years and fulfil certain criteria proving their integration in Spanish society. Secondly, the fact that both regular and irregular immigrants enjoy almost all basic social services, including education, housing and health care to a wider extent than in the Italian case. Although this may have prevented what could have been a social crisis, it has placed significant burdens on the welfare system, also because irregular workers in general do not contribute to the system (Serra et al., 2005). Both these factors are likely to have contributed to irregular migrants' willingness to register with the local population register (*padrón municipal*), which makes the local population register an important source of data. Registration in the local population register is first a pre-condition (except in Andalucía and Catalonia) for the use of health services and second may be a means of proving presence in Spain for the purpose of individual regularizations⁷.

2.2.2. Previous regularization programmes

Spain's first immigration law, Organic Law 7/1985, provided for a regularization opportunity during three months for those irregular migrants that were present in Spain at the time of entry into force of the law (24 July 1985). The process started on 1 August 1985 and was eventually extended until 31 March 1986.

Only 44,000 applications were made, of which only 23,000 were decided favourably, receiving a residence permit for the period of one year renewable. The main reasons for the failure of this programme were a lack of publicity and administrative capacity, uncertainty and lack of confidence amongst immigrants and employers as regards the possibility of sanctions when applying for regularization, and language problems.

Immigrants had to apply for regularization at the provincial General Police Office for Aliens and Documentation (Documentation Police). In order to obtain a residence permit for the purpose of work, the irregular worker had to declare (s)he had sufficient financial means and one of the following documents: a labour contract, a social security card or a payslip. These documents would be forwarded by the Documentation Police to the Provincial Labour Office, which would decide on the granting of a work permit after which the Provincial Documentation Police Station would decide on the residence permit. This process could take months, if not years.

Not only did this programme regularise only less than half of the irregular immigration population, in addition a considerable number of those who were regularised fell back into irregularity (Reyneri, 2001). By the end of the 1980s the situation of irregular immigrants led to a widely supported campaign (NGOs, unions, political parties) for the regularization of their position. As a result, independent of any legislative reform, the 1991 regularization programme was adopted. It specifically targeted those who had fallen back into irregularity after being legalised under the 1985 campaign, as well as the broader community of irregular migrants. The regularization programme ran from 10 June 1991 to 10 December 1991. It applied to:

- those legally present before 24 July 1985;
- those present since 15 May 1991, on one of the following conditions:
 - already held a work and residence permit;
 - worked as employee or self-employed for at least 9 months in the previous 2 years;
 - in possession of labour contract or offer for a period of no less than 6 months;
 - feasible project for being self-employed;
- asylum seekers whose applications had been rejected or were pending.

⁷ Some caution is required in the interpretation of the data from the local population registers however. On the one hand not all irregular migrants may have registered. On the other hand, some irregular immigrants may have already left the country, since an obligation to renew registration each second year was only introduced in 2003, effective of December 2005.

An additional provision to the Agreement on regularization allowed for the regularization of family members of regularised workers in an irregular situation. Under this particular strand of the procedure only 5,889 persons were regularised.

The procedure was free of charge and greater efforts were made to publicise the campaign, both by the administration and NGOs. The procedure was supervised by an ad hoc commission composed of representatives of the ministries involved (Foreign Affairs, Interior, Employment and Social Affairs), which could provide guidelines and clarifications as the process went along. Applications were made at the Provincial Offices of the Labour ministry or in the General Office of the Spanish Institute of Migration (both hierarchically falling under the Labour ministry), hence no longer at a police authority. They were forwarded to the Provincial Employment Offices which decided on the work permits after which a final decision was taken by the General Director of the Spanish Institute of Emigration. Work and residence permits could be collected at the Documentation Police. Only at this stage had the irregular migrant to appear before the police authorities, in order to have his identity checked and fingerprints taken. The residence permits had a validity of one year renewable, independent of the duration of the labour contract.

Although the programme succeeded in regularising 109,135 migrants (excluding family members), only three years later, about a third of the regularised immigrants had not renewed their residence permit, of which presumably a large portion had fallen back into irregularity (Codini, 2005; Reyneri, 2001).

A third Regularization Programme ran from 23 April to 23 August 1996. It was introduced together with the adoption of Implementing rules to the 1985 law, which for the first time not only recognised the permanent character of migration, but also migrants' rights connected therewith. It was specifically aimed at regularised migrants who had fallen back to irregularity. The programme applied to irregular migrants meeting one of the following requisites:

- a) in Spain before 1 January 1996;
- b) in possession of some title of residence before 26 May 1986 (when the last permits under the 1985 programme were issued);
- c) family member of an irregular migrant fulfilling the first two conditions;
- d) irregular family members of regular immigrants.

Applicants who applied only for a residence permit had to show that they had sufficient financial means and health insurance for the period covered by the residence permit. Applicants for a work/residence permit had to show an offer of employment or a statement of two activities in which they intended to work. A permit would be refused if there were overriding motives, such as public security.

Depending on whether an application was made for a residence permit or a residence/work permit, the application had to be lodged at authorities resorting under the Interior Ministry (Aliens Office or Documentation Police) or the Ministry of Employment (Provincial Offices of Employment) respectively. In the case of an application for a work/residence permit a decision on the work permit would be taken by the Provincial Office of Employment and on the residence permit by the authority resorting under the Ministry of the Interior.

The programme regularized 21,300 foreigners, the majority of which had work/residence permits (13,800) and 7,500 permits for residence only. Of those who applied, 59 percent were people who had formerly held a residence and work permit, and 34 percent were from family members of immigrants who had permits (Reyneri, 2001). Residence permits had a validity of two years renewable. Those of family members had a validity of one year renewable.

In 2000 a new comprehensive migration law was adopted. Law 4/2000 was characterised by its inclusive character, with an emphasis on integration and characterised by a rights-based approach towards migration. On the basis of this law Royal Decree 239/00 was adopted which provided for yet another regularization programme running from 21 March 2000 until 21 July of that year. The programme applied to those workers who were present in Spain before 1 June 1991 and could prove a certain degree of *arraigo laboral* ("labour rootedness/integra-

tion”) through their work. Since only 6 percent of the applications were made by irregular immigrants who had been in possession of a previous permit, it could be concluded that the amount of immigrants falling back into irregularity after the 1996 programme was smaller than under previous programmes (Kostova, 2006). However, another possible explanation could be that the quota system had provided an alternative means for irregular migrants to legalise their status.

The 2000 programme resulted in around 163,900 regularizations, although a large part of the applications was rejected for lack of proof of presence before 1 June 1991.

While the drafting phase of Law 4/2000 saw a great consensus between parties, soon after its adoption the Centre-Right Partido Popular (PP) opposed the law for being too permissive. Since the PP came into power shortly after its adoption, it was capable of introducing restrictions into the new law (through Law 8/2000). Nonetheless, some of the innovations of Law 4/2000 were maintained and the Aznar government even introduced an additional regularization programme in Royal Decree 142/01.

The 2001 programme had essentially the same requirements as the preceding programme, with the exception that immigrants had to prove presence in Spain from 21 January 2001 (i.e. ten years later than the preceding programme’s deadline). This resulted in 234,600 regularizations.

In both the 2000 and 2001 programmes the permits issued had a validity of one year renewable. The competences for deciding on the applications essentially followed that of the 1996 programme (Gortázar, 2000). An important difference was that the applications could be lodged at a greater number of government authorities and institutions, including the registry offices of the different Government representations and sub-representations, as well as at the Post Offices. Although there are no data related to the renewal rate of permits granted in the 2000 and 2001 regularizations, the increase in first renewals in general in 2002 and 2003 could be directly linked to these programmes (Arango et al., 2008).

An important innovation of Law 4/2000 that was maintained after Law 8/2000 was the permanent regularization scheme. Under this scheme an irregular immigrant that could prove a continuous presence in Spain could apply for a temporary one year residence and work permit (Gortázar, 2002) on the basis of *arraigo laboral* or *arraigo social*, literally rooting in the labour market or Spanish society respectively.

A subsequent modification to the 2004 law (Law 14/2003), adopted by the PP and supported by the Socialist Party (PSOE), aimed to facilitate and simplify legal immigration and reinforce border controls. It was not accompanied by a regularization programme, but determined in its third final provision that the Government was to adopt a regulation for the execution of Law 4/2000 as amended.

In 2004, the socialist Zapatero government came into power, replacing the Centre-Right government of Aznar. It created the position of Secretary of State for Immigration and Emigration within the Ministry of Labour and Social Affairs. With the adoption of Royal Decree 2393/2004 for the execution of Law 4/2000, the focus of Spanish immigration policy shifted to integration.

The Royal Decree modified the conditions for the granting of a permit on the basis of *arraigo*. Under these new rules, *arraigo laboral* requires a continuous presence of two years, an employment relation of at least one year and no criminal record in Spain or the country of origin. *Ar-raigo social* instead requires a period of continuous presence of three years, a labour contract for at least one year and the proof of either family ties with other resident foreigners or integration into the place of habitual residence. A third possibility of obtaining a temporary residence and work permit exists for children of parents of Spanish origin. There is evidence that the regime of *arraigo social*, rather than that of *arraigo laboral*, has become an important way of regularising immigration status in Spain (Arango et al., 2008). In 2006, 7,427 cases of *arraigo* were reported of which 7,204 were based on *arraigo social*, 585 on the basis of being children of Spanish parents and 223 for *arraigo laboral*.

Decree 2394/2004 furthermore provided for the most extensive regularization in Spanish history. It will be discussed in the next section.

2.2.3. The 2005 Normalization programme of foreign workers

The third transitory provision of Royal Decree 2394/2004 established an employer-driven regularization programme for irregular employees, as well as the possibility for domestic workers in a part-time or discontinuous labour situation to regularise their own position. Detailed rules were elaborated in the Ministerial Order PRE/140/2005 of 2 February 2005. The programme was presented as the last ever of this kind.

By the end of March 2005 the number of non-EU foreigners with a residence permit amounted to 1,291,285. By the end of January 2005, the number of non-EU foreigners registered in the local population register amounted to 2,955,712. Although one cannot but exercise extreme care in comparing such different statistical data, the very large difference between the two data does indicate a large irregular presence in the territory.

Secretary of State for Immigration and Emigration, Consuelo Rumí stated the twofold purpose for the normalisation programme: regularising jobs from the informal economy and increasing affiliations to the social security system. Not only did the increasing presence of irregular migrants mean a growing strain on the social security system, it also fuelled the informal economy with accompanying cases of labour exploitation. The regularization of irregular immigrants should ultimately serve their integration in Spain.

It has been noted that the new direction of immigration policy under the Zapatero government also aimed at creating as broad as possible a consensus in this policy field (Arango et al., 2008). With regards to the regularization programme, this is reflected in its name: “normalization” rather than “legalization” (Levinson, 2005). With the exception of the PP, which considered that the regularization programme would exercise an important call effect, a broad consensus could indeed be observed. Support for the regularization programme was voiced by political parties, immigrant organizations and other parts of civil society, as well as employers’ organizations and trade unions. The latter have from the very beginning had a very positive approach towards labour migration and have acted as champions for the integration of migrant workers and equal working conditions.

2.2.4. Criteria

An employer or the legal representative of a company could request the regularization of his/her worker if the following conditions were fulfilled:

Table 4: Criteria for the 2005 regularization

Employer
The requesting company must be registered with the Social Security and must not have outstanding payments
The employer could be required to prove that (s)he had the financial, material and personal means to carry out the contract
Worker
Registered with the local population register for at least six months prior to 7 February 2005 (last day of registry 7 August 2004) and continuous presence during these six months
In possession of the necessary title for the exercise of the work (where required) or the necessary skills
No criminal conviction in Spain or in the countries in which (s)he has resided in the previous 5 years
Not been refused entry into Spain on e.g. grounds of public security, unless on the basis of a non-executed expulsion order for the infringement of rules on irregular residence and/or work under the immigration law
Labour Contract
Signed contract for a future period of at least six months – in the agricultural sector: 3 months

- in the construction and hotel sector: 6 months within 12 months
- in the domestic service sector, in a case of a single employer: 80 or more hours a month and equal to or less than 40 hours of work a week

In case of part-time contracts, the sum of the working days under these contracts must equal a contract under one of the above

The labour conditions laid down in the contract must be in line with regulations in force

A domestic worker in a part-time or discontinuous employment situation could request regularization her/himself when s(he) fulfilled the same conditions *mutatis mutandis*. (S)he had to be guaranteed work for a future period of a minimum of six months and fulfil the conditions to be included in the Domestic Worker Social Security regime. This meant that *inter alia* the cumulative duration of the work could not be less than 30 hours a week, carried out during at least 12 days a month.

2.2.5. Procedure

Applications had to be submitted in person within three months from 7 February 2005 (entry into force of the Order). A compulsory, free application form was made available on the web and in the various public authorities forming part of the information network.

Applications had to be submitted in the social security institutes to be determined by the Province (General Treasury of Social Security, National Institute for Social Security, Social Institute for the Sea, resorting under the Ministry of Social Affairs). Applications had to be accompanied by documents certifying that the conditions were fulfilled, such as a certificate issued by the embassy/consulate of the country of previous residence regarding the absence of criminal convictions. In the absence of a labour contract, proof of registration with the local population register or identity documents of the worker, the application would be considered as manifestly unfounded; for other documents an extension of 15 working days could be given after which the application would be achieved. For the certificate proving absence of criminal convictions the applicant would have to show that a request had been made to the competent authority of the country of previous residence. With the process already underway, on 14 April, the tripartite dialogue between the executive, employers organizations and unions decided to allow irregular workers to comply with the condition of registration with the local population register before 7 August 2004 by "omission". A list of public authentic documents was drafted on the basis of which an irregular worker would be able to prove his/her continuous presence and could obtain a retroactive registration in the local population register from the municipalities (e.g. health card, expulsion orders, application of registry in the register). This led to a considerable increase in requests and it has been argued that in the end many documents were neither public, nor authentic (Kostova, 2006).

The processing and final decision on the applications was made by the Delegation (at the level of the Autonomous Regions) or Subdelegation (at the provincial level) of the Government, resorting under the Ministry of the Interior. These would receive, within 10 days and of their own motion, the information from the tax agency, the criminal offence register, the competent services of the General Directorate of Police, the General Treasury of Social Security and the National Institute for statistics necessary to inform their decision. The decision would have to be taken within three months starting from the day after the competent authority had registered the application in its register. If after three months no notification was given, this counted as a rejection.

In case of a favourable decision, the residence and work permit were issued on the condition that the administrative fee for the residence and work permit would be paid and that, within one month, the worker would be registered with the social security. From the moment of registration with the social security the one year validity (renewable) of the residence and work started running. If the payments were not made the authorisation would expire, and only if sufficient reasons were presented why the work relationship had not started was it possible to submit a new application. A positive decision nullified previous infringements of rules and regulations relating to irregular stay and work, as well as any expulsion order.

Within a month after entry into force of the residence and work permit coming into force, the regularised migrant had to request a Foreigner Identity Card which was issued for the duration of the residence and work permit. The request had to be made in person at the competent authority (Office for Foreigners or in the absence thereof the Police Commissariat in the place of residence). When picking up the Foreigner Identity Card the regularised worker would have to pay another administrative fee.

The whole operation was supported by a network of 761 information points consisting of civil society actors, such as migrants organizations, unions and other NGOs, who acted not only as providers of information regarding the process but also as “go-betweens” the administration and applicants.

2.2.6. Outcome and comparison to previous programmes

A total of 690,679 applications were made, which constitutes a considerable increase compared to previous programmes. The majority of the requests were made in Madrid, Barcelona and Valencia. Over 50 percent of the immigrants came from three countries: Ecuador (20%), Romania (17%) and Morocco (13%). Application were made first and foremost for workers in the domestic sector (31.67%), followed by construction (20.76%) and agriculture (14.61%). Over 40 percent of the applicants were women, who mostly worked in the domestic work sector or tourism.

Data provided by the Spanish Ministry of Labour and Social Affairs show that a total of 578,375 applicants were successful (84%). Of the successful applications 97 percent fulfilled the requirement to register with Social Security within a month. Indeed, while the number of foreigners affiliated to Social Security has been on the rise since 2000, there is a clear and sudden increase between 2004 and 2005, in particular of non-EC workers (MTAS, 2005a). In some provinces this number has slightly decreased in 2006, which could indicate that some workers in these provinces have fallen back into irregularity or have moved to another province (Arango et al., 2008). Also in the social security scheme for domestic work there is a certain decrease discernable in 2006. This could be related to the precarious nature of this type of work, which would increase the possibility of a fall back into irregularity or of a change in employment sector; the latter is not improbable since some workers may have regularised themselves as domestic workers in the absence of an available employer (Arango et al., 2008). A total of 81 percent of the workers regularised in 2005 results however affiliated in 2006. A comparison between the number of foreigners in possession of a Foreigner Identity Card in 2005 and 2006 does not show evidence of a widespread fall back into irregularity (Arango et al., 2008).

Table 5: Outcomes of the main Spanish regularization schemes

Programme	End Date	No of Regularizations (percentage of successful applicants)	Category of irregular migrants	
1985	31/3/1986	23,000	52 %	All
1991	10/12/1991	109,135	81 %	<u>Previous permit before 24/7/1985:</u> all <u>Present before 15 May 1991:</u> previous permit employment autonomous family members
1996	23/8/1996	21,300	86 %	All (with previous permit)
2000	21/7/2000	163,900	66 %	All
2001	1/8/2001	234,600	69 %	All
2005	7/5/2005	578,375	82 %	Employment

Source: Levinson, 2005; Gortázar, 2000; Cangiano and Strozza, 2006.

Apart from the number of regularised immigrants, the 2005 programme distinguishes itself from previous programmes by its employer-driven character.

From an organizational point of view, the process must be evaluated positively. The 2005 programme distinguishes itself for the speed with which it was carried out (all in all about twelve months from the first negotiations until the taking of the last decisions). The separation between points of application and decision-making has contributed to this, also because roughly 200 Social Security centres are spread equally throughout the territory. The average decision-making time was around 4 weeks (Arango et al., 2008). Internal coordination was facilitated through an electronic dossier to which all actors had access (SILCON). Although there were considerable queues reported on the opening and closing days of the process, this was generally to be expected.

From the workers point of view the two most important problems were the costs of the regularization and the collection of all required documentation. The Spanish refugee organization *Consejo de Apoyo a los Refugiados* (CEAR) estimated the cost for an irregular worker of Cuban nationality in Parla (Madrid) as follows:

Table 6: Example of costs of 2005 regularization for migrant

Certificate of registration with the local population registry (Municipality of Parla):	15 €
Certificate of absence of criminal convictions (Cuban Consulate in Spain):	300 €
Taxes for the work permit:	344.02 €
Taxes for the residence permit:	5.62 €
Taxes for the Foreigner Identity Card:	6.31 €
Total:	670.95 €

Source: <http://www.migrantesenlinea.org/enlinea.php?c=435>

Although the costs of the work permit are by law to be paid by the employer, these costs are often covered by the worker. Unlike the Italian situation there were no remedies available to the worker in case the employer refused to regularise him/her. No information is available as to the frequency with which such has been the case. Unions did, however, state that they would report companies that fire their workers on the assumption they could hire other irregular workers by the end of the process, thus facilitating labour inspections (Lobo, 2005). The most problematic document to obtain was the certificate of absence of criminal convictions. For many countries such a certificate could only be issued in the country itself, which implied the worker would have to resort to contacts in the country of previous residence in order to obtain the document. There were problems for those requesting certificates from countries without a diplomatic representation in Spain. In relation to the registration in the local population registry by omission, there were cases reported in which municipalities did not accept certain documents, whereas others did.

There have been reports of false employment relations being presented for regularization. One Spanish newspaper reported that in as many as one out of three cases fraud was suspected by the Labour Inspection charged with the detection thereof (Cinco Dias, 20 April 2004). The Labour Inspection worked on the basis of an “alarm system” under which the following situations would call for further investigation: 1) a family tried to regularise more than three domestic workers, 2) a company existing for less than six months would regularize more than 10 workers, 3) a company doubled, tripled or expanded fivefold its permanent staff through the employment of regularised workers.

One of the main arguments put forward by the main opposition party, PP, against the regularization programme was the so-called “call effect” (or “sponge”, or “magnet effect”) that would be exercised by this operation. The same argument, and indeed severe criticism, was voiced at the European level leading to the setting up of a consultation mechanism on such operations in the future. This criticism was linked to the fact that Spain forms part of the borderless Schengen area, and was thus perceived to be opening the gates to the rest of Europe. This has finally led

to the establishment of a (non-binding) “mutual information mechanism concerning Member States’ measures in the areas of asylum and immigration” (Council Decision 2006/688/EC of 5 October 2006).

Attempts to establish whether there has indeed been a call effect as a result of a regularization programme are always hampered by the lack of statistical data or the reliability of such data, as well as the fact that many other factors affect migratory choices such as the characteristics of the immigrant population, economic developments in both countries of origin and destination, visa rules and other means of immigration control. The few studies that have been carried out in relation to the 2005 normalisation programme are not conclusive. Pajares (2006) has shown that in the year 2006 there was a considerable decrease in the illegal entries in Spain, whilst the number of legal entries had risen. Compared to previous years, there is no significant overall rise in Spanish immigration in 2005, even if there did exist an increase in demand for labour (Pajares, 2006 and 2007, Sandell, 2006). A study by Arango et al. (2008) does not find evidence “tout court” for a call effect as a result of the 2005 regularization. Kostova (2006) does consider there have been such effect and in particular evaluates negatively the registration in the local population register by omission.

The regularization programme has had the effect considerably reducing the amount of irregular workers, most of whom have been able to maintain their status at the first renewal. Notwithstanding these positive effects of the regularization, many irregular immigrants have remained outside the process. As a result Spain continues to have a large irregular migrant population, which, albeit at a slower pace, continues to grow.

2.2.7. Costs

There are no clear and publicly available data on the operational costs of the 2005 programme. A Covenant of cooperation of February 2005 between the Secretariat of State of Immigration and Emigration, the Secretariat of State for Social Security and the Sub-Secretariat of Public Administration for the realisation of the 2005 regularization determined that each party would finance its involvement in the operation from its own means, including e.g. the training of staff and the employment of temporary staff. Considering that Social Security alone temporarily employed 1,639 persons for the duration of the process (as compared to the deployment of 1,231 of their permanent staff), the latter constituted one of the major expenses. Given the expected increase in contributions to the Social Security, the Covenant established that the Social Security would reserve 800,000 euro for common expenses.

In terms of benefits, it is without doubt that the increase in affiliated workers has increased contributions to the social security system. Shortly after the end of the process the Spanish government estimated an additional input of 750 million euro in 2005, and nearly 1,500 million in 2006, i.e. 1.6 percent of the total (Le Monde, 12 January 2006; El País, 7 June 2005). The actual benefit cannot however not be established, as these are calculated in relation to companies rather than individuals (Arango et al., 2008). A press release of the Spanish Ministry of Social Affairs stated that in the period of August 2004-August 2005, the affiliation to the Social Security had increased with 905,884 workers. In the General Regime, 1 out of 3 new affiliated workers could be linked to the regularization programme. In August 2005, the total amount of contributions was for the first time higher than 800 million euro (MTAS, 2005b).

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2.3. France

Already an immigration country since the late nineteenth century, after the end of the Second World War, decolonisation and the active recruitment of foreign labour made France once again an important labour importer. In 1974, as a result of the deteriorating economic conditions in the wake of the 1973 oil crisis, France ended its foreign worker programme and implemented employer sanctions to discourage the contracting of foreigners (Weil, 2005). Ever since, the question of irregular migrants has been prominent in political and public debate. In 1993, the “*Pasqua laws*” (from the name of the Minister of the Interior of that period) introduced by a centre right coalition initiated a policy of zero tolerance against irregular migration. As a result of these laws a great number of irregular immigrants, including asylum seekers and foreign parents of French children could not be expelled, but could neither obtain residence and work permits. This led to a widely supported public campaign of *sans-papiers* and their supporters, which has included the occupation of churches, hunger strikes and protest marches.

Like its southern neighbours France has had recourse to extraordinary regularization campaigns. A first regularization took place in tandem with the closing of the borders in 1973 and regularised around 400,000 foreign workers (Poelmann and De Sèze, 2000). Further programmes took place in 1981, 1991, 1998 and 2006. With the exception of the last, these programmes were initiated by left governments. All were much less motivated by a sense of uncontrollability of the situation of irregular migrants in the country than by humanitarian concerns. As was pointed out by a 2004 study commissioned by the European Commission, the regularization on the basis of family ties gives the programme an additional constituency, since it benefits legal residents in an important way, is directed at irregular migrants who considering their family ties were unlikely to leave the territory and who are because of these ties likely to integrate better (Papademetriou et al., 2004).

In addition to one-off regularization programmes, the 1997 *Debré law* (from the name of the Minister of the Interior, in the Centre-Right government of Juppé) introduced a procedure for permanent regularization after 15 years of continuous presence in France. This period was later brought down to 10 years by the 1998 *Chevènement Laws* (from the name of the Minister of the Interior) enacted by a Centre-Left government of Prime Minister Jospin one year later. The 1997 one-off regularization programme can be considered a “prelude” to the relaxation of the requirements for permanent regularizations. In fact, it has been argued that many decision under the 1997 programme have been delayed in order to be eventually dealt with under the amended law (Sénat, 1997).

In 2005, after ten years of constant growth, the inflow of immigrants has stabilised. Family reunion remains the most important source of permanent entries. Labour immigration has increased. France remains the EU Member State with the largest number of asylum applications (OECD, 2007). In 2006, the French Interior Ministry estimated the number of irregular migrants between 200,000 and 400,000, with 80,000 to 100,000 arriving each year (Sénat, 2006).

On 24 July 2006 a new immigration law was adopted (Law 2006-911, incorporated in the Code for entry and stay of foreigners and the right to asylum), which overhauled France’s immigration system by giving the government new powers to encourage high-skilled migration (“chosen migration”), restrict family immigration and fight irregular migration more effectively. The new law makes it easier to deport irregular immigrants and deportations have been on the rise even before its entry into force (Murphy, 2006). Moreover, the law has abolished the system of permanent regularization, instead permanent residency status will be granted on a case-by-case basis, and will largely be based on new integration criteria (CoE, 2007).

The 2006 regularization programme can be seen as a response to the public outrage over the deportation of irregular migrant families with school-going children.

Table 7: The main French regularization schemes

Programme	End Date	No of Regularizations (percentage of successful applicants)	Eligibility	Permit Granted
Ministerial Circular of 11 August 1981	15/1/1982 (29/1/1982 – seasonal workers)	130,000 (87%)	– Presence before 1/1/1981 – Proof of stable employment or work contract for one year (eventually expanded to include many other categories)	Permanent residence
Ministerial Circular of 23 July 1991	NA	15,000 (30%)	Asylum seekers whose application was denied and who: – entered France before 1/1/1989 – waited for a reply for min. of 3 years (2 years when family ties) – Employment for min. 2 years	Permanent residence
Ministerial Circular of 24 June 1997	31/10/1997	150,000 (58%)	Stable presence in France and family ties to French national or foreigner regularly present in France or Families in an irregular situation proofing degree of integration in France	1 year, renewable
Ministerial Circular of 13 June 2006	13/8/2006	6924 (23%)	Child enrolled and attending school since September 2005 latest and continuous presence of one of the parents for at least two years prior to 13/8/2006	1 year, renewable

Source: Levinson, 2005; Poelemans and De Sèze, texts of the circulaires.

France's current President Sarkozy has clearly expressed himself, amongst others at the occasion of the Spanish regularization of 2005, against massive one-off regularization programmes. Although limited in its results, the last regularization is nevertheless an important example of the continuing French tradition of regularization for humanitarian reasons, yet at the same time shows the preoccupation with the integration of the migrant population (in particular after the widespread 2005 unrest in French suburbs) through the condition of a "genuine will to integrate into French society." This concern seems also to underpin the similar requirement for individual regularization.

The Immigration Law of 20 November 2007 introduced a new procedure for permanent regularization for irregular workers. A ministerial circular of 7 January 2008 imposes the following conditions:

- diploma or experience in one of the professions which is on the list of job openings that cannot easily be filled in the region in which the worker applies
- proof of a job offer for an open contract or exceptionally a contract with limited duration for at least one year.

Exceptionally also workers with jobs that are not on the list but that nevertheless have recruitment difficulties could apply.

It seems however that this procedure is not well understood by employers, who are afraid to ask for the regularization, in part also in view of the existence of employer sanctions, and in

some cases rather prefer to lay off their irregular workers. France's crackdown on irregular migrant workers, whilst at the same time continuing to allow for the possibility of their regularization, has been described by Patrick Weil as a sort of political-administrative schizophrenia causing much distress to business (Le Monde, 28 February 2008).

The case law of the French Council of State has recognised that, although regularization is not a right, the government has the discretionary power to regularise (Poelemans and De Sèze, 2000). The regularization programmes have been carried out on the basis of ministerial circulars addressed to the Prefects, heads of the Departments and falling under the Ministry of the Interior, who are responsible for the implementation of the Immigration Law and the decision making during regularization procedures.

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2.4. Germany

After years of active labour recruitment in the post-war period, Germany in 1973 imposed a legal recruitment ban for both skilled and unskilled labour in response to the 1973 oil crisis and subsequent economic slowdown. Since the 1990s labour shortages in certain sectors, as well as the ageing of Germany's population have led to a broader discussion on the need for economic migration. In 2001 a government Commission (Süssmuth Commission) published an extensive report, which had as one of its key recommendations the active selection of qualified immigrants.

In 2004 (in force since 1 January 2005) Germany passed a new framework law on immigration (*Zuwanderungsgesetz*), the central piece of which is the Law on Stay (*Aufenthaltsgesetz*). The initial proposal, which followed much of the recommendations of the Süssmuth Report, was heavily amended in the mediation process between the two houses of parliament. As a result the recruitment ban remains in effect, albeit subject to additional exceptions.

During the early and mid-1990s Germany received an unprecedented number of asylum applicants as a result of the Balkan wars and liberal asylum laws. The German government responded to the influx of asylum applicants by reforming the asylum law in 1992, upholding the right to asylum in Germany out of humanitarian concerns and introducing the safe-third-country and safe-country-of-origin concept. The number of asylum applications has been declining steadily since (Oeczan, 2004; OECD, 2007).

German law has never known a provision for the regularization of clandestine immigrants, nor have German governments resorted to one-shot regularization programs. Not only do such operations seem to contradict the tradition of legality embedded in German political and social culture, opposing whatever kind of amnesty, it is also true that Germany has a much smaller informal economy than the Mediterranean EU Member States. Unsurprisingly it was Germany, together with France, that voiced considerable opposition at EU level in response to Spain's 2005 regularization programme.

However, it is a largely ignored fact, and worth noting, that large scale regularization measures were seriously considered under the Brandt government (1969-74) (Schönwälder et al., 2006). Regularizations have taken place mostly in relation to asylum seekers whose claims have been rejected, but whose deportation or return is impossible or unacceptable and who have as a result been given a toleration status (*Duldung*). The authorities of the *Länder* have the discretionary power to regularise these tolerated aliens, either on the basis of an individual decision or for a specified group of aliens (Hailbronner, 2000).

The possibility for the *Land* authorities to grant a special residence permit was used in 1996 to allow for the regularization of asylum seekers that had entered Germany before 1 July 1990 and had lived there for more than eight years. The limited number of beneficiaries of this programme resulted in a second programme in 1999, regularising the position of asylum seekers who had entered Germany before 1 July 1993. In addition there have been regularizations of asylum seekers from specific countries. Nevertheless, the German government has in response to the call for regularization programmes explicitly rejected the idea of regularizations in response to the administrative backlogs in the processing of asylum applications (Hailbronner, 2000). Regularization in these cases should only be applied as means of last resort and out of humanitarian concerns.

Although Germany's previous migration law provided for a maximum duration of one year for toleration status, this could be renewed, resulting in "chain-toleration" (Geyer, 2007). *Duldung* itself does not confer any residence rights on the migrants. It moreover bars them from

regular employment, free movement in Germany and access only to minimum welfare benefits. The new German immigration law was to abolish the system of toleration but retained it in Section 60a, limiting it to six months renewable. For longer periods the *Land* authorities may decide on the basis of international obligations or humanitarian grounds to grant a residence permit (Section 23). In individual cases there is the possibility of regularization in cases of hardship (Section 23a). At the end of October 2006 about 178,326 persons lived in Germany as tolerated, of whom 100,000 since at least six years and 70,000 since more than eight years (BMI, 2007).

In November 2006, the Interior Ministers of the German *Länder* agreed to grant residency permits to some of the tolerated asylum seekers. The idea behind this was to relieve the financial burden of providing tolerated asylum seekers with minimum welfare benefits and ending the uncertainty in which these people found themselves (Leise, 2007).

Section 104a, inserted in the *Aufenthaltsgesetz*, granted a temporary right of residency to the tolerated asylum seekers who had resided in Germany for 8 years, or 6 years if they had children, by 1 July 2007. They were required to show a minimum of willingness to integrate, having appropriate accommodation, having sufficient knowledge of spoken German, not having deliberately misled the authorities, having no criminal record, and not being affiliated to any terrorist or extremist organization. The temporary residence right is valid until 31 December 2009 and includes a right to work. The temporary right to residence is only renewed for another two years if the foreigner proves to have been providing for himself and can be assumed to do so in the future. If the tolerated foreigner will be able to prove being able to provide for himself by working, he/she will be granted a residence permit from the start on the basis of Section 23.

Section 104b provided for an independent right of temporary residence for integrated children of tolerated for who by 1 July 2007 had reached the age of 14. They needed to give evidence of being present for at least six years, speaking German, having their care ensured and being integrated in Germany.

At the closing date for applications, 30 September 2006, 71,857 persons had applied for the *Bleiberecht* (right to stay)⁸. Applications had to be made by 30 September 2007 at the latest. The expectation was that approximately 50,000 of the over 170,000 tolerated asylum seekers would qualify for the temporary residency status. On the basis of the reply given by the German government to questions from the left *Linke* Party on 13 November 2007, a first provisional appraisal of the programme can be made. Of the 71,857 applications, 19,779 had been thus far decided favourably (28%). An additional 29,834 persons were given an additional “toleration” in order to prove they were able to provide for themselves by working. 7,885 applications had been rejected definitely (BM, 2007).

The strict requirement of the Regularization and the relatively small number of beneficiaries of this programme have led to criticisms from left opposition parties, as well as immigrant organizations, who are demanding a more open and permanent regularization for tolerated aliens. Since the status of toleration is a prerequisite for eligibility for this regularization programme, one can question whether this is to be considered as a functional equivalent at all of the other regularization programmes under discussion in this study. The fact is that the 2006 regularization does not apply to the estimated 500,000 to 1,000,000 irregular migrants in Germany who lack even as much as the toleration status⁹.

Literature:

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⁸ Although the government added the caveat that not all *Länder* had submitted their data yet.

⁹ Thanks to Barbara Laubenthal for pointing this out.

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2.5. Greece

Migration to Greece, long considered a country of emigration, transformed into a massive and largely uncontrollable phenomenon with the collapse of Communism in 1989 (Kasimis and Kassimi, 2004). In the 1990s, although being one of the least developed EU Member States, it received the highest percentage of immigrants in relation to its labour force (Kasimis and Kassimi, 2004).

The country's economic growth since its entry into the EU, its large informal economy and demand for low-skilled work in sectors characterized by seasonality (Cavounidis, 2006) all contribute to the inflow of migrants. In addition its geographic location and the nature of its borders (islands, long coastline) make it a point of entry to the EU for both immigrants as well as asylum seekers. Perhaps even more so than in Italy and Spain, the regulatory framework for the management of migratory flows has proven incapable of steering migratory flows. Although there are signs of improvement in recent years, there has been a weak public discourse on immigration and a lack of involvement of civil society actors in the formulation of immigration policies (Pavlou et al., 2005). A first migration law, which was a very restrictive and barred law, barring amongst others irregular immigrants from public services, was adopted in 1991. The first however migration law was adopted in 2001. Migration remains regulated "through a complex system of visas and quotas based on non-existent statistical employment data about job vacancies, administered by an overbearing bureaucracy, unable to manage the implementation in an efficient manner." (Pavlou et al., 2005).

A 2001 population census showed a foreign population of 762,191, representing 7.5 percent of the population of Greece. The lack of accurate statistics however makes it difficult to establish the true size of Greece's migrant population. Tryandafillidou and Maroufof (2008) estimate that there are currently around 1 million immigrants in Greece, excluding those of Greek ethnic origin, and a total of around 167,000 undocumented migrants.

Like other Southern European countries, Greece has had recourse to large scale, one-off regularization programmes in order to control the number of illegal residents within its borders (estimated at half a million in the mid-1990s already) (Tryandafillidou and Maroufof, 2008). This is in spite of strong public opposition against such programmes and migration in general (Levinson, 2005). Trade Unions and employers' organizations have generally been in favour of such operations, even if smaller and medium-sized enterprises, and farmers, have been more hesitant in their support (Fakiolas, 1997).

The first regularization programme was launched at the end of 1997 and carried out in 1998. A second regularization was included in the 2001 immigration law. A third programme, accompanied the introduction of a new migration law in 2005, which itself simplified the system of residence and work permits. Arguably Law 3536/2007, rather than introducing another regularization programme, simplified the requirements relating to social security payments of the 2005 law for the issuing and renewal of permits. It thus prevented irregular migrants who were still in the process of having their applications rejected and those who were already regularised from falling back into irregularity (Tryandafillidou and Maroufof, 2008; OECD, 2007) [see Table 8, page 71].

Greece's regularization programmes have been heavily criticised for their poor organization, incompetent government oversight, lack of data, as well as the absence of accompanying policies aimed at regulating migratory flows (Levinson, 2005). Both the 1998 and 2001 programme allowed for a relatively short period of regularization (white card, six months validity of permit respectively), after which the migrant had to apply for a more permanent status. Administrative backlogs however resulted in the issuing of the provisional permit at the time of its expiry

Table 8. Outcomes of the main Greek regularization schemes

Programme	End Date Applications	Number of Applicants	Eligibility	Permit Granted
1997 Regularization Presidential Decree 358/1997 (White Card)	1/06/1998	370,000	Continuous presence since 28/11/1997	Provisional work/residence permit, valid until 30/4/1998 (ca. 14 months)
Presidential Decree 359/1997 (Green Card)	31/10/1998	228,000 (successful 96 %, i.e. 59 % of initial applicants)	Legal employment since January 1 1998 for min. 40 days at min. wage (= 40 social security stamps)	One, two or five years, renewable
Law 2910/2001	1/8/2001	368,000 (successful 62%)	Expired permit and continuous presence since or continuous presence since 2/6/2000 and employment for 250 days	Two years, renewable
Law 3386/2005	31/12/2006	200,000 (NA)	Expired permit before 23/8/2005 or continuous presence since 1/1/2005 and Employment for 150 days (200 if different employers)	Two years, renewable
Law 3536/2007	30/9/2007			

Sources: Skordas, 2000; Fakiolas, 2003; Levinson, 2005; Cavounidis, 2006; Tryandafillidou and Maroufouf, 2008.

only. Despite frequent extensions of deadlines and validity of permits granted this has resulted in a high numbers of regularised migrants falling back into irregularity (Fakiolas, 2003). The overlap in both time and beneficiaries of the various programmes arguably justifies speaking of regularization processes rather than of separate programmes.

The most recent programme attempted to remedy some of the shortcomings of previous ones, in particular regarding the training of staff, consultation of civil society actors and publicizing the operations, nevertheless many problems in the administration of the programme have remained (Cavounidis, 2006).

Although from the 2001 Programme onwards there has been a focus on the regularization of irregular workers (as contributors to the Social Security system), the responsibility for the regularization programmes has, since the 2001 programme, been with the Interior Ministry rather than the Labour Ministry. Irregular migrants in the 2005 Programme first applied for a work permit with the Provincial Labour Directorates, after which they applied for a residence permit with the local municipality. The municipality then forwarded the decision to the Prefecture for a decision. Local governments would receive 30 percent of the revenue from the application fees to cover their management costs and in addition training and free software for the organization of data was made available (Cavounidis, 2006).

The 2005 Regularization Programme had the twofold aim of reducing the informal economy and improving the vulnerable position of irregular immigrants (Cavounidis, 2006). Apart from evidence of presence in Greece before January 2005, requirements included a health certificate issued by a state hospital, 150 social insurance stamps (equivalent to 150 working days) and an

application fee of 150€. In response to the widespread forgery of documents proving residence in the 2001 programme, the 2005 programme only allowed for public documents that could be readily verified. Unlike under the 2001 programme, social security stamps could not be purchased, underlining once more the focus on the regularization of irregular workers.

In view of the low number of applications (145,000) resulting from the strict requirements, Law 3536/2007 allowed for additional documents, such as birth certificates of children born in Greece. Migrants who were unable to provide proof of the full number of 150 days employed were given the opportunity to purchase up to 20 percent of the required number of stamps. For a range of occupations, the required number of days was halved (OECD, 2007)¹⁰.

The success of the Greek regularization programmes is doubtful. Employment in the informal economy remains widespread, also amongst native workers. In the absence of labour inspections, this situation seems unlikely to change. As such the benefits to the Greek treasury appear to be dubious: while Greece clearly has intended to increase tax collection, it will not release this information (CoE, 2007). Both Cavounidis (2006) and Fakiolas (2003) have noted regularization does not necessarily mean an end to the informal employment relationship.

It is also questionable in how far the programmes have succeeded in improving the position of irregular migrants. It is expected that even after the relaxation of requirements of the 2005 Programme in 2007 many migrants will have remained excluded. Furthermore, it has been observed that many employers do prefer to employ workers legally, yet employ them at minimum wage and under bad working conditions under the threat of firing them (Tryandafillidou and Marouf, 2008). The regular worker remains in a vulnerable position, since the continuing payment of social security stamps, proving a formal labour relationship, is a prerequisite for renewal of his/her permit.

Literature:

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¹⁰ It should be noted that under Greek labour law the social security stamps are to be paid by the employer and worker jointly. Allowing irregular workers to buy the social security stamps makes them less dependent on an employer that refuses to employ them on the books, the result however is that the financial burden is shifted on the irregular worker.

2.6. Comparison

2.6.1. Types of regularization: Extraordinary vs. routinely; One shot vs. permanent

The countries under discussion in this study have all, although in different forms, periods and to a very different extent, opted for the regularization of irregular migrants. In 2006 however, both Spain and France announced that they would no longer resort to major one-off regularizations. The Spanish Prime Minister explicitly confirmed this engagement during the electoral campaign for the March 2008 parliamentary vote (El País, 7 March 2008). Italy's draft migration law of 2006 did not provide for a new programme. A convergence can thus be noted in that southern European countries, at least publicly, distance themselves from the possibility of new large-scale regularizations. Germany has always had and retains its reluctance towards such programmes. It must however be recalled that on many an occasion of regularization EU Member States have affirmed that such programme would be the last; for many countries, in particular Italy, Spain and Greece, it can be said that regularizations have nevertheless become a *de facto* migration policy.

With the exception of France, one shot regularization programmes have been based on legislative measures. This increases the overall transparency and legitimacy of the process. However, giving regularization a legislative basis also increases the length of the preparatory phase, produces a public debate, and may therefore generate a call effect on latecomers who might then be able to fraudulently enter the programme.

In general the legislative measures have been elaborated in implementing decrees and supplemented by interpretative circulars from competent authorities. Often these interpretative notes have been issued during the process in response to questions from the implementing authorities or practical problems that have arisen during the implementation.

Large scale regularization programmes do not take place in a legal vacuum, but form part of a broader migration policy and are often intended to bring the position of irregular immigrants back in line with general migration laws. It is not without reason that often regularization programmes have been introduced on the occasion of general migration law reforms.

It is worth anticipating here (we will come back to this aspect in the conclusions) that most regularization programmes are inserted in *sectoral* migration policy strategies, which target undocumented foreign labour without addressing the deeper economic roots of such phenomenon. Most regularization schemes deal with the symptoms of an ever more widespread "illness" of advanced economic systems (i.e. underground labour, including of nationals) whose structural causes (both international and domestic) are seldom addressed. For this reason, and until a different approach emerges, it is most unlikely that regularizations may mitigate, but certainly not solve the problem they are meant to address. It has also to be said that the removal of the problem and the refusal to carry out any regularization is not a solution either in contexts where underground foreign labour is possibly less widespread and endemic but still existing.

Although most EU Member States know the possibility of individual regularization by discretionary decision of the competent authority, a true system of permanent regularization can be found in Spain (*arraigo*) and, although no longer functioning as automatically, in France. On the one hand an obvious disadvantage of such a system is that, put bluntly, it rewards irregular migrants for breaking the law. At the same time, where based on the rootedness of an irregular migrant in the host society and his or her ability to provide for him/herself, the regularization

carries advantages for both immigrant and the host country. The successful functioning of an individual, case-by-case and permanent regularization system presupposes a good level of social cohesion and trust between the different social and economic parties. Otherwise, individual regularization channels might be paralysed by lack of information, lack of trust in the administration, fear of law enforcement consequences on the side of employers, etc (these obstacles are emerging in the initial phase of the implementation of the new French mechanism of case-by-case regularization based on economic reasons (Le Monde, 26 February 2008).

2.6.2. Grounds for regularization: Humanitarian vs. economic concerns

While in Germany and (although with some recent change) in France humanitarian concerns have been at the basis of regularization programmes, in Italy, Spain and Greece a twofold purpose of such programmes can be discerned. First and foremost, the emergence of the informal economy and the ensuing benefits to the tax and social security system. Secondly, the complementary goal to end the precarious situation of the irregular migrants. Even if in France and Germany recent regularizations have predominantly been motivated by humanitarian concerns, there is an across the board focus on the position of irregular migrants as economic actors and contributors to the social security system. In this respect one could consider regularizations as a means of ex-post matching offer and demand of labour. Moreover, the official system that countries such as Italy, Spain and Greece apply for this purpose, namely entry quotas, is either considered to be functioning badly or has been serving as a means of hidden regularization of workers already present in the territory. Both Spain and France have permanent regularization schemes for irregular migrants that have become rooted in their host society. Again, economic independence is an important factor in the evaluation of such applications.

In all Member States there is an increasing attention for the integration of the migrant population in the host society. In Germany and France however the “will to integrate” has been made an explicit prerequisite for regularization. In recent years, the requirement of integration has gained prominence in the immigration policy of these countries in general in the form of an ever stricter conditionality on entry and on further bureaucratic steps such as access to longer term status or naturalisation.

2.6.3. Irregular migrants as economic actors

The focus on irregular immigrants as economic actors, is reflected in the employer-driven regularization programmes of Italy and Spain. One could in this respect observe a policy transfer from Italy to Spain.

The role of the employer as the initiator of the regularization process carries certain safeguards as to the genuine character of the employment relationship. At the same time it entails the risk for the irregular immigrant that an employer will refuse to regularise his/her position. In Italy, at a relatively late stage in the procedure, irregular immigrants whose employer refused to regularise their position could denounce him/her and initiate their own regularization. Also in Italy, cases have been reported in which employers did not report the full length of the employment relationship, presumably to avoid having to regularise their position with the social security authorities for the full duration of the contract. In Greece employers have been allowed to buy part of the social security stamps needed to prove an employment relationship themselves. In France in an early regularization programme third party declarations have been allowed in order to counter this problem. In Spain domestic workers have been allowed to initiate their own regularization, which can be beneficial considering the fragmented character of the employment relationships in this sector. In Italy, this same problem was addressed in a more laborious way by allowing more employers jointly to regularise one single domestic or home care-worker.

It should be recalled that where regularization programmes obliged employers to carry the cost for the regularization procedure, including for the regularization of their own position vis-à-vis tax and social security authorities, these costs have often been forced upon the immigrant.

2.6.4. Outcomes

Assessing the results of regularizations is often difficult due to the lack of statistical data on factors which are by their nature difficult to measure, such as the underground economy and irregular presence of immigrants. It seems however safe to say that regularization in none of the countries under study has provided a definitive solution to the problem of irregular immigration or the informal economy. In both Italy and Spain the most recent regularization programmes have resulted in a considerable decrease in the stock of irregular immigrants (and corresponding growth in the stock of regular migrants and therefore of a) the administrative workload for public offices managing their position and b) entitlements for access to health and welfare system). Inevitably however, a great number of irregular immigrants that would not qualify for regularization remain and are joined by new arrivals. Also, where the informal economy is firmly rooted in a country's economic make-up, such as is the case in most of the southern EU Member States, regularization alone will not be able to eradicate the existence nor demand of this sector. Nonetheless, the overall assessment of the most recent Italian as well as Spanish programme is positive.

In all countries under study the residence permits granted were generally of a temporary nature and the renewal was made subject to the continuing fulfilment of the regularization conditions, in particular an employment relationship. This carries in it the danger of a fall back into irregularity. In the more recent programmes in Spain and Italy however, it may be concluded from the number of first renewals of residence permits that the number of persons falling back into irregularity have been limited. In Spain this could be at least partly explained by a system of entry quotas. The problem with people falling back into irregularity in Greece is clearly linked to the bureaucratic backlogs, which have frequently resulted in the issuing of a residence permit at the time of its expiry.

The fact that the majority of beneficiaries of the Italian regularization programmes had only recently arrived seems to confirm a "call effect". Clear proof for such an effect seems however absent in the case of Spain. It has nevertheless featured, as continues to do so, in the heated political debate between the Centre-Right Partido Popular and Centre-Left PSOE in Spain (El País, 19 February 2008).

The total sum of benefits that regularization programmes produce for the social security systems of the countries involved are difficult to evaluate. These are either not available (Greece) or cannot be calculated (Spain). On the one hand, regular status may involve entitlement to certain social security benefits not available beforehand. However, in view of the link between the employment relationship and the regularization, it can be assumed that the regularizations have at the same time made a considerable contribution to the tax income and social security funds of the states in question. This is in particular the case in Italy where employers were required to regularize their own position with the social security authorities through the payment of a lump-sum or where, as is the case in Spain, the entitlement to important social security benefits is unrelated to the regularity of status.

2.6.5. Requirements

Criteria that require migrants to prove past behaviour, that cannot be verified independently by public records may create incentives for fraud (Papadopoulou, 2005). An important concern in the regularization programmes is the character of the documents that prove either the employment relationship or the presence in the territory. Drafters of regularization policies need to carry out a careful balancing act here. If the document requirements are made too strict this can lead to the exclusion of irregular migrants who would normally be eligible for regulariza-

tion but cannot provide sufficient proof that they fulfil the requirements. In many programmes document requirements have been relaxed in the course of the programme. Nevertheless the genuine character of the documents need to be verifiable. During some regularization programmes there have been reports of a trade in documents, but also corruption of government officials (Levinson, 2005).

Where documents need to be issued by official authorities the cost thereof can have an impeding effect. If the documents are required from foreign authorities there may be practical obstacles as was the case in Spain in the 2005 programme. Although in the most recent programmes of both Spain and Italy document requirements were strict, both programmes have regularised the greatest number of irregular migrants in these countries to date. This seems paradoxical, but could be explained by the sheer number of stock of irregular immigrants present. Interviews in which both the employer and the worker are simultaneously present as was the case in the most recent Italian programme, could function as an additional opportunity to check the genuine nature of the employment relationship.

In all countries under study a clean criminal record, apart from offences related to the irregular entry and stay, has been a pre-requisite for regularization. In some countries, a medical certificate proving health has been required (Greece, France). Where such requirement is made, the structures appointed to provide for the health certificates must be capable of dealing with the temporary increase in work.

2.6.6. Procedure and Organization

In terms of procedure a clear convergence can be noticed in the separation between the receipt of applications and the processing thereof. In order to avoid a clogging-up the administrative system, both Spain and Italy in their most recent programmes have opted for the use of the existing administrative structures already present throughout the national territory for the handing in of applications. Moreover, there is a shift towards the use of single counters, which considerably facilitates the application and forces government agencies to work together more closely. Indeed, in all cases the coordination and information exchange between the different government agencies involved has been extremely important. In the case of Spain, a duty to inform *ex officio* was inscribed in the regularization order. In Italy the agencies were all physically present at the meeting at which worker and employer were convened and the application process was concluded. Moreover, in both Greece and Spain there has been made a uniform computer system with access to all the agencies involved.

In some countries, such as Spain, the focus on the regularization of workers is reflected in the overall responsibility for the process with the Ministry of Labour and Social Affairs. However in all countries under study the final decision on the applications was taken by the Ministry of the Interior.

Without exception regularization programmes have been hotly debated. They have nevertheless carried the approval of the social partners in all cases. In southern Europe, trade unions have generally seen regularization as a means of asserting (migrant) workers rights. This has represented a significant break with the traditionally more protectionist stance taken by trade unions in continental Europe towards foreign labour (especially when undocumented). Employer organizations have underlined the existing demand for labour and the unfair competition coming from economic sectors which benefit more from undocumented foreign labour. Networks of unions, migrant organization and other NGOs have in all countries had an important role as advocates as well as points of information and support for applicants (employers and workers) and a "go-between" with government authorities. In none of the more recent programmes, however, was such a role formalised.

In most countries permanent and temporary staff have received (limited) training for the handling of the applications. The sudden increase in work for the government agencies involved is an important factor to take into account when assessing the feasibility of a regularization programme. In all programmes under study the most important cost made was that of hiring

extra temporary staff. It should also be born in mind that if the renewal of temporary residence permits is to run smoothly the capacity to deal with the increase in applications for renewal must be made available quickly in order to avoid a delayed administrative clog up resulting in regularised migrants falling back into irregularity.

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3. Recommendations

3.1. Enhancing the legitimacy of regularization programmes

Regularization programmes have been adopted, without exception, against the background of heated political debate. The programmes adopted, however, all have been the outcome of some degree of consensus as regards the desirability of regularising the status of at least part of the irregular migrant stock present in a country. Consensus, both at the political level as well as between social partners, greatly enhances the legitimacy (and, arguably, the effectiveness) of a regularization programme. The consultation of stakeholders both in the drafting phase and implementation phase is of great importance. The actual participation of the social partners, as well as other stakeholders, in the actual implementation of a regularization programme can greatly contribute to its success.

In some countries regularization programmes have been carried out in the face of strong public opposition. This opposition may find its roots in a general mistrust against “the foreigner” or in the fear for loss of national employment. Here a focus on the regularization of workers, rather than irregular migrants in general, may add to the legitimacy of a regularization programme. Bringing underground jobs back into the formal economy allows for taxes and social security contribution to be paid and for equal competition on the labour market.

The humanitarian component of regularization programmes, namely the objective of ending the precarious and exploitable situation of irregular migrant families, may serve to provide further legitimacy to such programmes; this applies particularly in contexts where the plight of irregular migrants has been made public and has been the subject of public debate. Regularization can further be considered as a precondition for successful integration into host societies, with the potential of diminishing tensions between migrant communities and the national population. In this respect, an argument that has recently been given more prominence is the importance of regularization as a means to gain a greater consciousness and knowledge of, and a greater control over, the irregular migrant presence. Not only may this inform policy-making in the area of migration management, it may also enhance security efforts.

However important the overall cultural and political climate, from the comparison of the regularization exercises undertaken in our target countries it can be concluded that a great part of the success of a programme is linked to the careful design of the programme. From this perspective governments can and have indeed learnt from previous programmes and the experiences in other countries.

Recently there has been more interest in improving the use of regularization as a policy tool. In this respect the memorandum of the Council of Europe (CoE, 2007) is exemplary. Some of the recommendations below draw on the points raised in that memorandum.

3.2. Design of regularization programme

Careful design of the regularization programme can help to mitigate some of the problems that have been experienced in previous regularization programmes. Most of these problems have been of an administrative nature.

a. Lack of administrative capacity

Regularization Programmes mean a sudden and considerable extra burden of work for a state bureaucracy. Coordination and extra funding, in particular for additional staff and training, are

indispensable in order to avoid long queues in front of application offices, backlogs in the processing of applications and time, and thus money lost, by irregular immigrants and their employers. In both Italy and Spain the separation between application and decision and the establishment of “one-stop-shop” procedures has been assessed positively. The use of electronic dossiers to which all actors in the process have access may considerably facilitate the work of the administration. Resources must also be made available to deal with the increase in workload in the aftermath of the regularization programme, in particular in relation to applications for family reunification and at the time of renewal of the permits issued during the programme.

b. Lack of publicity and fear of dealing with the authorities

During early regularization programmes the lack of publicity has often resulted in a low turn out. Governments have clearly learnt from this, and the high application numbers in recent Italian and Spanish programmes may in part be explained by widespread publicity of the programme. The provision of information in different languages is of course very important. Although the internet can play an important role here, it should be realised that many irregular immigrants may not have easy access thereto. The role of trade unions, immigrant organization and other NGOs is instrumental as they may both be in contact with and trusted by the irregular immigrant community. Information should be clear about the requirements for regularization and available amnesties, so as to reduce the fears of irregular immigrants in dealing with the competent authorities.

The problems of a more substantive nature, are those problems related to the conditions for eligibility, documents to be provided, costs and duration of permits issued.

c. Reversion to undocumented status

Although, as was noticed before, in the more recent programmes in Spain and Italy the number of regularised immigrants reverting to irregular status has been limited, it should nonetheless be recalled that many regularization programmes have been introduced in order to (or partly devoted to) “re-regularise” immigrants that had already received some form of permit under previous programmes. This could firstly be explained by too short a duration period of the validity of the permit granted and/or too long procedures for the issue and renewal of permits. Both result in migrants receiving their permit at the time of its expiry, having to start an application/renewal procedure again. It may also be explained by the precarious nature of many jobs typically performed by migrant workers. Often finding a job is not the problem, yet keeping it until the period of renewal of the residence permit is.

d. Requirements and fraud

A balance needs to be struck between the need to control the conditions for eligibility and the need not to exclude irregular immigrants by the mere fact of their inability to provide proof of their eligibility. As has been already noted the criteria that requires migrants to prove past behaviour, (that cannot be verified independently by public records), but also the over-strict requirements may incite fraud (Papadopoulou, 2005). Where the programme is employer-driven the irregular migrants must have means of recourse against employers who refuse to regularise their position without jeopardizing their right to regularization, either through third party declarations or a job-seekers permit. The requirement to provide official documents should take into account the difficulty with which some of these are available in the countries of origin and the cost of obtaining these.

e. Needs of workers and employers

In the design of the programme the needs of both workers and employers should be taken into account. In the first place, this enhances the legitimacy of the operation. Secondly, an analysis of the situation of irregular migrants, as well as the demands of the national labour market can inform the decision as to the duration and type of permit to be provided to the regularised migrant. Here possible fragmentation of the national labour market and regional economic differences should be taken into account, since regularization potentially provides access for the whole territory.

3.3. Accompanying measures

Perhaps the most important recommendation that can be made is that regularization should not be considered in isolation. The fact that regularization is an “ex post” measure, means that other measures are required in order to try and avoid a situation necessitating requiring fresh regularization although practice shows this is difficult to avoid.

The objectives of regularization generally overlap with the objectives of immigration policy and social policy at large. In order for these objectives to be attained regularization efforts should be accompanied by other instruments. Most importantly are instruments to fight the informal economy, such as labour inspections, but one could also point at a country’s visa policy, border controls and the creation of more and better functioning channels for regular migration.

Regularization may be the first step in a process cumulating in the permanent settlement of the regularised migrant in the host society and his/her naturalisation. This calls for attention to be paid to the integration of these migrants in the host society and the eventual exercise of the right to family life.

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III. Employer sanctions

1. Introduction

The informal economy not only attracts irregular migrants, but is also reinforced by irregular migrant workers (MPI, 2004). In Europe since the late 1980s the irregular employment of foreigners has been considered as an aspect of a broader problem of irregular employment linked to the growth of the informal economy (Castles and Miller, 2003). An important difference between the characteristics of the United States' and the European labour markets must be pointed here. The United States have a less vast underground economy for the reason that it is relatively easy to hire unauthorised immigrants "on-the-books", whereas in the much more regulated labour markets of the EU Member this is much harder (Papademetriou, 2004).

One of the ways in which developed countries have tried to combat irregular migration, has been through the imposition of sanctions on employers who knowingly hire, recruit or retain irregular migrants. Employer sanctions function as a deterrent since they add a risk premium to the wage of irregular workers (OECD, 1999). They aim to place liability on those who allow or promote illegal employment (OECD 2000).

Employer sanctions have a two-fold purpose. They contribute to the credibility of other instruments of migrations policy, such as importantly, regularizations, by attacking one of the major pull factors for migration, namely employment. Secondly they aim to achieve fair competition on the labour market, since the hiring of irregular migrant workers allows employers to evade taxes and social contribution and often exploits workers because of their vulnerable position.

Employer sanctions are a relatively new instrument in the labour and immigration laws of industrial democracies, existing only since the mid-1970s in Western Europe, since the late-1980s in the US, and since 1997 in the UK (Martin and Miller, 2000). Snow (1998), amongst others, partly explains the support for employer sanctions in Europe in the mid-1980s by the need for internal controls to substitute for controls at the external borders of the Schengen area.

A number of different sanctions can be put under the heading of employer sanctions. First and most important are penalties for the direct employer. These sanctions can be of an administrative nature (fines, closure of business) as well as of a penal nature (fines, imprisonment). It should be pointed out that the European Court of Human Rights has held that, (notwithstanding their classification as administrative), sanctions that have a deterrent and punitive character are nevertheless to be considered as criminal for the purposes of the European Convention on Human Rights, and the safeguards found in that convention relating to due process of law (*Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, para. 54).

In some countries indirect employment (i.e. via an intermediary) and/or assisting illegal employment are also sanctioned, either as an independent offence or as direct employment. In some legal systems, administrative and civil sanctions are combined with a civil liability of the employer vis-à-vis the irregular worker (Robin and Barros, 2000).

Generally the enforcement of employer sanctions is the responsibility of a number of separate government agencies, which include the police forces, immigration services and bodies falling under the responsibility of Social Affairs and Labour. This may lead to obvious problems of limiting competence and effective coordination.

The use of employer sanctions as an instrument to curb illegal labour is not undisputed. Employer sanctions are often thought to constitute unreasonable burdens on employers, indirectly punish irregular workers and carry the risk of discrimination against eligible workers. The United States General Accounting Office (GAO) found that the imposition of employer sanctions in 1986 in the US had resulted in a "widespread pattern of discrimination" mainly caused

by a lack of understanding of the law as regards the requirements employers had to fulfil when hiring migrant workers (GAO, 1990). Research in the greenhouse farming sector in the Netherlands showed that increased employer sanctions resulted in increased identity fraud, lower wages for immigrant workers as employers aim to shift the risk to the irregular migrant workers, the use of shorter periods of employment and the use of shady employment agencies as intermediaries (OKIA, 2004).

A relatively new feature is rewarding legislation granting the irregular worker a degree of protection when cooperating with the authorities against his employers. This type of provision has initially been introduced to protect the victims of offences such as human trafficking, but is gaining ground more generally as regards irregular employment.

The effectiveness and efficiency of employer sanctions have been frequently questioned. As early as 1982, the US GAO concluded from a study surveying 19 countries that sanctions were largely ineffective for two reasons: 1) employers were either able to evade responsibility for illegal employment or, once apprehended, were penalized too little to deter such acts, 2) the laws were generally not effectively enforced because of strict legal constraints on investigations, non-communication between government agencies, lack of enforcement resolve, and lack of personnel (GAO, 1982).

Papademetriou et al. (1991) have noted that “the effectiveness of the effort to stem illegal immigration hinges on this nation’s ability to devote sufficient resources to enforce all of the law’s provisions.” Martin and Miller (2000) have remarked in the same vein that: “with powerful and often mutual worker and employer incentives to violate the law, sanctions must be aggressively enforced and constantly fine tuned to keep up changes in employer and worker behaviour in response to sanctions laws and enforcement efforts.” Across the board poor coordination and insufficient resources devoted to enforcement seem to have prevented just that. This may be explained by the dispersal of competencies over different government agencies, but also by the fact that, despite political consensus underlying employer sanctions, irregular employment is often considered as a relatively harmless crime.

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2. Italy

2.1. The informal labour market

Irregular work in Italy accounts for between 15.9 percent and 17.6 percent of GDP (ISTAT, 2005), although less conservative estimates rather speak of 27–30 percent (Schneider and Frey, 2000). A survey carried out in 2005 by the INPS (National Social Security Institute) on more than 100,000 companies found irregularities of some form in more than 78,000 of them, affecting almost 50,000 workers (Galetto and Lombardia, 2006).

Irregular work is particularly widespread in the construction sector (Graziani, 2006), but also in the service sector (domestic work) and agriculture. These are also the sectors with a stronger presence of regular foreign workers (Caritas, 2006), attributable to factors such as the high levels of unskilled work, low productivity, minimal visibility, etc (Reyneri, 2004). In this respect it is disconcerting to note the disproportionately high number of foreign workers that are the victim of fatal labor accidents in these sectors (Pastore, 2006). In the construction sector alone, one out of six registered accidents involved an immigrant worker (Fillea Cgil, 2007).

The INPS (National Social Security Institute) has also been noting an upward trend in undeclared work by immigrant workers (Caritas, 2006). According to Reyneri (2004), as a result of the frequent regularization programmes the determinants for the high immigrant presence in Italy's underground economy are now similar to those of many Italians. Nevertheless, in 2005 2 percent of the workers inspected by the labour inspection did not have a valid permit of stay, which amounted to 8 percent of all non-EU workers controlled (data provided by the Italian Labour Ministry).

2.2. Sanctions for the employment of irregular migrants

Article 20(8) of Italy's first consolidated immigration law, Law 40/1998 (Turco-Napolitano Law) introduced for the first time sanctions for the employment of irregular migrants. The sanction for employing a foreign worker without a valid permit of stay could be punished with imprisonment of 3 months to a year or a fine of 2 million to 6 million lire (approx. 1,032–3,098€).

Article 22(12) of the Bossi-Fini Law (Law 89/2002), and the current legal basis for employer sanctions in Italy, retained the terms for imprisonment, but changed the fines payable to 5,000€ for each irregular worker employed. It furthermore introduced an administrative fine of 500 to 2,500 (Article 22(7)) for the employer who would fail to report any changes in the employment relation with a foreign worker to the single immigration counter (*sportello unico*) of the Prefecture, Territorial Office of the Government.

In addition the Italian government has, as part of the more general fight against the underground economy and the non-observance of labour rules and regulations adopted a series of further sanctions. Article 36-bis (7), of Law 248/06 (Decreto Bersani) provides for an administrative sanction of 1,500 to 12,000€ for each worker whose documentation is not in order, totalled with a 150€ for each working day. The same law further establishes a minimum of 3,000€ in civil sanctions connected to the non-payment of social security contributions, independent of the duration of the undeclared work, which however does not apply to irregular migrant workers, since their irregular status implies that they are not declared with the social security in the first place. Moreover, in the construction sector the inspection authorities resorting under the Ministry of Labour have the power to suspend activities where they find workers without the necessary documentation up to the level of 20 percent or more of the total of regularly employed workers or in case of persistent

violations of the labour laws regarding working time. A circular of the Ministry of Labour of 4 July 2007 makes it clear that the imposition of sanctions under Article 22 of the *Testo Unico* (Unified text of laws on immigration and immigrants' status) does not bar the application of simultaneous imposition of sanctions under Article 36-bis of Law 248/06 since they related to different offences.

The non-observance of labour regulations in relation to the health and safety of workers and continuing media coverage of fatalities at work (the so-called "white deaths") has furthermore resulted in the five-fold increase of administrative sanctions introduced by Law 296/2006 (The 2007 Budget Law). Article 5 of Law 123/2007 has further extended the possibility for a suspension of activities from the construction sector to all sectors of production.

The bill Amato-Ferrero would have added a new crime to the Italian Criminal Code, namely the exploitation of immigrant workers. This crime would be punishable with imprisonment from three to eight years and a fine of 9,000€ per worker. Even though the adoption of this bill is now halted, the Italian Court of Cassation has already held that the exploitation of immigrant workers can amount to a criminal offence, namely "aggravated and continued extortion" (Judgment 36642/07 of 5 October 2007, Second Criminal section).

The Amato-Ferrero bill would have further raised the fine for the employment of irregular workers from 5,000 to 9,000€ per worker and add as possible sanctions the bar from public contracts and public subsidies. In the case of more than three irregular workers it would furthermore allow for the suspension of activities for a month. The administrative fines for offences related to undeclared work would have been doubled in case of irregular immigrant workers.

Another, complementary bill (Atto Camera n. 2784, XV Legislatura), approved by the Senate in June 2007 but then aborted due to the premature end of the legislature, would have amended the Italian immigration law to the effect of providing for the possibility of granting a regularization to the irregular immigrant worker who is victim of "severe abuse and exploitation". Under the current law, Article 18 provides for the issue of a permit of stay on the basis of humanitarian grounds, but that has been applied only to the victims of human trafficking for sexual exploitation.

2.3. Inspection authorities

Like in many other countries, in Italy the competences for labour inspections are divided over a number of government agencies. The main responsibility lies with the labour inspectors of the Regional and Provincial Directorates, who have police powers in relation to their competencies (they are part of the *Polizia Giudiziaria*). They are hierarchically subordinated to the Ministry of Labour and Social Security.

With similar functions to the labour inspectors, but in possession of general police powers, are the specialised members of the Carabinieri (gendarmarie). In every Provincial Labour Directorate there is a *Nucleo Ispettorato dei Carabinieri* (Inspectorial focal point of the Carabinieri) which since 1997 are subordinated to the *Comando Carabinieri per la Tutela del Lavoro* (Command of the Carabinieri for the Protection of Work). In Sicily there is an additional Regional focal point, coordinating the work of the 9 provincial focal points. The Command has its central seat in Rome at the Ministry of Labour and Social Security.

The social security institutions such as the INPS and INAIL (National Institute for Insurance against Accidents at Work) all have their own inspection services with powers similar to those of labour inspectors in order to detect the evasion of the payment of social security payments. Rules and regulations related to health and safety and work fall, with the exception of the construction industry, under the responsibility of the Regional Health Centres.

The Labour Inspectorates are traditionally a very underdeveloped law enforcement tool with a particularly uneven distribution (and degree of effectiveness) on the national territory (Pastore, 2006). Currently, the estimate is that every firm can be inspected once every 12 years. For years there has been a downward trend in the number of inspectors. Their number diminished from 2,083 in 2003 to 1,356 inspectors in 2007 (Italia Oggi, 20 December 2007).

Figures provided by the Ministry in January 2008 seem to indicate that this trend is being reversed with a 58,8 percent increase in labour inspectors under the Ministry of Labour and 13,5 percent increase in Carabinieri under the Command for the Protection of Work in comparison to the situation at 30 April 2006. Law 123/2007 has allocated 4,250,000€ for the hiring of extra staff and the same amount of money to reinforce inspection activities.

An important development has been the adoption of Legislative Decree 124/2004, which had aimed to rationalize the inspection functions in the area of work and social security. It established the Directorate General for Inspection Activities at the Ministry of Labour and Social Security in Rome, which has been entrusted with the oversight and coordination of inspection activities. A ministerial Decree of 20 April 2006 established a Code of Conduct aimed to harmonize the exercise of the various inspection authorities.

Table 9. Italian authorities for labour inspection

Inspection authority	Tasks and powers	Staff foreseen at 1/1/2008
Labour inspectors of the Regional and Provincial Labour Directorates (Under the responsibility of the Ministry of Labour and Social Security, coordinated by the Directorate General for Inspection Activities)	Law 628/1961 and Legislative Decree 124/2004: – General power of inspection as regards labour rules and regulations – Inspections into health and safety at work (limited to the construction sector) – Have police powers in relation to their competences	3,761
Carabinieri(gendarmerie)Corps for the Protection of Work	Law 608/1996 – Similar to the powers of the Labour inspectors – Have general police powers	503
INPS, INAIL and other Social security institutions	Law 638/83 and Legislative Decree 124/2004 – Inspection powers in relation to the control of payment of social security contributions, no police powers – no police powers, but right of access, inspection and confiscation	INPS: 1,735 INAIL: 404
AA.SS.LL. (Regional Health Centres)	Inspections into health and safety at work (Article 21, Law 833/1978)	NA

2.4. Inspection activities

As one labour Inspector stated in the press, inspection activities were more or less paralyzed under the Berlusconi Government. The number of inspections carried out decreased from 147,410 in 2003 to 102,227 in 2007 (Italia Oggi, 20 December 2007). Nevertheless, inspections have since been relaunched also thanks to the budget allocations foreseen by Law 123/2007 (La Repubblica, 15 September 2007; Il Sole-24Ore, 11 December 2007). A Decree proposing a *Testo Unico* (Unified Text) compiling and amending the laws on Health and Safety at work, including increased inspections and more severe sanctions, was adopted by the Council of ministers on 6 March 2008 (La Repubblica, 4 March 2008)¹¹.

The decrease in inspections, may partly be explained by a shift in focus from quantitative to qualitative inspections. The Minister of Labour under the Prodi government, Cesare Damiano, has in this respect pointed out the increase in 2006 in infringements detected (Ministry of Labour, 2007a), although this could also be considered as an indication that irregular labour itself is on the rise. In 2007, however both the number of inspections and the number of infringements detected has increased considerably (Ministry of Labour, 2008).

¹¹ See for more detail: <http://www.governo.it/Governo/ConsiglioMinistri/dettaglio.asp?d=38510>

Strategic objectives for the regular activities are lined out at the beginning of the year under the coordination of the Directorate General for Inspection Activities. An annual programme of work is established at the beginning of the year (the first however having been in 2008). The focus of inspection activities coordinated by the Directorate General lies with specific focussed ad-hoc operations, based on previously collected intelligence. Examples of such operations are the operations aimed at Chinese-owned businesses in several Italian regions (Marco Polo Operations, I and II; Great Wall Operation; in May and November 2005 and November/December 2007 respectively). As Pastore (2006) has noted these operations may have, at least in part, had a political motivation, in a context where the large sector of Italy's small and medium sized enterprises is deeply concerned about the allegedly unfair competition by Chinese firms, including transnational ones based in Italy.

Another example of a campaign under the coordination of the Directorate General for Inspection Activities, this time focussing on a specific sector is the "Operation 10,000 construction sites" (June-September 2007). The main objective of this operation was to fight the non-compliance with health and safety regulations in the building industry. This of course did not exclude the detection of irregular migrant workers, who, as was pointed out before, are often the victims of the non-compliance with health and safety regulations.

It is worth noting that the Ministry of Labour is working on the development of an on-line information system, which allows for the exchange of data between inspection authorities, as well as a system for the notification of new employment relationships, already on-line in a number of regions and provinces. One of the difficulties for labour inspectors has been the detection of "grey workers" rather than "black workers", meaning that in a situation of regular employment there is nevertheless an infringement of the rules. This is e.g. done through the use of part-time contracts for full-time employment, the use of intermediary employment agencies or contracts of collaboration (Interview with Ministry of Labour official, January 2008).

At regional level additional initiatives are undertaken in the fight against the underground economy. One of the better known examples is the Apulian regional law (Law No. 28 of 26 October 2006), which was adopted after previous consultation with the social partners. This law combines incentives for emergence with tighter controls, one of the main measures introduced being the obligation for companies applying for any kind of funding to certify the regular employment of their entire workforce (Galetto and Lombardia, 2006). Increased labor inspections took place in the Apulian provinces of Taranto and Bari in January and February 2007 linked to the harvest of grapes (Ministry of Labour, 2007b).

Apart from regional laws, other local initiatives include coordination between inspection authorities at local level, the establishment of local data systems, as well as the establishment of taskforces including not only the inspection authorities, but also local government and the prefecture (see e.g. Brescia Oggi, 10 November 2007).

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3. Spain

3.1. *The informal labour market*

In Spain, during the 1970s and especially in the 1980s, it became widespread practice for employers to operate in the underground economy (Namkee and De La Rica, 1997). Although since the entry of Spain into the European Union the informal economy has been decreasing, estimates for the year 2000 still range from 20,9 percent to 26,2 percent as a ratio of the GDP (Dell'Anno et al., 2007).

In many ways the situation of foreigners on the Spanish labour market can be compared to that of Italy. In 2005, most regular foreign workers, 65 percent of the total, were employed in the service sectors (in particular tourism and domestic work), followed by manufacturing activities (17.3%), construction (12.4%) and agriculture (5,3%). Relative to national workers, the largest percentage of foreign workers can be found in the latter two sectors (Issusi and Coral, 2007). This can be partly explained by the low skill nature of the work, harsh working conditions and temporary nature of the work. These are also the sectors in which many irregular immigrants can be found to be working irregularly (Cornelius, 2004). The number of illegal immigrants working in 2006 has been estimated at 7,296 (GHK, 2007). Like in Italy, foreign workers are relatively more often victims of labour accidents. In 2006, 1 out of 10 reported accidents involved non-EU workers (Ministry of Labour, 2007a).

3.2. *Sanctions for the employment of irregular migrants*

Employer sanctions against employers who knowingly hire irregular immigrants were included in Spain's first immigration law, Organic Law 7/1985 in Article 28. The law prescribed administrative, not criminal penalties for each worker of 100,000 pesetas (approximately 600€). Law 8/1988, article 35, raised the maximum to 500,000 pesetas (slightly over 3005€).

Article 54 of Law 4/2000, the current legal basis for employer sanctions, defines the hiring of irregular immigrants which are not in possession of a work permit as a "serious offence." These are sanctioned in accordance with Article 55(1)(c) with an administrative fine of 6,001€ to 60,000€ per worker. The law states that in establishing the fines the competent authority must take into account the principle of proportionality and taking into account especially the economic capacity of the employer to pay. The offence is prescribed for three years and the sanctions imposed after 5 years.

Criminal sanctions are possible under Article 311 of the Criminal Code for the exploitation of workers, irrespective of their status (six months to three years imprisonment, fine equivalent to six to twelve months) Article 312 of the Criminal Code prescribes a sanction of two to five years and a fine equivalent to six to twelve months for whoever trafficks irregular labour. The same sanction is imposed by Article 313 on whoever promotes the illegal immigration of workers into Spain or the European Union. Criminal sanctions and administrative sanctions are mutually exclusive.

Although there has been no evaluation, the opinion has been expressed that fines are effective, notwithstanding the fact that some companies continue to incur fines on a yearly basis (GHK, 2007). The sanctions for the violation of Social Security and Health and Safety rules and regulations are laid down in Article 40 of Legislative Decree 5/2000. In accordance with paragraph 4 the sanctions related to infringements of the rules on Social Security are halved in case of simultaneous application of employer sanctions under Article 54 of Law 4/2000. Article 45 of Royal Decree 2393/2004 for the execution of Law 4/2000, allows in Article 45(5) for the conces-

sion of a residence or residence/work permit for the irregular migrant who collaborates with the administrative, police, fiscal or judicial authorities.

3.3. Inspection authorities

The inspection authority responsible for the enforcement of employer sanctions in Spain is the Inspectorate for Labour and Social Security, falling under the responsibility of the Under-Secretary of Labour and Social Affairs, and forming a Directorate General within the Ministry of Labour and Social Affairs. The first Spanish labour inspection service was established in 1906, the current legal basis for its functioning is Law 42/1997, supplemented by Royal Decree 138/2000 (as amended by Royal Decree 125/2001). Unlike Italy, the Labour Inspectorate is responsible for the detection of violations of labour law in general, including the non-contribution to social security, non compliance with health and safety regulations, and/or the irregular employment of workers.

The Directorate General is subdivided in four under-directorates, of which the Under-Directorate for the Emergence of the Informal Economy is most closely concerned with the employment of irregular workers. A Special Directorate is responsible for the coordination of inspections activities involving more than one Autonomous Region. In each Autonomous Region there is a Territorial Director, and in each province a Head of Provincial Inspection. The Directorates have a coordination role when more than one Autonomous Community is involved. Functionally the inspection activities fall under the competence of the national ministry or the Autonomous Community, depending on the division of competences in each particular case.

In 2005 there were 1,650 officials working for the Labour Inspection, comprised of which 806 inspectors and 844 under-inspectors. The former are almost exclusively working on inspections relating to health and safety regulations and employment relations, areas outside the competence of the under-inspectors. Both are however competent to deal with infringements of migration law. In particular after the 2005 regularization, there has been a considerable increase in work for the Labour Inspection as a result of the increase in affiliations with the Social Security system and the political goal of increasing inspections. There has been a general increase in the number of inspection personnel, in particular during the centre-left government of Prime-Minister Zapatero. In 2006 and 2007, a total of 175 inspectors and 100 sub-inspectors were newly hired (Ministry of Labour, 2007b). For the year 2008 the government has announced an increase of 200 inspectors and 50 under-inspectors (Ministry of Labour, 2007c). The high qualifications required from inspectors, and to a lesser degree from under-inspectors, have however meant that in 2006 not all vacancies were filled (Arango et al., 2008).

3.4. Inspection activities

Until recently, the broad task of the Labour Inspection in Spain meant that only a fraction of violations detected through workplace inspections has been related to infringements of migration law (Cornelius, 2004). In practice the employers penalised were those most blatantly violating the law. Cornelius (2004) offers a number of examples and indirect evidences for the faulty enforcement of employer sanctions: these include the large informal sector, the closeness of business-government ties as well as problems specific to the sectors most affected. For instance in the domestic service sectors, inspectors lack the power to enter private homes unless there is a complaint or labour accident.

However in the wake of the 2005 regularisation programme the government aimed at considerably increasing inspections. Labour minister, José Calderon, announced to the Senate in February 2005 a number of 500,000 inspections by the end of that year (El País, 31 March 2005). This led to a considerable critique of the labour inspectors who, via the mouthpiece of two of their Unions, declared that they did not deploy the necessary means, nor have sufficient and adequate resources. The necessary modernisation of the information systems and the access to new technologies has not been carried out or completed in a way that allowed the inspectors to carry out their daily work adequately (Unions, 2005). Considering that the total number of inspections in 2004 did not even reach 35,000, this critique seemed justified. It would mean that

every inspector would have to do 100 visits that year, focusing only on immigration control. Inspectors seem to have had to have resort to statistical tricks such as counting every irregular migrant worker detected as a separate inspection (El Mundo, 27 May 2005).

Sub-inspectors further demanded a better remuneration for their work. They moreover denounced a 7 million euro information system put in place in May 2006 for adding bureaucratic tasks to their work at the expense of their investigative activities (Cinco Oras, 25 September 2007).

Anyone having knowledge of infringements can report in writing to the provincial delegations of the Ministry of Labour and Social Affairs or the equivalent authorities at the level of the Autonomous Regions. A standardized form for this purpose is available online. In recent years the Labour Inspection has changed its approach to the planning of inspection activities, shifting from basing itself on macro-studies to an approach driven more by from-the-ground information provided by individual inspectors and transmitted by the Territorial Directors and Heads of Provincial Inspection (Arango et al., 2008).

The number of inspections increased from 30,409 in 2003 to 71,343 in 2006. At the same time the number of infringements found did not increase much (from 10,152 in 2003 to 10,893 in 2006). This could be in part be explained by the 2005 regularization (Arango et al., 2008). For the year 2008, 228,000 inspections are planned. In 2007, 208,000 inspections were carried out and 25,813 irregular migrant workers were detected and a total of 78 million euro in sanctions was imposed (Ministry of Labour, 2007c). It has been reported that increased inspections have indeed had a deterrent effect on employers (Arango et al., 2008).

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4. United States of America

The United States being a country of immigration, limited government regulation and a business culture, the approach towards the employment of irregular immigrants has been lenient for a long time. Although the Immigration and Nationality Act of 1952 did introduce the offence of concealing or harbouring an alien, agricultural employers succeeded in obtaining the incorporation of a clause which stated that neither employment nor “the usual and normal practices incident to employment” would constitute “harbouring” for this purpose. This became known as the “Texas proviso” named after the state relying specifically on irregular seasonal workers in the agricultural sector.

The enormous increase in irregular migration from Mexico to the United States in the 1970s and 1980s led to the adoption of the Immigration Reform and Control Act (IRCA) in 1986. The IRCA provided for the regularization of irregular migrants present in the US on January 1, 1982 and implied for the first time employer sanctions in an attempt to close off the labour market to irregular jobseekers.

The IRCA obliges all employer who hire new employees to verify that person’s legal right to work in the US and to complete a one-page Employment Eligibility Verification Form (“I-9 Form”), which must be signed by both employer and the employee. Under the IRCA it is an offence to knowingly hire or continue to employ irregular immigrant workers.

Failure to complete I-9 employment verification forms properly carries a fine of \$100 to \$1,000 per worker. An employer only has a “good faith obligation and is not required to do other than check whether a document “reasonably appears on its face to be genuine.” Implementing regulations define knowledge as including “constructive knowledge”, i.e. knowledge which the employer could reasonably be expected to have.

Employers who knowingly hire irregular migrant workers are subject to civil fines of \$250 to \$2,000 per irregular worker for a first offense, \$2,000 to \$5,000 per irregular worker for a second offense, and \$3,000 to \$10,000 per irregular worker for each additional offense¹². Criminal penalties can be imposed of a maximum of 6 months imprisonment and \$3,000 per irregular worker, in case there is a pattern or practice of violations which INS regulations define as “regular, repeated and intentional activities.”

The civil penalties will be raised by approximately 25 percent effective from 27 March 2008. Most of the fines were last revised in 1999 and the increase is said to be an adjustment for inflation. The biggest increase under the rounding mechanism under US law raises the maximum civil penalty for multiple violations to \$16,000. In addition, non-payment of taxes and the non-payment of social security and unemployment compensation can result in substantial fines up to 100 percent of the social security tax due, the tax itself, and interest (High, 1993).

In principle irregular workers in the US have the same workplace rights as regular workers, although a 2002 Supreme Court ruling in the Hoffman Plastics case (*Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 2002) seemed to undermine these rights by ruling that the irregular position of a worker who had been fired for union activities justified non-payment of back pay. This ruling has however been widely criticized, including by the ILO’s Committee on Freedom of Association, and has led to considerable legal uncertainty (TUC, 2007).

¹² Under US law administrative financial penalties are imposed by an administrative agency on a person for infringement of laws administered by such administrative agency, whereas civil financial penalties are imposed by a court during civil proceedings initiated by an administrative agency against a person for infringements of laws administered by such administrative agency.

A major effect of the sanctions provisions has been the proliferation of forged or counterfeit versions of the documents required by IRCA to establish the right to work (High, 1993). The Immigration Act of 1990 added section 274C which makes it illegal to forge, counterfeit, or alter documents required to prove identity and employment eligibility, and imposed fines of \$250 to \$2,000 for each document and \$2,000 to \$5,000 in case of previous violations.

The United States' system of employer sanctions has since its inception been considered to have serious flaws. It has certainly not been capable of stemming the inflow of irregular migrant workers. In 2005 the irregular migrant population in the US was estimated to be between 11.5 and 12 million people (Passel, 2006). Ryan (2007) identifies the three important shortcomings of legislation and policy in this area.

A) First, employer sanctions in the US are considered mainly as a tool of immigration enforcement. As a result enforcement is mainly carried out by the Immigration and Naturalization Service (INS), and now Immigration and Customs Enforcement (ICE). Officials of the Labour Department only have a limited role and must refer offences to the ICE.

B) A second major shortcoming is the low level of priority given to enforcement (see also: Brownell, 2005). This is translated both in the low number of inspections and numbers of ICE personnel employed for the enforcement of employer sanctions, in particular when compared to the financial and human resources made available for border control (Martin and Miller, 2000). As a result, IRCA's employer sanctions provisions came to be seen in Mexican sending communities as an annoying but surmountable barrier to US entry (Perotti, 1994). There may however be signs that the ICE is stepping up enforcement efforts. Between Oct. 1, 2006 and Sept. 30, 2007, ICE fined employers more than \$30 million for violating immigration laws. ICE arrested 92 employers and 771 employees and began deportation proceedings against more than 4,000 irregular migrant workers (Associated Press, 22 February 2008). ICE's focus lies on large-scale operations (Ryan, 2007).

A step-up in the level of political priority given to employer sanctions is witnessed also by important policy planning documents, such as the latest National Strategy for Homeland Security (2007) where it says: "we will enhance interior enforcement efforts, including worksite enforcement programs. Employers should be required to verify the work eligibility of all employees, preventing illegal immigrants from obtaining jobs through fraud or the use of stolen identification, including Social Security numbers. In order to accomplish this, we must expand the use of an electronic employment eligibility verification system that is timely, accurate, and easy for employers to use" [see below for details]. "We also will continue to crack down on employers who knowingly hire illegal immigrants by applying criminal penalties to those who circumvent the law" (Homeland Security, 2007).

C) Third is the large number of documents that may serve as proof of eligibility to work. Although their number was brought down to 27 by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, many of these documents do not carry a photograph and there has been a proliferation of false documentation.

D) A fourth shortcoming is the lack of external verification, in particular the absence of a linkage with the Social Security Administration. Social security contributions made in relation to a non-existent social security result in a so-called no-match letter issued to the employer, but no follow-up action used to be taken. A rule which would give employers a fixed period to resolve discrepancies was issued in August 2007, but suspended indefinitely by a ruling of a Federal District Court in San Francisco who found that the Social Security database the government would use to verify workers' status was full of errors, which could result in the dismissal of thousands of eligible workers (New York Times, 8 August 2007). The administration has been reported to plan to issue a revised rule by late March of 2008, taking these courts concerns into consideration (New York Times, 25 November 2007)

An additional weakness of the system that should be pointed out here is the "widespread pattern discrimination" that was found to exist by a report of General Accounting Office (GAO, 1990; Briggs, 1990). This pattern was found to exist despite the fact that the ICRA contained

several provisions aimed at preventing discriminatory hiring practices, including the establishment of an office within the Justice department to investigate immigration-related unfair employment practices and the possibility to impose a civil money penalty of \$1,000 per person discriminated against.

In June 2007 the Bush Administration's bill for a Comprehensive Immigration Reform Act stalled in the US Senate. One element which is likely to be introduced separately is the establishment of an "electronic eligibility verification system" (EEVS). This system is based on the Basic Pilot, an Internet-based programme that allows employers to electronically verify workers' eligibility by directly checking the records maintained by DHS and SSA. The Basic Pilot was introduced by the 1996 Immigration Act in 6 states, extended to all 50 states in 2004 and applied by employers on a voluntary basis, although employers found guilty of employing irregular migrants may be required to participate (Moran and Friedland, 2006, see also the Westat, 2007).

An important legal development in the United States is the adoption of employer sanctions provisions by the State legislatures in response to a lack of action at Federal level. In the course of 2007, 19 states successfully enacted 26 employment-related immigration laws (Proskauer Rose, 2007). One of the strictest laws was passed in Arizona, the Legal Workers Arizona Act, taking effect as of 1 January 2008 (Chishti and Bergeron, 2008). In that state, use of the EEVS has been made compulsory and heavy sanctions are imposed for the employment of irregular migrant workers. A first violation can result in a 10 day suspension of a business license and a 3-year probationary period. A first "intentional" violation results in a compulsory suspension of at least 10 days and a probationary period of five years. If businesses are found guilty of infringements during their probationary period, they may lose their license permanently. The Arizona law is currently being challenged before Federal Courts by immigrant and business interest groups. Request for injunctions were rejected and on 7 February 2008, a Federal District Court upheld the law (*Arizona Contractors Ass'n v Candelaria (Arizona Contractors II)*, DAriz, Nos CV07-02496-PHX-NVW & No CV 07-02518-PHX-NVW). There have been reports that in response to the law Arizona business have been firing irregular migrant workers, moving operations and freezing expansions (Wall Street Journal, 14 December 2007). Also immigrants have been reported to start leaving for other states.

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5. United Kingdom

Government studies, as well as reports by trade unions support the conclusion that unauthorized employment in the UK, often in exploitative conditions, has become more extensive in recent years (Ryan, 2006 and 2007). This can be explained by the extensive demand for labour migration at all skill levels and the general weakness of labour market regulation in Britain (Ryan, 2006).

Immigration control in the UK has always been much more focused on entry and exit control rather than control within the territory. The UK has always refused to participate in the borderless Schengen area and the Act for the introduction of for a national identity cards was only passed in 2006. There has always been considerable opposition towards employer sanctions. Business would has argued that they constitute an unreasonable burden on employers whilst immigrant organizations have feared discriminatory hiring practices.

Sanctions were nevertheless introduced by the 1996 Asylum and Immigration Act. Section 8 of the Act made it a criminal offence to employ an irregular migrant punishable with a fine of up to £5,000 per worker. A statutory defence consisted in that the employer checked and copied one of the documents from a list provided for implementing legislation. The statutory defence was not available to employers who knowingly hired an irregular worker. The burden of proof thereof fell on the employer. The 2002 Nationality Immigration and Asylum Act allowed more than one document to be required before the employer defence could succeed and included section 8 among the offenses covered by many of the enforcement powers given to immigration officers. The 2004 Asylum and Immigration Act made the hiring of irregular migrants an offense to be tried upon indictment, in addition to being triable as a summary offense, with as practical significance, that where there was a conviction upon indictment, the amount of the possible fine was unlimited (Ryan, 2006). The, initially very broad, list of documents that could prove worker eligibility was restricted in 2004.

In the UK there is no one single authority responsible for labour inspection. Specific enforcement action is carried out by the Inland Revenue as regards compliance with minimum wages, and by the Health and Safety Executive in relation to health and safety regulations and working time (Heyes, 2001). Breaches of the immigration rules are dealt with by the Home Office (Ministry of the Interior). Even though the Home Office had not actively been engaged in enforcement of employer sanctions, they have a duty to investigate infringements that come to their knowledge. Enforcement has increased in recent year, according to the Home Office the number of "successful operations" rose from 390 in 2003 to 1,098 in 2004. Although increasing, prosecution rates and fines imposed have remained low. During 2001–2003 only 3 persons were successfully prosecuted, in 2004–2005 this number was 2,135 (Home Office, 2006).

In 2005, the UK government returned its attention to employer sanctions in the framework of its five year strategy for Immigration and Asylum, which outlined a more general overhaul of its regulatory framework for immigration. It announced amongst others "on-the-spot" fines, in the form of civil financial penalties (Home Office, 2005). The 2006 Immigration, Asylum and Nationality Act in Section 15 gives the Home Secretary the power to serve "penalty notices" upon the employers of unauthorized workers for a maximum of £10,000. Penalty notices are served through the immigration officers of the newly established Border and Immigration Agency, an executive agency falling under the Home Office. An employer can object to the penalty within 28 days. Where such challenge is not brought or is unsuccessful, the penalty becomes enforceable by the Secretary of State as a debt in the civil courts.

A new element in the 2006 Act is that in order to retain the statutory defence, an employer is obliged to check the work eligibility of his/her migrant worker not only upon hiring, but once every 12 months thereafter. Reduction of fines is possible in the case of partial check, where e.g. the employer has only checked and copied one of a specified combination of two original documents required for the statutory excuse, or has failed to conduct a follow-up check. The provisions on employer sanctions have come into force as of 29 February 2008.

In February 2008, a code of practice was published, outlining how civil penalties would be calculated (see table below).

Table 10. Calculation of civil penalties under the 2006 Act

		Nature of Check completed					
		Full	Partial		No		
Occasion on which warning/penalty was issued	3rd +	No Penalty	Maximum penalty of £10,000 per worker		Maximum penalty of £10,000 per worker		
			Reduced by up to £1,250 per worker reported	Reduced by up to £1,250 per worker, with cooperation			
			Minimum penalty of £7,500 per worker				
	2nd	No Penalty	Maximum penalty of £7,500 per worker		Maximum penalty of £10,000 per worker		
			Reduced by up to £1,250 per worker reported	Reduced by up to £1,250 per worker, with cooperation		Reduced by up to £1,250 per worker reported	Reduced by up to £1,250 per worker, with cooperation
			Minimum penalty of £5,000 per worker			Minimum penalty of £7,500 per worker	
	1st	No Penalty	Maximum penalty of £5,000 per worker		Maximum penalty of £7,500 per worker		
			Reduced by up to £2,500 per worker reported	Reduced by up to £2,500 per worker, with cooperation		Reduced by up to £2,500 per worker reported	Reduced by up to £2,500 per worker, with cooperation
			No penalty Warning letter issued			Minimum penalty of £2,500 per worker	

Source: Home Office, 2008a

Under Section 21 of the 2006 Act knowingly employing an irregular migrant worker is a criminal offence. Unlike the 1996 Act there is now the possibility of imprisonment. If convicted on indictment, the employer can be sentenced to up to two years in jail. For a summary conviction, there is a maximum of twelve months' imprisonment in England and Wales, and of six months' imprisonment in Scotland and Northern Ireland (Ryan, 2006). The fine can in such case be unlimited.

The UK government has announced that in connection to the new provision on employer sanctions they will increase enforcement activity, implement a new data gateway in the UK Borders Act 2007 with HM Revenue and Customs to provide for intelligence exchange and cooperation as well as considering data exchange with other authorities, enhance cooperation with other workplace enforcement agencies (Home Office, 2007).

A pilot Employment checking service for employers has been set up between the Border and Immigration Agency and the Identity and Passport Service. This Service is now to cover a

broad range of documents, including passports and visa, which can establish the entitlement to work (Home Office, 2007).

In contrast to the United States, there is no general obligation under the law to check the work eligibility of all future employees. Accompanying both the 1996 and the 2006 Act, the UK government published guidance on the subject in the form of a Code of Practice to avoid unlawful discrimination advising employers to “treat all applicants in the same way at each stage of the recruitment process” (Home Office, 2008b). There have been no reports investigating the possible occurrence of discriminatory hiring practices as a result of employer sanctions in the UK. The 2006 Act does not provide for specific redress procedures in case of discrimination.

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6. Initiatives at EU level

The Treaty of Amsterdam gave the European Union important supra-national powers in the area of migration management. These powers are laid down in Title IV of the EC Treaty. Three Member States have a special position in relation to this part of EC law: the UK and Ireland, who have the possibility to opt-in to measures under this title and Denmark which does not have this possibility¹³. Since the Treaty of Amsterdam there has been a great number of legislative instruments adopted dealing with migration. Since the volume of long-term legal migration remains firmly in the hands of the EU Member States, most of this legislative activity has dealt with ways of stemming migration into the EU.

In May 2007, the European Commission, exercising its exclusive right of legislative initiative in this field, came forward with a draft Directive on providing for sanctions against employers of illegally staying third-country nationals “as part of the EU’s efforts to develop a comprehensive migration policy” (European Commission, 2007). Once adopted the Member States would be bound to implement the provisions in this Directive into their national legal systems. The proposal is based on Article 63(3)(b) of Title IV EC, since in the words of the Commission, it is concerned with immigration policy and not with labour or social policy. The UK has not yet decided whether it wants to opt-in to the proposal. The Select Committee on the European Union of the House of Commons took the view that as substantial legislation was already in place both at the national and the European level, this needed to be fully tested through implementation and enforcement before further legislation would be justified (House of Commons, 2007).

The proposal contains a general obligation for Member States to prohibit irregular employment of “third-country nationals who are illegally staying on the territory of the Member States”. Since at least 26 out of the 27 Member States (information on Cyprus was not available) already have employer sanctions in place, this provision would not impose any new obligation on Member States.

Under the proposal employers are obliged to copy the residence permit or other authorisation of the worker and keep these copies for at least the duration of the employment relationship. Businesses or legal persons would further be required to report the start and termination of the employment relationship to the Member States’ competent authorities. Where employers fulfil these obligation they have a defence against the imposition of employer sanctions in case the worker is irregular. This is not the case where the documents were manifestly incorrect.

Member States are required to impose employer sanctions that are effective, proportionate and dissuasive, a standard formulation in EC legislation, which in general leaves a wide discretion as to the nature and form of sanctions in response to infringements. The proposal however limits the discretion of the Member States by adding that such sanctions should in any case include: financial penalties in relation to each irregular third country national and payment of the cost of return. The directive mentions as optional sanctions: the exclusion from public benefits, public contracting, recovery of public funding granted during the year prior to detection, temporary or permanent closure.

The proposal further obliges Member States to criminalise irregular employment in case the infringement is the third one in two years, at least four irregular workers are detected, employ-

¹³ This is a very simplified picture of a very complex legal reality, suffice to note that in case of measures developing the Schengen acquis, on the lifting of internal border controls, other rules apply.

ment takes place in exploitative circumstances or the workers are victims of human trafficking. In that case the irregular employment should be punishable by effective, proportionate and dissuasive sanctions, which must include criminal or non-criminal fines. They may include other sanctions such as the exclusion from public benefits, public contracting or the withdrawal of business licences.

The case of subcontracting the proposal determines that the main contractor and any intermediate subcontractor are liable jointly and severally for sanctions imposed and back-payments due. The proposal further obliges Member States to “lift the corporate veil” (Article 12) for people with legal status who are found guilty of infringement and had a power of representation, decision or control in relation to irregular employment.

Bearing in mind that the lack of enforcement in many countries has been an obstacle to the effectiveness of employer sanctions, the Commission has proposed that Member States should control, on the basis of a risk assessment by the competent Member States’ authorities, at least 10 percent of all companies on their territory. It may however be questioned whether such obligation could of itself tackle some of the organizational and practical difficulties Member States face in the exercise of inspection activities.

The Directive itself would not impose an obligation on the Member States to issue a return decision, under the Commission proposal for a Return Directive (European Commission, 2005). Under the directive there would be an obligation for Member States to provide for an “effective mechanism” allowing irregular workers to lodge complaints. In the absence of true rewarding legislation it may however be questioned how effective any complaint mechanism can be. The proposal does have a number of protective elements for the irregular migrant worker that is detected, but the scope of these provisions seems limited.

Member States are obliged to make the employer pay any back-payments to the irregular worker. If the duration of the employment relationship is unclear this should be done for at least 6 months. Only in respect of criminal offences a Member State must suspend the execution of a return decision until the irregular worker has received the back payments due (Article 7(4)). In respect of the infringements Member States are to criminalise, the Member States are required to grant residence permits of a limited duration, yet only linked to the length of the relevant national proceedings, and only for irregular migrant workers who have been subjected to exploitative working conditions and who cooperate in proceedings against the employer (Article 14(3)).

The detailed and mandatory nature of the directive may constitute a problem for Member State governments. The most contentious point in this respect is likely to be the Directive’s obligation to criminalise certain behaviour and the prescription of the penalties to be imposed (see e.g. BuZa, 2007). Furthermore, some elements of the proposal, such as the obligation to report the start and termination of an employment relationship may be considered as an unnecessary burden in those Member States that at present do not have such obligation. European business interest groups have in particular spoken out against the joint and several liability in relation to sub-contractors (UEAPME, 2007; BDA, 2007). They have further pointed at the broader labour market situation in which irregular employment in general takes place (BDA, 2007). It has been argued that “although the criminalization of exploitative behaviour on the part of an employer is unlikely to raise objections, the creation of a strict liability criminal offence for the hiring of four well-treated yet illegal employees may be more objectionable” (Dawes and Lynskey, 2008). Immigrant groups have underlined the importance of protective provisions for irregular workers that report their situation to the authorities (ETUC, 2007).

Carrera and Guild (2007) argue the actual effects in the area of irregular immigration are only secondary to the wider fields of action covered by the act, and therefore the initiative falls more correctly within the context of employment and social affairs. Here the Community competences are however limited. The argument could be made that, in view also of the Commission’s own argument that the directive creates a more level playing field for businesses, it could be based on the more general legislative competence for regulating the EU internal

market. By basing its proposal on Article 63(3)(b), the Commission firmly makes employer sanctions first and foremost a policy tool in the fight against irregular migration, aimed at reducing irregular work as a pull-factor, rather than using its wider potential of fighting the informal economy or ensuring compliance with labour standards. This is not unlike the situation in the US and the UK.

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7. Comparison and policy oriented conclusions

As regards the imposition of employment sanctions for the employment of irregular workers, there is a clear distinction between the two Mediterranean countries on the one hand and the UK and the US on the other. In both Italy and Spain, the aim to reduce irregular migrant employment forms part of a broader policy of fighting employment in the underground economy in general. Both countries have a considerable informal economy, in which irregular employment concerns both (irregular) migrant workers and native workers. It is therefore important to place the fight against irregular migrant labour in these countries in the context of the more general fight against social security fraud, tax evasion, and non-compliance with health and safety regulations. It is important to recall that the existence of a large informal economy may actually facilitate and attract irregular migrant employment. Moreover, while in the informal economy the position of workers in general is vulnerable, this is particularly the case for (irregular) migrant workers.

In the US and the UK employer sanctions and their enforcement are much more self-standing, linked almost exclusively to the fight against irregular migration. For reasons of competence, this is also the approach taken at European level in relation to the proposal for a directive on employer sanctions.

In terms of enforcement Spain is different from Italy in that the Spanish labour inspection has the competence to inspect compliance with labour rules in general, whereas in Italy inspection activities, including those in relation to irregular migrant employment, are divided between a number of various government agencies. In the US and the UK, the embedded nature of employer sanctions in the fight against irregular migration means that the enforcement of different sets of labour rules is divided over different agencies, with only one of these agencies competent in the area of irregular migrant employment. Centralised enforcement of general labour rules may be less plagued by questions of division of competence or coordination. Moreover, irregular migrant employment is often linked to the non-compliance with social security rules and health and safety regulations. A division of competence between various agencies may however allow for a greater degree of specialisation and professionalization of inspection activities.

From the situation in the countries under study, a number of trends as regards the use of employer sanctions in industrialised countries in the western world can be established. First of all, there is a clear tendency towards more severe penalties. All countries know the possibility of administrative fines¹⁴. Since their introduction maximum fines have been increased by subsequent legislation in at least three of the four countries under study. They now apply in all countries per worker detected. Furthermore, all countries have the possibility to impose criminal sanctions. Since 2006, with the introduction of this possibility by the UK, criminal sanctions in all countries include imprisonment. It is interesting to note that the last country to introduce employer sanctions, the UK, now has the possibility of imposing the highest fines.

Table 11. Overview of maximum fines/terms imprisonment

Country	Max. civil/administrative fine per worker	Imprisonment (Criminal sanction)
Italy	5000€	3 months – 1 year
Spain	60,000 €	2 – 5 years
UK	£10,000 (ca 13,038€)	2 years
US	\$16,000 (ca. 10,345€)	6 months

¹⁴ Although these are called civil under the US and UK Legal system because of their enforceability in civil law courts, in particular in civil law countries they would be considered administrative in nature.

The fact that fines are imposed per worker means that fines are automatically adjusted to the seriousness of the infringement. Here it should be noted that exploitative labour conditions often form an aggravating circumstance. In the UK and the US fines may be limited in case of mitigating circumstances such as cooperation with the authorities. In most legislations, repeated or particularly serious infringement automatically fall in a higher category of fines. The European Commission's proposal for a Directive on employer sanctions proposes that such infringements be qualified as criminal offences under the national laws of the EU Member States.

In terms of enforcement there is a clear trend towards an increase of the control apparatus and number of enforcement actions. In particular as regards the latter, it may be questioned how far this is a trend that is long-term and structural. In Spain e.g. the increase in activity can be considered to have been politically motivated by the 2005 regularization programme, in the UK by the introduction of civil penalties in force as of 2008 and in Italy by the surge in labour incidents often affecting undocumented foreigners.

In all countries, even those in which the fight against irregular employment is not directly related to the enforcement of broader labour rules, there is a trend towards increased inter-agency cooperation. Importantly, this cooperation includes the linking and exchange of information. There is furthermore a noticeable shift towards the computerisation of inspection activities. Inter-agency cooperation and computerisation also allow for more targeted enforcement based on intelligence gathering and risk analysis.

Computerisation can also be seen at the level of prevention. In both the US and the UK, where the verification of a future employee's work eligibility is either compulsory or a pre-condition for the existence of a statutory defence, pilot projects on the electronic verification have been carried out. Although the use of databases is often plagued by technical difficulties or the inaccuracy of the data contained in them, there is a serious potential for such systems to alleviate the burden the verification of a workers status may impose on business.

It is interesting to note that in response to a (perceived) lack of action at a federal level, in the US the states legislatures have taken on an active role in the imposition of employer sanctions. The limits within which a state, region or local authority may adopt (additional) rules in relation to irregular migrant employment is of course determined by national constitutional law. Activity on the level of local authorities does not however necessarily need to imply the adoption of legislative measures but can also consist of increased cooperation between territorially competent government agencies. It should here be noted that different employer sanctions within one country, as well as the asymmetrical enforcement of such sanctions may lead to the displacements of businesses and immigrant workers. A recent initiative for an EU directive on employer sanctions mentions the need to establish a level playing field, even if the directive as such is based on the Union's competence in relation to migration, rather than on treaty norms regulating the internal market.

An important problem that has been noted in particular in relation to the United States, and has been an important argument in the discussion on the introduction of employer sanctions in the UK, was the danger of discriminatory hiring practices resulting from the imposition of such sanctions. This is a particularly important issue in immigration countries with a mixed ethnic composition and/or a large regular immigrant community, since these persons would be unjustifiably excluded from employment out of fear of employment sanctions. An unequivocal prohibition of discrimination, clear guidance for employers and an active response of authorities in response to complaints on discrimination are important instruments against discrimination.

A relatively new concept in relation to employer sanctions is that of "rewarding legislation" for irregular immigrant workers that report their situation to and cooperate with authorities. Here one should think of the granting of temporary residence permits. Currently, such "protective" legislation exists mainly for the victims of human trafficking. Spanish legislation already knows the possibility of granting a residence permit for an irregular migrant that actively cooperates with the authorities. A proposal to this effect was made in Italy and the EU directive on employer sanctions would, once adopted, provide for a temporary residence permit in case of particularly serious infringements.

The usefulness of employer sanctions has not gone unchallenged and in all countries under study irregular immigrant employment has increased, rather than reduced, since the introduction. Nevertheless, employer sanctions have recently won the renewed favour of policy makers as a tool of immigration control *stricto sensu* and a means of enforcing labour market regulations in more general. In part, the renewed interest for employer sanctions could be considered to form part of a more general political will to crack down on irregular migration. At the same time, the emergence of rewarding legislation may also indicate that irregular employment is less and less seen as a relatively harmless crime. Increased enforcement, with the help of intelligence gathering and modern technologies may be able to remedy some of most significant shortcomings of employer sanctions so far.

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