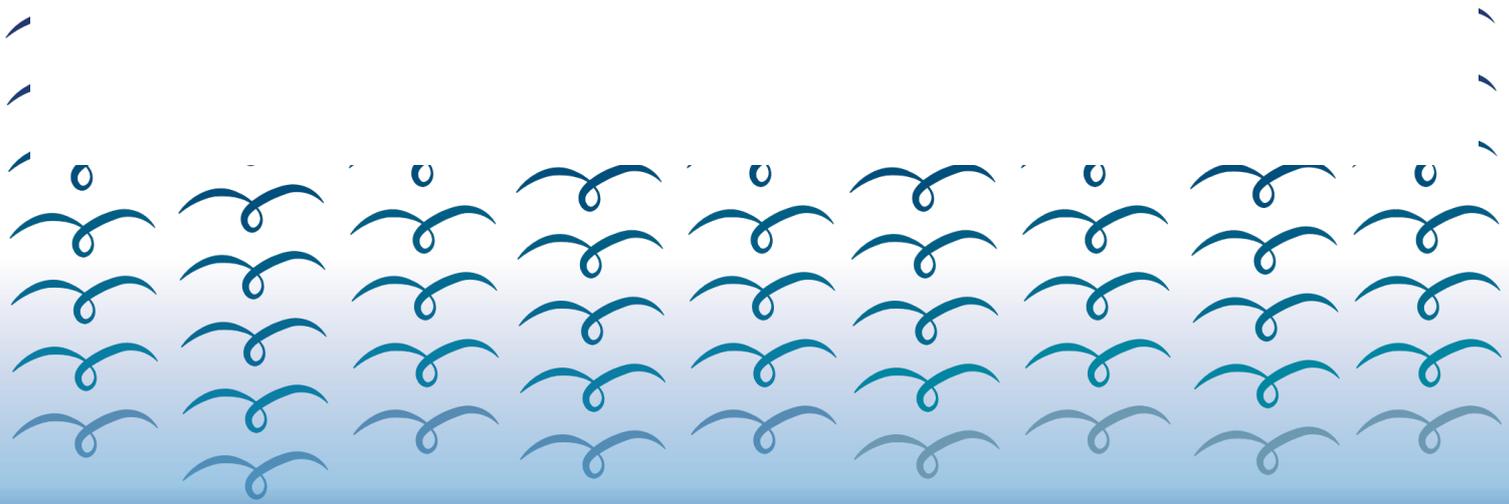




Advancing Alternative Migration Governance



Legal pathways to regularisation of illegally staying migrants in EU Member States

D.2.7

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1. Introduction

This paper aims to identify and compare the existing legal pathways for the regularisation of illegally staying migrants in the Member States of the European (EU), in order to promote the discussion about EU standards on this issue. In 2017, between 2.9 and 3.8 million migrants were estimated to be residing irregularly in Europe (Connor and Passel, 2019).¹ The EU Return Directive², which provides the legal framework on deportation of illegally staying migrants, gives Member States two main options upon detecting a third-country national staying irregularly on their territory: order them to leave to a third country or another Member State³, or authorise their stay.⁴ From a political and legal perspective, however, all Member States focus on return policies. In 2013, at least 16 Member States had not installed mechanisms for regularisations of this group (Heegard Bausager, Köpfler Møller and Ardittis, 2013, p. 68). The unwillingness of Member States to do so becomes most evident in the situation of third-country nationals who cannot be removed ('non-removable returnees') due to practical or legal reasons and who have access to a (provisional) legal status only in few countries.

Despite this situation at EU level, the establishment of pathways to regularisation, "on a case-by-case basis and with clear and transparent criteria", is included in objective 7 of the Global Compact on Safe, Orderly and Regular Migration as a way to reduce and address vulnerabilities in migration, in particular for children, youth and families.⁵ In his report accompanying the Global Compact, UN Secretary-General António Guterres emphasised that some degree of regularisation is preferred to a framework based solely on voluntary and forced return, citing the high cost, limited effectiveness and human rights risk of return policy, and arguing that "[i]t is not clear that returns have their supposed deterrent effect."⁶ Already in 2003, the European Commission suggested that the positives of regularisation, e.g. promoting integration, may sometimes outweigh the negatives, especially considering that irregular migrants cannot always be returned due to legal, humanitarian or practical reasons (European Commission, p. 26) In 2009, the EESC went further by arguing that "return policy is not the only answer to irregular immigration (European Union, 18 May 2019, para. 4.9.1, pp. 29-35)." According to these statements, legal pathways to regularisation could be addressed at least to some extent as an alternative to unrealistic and failed return policies both at EU and Member States' level. For the moment, however, the EU's response towards irregular migration continues to be characterized by a focus on deterrence and return, while regularisation remains a national competence (Kraler, 2019, p. 1). But an alternative migration governance system at EU level should consider including regularisation mechanisms for irregularly

¹ Data for the EU28 and EFTA member states.

² Return Directive

³ Art. 6(1) Return Directive

⁴ Art. 6(4) Return Directive

⁵ Para. 23(i), United Nations General Assembly, 'Global Compact for Safe, Orderly and Regular Migration', A/RES/73/195, 11 January 2019.

⁶ Para. 36-41, United Nations General Assembly, 'Making migration work for all, Report of the Secretary-General,' A/72/643, 12 December 2017.

staying third-country nationals. In fact, some EU Directives already include references to regularisation mechanisms for human trafficking victims⁷ and third country nationals in illegal employments⁸. The recent EU Strategy on Victims' Rights (2020-2025) (European Commission, 2020) refers also to the need to set the legal conditions for safe reporting of crime for migrant victims independently of their residence status. However, the existing regulations leave this possibility to EU Member States and set restrictive conditions for the regularisation of these exceptional cases. Member States can always have more favourable regulations, but at EU level the golden rule is clear: regularisation mechanisms for illegally staying third country nationals is still in hands of Member States.

Earlier studies on the use of these regularisation mechanisms by EU Member States show a great variety in the extent to which regularisation measures have been used, as well as in their target groups and in the conditions for obtaining a residence permit. In 2009, the International Centre for Migration Policy Development (ICMPD) distinguished six "clusters" of EU Member States based on their regularisation policies, including southern Member States (Greece, Italy, Spain, Portugal) which were found to rely on regularisation as an alternative to regular recruitment of labour migrants from abroad, and northern Member States (Belgium, Denmark, Finland, Luxembourg, the Netherlands and Sweden) which were considered to enact regularisation primarily for humanitarian reasons (Baldwin-Edwards and Kraler, 2009, pp. 39-43). EMN (2012) and ICMPD (2014) furthermore distinguish measures based on the length of residence in the country, family ties and integration, as well as semi-regularisations – measures suspending removal of third-country nationals without issuing a residence permit. In addition, both small-scale 'case-by-case' regularisations and collective, 'one-off' regularisations – also known as 'amnesties' – have been carried out in the EU (EMN 2012, 2014, p. 47).

For the purpose of this paper, we define "illegally staying migrants", "migrants with irregular status" or "migrants without an authorization of stay" as third-country nationals who have entered an EU Member State without being authorised to do so; who have entered legally but stayed longer than permitted or violated the conditions of stay; or who find themselves in an irregular situation after their asylum claim or request for protection has been denied. We analyse the existence of pathways towards regularisation – awarding legal residence status – for these migrants in the national legal frameworks of EU Member States, in line with the Global Compact on Migration. In doing so, we pay special attention to the situation of third-country nationals whose deportation proceedings have been postponed or exhausted. On the other hand, we exclude regularisation as part of asylum and protection procedures, which are covered by Work Package 6 of the ADMIGOV research programme.

⁷ Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

⁸ Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals

The first section of this paper provides a review of the literature on regularisation in the EU, identifying different policy designs and rationales for implementing regularisation. In addition, it explores the arguments in favour and against regularisation as presented in the European debate on this issue during the last two decades, and investigates to what extent a common stance has been adopted at the EU level. The second section analyses the national legal frameworks on regularisation in Denmark, France, Germany, the Netherlands, Poland and Spain. These states have been selected due to their varied use of regularisation. Denmark and the Netherlands have generally opposed regularisation, though the latter has implemented collective regularisations in the past. France has an extensive regularisation framework based on labour market demands, while Germany stands out for its application of ‘tolerated stay’ for third-country nationals who cannot leave. Poland uses a similar construct, and has been included to represent a Member State where regularisation is a relatively new policy tool. Finally, Spain has conducted numerous mass regularisations in the past, but has since reformed its legal framework to create a permanent individual pathway to regular status.

2. Regularisation in the European Union

Through a review of secondary literature and policy documents, this section clarifies the different types of regularisation that have been used in EU Member States and explores arguments in favour and against implementing regularisation as presented in public debate. Furthermore, it investigates efforts at the EU level to set common standards regarding regularisation in the Member states.

2.1 Types of regularisation

A first important finding when studying the literature on regularisation in the European context is that it is rather outdated. Between 2000 and 2014, a number of overview reports were published at the initiative of policy institutions, international organisations and academic networks, showing that the majority of EU Member States had implemented regularisation measures in previous years (Apap, De Bruycker and Schmitter, 2000, pp. 263-308; Levinson, 2005; Blaschke, 2008; Baldwin-Edwards and Kraler, 2009; Brick, 2011; Kraler et al, 2014). These sources provide a sound overview of the different target groups of regularisation measures and the conditions they needed to fulfil, as well as the rationales for policy makers to implement such measures and the designs they used. On the other hand, limited attention was paid to the type of residence permit issued to beneficiaries, in terms of duration and access to social rights, or to the impact of regularisation on beneficiaries. In recent years, studies on regularisation throughout the EU have become scarce, though important insights can be obtained from case studies and research into specific aspects of regularisation (Finotelli and Arango, 2011; Chauvin, Garcés-Masareñas and Kraler, 2013; Larramona and Sanso-Navarro, 2016; Kraler, 2019; Markova, Paraskevopoulou and McKay, 2019; Murillo, Arévalo and Brey, 2019).

Though regularisation can take many shapes, two main categories can be distinguished: large-scale, “one-off” regularisation *programmes* and structural, case-by-case regularisation

mechanisms (Apap, De Bruycker and Schmitter, 2000, pp. 263-308; Baldwin-Edwards and Kraler, 2009). The former are often motivated by humanitarian or compassionate reasons, such as Germany's regularisation of Bosnian refugees (2002) or the Dutch general "pardon" for asylum seekers (2007). Sometimes, they are implemented to respond to shortages on the labour market, as in the case of Italy's mass regularisations between 1982 and 2002 (Baldwin-Edwards, and Kraler (eds.), 2009a, p.11). Between 1973 and 2008, over four million regularisations were carried out in Europe as part of one-off programmes, with more than 20 million applications received (Blaschke, 2008, pp. 10-17).⁹ Structural, case-by-case mechanisms differ from one-off programmes as they do not *a priori* define the limits of the eligible group, e.g. by applying it only to migrants of a specific nationality who entered the country before a certain date. Instead, regularisation mechanisms could in principle become relevant for all illegally staying migrants once they meet the conditions. Continuous mechanisms are generally less controversial than large-scale programmes as they draw less attention (Levinson, 2005).

Besides dividing regularisation measures into programmes and mechanisms, regularisation policies can furthermore be distinguished depending on their purpose, which is reflected in the conditions for regularisation. In that regard, three main policy rationales can be identified. First of all, regularisation can be used as a means of addressing *de facto* residence, also known as a "*fait accompli* procedure" (Apap, De Bruycker and Schmitter, 2000, p. 268). Such measures are usually targeted at persons who have already been staying in the country for several years or entered before a specific date (Apap, De Bruycker and Schmitter, 2000, p. 268). But also to solve the situation of "non-removable returnees", i.e. third-country nationals who have been issued a return order, but who are unable to leave due to administrative or practical reasons. Taking into account that only half of illegally staying migrants noticed by authorities in the EU receive a return order, and that less than half of them are actually returned to a third country (Lutz, 2018, p. 29), regularisations put an end to the legal uncertainty of those migrants who remain.

Secondly, the granting of legal status for illegally staying migrants can be justified based on the humanitarian or social *needs* of the migrant, for example if there are medical reasons, family ties or other pressing reasons that require their presence in the country (Baldwin-Edwards and Kraler, 2009, p. 43). Such measures are also invoked for victims of trafficking in human beings, who have the right to a residence permit under EU law if they choose to cooperate with Member State authorities.¹⁰ And thirdly, regularisation measures can be implemented with the objective of rewarding migrants' civic or economic *deservingness*. In that case, the conditions for regularisation are chosen to select those persons who conform to national values or who have made efforts to integrate or be economically productive (Kraler, 2019; Chauvin, Garcés-Mascreñas and Kraler,

⁹ This number covers official regularisation programmes conducted between 1973 and 2008 in Austria, Belgium, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Poland, Portugal, Slovenia, Spain, and the United Kingdom.

¹⁰ Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, *OJ L 261*, 6 August 2004, pp. 19–23.

2013). In practice however, deservingness and humanitarian considerations often overlap as motivations for regularisations (Kraler, 2019, p. 4).

2.2 Benefits of regularisation

The benefits of regularisation for illegally staying migrants and their host society have been outlined by numerous NGOs, academics and human rights institutions (EUAFR, 2011; Carrera and Guild (eds.), 2016; Cholewinski, 2005; PICUM, 2018). Taking into account the economic and human costs of the deportation system at EU- and at national level, as shown in other deliverables of the ADMIGOV project, regularisation appears as a real alternative. At the same time, it is regarded as a social policy tool to address situations of hardship among irregular migrants (Kraler, 2019). Migrants without a legal status are more vulnerable and more likely to fall victim to trafficking in human beings, homelessness, poverty, and ill health. This is due, in part, to the fact that illegally staying migrants' access to fundamental rights, including social rights related to housing, education and healthcare, is strongly limited when compared to citizens and legal residents (Cholewinski, 2005; EUAFR, 2011).

Some EU Member States have restricted irregular migrants' access to these rights in their legislation, while in others, persons in an irregular situation have to overcome legal or practical obstacles to enjoy fundamental rights (Cholewinski, 2005, p. 73). These issues are amplified as many migrants avoid contact with authorities for fear of being detained (EUAFR, 2014). In addition, NGOs and human rights organisations emphasise the importance of implementing regularization mechanisms to fight workplace abuse and exploitation, especially for low-wage workers, who have fewer regular migration pathways available to them (Kraler, 2012; PICUM, 2018). The lack of pathways towards regularisation of irregular workers independent of their employer reduces the effectiveness of existing measures against abuse by employers, such as the Employers Sanctions Directive (2009/52/EC) (Van Ballegooij and Thirion, 2019, p. 42). Granting legal status to irregular migrants can thus benefit their socio-economic situation and improve access to education and healthcare, in addition to providing legal inclusion (Levinson 2005, p. 9; Kraler (2014), p. 82; Kraler, 2019, p. 95; Kraler, 2012).

In addition to addressing vulnerabilities among migrants, the Global Compact on Migration advocates for the use of regularisation measures to improve the accuracy of demographic information available to the state.¹¹ The availability of regularisation mechanisms is furthermore crucial to solve the issue of statelessness (De Groot, Swider and Vonk, 2015). Lastly, the significance of regularisation mechanisms is illustrated by the case of 'non-removable returnees'. Several EU Member States do not foresee a procedure by which they can obtain legal stay, even when their inability to return has been established, forcing them to live like undocumented migrants without prospects of improvement (Heegaard Bausager, Köpfler Møller and Ardittis, 2013, pp. 4-6).

¹¹ Para. 23(i), UN Global Compact on Migration.

2.3 Concerns regarding regularisation

For some, opposition towards regularisations is motivated by the view that illegally staying migrants broke the law and should therefore not be “rewarded” with an authorisation of stay (Brick, 2011, p.2).¹² However, at the European level, debates regarding regularisation have centred around three arguments related to the supposed ineffectiveness of regularisation measures and potential side-effects. These concerns were first voiced in the early 2000s, in response to a number of mass regularisations in southern EU Member States, particularly in Spain and Italy, which placed the topic of regularisation high on the European agenda (Eichhorst et al, 2011, p. 32).

Member States including the Netherlands and Germany expressed opposition towards these collective regularisations, for fear that regularised migrants would subsequently travel onwards to other EU destinations, especially in light of the newly adopted Long-Term Residents Directive (2003/109/EC) which enabled intra-EU mobility for regular(ised) migrants after five years (European Commission, 2006, para. 33). This prompted several attempts at the EU-level to place restrictions on Member States’ ability to implement regularisation measures (Brick, 2011, p. 8; Hooper, 2019, p. 14; Finotelli and Arrango, 2011, p. 497).

Furthermore, regularisations have frequently been considered as a potential “pull factor” for further irregular movement from third countries (Martín et al, 2005, p. 38; Eichhorst et al, 2011, p. 31). This concern was voiced by the European Commission following a regularisation programme in Belgium in the year 1999, after which “preliminary evaluations (...) indicated that the flows of illegal migrants actually increased following the measure” (European Commission, 2004, p. 9 and p.17). However, the existence of such a link in European regularisation programmes is not supported by scientific evidence. In 2007, a report by the European Parliament’s Committee on Migration, Refugees and Population found that ‘research in this area is largely anecdotal and indeterminate’.¹³ This view is shared by Larramona et al. (2016) who find that in the European context, “little attention has been paid to empirically establishing the effects of regularization programs for illegal immigrants.” (Larramona and Sanso-Navarro, 2016, p. 297). As an example of research missing an empirical foundation they refer Kostova’s (2006) study of the Spanish mass regularisation implemented in 2005, which concludes that the programme “did not have the desired effect, considering not only that immigration has not become more orderly, but also that it has created a massive increase in the arrival of irregular migrants” (Kostova, 2006). By contrast, Larramona et al find that “the increase of the foreign population in Spain in the period analyzed is the result of a catching-up process, rather than of a magnet effect arising from the 2005 regularization program (Larramona and Sanso-Navarro, 2016, p. 310).”

Furthermore, referring to the earlier mentioned experiences with regularisation in Belgium, a study commissioned by the European Commission found “limited evidence that regularisation in

¹² Para. 91, European Parliament, Committee on Migration, Refugees and Population, ‘Regularisation programmes for irregular migrants,’ rapporteur: John Greenway, 6 July 2007.

¹³ Para. 91, European Parliament, Committee on Migration, Refugees and Population, ‘Regularisation programmes for irregular migrants,’ rapporteur: John Greenway, 6 July 2007.

one Member State has led to immigration of irregular immigrants from (or transiting) other Member States, although the magnitude of in-migration is likely to be small. Not unsurprisingly, regularisation programmes (or rumours about pending regularisation programmes) are likely to reduce voluntary returns of failed migrants, but are unlikely to have an overall effect on returns. However, there is hardly any evidence for a pull effect from third countries, although pull effects might be more important for selected groups of immigrants” (Baldwin-Edwards and Kraler, 2009, p. 109).

A third argument against regularisations relates specifically to the so-called “one-off” programmes, which have been criticized for failing to provide a structural response to the issue of migrant irregularity, due to their strict criteria and limited timespan (Blaschke, 2008, p. 16 and p. 20; European Parliament, 2007, cited in Baldwin-Edwards and Kraler, 2009, pp. 105-106). Levinson (2005) argues that rather than the supposed encouragement of further irregular migration, “What may be a greater concern is the percentage of migrants who fall out of regular status once their permits expire. This creates an endogenous phenomenon of undocumented migration, a vicious cycle which may artificially inflate the numbers of irregular migrants and also encourage many to stay in the country until the next amnesty is announced (Levinson, 2005, p. 9).” Indeed, there have been indications that beneficiaries of regularisation programmes are sometimes unable to renew their newly-obtained residence permit, resulting in a return to irregularity (Finotelli and Arango, 2011; Levinson, 2005, p. 10; Kraler, 2012; Blaschke, 2008, p. 20). Furthermore, regularisation programmes have sometimes been repeated to reach those who missed out during the initial cycle.¹⁴

2.4 EU response to regularisation

In 2003, the European Commission suggested that the positives of regularisation may sometimes outweigh the negatives. It emphasized that illegally staying migrants cannot always be returned, and that should enjoy basic rights. Regularisation was presented as a tool for fighting exploitation, addressing labour market inefficiencies. In addition, it was highlighted that “illegal immigrants are excluded from full participation in society, both as contributors and as beneficiaries, which contributes to their marginalisation and fuels negative attitudes to them from local people” (European Commission, 2003, p. 26).

However, in the years that followed, regularisation came to be viewed more sceptically. In response to the mass regularisations in several Member States and the ensuing concerns listed above, in 2006 a Council Decision was adopted calling for the establishment of an information mechanism through which Member States were to inform each other on national measures in the area of asylum and immigration.¹⁵ Furthermore, in 2008 the EU Member States adopted a

¹⁴ See e.g. the case of Poland below.

¹⁵ Council Decision (2006/688/EC) of 5 October 2006 on the establishment of a mutual information mechanism concerning Member States' measures in the areas of asylum and immigration, *OJ L 283*, 14 October 2006, p. 40-43; Commission Staff Working Document Accompanying the Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals, Brussels, 19 July 2006, SEC (2006) 1010, p. 9.

common viewpoint regarding regularisation in the European Pact on Immigration and Asylum (hereafter: 'the Pact'). It made clear that regularisation should be seen as a measure of last resort rather than a standard approach to irregular migration, as the Pact called on Member States to "control illegal immigration in particular by ensuring that illegal immigrants return to their countries of origin or to transit countries".¹⁶ The Return Directive, adopted the same year, would provide the legal framework for this decision. Member States furthermore agreed to only use "case-by-case" rather than "mass regularisations", 'under national law, for humanitarian or economic reasons'.¹⁷

Apart from adopting a common standpoint in the Pact, no common framework on regularisation was developed. With the exception of victims of trafficking in human beings as well as refugees and persons eligible for subsidiary protection¹⁸, the granting of regular status to third-country nationals who are already residing in one of the Member States without an authorization of stay remains the exclusive competence of Member States (Hinterberger, 2018). In 2010, the Commission concluded that "As for regularisation measures, there seems no consistent view among Member States on their use as a tool to tackle illegal immigration (European Commission, 6 May 2010, pp. 4-5). Thus, regularisations remained a national issue. In the years following the Pact, regularisations all but disappeared from the European debate. In the European Agenda on Migration, adopted in 2015, regularisation is mentioned only once, as it states that "The Commission will support Member States in promoting a permanent dialogue and peer evaluation at European level on issues such as labour market gaps, regularisation and integration –issues where decisions by one Member State have an impact on others" (European Commission, 2015, p. 15).

Finally, the objective of establishing legal pathways as formulated in the New York Declaration and the Global Compact for Migration has not led to concrete action regarding the regularisation of illegally staying migrants already residing in Europe. The EU has thus far interpreted this commitment mainly as the strengthening or establishment of legal routes from third countries to EU Member States, e.g. through private sponsorship or resettlement schemes, while avoiding the topic of regularisation for irregular migrants already present in the EU (European Commission, 2018). Thus, in its response to irregular migration, the EU continues to rely on return measures and deterrence (Kraler, 2019).

2.5 Conclusion

This section has showed, firstly, that there is a lack of up-to-date research comparing the implementation of regularisation measures across the EU. The present study aims to fill this

¹⁶ European Pact on Asylum and Immigration, p. 7.

¹⁷ European Pact on Asylum and Immigration, p. 7.

¹⁸ Qualification Directive, Directive 2011/95/EU of the European Parliament and of the Council, *OJ L 337*, 20.12.2011, p. 9–26.

knowledge gap by analysing the existing legal frameworks on regularisation in selected Member States.

Secondly, it is striking that most EU Member States have implemented regularisation measures in the last fifteen years despite their opposition towards this issue. Mostly in response to large-scale regularisation programmes in southern EU Member States in the early 2000s, concerns have focused on the supposed “pull factor” of regularisation towards further irregular movement and a fear of secondary movement of regularised migrants towards other (wealthier) Member States, both of which have not been substantiated by evidence. A third argument against regularisation, i.e. that such measures fail to adequately tackle the problem of irregular migration, may be rooted in experiences in some Member States where supposedly “one-off” regularisation programmes were repeated multiple times.

However, it should be questioned whether regularisation is presented as a structural solution to the existence of irregular migration in the first place; rather, the literature emphasises its value for addressing marginalisation, exploitation and access to fundamental rights among particularly vulnerable persons, including children, families, stateless persons, victims of trafficking in human beings, and persons whose deportation proceedings have been postponed or suspended.

Though the benefits of regularisation have been acknowledged in the Global Compact on Migration as well as by the European Commission, the European response to this issue has been limited. In 2008, EU Member States committed to only using case-by-case regularisation rather than collective, “one-off” programmes. In addition, they agreed that regularisation could be carried out for labour market reasons or on humanitarian grounds. However, regularisation of illegally staying migrants remains the exclusive competence of the Member States. As a result, the design of regularisation measures as well as their conditions and target groups vary greatly across the EU, while the EU framework on irregular migration continues to be centered around return and deterrence.

3. Regularisation mechanisms in selected Member States

In the following, we map the regularisation measures implemented in six Member States. We first provide a brief history of the use of regularisation in each country, after which we identify regularisation measures in the current national legal framework. In doing so, we focus on case-by-case mechanisms – in accordance with the European Pact on Immigration and Asylum – and pay special attention to the situation of third-country nationals with frustrated deportation proceedings.

3.1 Denmark

Migrants in an irregular situation are, in principle, not eligible to apply for a residence or work permit in Denmark. In general, employment is not allowed without a work permit,¹⁹ though the Immigration Service may authorize applicants for a residence permit to work until a decision is taken or until they leave Denmark.²⁰ Applicants for a residence permit must either file their application abroad, or already be lawfully staying in Denmark. An exception is made for the (step)children of Danish nationals or legally residing foreigners²¹ and for persons who have completed a master's or PhD programme in Denmark within six months before applying.²² In addition, it is possible to grant a residence permit for (self-)employment to persons staying irregularly in certain circumstances, such as following Denmark's international obligations, or for persons whose unauthorized stay is due to circumstances beyond their control.²³ Furthermore, persons who are registered as asylum seekers but who do not qualify for international protection, may be issued a residence permit for humanitarian reasons, for example based on health grounds.²⁴

Moreover, residence permits may be issued for exceptional reasons, such as family unity or best interests of the child.²⁵ In this case, a number of conditions apply similar to those for partners/spouses.²⁶ They can also be granted to persons whose application for international protection was unsuccessful, if, after 18 months, they are still in Denmark despite cooperating with authorities on their return, and if return is considered "futile".²⁷ Thirdly, unaccompanied minors who have applied for asylum or whose claim has been refused may be issued a residence permit, if it is believed that deportation to a third country would subject them to a situation of emergency. However, the permit for unaccompanied minors is not renewed beyond their 18th birthday.²⁸ There are several other narrowly-defined groups that may apply for a permit without residing lawfully, such as persons whose residence is required for the purpose of investigation or prosecution²⁹ or persons covered by the Kosovo Emergency Act.³⁰ A number of residence permits, such as for the purpose of education, au pairing, or participating in an internship, may also be granted to persons residing irregularly if their stay is caused by circumstances beyond their control, or for exceptional reasons.³¹

¹⁹ Art. 13(1), Aliens Consolidation Act, 10 March 2019.

²⁰ Art. 14a.

²¹ Art. 9.(1)(2) and (3)

²² Art.9.a(9); Art.9.a(5)

²³ Art. 9.a(5)

²⁴ Art. 9b

²⁵ Art. 9c

²⁶ Art. 9c.(1)

²⁷ Art. 9c.(2)

²⁸ Art. 9c.(3)

²⁹ Art. 9c.(5)

³⁰ Art.9e.(1)

³¹ Artt. 9i.-(3); 9j.-(2); 9k.(2); see also Artt. 9l.(2); 9m.(2); 9n.(2); 9p.(2)

Finally, the Danish Aliens Act foresees possibilities for regularisation through marriage or permanent cohabitation. The applicant should be over the age of 24, and their spouse or partner should either be a citizen of Denmark or another Nordic country; be a person with refugee status or temporary protection; or have held a permanent residence permit for at least the past three years. Whether or not a residence permit is issued depends on a range of conditions, including that the applicant passes a Danish language test³² and has had at least one lawful stay in Denmark.³³ The partner or spouse is subject to financial requirements³⁴, and additional conditions, such as passing a civic qualification test, apply if they are on a permanent residence permit for other reasons than international protection.³⁵ However, conditions on applicants and partners/spouses can be suspended in case of exceptional reasons, including for reasons of family unity.

In general, applications for the permits discussed above are refused if the applicant is considered danger to national security or a threat to public order, safety or health, or if they could qualify for refugee status.³⁶ Other factors that could lead to a refusal, such as fulfilling conditions for expulsion or being the subject of an entry ban, can be foregone in case of special reasons, such as family unity.³⁷ If such factors are not present, these residence permits are issued for a limited period of time and may be renewed, with a possibility of permanent residence.³⁸ Permanent residence may be granted after eight years of legal residence³⁹, or four years in case the applicant has reached the age of retirement, as long as other conditions are met, such as requirements regarding civic integration or employment.⁴⁰ Permanent residence without fulfilling these conditions or without having resided legally for a certain period of time can be considered if the applicant demonstrates strong ties to Denmark.⁴¹

3.2. France

France has not applied any collective regularisation programme since 2006, when nearly 7 000 persons obtained regular status, targeted at parents with young, dependent school-going children (Kraler 2019: 7). In the current legal framework, there are two mechanisms through which persons in an irregular situation obtain a residence permit for “exceptional reasons”, either on the basis of employment⁴² or on grounds of private and family life.⁴³ These mechanisms, introduced in the 2012 Valls Circular, formalised and centralised existing regularisation practices, and alleviated

³² Art. 9.(8)(3)

³³ Art. 9.(10)

³⁴ Art.9.(4)

³⁵ Art. 9.(16)

³⁶ Art. 10.(1)

³⁷ Art. 10.(2)-(4)

³⁸ Art. 11.(2)

³⁹ Art. 11.(3)

⁴⁰ Art. 11.(6)

⁴¹ Art.11.(13)

⁴² Para 2.2, Circulaire Valls, Ministry of the Interior, 28 November 2012

⁴³ Para 2.1, Circulaire 2012;

some of the conditions applied to persons seeking a residence permit on the basis of employment (Chauvin, Garcés-Masareñas and Kraler, 2013, p. 122).

Regularisation based on employment is intended for persons who have been present in France for at least five years, and who either have an employment contract or a promise of future employment (“promesse d’embauche”). Furthermore, they should have already worked for at least 8 months in the past two years or 30 months in the past five years. Alternatively, persons who have resided in France for only three years but who have worked a minimum of two years are also eligible. The applicant is required to provide proof of the previous employment, mainly by providing salary statements.⁴⁴ If the applicant fulfils all requirements, a renewable residence permit is issued with a maximum validity of one year. The holder will be allowed to take up employment without conducting a labour market test.⁴⁵ At the discretion of immigration officials, an applicant who cannot present an employment contract or a promise of employment may nonetheless be granted a temporary, non-renewable residence permit for the purpose of seeking employment.⁴⁶

Regularisation based on reasons of private and family life also lead to a temporary residence permit that allows the holder to work. They are intended for parents of school-going children; the spouse or partner of a regular migrant (based on Art. 8 ECHR); and minors turning eighteen who have family links or are following an education in France.⁴⁷ Residence permits for private and family life may also be issued to foreigners with an exceptional talent or whose services benefit society, e.g. in the cultural or civic domain, or based on humanitarian considerations. Here, special attention is paid to victims of trafficking in human beings who cooperate with authorities, and victims of domestic violence. To these two groups, a renewable residence permit of one year is issued.⁴⁸

The regularisation mechanisms described above lead to the issue of a temporary residence permit with the description “private and family life”.⁴⁹ Both regularisation on the basis employment and regularisation on grounds of private and family life explicitly exclude persons whose presence constitutes a public order risk, and persons involved in a polygamous marriage on French territory.⁵⁰

In addition to the mechanisms specified in the Valls circular, regularisation is also possible for victims of trafficking in human beings. The issue of this permit is regulated in the Code governing the entry and stay of foreigners and right of asylum (CESEDA). For the purpose of facilitating

⁴⁴ Para. 2.2.1, Circulaire 2012, p. 8.

⁴⁵ Para. 2.2.1-2.2.2, Circulaire 2012; Article L313-10, Code de l’entrée et du séjour des étrangers et du droit d’asile ; Art. R5221-20 para. 2-6.

⁴⁶ Para. 2.2.3 (a), Circulaire 2012

⁴⁷ Para 2.1.1-2.1.3 Circulaire 2012; Art. L313-11 and L313-12, Code de l’entrée et du séjour des étrangers et du droit d’asile

⁴⁸ Para. 2.1.3 Circulaire 2012, p. 7.

⁴⁹ L313-11, L313-14 Code de l’entrée et du séjour des étrangers et du droit d’asile (CESEDA); Art. R313-20 – R313-26 CESEDA.

⁵⁰ Para. 2, Circulaire 2012, p. 4.

the criminal procedure, a residence permit on the grounds of private and family life may be issued with a duration of 6 months, which can be renewed as long as the procedure is on-going.⁵¹ This permit provides access to the labour market or to education and to the social security system.⁵² If the suspect is convicted, the victim is entitled to a residence permit for ten years.⁵³

While the grounds for regularisation of migrants already in France are described clearly in the Valls Circular, it is difficult to estimate how often these mechanisms are applied, as official reports on the issue of residence permit often provide statistics based on the type of permit rather than the grounds for which it is issued. While it is for example clear that data on residence permits for family reasons or on humanitarian grounds include permits issued to persons already in France, the exact proportion of persons residing irregularly in France obtaining such permits is unclear.

For example, DGEF (2018) specifies that its statistics on residence permits issued for economic reasons and on economic grounds include “admissions exceptionnelles au séjour”, i.e. regularisation of persons already in France, for the categories of “salarié” (salaried workers) and “liens personnels et familiaux” (personal and family links). However, this is not mentioned with regards to the “humanitarian” category, even though it is likely that permits for humanitarian reasons are issued primarily to persons who were already in France, some of whom in an irregular situation (DGEF, 2019, p.29).

Table 1. Issue of residence permits by grounds – categories that are said to include regularisation

	2013	2014	2015	2016	2017	2018*
Salarié	12881	13692	14495	17237	20331	25047
Liens personnels et familiaux	20342	18307	16184	15413	15397	15638

*Provisional

Source: DGEF, 2018, p. 29-30

⁵¹ Article R316-3, CESEDA.

⁵² Article R316-7, CESEDA.

⁵³ Article R316-5 CESEDA; Art. L314-1 CESEDA.

Table 2. Issue of residence permits by grounds – humanitarian (excl. asylum)

	2013	2014	2015	2016	2017	2018*
Asile territorial / protection subsidiaire	1956	2364	2614	5542	10903	10781
Étranger malade	5986	6912	6555	6850	4227	4647
Victim of trafficking in human beings	38	63	45	74	112	88
Victime de violences conjugales			33	47	48	57

*Provisional

Source: Rapport DGEF 2018, p. 30

Another example is the following table: the “mineur devenu majeur” covers the regularisation mechanism specified in the Valls circular and thus most likely refers mainly to persons who were in an irregular situation in France. However, this is not made explicit in the data. Likewise, “parents of French children” and “parents of school-going children” most likely include persons who were previously irregular in France but may also include persons who had a regular status or who were residing outside of France when they obtained a permit for family reasons.

Table 3. Residence permits for personal and family links

	2014	2015	2016	2017	2018*
Motifs humanitaires	5597	4790	4319	3375	3303
Mineur devenu majeur	648	691	881	687	698
Résidant en France depuis 10 ans ou 15 ans pour les étudiants	1120	982	929	662	633
Talent exceptionnel /service rendu à la collectivité	6	8	6	2	7

*Provisional

Source: Rapport DGEF 2018, p. 36

Finally, the following table shows the issue of residence permits related specifically to children and their parents, which may include regularisation

Table 4. Residence permits on family grounds: parents

	2014	2015	2016	2017	2018*
Parent de français	10186	9247	9361	9599	9060
Parents d'enfants scolarisés	2930	2824	3354	2695	2936

*Provisional

Source: Rapport DGEF 2018, p. 35-36

3.3. Germany

The German legal framework stands out for its provisions regarding irregular migrations who are subject to a return order, but who cannot effectively be removed due to legal reasons or factual circumstances. Article 60 of the Aliens Act⁵⁴ regulates situations in which deportations are forbidden or not enforceable and provides an administrative solution for the persons involved. For reasons of international law or on humanitarian grounds, or for political reasons, deportations to certain states or for certain groups can be temporarily suspended, in which case a “Duldung” (“toleration”) status is given to the persons involved. This status is granted for a period of three months and may be prolonged.⁵⁵ In individual cases, deportations may be suspended if return is impossible in practice or due to legal reasons; if presence in Germany is required for the purpose of a criminal investigation; or because of humanitarian or personal reasons or reasons of public interest.⁵⁶ Persons whose identity cannot be determined are also eligible for tolerated status⁵⁷, and it may furthermore be granted because of medical reasons.⁵⁸

Tolerated status creates legal clarity for persons who cannot return and comes with the right to work, although this right is not extended to persons who have come from a “safe country of origin”⁵⁹ or who travelled to Germany specifically to obtain social benefits as asylum seekers, or if the failure to be deported is due to their own fault.⁶⁰ The right to take up employment is furthermore withheld from persons who hold a Duldung due to their undetermined identity, who, in addition, are subject to a residence requirement.⁶¹

Tolerated status in itself cannot be considered a full regularisation. Holders remain in a precarious position as the return order is not rescinded, but merely put on hold: as soon as return becomes possible again, the status can be withdrawn (Heegard Bausager, Köpfler Møller and Ardittis, 2013, pp. 86-87).⁶² As of January 2020, longer-term toleration can be granted for the purpose of vocational training⁶³ and – for persons who entered Germany before 1 August 2018 – on employment grounds (Beschäftigungsduldung), which has a duration of 30 months.⁶⁴ However, the latter form of tolerated stay in particular has been criticized for being too restrictive and

⁵⁴ Aufenthaltsgesetz (AufenthG) in der Fassung der Bekanntmachung vom 25. Februar 2008 (BGBl. I S. 162), das zuletzt durch Artikel 49 des Gesetzes vom 20. November 2019 (BGBl. I S. 1626) geändert worden ist

⁵⁵ Ibid., § 60a(1)

⁵⁶ Ibid., § 60a(2)

⁵⁷ Ibid., § 60b; see also Ibid., § 105.

⁵⁸ Ibid., § 60a(2c-d)

⁵⁹ As of 2020, these include the EU Member States, Albania, Bosnia and Herzegovina, Kosovo, Montenegro, the Republic of North Macedonia, Serbia, Ghana and Senegal.

⁶⁰ Ibid., § 60a(6)

⁶¹ Ibid., § 60b subs. 5; Ibid., § 61 subs. 1d

⁶² Anwendungshinweise des Bundesministeriums des Innern, für Bau und Heimat zum Gesetz über Duldung bei Ausbildung und Beschäftigung (BGBl. I 2019, S. 1021), p. 2.

⁶³ Ibid., § 60c

⁶⁴ Ibid., § 60d

therefore not applicable in practice.⁶⁵ The Beschäftigungsduldung was designed to improve the legal certainty of certain tolerated persons and to give them a prospect of staying in Germany (see below).⁶⁶ Though the federal ministry of the interior issued guidelines to ensure the application of the new status by the immigration authorities (Ausländerbehörde), its minister emphasised his intention to maintain a “clear separation of asylum and employment migration”.⁶⁷ The Beschäftigungsduldung has an end date of 31 December 2023.⁶⁸

On the other hand, there are several mechanisms through which illegally staying migrants with or without tolerated status can obtain a regular residence permit. Firstly, deportation orders may not be suspended indefinitely. If after eighteen months a returnee has not been able to leave the country, or if deportation is not foreseeable in the near future, a residence permit should be issued instead. However, this only applies if the individual is not at fault for the failure to return, and has cooperated with authorities, such as by providing correct information regarding his or her nationality.⁶⁹ If these conditions are met, a residence permit on humanitarian grounds can be issued at the discretion of the immigration authorities (Ausländerbehörde).⁷⁰ In addition, persons whose return order has been suspended can acquire a right to a residence permit through the birth of a child, marriage or the establishment of a civil partnership in the territory of Germany.⁷¹ Furthermore, residence permits can be issued to those who are subject to an (enforceable) return order if their presence is required for criminal investigation or prosecution⁷², or when they are the victim of illegal employment conditions.⁷³ In some cases, their residence permit may be extended beyond the duration of prosecution. A residence permit may also be issued to migrants without a pending (enforceable) return order, if there are humanitarian or personal reasons to do so, or reasons of public interest.⁷⁴

Secondly, residence permits may be granted on the basis of integration.⁷⁵ Adult applicants for this permit qualify if they have been living in Germany for at least eight years with tolerated status, an authorization of stay or a residence permit. If there are minors in the household, this period is reduced to six years.⁷⁶ Applicants who have held a tolerated status on employment grounds for at least thirty months, as well as the spouse/partner and minor children of applicants, are exempt

⁶⁵ Pro-Asyl, Stellungnahme zum Entwurf eines Gesetzes über Duldung bei Ausbildung und Beschäftigung (BT-Drs. 19/8286) zur Sachverständigenanhörung des Ausschusses für Inneres und Heimat des Deutschen Bundestages am 03.06.2019, Frankfurt am Main, 30 May 2019, p. 4.

⁶⁶ Anwendungshinweise des Bundesministeriums des Innern, für Bau und Heimat zum

Gesetz über Duldung bei Ausbildung und Beschäftigung vom 20.12.2019, Bundesgesetzblatt I 2019, S. 1021, p. 1.

⁶⁷ Bundesministerium des Innern, für Bau und Heimat, “Migration ordnen, steuern und begrenzen! Umfassendes BMI-Gesetzespaket vom Deutschen Bundestag verabschiedet”, press release, <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2019/06/migrationspaket.html>, accessed July 2020.

⁶⁸ Art. 3(2), Gesetz über Duldung bei Ausbildung und Beschäftigung vom 08.07.2019, Bundesgesetzblatt I 2019 S. 1021.

⁶⁹ Ibid., § 25(5)

⁷⁰ Ibid., § 25(5)

⁷¹ Aufenthaltsverordnung §39(5)

⁷² AufenthG., § 25(4a)

⁷³ Ibid., § 25(4b)

⁷⁴ Ibid., § 25(4)

⁷⁵ Ibid., § 25a and 25b

⁷⁶ Ibid., § 25b(1)

from the minimum period of residence.⁷⁷ In all cases, applicants must fulfil a number of integration requirements, such as having sufficient civic knowledge and being proficient in German, and being involved in (or expected to obtain) gainful employment – unless in the case of disability.⁷⁸ These conditions do not apply to minors and young persons under 21 years old, who are eligible after four years of legal or tolerated stay if they have followed an education. Instead, it is considered whether they support the democratic principles of Germany, and are adapted to the living conditions of Germany.⁷⁹ If a permit is granted to a minor, it leads to the suspension of the return order for the parent(s) and other underage children who live with them.⁸⁰

Furthermore, persons with tolerated status can obtain access to a residence permit for employment purposes.⁸¹ They may qualify for this permit if they have completed tertiary education, or if they have been employed in a position that requires vocational training for the past three years. Applicants need to comply with several conditions, such as having adequate accommodation and being proficient in German, and the application must be approved by the Federal Labour Office. Residence permits will be refused to persons who have been involved in criminal, extremist or terrorist activities.⁸² It is also required that applicants have cooperated with immigration authorities⁸³, except when they hold a tolerated status for the purpose of following vocational training. For the latter group, a residence permit can be issued for a period of two years.⁸⁴

In exceptional cases, foreigners can qualify for a residence permit under a discretionary clause, i.e. the “Hardship rule”⁸⁵, if there are urgent personal or humanitarian reasons to authorize their stay. This rule is applied on a case-by-case basis, at the request of a “hardship committee” installed by the state. The applicant remains deportable until a decision is taken. There are no set criteria or procedures for this permit.⁸⁶ However, in general, the means of subsistence of the foreigner will be taken into account, and permits will be refused when a return date has already been determined or if the applicant has committed criminal offences of substantial weight.⁸⁷

Finally, in 2007, Germany implemented a regularisation mechanism for so-called “old cases” (Altfallregulation), affecting persons who had, by 1 July 2007, been living with tolerated status for at least eight years⁸⁸, or minors aged 14 or older with six years tolerated stay.⁸⁹ They were able to obtain a residence permit on the condition that they spoke German and had sufficient means of

⁷⁷ Ibid., § 25b(4) and (6)

⁷⁸ Ibid., § 25b(1); (3)

⁷⁹ Ibid., § 25a(1)

⁸⁰ Ibid., § 60a (2b)

⁸¹ Ibid., § 18a

⁸² Ibid., § 18a(1)

⁸³ Ibid., § 18a(1)(4) and (5)

⁸⁴ Ibid., § 18a(1a)

⁸⁵ Ibid., § 23a

⁸⁶ Ibid., § 23a(1) and (2)

⁸⁷ Ibid., § 23a(1)

⁸⁸ Ibid., § 104a

⁸⁹ Ibid., § 104b

subsistence without recourse to social assistance.⁹⁰ That year, 11.765 persons with tolerated status obtained a residence permit through the regulation, out of 23 000 applications.⁹¹ As of 31 December 2018, 885 persons in Germany still hold a residence permit through this mechanism, mainly persons from Kosovo (285) and Serbia (204).⁹² Apart from this particular regulation, Germany does not have a recent history of implementing “one-off” regularisations.

3.4. Netherlands

In 2008, the Dutch Ministry of Justice reported that there were no structural measures to authorize legal stay for migrants without legal status. Apart from several collective regularisations that had taken place in previous years, legal stay could only be authorized due to court rulings (Blaschke, 2008, p. 30) or through applying for asylum or marrying a Dutch national (Baldwin-Edwards and Kraler (eds.), 2009b, p.101; following Van der Leun and Ilies, 2008, p.12). A measure to grant residence permits to asylum seekers who, after three years, were still awaiting a decision had been abolished in 2003, and was replaced by a one-off regularisation programme (Baldwin-Edwards and Kraler (eds.), 2009b, p.101).

A new regularisation mechanism (“pardon measure”) was introduced in 2013, intended for children who had been awaiting a decision in an asylum procedure for at least five years, if that procedure was initiated before their thirteenth birthday. Their immediate family could also obtain a residence permit through this mechanism, if family ties were proven to be intact. However, in 2019, the mechanism was abolished. During that year, eligible children or 18-year olds had a final chance to apply for a residence permit, granted that they had cooperated with immigration authorities during their stay in the Netherlands.⁹³ In the same year, the so-called “discretionary power” was terminated, a measure through which the State Secretary of Security and Justice had been able to authorize stay in exceptional cases.⁹⁴ The decision to end this possibility was taken after a series of exceptionally poignant cases received widespread public attention, often involving minors and adolescents who had spent the majority of their lives in the Netherlands undergoing lengthy legal procedures. As their deportation was now imminent, they made a final appeal to the State Secretary to grant legal stay. A committee of inquiry into the issue of long-term unauthorized

⁹⁰ Deutscher Bundestag, Wissenschaftliche Dienste, „Duldung und Behandlung von „Altfällen“ nach dem Aufenthaltsgesetz, Zu vergleichbaren Regelungen in anderen EU-Mitgliedstaaten“, Deutscher Bundestag, Sachstand WD 3 – 3000 – 199/16, 2006, p. 5.

⁹¹ Deutscher Bundestag, “Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Sevim Dagdelen, Jan Korte, Petra Pau und der Fraktion DIE LINKE.- Drucksache 16/8803 – Fortführung der Bilanz zur gesetzlichen Altfallregelung“, Drucksache 16/8998, 29 April 2008, p. 1.

⁹² Deutscher Bundestag, “Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke, Dr. André Hahn, Gökay Akbulut, weiterer Abgeordneter und der Fraktion DIE LINKE. – Drucksache 19/7334 – Zahlen in der Bundesrepublik Deutschland lebender Flüchtlinge zum Stand. 31 Dezember 2018“, Drucksache 19/8258, 12 March 2019, p. 23-24.

⁹³ B9, para. 6, Vreemdelingencirculaire 2000; Besluit van de Staatssecretaris van Justitie en Veiligheid van 8 februari 2019, nummer WBV 2019/1, houdende wijziging van de Vreemdelingencirculaire 2000, Staatscourant, Nr. 8116 (11 February 2019), p. 3; <https://ind.nl/over-ind/Paginas/Alles-over-de-Regeling-langdurig-verblijvende-kinderen.aspx>.

⁹⁴ Besluit van 8 april 2019 tot wijziging van het Vreemdelingenbesluit 2000, in verband met de aanpassing van enkele regels voor de beoordeling van verblijfsaanvragen; Stb. 143, 8 April 2019, Art. I (A)(1); p. 4.

residence in the Netherlands had concluded that this discretionary power as well as pardon measures had an adverse effect on the willingness to cooperate with departure, by “providing hope” to be able to stay (Parliamentary Papers II, 2018-2019, p.7). However, the complicated position of the State Secretary, who had to operate within political constraints while being subject to extensive public pressure to show compassion, may have also been an important factor in deciding to terminate this measure.

The discretionary power of the State Secretary was replaced by a new discretionary measure (ambtshalve toets schrijvende situatie) under the responsibility of the head director of the central immigration authority, the IND.⁹⁵ The IND may, during first-instance application procedures for residence permits or asylum, consider authorizing residence for exceptional reasons to applicants who would not otherwise qualify for a permit. This decision should be made *ex officio*, or by court judgment in appeal.⁹⁶ Applicants who think there are exceptional, individual circumstances that could warrant a discretionary decision need to motivate why it should be used, and substantiate it with evidence. Possible reasons could include (severe) medical issues (of a family member); death of a family member in the Netherlands; gender related aspects, especially honour crimes and domestic violence; and traumatizing experiences in the Netherlands. However, only limited importance is given to circumstances arisen during a period of unauthorized stay.⁹⁷

Apart from the abovementioned discretionary measure, there are a number of narrowly-defined cases in which persons staying irregularly may obtain a residence permit on medical or humanitarian grounds.⁹⁸ These rules apply to persons who are victims and witnesses of trafficking in human beings who cooperate with authorities or who have important reasons not to cooperate⁹⁹; victims or at risk of honour crimes and domestic violence¹⁰⁰; involved in a witness protection programme¹⁰¹; undergoing medical treatment in the Netherlands¹⁰²; terminally ill¹⁰³; or persons who have cooperated on their removal but cannot effectively return (the “no-fault” permit)¹⁰⁴. It can also be issued on the basis of Article 8 ECHR¹⁰⁵, as well as to persons who previously held a residence permit as a family member of a legal resident on humanitarian grounds¹⁰⁶, granted that no more than two years have passed since expiry of the previous

⁹⁵ Art. Artikel 3.6ba, Vreemdelingenbesluit 2000

⁹⁶ Besluit van 8 april 2019 tot wijziging van het Vreemdelingenbesluit 2000, in verband met de aanpassing van enkele regels voor de beoordeling van verblijfsaanvragen; Stb. 143, 8 April 2019, p. 4; Onderzoekscommissie Langdurig verblijvende vreemdelingen zonder bestendig verblijfsrecht, 2019, p. 22.

⁹⁷ Besluit van de Staatssecretaris van Justitie en Veiligheid van 29 april 2019, nummer WBV 2019/7, houdende wijziging van de Vreemdelingencirculaire 2000, p. 19; Paragraaf B11/2.5 Vreemdelingencirculaire 2000.

⁹⁸ Art 3.46, 3.48, 3.50 Vreemdelingenbesluit 2000

⁹⁹ B8 para. 3; B9 para. 10, para. 12-13, Vreemdelingencirculaire 2000

¹⁰⁰ B8 para. 2; B9 para. 11, Vreemdelingencirculaire 2000

¹⁰¹ B8 para. 14; B9 para. 17, Vreemdelingencirculaire 2000

¹⁰² B8 para. 9; B9 para. 9, Vreemdelingencirculaire 2000

¹⁰³ B8 para. 12, Vreemdelingencirculaire 2000

¹⁰⁴ B8 para. 4; B9 para. 3, Vreemdelingencirculaire 2000

¹⁰⁵ B9, para. 14, Vreemdelingencirculaire 2000

¹⁰⁶ B9, para. 8, Vreemdelingencirculaire 2000

permit¹⁰⁷. Residence permits issued on medical or humanitarian grounds usually have a maximum duration of one year if the reason for issuing is of a temporary nature, and can be revoked if this reason no longer applies. Otherwise, they can be renewed. If the reason is of non-temporary nature, the maximum validity is five years. Residence permits on medical or humanitarian grounds authorize the holder to take up employment.

Table 5

Residence permits for victims of trafficking in human beings						
Year	2014	2015	2016	2017	2018	2019
Amount	180	135	120	155	290	385

Source: Centraal Bureau voor de Statistiek, 2020.

Finally, it is worth explaining more in-depth the requirements for the so-called “no-fault permit” for non-removable returnees, as the Netherlands is one of few Member States that have implemented a specific regularisation mechanism explicitly targeting irregular migrants who cannot leave the country through no fault of their own (EMN, 2012; ACVZ, 2013, p. 31). The permit is intended for persons who have independently attempted to return, and who can prove that they have contacted the authorities of the relevant third countries regarding their readmission and to obtain the required (travel) documents. If the authorities do not cooperate or do not authorize return, the applicant is considered “not at fault”, as long as he or she has done everything in their power to make their identity known. The fulfilment of these conditions needs to be testified by the Repatriation and Departure Service, based on evidence submitted by the applicants, such as correspondence with consular authorities.¹⁰⁸ In the period 2008-2011, 230 no-fault permits were issued, out of 1770 applications.¹⁰⁹ Officials tend to award no-fault permits very scarcely, allegedly because they claim that migrants have not been collaborating enough to be deported (Kalir, 2017, p. 67).

3.5. Poland

The use and scope of collective or one-off regularisation programmes in Poland has been relatively limited compared to other Member States. From 1 September to 31 December 2003, Poland organized its first regularisation programme in the framework of the newly adopted Act on Aliens of 13 June 2003, intended for illegally staying residents who had “de facto” ties with Poland. While there were no nationality requirements, the measure was intended mainly for Armenian, Vietnamese and Ukraine citizens. In 2007-2008, a second phase of the programme was rolled out

¹⁰⁷ B9, para 8.1.1, Vreemdelingencirculaire 2000

¹⁰⁸ B8, para. 4, Vreemdelingencirculaire 2000.

¹⁰⁹ BRIEF VAN DE STAATSECRETARIS VAN VEILIGHEID EN JUSTITIE Aan de Voorzitter van de Tweede Kamer der Staten-Generaal, Den Haag, 18 december 2012, Kamerstukken II, 2012-2013, 29 344, nr. 109.

for the purpose of regularizing persons who were excluded or not informed during the first round. The 2003 Act on Aliens furthermore introduced a short-stay residence permit on special grounds, as well as a “tolerated status” (“pobyt tolerowany”), which functions as a regularisation mechanism (Baldwin-Edwards and Kraler, 2009, pp. 111-112).

In 2013, a new Act on Foreigners was adopted¹¹⁰, which foresees several situations in which a temporary residence permit can be issued to a person staying irregularly in Poland. Firstly, this applies to victims of trafficking in human beings. They qualify for a residence permit for at least six months, on the condition that they cooperate with authorities during criminal proceedings, and have cut all contact with the suspected perpetrator.¹¹¹ Furthermore, temporary residence permits for “circumstances requiring short-term stay” can be issued to persons who are obligated to appear before Polish authorities, or to persons whose presence in Poland is a matter of national interest or justified by exceptional personal circumstances. They have a maximum validity of six months.¹¹²

Secondly, Chapter 11 of the Act on Foreigners sets out the rules for issuing a temporary residence permit “due to other circumstances”. As the name indicates, the range of situations in which such a permit may be issued is broad, and includes persons already residing regularly in Poland or those applying for family reunification, as well as unaccompanied minors who are born in Poland. Of particular relevance here are two provisions which provide for the granting of a temporary residence permit to persons who are victims of exploitation or abuse by their employers, and who have on this ground launched criminal proceedings against them.¹¹³ Temporary residence permits can also be granted on grounds of respect for the right to family life¹¹⁴ or the rights of the child¹¹⁵. Finally, a discretionary clause is included which allows for the granting of a temporary residence permit due to other circumstances if there are any other grounds justifying stay in Poland.¹¹⁶

A third regularisation mechanism applies specifically to irregular migrants who cannot be returned to a third country. A residence permit on humanitarian grounds can be issued if return would violate the prohibition of torture and forced labour under the European Convention on Human Rights, as well as the right to life, liberty and security, fair trial, and private and family life, or the UN Convention on the Rights of the Child.¹¹⁷ This residence permit is issued for two years and may be renewed, but can also be revoked if the grounds for its issue cease to exist.¹¹⁸ Persons who have committed (war) crimes or who pose a threat to public security are excluded¹¹⁹ – however, they may be eligible for a permit for “tolerated stay”.¹²⁰ The latter is not a residence permit and

¹¹⁰ Act on Foreigners, 2013

¹¹¹ Chapter 9, Act on Foreigners 2013

¹¹² Chapter 10, Act on Foreigners 2013

¹¹³ Art. 187(4) and (5), Act on Foreigners 2013

¹¹⁴ Art. 187(6), Act on Foreigners 2013

¹¹⁵ Art. 187(7), Act on Foreigners 2013

¹¹⁶ Art. 187(8), Act on Foreigners 2013

¹¹⁷ Art. 348, Act on Foreigners 2013

¹¹⁸ Art. 350, Act on Foreigners 2013

¹¹⁹ Art. 349, Act on Foreigners 2013

¹²⁰ Art. 351, Act on Foreigners 2013

does not entitle the holder to cross the border. However, it does grant the holder some rights during a period of two years, after which it may be renewed.¹²¹ Tolerated status can also be granted to persons who cannot return due to reasons beyond their control, or if the expulsion is forbidden by court order or ministerial decision.¹²² Again, this status is revoked once circumstances allow for removal.

In most of the cases listed above – with the exception of “circumstances requiring short-term stay” – the person who has been issued a permit can eventually become eligible for long-term or permanent residence. Any holder of a temporary residence permit can apply for long-term residence status after five years of uninterrupted, legal residence in Poland.¹²³ Victims of trafficking in human beings may apply for permanent residence after one year legal stay.¹²⁴ Persons residing on humanitarian grounds can also apply for permanent residence after having resided uninterruptedly in Poland for at least five years.¹²⁵ For persons with tolerated status, the minimum period of residence before becoming eligible for permanent residence is ten years. However, it is only granted in case the permit for tolerated stay was issued on human rights grounds or because return to a third country was forbidden by the court or the Ministry of Justice, thus excluding persons whose non-removability is due to reasons beyond their control.¹²⁶

3.6. Spain

Between 1986 and 2005, Spain implemented several one-off regularisation programmes, resulting in 1.2 million residence permits being issued. Half of this number was the result of a mass regularisation in 2005, which was met with opposition by other EU Member States for fear of secondary movements. It would become the last large-scale collective regularisation (Baldwin-Edwards and Kraler, 2009, p. 84; Hooper, 2019; p.14; Finotelli and Arrango, 2011, p.504). After legal reforms in 2004 and 2011, the Spanish legal framework now foresees several mechanisms through which persons in an irregular situation can obtain a residence permit on a case-by-case basis. Most importantly, this regards residence permits based on “exceptional circumstances”, which can be issued on humanitarian grounds or for the purpose of international protection; based on integration or *arraigo* (“rootedness”); to enable cooperation with judicial investigations or prosecution; or in “other” exceptional circumstances.¹²⁷

In the period 2014-2018, 193 368 persons obtained a residence permit based on “exceptional circumstances” (see Table I) (Ministry of Labour, Migration and Social Security, 2020). The vast majority (174 215) did so on grounds of *arraigo*. This mechanism was introduced in 2004, and allows persons in an irregular situation to obtain a residence permit if they can show proof of

¹²¹ Art. 274, Act on Foreigners 2013

¹²² Art. 351(2) and (3), Act on Foreigners 2013

¹²³ Art. 211, Act on Foreigners 2013

¹²⁴ Art. 195(5), Act on Foreigners 2013

¹²⁵ Art. 195(6), Act on Foreigners 2013

¹²⁶ Art. 195(7), Act on Foreigners 2013

¹²⁷ Art. 31(3), LOEx

integration through employment, social or family ties (Hooper, 2019, p. 14). Persons applying based on *arraigo* through employment are required to have proven residence in Spain for at least two years through registration in the *Padrón*, and to have been involved in an employment relationship for at least six months, as attested by court or by the labour inspection (it is thus not necessary to have a contract).¹²⁸ *Arraigo* through social ties is possible if the applicant has been staying in Spain for at least three years, and presents an employment contract covering the following year (Lebrusán Murillo, Cáceres Arévalo and Brey, 2019). In addition, the applicant should either have family ties with another foreigner residing in Spain, or present a report of their social integration.¹²⁹ The issuing of this report is the responsibility of the Autonomous Community or city council of the municipality in which the individual resides. It should take into account, among others, the duration of stay; possible family ties with persons residing in Spain; housing and means of subsistence; and efforts to integrate, either through social or employment activities, or via cultural integration programmes (e.g. language courses).¹³⁰ In 2011, a third form of regularisation based on *arraigo* was introduced for persons who have family ties to a Spanish national (Hooper, 2019, p. 14). This measure is available to parents of a child with Spanish nationality, or to children of parents with Spanish nationality.¹³¹ For all three types of *arraigo*, (adult) applicants should provide a clean criminal record.¹³² When the application is approved, a temporary residence permit is issued together with a work permit.¹³³ They are valid for one year and can be renewed.¹³⁴

In the same period, 19 153 residence permits for “exceptional circumstances” were issued for other reasons than *arraigo*, as these permits can also be issued on humanitarian grounds, i.e. to victims of criminal offences; persons requiring medical treatment; or persons who cannot be returned to a third country for safety reasons.¹³⁵ The Spanish legal framework does not provide a specific mechanism through which non-removable returnees may obtain a residence permit (Heegaard Bausager, 2013, p. 71). Their situation can however be taken into account when authorizing residence for “exceptional circumstances” (EMN, 2012, p.11). In addition, they may be issued for the purpose of international protection; to enable cooperation with judicial investigations or prosecution; or in “other” exceptional circumstances.¹³⁶ As with regularisation through *arraigo*, these permits are renewable and have an initial validity of one year. In addition, residence based on “exceptional circumstances” can also be invoked for victims or witnesses of organized crime who are cooperating with authorities¹³⁷; victims of trafficking in human beings¹³⁸;

¹²⁸ Art. 124(1), RD 557/2011

¹²⁹ Art. 124(2), RD 557/2011.

¹³⁰ Art. 68(3) LOEx

¹³¹ Art. 124(3), RD 557/2011.

¹³² Art. 128(2)(a), RD 557/2011.

¹³³ Art. 129(1), RD 557/2011.

¹³⁴ Art. 130, RD 557/2011.

¹³⁵ Art. 126, RD 557/2011.

¹³⁶ Art. 31(3), LOEx

¹³⁷ Art. 59, LOEx

¹³⁸ Art. 59bis, LOEx

and female victims of gender-based violence¹³⁹ if they are cooperating with authorities. These groups first obtain a provisional residence permit, followed by a five-year residence and work permit after the conclusion of (criminal) investigations.¹⁴⁰

Table 6. Residence permits based on “exceptional circumstances”, 2014-2019

Year	Arraigo	Other	Total
2014	38 839	3 272	42 111
2015	36 692	3 365	40 057
2016	31 370	3 658	35 028
2017	30 579	3 940	34 519
2018	36 735	4 918	41 653
2019	40005	43861	83866
Total	214220	63014	277234

Source: Ministry of Labour, Migration and Social Security, Flujo de autorizaciones de residencia concedidas a extranjeros. Resultados detallados, <http://extranjeros.mitramiss.gob.es/es/Estadisticas/operaciones/flujos-autorizacion/index2.html>

4. Conclusions

As indicated in section one, scholars on regularisation have characterised these measures in different ways. Firstly, they can be distinguished based on the policy design, separating time-limited and collective programmes from structural and case-by-case mechanisms. Secondly, regularisation measures can be divided based on the policy rationale, as reflected in the conditions for granting regular status. In this regard, we identified regularisations for the purpose of addressing *de facto* stay; to respond to the humanitarian or social needs of the migrant; or to reward their civic or economic deservingness. In 2008, the heads of government of all Member States agreed to only make use of regularisation mechanisms, on the basis of humanitarian or economic grounds.

¹³⁹ Art. 31bis, LOEx

¹⁴⁰ Capítulo II, III and IV, RD 557/2011.

Since then, the implementation of collective regularisation programmes has indeed been limited while structural regularisation mechanisms have become widespread across the EU. However, our legal analysis of regularisation regimes in Denmark, France, Germany, the Netherlands, Poland and Spain shows that the design of regularisation frameworks still varies widely across Member States as well as the conditions and target groups of individual regularisation provisions. While the provision of regular status on the basis of fundamental rights or humanitarian needs, e.g. to persons requiring medical treatment or to maintain family unity, is common in all Member State, regularisation on the basis of employment, long-term *de facto* residence or social or cultural integration is less widespread. In this regard, the Spanish system of issuing residence permits based on *arraigo* and the French approach towards irregular migrants who are employed can be considered extensive, especially when compared to the Dutch and Danish framework. Furthermore, in accordance with Kraler (2018), we can conclude that the rationales behind regularisation provisions often overlap in practice. This is for example visible in the case of Germany's provisions for long-term "tolerated" migrants and the Spanish *arraigo*, where regularisation on the basis of *de facto* residence is made dependent on the fulfilment of integration conditions, which can be considered a way of testing migrants' *deservingness*.

Following the current stance of the EU regarding irregular migration, which is focused on deterrence and deportation, the provision of a regular status to all illegally staying migrants in the EU is very restrictive at the moment. However, in order to achieve a more orderly, safe and responsible migration governance, EU Member States should ensure that a structural regularisation mechanism is available to alleviate the situation of irregular migrants in exceptional, vulnerable or precarious circumstances. To this end, the adoption of provisions regarding victims of human trafficking as part of the transposition of the 2004 Directive has been an important step, although the condition that victims should cooperate with authorities limits its use in practice. The same happens with third-country nationals in illegal employments, who can access permits of limited duration according to national legislation to facilitate their participation in criminal proceedings. As described in this paper, some Member States do issue residence permits to other vulnerable third-country nationals without legal status such as victims of gender violence. However, a lot of improvement can be done at EU level as an alternative approach to the current return policy. The recent Strategy for Victims' Rights (2020-2025) seems to open the discussion for a regularisation pathway for all or other kind of victims, who should have a safe environment for crime reporting that benefits also the criminal justice system.

Taking into account the low implementation rate of return orders in all member States and at EU level, regularisation of migrants who cannot effectively return should be improved. The fact that residence permits for non-removable migrants can often be revoked once return becomes foreseeable, as well as the Polish and German practices of granting "tolerated stay" rather than a full residence permit, may limit the effectiveness of regularisation in terms of reducing migrants' legal uncertainty. Furthermore, although some Member States have now adopted measures that address so-called "non-removable returnees", their implementation remains limited in practice so that we cannot consider these policies as effective.

This also underlines the need for data and evaluations of the implementation of regularisation measures. As mentioned in the paper, legalisation mechanisms do exist, but access to data about their implementation and assessment of their consequences is very scarce. Member States seem afraid to share information about mechanisms that to some extent are in conflict with the official return policy and the efforts of the European Commission to improve it. The conditions under which regularisations may be granted should be taken as an indication of the scope of such measures. However, it is impossible to compare the restrictiveness and effectiveness of regularisation regimes without having examined implementation practices or data on completed regularisations. The findings in this report should therefore be complemented with studies on migrants' access to regularisation as well as the effect that regularisations have on migrants well-being and inclusion. In addition, the role of discretionary clauses and the wider notion of discretion in regularisation procedures should be further investigated. Finally, unsubstantiated claims regarding a potential "pull factor" of regularisation or its impact on secondary migration have frequently been presented as reasons not to implement such measures in the EU. Further research into this issue would be useful to facilitate an evidence-based debate on regularisation.

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