

Out of Crisis Comes Opportunity: Reconsidering Regularisation of Irregular Migrants in the EU in the light of COVID-19

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The main response of the European Union (EU) to irregular migration is to return migrants who are unlawfully present in the EU and to strengthen external border control to prevent unwanted arrivals. This policy brief suggests that “regularisation” must be seen as an essential tool in the EU’s work in the field of irregular migration that operates to the benefit of both migrants and their host states. Regularisation entails the conferral of a legal status on irregular migrants. It has been used widely and frequently by EU member states, but often on an ad hoc and haphazard basis. This policy brief highlights the scope for a more systematic, EU-wide approach to regularisation. It suggests that the ongoing COVID-19 pandemic has created space for meaningful and constructive discussion of politically sensitive and divisive topics such as regularisation that so far have evaded EU consensus and common action.

Keywords: *Irregular migration, regularisation, EU, common migration policy*

INTRODUCTION

Non-citizens who are unlawfully present in the territory of a host state are described using a variety of terms including irregular and undocumented. Unlawful presence may come about for a variety of reasons including the unauthorised crossing of a border, continued stay after the expiry of valid documents such as tourist visas or residence permits, or failure to depart from a state following rejection of an application for international protection. While an accurate calculation of the undocumented migrant population poses serious challenges (Vespe et al 2017), it was estimated in 2009 that the EU was home to up to 3.8 million irregular migrants (Clandestino 2009). It is likely to have increased following the 2015 migration “crisis” (Connor and Passel 2019). Global inequality, the proliferation of immigration law and border controls in recent decades, and the failure of states to provide adequate channels for legal migration mean that irregular migration is an inevitable feature of the contemporary Western world.

Their very lack of status makes irregular migrants a particularly vulnerable category of people. This vulnerability has been thrown into sharp relief by the COVID-19 crisis. This policy brief sets out why and how regularisation should be a key element in EU efforts to address irregular migrants’ heightened vulnerability for the mutual benefit of irregular migrants and host states. It also

examines the potential for an EU-wide approach to regularisation. It is important to note that discussion of irregular migrants in the EU context largely concerns non-EU citizens, so-called third-country nationals (TCNs). EU citizens who reside in an EU member state that is not their country of origin enjoy a high level of protection under EU rules on free movement (Directive 2004/38/EC).

Irregular Migrants and the COVID-19 Pandemic

Irregular migrants’ unlawful presence puts them at constant risk of deportation. This has many negative consequences. It means that such migrants will often avoid accessing services to which they are entitled because they fear they will be reported to immigration authorities and expelled from their host state. For this reason, they may be afraid to approach the police if they fall victim to crime, making them perfect prey for criminals. They may be reluctant to cooperate with police if they witness crime. They may be unable to provide a stable, supportive environment for their children, sometimes so fearful of coming into contact with authorities that they will not send their children to school. They will be slow to seek redress through official channels if they are underpaid, unpaid or otherwise exploited or abused by employers, making them ideal victims for cost-conscious employers seeking to gain an unfair competitive advantage. They may avoid accessing health care services until an illness becomes acute, creating a health risk not just for themselves, but for

the wider community, an issue of particular relevance in light of the ongoing COVID-19 crisis.

The presence of irregular migrants in a state thus leads to a situation where the trust that is essential for effective policing is eroded, innocent children suffer disadvantages that have lifelong consequences, unscrupulous employers enjoy an unfair advantage over competitors who play by the rules, and the health of the community at large is put at risk. The months since the outbreak of the COVID-19 pandemic have highlighted how states' failure to adequately respond to the presence of irregular migrants can work to the detriment of both migrants themselves as well as the host state, as illustrated by reports from countries such as the UK and Italy (Bulman 2020a; Bulman 2020b; Tondo and Bellingreri 2020).

Migrant workers have been disproportionately impacted by the fallout from the global health emergency (Gelatt 2020; Guadagno 2020; Morris 2020). Irregular migrants, often informally employed in low skilled jobs, are especially vulnerable to being forced to work in situations and conditions conducive to the spread of the virus (EMN/OECD 2020, 2; Labour Behind the Label 2020). In some countries, irregular migrants who lose their jobs are excluded from unemployment benefit and other financial support schemes introduced to protect individuals left without work as a result of the pandemic (FLEX 2020, 3-4).

Even though many EU member states allowed unlawfully staying migrants to access all emergency health care services on an equal footing with citizens (EMN/OECD 2020, 8), fear of deportation will have prevented many such migrants from doing so. There have been reports of irregular migrants dying from COVID-19 because they were too afraid to access the necessary health care (Bulman 2020a). In the case of a communicable infectious disease like COVID-19, reluctance to access health care poses a risk not just to the health of individual irregular migrants, but to the wider community (Vincent 2020).

Regularisation in the EU

When the Treaty of Amsterdam entered into force in 1999, it gave the EU a mandate to develop a common migration policy. Since then, efforts to forge this common policy have been pursued in three main areas, namely, regular migration, irregular migration and asylum. The primary response of the EU to irregular migration is to try to prevent arrival of irregular migrants and to deport those who have managed to enter or remain in the EU (Desmond 2016). There is, however, another response to irregular migration which should be given more serious consideration, particularly in light of the ongoing COVID-19 pandemic. Regularisation is a process whereby non-citizens "who are illegally residing, or who are otherwise in breach of national immigration rules, in their current country of residence are granted a legal status" (Baldwin-Edwards and Kraler 2009, 9).

Powerful EU member states such as Germany (Baldwin-Edwards and Kraler 2009, 286) and important institutions including the European Commission have expressed strong opposition to regularisation on the basis that it has a “pull effect”, encouraging further irregular migration (Commission 2004, 10 & 17). During its EU Presidency in 2008, France unsuccessfully sought to secure a prohibition on large-scale regularisation in the 2008 European Pact on Immigration and Asylum (Euractiv 2012). Such attitudes have led to the diagnosis of an “EU anti-regularization ethos” (Costello 2016). The contention concerning the “pull effect” of regularisation is questionable (eg., Elias et al 2018) and the claim of an EU anti-regularisation ethos is a faulty generalisation. A number of EU institutions and bodies, such as the European Parliament and the European Economic and Social Committee, have expressed support for regularisation (Desmond 2015) and regularisation is a measure to which states in the EU, and beyond, have long had frequent recourse (Baldwin-Edwards and Kraler 2009; Desmond 2015). It is estimated that between 1996 and 2007 over six million migrants may have been involved in transitions from irregularity to a legal status in the EU alone (Baldwin-Edwards and Kraler 2009, 35-36).

Regularisation may occur on the basis of one-off schemes to which migrants have to apply within a specified, limited period of time, or on the basis of measures which are a permanent feature of a state’s migration law framework. Applicants may be regularised

on the basis of specific legislation, or as a matter of policy and practice. The eligibility criteria for regularisation, its legal basis, as well as the particular type of migration status conferred on regularised migrants, vary from scheme to scheme and from state to state. There is therefore no consistency in how regularisation has been conducted across the EU. Many schemes, though targeted at specific subsets of the irregular migrant population, failed to regularise significant numbers of the target group owing to restrictive eligibility criteria and other factors discussed in the Recommendations section below.

The current crisis has led a number of EU countries such as Italy and Portugal (Chesnet, 2020) and states further afield (World Bank 2020, 22 & 35), to create pathways out of irregularity for migrants. These schemes, however, miss the opportunity to meaningfully address the presence of irregular migrants. They repeat the mistakes that have undermined past efforts at regularisation by, for example, including eligibility criteria which preclude applications from a large number of irregular migrants (eg., Palumbo 2020; Tondo and Bellingreri 2020).

The Scope for EU Action on Regularisation

Given the large number and wide range of regularisation schemes that have been used by EU member states, and their evident failure to appreciably reduce Europe’s irregular migrant population, it is worth considering an EU-wide approach to regularisation. The European Commission

has displayed an appetite for discussion of the need for a common legal framework on regularisation at EU level (Commission 2006, para. 35) and has called for the consideration of establishing common standards for taking charge of non-deportable irregular migrants (Commission 2009, para. 5.1.4). The legal basis for a common EU framework for regularisation is to be found in Article 79(2) of the Treaty on the Functioning of the EU (TFEU) which requires, as part of the development of a common migration policy, the adoption of measures concerning the entry and residence of TCNs, irregular migration and unauthorised residence. EU legislation on regularisation would have to satisfy the requirements of subsidiarity and proportionality that apply to any EU legislative initiative (see also Hinterberger 2019). A common EU approach to regularisation would bring a degree of clarity, certainty and consistency compatible with the rule of law, one of the fundamental values of the EU, as enshrined in Article 2 the Treaty on European Union.

Furthermore, the European Commission has long noted the need for legislation concerning irregular migration to comply with the human rights obligations set out in the European Convention on Human Rights and the Charter of Fundamental Rights of the EU (eg., Commission 2006, para. 8; Commission 2010, 5). This creates space for discussion of regularisation of unlawfully resident migrants on the basis of strong attachments to their host state, including family ties (Desmond 2015).

Given the EU's preference for dealing with irregular migration through tightening its borders and seeking the return of unlawfully staying TCNs, as well as the difficulty of achieving consensus on contentious issues in an organisation of 27 sovereign states and multiple institutional actors, the call for an EU-wide approach to regularisation may seem unrealistic. We are now, however, in a moment where significant change is possible, where we can "step back from the fray and rethink basic premises" (Motomura 2020, 547). The global health emergency has created space for the consideration and advancement of ideas that before now would have had little public or political purchase. There is anecdotal evidence that the pandemic has propitiated public opinion of migrants (Bulman 2020b; Carter 2020). Low skilled workers have become key frontline workers and migration status has become a matter of life or death. There may therefore now be an opportunity for regularisation to be fashioned as a central feature of an overall EU strategy for addressing the phenomenon of irregular migration. This opportunity should be seized as the EU works towards the adoption of a new Pact on Migration in 2020 (Commission 2020, 2).

Benefits of regularisation

Regularisation significantly reduces the risk of the various types of suffering, abuse and exploitation to which irregular migration status gives rise. It puts migrants in a position to demand and enjoy in practice the services and rights to which they are entitled in theory. In the specific context of pandemics, it reduces the danger posed to the wider community that is created when

migrants are unable or reluctant to effectively access necessary health care. More generally, there is evidence that regularisation works to the benefit of state revenue through shrinking the “black economy” and increasing social security and tax payments from regularised workers (eg., Elias et al 2018; Martino et al 2019).

Sensible, systematic use of regularisation in the EU would also increase the credibility and legitimacy of EU migration policy. Despite the EU’s emphasis on returning unlawfully present TCNs (eg., Commission 2017), there is a variety of factors which prevent many migrants from being deported. The reality is that less than 50% of irregular migrants in the EU are issued with return decisions, and less than 50% of those who receive such decisions leave the EU (Hinterberger 2019; Lutz 2018). In this respect, EU return policy is grossly ineffective. Having recourse to regularisation to subtract non-removable migrants from the statistics on non-effected decisions would reduce the gap between attempt and achievement in deportation.

Regularisation Recommendations

The continuing fallout from the COVID-19 pandemic makes an EU approach to regularisation more urgent and more feasible than at any point in the past. It is important for policymakers and lawmakers to seize the opportunity to address the issue. It is equally important, however, to acknowledge that any negotiation of EU legislation on regularisation would be a lengthy and

fraught process. Therefore, as a short-to-medium term response to the situation of irregular migrants, the EU should encourage its member states to take steps at the national level to regularise the status of irregular migrants on their territory.

For regularisation to be meaningful and effective, it is important to learn from the mistakes that have undermined past regularisation efforts in Europe and countries around the world. The following recommendations should be incorporated into any regularisation initiative taken in the short term at the national level and should guide any eventual elaboration of legislation on regularisation at the EU level.

Firstly, it is important that any regularisation scheme is put on a permanent footing. Introducing a one-off time-bound scheme that accepts applications only until a specified future date may reduce the current irregular migrant population, but will do nothing to address the situation of future undocumented migrants. Undocumented migration is a reality of the contemporary globalised world. It is a reality that can be proactively addressed by ambitious policy action, instead of reactive stopgap measures.

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Secondly, an energetic awareness-raising campaign is needed to ensure information about any new pathway to legal status reaches the target group, some of whom may be socially isolated and reluctant to have contact with state officials. This will require direct engagement with migrant communities and migrant support organisations and provision of informational material in a variety of languages.

To reduce the understandable reluctance of irregular migrants to provide detailed personal information to state officials, any regularisation initiative should be accompanied by a “firewall”, a guarantee that the personal data of applicants will not be used for purposes of immigration control and enforcement (PICUM 2020). Many individuals will refrain from applying for regularisation if they fear that an unsuccessful application may result in deportation.

Thirdly, to shrink a state’s population of undocumented migrants as far as possible, any new pathway to legal status should be subject to minimal eligibility criteria. Reasonable criteria would include a requirement for applicants to have been present in the state for a specified minimum period of time and the absence of a serious criminal record. Evidence of presence in the state for the minimum period required might include travel documents, utility bills, payment slips, letters of confirmation from employers or representatives of migrant support organisations or community representatives. Officials administering the scheme should be instructed to err on

the side of inclusion of applicants. Other eligibility criteria, such as previous lawful presence or past possession of a work permit, would severely restrict the pool of potential applicants and thereby undermine the effectiveness of a new regularisation initiative.

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Fourthly, caution should be exercised when it comes to the revenue-generating potential of regularisation. Application fees for regularisation should be set at a rate that covers the administrative costs involved, and should not be so high as to have the practical effect of preventing otherwise eligible candidates from submitting applications.

Finally, for regularisation to be meaningful, it must provide successful applicants with a residence permit which, even if initially temporary, is easily renewable. Time spent in a state on such permits should be reckonable towards long-term residence and, ultimately, citizenship. In the past, some countries provided short-term legal status to undocumented migrants and then allowed them to fall back into irregular status, essentially defeating the purpose of the initial regularisation.

There are many strong arguments in favour of an effective and meaningful legal framework on regularisation, ranging from the economic benefits it would bring to the enhanced legitimacy and efficiency it would lend to

national and supranational immigration systems. The most compelling argument currently, however, is the use that may be derived from regularisation by deploying it as a weapon in the fight against the COVID-19 pandemic.

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