

ADDRESSING THE IRREGULAR EMPLOYMENT OF IMMIGRANTS IN THE EUROPEAN UNION: BETWEEN SANCTIONS AND RIGHTS

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INTRODUCTION

Heikki Mattila

The theme of this book, the irregular employment of immigrants, covers a complex set of issues, ranging from irregular migration *per se* to many types of irregularities found in the employment of immigrants and to the related economic and labour market conditions that affect immigrants' lives and work in the host country.

In Europe, both irregular migration and immigrants' employment have been at the centre of migration policy-making, and are subjects of active research. Since the political changes in Central and Eastern Europe almost twenty years ago, irregular forms of East-West migration, and, more recently, from regions such as Africa and Asia have posed difficult challenges for migration policy-makers in European countries at both the national and European level. As a response, attention has been devoted increasingly to crime prevention especially in the cases of smuggling and trafficking of migrants. In addition, the debate on demographic changes, the rising shortages of the labour force in many European countries, and the latest accession of Central and Eastern European countries to the European Union are among the new elements that have led to a reconsideration of migration policy across Europe. The employment of immigrants is a crucial element in the reformulation of migration policy and in reducing irregular migration as their employment may take place in the informal economy, regardless of their legal status, where exploitative working conditions are not uncommon and the instances have multiplied in recent years. Furthermore, regular migration channels are often restrictive, making it increasingly difficult for migrants to gain access to the labour market in the destination country. Therefore, it is necessary for migration policy to strike a balance between reducing irregular migration while at the same time addressing the informal labour market in the destination country and creating legal channels for migrants in needed sectors of the economy (OSCE, IOM, ILO, 2006).

Established in 1951, IOM has actively worked to help ensure the orderly and humane management of migration, to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems and to provide humanitarian assistance to migrants in need. It has done so through a wide set of interventions within four broad areas of migration management: migration and development, facilitating migration, regulating migration and forced migration. IOM has actively contributed to these areas through programmatic and operational activities; research on migration – both regular and irregular – across world regions; facilitation of policy dialogue among governments; helping governments build capacities and policies to manage both legal and irregular forms of migration at their borders and elsewhere; building government capacity to regulate and promote labour migration; providing humanitarian assistance to migrants in need such as refugees and internally displaced people; and providing assistance to migrants, among them irregular migrants and victims of trafficking (VoTs) through reintegration and assistance programmes including assisted voluntary return.

The European Commission (EC) is likewise supporting its Member States with a continuous stream of policy initiatives and important guidelines. The EC's 2001 Communication on a

common policy on illegal immigration (EC, 2001), the more recent Communication on policy priorities in the fight against illegal immigration of third country nationals (EC, 2006), as well as the Communication “Towards a Common Immigration Policy” (COM, 2007a) have presented comprehensive sets of policy components to address irregular migration, including the flows directed to labour markets. The EC Communication of May 2007 on “Circular migration and mobility partnerships between the European Union and third countries” (EC, 2007c) emphasizes cooperation with the countries of origin. In the EC’s Employment and Social Affairs area, the European Employment Strategy is the main instrument for policy development related to labour markets, and is most relevant to the field of migration.

Combating the Irregular Employment of Immigrants in the Enlarged EU: Project Background and General Findings

Background. The project “*Combating the Irregular Employment of Immigrants in the Enlarged EU*” funded by the ARGO 2006 programme of EC’s Directorate General for Justice, Liberty and Security (JLS), aims to further contribute to the European policy development of recent years, while also producing updated information concerning the seven countries covered under this project. Following consultations with authorities and IOM Missions in a number of Western and Central European countries, the seven countries included in the project are: Belgium, Germany, Hungary, Ireland, Poland, Romania and Spain. Five country studies have been included in this volume,¹ along with a contribution from the International Labour Organization (ILO), and a summary chapter by Dr Marek Kupiszewski, the Research Coordinator of the project. The format of the project, similar to a previous ARGO project,² included the conducting of the country studies previously mentioned based on a commonly agreed methodology, the preparation of an expert conference to discuss the studies in April 2008, and finally the compilation of these country studies into this publication.

The project was designed in IOM’s Regional Office in Budapest in mid-2006, at a time when labour migration in the enlarged European Union was the focus of increasing attention. The idea behind the project – i.e. irregular forms of immigrant employment – emerged as media reports were increasingly focused on the severe exploitation of Central and Eastern European workers in Southern and Western Europe. In particular, the case of Romanian tomato pickers in Puglia, Southern Italy, became infamous for the gangmasters’ degrading and exploitative treatment of undocumented seasonal workers. In light of such events, two aspects have been particularly emphasized in the project: First, there is a need for improved law enforcement with a focus on the sanctions of employers, and second, it calls for better protection of immigrant workers, including the undocumented ones. In view of the latter, a partnership between IOM and ILO was formed aiming to promote, among other areas, decent work and the protection of workers’ rights.

1 The other two – namely the Belgian and the Romanian ones – will be published separately, online, as time constraints have prevented their enclosure in this publication.

2 Just prior to this project, the labour migration dynamics in Central and Eastern Europe and in selected Western European countries were assessed in IOM Budapest’s previous ARGO project, “European Cooperation in Labour Migration: Search for Best Practices”, with eight country reports being published in June 2008 under the title “Permanent or Circular Migration? Policy Choices to Address Demographic Decline and Labour Shortages in Europe”. These eight reports discussed migration policy options based on a thorough analysis of past and projected demographic and economic developments, and their impact on the labour markets in the countries under study.

In brief, the theme of the project, irregular employment of immigrants, combines the issues of irregular migration and labour migration. Labour migration does not necessarily exclude irregular migration, especially since many forms of migration are often related, directly or indirectly, to the labour market. While irregular migration is clearly an element to be prevented, regular labour migration options should be further promoted and facilitated by governments. Therefore, tackling irregular labour migration in a comprehensive way presents one of the many challenges policy-makers face in formulating coherent migration policies.

Policy formulation is further complicated by the fact that access to the cheap labour force provided by immigrants – regular or irregular – often plays a role in the competitiveness and survival of certain sectors of the economy (Reyneri, 2001, 2008). Moreover, the use of irregular migrant labour forces is often linked to the large and problematic issue of shadow economies which are often already part of the national economy (see chapters on Hungary and Germany) and the losses they cause to public finances. The research carried out under this project aimed to cover all these various aspects of this complex issue such as, but not limited to, migration control and border enforcement; the smuggling and trafficking of human beings; economic and labour market issues such as the availability of workers, their wage levels, and the question of shadow economies; immigrant workers' conditions of work, in particular those of the undocumented immigrants, and their rights and access to services such as health and education.

Terminology. For the sake of clarity, at the start of the project, the terminology needed clarification, as certain terms proposed initially appeared outdated or too narrow. To start with, the country researchers pointed out that in the original title of the project “*Combating the Illegal Employment of Foreigners in the Enlarged EU*”, the terms ‘illegal’ and ‘foreigners’ would be better replaced with others, since these terms had not only become ‘politically’ outdated, but were also limiting the scope of our research. Further discussions pointed out that the term ‘illegal’ has, for years, been avoided as an attribute to be applied to people, but rather applied to status, and has largely been withdrawn from other migration-related use as well. Likewise, ‘immigrants’ was preferred to ‘foreigners’, although in some cases – see the Irish chapter – the use of ‘foreign nationals’ was considered an option more in line with the common usage in the country.

Furthermore, the expression ‘illegal employment’ might be too narrow, since the employment relationship *per se* is not necessarily in violation of the law, as the immigrant can have an irregular status due to the violation of the entry and/or stay conditions (see also Table 1.2 in the German chapter for more details). Similarly, the use of the term ‘clandestine employment’ would have been too narrow, as the employment of immigrants with a degree of irregularity can be open and public whereas the term has slightly opposite connotations. Moreover, in order to ensure that all relevant forms of irregular employment of immigrants would be covered and included in the country studies, an open definition was agreed upon. Thus, irregular employment would include three elements:

1. a person of foreign nationality,
2. who carries out work,³
3. and this work violates the provisions set out in the immigration and/or labour legislation.

3 The study only discusses issues concerning activities which have an equivalent in the official economy but in some manner take place in the ‘shadow economy’; it does not cover work that is illegal by its very nature, such as, for example, dealing in drugs, or other criminal businesses, which are often referred to as the ‘black economy’.

General Findings and Recommendations. The country reports and Conference illustrate the many facets of the phenomenon under study, and accordingly, the many administrative sectors and other agencies that should be engaged in addressing it. The findings show that continued and simultaneous work in all these fields are needed, with efforts to maintain law and order and the integrity of migration policy and to remain competitive in global markets without business activities moving into the informal economy using undocumented labour, and to secure acceptable conditions of work and the protection of the rights of all workers.

Ideally, such efforts should be coordinated and integrated into a comprehensive framework for the combating of the irregular employment of immigrants and all its ramifications. In a national or wider context, such a framework should provide a common reference for those who deal with the irregular employment of immigrants in different fields. Such a cooperation framework should also be linked to overall migration policy and economic and labour market policies.

The research demonstrates that arduous, sometimes expensive and time-consuming bureaucratic formalities have often scared immigrants or their employers away from obtaining the necessary documentation (see for example the German chapter), or administrative delays have left immigrants without proper documentation. It is therefore recommended that, while effective border control and migration regulation are needed, facilitation of legal migration and an increase in the legal possibilities to migrate would have the potential to redirect undocumented immigration to legal channels.

On the other hand, while the size of the informal sector does not seem to decrease (EC, 2007b), and thus further work is needed to ‘formalize’ this part of the economy, it is the protection of undocumented immigrant workers’ rights which is the preferable option, as opposed to that of limiting their access to a variety of services, such as health, social services or education. Such restrictions are sometimes applied with the goal to send an unwelcoming message to potential new irregular immigrants abroad (see the Ireland chapter).

Marek Kupiszewski’s conclusive chapter lists a number of recommendations arising from the project. Similarly, the other chapters advance policy recommendations in view of their respective country policies or strategies. The overarching principles set out in these recommendations to address the irregular employment of immigrants are: comprehensiveness and the need to involve a broad range of stakeholders, recognition and coordination of their interests, creation of wide-ranging action frameworks to be adopted jointly by all the stakeholders and linked with larger key policy areas such as overall migration policy, labour market policy, and action to diminish the informal sector.

* * *

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Irregular Employment of Migrant Workers in Germany – Legal Situation and Approaches to Tackling the Phenomenon

Christoph Junkert, Axel Kreienbrink¹

1.1 Introduction

“There are a number of good reasons explaining why irregular labour migration should be prevented or reduced, such as the need to ensure the credibility of legal immigration policies, protect irregular migrant workers from exploitative and abusive situations, and maintain good relations among origin, transit and destination countries.”

OSCE, IOM, ILO (2006: 7)

When the *Immigration Act (Zuwanderungsgesetz, ZuwG²)* came into force on 1 January 2005, the *Federal Office for Migration and Refugees (Bundesamt für Migration und Flüchtlinge, BAMF)* was given the task of installing a research group to carry out migration and integration research, in order to provide a scientific base to its activities. From the very outset, research on aspects of the irregular residence and illegal employment³ of foreign nationals has been a focus of this research group.⁴

In Germany, awareness of the issue of illegal migration and the illegal employment of foreign nationals, which are interdependent, only emerged in the 1990s, in the wake of the fall of the Iron Curtain and the reunification boom, especially in the construction sector. Between 2001 and 2005, during the slowdown of the German economy, this awareness died away again. It is against the backdrop of the two ‘eastern’ enlargements which have occurred since May 2004, and the enlargement of the Schengen Area, with the subsequent abolition of border controls with the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia on 21 December 2007, that

1 The authors are members of the research group of the Federal Office for Migration and Refugees (BAMF).

2 The Immigration Act comprises the *Residence Act (Aufenthaltsgesetz, AufenthG)*, which applies only to third country nationals, i.e., citizens of non-EU member states, and the *Freedom of Movement Act/EU (Freizügigkeitsgesetz/EU, FreizügigkeitsG/EU)*. It is the legal basis for, inter alia, the *Ordinance on Lawful Employment of Foreigners Entering Germany (Beschäftigungsverordnung, BeschV)* and the *Ordinance on Lawful Employment of Foreigners Living in Germany (Beschäftigungsverfahrensordnung, BeschVerfV)*, as well as the *Ordinance on Residence (Aufenthaltsverordnung, AufenthV)*.

3 In this report, irregular employment and illegal employment are used as synonyms.

4 The present study is partly based on a research study from the year 2005 (Sinn et al., 2005) that was undertaken within the framework of the European Migration Network.

the debate about irregular migration and the illegal employment of foreign nationals has been revived in the media and become a matter of public discussion. In addition, it has re-emerged as an important issue on the political agenda in recent years, especially in the European context. The discussion in Germany focuses on illegally employed nationals of the new EU Member States and other Eastern European third country nationals, who are primarily employed in the construction business⁵, meat processing, facility management, the hotel and catering industry, agriculture and forestry and in private households. The illegality of the employment of foreign nationals stems from the lack of a work permit, especially in the case of citizens of the new EU Member States and the lack of a residence permit, which makes it impossible for an immigrant⁶ to be legally employed, especially in the case of Eastern European third country nationals; it also stems from employer practices such as the violation of applicable law and/or undermining of obligatory minimum standards of pay and working conditions.

The Federal Government considers the illegal employment of both natives and immigrants to be harmful to the German economy, as well as to society as a whole, for a number of reasons. These include the non-payment of direct taxes and social security contributions, that is, pension insurance, health insurance, nursing care insurance, unemployment insurance and accident insurance, while simultaneously making use of public goods and services, such as security, public order and the infrastructure; the displacement of native and legally employed foreign workers; the slowdown of structural change; and the need for the authorities to prosecute both employers and employees who are involved in illegal employment, which, in turn, consumes vast sums of tax money. In addition, illegal employment, that is, non-compliance with applicable law, undermines morale and can lead to discontent among the population. On the other hand, by consuming goods and services, illegally employed migrants pay indirect taxes, such as general and specific excise taxes, as well as VAT, for example, eco-, or on petroleum, tobacco and alcohol. This, at any rate, constitutes a reduction in fiscal losses from the public budget.

As the complex issue of illegal employment comprises the several, partly overlapping phenomena of illegal residence, illegal employment and the illegal practices of employers, and as various entry points into illegal employment exist, discussions of the issue encounter a variety of delineation problems. In this study, illegal employment of foreign nationals is defined as a situation where

1. a person of foreign nationality,
2. carries out work,⁷
3. in violation of provisions set by legislation.

5 In Germany, there is a distinct difference between the construction industry and the construction trade, each of which has its own employers' association, the *Organization of the German Construction Industry (Hauptverband der Deutschen Bauindustrie HDB)*, and the *Umbrella Organization of the German Construction Trade (Zentralverband des Deutschen Baugewerbes, ZDB)*. *Construction industry* refers to the major construction companies, which, in general, do not employ workers themselves, but subcontract to the companies of the *construction trade*. The general term used to encompass both the construction industry and the construction trade is *construction business*.

6 In this report, *foreign national* and *immigrant* will be used as synonyms, although many foreign nationals in Germany did not migrate themselves but are children of immigrants and were born in Germany.

7 The study only discusses issues concerning activities which have an equivalent in the official economy; it does not cover work that is illegal by its very nature, such as, for example, dealing in drugs.

Due to the nature of undocumented stays and irregular employment, there is no data available on the number of undocumented and/or illegally employed migrants in Germany. Inferences from the process data held by the authorities are problematic; estimations by researchers and other stakeholders are vague at best.

German law sets requirements to be met before an immigrant may take up employment; the requirements differ for different categories of immigrants, that is, citizens of the old EU Member States (EU-14), citizens of the new EU Member States which are subject to transition periods and of those that are not⁸, third country nationals and citizens of countries with which Germany has special arrangements. Non-compliance with these requirements leads to the illegality of the employment. The people involved, employers, principals, employees, service providers, craftsmen and customers, can be punished with fines of up to EUR 500,000 as well as by imprisonment of up to five years.⁹

The main stakeholders in the field of illegal employment of foreign nationals, that is, the Federal Government, trade unions, employers' associations and human/migrants' rights organizations, all represent different positions. On the political level, the *Federal Government* regards illegal employment first and foremost as a violation of applicable law. Furthermore, illegal employment is seen as problematic, especially against the background of unemployment in Germany, which still remains high. As a consequence, illegal employment is pursued with the full rigour of the law (the *state-control approach*). Simultaneously, the government makes efforts to diminish the incentives for illegal employment and to promote legal employment through measures such as tax incentives. Besides this, there are several legal ways by which foreign nationals may take up employment in Germany.

Trade Unions are torn between, on the one hand, representing the interests of their members, in other words, protecting legal jobs, as well as the achievements regarding social standards and working conditions which are undermined and threatened by illegal employment, and, on the other hand, the tradition of international workers' solidarity, which also demands that they defend the rights of illegally employed immigrants (Schmidt and Wenken, 2006: 41). Thus, in accordance with EU demands, they aim for a state-control policy, complemented by approaches that take the rights of illegally resident and employed migrants, their voluntary return, and regularization programmes into consideration (Cholewinski, 2000: 396; Cyrus, 2004: 40–43).¹⁰

8 In this study, the EU-10 are understood as being all ten countries of the first 'eastern' enlargement of 2004, and the EU-8 as being those countries of the first eastern enlargement which are subject to transition periods, namely the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia; the EU-2 are understood as being the two countries of the second eastern enlargement of 2007, that is, Bulgaria and Romania, which are also subject to transition periods; the EU-8+2 includes all ten countries of the two eastern enlargements which are subject to transitional arrangements.

9 Fines (*Bußgelder*) are administrative sanctions imposed by the authorities for infringements (*Ordnungswidrigkeiten*) of the law, whereas monetary penalties (*Geldstrafen*) result from a conviction for criminal offences (*Straftaten*).

10 Palokangas (2005) provides an interesting theoretical analysis on the political economy of policy making in the field of immigration, according to which, the coexistence of regular and irregular migration would not undermine the trade unions' bargaining power, and native workers would prefer irregular to regular immigration because irregular migrants would not compete with native workers in the formal sector.

Human rights and charitable organizations, as well as the *churches*, take a clear stand against irregular work. In some cases, for example, when a charitable organization is a provider of social services, they find themselves in a situation where they are competing with irregularly employed workers, especially in the field of care services (NGO1DE, NGO2DE). Nevertheless, they emphasize the basic rights of illegally employed migrants and demand that employers comply with statutory minimum standards of working conditions and pay, as well as with universally valid human rights (NGO3DE).

Employers' associations are interested in combating the illegal employment of immigrants in order to ensure fair competition; however, when it comes to issues involving immigrants' rights, they are less engaged. They promote the notion of tackling the roots of illegal employment, which from their viewpoint, are the high costs of labour, taxes and social security contributions, as well as the level of labour market regulation.

Research on the illegal employment of foreign nationals in Germany is not yet very extensive and, to date, it has mostly been covered in studies carried by researchers in disciplines other than that of economics. More intensive research on the issue of the 'illegality' of foreign nationals only commenced about a decade ago. Nevertheless, the research has produced a relatively rich body of literature. Existing studies differ widely in their focus, their emphasis being influenced not only by their formulation of the problem to be addressed and their research hypotheses, but also by political implications, personal views and the authors' organizational context (Cyrus, 2004: 13; Schönwälder et al., 2004: 17). Within the field of academic research, most publications have been produced by sociologists, with a smaller number of studies being published by legal experts, economists, ethnologists and, in some cases, by political scientists, geographers or demographers.

1.2 Illegal employment of foreign nationals in Germany: scale, nature and reasons behind the phenomenon

1.2.1 Illegal employment in general

1.2.1.1 Definition

According to § 1 para. 2 of the *Act to Combat Illicit Work and Illegal Employment* (*Schwarzarbeitsbekämpfungsgesetz*, SchwarzArbG), illicit work (*Schwarzarbeit*) occurs, when someone provides/produces or acquires a service or goods, and

- as an employee, entrepreneur or self-employed person who is subject to social security contributions, does not fulfil his or her obligations with regard to registration, social security contribution or maintaining statutory records (§ 1 para. 2 no. 1 of the SchwarzArbG),
- as a taxpayer, does not fulfil his or her obligations to pay taxes (§ 1 para. 2 no. 2 of the SchwarzArbG),
- as a recipient of social benefits, does not inform the social insurance agencies of this occupation (§ 1 para. 2 no. 3 of the SchwarzArbG),
- does not fulfil the obligations to register his/her trade, in accordance with § 14 of the *Industrial Code* (*Gewerbeordnung*, GewO), or does not have a concession to operate an

itinerant business (*Reisegewerbe*), in accordance with § 55 of the GewO (§ 1 para. 2 no. 4 of the SchwarzArbG),

- does not enlist in the Register of Craftsmen (*Handwerksrolle*), in accordance with § 1 of the *Crafts Code* (*Handwerksordnung*, HwO) (§ 1 para. 2 no. 5 of the SchwarzArbG).

Exempt from being defined as illicit work are situations where a service is provided, or work is carried out

- by family members, as defined in § 15 of the *Fiscal Code* (*Abgabenordnung*, AO)¹¹, or partners (§ 1 para. 3 no.1 of the SchwarzArbG),
- as an act of courtesy (§ 1 para. 3 no. 2 of the SchwarzArbG),
- as neighbourly help (§ 1 para. 3 no. 3 of the SchwarzArbG) or
- as self-help, as defined in § 36 para. 2 and 4 of the *Second Housing Act* (*Zweites Wohnungsbaugesetz*), or § 12 para. 1 of the *Housing Space Advancement Act* (*Wohnraumförderungsgesetz*) (§ 1 para. 3 no.4 of the SchwarzArbG)

without the predominant intention of making a profit; that is, for only a “*marginal remuneration*”.

1.2.1.2 The scale of illicit work in Germany

There are currently numerous studies which try to estimate the size of the shadow economy and the proportion of illicit employment therein.¹² Estimates of the scale of illicit work in Germany range from EUR 70 billion (Feld and Larsen, 2005) to EUR 160 billion (Enste and Schneider, 2007). In both the media and the political debate, there is often confusion about the meanings of the terms ‘illicit work’ and ‘shadow economy’; the latter being, in fact, a term which *includes* illicit work, as well as criminal activities in the classic sense, such as, for example, drug-dealing.

Schneider and Enste, in particular, are intensively engaged in the research on the shadow economy and illicit work (Schneider, F., 1994, 1997, 1998a, 1998b, 2000, 2003a, 2003b, 2005, 2007; Schneider and Enste, 2000, 2002, Enste and Schneider, 2006, 2007). Even though their estimates seem inflated and have recently been subjected to heavy criticism (Graf, 2007; Koch, 2007)¹³, they receive a high level of attention among media and politicians. According to Enste and Schneider (2007: 262, table 3), using data from a recent survey, illicit work amounts to between 6 and 7 per cent of the GDP, or EUR 140 to 160 billion, and accounts for about 40 per cent of the shadow economy.¹⁴

11 According to § 15 para. 1 of the Fiscal Code, family members are understood as being fiancé(e)s, spouses, family members related by ‘direct line’, including those related by marriage; in other words, a person’s own (grand-)children, (grand-)mother/father, and so forth, plus those of the spouse, siblings, children of siblings, spouses of siblings and siblings of spouses, siblings of parents, foster-children and foster-parents.

12 For an overview of studies for Germany covering 1975 to 2005, see Bühn et al. (2007).

13 In particular, their cash flow-method, which is based on the idea that illicit work is paid in cash, so one can estimate its size by an appropriate cash demand function, is facing criticism (see, for example, DGB, 2005).

14 Enste and Schneider (2007) extrapolated the survey data and concluded that approximately 13 million people have, at least temporarily, been working illicitly for approximately 320 hours a year on average. Valued at *market wages*, this gives the abovementioned figure.

An earlier study, based on two other surveys, recorded a far less substantial amount of illicit work. In 2001 and 2004, the Copenhagen-based Rockwool Foundation Research Unit carried out a number of surveys in Germany concerning, among other issues, illicit work and the amount of time, on average, the respondents spent on working illicitly (Feld and Larsen, 2005). In 2001, 11.7 per cent of the 15- to 66-year-olds questioned affirmed that they had carried out illicit work, 9.6 per cent of them in 2004. The time worked illicitly per week decreased from 8 hours 19 minutes in 2001 to 7 hours 34 minutes in 2004. Valued at the then current wages paid in the official economy, they came to the conclusion that illicit work in Germany amounted to 4.1 per cent of the GDP in 2001 and decreased to 3.1 per cent of the GDP in 2004 (Feld and Larsen, 2005: 68, table 7.1).¹⁵

A recent study by the European Commission presents results originating from a “Special Eurobarometer” survey of 2007 on undeclared work, covering all 27 Member States (European Commission, 2007a). In Germany, 3 per cent of the respondents stated that they themselves have carried out undeclared work. Only in the UK, Malta (2 per cent each) and Cyprus (1 per cent) was this proportion lower. 5 per cent of the German interviewees declared that they have used services provided or goods produced by illicit work.¹⁶ Almost 80 per cent of those interviewees who admitted to having carried out illicit work specified the time they spent on illicit work as between 1 and 199 hours a year, with nearly half declaring that they spent less than 50 hours on illicit work.

1.2.1.3 Adverse effects of illicit work and illegal employment

The Federal Government and the social partners deem illegal employment in general, and that of foreign nationals in particular, to be a considerable burden on the German economy, and especially on the labour market and social security systems, as well as on society itself. There is, naturally, no reliable empirical evidence in Germany on the impact made by the illegal employment of foreign nationals, especially on jobs, working conditions and wages, as well as on the tax and social security systems. The estimates for the losses in social security contributions for each 10,000 jobs that are lost due to illegal employment reached EUR 122 million in 2004 (Bundesregierung, 2005: 16).¹⁷ The fiscal loss, as revealed by the customs administration in 2004, totals EUR 96 million (Bundesregierung, 2005: 21).¹⁸

15 If they had weighted the proportions with *actual wages*, which were, according to their survey, EUR 10.30 in 2001 and EUR 10.40 in 2004, the proportions would have been 1.3 per cent in 2001 and 1.0 per cent in 2004.

16 Of course, one has to bear in mind that on such a sensitive issue, people do not always tell the truth and thus the given answers represent something of a minimum proportion. In addition, the authors of the study point out that the validity of the results is limited, due to the low number of respondents (“[...] results should be interpreted with great care.”, European Commission, 2007a: 3).

17 This figure of EUR 122 million breaks down into a EUR 57 million loss to pension insurance, a EUR 41 million loss to health insurance, a EUR 19 million loss to unemployment insurance and a EUR 5 million loss to nursing care insurance.

18 The methods for calculating the tax loss and the loss to the social security system differ substantially. The wage taken as a basis to calculate the loss to the social security system is the wage that the employee would have received if he were legally employed (*Anspruchsprinzip*; principle of claim). In contrast, to calculate the tax loss, the actual wage paid by the employer is taken as the basis (*Zuflussprinzip*; principle of cash flow) (Bundesregierung, 2005: 21).

In 1999, Statistics Denmark carried out a survey for the Rockwool Foundation, according to which, one third of the respondents who admitted to have paid for illicit work and/or its products, would have purchased these services and/or products on the legal market (Pedersen, 2003: 109).¹⁹ It can thus be presumed that it is no more than approximately one third of the illicit work which could be converted into regular jobs (Pedersen, 2003: 109).

1.2.1.4 The rationale behind illicit work and illegal employment

The reasons for the existence of illicit work are multifarious. When analysing the rationale behind illicit work, one has to distinguish between the supply and demand sides. Factors that are suspected of driving organizations and individuals on the demand side into the use of illicit work are high taxes and high, non-wage, labour costs, as well as a high level of state regulation, such as, for example, dismissal protection (Enste and Hardege, 2007: 11). According to surveys, “a faster service” and “as a favour amongst friends, relatives or colleagues” are additional reasons for making use of goods and services provided via illicit work (European Commission, 2007a: 16). A reason particularly emphasized by trade unions is the “excessive pursuit of profit” by employers (DGB²⁰, 2005: 4; TU1DE).

According to theoretical considerations, the motives for those on the supply side to switch to illicit work are the avoidance of taxes and of social security contributions. The extent to which high taxes and high social security contributions can affect the decision to switch to illicit work vary, to a certain degree, with the perceived quality of public institutions, that is, the effectiveness and efficiency of the administrative authorities, the quality of the legal system, corruption and a transparent and efficient tax system. If the quality of public institutions and the social security system is perceived as good, people are less irritated by high taxes and social security contributions. Theoretically, a high level of state regulation could likewise have an impact on the decision to carry out illicit work. Another important factor which is said to have led to the practice of illicit work is the reduction in working hours.²¹ A high level of transfer payments, which reduces the individual labour supply in the official economy, could strengthen this effect. When combined, the eventual effect is that it leaves more time for illicit work. For foreign nationals in particular, there is often no possibility of taking up employment in Germany legally, yet the wage differentials are high enough to drive immigrant workers into irregular employment (E1DE, E2DE).

19 Pedersen (2003: 109) also refers to a study by Viby Mogensen (1985), who found exactly the same results for 1983.

20 The *Federation of German Trade Unions (Deutscher Gewerkschaftsbund, DGB)* is the biggest and most influential umbrella organization of German trade unions.

21 In 1980, the negotiated weekly working hours for (West-) Germany amounted to 40 to 42 hours for 99 per cent of the blue-collar workers and 99.7 per cent for the white-collar workers (BMAS, 2006: 4.2 et seq.). Subsequently, this time has been reduced and reached 38 hours 17 minutes on average in 2006. With about 30 days paid leave, 219 working days (or 43.8 weeks; that is, without taking the average 7.1 days sick leave into account) remained (IAB, 2007: 15), which makes approximately 1,675 working hours in 2006.

1.2.2 *Illegal employment of foreign nationals*

In 1973, during the economic turbulences of the Oil Crisis, Germany imposed a recruitment ban on foreign workers, which put an end to the guest-worker programmes (GWP²²) and closed the German labour market to foreign nationals. In fact, this recruitment ban remains in effect, but there are multiple exceptions, both for workers from the new EU Member States, who are subject to transition periods regarding their access to the German labour market, and for third country nationals. Until the mid 1990s, a continuous increase in immigrants without legal residence and employment status was noticed; this was, in part, due to the fall of the Iron Curtain and the ensuing reunification boom, which stimulated the national economy and the labour market. It can be assumed that, since then, the number of illegally resident and employed migrants has remained stable, or even decreased. Against the backdrop of the two eastern enlargements of the European Union and the recent enlargement of the Schengen Area, the worries about an inflow of migrants becoming illegally employed and, in the case of third country nationals, often illegally resident, immigrants, which had receded during the recession period between 2001 and 2005, have returned and the issue of illegal employment of foreign nationals has re-emerged as one of importance on the political agenda. Recent newspaper articles have reported an increase in apprehensions of immigrants trying to cross the border illegally from Poland and the Czech Republic (cf., for example, Welt Online, 11 January 2008). The Federal Ministry of the Interior admits that there were “*numerous attempts*” at irregular border crossings in December 2007 and January 2008, in the course of which, 1,128 people were apprehended. Since then, the number of apprehensions has “*rapidly declined*” (BMI, 2008). One reason for the rise in apprehensions could be increased police patrols near the border area, the purpose of which is to compensate for the absence of border controls (Migration News Sheet, 2008).

1.2.2.1 *Illegal employment of foreign nationals: definition and practices*

When defining the phenomenon of ‘illegal employment of immigrants’, one has to differentiate between four groups of foreign nationals, all four of which have different implications for potential illegal employment (see Table 1.1). Firstly, the citizens of the old EU Member States (EU-14) are free to live and work in Germany, yet they have to be in possession of a valid passport or ID card and are required to register at the local residents’ registration office; they also have the right to be treated as equal to German employees. Secondly, nationals of the new EU Member States face transition periods regarding their access to the labour market, with the exception of Cypriot and Maltese nationals, but are free to settle and live anywhere within the EU. Nonetheless, according to § 284 para. 1 of the *Third Book of the German Social Code (Sozialgesetzbuch III, SGB III)*, foreign nationals from the new EU Member States can apply for a work permit-EU (*Arbeitsgenehmigung-EU*).²³ Thirdly, according to § 4 para. 3 of the

22 In 1955, the first guest-worker programme was arranged with Italy. In the following years, contracts on the installation of GWP with Greece and Spain (1960), Turkey (1961), Morocco (1963), Portugal (1964), Tunisia (1965) and former Yugoslavia (1968) were signed.

23 The legal rules for the German social security system, in other words, unemployment insurance, health insurance, pension insurance, accident insurance and nursing care insurance, are laid down in different books of the German Social Code.

AufenthG, third country nationals are only eligible to work in Germany if their visa or residence permit allows them to do so. Fourthly, § 15 of the Ordinance on Residence (*Aufenthaltsverordnung*, AufenthV) (*EU-positive list*) and § 16 of the AufenthV (*Priority of older visa agreements*) refer to countries which are free from the obligation to obtain an entry or residence permit for short-term stays of up to three months, but may not work in Germany without a proper work permit. As soon as they do so, their stay itself becomes illegal (§ 17 para. 1 of the AufenthV).²⁴ If their initial intention is to come to Germany in order to take up employment, they then require a visa; this requirement also applies to short-term stays.

Table 1.1: Entry/residence and labour market access requirements for ‘categories’ of foreign nationals entering Germany

Category of foreign national	Entry/residence	Labour market access (LMA)
EU-14	Passport (or ID card), obligation to register*	Equivalent to German nationals
EU-10		
EU-8	Passport (or ID card), obligation to register*	Transition period until 2011 at the latest; LMA according to § 284 of SGB III in connection with the Ordinance on Exceptions from the Recruitment Ban (ASAV) and the Ordinance on the Lawful Employment of Foreigners Entering Germany (BeschV)
Cyprus and Malta	Passport (or ID card), obligation to register*	Equivalent to German nationals
EU-2	Passport (or ID card), obligation to register*	Transition period until 2014; LMA according to § 284 of SGB III in connection with the ASAV and the BeschV
Third country nationals	Visa (< 3 months), residence permit (> 3 months)	Recruitment Ban; LMA according to §§ 18 to 20 of the AufenthG in connection with the BeschV
Third country nationals from “positive list”-countries (§ 15 and 16 of the AufenthV)	Passport (< 3 months), residence permit (> 3 months)	Recruitment Ban; LMA according to §§ 18 to 20 of the AufenthG in connection with the BeschV

* In addition, non-working EU citizens may only stay in Germany, if they have sufficient health insurance coverage and means of subsistence (§ 4 Freedom of Movement Act/EU)

Summarizing, it can be said that violations of § 284 para. 1 of SGB III and § 4 para. 3 of the AufenthG, coupled with offences against the Act on the Posting of Workers (*Arbeitnehmerentsendegesetz*, AEntG)²⁵ and the Temporary Employment Act (*Arbeitneh-*

24 Until the Act to Implement EU Directives (*Richtlinienumsetzungsgesetz*, RLUmG) of August 2007, there existed a legal gap arising from a ruling of the Federal Supreme Court (*Bundesgerichtshof*, BGH), according to which, a visa sustains its validity, despite having been attained under false pretences (BGH ruling 2 StR 457/04). The RLUmG introduced paragraphs in this respect to the Residence Act (§ 15 para. 2a, § 52 para. 7 and § 95 para. 1a) and tried to close this gap.

25 Under the provisions of the Act on the Posting of Workers, foreign construction workers, posted by a foreign company to work in Germany, are covered by German collective agreements, especially with

merüberlassungsgesetz, AÜG)²⁶, constitute the bulk of constellations constituting the illegal employment of foreign nationals.

Table 1.2 gives a generalized overview of those constellations which are to be considered as illegal employment of foreign nationals within the German legal framework.

Table 1.2: Constellations of the illegal employment of foreign nationals, according to their official status with regard to residence and work permits

		Employment ¹⁾	
		illegal	legal
Stay / Entry	illegal	I 'classic' case	IV not possible under German law
	legal²⁾	II legally resident immigrants who do not possess a work permit	III a) legally employed immigrants working under illegal conditions b) work permit received under false pretences, for example, bogus posting of workers or bogus temporary work c) bogus self-employment d) legally employed immigrants who perform illicit work alongside their regular job, like natives, or who, in addition to their legal employment, carry out work they are not permitted to do

1) *Either dependent or self-employed.*

2) *Immigrants who have been granted either a residence title or a toleration certificate and who have either been registered by the authorities or in the Central Register of Foreign Nationals (Ausländerzentralregister, AZR).*

Scenario I can only occur among third country nationals, that is, among non-EU-citizens who do not have a residence permit and thus cannot obtain a work permit either. These illegally resident, third country nationals could either be what are known as 'overstayers', in other words, people who have entered the country legally, for example, on a tourist visa, and then failed to leave the country in due time, or their entry might have been executed illegally by means of forged documents, smuggling or trafficking. It can be assumed that the people who fall within this group are fully aware of the illegality of their employment.

Group II comprises individuals who are allowed to stay in Germany, or whose stay is tolerated, but who may not work without a work permit, for example, citizens of the new EU Member States and citizens of 'positive list' countries. According to § 17 para. 1 of the *AufenthV*, in the case of foreign nationals who are entitled to enter the country without a visa, pursuant to §§ 15 and 16 of the *AufenthV*, the privilege of temporary

regard to minimum wages, including overtime wages, as well as leave, in terms of both length and pay; at the request of the social partners, these agreements have been declared by the Federal Ministry of Labour and Social Affairs to be generally binding.

26 According to the Temporary Employment Act, a foreign temporary employment agency is only eligible to second workers to Germany if it is allowed to do so by the Federal Employment Agency.

residence ceases to apply if such a person takes up employment without having been granted a work permit. Consequently, this person lacks the necessary residence permit and, having thus committed an offence against § 95 para. 1a of the AufenthaltG, is legally obliged to leave the country.

Scenario III, in which the foreign nationals are, at least officially, legally resident and legally employed, has different ‘cases’. Case a) is where the illegality of the employment is the employer’s doing, and where the illegally employed immigrants are often unaware of their status. This is the case when foreign nationals, as either posted workers, or as seasonal or contract workers, are employed under illegal conditions, that is, they are paid less or are working under less favourable conditions than native employees in comparable positions, or as specified under collective agreements. A particular problem in this context is the non-payment of social security contributions resulting from forged or fraudulently obtained E-101 certifications²⁷, which, according to a ruling by the Federal Supreme Court of 26 October 2006 (1 StR 44/06), may not be checked by the German authorities or law courts, even if significant doubts as to their validity exist. The Federal Government assumes that there is a “*considerable number*” of temporarily posted foreign workers in Germany who are in possession of an E-101 certification without fulfilling the necessary conditions (Bundesregierung, 2007a: 2). Case b) applies to posted workers, who, in fact, should not have been posted because the requirements on the employer’s side are not met, for example, in the case of bogus companies, or to temporary workers whose employer does not have the permission of the Federal Employment Agency to hire out his or her workers. In addition, such employees are often paid less and/or work under less favourable conditions than native employees in comparable positions, or as specified under collective agreements. The third case, c), is that of bogus self-employment. The free provision of services is guaranteed by the EC Treaty and is not subject to transitional arrangements, as is dependent work. Bogus self-employment occurs when a foreign national, who is officially self-employed, in reality works for just one employer and is subject entirely to his instructions and the conditions of work he imposes. The last case, d), refers to foreign nationals who are only entitled to engage in a specific kind of employment, but actually carry out other tasks on top of that. A popular example of anecdotal evidence is that of Eastern European immigrants, mostly female in this case, who are only entitled to work as a domestic worker in households with people who are in need of care, in other words, those people who are recipients of benefits from the nursing care insurance scheme under the provisions of SGB XI; however, many of these workers carry out custodial activities as well.²⁸

27 Under the provisions of EU law, the E-101 certification is issued to workers who are temporarily posted by a company to work in another country. The certification confirms to the authorities of the country to which the worker is posted that he is employed by a company registered in the sending country and thus subject to the social security system of the sending country.

28 This is especially true in cases of people who suffer from dementia, which, according to critics, is not sufficiently taken into account in the decision of the Medical Service of the German Health Insurance Companies on the benefits to be paid by the nursing care insurance scheme. This, in turn, renders these households particularly prone to illegal employment. According to the Federal Association of Private Providers of Social Services (bpa), there are up to 100,000 illegally employed foreign nationals from Central and Eastern Europe who are in such a situation (bpa, 2007).

Scenario IV presents a situation where there is a failure to comply with the provisions of § 4 para. 3 of the *AufenthG*, which states that, in Germany, it is not possible to take up work legally if one's residence is illegal.

1.2.2.2 Size of the illegally employed foreign population

First and foremost, people without a legal residence status migrate for economic reasons; in other words, current labour market opportunities and the respective situation in Germany play a central role as pull factors. It can be assumed that, as the economic and labour market situation in Germany has rapidly deteriorated since the 'boom-year' of 2000, illegal employment has experienced a downward trend, due to a reduced demand from companies and private households. A recent assessment of the available control-processed data comes to a similar conclusion; that there are indications that, from the late 1990s until at least 2005, there was a decrease in both the influx and the stock of irregular migrants (Kreienbrink and Sinn, 2007: 27). This downward trend has also weakened the economic impact of illegal employment (Cyrus, 2004: 28). For approximately two years now, the German economy has been flourishing, unemployment has been constantly decreasing, falling below 3.5 million in September 2007 (IAB, 2007: 23), and employment has exceeded the 40-million-threshold for the first time in German history (IAB, 2007: 18). This development could act as a pull factor for foreign nationals to come to Germany in order to pick up work, illegally if 'necessary'.

The number of people detained by the authorities naturally only comprises the cases which have been detected or registered and not the 'shadow figure' of the illegally employed. In addition, researchers in Germany have little experience with quantitative estimation as regards the volume of undocumented migrants and illegally employed foreign nationals, whereas researchers in the United States, for example, have been developing respective methods since the 1930s.²⁹ However, most of these methods cannot be applied in Germany, not only because they include none of the necessary differentiations for the legal framework, but also as a result of the situation as regards data availability and the structure of illegal immigration (Lederer, 2004: 192). Furthermore, Germany has never implemented any regularization programmes, which would have enabled researchers to draw some inferences regarding the size and structure of the illegally resident and employed population.

Even a thorough analysis of available data sources, that is, Federal Police statistics³⁰, Police Crime statistics and the statistics produced by the Federal Employment Agency, cannot provide reliable data on the size and composition of the illegally employed population in Germany. The range of estimates of the total number of illegally resident migrants in Germany, most of whom can be assumed to have entered Germany in order to take up gainful employment, differs widely, from 100,000 up to 1 million people.³¹ These figures equate to approximately 0.25 to 2.5 per cent of the national labour force.

29 See Hanson (2006) for a review of the literature on illegal migration from Mexico to the U.S. including, inter alia, methods for estimating flows and stocks of irregular migrants.

30 With effect from 1 July 2005, the Federal Border Force (*Bundesgrenzschutz*, BGS) was renamed as the Federal Police (*Bundespolizei*, BPOL).

31 These figures have been constantly recurrent since the late 1990s.

To our knowledge, there is only one study which deals directly with the migrants' share in the *shadow economy*. On the basis of the cash flow-method, Schneider (2003a: 12) infers the number of working hours in the shadow economy, from which he constructs the variable of *fulltime illicit workers*, which is, as he states himself, a *fictitious quantity*, and shows the number of *possible working places*, amounting to 9.4 million native and 1.2 million foreign national *fulltime illicit workers*. There are, however, a number of objections to this approach. First, the cash flow-method itself is subject to criticism. Second, it is not apparent how the proportion of foreign nationals amounting to 11.5 per cent is calculated.³² Third, illicit work, which is the focus of our interest, accounts for only 40 per cent of the shadow economy. Fourth, the approach by which *possible working places* are estimated conveys the impression that the complete work effort in the shadow economy could be transferred to the official economy. As shown above, surveys indicate that only about one third of illegal employment would be demanded if provided legally. Furthermore, many activities have no equivalent in the official economy as they are against the law. All of this leads to an overestimation of illegally employed people in general, and of immigrants in particular. Meanwhile, the approach does not take 'legal' labour migrants who are employed under irregular conditions into account. Given these objections, 1.2 million illegally employed immigrants seem to be putting the number far too high. As the author himself points out, the number is only "a *first rough estimation of the total number of illegally employed foreigners (who are involved in shadow-economy activities)*" in Germany.

If the abovementioned guesses, which place the proportion of irregularly employed migrants in the labour force as being up to 2 per cent, are taken as a rough empirical landmark, this would indicate that the scope of the phenomenon in Germany is relatively modest in comparison with, for example, the United States, where the latest estimates on the size of the illegally resident population, most of whom are also illegally employed, reach up to 12 million, equalling about 8 per cent of the labour force (Hanson, 2007).³³

Once again, given the methodological problems and scarcity of available data, it must be noted that all figures regarding the number of illegally employed migrants should be interpreted with great care.

32 On the basis of Schneider's estimations, Cyrus (2004: 30) calculates a share of 13 per cent, but seems, accidentally, only to have related the 1.2 million foreign, full-time, inland, illicit workers to the 9.4 million German full-time, inland, illicit workers, rather than to the entire population of full-time, inland, illicit workers of 10.6 million Germans and foreign nationals. In contrast, the proportion of foreign nationals in the German population amounts to 8.9 per cent (StBA, 2008: 60 et seq.)

33 It should be mentioned here that in America, as opposed to Germany, illegally employed migrants are in all likelihood included in the registered labour force as a result of the quasi-legality of many illegal employment relationships; thus the proportion is somewhat higher, when compared to the proportion in Germany.

Furthermore, to avoid confusion, it should be noted that the group of illegally employed migrants does not only comprise undocumented migrants but many legally resident migrants who are employed under irregular conditions, or who just carry out illicit work as well as their regular job. In turn, not every undocumented migrant is involved in irregular employment.

1.2.2.3 Characteristics of illegal employment of immigrants

In the *Tenth Report of the Federal Government on the Impacts of the Act to Combat Illegal Employment* (Bundesregierung, 2005), it is stated that almost all branches of the economy are affected by the illegal employment of foreign nationals (Bundesregierung, 2000: 44; 2005: 40 et seq.; Schönwälder et al., 2004: 47 et seq.). According to survey data (Enste and Schneider, 2007: 263, figure 2; European Commission, 2007a: 21), data held by the authorities and reports in the media, irregular employment occurs primarily in the construction business, the hotel and catering industry, household services, meat processing, transport and forwarding, facility management, agriculture and forestry, car repair services, domestic nursing and geriatric care, private tuition and child care, the entertainment and amusement business, and hairdressing.

According to qualitative-empirical studies, these jobs are characterized by precarious employment conditions, which are brought about by the high level of employee substitutability and leave the workers in a weak position (Bundesregierung, 2005: 40), the low level of qualifications required, physical work combined with the fact that a command of the German language is of little relevance, and temporal limitations or seasonal employment (Lederer and Nickel, 1997: 31). In occupations demanding low-qualified workers, illegally employed foreign nationals are often overqualified for the job, a phenomenon known as *brain waste* (Cyrus, 2004: 37; I1DE, NGO1DE, NGO3DE, NGO4DE, TU2DE).³⁴

On the basis of Hofer's research findings (1992, 1993), Lederer and Nickel (1997: 29) indicate the "*structurally-founded vulnerability to be blackmailed*" which characterises illegally resident employees. As they lack a residence permit, and must therefore fear that their status may be revealed at any time, they are hardly in a position that allows them to protest against underpayment, fraud or exploitation by employers. Illegally resident migrants are thus exposed to the risk that the employment they take up might be forced labour.³⁵ Typical of forced labour are working conditions below normal standards, which the employees thus affected tolerate for want of alternatives, or which are enforced by subjecting the employees to indirect and/or direct threats, or, in extreme cases, by restricting their freedom of movement. This can constitute a gradual process, with conditions of employment deteriorating until, at a certain point, they give way to coercion and force (Cyrus, 2005: 56–59).³⁶

Generally, illegal employment of foreign nationals seems to be more common in small- and medium-sized enterprises (SMEs) than in large ones and it is more concentrated in urban than in rural areas, which is due to the greater economic activity and anonymity which these alternatives represent (Bundesregierung, 2005: 12). Regarding household

34 According to anecdotal evidence, this is also the case for many legally employed foreign nationals, as their formal qualifications are often not granted full accreditation.

35 The term 'forced labour' is defined in Art. 2 of Convention No. 29 of the International Labour Organisation as "*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself [or herself] voluntarily.*" (ILO 1930: 1).

36 There are no well-substantiated findings available which provide information on the scope of forced labour among illegally resident migrants (Schönwälder et al., 2004: 64).

services, particularly domestic care and nursing, the opposite seems to be true. In urban areas, the supply of household and care services is more extensive and distinct, while the possibilities of accommodating a 24-hour-nurse are limited, due to restricted living space (NGOIDE). Even so, the phenomenon seems to be increasing in medium-sized cities (NGOIDE).

Usually, foreign workers who are paid less than they should be in accordance with the Act on the Posting of Workers and other statutory provisions do not complain. This is mostly because they are unaware of those provisions and what they are paid, even if it is below the statutory minimum, is often much more than they would receive in their home country if, indeed, they were employed there at all.

This situation also results from the fact that irregularly employed migrants face great difficulties in claiming adequate wages from fraudulent employers. It can be assumed that wage claims made on account of withheld or only partly paid wages, can, in most cases, be neither pursued, least of all in a court of law, nor settled by means of an amicable agreement, or even by force. In the past, some successful legal actions have indeed been brought before the labour courts by illegally employed workers. However, pursuant to § 3 no. 9e of the SchwarzArbG, which came into force on 1 August 2004, both the courts and the criminal prosecution and law enforcement authorities are obliged to report “*findings from procedures which, in their view, are necessary for prosecuting offences pursuant to § 404 para. 1 or 2 no. 3 of SGB III*” to the customs administration authorities, provided that the duty to report such findings is not outweighed by the vital personal interests of the people involved. In turn, the customs administration authorities, just like other authorities, are obliged to report these findings to the authority for foreigners.³⁷ Cyrus (2004: 70) criticised this act, arguing that the new regulations would turn the law courts into additional auxiliary staff of the control bodies and would require them to evaluate whether or not vital personal interests forbid a transfer of data. He also made the criticism that these regulations would put non-German workers at an unfair disadvantage and create additional incentives for the illegal employment of non-German labour, as employers would face a lesser risk of being sued by their employees than before, because irregular migrant workers would be even less disposed to claim their rights, due to the risk of disclosure and subsequent expulsion.

1.3. Combating the illegal employment of foreigners – policy and legal situation

1.3.1 Policy and politics to combat the illegal employment of foreign nationals: general description and legal developments

From an historical perspective, it becomes obvious that policy approaches towards ‘illegality’ have changed fundamentally in recent decades. Even though it cannot be characterised as positive, the approach towards illegal entries during the period of the

³⁷ The authority for foreigners, which comes under the supervision of the *Länder*, comprises those authorities competent to implement the law pertaining to foreigners, such as, for example, the issuance of residence and/or settlement permits and decisions on deportations and expulsions.

so-called ‘guest-worker’ migration, which occurred between the mid-1950s and 1973, was marked by a pragmatic attitude focusing, above all, on economic interests (Schönwälder, 2001: 323 et seq.; Sonnenberger, 2003; Sanz Díaz, 2004). In regard to human smuggling, attitudes seem to have undergone a complete transformation, with human smuggling having been valued as something positive during the East-West conflict.³⁸ It was only in the late 1990s that human smuggling was included in German criminal law (Dietrich, 1998: 5; Jünschke and Paul, 2004: 368).

The first extensive legal approach in the fight against illegal employment was the *Act to Combat Illegal Employment (Gesetz zur Bekämpfung der illegalen Beschäftigung, BillBG)* of 1981. The strategy applied by the Federal Government aimed at deterring employers, as well as employees. With the enforcement of the full rigour of the law, illegal employment should have become an incalculable risk for the employer, a risk which would not be balanced by the higher profits drawn from illegally employing native and foreign national workers. Under the provisions of the law, illegitimate profits, for example, could be seized by the state and the employer would face tough economic consequences, such as exclusion from participation in public tenders (Bundesregierung, 2000). Yet the BillBG did not prove sufficiently effective, as the penalties were not high enough and employers could enter a caveat on imposed penalties, in the course of which the law courts have often reduced the penalty.

Since 2001, there has been a vast number of changes in legislation, as well as in the implementation of new acts in the field of combating illicit work and illegal employment. Especially worth mentioning is the *Act to Combat Illicit Work and Illegal Employment (Schwarzarbeitsbekämpfungsgesetz, SchwarzArbG)*, which, together with the *Act on Intensifying the Fight Against Illegal Employment and Ensuing Tax Evasion (Gesetz zur Intensivierung der Bekämpfung der Schwarzarbeit und damit zusammenhängender Steuerhinterziehung)*, came into force with effect from 23 July 2004. From then on, this act has formed the legal basis for combating illegal employment. This new act, for the first time, dealt comprehensively with the illegal employment of both natives and foreign nationals and set out the definition of illicit work.

The Federal Government’s approach towards the combating of the illegal employment in general, and of immigrants in particular, focuses on the business sector, treating illegal employment in private households as only an infringement (Bundesregierung, 2005: 9). It is multi-layered and comprises of

- the building of a new perception among the population of the injustice of illegal employment, as well as the promotion of lawful behaviour, inter alia, via the ‘facilitation’ of legal employment,
- the intensifying of labour market controls and the prosecution of illegal employment,
- an organisational reorientation, with responsibilities being concentrated, in 2004, within the customs administration,
- a comprehensive information campaign targeted at the resident population.

³⁸ For example, it was legally possible at that time to sue for previously agreed smuggling fees.

Regularizations, as conducted in several southern EU Member States, have not, and in all likelihood, will not, be implemented in Germany. The unanimous opinion among officials is that unlawful behaviour should not be rewarded in this way and that regularizations would undermine the efforts to create the new perception of illegal employment described above, as well as putting those immigrants who legally entered Germany to take up employment at a disadvantage. The latter is true; first, because legally resident migrants have surmounted the bureaucratic hurdles, and have thus, in comparison to undocumented migrants, committed additional resources in terms of opportunity costs in order to enter the country for employment purposes in compliance with the law. Second, regularized migrants could endanger the labour market situation of legally employed foreign nationals; however, this is dependent on the substitutability of both groups in the labour market.³⁹

In addition to the legal framework, there are several nationwide, sector-specific, tripartite *Alliances against Illicit Work and Illegal Employment*, formed between government, trade unions and employers' associations. These alliances seek to increase awareness of the adverse effects of illicit work and illegal employment, improve the information exchange between the social partners and the authorities and intensify labour market controls. These nationwide alliances have also given rise to some regional alliances in the construction business.

1.3.2 Prevention of the illegal employment of foreign workers

1.3.2.1 Legal labour migration schemes

Legal situation

In 1973, after 18 years of 'guest worker' immigration, which started in 1955 with a bilateral agreement between Germany and Italy, Germany imposed a recruitment ban on immigrant workers from countries outside the EU. At the end of the 1980s, complaints about labour shortages, especially in agriculture and the catering industry, led to the introduction of various exceptional entry channels for temporary labour migration to Germany. Initially, there was a catalogue of exceptions for the entry and stay of foreign workers, which was later replaced by the *Ordinance on Exceptions from the Recruitment Ban (Anwerbestoppausnahmeverordnung, ASAV)* and the *Ordinance on Working Stays (Arbeitsaufenthaltsverordnung, AAV)* in 1991.

The Immigration Act of 2005 did not lift the recruitment ban on third country nationals who can engage in legal employment on the basis of the *Ordinance on Lawful Employment of Foreigners Entering Germany (Beschäftigungsverordnung, BeschV)*. Before admitting third country nationals to the German labour market, the needs of the German economy with respect to the situation on the German labour market and the necessity to effectively combat unemployment must be considered (§ 18 para. 1 of the *AufenthG*).

³⁹ A recent empirical study by D'Amuri et al. (2008: 20 et seq.) suggests that 'old' and 'new' migrants are almost perfect substitutes on the German labour market.

If admitted, they are given a residence permit, which now includes a work permit, in accordance with § 18 of the *AufenthG*.⁴⁰

Pursuant to § 18 para. 3 of the *AufenthG*, *unqualified employees* may only be admitted to the German labour market temporarily if it is permitted by bilateral agreements, or if ordinances issued on the basis of § 42 of the *AufenthG* (i.e. the *BeschV*) thus permit. *Qualified immigrants* from third countries, in other words, those with a vocational training of no less than three years, can be given a temporary residence permit for employment purposes, but only for those occupational groups that are listed in the *BeschV*. ‘*In justified individual cases*’, when the employment is in the public interest, especially in terms of regional, economical or labour market considerations, a residence permit may be issued, in accordance with § 18 para. 4 of the *AufenthG*. *Highly qualified foreign nationals* may, ‘*in special cases*’, be granted a permanent settlement permit, in accordance with § 19 para. 1 of the *AufenthG*. Highly qualified individuals are defined by § 19 para. 2 of the *AufenthG* as being, *in particular*, 1. scientists with special technical knowledge, 2. teaching or scientific personnel in prominent positions, or 3. specialists and executive personnel with special professional experience who receive a salary of at least twice the earnings ceiling of the health insurance scheme.⁴¹ With the coming into force of the *Act to Implement EU Directives (Richtlinienumsetzungsgesetz, RLUMG)* on 28 August 2007, there came the introduction of a new section, which provides for the facilitated admission of scientists and researchers, under § 20 of the *AufenthG*. The new section was introduced as a countermeasure against growing concerns about possible labour shortages, especially of highly qualified employees. In addition, the *RLUMG* facilitated the entry of self-employed migrants. Before the *RLUMG* came into force, such immigrants were obliged to invest EUR 1 million and create 10 sustainable positions in order to qualify for a residence permit. The *RLUMG* lowered these requirements to EUR 500,000 and 5 positions.

In principle, unless an ordinance states differently, in accordance with § 39 para. 1 of the *AufenthG*, the Federal Employment Agency must allow any employment of a foreign national and may do so only if the applicant already has a job offer. The Federal Employment Agency is obliged to scrutinise for potential adverse effects on the German labour market which might result from the employment of the immigrant, and to check whether German employees or comparable foreign nationals or immigrants who have privileged access to the German labour market are not available.⁴² In addition, the German em-

40 With the coming into force of the Immigration Act, the number of residence titles has been reduced from five to two; the residence permit (*Aufenthaltserlaubnis*), which allows for a temporary residence, and the settlement permit (*Niederlassungserlaubnis*), which allows for a permanent residence. Another facilitation has been the introduction of the *one-stop-government*, meaning that a potential immigrant need only apply once, at the authority for foreigners, for a residence title and work permit.

41 The earnings ceiling of the health insurance, amounting to EUR 43,200 in 2008 and EUR 42,750 in 2007, is the limit up to which an income is charged with the contribution rate of the insurance company individually selected by the insurant. Half of the contribution rate, the average of which was approximately 13.3 per cent in 2006, is paid by the employee and half by the employer. Furthermore, the employee is obliged to pay an additional contribution rate of 0.9 per cent (BMG, 2007).

42 Comparable foreign nationals are those who have unrestricted access to the German labour market, that is, nationals from the EU-14, third country nationals with a settlement permit or citizens of the new EU member states who, although facing transition periods, are to be given preference over third country nationals (§ 39 para. 6 of the *AufenthG*).

ployer is obliged to affirm that the foreign national is employed under equal conditions, including pay, to comparable German employees (§ 39 para. 2 of the AufenthG). The employment is permitted and approved in an internal procedure between the authority for foreigners and the Employment Agency, so that the migrant worker does not have to approach both offices separately (*one-stop-government*). The work permit is then issued, together with the residence permit, by the authority for foreigners.

The BeschV specifies occupations for which approval by the Federal Employment Agency may be dispensed with (§§ 2 to 16 of the BeschV⁴³), as well as occupations that are subject to approval (§§ 18 to 24 of the BeschV for unqualified occupations⁴⁴, §§ 26 to 31 of the BeschV for qualified occupations⁴⁵, §§ 33 to 37 of the BeschV for ‘other’ occupations⁴⁶ and, finally, §§ 39 to 41 of the BeschV for occupations within the framework of bilateral agreements⁴⁷).

During the transition periods imposed by Germany upon the new EU Member States of the 2004 and 2007 enlargements, with the exception of Malta and Cyprus, nationals of these states are treated differently from the rest of EU nationals with regard to their access to the labour market.

For citizens of the new EU Member States, the ASAV continues to apply as long as the prerequisites stipulated in the BeschV are more demanding (BAMF, 2007: 72). In cases of §§ 2 to 10 of the ASAV, EU-8+2 nationals can be given a work permit-EU, in accordance with § 284 para. 6 of SGB III. In addition, qualified employees of the new EU Member States, in other words, those with a vocational training of no less than three years, may be admitted to the German labour market under the conditions of § 39 para. 2 of the AufenthG (see above) and are to be given preference over third country nationals (§ 39 para. 6 of the AufenthG).

Legal labour migration schemes

The most important legal channels for foreign nationals entering Germany in order to take up employment are those of contractual and seasonal work.

Germany has concluded a number of bilateral agreements with Eastern and South-eastern European countries, in order to allow foreign employers who are subcontracted by German entrepreneurs to send workers to Germany (§ 39 of the BeschV, § 3 of the ASAV).

43 For example, highly qualified, as defined in § 19 para. 2 of the AufenthG (§ 3 of the BeschV), temporarily posted science and R&D (§ 5 BeschV), workers; temporary here being defined as less than three months (§ 11 of the BeschV), or workers posted within the framework of the free provision of services in the EU (§ 15 of the BeschV).

44 For example, seasonal employment in agriculture and forestry, catering, fruit and vegetable processing, and sawmills (§ 18 of the BeschV) or domestic help in households with people in need of care (§ 21 of the BeschV).

45 For example, IT specialists (§ 27 of the BeschV) or nursing staff (§ 30 of the BeschV).

46 For example, the erection of prefabricated houses (§ 35 of the BeschV), long-term posted workers (§ 36 of the BeschV) or transborder commuters (§ 37 of the BeschV).

47 For example, contracts for work and services (§ 39 of the BeschV), or guest employees (§ 40 of the BeschV).

Such arrangements have been concluded with Bosnia-Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Latvia, Macedonia, Montenegro, Poland, Romania, Serbia, the Slovak Republic, Slovenia and Turkey. The admission of contractual workers is subject to an annually adjusted quota for each country, with sub-contingents for particular branches. The adjustment follows the development of the German labour market. For each one-percentage point increase (decrease) in the unemployment rate, the contingents are decreased (increased) accordingly, by 5 per cent. Besides this, in labour office districts where the unemployment rate exceeds the national average by more than 30 per cent, no contractual workers may be admitted.⁴⁸ Contractual workers are subject to the Act on the Posting of Workers, including the minimum wages and working conditions specified therein.

The largest group of foreign labourers enters Germany as seasonal workers. Workers from the EU accession states and Croatia may work for up to 4 months a year in agriculture and forestry, fruit and vegetable farming and the catering business. The respective employer is obliged to pay collectively agreed or *customary* wages and to provide *appropriate* accommodation. The *Information Sheet for Employers on the Mediation and the Employment of Foreign Seasonal Workers and Showmen Assistants* (BA, 2008) lays down the standards of payment and working conditions, as well as those for accommodation.

Another group, which is of minor numerical importance when measured by the number of legal admissions, but which is attracting increasing attention from the media in the context of illegal employment, consists of domestic workers in private households with people in need of care. Since 1 January 2005, in a case where the Federal Employment Agency has an agreement with a country's labour administration, nationals of that country have been permitted to take up full-time employment which carries compulsory insurance as provided for under § 21 of BeschV, for up to three years; they are permitted to do household chores, but must not perform custodial activities, as defined in SGB XI on nursing care insurance. At the moment, such agreements exist with Bulgaria, the Czech Republic, Hungary, Poland, Romania, the Slovak Republic and Slovenia.

Furthermore, third country nationals who have completed vocational nursing training, including geriatric nursing, may work in Germany if they are from countries with a corresponding mediation agreement with the Federal Employment Agency (§ 30 of the BeschV in connection with § 18 para. 2 of the AufenthG); at present, the only such agreement is with Croatia. Citizens of the EU-8+2 countries may take up qualified employment as geriatric nurses without the requirement for mediation agreements between the labour administrations, in accordance with the abovementioned § 39 para. 6 of the AufenthG.

In response to the problems with hiring qualified personnel which have recently been expressed, especially by employers' associations, the Federal Government has enacted the *Ordinance on the Admission of Foreign University Graduates to the German Labour Market* (*Hochschulabsolventenzugangsverordnung*, HSchulAbsZugV) of 9 October 2007. Under the provisions of this ordinance, both the labour market check which is generally required under § 39 para. 2 no. 1a of the AufenthG, and the priority check which is generally required under § 39 para. 2 no. 1b of the AufenthG, are suspended in

48 Every three months, the Federal Employment Agency updates the list of respective districts.

the case of citizens of the new EU Member States who are college or university graduates in mechanical engineering, vehicle construction or electrical engineering, or who have a comparable qualification; these same provisions also apply to foreign graduates of German universities, independent of their academic discipline.

German stances on efforts on the EU level to foster legal labour migration

On the EU level, there are several approaches to dealing with the problem of irregular immigration. Among other approaches, the EU is trying, via the introduction of legal labour migration opportunities, to diminish the incentives to migrate irregularly. On 23 October 2007, Franco Frattini, Vice-President of the European Commission and responsible for justice, freedom and security, put forward the European Commission's proposal for the *Blue Card* initiative on a facilitated admission of highly qualified third country nationals to the labour market of the Member States. However, this initiative is a topic of controversial debate in Germany. While the Federal Government opposes the Commission's approach, claiming that legal labour migration does not fall within the purviews of the EU, the picture across the landscape of the political parties is mixed. Several politicians emphasize the priority of the (re-)integration of the unemployed, while others welcome the initiative and underline the perception that Germany needs more highly qualified migrants.

Furthermore, there are efforts to implement what are referred to as *mobility partnerships*, in order to promote temporary labour migration for the benefit of both the receiving and the sending countries via remittances and brain gain (*circular migration*). On 16 January 2008, a hearing was held by the *German Parliamentary Committee for Economic Cooperation and Development* (*Ausschuss für wirtschaftliche Zusammenarbeit und Entwicklung*), where most of the experts expressed scepticism with regard to this concept. An OECD expert pointed out that circular migration barely contributes to the economic development in the sending countries, as most of the migrant workers are earners in low-income groups. Furthermore, he emphasized the fact that economic development does not reduce migration pressure⁴⁹; on the contrary, it would lead to increased migration from developing countries as a result of the increased resources which make migration possible in the first place. The process of reducing migration pressure would, in his opinion, take decades of economic development (*migration hump*). An NGO expert pointed to the similarities with the guest worker schemes of the 1950s to 1970s and warned against making the same mistakes again, stating his fears that circular migration would be to the disadvantage of the migrants (Deutscher Bundestag, 2008).

1.3.2.2 External controls

Border controls

Since the 1990s, Germany, along with the other EU Member States, has invested large sums in stepping up border controls and engaging new personnel for the Federal Police,

⁴⁹ See Gaytán-Fregoso and Lahiri (2000) for a theoretical analysis of the links between foreign aid, border controls and irregular immigration.

in order to counteract illegal border crossings and criminal smuggling operations. In terms of technology, the surveillance equipment has been upgraded (Minthe, 2002: 20; Dietrich, 1998: 17). In terms of human resources, in the early 1990s the Federal Border Force recruited more than 1,200 border support personnel from the local population in the eastern federal states (Dietrich, 1998: 12 et seq.). In total, the Federal Border Force deployed some 13,000 civil servants (*Beamte*) and employees (*Angestellte*) along the external borders between 1999 and 2003 (BMI, 2002: 21; 2004: 22).

As passport controls at internal EU frontiers have been abolished as part of the European integration process, Europe is faced with fundamental changes concerning the practice of passport control and the associated prevention and combating of illegal immigration and employment. Until 21 December 2007, Germany carried out border controls at the frontiers with Poland and the Czech Republic, at the border with Switzerland and at sea- and airports. With the enlargement of the Schengen Area on 21 December 2007, the only remaining land border controls are carried out at the Swiss-German border; however, these will also presumably be abolished in late 2008.

The Federal Police, formerly the Federal Border Force, which is the authority responsible for border controls, are authorized to carry out identity checks without concrete cause or grounds for suspicion within a 30-kilometer corridor on the German side of the borders. They are also authorized to enter suspicious houses without obtaining prior authorization from a judge, carry out photo and video surveillance and apply measures involving the intelligence services and police informers (Dietrich 1998: 18). The Federal Police are also authorized to carry out border checks at the German EU internal borders, dependent upon status reports and independent of grounds for suspicion. These controls are continued inland. However, the precondition for these checks to be carried out inland is a formally justified assumption that the person to be checked has recently crossed an external border. This regulation also delegates the authority to carry out inspections on transit routes and at railway stations and airports to the Federal Police. Under the *Counter-Terrorism Act (Terrorismusbekämpfungsgesetz, TBG)* of 2002, they are also authorized not only to stop and question people in the course of checks, but also to examine and verify their passports.

Beyond the territory close to the borders, on transit routes and at railway stations, checks independent of suspicion are carried out by the police officers of the federal states as part of their investigative duties. In this case, as part of the identity checks and as a matter of principle, the officers are obliged to enquire about a person's residence status. In some federal states, such as Berlin, for example, additional, special control competences in specific security zones are anchored in the *Security and Order Act of the State of Berlin (Sicherheits- und Ordnungsgesetz des Landes Berlin)*. Under the *Counter-Terrorism Act* of 2002, the police are also delegated the authorization to carry out checks, independent of a special reason, as part of specific searches for criminals (Stobbe, 2004: 92; Alt, 2003: 446).

Passports checks at airports are becoming more and more crucial (cf. 1.4.2.2) and, to an increasing extent, airline companies are involved in passport and visa checks and are held responsible for cases of irregular immigration via airports. By reassigning the

controls in this way, the state succeeds in increasing the effectiveness of its external controls (Guiraudon, 2001, 2002).

In order to combat entry on the basis of forged documents, methods of document verification are being improved across Europe (Sachverständigenrat 2004: 355; Cyrus 2004: 15 et seq.). These measures include the integration of photographs and biometrical data in visa and passports documents, as well as the establishment of an automatic network which links national and European databases, such as the Schengen Information System.

Visa policy

Citizens of the EU Member States do not need a visa to enter Germany, whereas nationals from all other third countries must, in principle, be in possession of one. Decisions on visa regulations for short stays of up to three months for visiting purposes or for tourists is incumbent upon the Council of the European Union⁵⁰, whereas it is the responsibility of the Member States to regulate long-term stays. In accordance with the Council's decision, several third countries are currently exempt from the obligation to hold a three month-visa ('*EU Positive List*' countries), known as a Schengen visa, which grants open access to all Schengen countries.⁵¹

Under § 71 para. 2 of the *AufenthG*, the embassies and general consulates of Germany are responsible for issuing visas abroad. For this reason, in terms of illegal migration, the embassies and general consulates act as preventive bodies during the preliminary stage of the migration process. Measures of control are oriented towards those who try to obtain a visa by providing false information.

Third country nationals who enter Germany legally with a visa and outstay its validity, or who take up employment, although they are not in possession of a work permit, are difficult to trace. Since no exit controls are carried out, it cannot be ascertained whether they have already left the country. In order to improve the handling and control of these cases, as well as cases of people who entered Germany with forged or fraudulently obtained visas, the *Central Register of Foreign Nationals Act (Ausländerzentralregistergesetz, AZRG)* was modified by the Counter-Terrorism Act in 2002. When this act came into force, the visa file was extended to become a visa decision file. Whereas previously, it was only information on applications which was registered, the visa decision file now also includes information on issued visas and rejected visa applications (§ 29 of the *AZRG*) (Schmahl, 2004: 218). Under the Counter-Terrorism Act, it is now also possible to register identity characteristics, including biometric features, among others (now § 49 para. 2 of the *AufenthG*). Hence, since 2003, German visas have been issued with an integrated photograph of the applicant. Regarding third country nationals who are exempt from visa requirements, it can often no longer be ascertained how long they

50 EU Treaty (2001), Article 62 Point 2 Letter b No i.

51 Council Regulation (EC) No. 539/2001 of 15 March 2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. Amended by Council Regulation (EC) No. 2414/2001 of 7 December 2001, Council Regulation (EC) No. 453/2003 of 6 March 2003, Council Regulation (EC) No. 851/2005 of 2 June 2005 and Council Regulation (EC) 1932/2006 of 21 December 2006.

have already been resident in the country, as, in most cases, passports are no longer stamped at border crossing points (Cyrus, 2004: 18; Vogel, 2000: 401).

1.3.2.3 Incentives for legal employment

With the coming into force of the *Second Act on Modern Services on the Labour Market* (*Zweites Gesetz für moderne Dienstleistungen am Arbeitsmarkt, Hartz II*), on 1 January 2003,⁵² several measures to promote legal employment subsequently took effect. In part, the legislation covered the reorganization of what are commonly known as mini-jobs. Employees in jobs with a monthly remuneration of no more than EUR 400, or in temporary employment with a duration of less than two months, or 50 days a year, are exempt from taxation and payments of social security contributions. Their employer, in contrast, is obliged to pay 30 per cent of their gross wages, including a 13 per cent health insurance contribution, a 15 per cent pension insurance contribution⁵³ and a 2 per cent payroll tax, church tax and solidarity tax contribution (*Solidaritätszuschlag*)⁵⁴. Furthermore, the law introduced a special form of mini-jobs for domestic services, also with a threshold of EUR 400, but with a reduced payment of only 13.7 per cent.⁵⁵ Finally, Hartz II granted a subsidy for unemployed people who started their own businesses.

Another measure to combat illegal employment or, rather, to promote legal employment in private households is that household services such as cleaning are tax-deductible to the sum of 20 per cent of a bill of up to EUR 3,000, giving a maximum possible deduction of EUR 600. The deductible sum doubles to EUR 1,200 if domestic nursing services are used. In addition, EUR 600 can be deducted for the services of craftsmen, bringing the total to EUR 1,800 (§ 35a para. 2 of the Income Tax Act). In all cases, the only costs taken into consideration are labour costs.

On 1 January 2004, an amendment to the *Crafts Code* (*Handwerksordnung, HwO*) came into force, reducing the number of trades which demand a master craftsman certificate (the *Great Certificate of Qualification – Großer Befähigungsnachweis*) and enrolment

52 In August 2002, the *Commission on Modern Services on the Labour Market*, which was established by the former chancellor, Gerhard Schröder and headed by Peter Hartz, a former human resources executive and member of the board of Volkswagen AG, submitted their report on recommendations to improve efficiency on the German labour market and to reform the German labour administration. The proposed measures have been split into four different laws, colloquially known as *Hartz I*, *Hartz II*, both of which came into force on 1 January 2003, *Hartz III*, which came into effect on 1 January 2004 and *Hartz IV*, which came into force on 1 January 2005

53 For 'regular' employment, the average health insurance contribution rate was 13.3 per cent of the gross wage in 2006; the pension insurance contribution rate has amounted to 19.9 per cent since 1 January 2007, having previously amounted to 19.5 per cent; the nursing care insurance contribution rate is 1.7 per cent and the unemployment insurance contribution rate was 4.2 per cent in 2007, but was reduced to 3.3 per cent on 1 January 2008. Half of each contribution rate is paid by the employee and half by the employer. Employees have an additional health insurance contribution rate of 0.9 per cent and childless employees carry an additional 0.25 per cent for nursing care insurance. The accident insurance contribution is paid in its entirety by the employer.

54 The solidarity tax contribution was introduced in 1991 to finance the costs of German reunification and amounts to 5.5 per cent of individual payroll and corporate taxes.

55 5 per cent health insurance contribution, 5 per cent pension insurance contribution, 2 per cent payroll tax, church tax and solidarity tax contribution, 1.6 per cent accident insurance contribution and, finally, 0.1 per cent apportionment.

in the Register of Qualified Craftsmen as a prerequisite for the practice of these occupations on a self-employed basis, to 41. In addition, apprentices with professional experience of at least 6 years, 4 of which must have been spent in a leading position, may also start their own business. 57 trades, codified in the HwO, can now be practised without the aforementioned qualifications. Furthermore, the amendment abolished the *owner principle (Inhaberprinzip)*, which demanded that the owner of a workshop be a master craftsman himself. Now it suffices that the operating manager is a master craftsman. Nonetheless, the amendment of the HwO has also brought about some problems related to illegal employment (see 1.4.2).

1.3.2.4 Specific measures to combat illegal employment in the construction business

In recent years, several laws and amendments have been passed to combat, in particular, the occurrence of illegal employment in the construction business. On 7 September 2001, the *Act for the Containment of Illegal Activity in the Construction Industry (Gesetz zur Eindämmung illegaler Betätigung im Baugewerbe)* came into force and led to the introduction of a statutory tax deduction amounting to 15 per cent of the sum invoiced, which must be paid by the principal of a construction service directly to the fiscal authority, rather than to the service provider. The aim of this measure is to ensure tax revenues and to work against the tax evasion practised by construction firms carrying out contracts (Bundesregierung, 2005: 5).⁵⁶

With the *Act on Intensifying the Fight Against Illicit Work and Correlated Tax Evasion (Gesetz zur Intensivierung der Bekämpfung der Schwarzarbeit und damit zusammenhängender Steuerhinterziehung)*, which came into force on 1 August 2004 and brought the Act to Combat Illicit Work and Illegal Employment into force, a detailed definition of the phenomenon and a transparent pooling of regulations were introduced in order to achieve the effect of prevention and an increased awareness of the injustices involved (Bundesregierung, 2005: 8).

In addition, the threat of punitive measures which has been raised in recent years (cf. 1.3.4) should discourage both employers and employees from resorting to illegal employment and thus exert a deterrent effect.

Especially worth mentioning in this context is the introduction of the general contractor's liability for the pending wages and social security contributions owed by his subcontractors. According to § 1a of the Act on the Posting of Workers (AEntG), as amended on 1 January 1999 due to the implementation of EU-Directive 96/71/EC into national law, general contractors are liable for the payment of the minimum wage to the workers of all their subcontractors⁵⁷, as well as for the payments to "the joint institutions of the

56 In order not to place reputable construction firms at a disadvantage, it is possible to refrain from making the tax deduction if the firm is able to show the principal evidence of exemption in the form of a notice of non-liability issued by the fiscal authorities.

57 Although there is no nationwide minimum wage in Germany, the Act on the Posting of Workers has introduced minimum wages in the construction business, the industrial cleaning business and, most recently, the mail delivery services. The illegally paid wage, which is taken as the basis for the calculation of social

social partners”, which, in this case, is the *Holiday and Pay Compensation Fund of the Construction Business (Urlaubs- und Lohnausgleichkasse der Bauwirtschaft, ULAK)*. In addition, the general contractor is liable for the social security contributions of his subcontractors in cases where the estimated value of the services provided exceeds EUR 500,000 in total (§§ 28e para. 3a to 3e of SGB IV).⁵⁸

1.3.2.5 Measures taken by the social partners

The social partners play a crucial role with regard to the illegal employment of immigrants. On 13 September 2004, the first *Alliance Against Illicit Work and Illegal Employment* in the construction business was concluded between the Organization of the German Construction Industry (*Hauptverband der Deutschen Bauindustrie, HDB*), the Umbrella Organization of the German Construction Trade (*Zentralverband des Deutschen Baugewerbes, ZDB*), the Industrial Trade Union Construction-Agriculture-Environment (*Industriegewerkschaft Bauen-Agrar-Umwelt, IG BAU*) and the Federal Ministry of Finance (BMF). Measures scheduled by the alliance consist of information campaigns on the adverse effects of illicit work and illegal employment, the enhancement of the exchange of information between the construction business organizations and the authorities, periodic inspections of both public and private building sites and the promotion of regional alliances (BMF, 2006: 69). These regional alliances exist in a number of federal states and seek to improve the cooperation between the local representatives of the construction business and the monitoring authority for illegal employment, which has been responsible for the fight against illicit work and illegal employment since 1 January 2004 (see 4.1).

A second tripartite alliance against irregular employment was concluded on 13 April 2006 for the transport, forwarding and logistics industry. The latest alliance to be accomplished between the social partners and the Federal Ministry of Finance in order to combat illicit work and illegal employment is that encompassing the meat processing industry and was established on 28 June 2007.

In 2004, the trade union for the construction business, IG BAU, launched the mobilization campaign *Ohne Regeln geht es nicht!* (“There must be rules!”). As a first step, IG BAU built a nationwide network of volunteers to secure compliance with collective agreements and to support the authorities. The second step was the installation of a hotline, where irregular and/or illegal doings on building sites could be reported. The operation was accompanied by a widespread information campaign among construction workers.⁵⁹

security contributions and taxes, is regarded as being the net wage [*fiction of net remuneration - Fiktion des Nettoarbeitsentgelts*; § 14 para. 2 SGB IV].

58 This regulation was introduced with the *Act to Facilitate the Combat Against Illegal Employment and Illicit Work (Gesetz zur Erleichterung der Bekämpfung illegaler Beschäftigung und Schwarzarbeit)* of 23 July 2002 and came into force on 1 August 2002.

59 The entire campaign was opposed by some members of the IG BAU and led to a lively internal discussion, underlining the abovementioned trade-off with which trade unions are confronted when it comes to combating the illegal employment of foreign nationals, in other words, international workers’ solidarity vs. combating illegal employment and thus, inescapably, harming illegally employed migrants.

Considerations regarding the introduction of a special ID card for workers in the construction business (*Bau-Card*), have been abandoned by the Federal Ministry of Labour and Social Affairs and the Federal Ministry of Finance. The social partners of the construction business proposed the card as early as 2000. It should contain *all the relevant information* regarding workers in the construction business, including a photograph, and facilitate data transmission between the authorities. The Federal Ministry of Labour and Social Affairs and the Federal Ministry of Finance instead propose to facilitate identification on site by introducing the obligation to carry an official ID card issued by the respective country (BMAS and BMF, 2008).

Another important measure was the foundation of the European Migrant Workers Union in 2004 (cf. 1.3.2.3).

1.3.3 Protection against the exploitation of workers

1.3.3.1 National law and international conventions

Enshrined in the *Basic Law* (*Grundgesetz*, GG), the German constitution of 1949, are basic rights which, as set out in Art. 1 para. 3 of the GG, constitute directly applicable law and can therefore be enforced by individuals through legal action. However, it is only universal human rights which may be invoked by undocumented foreign residents.⁶⁰ For example, an *illegally resident immigrant* can invoke the protection of human dignity (Art. 1 para. 1 of the GG). Correspondingly, the right to life and physical integrity (Art. 2 para. 2 s. 1 of the GG) is a universal right, whereas the right to personal freedom is restricted by sentence 2, stating that “[e]very person shall have the right to the free development of his personality, insofar as he does not violate the rights of others or offend against constitutional order or moral law”. These constitutional rights do, nevertheless, have what is referred to as the ‘third-party effect’, as they establish an ‘objective value system’ which is legally binding in both civil and labour law. This entails, for example, the fact that employers must respect the fundamental values of the Basic Law in their dealings with illegally employed foreign residents, including the protection of their fundamental rights, that is, human dignity and personal integrity, their right to equal treatment, especially of men and women, freedom of religion and conscience, freedom of speech, the special protection of marriage and family, and the negative and positive freedom of association (McHardy, 1994: 97).

The basic rights codified in international law and the documents of the United Nations and the International Labour Organization (ILO) apply to all human beings; in other words, they also protect illegally resident and/or employed migrants (Taran, 2004). Above all, this is true for universal rights; that is, the right to life, liberty and personal integrity, equality before the law, and the due process of law, as enshrined in the *Universal Declaration of Human Rights* of 1948. To what extent these basic rights are legally binding and enforceable by individuals through legal action is a matter of controversial discussion (Schneider, J., 2005).

⁶⁰ Chapter 3.3 mainly deals with undocumented migrants. To make it clear, the group of illegally employed immigrants not only comprises undocumented migrants, but many legally employed foreign nationals, for example, working under irregular conditions as well.

Three international conventions are especially targeted at migrant workers, including those who are irregularly employed. They are ILO Convention No. 97 (*Migration for Employment Convention*) of 1949, ILO Convention No. 143 (*Migrant Workers Convention*) of 1975 and the more recent *UN International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families* of 1990.

The first of the abovementioned conventions aims at the prosecution of those promoting irregular immigration and does not yet give consideration to the rights of irregular migrants⁶¹, while ILO Convention No. 143 demands that a migrant worker, who has been legally residing and employed in a country of destination “[...] shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorization of residence or, as the case may be, work permit” (ILO Convention No. 143, Art. 8 No. 1; ILO 1975), which is typically the case in Germany. Furthermore, Article 8 No. 2 calls for equality of treatment with nationals regarding “*guarantees of security of employment, the provision of alternative employment, relief work and retraining*”.

In December 1990, the United Nations General Assembly adopted the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, which is the most comprehensive yet with regard to the rights of migrant workers (Spieß, 2007). Article 2 No. 1 of the convention, defining the term ‘migrant worker’, can be interpreted to the effect that the definition includes regularly as well as irregularly employed migrants; thus the entire convention also applies to illegally employed migrants. Articles 68 and 69 explicitly refer to migrant workers and members of their families in an irregular situation. It was not until 1 July 2003 that the convention entered into force, after the threshold of 20 ratifying/acceding states (Art. 87 No. 1) had been reached in March 2003. As of July 2007, 37 countries had ratified/accessed the convention, all of them being developing and migrant sending countries. Of the abovementioned conventions, Germany has only ratified ILO Convention No. 97.

1.3.3.2 Access to social services

Irrespective of their residence status, migrants are entitled to certain welfare benefits. Inter alia, this pertains to the claim of assistance in cases of medical emergency, which, in principle, is not limited to German nationals (Schönwälder et al., 2004: 41). Illegally resident migrants are entitled to medical care under the provisions of the *Asylum Seekers Benefits Act (Asylbewerberleistungsgesetz, AsylbLG)*, which grants services which are limited in comparison to the regular insurance coverage. In particular, medical services are granted in cases of acute sickness and pain, pregnancy and childbirth (§ 4 of the AsylbLG).⁶² The social welfare offices responsible are obliged to cover the costs for the services defined in § 3, which covers standard benefits, such as, for example, food, clothing, or accommodation, and § 4 of the AsylbLG. Generally speaking, it is also

61 “Any person who promotes clandestine or illegal immigration shall be subject to appropriate penalties” (ILO Convention No. 97, Annex I, Article 8; ILO, 1949).

62 There has been controversial discussion as to whether the treatment of chronic diseases is covered by the Asylum Seekers Benefits Act (Müller, 2004: 65).

possible to apply for social benefits, but whether or not there is an entitlement must be reviewed in every single case (Schönwälder et al., 2004: 41).

However, under the provisions of the AsylbLG, the application for these services or the application for social benefits at the social welfare offices means the automatic disclosure of the residence status of the migrant, who, in the case of an irregular stay, is thus threatened with expulsion. This deters most irregular migrants from claiming social benefits since, in accordance with § 87 para. 2 of the AufenthG, public entities have the obligation to forward information to the authority for foreigners if they obtain knowledge of: 1. the whereabouts of a foreigner who does not possess a required residence title and whose deportation has not been suspended; 2. a violation of a spatial restriction; or 3. any other reasons for expulsion (§ 87 para. 2 of the AufenthG).⁶³ Churches, as well as charitable and human rights organizations heavily criticize this regulation and demand its abolition.

Illegally resident and/or employed migrants cannot claim pension payments, child benefits or child-raising allowances (Röseler and Vogel, 1993: 26).⁶⁴ In contrast, accident insurance covers illegally employed people, irrespective of their residence status, which is particularly important in the construction business. In this case, the insurance coverage does not depend on individual contribution payments, but is disbursed in cases of work-related accidents or occupational disease (Röseler and Vogel, 1993: 25). Pursuant to the *Act on Intensifying the Fight Against Illegal Employment and Ensuing Tax Evasion*, the statutory accident insurance companies have the right to claim a refund from employers illegally employing immigrants who use the accident insurance services and benefits (§ 110 para. 1a of SGB VII).

In its report, “*Illegally resident migrants in Germany*”, which was commissioned under the coalition agreement between the Christian Democratic Union/Christian Social Union and the Social Democratic Party of Germany when they formed the Federal Government (the ‘*Grand Coalition*’) in November 2005, the Federal Ministry of the Interior discusses this problem (BMI, 2007a). In general, all private individuals and institutions are exempt from the obligation to transfer information to the authority for foreigners, that is, physicians, private hospitals and schools, as well as privately operated kindergartens (BMI, 2007a: 25; Lehmann, 2008: 27). Furthermore, in accordance with no. 87.2.0.3 of the *Preliminary Application Guidelines for the Residence Act (vorläufige Anwendungshinweise*

63 No. 87.1.1 of the *Preliminary Application Guidelines for the Residence Act (vorläufige Anwendungshinweise zum Aufenthaltsgesetz)* refers to the definition of public entities in § 2 of the *Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG)* and underlines the fact that a particular obligation to forward information applies to the Federal Police and the police forces of the States, as well as regulatory bodies and authorities such as the criminal prosecution authorities, the authorities of penal institutions, for example, prisons, the law courts, German embassies and general consulates, the Federal Office for Migration and Refugees, the authorities competent to prosecute and punish infringements, registration offices (*Meldebehörden*), the competent authorities for displaced persons (*Vertriebenenbehörden*), the Federal Administration Office (*Bundesverwaltungsamt*), registry offices (*Standesämter*), fiscal authorities, the Federal Employment Agency, providers of social assistance, providers of unemployment assistance, the competent authorities for the implementation of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz*), youth welfare offices and public entities in the field of teaching, education and science.

64 See Cholewinski (2005) for a comparative paper on obstacles to irregular migrants in the accessing of social services. Deutsches Institut für Menschenrechte (2007) provides an analysis of undocumented migrants’ access to medical services in Germany.

zum Aufenthaltsgesetz), issued by the Federal Ministry of the Interior, public entities are obliged to forward information concerning the residence status of immigrants only if they receive this information *in the execution (in Erfüllung)* of their duties. They need not do so if they come by the information *casually (bei Gelegenheit)*, or privately. The BMI underlines that physicians, in particular, are exempt from this, due to their obligation to maintain confidentiality (BMI, 2007a: 25 et seq.). Information which a physician acquires during the exercise of his/her profession, must not be forwarded; in fact, its unauthorized disclosure is even threatened with penalties under § 203 of the Penal Code.

Nonetheless, there still seems to be legal uncertainty as to how to interpret *in the execution* and *casually* (BMI, 2007a: 27) and how the administrative staff of medical centres should be treated regarding the transfer of information in cases where they do not assist the physicians (BMI, 2007a: 28).

In addition to the legal uncertainty on the obligation to transfer information, those who provide humanitarian assistance to illegally resident migrants are threatened with penalties under § 96 para. 1 no. 2 of the AufenthG, which punishes those who assist foreigners to prolong their illegal stay. As to the question of whether the services provided by doctors in the course of treating illegally resident migrants carry a penalty, Fodor (2001: 179 et seq.), for example, argues that this depends on whether the foreigner makes the continuation of his illegal stay conditional on the medical treatment and whether the doctor receives a *pecuniary advantage*. This would only be the case if this pecuniary advantage was paid in order to assist in facilitating the irregular residence; the mere payment for the medical treatment would not suffice to constitute punishability. With regard to the legal situation after the 2007 amendment of the Residence Act, which introduced some minor changes, Lehmann (2008) comes to a similar conclusion.

Fodor (2001: 181) concludes that the decision as to whether medical assistance for illegally resident migrants incurs a penalty must be assessed individually in every case. With regard to churches and lobbying associations, the argument they put forward is that the adoption of the discretionary clause on exemption from punishment in cases of humanitarian assistance (Art. 1 no. 2) of *Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence* would have resulted in more legal certainty.

The aforementioned risks faced by providers of social services in health care for illegally resident migrants touch on numerous issues that are not easy to solve. The dilemma originates in the relationship between the state's right to sovereignty, the human right to health, life and physical integrity and the question of how the costs for the treatment administered should be distributed (Cyrus, 2004: 47). Providers of medical services who treat illegally resident migrants run the risk of penal or legal consequences for so doing. At the same time, doctors must fulfil the obligations of their profession by following their conscience, the principles of medical ethics and humanity (Bundesärztekammer, 2004). In addition, cases of failure to render assistance might result in penal consequences (Groß, 2005: 12). The providers of medical services, however, pose the question as to who pays for the medical treatments. If the answer to this question involves the social welfare offices, it then, in turn, leads to the obligation to forward information. The only public authorities

that offer anonymous medical counselling and examination and, in selected cases, cover the costs of hospital treatment, are the municipal health offices. However, this is only possible when it is a matter of dealing with diseases that might result in epidemics, such as tuberculosis, HIV or hepatitis, and it only applies to individuals who do not have health insurance, or cannot pay the costs (Groß, 2005: 16). In the course of intensified media attention in recent years, the existence of medical networks treating undocumented migrants has emerged in most major cities of Germany; the authorities, in the main, tolerate these networks. It can therefore be concluded that the existing medical care received by illegally resident migrants has a predominantly charitable character and depends on the commitment of individual people or charitable organizations.

1.3.3.3 Protection against exploitation

Whatever the legal nature of the employment relationship with a foreign national, be it regular or irregular, and whatever the residence status of the immigrant, migrant workers have the right to claim due wages. In cases where the irregular nature of an employment relationship with a foreign national who is eligible to work in Germany results in illegal practices on the part of the employer, be it that the employer pays less than he should, or that he does not pay at all, or that migrant workers are employed under less favourable conditions than comparable employees, it is clear that foreign nationals can sue for their due wages. The vital point here is whether the respective migrant workers are aware of their rights.

In cases where the foreign national is not entitled to work in Germany⁶⁵, the abovementioned Federal Ministry of the Interior report comes to the conclusion that the actual employment relationship constitutes the basis on which a migrant worker can claim due wage payments (BMI, 2007a: 25). The problem is, that illegally resident migrants risk the disclosure of their status and are thus threatened with expulsion, as judges are explicitly bound to transfer the relevant information to the authority for foreigners, since they will have received the information in the execution of their duties (BMI, 2007a: 30). However, the danger of expulsion exists even for migrant workers who are legally entitled to work, but are employed under irregular conditions. For example, if violations regarding the minimum wages in the construction business, as defined by the Act on the Posting of Workers, are ascertained, the general contractor then cancels the contract with the respective subcontractor, whose foreign workers thus lose their residence and work permits and are therefore obliged to leave Germany.

In 2004, the *European Migrant Workers Union* (EMWU), based in Munich and maintaining bureaus in Frankfurt and Warsaw, was founded as an initiative on the part of the IG BAU, in order to help migrant workers to enforce their rights. The EMWU's goal is to obtain prompt assistance for illegally employed migrant workers, who are often in a desperate situation when payments are delayed, incomplete or have completely ceased, and are on the verge of leaving the country (TU2DE). Recently, due to the "*moderate development of the number of members*"⁶⁶, mostly originating from Poland, Romania,

⁶⁵ In such cases, there is also a regular failure to adhere to the provisions for legal employment relationships.

⁶⁶ cf. the IG BAU homepage (www.igbau.de).

Hungary and Bulgaria, and employed in the construction business, the EMWU has been integrated with the IG BAU and will no longer act as an independent professional organization, but as a registered association (*eingetragener Verein*) within the IG BAU.

The EMWU does not usually seek to reach court decisions, attempting, rather, to obtain out-of-court-agreements in order to advance proceedings. As a result of the abovementioned general contractors's liability for wage payments and social security contributions of all his subcontractors, the EMWU addresses the general contractor directly; the contractor himself is often interested in reaching out-of-court-agreements. Negotiations regarding pending wage payments do not deal with hourly wages, since the EMWU always demands the minimum wage where applicable, but with the number of actual working hours, which is often higher than the number declared.

On 19 February 2005, a new statutory offence was introduced into the *Penal Code (Strafgesetzbuch, StGB): Human Trafficking for the Purpose of Exploiting Human Labour*. Under the provisions of § 233 of the StGB, this offence is punishable by imprisonment from six months to 10 years, while the mere act of assisting in human trafficking carries a penalty of as many as five years of imprisonment. In 2005, there was only one conviction on the basis of this section of the act (Bundesregierung, 2007b: 2).

1.3.3.4 Regularizations

As mentioned above, Germany has not implemented any regularization campaigns. It is normally argued that illegal residence and employment should not be rewarded in the medium-term. In addition, these types of measures would undermine the controlling effect of migration policy and put those immigrants who overcame the hurdles necessary in order to legally take up employment in Germany at disadvantage. In principle, experts refer to the legal-political culture in Germany, where the principle of legality outranks the principle of opportunity. For this reason, amnesties are very rarely considered, although they have, in fact, been employed with regard to tax evaders (Sachverständigenrat, 2004: 358 et seq.).

It is fundamentally debatable as to whether regularization campaigns are effective (see 4.2). Admittedly, there is general agreement that such campaigns improve the social situation of illegally resident people. Apart from the humanitarian considerations, they can also constitute a pragmatic approach to reducing illegal employment on the labour market (Sachverständigenrat, 2004: 358 et seq.). However, to achieve this effect, measures that will have an impact on labour market access and illicit work as a whole should be considered, rather than being restricted to dealing with illegally employed foreign nationals (OECD, 2000: 66). That regularizations are an appropriate means of reducing illegal immigration and thus, in the long run, the illegal employment of immigrants, is very much doubted in Germany; consideration tends to be given to the experiences of other countries, where the expectation of more regularization campaigns seems to have acted as a strong pull factor for further illegal immigration (Schönwälder et al., 2004: 75) (cf. also 1.4.2.4).

To date, the regularization issue in Germany has primarily been discussed in the light of rejected asylum seekers who cannot be deported, rather than from the viewpoint of labour market aspects, as it is in Southern Europe (Kreienbrink, 2004: 248 et seq.; Finote-

lli, 2005). The toleration status, which does not legalize the residence of the person to be deported, has, in many cases, led to year-long ‘chain tolerations’ (*Kettenduldungen*), with the person affected remaining in a situation of uncertainty.

For humanitarian reasons, the so-called *Old Case-Arrangements* (*Altfallregelungen*) and *Arrangements for the Right to Continued Stay* (*Bleiberechtsregelungen*) were carried out under certain circumstances for specific groups of individuals. According to the Federal Ministry of the Interior, a total of ten arrangements of this kind were carried out between 1999 and 2001, in consultation with the federal states. Each arrangement was limited to numerically restricted nationalities or status groups and was always linked to certain conditions. The applicant may not have violated the law in any way and may not have been receiving social benefits in order to live (Cyrus, 2004: 74 et seq.; Hailbronner, 2000: 254–263). Unlike the opinion expressed by Cyrus (2004: 75), these measures differ considerably from campaigns in other countries, regardless of the restriction to certain nationalities, as the applicants in Germany are in possession of a toleration status and are thus registered with the authorities.

The most recent Arrangement for the Right to Continued Stay, which was passed by the *Standing Conference of the Ministers and Senators of the Interior of the Federal States* on 17 November 2006 (*Innenministerkonferenz*, IMK, 2006), offered tolerated foreign nationals, who are, in fact, obliged to leave the country, but who are “*economically and socially integrated*” in Germany, the possibility of obtaining a residence permit, in accordance with § 23 para. 1 of the *AufenthG*, if several requirements are met. As of the date of the decision, the tolerated immigrant must have lived continuously in Germany for at least eight years, or six, if she/he has a child who is a minor and attends kindergarten or school. In addition, she/he must have permanent employment and must not rely on benefits in order to live; furthermore, there should be no anticipation that she/he will do so in the future. There are several exemptions from these requirements, such as, for example, apprentices. Furthermore, families must have sufficient living space and, by 30 September 2007, all potential recipients of a residence permit must have given proof that they have sufficient command of the German language, here adjudged to be level A2 of the *Common European Framework of References for Languages*. There are, however, several groups which are excluded from this arrangement, for example, immigrants who have deliberately deceived the authority for foreigners or who have committed crimes in Germany.

By 30 September 2007, 71,857 immigrants had applied for a residence permit on the basis of the IMK decision. To date, 19,779 immigrants have been granted a permit, 29,834 immigrants received a temporary suspension of deportation (*Duldung*⁶⁷), valid until 30 September 2007, in order to meet the requirements and 7,885 applications have been rejected. In 19,302 cases, a decision has yet to be made (Bundesregierung, 2007c: 7).

With the *Act to Implement EU Directives* (*Richtlinienumsetzungsgesetz*, RLUMG), which came into force on 28 August 2007 and which implemented 11 EU-Directives concerning residence and asylum, a further old case arrangement (cf. § 104 a and b of the *AufenthG*), which resembles the IMK decision in its conditions, was enacted. By 31 December 2007,

⁶⁷ A temporary suspension of deportation is not a residence permit in a legal sense; it does not remove the foreigner’s obligation to leave the country, but merely postpones its enforcement.

22,858 applications had been filed and 11,765 people have since been granted a residence permit in accordance with §§ 104 a and b of the AufenthG (Bundesregierung, 2008b).

Apart from legalization campaigns, asylum petitions, marriage and parenthood provide alternative means by which a legal residence title may be obtained. The legal regulations try to ensure that no incentives for illegal migration flows to Germany are created, as would be the case if simple legalization possibilities were offered. Appeals to hardship commissions or petitions for subsidiary protection do not constitute legalization options.

1.3.4 Punitive measures

Pursuant to the current framework regarding the punishment for the illegal employment of foreign nationals (§§ 10 and 11 of the SchwarzArbG 2004; § 404 of SGB III)⁶⁸, the main focus lies on the punishment of the employers.

The mere employment, deliberately or negligently, of foreign nationals who are not entitled to work, is treated as an infringement and is thus punished with a fine of up to EUR 500,000. If the employer *persistently* repeats the infringement, or if the illegal employment involves more than five immigrants, the employer can be punished with a prison term of up to one year. In cases of ruthless self-interest on the part of the employer, or where the illegal employment takes place under significantly less favourable conditions than for comparable German employees, the prison term can be increased to three years. In particularly severe cases, a minimum of six months and a maximum of five years of imprisonment can be imposed. Analogical regulations apply under the provisions of the Temporary Employment Act (§§ 15, 15a, 16 of the AÜG) and the Act on the Posting of Workers (§ 5 of the AEntG), with the latter referring to the construction business. Furthermore, in order to prevent the employment of subcontractors for concealment purposes, liability is defined as resting with the general contractor.

Fines against immigrants who are employed, but are not entitled to work, are much lower, amounting to only EUR 5,000. However, in a case where the foreign national insistently repeats the infringement, she/he can also be sentenced to a prison term of up to one year. For a comprehensive overview of punitive measures, see Table 1.3.

In addition to the foregoing penalties, which are related solely to the fact of having illegally employed foreign nationals, employers are faced with additional penalties. Violations of the regulations of the tax law or the provisions set out for the social security systems are treated as criminal offences and can be punished with a prison term of up to five years, or 10 in severe cases. Furthermore, illegal employment is often accompanied by violations of the provisions set out in the Industrial Code, or the Crafts Code; these are treated as infringements. Finally, as is often the case with natives, illegally employed people may be receiving social benefits to which they are not entitled.⁶⁹

68 For more information on the development of the framework of penalties since 1981, see Hofherr 1999:14–16.

69 For detailed information on ‘additional’ punitive measures, see Bundesregierung (2005).

Table 1.3: Punitive measures

Violation	Legal basis	Fine (infringement)	Penalty (criminal offence)	Object
<i>Illegal employment of foreign nationals</i>				
Working without permit	§ 404 para. 2 no. 4 of SGB III	up to EUR 5,000	-	Employee
Repeatedly working without permit	§ 11 para. 1 no. 2b of the SchwarzArbG	-	Imprisonment of up to 1 year, or monetary penalty	Employee
Employment of foreign nationals who are not entitled to work	§ 404 para. 2 no. 3 of SGB III	up to EUR 500,000	-	Employer
Repeated employment of foreign nationals who are not entitled to work	§ 11 para. 1 no. 2a of the SchwarzArbG	-	Imprisonment of up to 1 year, or monetary penalty	Employer
Employer acts out of ruthless self-interest, as defined in § 11 para. 1 no. 2a of the SchwarzArbG	§ 11 para. 2 of the SchwarzArbG	-	Imprisonment of up to 3 years, or monetary penalty	Employer
Assigning work-related services to entrepreneurs who either themselves employ foreign nationals who are not entitled to work, or whose subcontractors do	§ 404 para. 1 of SGB III	up to EUR 500,000	-	General contractor
Employment of more than 5 foreign nationals who are not entitled to work	§ 11 para. 1 no. 1 of the SchwarzArbG	-	Imprisonment of up to 1 year, or monetary penalty	Employer
Employer acts out of ruthless self-interest as defined in § 11 para. 1 no. 1 of the SchwarzArbG	§ 11 para. 2 of the SchwarzArbG	-	Imprisonment of up to 3 years, or monetary penalty	Employer
Employment of foreign nationals who are not entitled to work, under significantly less favourable conditions than comparable German employees	§ 10 para. 1 of the SchwarzArbG	-	Imprisonment of up to 3 years, or monetary penalty	Employer
Severe incidences of the case provided for under § 10 para. 1 of the SchwarzArbG	§ 10 para. 2 of the SchwarzArbG	-	Imprisonment from 6 months up to 5 years	Employer
Human trafficking for the purpose of exploiting human labour	§ 233 of the StGB	-	Imprisonment from 6 months to 5 years	

Violation	Legal basis	Fine (infringement)	Penalty (criminal offence)	Object
<i>Illicit hiring out of employees</i>				
Hiring out of workers without having a permit to do so, in accordance with § 1 para. 1 s. 1 of the AÜG	§ 16 para. 1 no.1 of the AÜG	up to EUR 25,000	-	TEA
Employment of workers who have been assigned by an illicit TEA	§ 16 para. 1a of the AÜG	up to EUR 25,000	-	Employer
Employment of foreign nationals who have been assigned by an authorized proper TEA, but who are not entitled to work	§ 16 para. 1 no.2 of the AÜG	up to EUR 500,000	-	Employer
Hiring out of foreign nationals who are not entitled to work, and without having an appropriate permit	§ 15 para. 1 of the AÜG	-	Imprisonment of up to 3 years, or monetary penalty	TEA
Severe incidences of the case provided for under § 15, para. 1 of the AÜG	§ 15 para. 2 of the AÜG	-	Imprisonment from 6 months to 5 years	TEA
Employment of foreign nationals who have been assigned by an authorized TEA, but who are not entitled to work. The employment takes place under significantly less favourable conditions than that of comparable German employees	§ 15a para. 1 s. 1 of the AÜG	-	Imprisonment of up to 3 years, or monetary penalty	Employer
Severe incidences of the case provided for under § 15a para. 1 s. 1 of the AÜG	§ 15a para. 1 s. 2 of the AÜG	-	Imprisonment from 6 months to 5 years	Employer
Simultaneous employment of more than 5 foreign nationals who have been assigned by an authorized TEA, but who are not entitled to work	§ 15a para. 2 s. 1 no. 1 of the AÜG	-	Imprisonment of up to 1 year	Employer
Severe incidences of the case provided for under § 15a para. 2 s. 1 of the AÜG	§ 15a para. 2 s. 2 of the AÜG	-	Imprisonment of up to 3 year, or monetary penalty	Employer
Repeated employment of foreign nationals who have been assigned by an authorized TEA, but who are not entitled to work.	§ 15a para. 2 s. 1 no. 2 of the AÜG	-	Imprisonment of up to 1 year	Employer
Severe incidences of the case provided for under § 15a para. 2 s. 1 no. 2 of the AÜG	§ 15a para. 2 s. 2 of the AÜG	-	Imprisonment of up to 3 year, or monetary penalty	Employer

Violation	Legal basis	Fine (infringement)	Penalty (criminal offence)	Object
Employment of foreign nationals who have been assigned by an illicit TEA and who are not entitled to work	This constitutes not the illicit hiring out of workers, but the illegal employment of foreign nationals (§ 10 para. 1 of the AÜG in connection with § 9, no. 1 of the AÜG)	Depending on the type of violation, up to EUR 500,000 (§ 10 para. 1 of the AÜG in connection with § 9, no. 1 of the AÜG)	Imprisonment of up to 1, 3 or 5 years, or monetary penalty (§§ 10 and 11 of the SchwarzArbG)	Employer
Hiring out of workers in the construction business	§ 16 para. 1 no. 1b of the AÜG	up to EUR 25,000	-	TEA
Illegal Posting of Workers				
Non-compliance on the part of employers with the regulations of the Act on the Posting of Workers (AEntG), under the provisions of which, domestic or foreign employers are obliged to provide certain working conditions, in particular, the payment of the agreed minimum wage	§ 5 para. 1 no. 1 of the AEntG	up to EUR 500,000	-	Employer
Non-compliance, on the part of TEAs, with the statutory payment of the minimum wage to assigned workers	§ 5 para. 1 no. 1 of the AEntG	up to EUR 500,000	-	TEA
Non-payment of statutory contributions by domestic or foreign employers to the joint institutions of the social partners, that is, the Holiday and Pay Compensation Fund (ULAK) and the Auxiliary Social Insurance Fund	§ 5 para. 1 no. 2 of the AEntG	up to EUR 500,000	-	Employer
Assigning the supply of a substantial <i>significant quantity</i> of construction services to entrepreneurs who either themselves fail to comply with the regulations of the AEntG regarding working conditions, in particular, the payment of the agreed minimum wage, or whose subcontractors fail to do so	§ 5 para. 2 of the AEntG	up to EUR 500,000	-	General contractor

Violation	Legal basis	Fine (infringement)	Penalty (criminal offence)	Object
Non-registration of posted workers at the competent customs administration authority; the workers must be registered, in the German language, before beginning to supply the construction service	§ 5 para. 1 no. 8 of the AEntG	up to EUR 25,000	-	Foreign employer / TEA
Non-issuance of an assurance of compliance with the working conditions, as provided for under § 1 of the AEntG	§ 5 para. 1 no. 9 of the AEntG	up to EUR 25,000	-	Foreign employer / TEA
Other punitive measures				
Measure	Legal basis	Precondition for the application of the measure		Subject of the measure
Exclusion of up to 3 years from participation in public tenders for construction contracts	§ 21 of the SchwarzArbG	A sentence of at least 3 months imprisonment, or a monetary penalty of at least 90 daily rates, or the imposition of a fine of at least EUR 2,500 as a result of a violation of the regulations on illicit work and illegal employment		Employer
Exclusion from participation in public tenders for procurement, construction and service contracts, for <i>an appropriate time, until the verified re-establishment of the reliability</i> of the entrepreneur	§ 6 of the AEntG	The imposition of a fine of at least EUR 2,500 as a result of a violation of § 5 of the AEntG, and, in particular, with regard to compliance with agreed working conditions and payment of agreed minimum wages)		Employer
The liability of a general contractor in the construction industry for the payment of the social security contributions of his contractors and of the TEAs commissioned by his contractors	§ 28 para. 3a to 3e of SGB IV	-		General contractor
The liability of a general contractor for the payment of the minimum wages, as well as his contractors' and the subcontractors' contributions to the construction business social fund, together with those of the TEAs commissioned by his contractors or the subcontractors	§ 1a of the AEntG	-		General contractor

Violation	Legal basis	Fine (infringement)	Penalty (criminal offence)	Object
The liability of employers who hire foreign nationals who were not entitled to work, for deportation costs	§ 66 para. 4 s. 1 of the AufenthaltG	-	-	Employer
The liability of employers who use illicit work, for accident insurance agency expenditures arising from an illegally employed worker's accident at work; the same applies to private households, which employ or commission illegally employed workers	§ 110 para. 1a of SGB VII	-	-	Employer
Partial or complete prohibition of tradesmen from conducting their business, if facts prove their unreliability or the unreliability of those who have been commissioned to carry out the management of the business, in terms of illicit work and illegal employment, among other things	§ 35 para. 1 of the GewO	-	-	Employer

Source: <http://www.berlin.de/sen/arbeit/schwarzarbeit/strafen.html>, authors' translation, authors' elaboration.

1.4. Policy evaluation

“It is always risky to undertake a general review of the effectiveness of state policies on migration since one cannot really separate them from the specific context of a country’s history, social and political institutions, the limits imposed by geography, and the pressures unleashed by changing conditions of its economy.”

Abella (2000: 205)

1.4.1 Policy implementation

1.4.1.1 Inspections and investigations carried out by the monitoring authority for illegal employment (Finanzkontrolle Schwarzarbeit, FKS)

Competent authorities

From 1981 until the beginning of the 1990s, the local labour offices held sole responsibility for workplace checks and investigations carried out in order to bring about prosecutions for illicit work and illegal employment. As of 1992, with the *Act to Amend the Fiscal Administration Law (Gesetz zur Änderung des Finanzverwaltungsgesetzes)*, the customs administration authorities were also entrusted with the relevant control activities. Since then, the customs administration authorities and the labour offices have shared responsibilities for workplace checks made to combat illegal employment. With the *Act to Amend the Third Book of the German Social Code (SGB III-Änderungsgesetz)* of 1997, customs officers who are deployed in workplace inspections have been assigned the rights and duties of police officers and, as such, are investigative personnel of the public prosecutor’s office. This has facilitated the proceedings, as previously, labour inspectors had to call in the police if, during ongoing inspections, certain suspicious facts emerged (Vogel, 2001: 338).⁷⁰

On 1 January 2004, the *Third Act on Modern Services for the Labour Market (Hartz III)* came into force and led to the bundling of the control responsibilities with which the customs administration was charged under the authority of the newly founded monitoring authority for illegal employment (*Finanzkontrolle Schwarzarbeit, FKS*). The 2,700 employees of the Labour Market Inspection have been transferred to the FKS.

*Organization of the FKS*⁷¹

The headquarters of the FKS is located at the chief customs office in Cologne. Nearly 6,500 officers, deployed in 113 locations, each of which is affiliated to the local customs administration offices, are assigned to this organization, the monitoring authority for illegal employment. Each location is intended to have a staff of at least 36 officers, assigned to three different task forces (*Arbeitsgebiete*).

⁷⁰ The details of such external controls are not dealt with here. For more information, see Cyrus and Vogel (2002). For a critical assessment, see Vogel (2003).

⁷¹ The source of the two following sub-chapters, is a recently published report, which was compiled by the Federal Audit Office, on the organization and the activities of the FKS, (Bundesrechnungshof, 2008: 10 et seq.).

Around 20 per cent of the respective staff is assigned to the *Prevention* task force (*Prävention*), which supports the work of the other task forces, as well as that of other authorities such as the public prosecutor's office. Prevention officers are deployed to spend at least 50 per cent of their working time on patrol and thus guarantee an extensive presence. They are allowed to carry out discretionary inspections and investigations unrelated to a specific suspicion (*verdachtsunabhängige Prüfungen und Ermittlungen*).

The majority of the officers at each location, that is, approximately 65 per cent, should be allocated to the *Inspections and Investigation* task force (*Prüfungen und Ermittlungen*), which carries out all inspections and investigations required by law, as long as these do not come under the responsibilities of one of the other two task forces.

The remaining staff is for assignment to the *Punishment* task force (*Ahndung*). This task force is responsible for inspections and investigations such as document checks, data matching, for which no external work is necessary, and for the monetary fine proceedings (*Bußgeldverfahren*). It is also this task force that receives the appeals against fines issued by *Prevention* or *Inspections and Investigation*. Finally, *Punishment* processes the DALEB-System (Matching of Benefit Recipients and Employment Data, *Datenabgleich Leistungsempfänger/Beschäftigtendatei*), which collates periods of during which unemployment benefits are received with the periods of employment as reported by the respective employers for every individual. Thus, cases where individuals are in receipt of benefits to which they are not entitled can be identified, as long as employers fulfil their obligation to report to the health insurance companies, which are responsible for the collection of all social security contributions, in other words, for health insurance, pension insurance, accident insurance, nursing care insurance and unemployment insurance.

Selected activities

In order to carry out the required controls on individuals and on-site investigations of business documents, the customs administration and the supporting authorities (see below) are allowed to enter the premises and offices of employers, as well as of principals and general contractors, during the *working hours*⁷² of the employees, the self-employed individuals or the posted workers (§ 3 para. 1 and para. 2 of the SchwarzArbG, § 4 of the SchwarzArbG). With the Act to Combat Illicit Work and Illegal Employment, the FKS has been given comprehensive rights to control business, and even private, documents.⁷³ Non-compliance on the part of the employers, employees or principals with the statutory obligation to cooperate with inspections (§ 5 of the SchwarzArbG) can be punished by a fine of up to EUR 30,000 (§ 8 para. 2 of the SchwarzArbG).

At irregular intervals, the FKS conducts nationwide inspections with an emphasis on specific sectors (*Schwerpunktprüfungen*) such as, for example, the construction busi-

⁷² Before 1 August 2004, inspections were only allowed during *office hours*.

⁷³ It is often the case that illegally employed immigrants keep their own records of their working hours or other employment-related facts.

ness.⁷⁴ These inspections range in duration from several days to several weeks and are carried out by the staff of the *Prevention* task force.

According to an agreement between the Federal Ministry of Finance and the Federal Employment Agency, the FKS shall conduct a comprehensive examination of all contracts for work and services (*Werkverträge*) concluded within the framework of bilateral agreements with Eastern European countries. The relevant documents are forwarded by the Federal Employment Agency, which grants permission for the employment of contractual workers.

Finally, the FKS works with both the abovementioned nationwide alliances and the regional construction business alliances which arose from them. Joint efforts include, inter alia, the circulation of sector-specific handouts on cooperating during inspections, the nomination of local contact people and the forwarding of example calculations relating to various works and services.

External inspections are initiated as a result of investigations carried out by the labour offices or chief customs offices on the basis of findings made by other authorities, such as the police, the fiscal authorities, social insurance agencies, the public prosecutor's office, the authority for foreigners and so forth, or on the basis of tip-offs from competitors, neighbours, trade unions or regular employees (Stobbe, 2004: 101; Cyrus and Vogel, 2002).

1.4.1.2 Cooperation between authorities

According to § 2 para. 2 of the SchwarzArbG, the customs administration authorities are supported in their control activities by the fiscal authorities, the Federal Employment Agency, the health insurance companies, in their function as collector of social security contributions, the providers of pension insurances, the providers of accident insurances, the providers of social assistance, the competent authorities for the provision of services provided for in the Asylum Seekers Benefits Act, the authorities listed in § 71 para. 1 to 3 of the AufenthG, in other words, the authority for foreigners, German embassies and general consulates and the Federal Police, the *Federal Office for Freight Traffic* (*Bundesamt für Güterverkehr*), the federal state authorities who are assigned to monitor compliance with the health and safety at work regulations, the police authorities of the federal states and the authorities for the prosecution and punishment of infringements, competent on the basis of federal state law.

Furthermore, the cooperation between the authorities concerned with illegal migration, that is, the Federal Police, the Federal Criminal Police Office, the Federal Office for Migration and Refugees, the Federal Intelligence Service, the monitoring authority for illegal employment, the police authorities of the federal states, and so forth, has been intensified. The information collected by the authorities is pooled in various forums, such as the Joint Analysis and Strategy Centre for Illegal Migration (*Gemeinsames Analyse- und Strategiezentrum Illegale Migration*, GASIM) and the Working Group on Illegal

⁷⁴ Other sectors, especially household related services, may not be checked at all without grounds for suspicion (cf. 1.4.2.5.).

Migration/Smuggling Criminality, and, based on this general overview, the need for specific action is determined. Various authorities also cooperate at the operational level. This pooling of information is complemented by national and European information systems. Furthermore, bi- and multilateral agreements on the cooperation of police and border control authorities have been concluded with the neighbouring countries. In the course of the abolishment of EU-internal border controls, liaison officers from various authorities and Federal Crime Police Office document counsellors were dispatched to countries of origin or transit.

A certain organizational fragmentation has ceased, as a consequence of the new Residence Act, which came into force on 1 January 2005 and which introduced the system of *one-stop-government* with regard to the authority for foreigners. Apart from issuing residence titles, the authority for foreigners is now also charged with the *issuing* of work permits, a task which previously came within the remit of the labour offices; however, it is still the labour office which grants permission for the employment, though this takes the form of an internal procedure carried out in conjunction with the authority for foreigners.

1.4.1.3 Databases, data matching and data transmission

If the status of a foreign employee cannot be ascertained on the basis of document checks carried out as part of the external control procedure, it can be determined afterwards by verifying the data with the *Central Register of Foreign Nationals (Ausländerzentralregister, AZR)*. For example, in the case of illegal temporary or contractual work carried out by foreign employees who are in possession of a work permit, the data are verified by comparing the actual salary paid by the companies, as stated, with the social insurance contributions reported to the social insurance agencies. However, if illegally employed foreign nationals use forged EU passports, the identification process becomes more difficult, as the AZR does not contain information regarding the employment of EU citizens.

More information can be obtained by consulting the *Automated Fingerprint Identification System (Automatisiertes Fingerabdruckidentifizierungssystem, AFIS)*, which registers asylum seekers, as well as apprehended irregular migrants. The AFIS was installed in 1993 and is administered by the *Federal Crime Police Office (Bundeskriminalamt, BKA)*. With the *EURODAC-System* (European Dactyloscopy), the EU has built up a community-wide equivalent to the AFIS, and it is on this basis that the EURODAC has been operating since 15 January 2003.⁷⁵ EURODAC was introduced to facilitate the implementation of the Dublin II Regulation, by registering asylum seekers, as well as apprehended, undocumented immigrants if they are at least 14 years old.

With the *Act to Amend the Residence Act and Other Laws (Gesetz zur Änderung des Aufenthaltsgesetzes und weiterer Gesetze)* of 1 October 2005, came the installation of a *Found Document Database (Fundpapierdatenbank)*. The database is administered by the *Federal Administration Office (Bundesverwaltungsamt)* and contains information on iden-

75 cf. http://ec.europa.eu/justice_home/fsj/asylum/identification/fsj_asylum_identification_en.htm.

tification documents, issued by foreign public entities, which have been found on German territory. To date, however, there has been little experience with this database.

Furthermore, and most importantly, public entities⁷⁶ are obliged to forward information requested by the authority for foreigners, as long as it is relevant to the fulfilment of the authority's task (§ 87 para. 1 of the AufenthG). However, if public entities come to know of a foreigner staying in the country who is not in the possession of the required residence title and whose expulsion has not been temporarily suspended, they are obliged to inform the authority for foreigners immediately (§ 87 para. 2 of the AufenthG). This information can also be reported to the police, who, in turn, inform the authority for foreigners.

1.4.2 Policy outcomes: identification and evaluation

1.4.2.1 Legal labour migration schemes

Policy outcomes

As presented in 1.3.1.1, there are several legal channels by which employment in Germany may be taken up, despite the recruitment ban, on citizens of the new member states which are subject to transition periods, and on third country nationals.

In 2005, 280,000 work permits were issued on the basis of the Ordinance on Exceptions from the Recruitment Ban, that is, to citizens of the new EU Member States, and 235,000 were issued in 2006 (BAMF, 2007: 72 et seq.). 94 per cent of these permits were issued to Polish nationals, 3 per cent went to Slovak nationals and the remaining 3 per cent to citizens of the other six new member countries which entered in 2004 and are subject to transition periods.

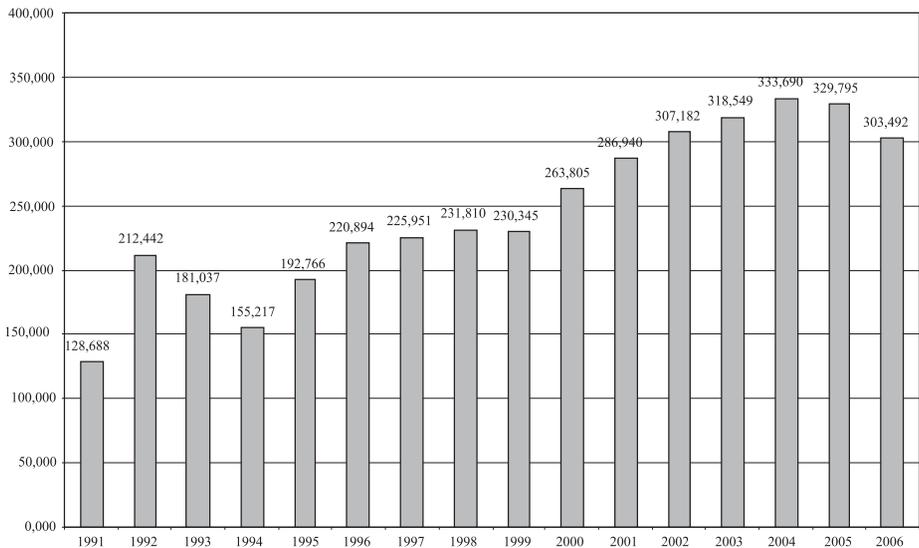
The majority of the employees from the EU-8 entered Germany as *seasonal workers*, the admission of whom increased from 137,819⁷⁷ in 1994 to its height of 333,690 in 2004 (BAMF, 2007: 80). In 2006, 303,492 seasonal workers were admitted (see figure 1), 90 per cent of whom were employed in agriculture and forestry (BAMF, 2007: 79). The 10 per cent decrease since 2004 is largely due to an arrangement between the Federal Minister of Labour, the professional associations concerned and the IG BAU, to promote the hiring of unemployed natives, in accordance with which, in any establishment, only 80 per cent of the foreign seasonal workers, who were granted a work permit in 2005 could be admitted in 2006 and 2007 respectively. If an insufficient number of native workers was available to fill the vacancies, the share increased to 90 per cent. This agreement has recently been extended to the end of 2009. With the prolongation came a certain amount of flexibility, in that employers in labour office districts with an unemployment rate of less than 7.5 per cent in October 2007 may hire 90 per cent of their 2005 stock of seasonal workers without having to check for suitable unemployed natives.

⁷⁶ cf. 1.3.2.

⁷⁷ The Federal Employment Agency statistics only list the mediations of seasonal workers by the *Central Placement Office (Zentrale Auslands- und Fachvermittlung, ZAV)* but does not document actual entries.

Another reason for the decrease in the number of seasonal workers could be the redirection of migrant worker flows to the United Kingdom and Ireland after unrestricted access to these labour markets was made possible for EU-8 workers in the context of the 2004 enlargement. Even though the bilateral agreements are unaffected by the transition periods, EU-8 workers appear to have perceived better employment opportunities abroad. To compensate for the decrease of Polish citizens among seasonal workers⁷⁸, the Federal Employment Agency will seek to reach an agreement with the Bulgarian labour administration on an increased mediation of Bulgarian seasonal workers (BMELV, 2007).

Figure 1.1: Mediations of seasonal workers



Source: BAMF (2007: 76) based on data held by the Federal Employment Agency; authors' elaboration.

The employment of *contractual workers* reached its height in 1993, with a total of 83,412 workers (see Table 1.4)⁷⁹ Since then, the numbers have steadily declined, reaching an all-time low of 18,499 employees in 2007. This also marks the first time that the aggregate contingent has been exhausted by less than a half. But there are extreme regional differences. Several countries used less than one third of their contingents from the very beginning, whereas other countries have exceeded their contingent in several of the periods. Generally speaking, exceedance of contingents is a legitimate procedure; however, in consequence, it leads to the reduction of the next period's contingent for the respective countries.⁸⁰

78 From the late 1990s, the share of Polish seasonal workers decreased from around 90 per cent to 80 per cent in 2006.

79 The first bilateral agreement was concluded in 1988 with Yugoslavia.

80 Before 1999/2000, the exceedance of contingents led to a temporary halt in the admission of new applications from the respective countries.

Table 1.4: Contingents and exhaustion of contingents of contractual workers

	Contingents (bilateral agreements)	After deduction of exceedance from the previous period	Contingents for construction business (bilateral agreements)	Employees (average)	Use of contingents	Employees: construction business	Use of contingents (construction business)
10/92-9/93	83,214	77,488	62,220	83,412	108 %	63,019	101 %
10/93-9/94	79,690	56,768	54,990	42,395	75 %	27,832	51 %
10/94-9/95	61,920	54,850	41,630	47,655	87 %	27,716	67 %
10/95-9/96	56,850	52,596	35,560	48,102	91 %	21,895	62 %
10/96-9/97	54,100	48,845	32,440	41,048	84 %	16,737	52 %
10/97-9/98	34,638	34,638	19,612	32,096	93 %	13,064	67 %
10/98-9/99	52,340	50,363	29,320	38,042	76 %	15,351	52 %
10/99-9/00	53,700	53,463	30,460	42,994	80 %	16,713	55 %
10/00-9/01	57,630	54,171	31,280	46,108	85 %	15,767	50 %
10/01-9/02	58,310	56,260	30,390	46,153	82 %	13,760	45 %
10/02-9/03	56,620	56,316	28,227	44,057	78 %	12,366	44 %
10/03-9/04	49,140	48,965	26,800	38,025	78 %	11,833	44 %
10/04-9/05	41,664	41,660	26,400	23,659	57 %	10,693	41 %
10/05-9/06	39,100	39,100	24,183	20,057	51 %	10,143	42 %
10/06-9/07	40,390	40,390	27,510	18,499	46 %	8,618	31 %
10/07-9/08	44,440	44,440	29,300	—	—	—	—

Source: Federal Employment Agency, on request.

In addition to contractual and seasonal employment, there are several other legal channels for working in Germany, especially for third country nationals. These channels are worth mentioning in the context of the illegal employment of immigrants because of the claims and assumptions with regard to both the demand and the scale of illegal employment in this field. In 2005, there were 11 mediations regarding *geriatric nurses* originating from Croatia, the only country with which a mediation agreement exists (see Table 1.5).

The mediations of *domestic workers* jumped by about one third from 1,667 in 2005 to 2,241 in 2006 (BAMF, 2007: 84). These numbers are a remarkable contrast to the 100,000 illegally employed migrants who it is claimed are working with people in need of care in private households (bpa, 2007).

Table 5: Mediations of (geriatric) nurses from 1996 to 2005

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Croatia	388	287	123	74	137	314	353	103	37	11

Source: BAMF (2007: 260), authors' elaboration.

Altogether, 17,612 third country nationals who entered Germany in 2005 were issued with residence permits in accordance with the provisions of § 18 of the Residence Act pertaining to qualified employees. The sum of residence permits issued to newly arriving immigrants jumped to 29,466 in 2006. Most of these permits were issued to Romanians, Indians, Chinese, US-Americans and Russians (BAMF, 2007: 70).

Definitive figures for 2007 are not available yet, but it begins to appear that there have been somewhat less entries for the employment purposes defined by § 18 of the Residence Act. In contrast, the number of residence permits pertaining to § 18 of the Residence Act and issued to foreign nationals already present in Germany was higher. Nonetheless, the total number of residence permits issued pursuant to § 18 of the Residence Act tends to be lower than in 2006. The reason for this decrease is the EU-accession of Bulgaria and Romania whose nationals subsequently are no longer registered as third country nationals.

The issuance of settlement permits in accordance with the provisions of § 19 of the Residence Act, pertaining to highly qualified employees, is significantly lower. From 1 January 2005 to 31 December 2007, 1,589 settlement permits were issued to third country nationals, of whom more than 80 per cent have been residing in Germany since before 2005.

Policy evaluation

Germany provides a variety of legal channels for the labour migration of EU-8+2 workers, as well as for third country nationals. Despite the transition periods, more than 300,000 nationals of the new EU Member States were admitted to the German labour market in 2006, most of them on a temporary basis (BAMF, 2007: 255 et seq.). Yet, if the guesses on the scale of the illegal employment of immigrants hold true, it would seem that these channels still do not suffice.

The main problem as regards the legal labour migration schemes seems to be that there apparently exists a mismatch between the supply of foreign workers via legal labour migration schemes and the demand for migrant workers. As several empirical studies argue (Steinhardt, 2007: 5, among others)⁸¹, migration flows to Germany tend to be negatively self-selected as regards the qualifications and unobservable characteristics, such as motivation or risk-taking, of migrants coming to Germany, yet most of the legal channels are designed for qualified employees.⁸² Thus there remains a large potential of unqualified labour migrants abroad, which, in combination with a respective demand in Germany for unqualified workers, leads to irregular employment (NGO3DE).

The number of seasonal workers, which continued to increase until at least 2004, is in sharp contrast to the declining admissions of, for example, contractual workers, indicating a sizeable demand for unqualified labour.⁸³ Furthermore, as Hanson (2007: 28) argues, undocumented immigrants bring certain qualities, such as flexibility, the willingness to do jobs that natives are no longer prepared to do and geographical and occupational mobility, which are highly estimated amongst employers and which workers arriving within the framework of legal labour migration programmes may not offer (Amin and Mattoo, 2006: 4). This holds true for German labour migration schemes, as the issuance of a work permit is, in the main, conditional on a specific job. Hanson (2007: 34) concludes: *“Perhaps the most important provision of any new visa program would be to allow guest workers to move between jobs.”*

Legal channels for labour migration also harbour some risks. Knowing potential employers from previous, legal working stays and, in this way gaining access to the local labour market, can facilitate a future illegal working stay (Lederer and Nickel, 1997: 28).⁸⁴ However, first and foremost, it is much easier for foreign nationals to enter a country legally via labour migration schemes and then to overstay the permissible period in order to take up illegal employment, than it is to enter the country illegally. As stated in a joint paper by the OSCE, the IOM and the ILO (2006: 7), the majority of irregular migrants enter their host country via legal channels.

To counter this problem, there are a number of practices and proposals to increase the effectiveness of guest worker schemes, in the sense of making the rotation principle work; in other words, making the guest workers leave the host country and thus make way for the next ‘wave’.⁸⁵ However, this may not be in the interest of the employers, who are interested in a higher retention of workers who have been properly trained for their tasks and are increasingly accustomed to a specific working environment. This is one of the reasons why many German ‘guest workers’ between 1955 and 1973 stayed longer than was originally planned and, in the end, remained in Germany for good. Yet the return of

81 The theoretical framework for studies on the self-selection of migrants has its roots in the Roy-Model (Roy, 1951), which discusses the optimal choice of workers between two different occupations. This model was later adapted by Robinson and Tomes (1982) to explain internal migration and by Borjas (1987) to explain international migration flows.

82 Although the majority of labour migrants enters Germany as unqualified seasonal workers.

83 Contractual workers are assumed to be qualified. The appropriate relation of unskilled auxiliary workers to qualified personnel within the framework of contractual work is set at 10 per cent (BA, 2007a: 9; 2007b: 8).

84 On the link between legal and illegal migration, see European Commission (2004) and Kondoh (2004).

85 For the following deliberations, cf., in particular, Epstein et al. (1999), as well as Schiff (2004, 2007).

migrant workers is only one question. Another important issue is whether the sending countries will take their emigrants back. Any GWP should thus include terms on the repatriation of migrant workers.

One proposal for making the rotation principle work is to regulate the length of the permissible working stay, based on the premise that the longer the possible stay, the weaker the incentive to switch to illegal employment, as a longer stay gives the migrant worker enough time to earn the income he/she intended. Yet if the permitted stay is too long, the migrant worker might become too acclimatized and will not then be willing to leave the country. Another possibility is to allow for repeated working stays, giving the migrant the chance to return for employment purposes if deemed necessary.⁸⁶

Two other ‘classic’ measures are monetary in nature. The government of the host country could temporarily seize parts of the migrant worker’s income. The repayment of this money, with interest, is conditional on the migrant worker’s return to his home country. Schiff (2004: 2) refers to Taiwanese firms where this is common practice. Another monetary incentive would be the refund of social security contributions paid by the migrant worker, particularly those made to pension schemes. In Germany, this incentive was incorporated into the *Act to Promote the Willingness of Foreign Nationals to Return Home* (*Rückkehrhilfegesetz*, RückHG) of 1983, created to initiate the return of the guest workers who came before the recruitment ban of 1973. In addition, they were paid a premium of DM 10,500. In the end, these measures did not provide an effective incentive to return, as only approximately 14,000 ‘guest workers’, most of whom wanted to leave Germany in any case, accepted these offers (Werner, 2001: 10).

The second ‘classic’ monetary measure is to make employers financially responsible for the return of their immigrant workers. Some countries oblige employers to buy a bond for every immigrant worker, which the employers then forfeit if the foreign employee does not leave the country at the end of the permitted period (Epstein et al., 1999: 3). Germany introduced a similar mechanism with the implementation of Council Directive 2005/71/EC (*Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research*) in 2007. Under § 20 para. 1 no. 2 of the Residence Act, research institutes which admit foreign researchers are held financially responsible for the costs of a) the subsistence payments for the immigrant during an irregular stay in a Member State of the EU and b) the deportation, as incurred by public authorities in the 6-month period following the expiration of a residence permit.⁸⁷ The general problem with this obligation is the lack of proper means to enforce the return of their workers on the part of the employers.

Evaluation of the effectiveness of legal labour migration schemes is very difficult. They tend to prevent labour migrants from adopting irregular methods of taking up employment in Germany and they have opened up a variety of channels for foreign nationals

86 Because the question as to how to ensure that temporary migrant workers leave voluntarily remains open, proposals for circular migration schemes are viewed with caution in Germany (Zerger, 2008: 3 et seq.).

87 Exempt from this obligation *shall* be research institutions, which are primarily financed by public means (§ 20 para. 2 s. 1 of the Residence Act). In addition, exceptions *can* be made in cases where the research project is a matter of public interest (§ 20 para. 2 s. 2 of the Residence Act).

to work in Germany. In the 1990s, when migration pressure from the eastern European countries began to rise as a consequence of the fall of the Iron Curtain and the booming economy in the aftermath of German reunification, the schemes made illegal employment for immigrants significantly less attractive (Schönwälder et al., 2004: 51; Dietz, 2004: 111), particularly because they allowed repeated working stays in Germany. If, in order to make a comparison, we ask the hypothetical question as to what the situation would be if Germany had not introduced legal labour migration schemes and if the more than 300,000 migrant workers currently admitted to the German labour market in the framework of these schemes had only been able to work in Germany irregularly, then the German migration channels can certainly be seen as contributing to a reduction in irregular immigration and in the illegal employment of immigrants.

However, as the assumed number of illegally employed migrants continues to amount to significant figures, the German legal labour migration schemes still have the potential to be developed further, especially with regard to the mobility of immigrant workers, both geographically and between jobs.

Several authors highlight the fact that legal labour migration schemes foster political relationships with sending countries, as well as facilitating cooperation in the field of combating illegal employment (European Commission, 2004: 12; Schiff, 2004: 10).⁸⁸ Moreover, as the European Commission notes (2004: 14), “[t]he co-operation of third countries is vital if illegal migration flows are to be reduced.”⁸⁹ For years now, Germany has cooperated with its eastern neighbours to tackle the problem of illegal migration and employment. The early introduction of legal labour migration schemes has certainly contributed to this spirit of cooperation.

1.4.2.2 External controls

Policy outcomes

With the enlargement of the European Union and the Schengen Area came the gradual abolishment of ‘regular’ border controls. As circumstances have changed, so has the implementing agency, the Federal Police (*Bundespolizei*, BPOL), formerly the Federal Border Force (*Bundesgrenzschutz*, BGS), which has recently been reorganized. With regard to border controls, which can be conducted within a range of 30 km on the German side of the border, as well as at sea and air borders, the BPOL focuses on the prevention of illegal border crossings, the fight against human smuggling and trafficking and other cross-border crimes.

Tables 1.6 to 1.9 show the development of illegal border crossings, the smuggling of human beings and apprehensions made at the German borders. Summarizing, it can

88 However, this involves the risk that countries with which no such labour migration schemes have been concluded will refuse all cooperation (European Commission, 2004: 8).

89 On 25 February 2008, the French minister for immigration, Brice Hortefeux, signed a bilateral agreement with Senegal on the admission of Senegalese guest workers, of whom there will be approximately 1,400 in 2008. In return, Senegal has committed to close cooperation with France on fighting illegal migration, to facilitating the repatriation of undocumented emigrants and to intensifying border surveillance (Le Monde, 2008).

be stated that in 2007, prior to 30 June, most of the irregular entries occurred at the Schengen-*internal* borders with Austria, France, the Netherlands and Belgium, with a 58.5 per cent share of all detected irregular crossings. In 2005, most of the irregular ‘entrants’ at the aforementioned borders came from Romania, Serbia and Montenegro and from Turkey; in 2006 they came from Romania, Serbia and Montenegro and Ukraine; and during the first half of 2007 they came from Iraq, Serbia and Turkey (BMI, 2007b: 5). The percentage of irregular entries via what were, at the time, the Schengen-*external* borders, amounted to 20.2 per cent for the first half of 2007. The main source countries were Vietnam, Serbia and Turkey; in previous years, they were Ukraine, the Russian Federation and the Republic of Moldova in 2005 and Ukraine, Serbia and Montenegro and Turkey in 2006. Worth mentioning in this context is the increasing importance of airports as access points to irregular entries; 19 per cent of all detected irregular entries in 2007, prior to 30 June, took place at German airports.

Regarding the smuggling of human beings, it can be noted that the Eastern borders to the Czech Republic and Poland still play a crucial role. In 2005, 37.2 per cent of detected smuggling activities took place at the Polish border (28.9 per cent in 2006; 14.31 per cent from January to June 2007) and 19.0 per cent at the Czech border (17.8 per cent in 2006; 22.2 per cent from January to June 2007; BMI, 2007b: 7). Furthermore, a sharp increase in the smuggling of human beings has been noted at the Swiss border; 0.6 per cent in 2005; 9.5 per cent in 2006; and 12.3 per cent between January and June 2007 (BMI, 2007b: 7). The main source countries of people being smuggled in 2005 were Ukraine, with 638 people, the Republic of Moldova, with 235 people and the Russian Federation, with 227 people; in 2006, the Ukraine with 558 people, China, with 201 people and the Russian Federation, with 183 people; and, in the first half of 2007, Vietnam, with 181 people, Ukraine, with 100 people and Iraq, with 89 people (BMI, 2007b: 7).

Table 1.6: Illegal crossings of the German border, 2005 – 2007¹⁾

Borders	2005	2006	2007¹⁾
Total	15,551	17,992	7,326
Internal borders	9,497	10,445	4,271
Austria	3,755	3,888	1,640
France	2,042	3,271	1,260
Luxemburg	118	112	44
Belgium	1,326	1,089	504
Netherlands	2,044	1,851	744
Denmark	212	234	79
External borders (excluding airports/sea borders)	2,780	3,350	1,478
Czech Republic ²⁾	858	878	485
Poland ²⁾	1,111	957	313
Switzerland	811	1,515	680
Airports and sea borders	3,228	4,150	1,527
Sea borders	545	287	136
Airports	2,683	3,863	1,391

Source: *Schengen Erfahrungsbericht* (BMI, 2007b: 30).

1) The figures refer to the period 1 January 2007 to 30 June 2007.

2) The decline in detections at the Czech and the Polish border is mainly due to the accession of both countries to the EU (BMI, 2007b: 7).

Table 1.7: Apprehensions of human smugglers at the German border, 2005 – 2007¹⁾

Borders	2005	2006	2007¹⁾
Total	1,232	1,444	614
Internal borders	571	592	295
Austria	437	362	238
France	35	117	5
Luxemburg	0	0	2
Belgium	8	6	12
Netherlands	66	67	31
Denmark	25	40	7
External borders (excluding airports/sea borders)	595	737	263
Czech Republic	233	269	116
Poland	352	340	76
Switzerland	10	128	71
Airports and sea borders	59	97	44
Sea borders	5	33	17
Airports	54	64	27

Source: Schengen Erfahrungsbericht (BMI, 2007b: 31).

1) The figures refer to the period 1 January 2007 to 30 June 2007.

Table 1.8: People smuggled, 2005 – 2007¹⁾

Borders	2005	2006	2007¹⁾
Total	2,991	3,537	1,516
Internal borders	1,096	1,202	607
Austria	774	625	467
France	85	361	14
Luxemburg	0	0	5
Belgium	68	31	28
Netherlands	144	135	81
Denmark	25	50	12
External borders (excluding airports/sea borders)	1,699	1,988	740
Czech Republic	569	631	337
Poland	1,112	1,022	217
Switzerland	18	335	186
Airports and sea borders	192	300	119
Sea borders	24	72	30
Airports	168	228	89

Source: Schengen Erfahrungsbericht (BMI, 2007b: 31).

1) The figures refer to the period 1 January 2007 to 30 June 2007.

Table 1.9: Seizure of falsified or forged documents, 2005 – 2007¹⁾

	2005	2006	2007 ¹⁾
Poland	1,471	1,293	795
Czech Republic	558	535	821
Switzerland	610	610	244
Sea borders	116	52	29
Airports	2,132	1,580	683
External borders	4,887	4,070	2,032
Internal borders	1,540	1,389	726
Total	6,427	5,459	2,758
Type of document			
Border crossing documents (e.g. passport, ID card)	4,600	3,834	1,792
Vehicle documents (incl. driver's licenses)	1,407	1,377	702
Total	6,007	5,211	2,494
Complete forgeries thereof	2,334	2,243	1,101

Source: Schengen Erfahrungsbericht (BMI, 2007b: 32).

1) The figures refer to the period 1 January 2007 to 30 June 2007.

Policy Evaluation: Border controls

The theoretical debate on optimal border enforcement and its welfare effects reaches back to the works of Ethier (1986), and Bond and Chen (1987). It was these authors who highlighted that fact that, in terms of economic considerations, extensive border enforcement is likely to be a net drain on the economy (Ethier, 1986: 62). In recent years, the topic has been taken up and developed further by several authors.⁹⁰

Entorf (2000: 3) points out that “[...] *the optimal policy of wanted and unwanted migration is a question of the optimal allocation of resources*”. He concludes that the optimal level of irregular immigration is positive in terms of economic considerations⁹¹ and that efforts to increase enforcement beyond the social optimum are both useless and a waste of public resources. Hanson (2007: 27) argues that in the case of the U.S.-Mexican border, expenditure on surveillance has already exceeded the fiscal benefits of reducing irregular immigration.

In addition to the effect of impeding migrants from crossing the border irregularly, it is hoped that border controls will have a deterrent effect on potential irregular immigrants. Dávila et al. (2002) show that this is the case only in the short-term. Undocumented migrants quickly adjust to new situations, so a long-term deterrent effect is non-existent. The authors argue that a deterrent effect might come about if the probability of being apprehended were to be more than 90 per cent, but that the resources needed to create such a probability might be prohibitively high.

90 See Yoshida and Woodland (2005) for a thorough, theoretical, economic analysis covering a wide range of issues regarding irregular immigration (inter alia, welfare effects and optimal border and internal enforcement).

91 See also, Woodland and Yoshida (2006).

Djajic (1999: 57) shows that there is a trade-off between two effects resulting from border controls. On the one hand, border enforcement increases the costs of entry and is thus likely to reduce clandestine flows. On the other hand, border controls induce irregular migrants who are already residing in the country to increase their 'anti-detection' efforts in order to reduce the probability of detection and, thus, the chances of deportation. If the latter effect prevails, the stock of irregular immigrants actually increases.

This last point leads us to another problem connected with extensive border surveillance. When the possibilities of entering the country become more difficult, migrants more frequently turn to the services of smugglers. Increased demand results in increased prices for smuggling operations, with higher profits, and thus this field of criminal activity becomes more attractive (Orrenius, 2001; NGO1DE). However, as the smugglers run a greater risk of detection, they are more inclined to use violence against the authorities and, particularly, against the migrants (Sachverständigenrat, 2004: 355; Neske et al., 2004: 62; Cantzler, 2004: 31; Zimmermann, 2003: 182 et seq.; Schatzer, 2000: 43).

In conclusion, it can be stated that evaluating the effectiveness of German border controls is anything but easy (Schönwälder et al. 2004: 72). On the one hand, progress reports by the security authorities show that the tightened controls have resulted in a decrease of apprehensions and thus indicate that the border surveillance is having a deterrent effect (BMI 2002; 2003; 2004). But one has to bear in mind that the enlargement of the EU and the accompanying introduction of the freedom of movement have contributed to this decrease. On the other hand, potential migrants take greater risks in order to enter the country irregularly, with the negative consequences described above and, as yet, there has been no analysis of the welfare effects of German border enforcements.

However, border enforcement must not be considered only from an economic point of view. It also has a high political signalling effect (Leslie, 2002: 223). If the public believes the level of irregular immigration to be high due to a lack of border enforcement, this could influence its perception of the state as guarantor of the security of its citizens; this, in turn, may have unforeseeable consequences, such as, for example, a shift in the political spectrum to right-wing political parties. This potential effect must therefore also be taken into account.

The Federal Ministry of the Interior has pointed out that illegal migration could not be completely prevented, even if border protection was optimized (Sonntag-Wolgast, 2000: 29). There is historical evidence that illegal migration will continue to exist to a certain extent and that the temptation to migrate illegally correlates with restrictions in accessing a country legally (Bade and Bommers, 2004: 35; Bade, 2001: 69).

Policy Evaluation: Visa policy

German embassies and consulates try to prevent the irregular entry of foreign nationals at an early stage of the migration process via the issuance of visas in the home countries of the potential migrants. Applicants try to circumvent the controls in place at this stage by declaring purposes for entry other than the one which they actually intended, or they submit forged documents. Since the 2005 investigation committee on the misuse of visas,

which dealt with significant visa misuse, especially at the German embassy in Ukraine, the government has set up the means to enhance the security of visa-issuance, inter alia the installation of new control mechanisms to detect and prevent cases of visa misuse.

Despite recent reports of cases of visa fraud, the number of cases of visa misuse⁹² constitutes only a minor fraction of the number of visa applications submitted to German embassies and consulates.⁹³

Nonetheless, the effectiveness of the control measures cannot be assessed, as the number of rejected visa applications for employment purposes and the respective reasons for their denial are not registered and therefore cannot be compared with evidence from, for example, apprehensions.

1.4.2.3 Incentives for legal employment

Incentives to promote the use of legal employment, as described in 1.3.1.3, seem to have proved successful, as is demonstrated by the studies conducted by Schneider (IAW, 2007), who estimates that the deductibility of household-related services decreased the shadow economy by EUR 1.5 to 3 billion⁹⁴ and the reduction of the contribution rate to the unemployment insurance by as much as EUR 2.3 to 4 billion⁹⁵. The effect of mini-jobs as an incentive for legal employment is seen as ambivalent (NGO3DE). On the one hand, the underlying idea of reducing non-wage labour costs for low-qualified occupations is recognized as being positive (E2DE, I1DE). On the other hand, due to the lack of checks made on private households, the probability of being detected is quasi non-existent (NGO1DE). Furthermore, as soon as it was made clear that the monitoring authority for illegal employment would not check private households without suspicion, registrations of low mini jobs decreased, following an initial rise (I1DE).

The amendment of the Crafts Code (*Handwerksordnung*, HwO) should also have contributed to a decrease in people working irregularly. However, at the same time, it opened channels for bogus self-employment on the part of foreign nationals, as the requirements for the self-employed practice of several crafts have been lowered and workers from the EU-8+2 enjoy freedom of services within the EU (E2DE). On 1 January 2004, floor tilers, among others, were deleted from Annex A of the Crafts Code. Annex A lists those crafts which demand a master craftsman certificate (*Great Certificate of Qualification – Großer Befähigungsnachweis*) as a requirement for the self-employed practice of these occupations. The *Tenth Report of the Federal Government on the Effects of the Act to Combat Illegal Employment* (Bundesregierung, 2005: 16 et seq.) reports that the stock of self-employed floor tilers on 1 January 2004 amounted to 12,401. Between 1 January 2004 and 31 December 2004, 1,266 deregistered and 14,410 registered, giving a stock of 25,545 at the end of 2004, eight months after the first eastern enlargement of the

92 To date, 1,678 cases have been detected; of these, 1,259 cases were discovered at the German embassy in Moscow and 209 in Cairo. The remaining cases were uncovered in Chisinau and Shanghai. In four other embassies, investigations are still in progress (Bundesregierung, 2008a: 2).

93 Altogether, German missions in 184 countries made decisions on 2.3 million visa applications in 2007 (Bundesregierung, 2008a: 1).

94 Agreeing: TU1DE.

95 Agreeing: E1DE.

European Union. 10,990 of these registrations were made by one-man-companies and one fourth thereof by foreign nationals. According to the construction business trade union, the IG BAU, a significant number of these 2,370 foreign one-man-companies are bogus self-employed who are, furthermore, deployed in all sectors of the construction trade (Bundesregierung, 2005: 16).

1.4.2.4 Possibilities for enforcement of migrants' rights

With regard to the enforcement of migrants' rights and, especially, the rights of migrants who are working irregularly, there are two aspects normally discussed; the question of regularization and the possibilities of claiming pending wages. The main argument put forward by supporters of regularizations (NGO2DE, NGO3DE) is that they lead to an improvement in the social situation of irregular migrants, who face hindrances in accessing social services and are exposed to exploitation by employers. This improvement only affects those benefiting from regularizations. However, regularizations are accompanied by a major problem, in that they act as a strong pull factor for future irregular migration flows, which comes about as a result of the anticipation of future regularizations. A second problem is that regularized migrants could lose the jobs they had when they were still undocumented, because they will lose their competitive advantage and employers would turn to 'new', undocumented, and more 'competitive', migrant workers.⁹⁶

In fact, many authors stress that regularizations do not have a long-term effect on the level of irregular migration (Orrenius and Zavodny, 2001, 2004; European Commission, 2004: 17). For example, the decrease in apprehensions at the U.S.- Mexican border, which was observed shortly after the U.S. American *Immigration Reform and Control Act* (IRCA) of 1986 came into force, is mostly ascribed to the deterrent effect of increased border surveillance and the concern of potential immigrants with regard to the availability of jobs in the United States.⁹⁷ However, the inflow of irregular immigrants quickly returned to pre-IRCA levels (Orrenius and Zavodny, 2004: 18; Hill and Pearce, 1990). Those new undocumented migrants then face the same hindrances and exploitation as the former, which exerts pressure for new regularization campaigns, creating a vicious circle. In this context, Kuptsch (2004: 15) points out that “[p]rotection of irregular immigrants therefore goes hand in hand with combating irregular migration.”, while Ethier (1986: 62) argues that illegal entry attempts would decrease “[...] once the employment prospects of immigrants are reduced”.⁹⁸

It was also this insight that led the European Commission to issue a *Proposal for a Council Directive providing for sanctions against employers of illegally staying third-country nationals* (European Commission, 2007b). Besides extending the duties of employers to include the obligation to check the documents of potential employees and extending domestic controls to a uniform level among the member states, the Directive proposal provides for a claim of pending wages *ex officio*, without any action on the

96 Unless the regularization is conditional on the verification of a work contract, as was the case in Spain in 2005 (Arango and Jachimowicz, 2005: 81).

97 See Epstein and Weiss (2001) for further reading on the theories of regularizations.

98 Also see Vogel and Cyrus (2008: 5).

part of the undocumented migrant, as well as for the suspension of expulsions during the course of legal proceedings. These extended rights should raise the costs and risks incurred by employers when employing undocumented migrants (cf. 1.4.2.5). Charitable organizations welcome the proposal (inter alia NGO1DE), but several stakeholders in Germany object to this view and argue that the opposite would be true and the proposed increase in rights is likely to act as a pull factor for future irregular migration (ZDH, 2007; Bundesrat, 2007). Furthermore, the enforcement of private claims *ex officio* would be a foreign element within the German legal system (ZDH, 2007; Bundesrat, 2007) and put both natives and legally resident migrants, for whom no such mechanism is in force, at a disadvantage (ZDH, 2007). IG BAU points out that legal proceedings often fail because there are no witnesses to testify against employers. Therefore, the suspension of the expulsion of irregularly employed, undocumented migrants was essential (TU1DE, TU2DE). Vogel and Cyrus (2008) add that there is little experience of how undocumented migrants' rights could be effectively enforced. As an alternative to claiming the money on behalf of the irregular migrants, the German Federal Council (*Bundesrat*) and the German Confederation of Skilled Crafts (*Zentralverband des Deutschen Handwerks*, ZDH) proposes its seizure for the state.

1.4.2.5 Domestic enforcement and punitive measures

Policy outcomes

Data exchange and the obligation of cooperation between various authorities are central elements of the German system for counteracting illegal employment. According to Vogel (2001: 340 *et seq.*), the system is characterized by fragmentation and organizational decentralization, as a consequence of German federalism on the one hand, and by the important features of cooperation and central databases on the other. Fragmentation characterizes the organizational structure, in which many public competences have been delegated to different intermediary organizations, such as the social insurance agencies, the Federal Employment Agency and so forth. The databases, comprising the register of residents, the Central Register for Foreign Nationals (AZR), the Automated Fingerprint Identification System (AFIS), employee statistics and so forth, were developed in order to compensate for the consequences of decentralization and fragmentation. By pooling the tasks at the Federal Customs Administration and by introducing the 'one-stop-government' system at the authority for foreigners, as provided for under the Immigration Act, this decentralization has been significantly reduced.

Due to the relatively large number of checks and the intensive cooperation and data transmission and matching between authorities, the frequency and intensity of checks on the German labour market can be regarded as high in comparison to other industrial countries. However, this does not apply to all sectors. As opposed to building sites, which are a focal point of inspections due to their visibility, there are several reasons for the fact that checks in private households are rare, although a considerable number of irregular employees work in this sector. These are: 1) The protection of private living space, which is guaranteed by the constitution, 2) the low efficiency of the inspections, as, according to the officers conducting them, only a very few irregular employees can be detected in one search, 3) providing evidence as to whether there is indeed an irregular employment situation or

whether it is one of ‘neighbourly help’ is complicated, 4) the low visibility of jobs behind closed doors (Stobbe, 2004: 103; Cyrus, 2004: 31 et seq.; I1DE, NGO2DE, NGO3DE). Shifting the responsibilities to the customs in 2004 should have led to households being checked more intensively. However, the ensuing protests from all political parties prevented a modification of the legal basis (Stobbe 2004: 103).

The loss uncovered, which comprises non-paid social security contributions and tax losses, losses incurred by the Federal Employment Agency from benefit fraud and losses incurred by employees resulting from the differences in wages actually paid and wages to which there is a legal entitlement, amounted to EUR 553.6 million in 2005 and EUR 601.7 million in 2006. Tables 1.10 and 1.11 present further information from FKS process data. The data presented in Table 1.10 does not distinguish between nationals and immigrants, or between different violations. However, Table 1.11 gives a deeper insight into the picture of the illegal employment of immigrants. Nonetheless, as can be seen, the vast majority of proceedings initiated by the monitoring authority for illegal employment (*Finanzkontrolle Schwarzarbeit*, FKS) results from benefit fraud committed by natives and legally resident immigrants; this amounts to more than 70 per cent of the proceedings. More than 20 per cent of the proceedings are related to illegal employment of immigrants, while less than one third of these proceedings was initiated against migrant workers due to the absence of a work permit (§ 404 para. 2 no. 4 SGB III; 2005: 10,202, 2006: 10,534; Bundesrechnungshof, 2008: Annex 5 and 6).

Table 1.10: Process data of the monitoring authority for illegal employment , 2004 to 2007

	2004	2005	2006	2007
Workplace checks on people	264,500	355,876	423,175	477,035
Checks on employers	104,965	78,316	83,258	62,256
Completion of preliminary proceedings resulting from criminal offences	56,900	81,290	91,820	117,441
Completion of preliminary proceedings resulting from infringements	49,926	53,852	54,087	72,969
	EUR Mio.			
Sum of fines	32.8	67.1	46.4	51.9
Sum of monetary penalties	8.9	21.2	19.8	25.4
Value of secured assets ¹⁾	43.1	13.1	15.6	29.4
Loss ascertained in the course of the preliminary proceedings ²⁾	475.6 ³⁾	562.8 ⁴⁾	603.6 ⁵⁾	561.8
	Years (total)			
Imposed prison terms	472	995	1 123	1,398

Source: BMF (2007: 78; 2008: 20).

- 1) The FKS employs some 125 financial investigators, (*Finanzermittler*) who try to secure assets from employers who have been fined or sentenced to a monetary penalty.
- 2) The loss results from non-payment of social security contributions and taxes and from the receipt of benefits by unemployed people who are not entitled to them, as well as from withheld wage payments, particularly in the case of workers who were entitled to the payment of the minimum wage, but were paid less.
- 3) EUR 1.27 million thereof by special commissions.
- 4) EUR 37 million thereof by special commissions.
- 5) EUR 1.92 million thereof by special commissions.

Table 1.11: Closed proceedings and violations ascertained, 2005 to 2006

	2005	2006
Closed proceedings	153,227	164,835
<i>within which:</i> benefit fraud	109,335	120,442
remaining proceedings	43,892	44,393
Within which, as related to the illegal employment of foreign nationals	37,213	34,470
Active/passive illegal employment of foreign nationals	24,497	23,315
Violations of the Temporary Employment Act	1,317	1,175
Violations of the Act on the Posting of Workers	7,424	6,170
Violations of the Asylum Procedure-, Aliens- /Residence Act	3,975	3,810

Source: Bundesrechnungshof (2008: 32, Annex 5 and 6), authors' elaboration.

Policy evaluation

On the one hand, punitive measures are designed to penalize both employers and employees who violate applicable law. On the other hand, the threat of being punished should exert a deterrent effect and thus prevent the use of illegal employment. Labour market controls compensate for abolished borders in an enlarged Europe and Schengen Area with an increased risk of irregular immigration.

Theoretically, domestic enforcement is suitable for the reduction of irregular migration and, thus, of the illegal employment of immigrants, in two ways (Gaytán-Fregoso and Lahiri, 2004). First, in comparison with border surveillance, domestic enforcement leads to a higher risk of being caught and apprehended. Second, as employers also face a greater risk of being caught, they pass this risk on to the employees by paying them less than they would receive in a scenario without labour market controls (Cobb-Clark et al., 1995). A lower expected wage, in turn, reduces incentives for immigrants to take up irregular employment (Entorf and Moebert, 2004; Djajic, 1999: 57). Epstein and Heizler (2007) conduct theoretical considerations on the optimal enforcement budget in the presence of a minimum wage and argue that an increased budget reduces the number of irregular immigrants in two ways; first, by increasing the probability of detection and second, by increasing the wage requested by the migrants, which, in turn, leads to a lower demand for such workers.

Hill and Pearce (1990) argue that it would be optimal to monitor only the subset of industries suspected of having a large proportion of irregularly employed immigrants.⁹⁹ In this context, Djajic (1999: 57) states that “[i]f enforcement in the sector where illegal aliens traditionally find employment reaches a sufficiently high level, it becomes attractive for them to explore options in other geographic locations and industries within the host country, where the probability of detection is lower and where enforcement measures are relatively less effective.” This seems probable, as qualitative studies prove that irregular resident migrants are a highly mobile workforce, whose selection of their whereabouts is subject to the economic possibilities of given locations (Düvell 2006: 174). As noted above, the same is true for the reaction of irregular migrants to increased

⁹⁹ See Bandyopadhyay and Bandyopadhyay (2006) for an analysis of optimal enforcement taking account of capital mobility.

or enhanced border surveillance. Thus, theoretically, it is unclear as to whether or not stricter domestic enforcement, *ceteris paribus*, leads to a long-term reductive effect on the irregular employment of immigrants.

As regards the question of the deterrent effect of domestic enforcement, sanctions also have an important role to play. By 2000, the Federal Government was pointing out that the fines and penalties had been increased to such an extent that employers would be severely affected. The truth of this can be observed from the fact that more and more employers are appealing against the fines imposed on them. As the courts are inclined to allow the appeals and to reduce the fines, the Federal Government has also indicated that there is a problem with enforcing the law (Bundesregierung, 2000: 42; E2DE, E3DE). The underlying problem is not as to whether the existing framework of penalties and fines is tight enough, but, rather, as to how the offence can be proved. Often there is insufficient evidence that can be brought forward in order even to gain a conviction against the employers. Illegally employed people are frequently unwilling to testify against their employers, a smoothly coordinated cooperation between employers and illegally employed people has been observable during the last few years. In many cases, if the illegally employed people are at all aware of the background of their employment, precautions have been taken by instructing them on their statements in the event of an arrest.

Another problem results from the fact that the public prosecutor's office often only comes to know of reports made by the Federal Customs Administration, or, formerly, by the labour administrations, too late in the day, when the authority for foreigners responsible for the matter has authorized expulsion proceedings for the illegally resident foreigner. In such cases, those foreigners are no longer in a position to appear as witness, unlike those who have a residence permit, but were employed without a work permit. As a consequence, the public prosecutor's office advocates a conviction for violation of the Residence Act, the Asylum Proceedings Act or the Tax Law. If suspicious facts can be identified, the investigating authorities are able to initiate legal proceedings against the contracting entrepreneurs and the customer for the smuggling of foreigners and organized crime (Bundesregierung, 2000: 33, 43; 2005: 39; Cyrus and Vogel, 2002: 268; Cyrus, 2004: 29; Worthmann and Zühlke-Robinet 2003: 110–112).

On 11 January 2008, the Federal Audit Office submitted a report in which it examined the organization and functioning of the monitoring authority for illegal employment (*Finanzkontrolle Schwarzarbeit*, FKS). The main point of criticism therein relates to the costs of the FKS and the discrepancy between expected revenues and actual receipt of payments.

There is no official information on the amount of the payments actually received, but only on the fines and monetary penalties imposed and the tax and social security losses uncovered (cf. Table 1.11). The Federal Audit Office has conducted its own research and has discovered that only around two thirds of the social security losses were claimed in 2005 and the first half of 2006. 90 per cent of these claims proved to be unenforceable, due to the bankruptcy of the employers concerned. The picture is much the same in terms of tax losses. For both tax and social security losses, the Federal Audit Office assumes that only 5 to 10 per cent of the losses uncovered have been enforced.

According to the Federal Audit Office (*Bundesrechnungshof*, BRH), the collection of imposed fines has been similarly meagre. In 2005, 11 per cent of the fines imposed were enforced, and in 2006, 21 per cent. The reason for this is that the proportion of appeals increases with the amount of the fine imposed. Fines of more than EUR 1,000 already give rise to an appeal quotient of more than 50 per cent (Bundesrechnungshof, 2008: 25). In response to an appeal, the FKS or the competent county court often reduce the fine or even render it null and void. At the FKS locations checked by the Federal Audit Office, only 22 per cent of the fines imposed became legally binding. In this context, the IG BAU proposes the establishment of public prosecutor's offices and law courts which specialize in combating irregular employment (TU1DE).

An enforcement deficit is also apparent when it comes to fines imposed on firms based abroad. Due to a lack of valid addresses, no more than 15 per cent of the notifications on fines imposed on foreign firms are even deliverable (E2DE). In this context, the introduction of the general contractor's liability for both wages, and social security and tax losses has turned out to be valuable (TU1DE). Another problem is that in their role as collector of social security contributions, health insurance companies are very hesitant in seizing assets secured by the monitoring authority for illegal employment for the purpose of claims enforcement (Bundesrechnungshof, 2008: 20).

Yet despite the problems listed above, the Federal Audit Office states that the FKS has, by and large, reached most of its internal targets (Bundesrechnungshof, 2008: 37). Furthermore, the social partners welcome the centralization of competences and attest to the FKS greater effectiveness when compared to the former system of split competences; however, they point out that it needs more experience with its relatively new structures (TU1DE, E2DE, E3DE). For this reason, the recent consideration which has been given to a reorganization of the FKS, and which harbours the risk of reduced coverage and intensity in terms of control, is seen very critically (Bundesrechnungshof, 2008; E2DE, E3DE, TU1DE, TU2DE). Efforts have also been made by the Federal Ministry of Labour and Social Affairs to absorb further industries into the Act on the Posting of Workers. If this were to occur, the coverage and intensity in terms of controls would again be at risk unless the personnel of the FKS were adjusted adequately. Besides migrants' rights, the abovementioned recent proposal for a Council Directive also addresses the issue of domestic controls and employer sanctions (see 1.4.2.4). Regarding the increased obligations for employers to check the residence status of immigrants and the respective documentation, several stakeholders stress that such tasks are the responsibility of the state and would charge employers, especially SMEs, with too great a burden (ZDH, 2007; Bundesrat, 2007). Vogel and Cyrus (2008: 6) underline that employer control of residence status would only avoid the *accidental* employment of undocumented migrants, but would not impinge on deliberate employment. In Germany, the accidental employment of undocumented migrants is rather rare. Furthermore, experiences in the U.S. show that such checks only lead to an increase in the employment of migrants with forged documents and, more importantly, may lead to discrimination against people of foreign appearance.

The German Federal Council (Bundesrat, 2007) and the German Confederation of Skilled Crafts (ZDH, 2007) point out that the punitive measures put forward in the

proposal are already provided for under German law, in the form of fines, under the provisions of German Social Code III, monetary penalties and prison terms under the provisions of the Act to Combat Illicit Work and Illegal Employment and the payment of expulsion costs by the employer under the provisions of the Residence Act. However, as stated above, punitive measures are ineffective as long as the probability of detection is infinitesimal (Vogel and Cyrus, 2008).

The Commission therefore proposes to standardize the coverage of inspections in all EU Member States at an annual rate of 10 per cent of local businesses.¹⁰⁰ The German Federal Council objects to this proposition as being too far-reaching (Bundesrat, 2008). As Vogel and Cyrus (2008) point out, the proposal would mean trebling the control coverage in Germany, where currently 2.5 to 3 per cent of all enterprises (Vogel and Cyrus, 2008: 6) are inspected each year. The costs, which stood at between EUR 314 million and EUR 386 million in 2006 (Bundesrechnungshof, 2008: 13 et seq.) would thus triple as well. This, in turn, would mean that the sum borne by Germany alone for the additional costs for intensified control coverage would be the sum calculated by the Commission and foreseen as being borne by all the EU Member States together (Vogel and Cyrus, 2008: 6). In this context, Carrera and Guild (2007: 7) raise the question of the “[...] *compatibility of the proposal with the principles of proportionality and effectiveness* [...].”

1.5. Conclusions

This study gives a broad overview of the phenomenon of the irregular employment of immigrants, setting it in a national and European context and describing the German approach to combating illegal employment in general and, specifically, with regard to foreign nationals.

The fight against the irregular employment of immigrants is broadly aligned with the fight against illegal employment in general. Over the years, Germany has developed a sophisticated legislation and a wide range of measures to counteract this problem. The fall of the Iron Curtain and the enlargement of the European Union brought new challenges in the combat with the irregular employment of foreign nationals. German legislation and law enforcement have been adjusted to this new situation. With the Act to Combat Illicit Work and Illegal Employment of 2004, steps were taken under law to eliminate certain legal and organizational fragmentation. Furthermore, the various competences were brought together at the customs authority and the monitoring authority for illegal employment (FKS), a special department which was established to conduct labour market checks, document controls and financial investigations.

Estimates on the stock of undocumented immigrants in Germany range from 100,000 to 1 million, most of whom are assumed to be illegally employed. In fact, prospects for irregular employment are seen to be the strongest pull factor for irregular migration. In

¹⁰⁰ The selection of the business to be inspected shall be decided upon by the competent authority on the basis of a risk evaluation.

addition to illegally employed, undocumented migrants, the FKS often discovers violations of the law applicable to immigrants who are legally employed within the framework of labour migration schemes, particularly violations of statutory pay, working time and conditions or accommodation. Irregular employment of immigrants mostly occurs in the construction and meat-processing industries, agriculture and forestry, the hotel and catering industry, the transport and forwarding industry and household services, as well as domestic nursing and geriatric care.

The focus of the German approach is to fight against profit-seeking by the utilization of irregular employment. Through the imposition of fines, monetary penalties, prison terms and exclusion from public tenders, illegal employment should become an incalculable risk for employers and thus deter them from its use. In this regard, the legal situation is considered to be sufficient, though many stakeholders point out that there exists an enforcement deficit regarding not only the fines and penalties, but also the reclaiming of tax and social security losses. However, some maintain that the FKS will become more effective over time, as will the enforcement of the legal provisions.

As a result of the strategy of focusing on employers and because of the protection of private living space, private households are exempt from inspection, even though the providers of social services such as nursing, in particular, emphasize the fact that they are under intense competition from illegally employed immigrants.

In contrast to the fines and penalties imposed on employers, those imposed on irregularly employed immigrants in Germany are not large. As illegally employed foreign nationals are usually obliged to leave the country, this causes problems in proving violations by, and enforcing penalties against, employers. Trade unions and charitable organizations therefore demand the suspension of expulsions during the course of legal proceedings, a move that has also recently been proposed by the European Commission.

In addition to domestic controls, Germany also tries to deter migrants from entering the country irregularly. Therefore, controls and checks in German embassies and consulates abroad are conducted, as are controls at and close to the border. A centrepiece of the German approach to the apprehension of undocumented migrants is the obligation for all public entities to forward information regarding the residence status of immigrants with whom they have dealings in the execution of their duties.

The OSCE, IOM and ILO (2006) underline the fact that restrictive measures alone are insufficient to tackle the problem. So, in addition to the restrictive measures, by the beginning of the 1990s, Germany had already set up channels for legal labour migration. But as most of the legal channels are designed for qualified workers and since, seemingly, a demand for unqualified migrant workers exists, there remains a significant potential for the hiring of irregular labour migrants.

Another instrument with which the Federal Government tries to tackle irregular employment is the provision of incentives for complying with legal regulations. Among others, tax deductions for household-related services or the reduction of the contribution rate to the unemployment insurance scheme seem to have proved successful.

But as many stakeholders point out, in a globalized world and an enlarged EU “[a]n isolationist approach is bound to fail. Strengthening dialogue, cooperation and partnerships between all countries affected by irregular migration (i.e. origin, transit and destination countries) is critical.” (OSCE, IOM and ILO, 2006: 164). The European Commission (2004: 15) emphasizes that there is a need “[...] to make a more intensive and targeted use of consultation and information exchange in specific areas [...].”

Regarding the deficit between fines and monetary penalties imposed on companies abroad and the enforcement thereof, it would be necessary to reach a Union-wide cooperation between the respective authorities (E2DE). Furthermore, trade unions in source countries have to become sensitive to the needs of their emigrating workers, be they regular or irregular (TU2DE).

In conclusion, the German approach to tackling the irregular employment of immigrants can be described as holistic, as demanded by the OSCE, ILO and IOM (2006: 164), among others. It can be assumed that the problem of irregular employment is much less substantial than it would be in a situation where none of the described measures were in place. Although some of these measures may still be subject to improvement, Germany has developed a sophisticated set of tools with which to tackle the challenge. In the end, particularly with regard to migrants’ rights, combating irregular employment lies in the best interest of the illegally employed immigrants themselves.

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ABBREVIATIONS

AAV	<i>Arbeitsaufenthaltsverordnung</i> (Ordinance on Working Stays ¹⁰¹)
ABH	<i>Ausländerbehörde</i> (Authority for foreigners)
AEntG	<i>Arbeitnehmerentsendegesetz</i> (Act on Obligatory Working Conditions for the Trans-Border Provision of Services / Act on the Posting of Workers)
AFIS	<i>Automatisiertes Fingerabdruckidentifizierungssystem</i> (Automated Finger Print Identification System)
AMI	<i>Arbeitsmarktinspektion</i> (Labour Market Inspection)
AO	<i>Abgabenordnung</i> (Fiscal Code)
ASAV	<i>Anwerbestoppausnahmereverordnung</i> (Ordinance on Exceptions from the Recruitment Ban)
AsylbLG	<i>Asylbewerberleistungsgesetz</i> (Asylum Seekers’ Benefits Act)
AÜG	<i>Arbeitnehmerüberlassungsgesetz</i> (Act Regulating the Commercial Lease of Employees / Temporary Employment Act)
AufenthG	<i>Aufenthaltsgesetz</i> (Residence Act)
AufenthV	<i>Aufenthaltsverordnung</i> (Ordinance on Residence)
AuslG	<i>Ausländergesetz</i> (Aliens Act)
AZR	<i>Ausländerzentralregister</i> (Central Register of Foreign Nationals)
BA	<i>Bundesagentur für Arbeit</i> (Federal Employment Agency)

¹⁰¹ As far as available, translations of the German terms are drawn from ‘official’ documents.

BAMF	<i>Bundesamt für Migration und Flüchtlinge</i> (Federal Office for Migration and Refugees)
BDA	<i>Bundesvereinigung der Deutschen Arbeitgeberverbände</i> (Organization of German Employers' Associations)
BDSG	<i>Bundesdatenschutzgesetz</i> (Federal Data Protection Act)
BeschV	<i>Beschäftigungsverordnung</i> (Ordinance on the Lawful Employment of Foreigners Entering Germany)
BeschVerfV	<i>Beschäftigungsverfahrensverordnung</i> (Ordinance on the Lawful Employment of Foreigners Living in Germany)
BGH	<i>Bundesgerichtshof</i> (Federal Supreme Court)
BGS	<i>Bundesgrenzschutz</i> (Federal Border Force)
BillBG	<i>Gesetz zur Bekämpfung der illegalen Beschäftigung</i> (Act to Combat Illegal Employment)
BillBZ	<i>Bekämpfungsstelle illegale Beschäftigung Zoll</i> (Customs service task force for the combating of illegal employment)
BKA	<i>Bundeskriminalamt</i> (Federal Criminal Police Office)
BMAS	<i>Bundesministerium für Arbeit und Soziales</i> (Federal Ministry of Labour and Social Affairs)
BMELV	<i>Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz</i> (Federal Ministry of Food, Agriculture and Consumer Protection)
BMF	<i>Bundesfinanzministerium</i> (Federal Ministry of Finance)
BMI	<i>Bundesministerium des Innern</i> (Federal Ministry of the Interior)
BMJ	<i>Bundesministerium der Justiz</i> (Federal Ministry of Justice)
bpa	<i>Bundesverband privater Anbieter sozialer Dienste e.V.</i> (Federal Association of Private Providers of Social Services)
BPOL	<i>Bundespolizei</i> (Federal Police)
BRH	<i>Bundesrechnungshof</i> (Federal Audit Office)
BT-Drs.	<i>Bundestags-Drucksache</i> (Printed Matter of the <i>German Bundestag</i> ¹⁰²)
BVA	<i>Bundesverwaltungsamt</i> (Federal Administration Office)
CDU	<i>Christlich-Demokratische Union</i> (Christian Democratic Union)
CSU	<i>Christlich-Soziale Union</i> (Christian Social Union)
DGB	<i>Deutscher Gewerkschaftsbund</i> (Federation of German Trade Unions)
epd	<i>Evangelischer Pressedienst</i> (Evangelic News Agency)
EU	European Union
EURODAC	European Dactyloscopy
EMWU	<i>Europäischer Verband der Wanderarbeiter</i> (European Migrant Workers Union)
FDP	<i>Freie Demokratische Partei Deutschlands</i> (Free Democratic Party)
FKS	<i>Finanzkontrolle Schwarzarbeit</i> (Monitoring authority for illegal employment)
FRONTEX	<i>Frontières Extérieures</i> (European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union)

¹⁰² The German Parliament is a bicameral parliament and consists of the Federal Assembly (*Bundestag*), the members of which are elected by popular vote, and the Federal Council (*Bundesrat*), in which the States (*Bundesländer*) are represented.

GASIM	<i>Gemeinsames Analyse- und Strategiezentrum Illegale Migration</i> (Joint Analysis and Strategy Centre for Illegal Migration)
GewO	<i>Gewerbeordnung</i> (Industrial Code)
GDP	Gross Domestic Product
HDB	<i>Hauptverband der Deutschen Bauindustrie</i> (Organization of the German Construction Industry)
HSchulAbsZugV	<i>Hochschulabsolventenzugangsverordnung</i> (Ordinance on the Admission of Foreign University Graduates)
HwO	<i>Handwerksordnung</i> (Crafts Code)
HWWI	<i>Hamburgisches WeltWirtschaftsinstitut</i> (Hamburg Institute for International Economics)
IAB	<i>Institut für Arbeitsmarkt- und Berufsforschung</i> (Institute for Labour Market and Employment Research)
IAW	<i>Institut für Angewandte Wirtschaftsforschung</i> (Institute for Applied Economic Research)
IG BAU	<i>Industriegewerkschaft Bauen-Agrar-Umwelt</i> (Industrial Trade Union Construction-Agriculture-Environment)
ILO	International Labour Organization
IMK	<i>Innenministerkonferenz</i> (Standing Conference of the Ministers and Senators of the Interior of the Federal States)
IOM	International Organization for Migration
IZA	<i>Institut zur Zukunft der Arbeit</i> (Institute for the Study of Labor)
MDK	<i>Medizinischer Dienst der Krankenkassen</i> (Medical Service of the German Health Insurance Companies)
OSCE	Organization for Security and Co-operation in Europe
RLUmG	<i>Richtlinienumsetzungsgesetz</i> (Act to Implement EU Directives)
RückHG	<i>Rückkehrhilfegesetz</i> (Act to Promote the Willingness of Foreign Nationals to Return Home)
SchwarzArbG	<i>Schwarzarbeitsbekämpfungsgesetz</i> (Act to Combat Illicit Work and Illegal Employment)
SGB	<i>Sozialgesetzbuch</i> (German Social Code)
SME	Small and medium-sized enterprises
SPD	<i>Sozialdemokratische Partei Deutschlands</i> (Social Democratic Party of Germany)
StBA	<i>Statistisches Bundesamt</i> (Federal Statistical Office)
StGB	<i>Strafgesetzbuch</i> (German Penal Code)
TBG	<i>Terrorismusbekämpfungsgesetz</i> (Counter-Terrorism Act)
ULAK	<i>Urlaubs- und Lohnausgleichskasse der Bauwirtschaft</i> (Holiday and Pay Compensation Fund of the Construction Business)
VAT	value-added tax
ZAV	<i>Zentrale Auslands- und Fachvermittlung</i> (Central Placement Office of the Federal Employment Agency)
ZDB	<i>Zentralverband des Deutsche Baugewerbes</i> (Umbrella Organization of the German Construction Trade)

ZDH	<i>Zentralverband des Deutschen Handwerks</i> (German Confederation of Skilled Crafts)
ZuwG	<i>Zuwanderungsgesetz</i> (Immigration Act)

EXPERT INTERVIEWS

E1DE	BDA (<i>Organization of German Employers' Associations</i>)
E2DE	ZDB (<i>Umbrella Organization of the German Construction Trade</i>)
E3DE	ZDH (<i>German Confederation of Skilled Crafts</i>)
I1DE	FKS (<i>Monitoring authority for illegal employment</i>)
NGO1DE	Caritas
NGO2DE	Diakonisches Werk ¹⁰³
NGO3DE	FiM e.V. (<i>Frauenrecht ist Menschenrecht e.V. / Women's Rights are Human Rights</i>)
NGO4DE	Katholisches Forum "Leben in der Illegalität" (<i>Catholic Forum "Living in Illegality"</i>)
TU1DE	IG BAU (<i>Industrial Trade Union Construction-Agriculture-Environment</i>)
TU2DE	EMWU (<i>European Migrant Workers Union</i>)

103 *Diakonisches Werk* is the social welfare organization of the Protestant Church in Germany.

Hungary – Towards Balanced Tightening of Regulations on Irregular Employment

Ágnes Hárs, Endre Sik

2.1 Introduction

In Hungary the concept of undeclared work has been part of the political discourse for decades¹.

The results of several public opinion polls have proved the controversial attitude of the Hungarian population towards this phenomenon. For example, in the late 1990s, 59 percent of the respondents, and 67 percent of the entrepreneurs responding, agreed that “the hidden economy is part of our everyday life” (HCSO, 1998), and that they simultaneously disliked the unethical nature and uncivilised characteristics of the informality, but accepted it as a part of their coping strategy.

More recent research (Belyó, 2003, 2004, 2007a, 2007b) has indicated the high inertia of these opinions. A telling example of this ambiguity is that while 85 percent of the respondents consider it unethical to hire undeclared employees, only 57 percent of them think that working undeclared is unethical (Belyó, 2003 p. 537).

A recent comparative European analysis of the attitudes toward undeclared work (European Commission, 2007) has demonstrated that Hungarians tend to be very tolerant of the informal economy in all its forms. (Table 2.1.)

Policy documents also refer to informality as an obstacle to development. In the course of accession to the EU, corruption was one of the most frequently mentioned ‘Hungaricums’ unacceptable to the EU. The 2006 national employment action plan referred to undeclared labour as the main cause of low levels of employment (Ádám, 2006, Social and Labour Ministry, 2006). Finally, as we will see in the summary section, there are currently strong governmental efforts being made to decrease the scope of the informal economy in general, and the fight against undeclared work in particular. To achieve these goals, new legislative measures and organizational solutions are in the making; new committees have been organized, the control authorities are to be reinforced, and so forth, and a campaign to change the attitude of the population towards informality has been launched.

¹ The illegal, irregular, undeclared and informal labour discussed in this paper should be understood as being synonymous references to any and all forms of irregular labour.

Table 2.1: The acceptance of unlawful behaviour, including undeclared work in EU27 countries and in Hungary

	Someone receives welfare payments without entitlement	Someone uses public transport without a valid ticket	A private person is hired by a private household for undeclared work	Undeclared work, including the business activities of firms	Someone evades taxes by not declaring, or only partially declaring, their income	Total
EU27	1.9	2.8	3.5	2.3	2.5	2.5
Hungary	2.6	3.0	4.0	2.7	3.0	2.9

Note: The scale offered to the respondents was from '1', meaning they found it 'absolutely unacceptable' to '10' meaning they found it 'absolutely acceptable'.

Source: European Commission, 2007.

2.2 The volume and composition of undeclared labour in general and of migrant labour in particular

In this section, we first summarize the available information on the volume and the characteristics of undeclared labour in general (Section 2.2.1) and then focus on the role of migrants in the undeclared economy (Section 2.2.2).

2.2.1 The volume and characteristics of undeclared labour in contemporary Hungary

While the size of the informal economy has been decreasing since the mid-1990s (Sik and Tóth, 1999, Lackó, 2000), the volume of undeclared labour is still significant in contemporary Hungary.

According to a discrepancy analysis (Kutas and Ádám, 2004), 13 percent of those reported as active in the HCSO labour force survey (LFS) did not appear in the tax authority's database. The authors emphasize that this estimate is likely to be a lower bound estimate, since even the LFS does not cover certain groups which are likely to include large numbers of people engaged in undeclared labour, such as students, part-time working pensioners and foreign citizens.

A more recent discrepancy analysis (Elek et al, 2008) shows the proportion of undeclared employment, including employees who receive a part of their salary off-the-books, in the form of an 'envelope wage', to be approximately 21–24 percent of declared employment. Comparing the level of declared employment recorded in the National Pension Insurance Directorate database with the level of gainful employment revealed by the labour force survey, Köllő (2008) estimated the scale of undeclared labour as being approximately 17–18 percent of the declared labour in 2004, varying between 10 percent in white collar jobs, to 50 percent in construction and personal services and 56 percent in various forms of agricultural labour.

Finally, according to a biased, but telling, source of information, labour inspectorate (OMMF) data on the number of identified undeclared workers shows a significant increase (National Association of Entrepreneurs and Employers, 2008). In 2007, 72,743 undeclared workers were caught; due, at least in part, to more frequent inspections, this figure was about twice as high as it had been in 2006 and seven times higher than in 2004.

As for the wages for undeclared labour, according to one survey of inspectors (Sik 1999), the estimated wages of unskilled undeclared workers did not increase, even nominally, between 1995 and 1997, and the rate of wage increase for unskilled agricultural and construction workers was below the annual level of inflation. The only exception was the case of wages received by masons; with a 30 percent wage increase, it was significantly above the inflation rate.

As the following table indicates, the estimated wage level for all forms of undeclared work increased from 2.3 to 2.6 times between 1998 and 2005².

Table 2.2 The highest and lowest estimated daily wage in three typical categories of undeclared work 1998–2005* (per thousand HUF)

	Mason (1)		Agricultural day labourer (2)		Unskilled construction worker (3)	
	Low	High	Low	High	Low	High
1998	2.0	3.2	0.9	1.4	1.1	1.7
1999	2.6	4.5	1.2	1.9	1.6	2.4
2001	3.3	5.3	1.8	2.8	1.6	2.4
2002	3.5	6.1	2.1	2.8	2.2	3.2
2005	4.5	8.1	2.2	3.6	2.8	4.4
2005/1998	2.25	2.53	2.44	2.57	2.54	2.59

Source: Girasek and Sik (2006)

* In the case of municipalities where undeclared labour was considered important by the mayor and/or local experts.

A detailed analysis of the estimated daily wages shows that the rate of increase for the estimated highest wage was greater than that of the lowest, indicating an increasing diversification and segmentation of the labour market; it also demonstrates that, on average, the wage level for unskilled work has remained consistent at approximately half of that received for skilled work.

2.2.2 The volume and composition of undeclared migrant labour

According to labour inspectorate data, 3–4 percent of undeclared workers identified in the course of inspections in 2006 were of foreign origin (National Labour Inspectorate, 2006); in 2007, there was a drop in the proportion of foreigners caught.

2 Between 1995 and 2004, the wage increase for day labourers working at the largest, open, marketplace (Moscow Square, Budapest) was somewhat lower. (Sik, 2006)

The prevalence of tourist, or suitcase trade, has decreased in the open-air marketplaces. While, in 1995 and 1997, there were foreign traders working in 75 percent and 61 percent of these marketplaces respectively (Sik and Tóth, 1999), in 2002, their presence, at 51 percent, had decreased to only slightly more than every second market place, similar to the figures for 2005, where foreign traders were present in 54 percent of the market places (Giczi, 2005).

A non-representative survey, based on expert interviews and conducted in 1999–2000 (Juhász and Szaitz, 2007), describes the typical, undeclared migrant worker as a young, male, ethnic Hungarian from one of the neighbouring countries, with previous experience and a good network on the Hungarian labour market, driven to work abroad by ambition, as well as by the poverty and lack of any future at home. The typical undeclared worker aims at earning as much money as possible in as short time as possible, and is unconcerned by issues relating to his work environment and prestige³. Compared to the distribution of Hungarian labour force, calculated by industrial branches, undeclared labour is more likely to appear in construction, at 34 percent, as compared to 8 percent, in agriculture, 7 percent to 5 percent, and, in personal services, 9 percent to 5 percent.

2.3 Combating the irregular employment of foreigners – an analysis of policy and the law

2.3.1 Policy and politics to combat the irregular employment of foreigners: general description

2.3.1.1 State policy on irregular employment

Although not unique among the new EU member states in its experience, Hungary has a long history of the hidden economy, including considerable irregular, or undeclared, employment. Although, as discussed above, both informal activities and undeclared work have declined since the early 1990s, both are nevertheless substantial. According to a recent report produced by the World Bank (World Bank, 2007), Hungary has one of the highest levels of undeclared labour in the EU.

The history of undeclared labour of various kinds, as well as the policy on informal labour, goes back to the communist system. Working outside the formal economy is something that has existed and been tolerated ever since the late 1960s, when the centrally planned economy was transformed into a decentralised model with some market elements. The so-called ‘second economy’ was part of the Hungarian model; various forms of activities were tolerated and considered to be elements of the system. Since the early 1980s, the level of employment in the formal economy has gradually decreased and various forms of activities have been considered to be alternative options for employment or subsistence⁴.

3 41 percent of the respondents worked more than 60 hours a week, and 21 percent more than 70 hours (Juhász et al, 2006; Juhász, Szaitz, 2007).

4 Legislation differed across the region; for example, in Czechoslovakia, legislation on private business was quite strict and penalties were rather high; as a result, undeclared work was rather modest in proportion. (Cp. Renoy et al, 2004)

In the 1990s, during the transition period, the labour market changed dramatically; industries were closed down and jobs disappeared *en masse*; there was a sharp increase in unemployment and the participation rate of the working age population, and even of the prime age population, decreased. The social safety net was unable to cope with the situation.

In practice, therefore, unregistered work and activity in the informal economy were tolerated and accepted as an important element of the ‘social peace’, a measure to prevent socio-economic tensions.

This attitude underwent little change following the early period of transition. Subsequent actions undertaken in order to combat the informal economy and undeclared labour were closely connected with economic restrictions and the social and political climate related to them. The targeting and fighting of such activities remained ineffective⁵. Consequently, the actions taken against undeclared work have been rather ineffective to date (cp. World Bank, 2007). The World Bank report, which is fully in line with the opinion of experts and officials, emphasizes the tacit acceptance and tolerance of undeclared employment on the part of politicians and official policy alike, as proved by interviews carried out with Ministry of Labour experts responsible for labour policy issues.

Although some steps in the form of policy initiatives have been taken to prevent informal employment, and to decrease the proportion of irregular employment, they have remained at the level of formalities and thus proved to be ineffective and to have had a somewhat limited impact. According to the European Commission assessment (Renooy et al, 2004), which is echoed by the World Bank (2007) and supported by the opinion of the Hungarian experts interviewed, there has been no explicit state policy against undeclared work in Hungary, despite the fact that successive governments have included elements of ‘the fight against black economy’ in their policy goals.

Various forms of irregular labour

The forms of undeclared work are diverse, and their causes are various and change over time. In many cases, employment is based on a mixture of legal and undeclared employment. Irregularity often stems from an employment contract which fails to adhere to formal requirements, or is defective in substance. In other cases, undeclared employment means employment without an employment contract, based on a verbal agreement between the parties concerned. In the latter case, the lack of any formal contract allows for the avoidance of tax payments on wages. At the same time, the employee lacks the security of the law, while, in the former case, only a part of the employment is legalized.

A widespread form of informal employment is employment by sub-contracting or assignment on the basis of a so-called ‘fake’ contract, which states a lower remuneration

5 Combating the informal economy received a stimulus in the mid-90s (cp. the detailed discussion provided by Borboly, 1999) and in recent years, as discussed below, when strong economic restrictions were necessary due to the economic imbalance and serious budget balance deficit. Most of the elements included in the measures were strongly linked to the budget revenue.

that is actually agreed upon, in order to avoid a high tax burden (cp. Fazekas, 2004). In Hungary, the tax burden on legal employment is high, even by international standards, due to the considerable tax and social security contributions required by law⁶. Consequently, it is in the short-term interest of both employers and employees to avoid legal employment contracts. During the 1990s, an important form of undeclared work was the so-called ‘double contract’, consisting of a formal contract providing for pay at the level of the national minimum wage and an informal contract reflecting the actual pay.

At the end of the late 1990s, a new form of undeclared employment, the fake civil law contract, became increasingly widespread. Since there is a lower tax and social security payment regime for enterprises, this is an effort to hide employment in the guise of entrepreneurship. Instead of entering into employment contracts, employers conclude service contracts with self-employed people who are operating as micro-enterprises; referred to as ‘forced entrepreneurs’, they are, in fact, in a position of dependent employment. Furthermore, employers gain important advantages of flexibility when using informal agreements or civil contracts instead of employment contracts. In addition to some form of tax evasion, the flexible form of employment often provides a gain for the employer and a short-term gain for the employee, since this form of employment is not subject to the protection of the Labour Code (Neumann and Tóth, 2004).

People of various ages are involved in undeclared employment. The form that the undeclared labour takes is connected with the groups involved. For the main part, these groups are the self-employed, who try to hide a part of their income from authorities; the unemployed, who try to earn income in addition to the benefits they receive; inactive persons of active age or even of prime age, living on social benefits or pensions, or dependent family members with, in fact, no income at all, whose additional income from undeclared labour is, in truth, their main income; retired people earning additional income; groups with the explicit aim of tax evasion, or involved in corruption or in activities verging on the borderline of crime, and foreign citizens of various kinds. This last group is discussed more in detail in section 3.1.2.

Considerations and measures in relation to the decreasing of irregular employment

The considerations and assumptions behind the actions undertaken to combat undeclared labour are diverse. The considerable financial burden placed on employment by high tax and social security contributions features extensively in the discussion held in the press and at the political level on the causes and consequences of undeclared work and on how the hidden economy might be combated.

Another approach to combating irregular labour aims at increasing the level of legal employment. The low level of formal employment and job seeking in Hungary is often presumed to lie behind the relatively high level of undeclared employment. The question here is as to whether formal and informal jobs substitute for, or complement, each other

⁶ The tax on Hungarian wages is one of the highest in Europe. Both employee and employer social security contributions are also extremely high, while net income is rather low (cp. data of the OECD (2007) on taxed wages.)

and whether people's engagement in informal employment is conducive to a lower search intensity for legal jobs. (Fazekas, 2004). The results available from the limited research conducted to date suggest that there is no causal relationship between informal and formal employment, or between informal employment and search intensity in Hungary. The informal economy is widespread in regions with low levels of education and a number of related attributes conducive to low levels of job creation and employment. In this sense, the informal economy is a consequence, rather than a cause, of low formal employment (Köllő and Nacsá, 2004).

The measures discussed in the political context and taken in order to combat undeclared work are diverse. They tackle various problems considered to be the causes of undocumented employment and target the various economic groups involved in informal activities, as detailed above. These measures have achieved only a limited success.

The Labour Inspectorates are authorized to control the labour market and the irregular employment of both natives and foreigners. The Act on Labour Inspection, introduced in 1996⁷, widened the responsibilities delegated to the Labour Inspectorates with the particular intent of combating irregular labour.

Irregular work is highly concentrated in sectors characterised by casual or seasonal labour. Over the course of the years, a number of measures have been taken to include seasonal employment in the labour legislation. A *labour certificate for casual workers* (the booklet for seasonal labour - AM könyv) was introduced in 1997 with the aim of easing the administration involved for employers in meeting their payment obligations, by enabling them to purchase a 'tax and contributions voucher'. The provisions under the law with regard to the certificate have been modified several times in light of the experience gained in its application and administration. The employees' task is to take the necessary steps in order to acquire the certificate, which they are then obliged to present whenever requested to do so in order to prove their legal employment.

Tax avoidance on the part of both employers and employees was presumed to be the reason for engaging in informal employment and constituted the assumption underlying the introduction of the voucher. However, wage-related taxes and contributions decreased substantially in the following years, suggesting its impact to have been limited. The rate of employers' contributions dropped by 6 percentage points in 1999 and by a further 2 percentage points in each of the years 2001 and 2002, that is, by a total of 10 percentage points (cp. Fazekas, 2004.) The impact of these changes on legal employment has not, therefore, been proven and remains the subject of discussion.

In 2001, a list of formal criteria regarding *employment contracts* was established under the new Labour Code, with the objective of promoting legal forms of employment. All contracts should be in written form and must include details of pay, the job description, and the location of the employment. However, this new employment contract initiative was evaded by employers, who resorted to hiring people in the form of micro-enterprises and under a civil contract, which works in the short-term economic interest of both

7 Act LXXV of 1996 on Labour Inspection.

parties. In 2003, in an effort to curb the incidence of sham civil contracts, the government amended the Labour Code, introducing more stringent rules (cp. World Bank, 2007).

To develop a comprehensive set of incentives for increasing legal employment in Hungary, an inter-ministerial working group was set up in May 2004 on the initiative of the Economic Cabinet of Ministers. The working group was headed by the Minister of Finance and involved a team of experts from the Ministry of Employment, Finance, Information and Justice and from the Central Statistical Office (State Reform/Allamreform, 2004). The Hungarian National Action Plan (NAP, The Program of New Equilibrium, 2006) also suggested measures to support and increase legal employment, recommending that further steps be taken to decrease taxes on employment, reform the contractual obligations and relationships incumbent on employment, increase public awareness, and permit more flexibility in the labour code, in order to reduce the incentives for engaging in undeclared work. Simultaneously, the government addressed the shortfalls in the staffing of the National Labour Inspectorate and increased the number of inspectors. A set of measures was also announced within the framework of the new socialist-liberal government's programme in 2006.

An important step toward preventing irregular employment on the labour market and supporting the work of the labour inspectorate has been to increase the amount of available information providing the background to their work. On 1 May 2004, when Hungary joined the EU, a new Unified Labour Register, known as *EMMA*, was adopted, requiring all employers to register new employees and terminations, with details of pay and work hours, in order to create a more transparent labour market by making data available to employees, employers and authorities⁸. This effort to curb the practice of undeclared work was further strengthened by the introduction of subsequent policies to improve the legal framework, especially in relation to contracts, as well as sanctions against those who are in breach of contract. There has been wide scepticism regarding the reliability of the data incorporated in the universal Labour Register. In fact, despite its promising nature, this proved to be the register's weakness and it has never successfully fulfilled the initial expectations for full transparency as regards the actors on the labour market. A huge sum of around 6.4 million euro was invested in the Unified Labour Register (EMMA); in effect, this appears to have been a high cost, borne for a very modest output in terms of data reliability and applicability (Fazekas, 2004 and interviews conducted with the Ministry of Labour and the National Employment Office). In effect from 1 January 2007, the registration procedure has been revised and the employer is now required to notify the Hungarian Tax and Financial Control Administration directly of details regarding employment (APEH). An employer-friendly, one-window registration system can thus be implemented, as there is no need for a series of different registrations. The data thus obtained can also be used by the National Labour Inspectorate which could, in the future, develop the data source provided by the Unified Labour Register (EMMA) as an effective tool for the investigation of undeclared employment. (World Bank, 2007).

8 67/2004.(IV. 15.) Decree of the Government on the Unified Labour Register (effective from 1 May 2004).

In 2005, ‘Employment Related Tax Fraud’, was designated as a new felony and inserted into the Criminal Code, its purpose being to enable a more stringent and effective fight against employment which evades the labour law, the tax law, and other employment-related legal provisions⁹.

The National Labour Inspectorate (OMMF) has the task of controlling the observance of labour market regulations, inspecting labour contracts, preventing violations of the employment law, administering fines imposed on violators of the law, and so forth. It was repeatedly claimed and declared that the activities of the National Labour Inspectorate were hampered by staff shortages. Administrative and legal institutions rarely exercised their power to support the work of the inspectorates in identifying false contracts, and an overall regulatory tone was also missing. At the beginning of 2006, the National Labour Inspectorate received support, the number of staff was increased and the organization of the Inspectorate was modernised. These changes have since been developed, although a great deal more work is still needed (Tremmer, 2006; interviews conducted with the chief of National Labour Inspectorate and with labour inspectors).

As mentioned above, the Unified Labour Register (EMMA) has been incorporated into a more unified database under the management of the Hungarian Tax and Financial Control Administration (APEH) and will thus provide information to better assist in revealing undeclared work. In addition, *adopting the individual social security insurance account* will offer transparency in the field of contribution payments. The management of individual accounts should be fully operational as of 1 January 2008.

A set of new measures and actions have recently been set in motion; a “Fair Play” campaign has been initiated and repeatedly advertised through media, with the aim of raising awareness of the importance of legalized activities, legalized trade, and so forth. As regards this process, the new approach of the National Labour Inspectorate is twofold; while it remains rigorous in its approach, inspections should be carried out in a way which is more humane. If the infringement is not very serious, a fine can be replaced with a preventive verbal warning, for example, in cases where there has been no previous irregular activity, where information concerning the irregularity is missing, where economic difficulties prevented legal activity or where there was cooperation during the inspection¹⁰. The World Bank (2007) report suggests some strategic policy directions that are relevant for the future in Hungary. Further amendments to the legislation, including simplification, enhanced transparency and more rigorous sanctions; organizational measures, such as the enhancement of the capacity of the controlling authority, with reorganization and an increase in the number of the staff would be desirable, as would the implementation of IT facilities, including electronic registers, electronic processing; an enhanced risk analysis system, with an increase in its efficiency; as well as the renewal of controlling methodologies.

9 Overview of the Hungarian Legislation Relating to the Reduction of Undeclared Work. Mimeo. Ministry of Justice and Law Enforcement. Budapest, 2007, reviewed by the World Bank (2007).

10 A recent National Labour Inspectorate (OMMF) conference, held on 16 October 2007, declared a selective humane approach to violators of the law. („Együtt a foglalkoztatás biztonságaért a feketemunka ellen” – “Together, for the safety of employment and against irregular labour”). The Prime Minister, Minister of Labour and the Head of the National Labour Inspectorate were present and supported the declaration.

2.3.1.2 State policy on the irregular employment of foreigners since 1990

Policy on the irregular employment of foreigners is embedded in the policies on both irregular employment and migration. In this section, we will briefly discuss the framework and the turning points of migration policy in general and, in particular, the labour migration policy focusing on the irregular employment of foreigners in Hungary¹¹. In the period since 1990, some changes, manifest in the changing regulatory regimes, have been evident in the policy relating to the employment and control of the irregular employment of foreigners. The early phase of immigration in the 1990s was followed by the regulation of immigration prior to the full adoption of EU regulations following the enlargement. The significant and peculiar character of the migration of ethnic Hungarians to the Hungarian labour market from the adjacent countries is an issue which is discussed separately.

The early phase of immigration in the 1990s

The recent history of immigration to Hungary goes back to the late 1980s and early 1990s, when successive waves of immigrants came from the adjacent countries. The source country was mainly Romania and later, in the first half of the 1990s, the former Yugoslavia, as a result of political unrest and war. The immigrant population was overwhelmingly ethnic Hungarian in origin¹². Another growing immigrant community comprises Chinese people and developed in the late 1980s, when they took advantage of the abolishment of visa requirements between China and Hungary¹³. The first period of immigration was characterised by the peculiarities of a state policy which was unprepared for the adoption of a official migration policy. A considerable proportion of the immigrants at that time were refugees; there was, however, no legal framework in place to accommodate them. During this early phase, regulations followed the first waves of immigration.

The Geneva Convention of 1951 on refugees was adopted by Hungary in 1989 and subsequently government decrees on its implementation were passed. However, most of the actual practice stemmed from unwritten administrative policies that developed to fill the gaps in the legal structure (Fullerton, 1997:134). Following the first waves

11 Previous immigration flows and waves to and from Hungary are not discussed in this paper. Until the late 1980s Hungary, was an emigrant country with considerable, and successive, emigration flows during the 20th century which have little relevance to the issue of present policy on irregular migration. For more detail, see Puskás (1991, 1996).

12 As a result of the peace treaties which concluded World War I, Hungary lost a substantial part of its territory; furthermore, during and after the First, and especially, the Second World Wars, large-scale forced resettlement movements took place. A consequence of all these changes is that, on the one hand, a population which was highly homogeneous in ethnic terms was created on the territory of Hungary, while on the other hand, ethnically mixed populations, with considerable Hungarian minorities, emerged in the countries surrounding Hungary. (Műnz 1995; Dövényi, Vukovich 1994; Hárs, Sik 2007).

13 At the end of October 1988, a treaty was signed on the waiving of the visa obligation between the two countries; it came into force on 1 January 1989. After June 1989, due to the political climate following the Tiananmen Square massacre, the Chinese became aware of the possibility thus afforded, and Hungary became an important destination. At the same time, the fact that several European countries had restricted the entry and stay of Chinese people made Hungary a more attractive destination, which led to an influx. Nyíri (1995).

of the inflow of foreigners, mostly ethnic Hungarians from the neighbouring countries, the number began to decrease. Applications for Hungarian citizenship and for residence permits, as well as the number of refugees and people under temporary protection, peaked in the early 1990s, mostly between 1991–1993. By the mid-1990s, over 130 thousand immigrants had entered Hungary by means of the sparse legal framework for refugee protection (Hárs et al, 2001).

The new foreign population, immigrant and refugee, and coming overwhelmingly from neighbouring countries, was present on the labour market, although mostly in the form of undocumented workers. A considerable proportion of working age foreigners sought work; mostly, however, without a work permit¹⁴. Following the economic transition of Hungary from a communist to a market economy, unemployment was fast on the increase; a fact which was mirrored in the changing sentiment of the natives toward the immigrants. In 1989, only 25 per cent of the population were of the opinion that foreigners would take their jobs; in 1993, every second respondent thought that foreigners would deprive the natives of jobs. Solidarity towards ethnic Hungarian immigrants was diminishing¹⁵.

As for Chinese immigration, it peaked in the autumn of 1991 at a figure of roughly 30 to 40 thousand Chinese. A considerable proportion of the Chinese immigrants were fairly well off. In the early period, a maximum of 20–30 percent of the Chinese immigrant population was living on the proceeds of unlawful conducted businesses. The proportion of those who were unsuccessful and, having failed to obtain an extension after the expiration of their stay permits, remained in Hungary illegally, soon dropped to 2–3 percent, while the rest left the country for the West via the green border¹⁶ (Nyíri, 2007). In addition to the economic self-selection characterising some groups, a political clean-up took place. In 1991, the first freely elected Hungarian government initiated a clean-up action aimed at extinguishing illegal trade and expelling those staying in the country illegally. The campaign was aimed mostly, though not explicitly, at the Chinese community and ended the liberal practice which had been introduced two years earlier. This prevented the further development of the previously flourishing community. Visa-free entry and stay was withdrawn. The routine of checking Chinese people on entry, in the course of the official procedures to get permission to stay or conduct a business, and in their activities made their circumstances unfavourable. Their number decreased substantially during this early period, some returning home, but most departing for other countries in CEEU, such as the Czech Republic, Romania, Slovakia, Slovenia, or elsewhere. This attitude towards the Chinese coincided with an economic and business situation which was less favourable towards entrepreneurship (Nyíri, 2007).

14 Cp. Hárs (1999b), and case studies such as Bognár and Kováts (1998), Szónokyné Ancsin (1997) and Bodó (1996).

15 This had been epitomized by the ‘national feeling’ aroused by the presence of ethnic Hungarian immigrants, which gradually decreased, from 70 percent in 1989, to about 30 percent in 1993 (Csepli and Sik, 1995)

16 According to Nyíri’s (2007) research on the peculiarities of Chinese immigration in Hungary, this class of Chinese immigrants was typical in other countries in the region in 1991 and they are still typical in Russia and possibly in countries other than Hungary.

As regards the general regulation of migration, in 1993, Parliament adopted Act LV of 1993 on Hungarian Citizenship and Act LXXXVI of 1993 on the Entry, Stay in Hungary and Immigration of Foreigners. However, these two laws still provided no comprehensive regulation of migration. The law, in fact, included only such *defensive and preventive* provisions as ‘exclusion clauses’, in order to focus on ‘public order’. The approach taken was that a country receiving migrants needed effective legal instruments, for example, sanctions for violation of the law, to be imposed against applicants with fake documents, and people crossing the border illegally, even against people overstaying, and so forth; sanctions, in fact, against illegal migrants. The flexibility which would permit a response to the positive elements of migration was missing, due to the lack of a comprehensive migration policy. Not much has changed since then. The regulations created a *rigid, restrictive model* for immigration. Benefits for ethnic Hungarians were limited, as they were also considered to be aliens (cp. Tóth, 1995).

Beyond entry regulations and residence permits, the employment of foreigners in Hungary was regulated, together with the employment of nationals, by the 1991 Employment Act¹⁷. Under the provisions of this law, *foreigners could only be employed* in Hungary, with specific exceptions, *if they had work permits*. It was a comprehensive regulation that included a definition of the full range of legal employment relationships and stated that the employment of foreigners under any type of contract was subject to approval by the appropriate authorities. Exceptions from the authorization requirement were partly regulated in the Employment Act. Permanent residents in possession of a permanent residence permit and recognized refugees with a permanent identity card were allowed to undertake employment without additional formalities. Other exceptions were stipulated by the Decree of the Minister of Labour, for instance, the managing director of company founded with foreign capital, foreign students attending schools in Hungary, the activities of foreign church officials, and so forth were not restricted by the work permit procedure. Violation of any form of this regulation resulted, in fact, in the illegal employment of foreigners.

In the early phase of transition, the regulations connected with immigration were characterised by the somewhat uninformed nature of the official policy. “*Since 1990 the political elite has shown little interest in the causes and consequences of international migration. The formulation of a migration policy has not been urged in any party platform, government decision, or any form influencing public opinion or the press. [...] Briefly, there was no domestic pressure on the government for the creation of a comprehensive migration policy even in its most rudimentary form.*” (Tóth, 1998). Although regulations were developed, control over the legal employment of foreigners, similarly to the case of the legal employment of natives, as discussed in the previous section, was not all that rigorous. Labour inspectors were authorized to examine identity papers, check passports and so forth, of people who were under inspection. By the mid-1990s, the staff of the Labour Inspectorates had been somewhat increased, as mentioned above. In addition, in

17 Act IV of 1991 on Employment Promotion and Provision for the Unemployed, Section 7. Special rules were stipulated by the Executive Decree of Act IV of 1991 on Employment Promotion and Provision for the Unemployed to the Minister of Labour on foreign labour authorization (Decree No. 7/1991 (X.17) MüM of the Minister of Labour on Permission for Employment of Foreign Citizens in Hungary).

order to ensure the security of the inspectors, inspections were usually effectuated jointly with the police. However, the effects were limited. (cp. Hárs, 1999a).

EU enlargement and labour immigration policy

In mid-2001, the Parliament passed a set of legislative measures known as the alien policing law package, which aimed to amend and/or replace four laws related to migration; (i) asylum, (ii) naturalisation, (iii) border control, and (iv) entry to, and residence in, Hungary. According to the government, these changes were required as part of the preparation for accession to the EU. The amendments *restricted* the conditions of entry and residence in Hungary, with the justification of combating “*illegal immigration*” and “*immigrant criminality*”. They created the legal category of ‘permanent resident’ (*letelepedett*), replacing the former status of ‘immigrant’ (*bevándorolt*) status. Under these laws, permanent residents enjoy somewhat fewer rights and entitlements than the previously defined immigrants had; furthermore, the status could be withdrawn if the original conditions, on the basis of which it was granted, no longer exist. The objective was to fight against the *illegal immigration* and *criminal activities* of foreigners, as is required by EU member states (Kováts et al, 2003). On 1 January 2002, less than a year after the new laws came into effect, the Government began preparing a new amendment to the laws on asylum and on the entry and residence of foreigners. Once again, EU accession and the fight against crime and illegal immigration were given as a justification.

The legal rules on the employment of foreigners were not changed in principle, although the Employment Act of 1991, having been modified several times, had become increasingly complicated as a result of the addition of new exceptions. Regulation on employment is clearly and considerably different from that of the policy relating to aliens, although the legislation for both cases is somewhat interrelated. There is an important characteristic common to the policy relating to aliens and the employment policy towards foreigners. The regulation was based on *state control*, that is, the attitude of the state was essential. In most cases, there was no entitlement by subjective right; the right depended on the authorities.

The formal, in other words, legal employment of foreigners is over-regulated in Hungary. Obtaining a work permit is a bureaucratic and time-consuming procedure, hedged by several restrictive rules. As a consequence, for those who should apply for a permit, there is a rational choice in preferring the expected gains from irregular employment to the benefits of respecting the legal employment procedure, if the risk involved is limited. The difficulty of obtaining a work permit pushes the employment of foreigners into unregistered and irregular forms (Hárs, 2002). As a consequence, irregular employment is widespread, while the legal employment of foreigners is limited. (Juhász et al, 2006, interviews conducted with migrants, employers and officials).

Ethnic Hungarian immigration and the Status Law

The status of ethnic Hungarians living in the countries adjacent to Hungary has always resulted in contradictory immigration legislation. The overwhelming majority of immigrants are from neighbouring countries and mostly have an ethnic Hungarian

background. On the one hand, successive Hungarian governments have always aimed at encouraging ethnic Hungarians to remain in their places of birth. Unlike the case of Germany, Hungary's policy toward co-ethnics abroad has thus developed as a policy of shaping national identity and not as an immigration policy. On the other hand, the Hungarian immigration and naturalisation system has often been criticised for being indifferent towards ethnic Hungarians. The key question has long been the extent to which a system of 'alien policing' can and should be the tool of trans-national ethnic politics, especially when the two have clearly conflicting interests. Until 2002, the governments of Hungary encouraged ethnic Hungarians to remain in the lands of their birth (Hárs, Sík, 2007).

Following heated political debate, some change occurred in the situation in 2002. The Status Law¹⁸, intended to introduce a set of legal instruments to support ethnic Hungarians in neighbouring countries, was introduced. In accordance with the new law, a 'Hungarian certificate' (*magyar igazolvány*) was introduced for ethnic Hungarians. As an important element of the Status Law, measures were proposed to regulate the seasonal employment of ethnic Hungarians in Hungary. The Law made it possible for holders of the 'Hungarian certificate' to be given a 3-month work permit without the necessity of instigating the complicated procedure of examining the labour market situation. This was not a significant exemption from the process of gaining permission to undertake employment, as other regulations still had to be met. According to research evidence, there was considerable pressure from the supply side, consisting of large numbers of ethnic Hungarians from the neighbouring countries who wished to take short-term jobs in Hungary, mostly in construction, agriculture and various unskilled activities. However, this pressure did not necessarily extend to making use of the possibility offered by the new legal framework provided by the Status Law. The 'Hungarian certificate' was a special scheme, targeting work similar to that being undertaken irregularly and providing the means to undertake the work legally. However, people often took their 'Hungarian certificate' for symbolic reasons of national sentiments and did not use it for legal, seasonal employment (Örkény, 2003; Hárs, 2003).

2.3.1.3 Present policy on the irregular employment of foreigners

The main issues in shaping and implementing the policy

The Hungarian policy towards labour migration pursues the priorities discussed above; these are somewhat different from the EU approach. While EU policies favour reducing demographic decline, combating irregular entries, stays and work, and the equal and fair treatment of migrant workers, the Hungarian migration policy continues the earlier practice of affording priority to short-term interests. Not much effort has been given to utilizing foreign labour by consciously following a clear migration policy. The Hungarian government still aims to maintain a restrictive labour migration system.

Due to the sensitive issue of ethnic kinship, some preference is given to the ethnic Hungarians living in the surrounding countries (Tóth 2006; Hárs and Sík, 2007).

18 Act LXII of 2001 on Hungarians in adjacent countries

Migration policy concerning third countries nationals is rather restrictive in Hungary; it is one of the few countries in the enlarged EU-25 where the termination of a work contract is still a reason for revoking a work and residence permit, or refusing their renewal, while the ability to take up self-employed activity is not equal to that of EU nationals either¹⁹. This has an unfavourable effect on third country immigrants, including the still considerable, although more or less static, Chinese community. As a consequence, the main idea behind the policy on irregular migration and labour migration is to limit the number of foreigners, on the assumption that the fewer foreigners there are, the less the burden of combating the irregular employment of foreigners will be.

To deal with the lack of a comprehensive migration policy, an Inter-ministry Committee on Migration was set up by the Prime Minister's Office in April 2004²⁰, with the explicit aim of harmonising and coordinating activities that are closely linked to the country's EU membership. Not much has been changed, however. Following inter-ministry consultations and redrafting, a migration strategy consistent with the previous approach was drafted. Three main issues were reiterated throughout the text, setting the general tone: (i) Any step taken as part of the migration strategy should consider the risks to public and national security which are inherent in migration; (ii) The migration strategy should reflect the inclusion capacity and Hungarian society's willingness to absorb foreigners; (iii) *Combating irregular migration* will remain a central issue in Hungary's migration policy and will become more closely intertwined with the fight against organized crime. Regarding labour migration, the proposal considers the introduction of a simplified administrative procedure for issuing work permits and visas, as well as encouraging the settlement of qualified workers and researchers of foreign origin. Underlining the emphasis on security, the document calls for *more effective action against the irregular employment of foreigners*, proposing *stricter sanctions* against employers, together with comprehensive monitoring to be carried out by the competent authorities (Hárs and Kováts, 2005).

The repeated suggestions of a restrictive immigration policy coincided with the policy on combating irregular employment and the informal economy. Action against the irregular employment of foreigners was part of Hungary's preparation for Schengen membership and focused on the introduction of a complex system of control to be implemented by the authorities involved²¹. This joint action involved the Immigration and Nationality Office (BÁH), the Hungarian Customs and Finance Guard (VPOP), the National Labour Inspectorate (OMMF), the border police and the police; it covered the inspection and control of visas, residence permits and work permits, as well as the exchange of information on such issues as the main sources of migration, organization, migration routes and so forth.

19 Niessen et al (2007). Consult also www.integrationindex.eu

20 The Committee was set up by a Government Decision (2104/2004. IV.28. korm.). The document produced by the committee remains unpublished.

21 20/2004.(B.K.15.) the common order of the Ministry of Interior, the Ministry of Finance and the Ministry of Employment and Labour, and information from an interview conducted with a member of the Migration Policy Department of the Ministry of Justice and Law Enforcement.

The high proportion of irregular employment has recently, and repeatedly, been the subject of political debates and campaigns. However, the core issue of the recent debate regarding the combating of irregular employment was not the irregular employment of foreigners, which has long been considered to be a marginal problem. According to the head of the National Labour Inspectorate, at the end of 2007 there were something over 1200 foreigners among approximately 40 thousand irregular workers, that is, less than 5 per cent. In Central-Transdanubia, the most industrialised region, where road building and other large construction works were underway, the regional labour inspectorate noted that in 2006 13 per cent of the undocumented employees inspected were foreigners (Central Transdanubian Labour Inspectorate, 2007). Another comprehensive report by Juhász and Szaitz (2007), based on a set of interviews conducted with experts and professionals on migration and irregular work in Hungary, came to similar conclusions; the existence of a considerable irregular labour market for natives is the main problem and not the employment of foreigners. According to the estimates presented in the report, the proportion of irregular labour in the economy can be set at 25–30 percent on average, of which 15–20 percent is represented by the irregular labour of foreigners, with differences by region and by industry. Construction represents a higher proportion, for example. The president of the construction workers' trade union is of the opinion that irregular foreign labour is increasing as a result of the estimated lack of some categories of skilled labour, combined with increased production in the sector. When asked if there was any irregular employment of foreigners, the spokesman for a major enterprise in the construction industry laconically replied that in the case of many road and canal construction sites, interpreters are as important as the workers (Népszabadság, 2007). Nevertheless, a recent article on experiences regarding the Labour Inspectorates' newly initiated action against irregular labour stresses that, in contrast to public belief, the overwhelming majority of irregular labourer are not foreigners, but Hungarian citizens (HVG on-line, 2007).

Policies targeting the irregular employment of foreigners are, in fact, part of the policy measures instituted against irregular employment in general and they represent only a marginal part of the complete set of policies against irregular employment. A full set of actions and measures have been introduced by the government recently under the heading of "Fair play", in order to combat irregular labour; however, foreigners are not specifically targeted. Inspections have been carried out by the Labour Inspectorates in the market places; the Chinese Markets in Budapest and elsewhere repeatedly form the focus of these initiatives. The staff and budget of the Labour Inspectorates have also been reinforced. Economic incentives relating to taxation and aiming to encourage financial discipline in the form of issuing invoices or bills also constitute a part of these measures. In effect from 2006, state subsidy is not granted to employers with irregular employment relations; similarly, companies involved with the irregular employment of workers and/or in violation of employment regulations with regard to foreigners are banned from participating in public procurement procedures²². However, there are

22 Employers who are caught are openly listed on the National Labour Inspectorate's website. This information can be used by people seeking employment and those searching for cooperation with a new partner, in order to avoid collaborating with employers on the list. However, according to the lecture given by the State Secretary of Ministry of Finance at the Government forum organized by the Government Office and the Hungarian Academy of Sciences on the informal economy, on 27th November 2007, in practice, there are few enquiries.

some contradictions concerning the black list relating to punishment by exclusion from the public procurement process. When disclosed by the Labour Inspectorate, having irregularly employed workers leads to exclusion from public procurement; when similar contraventions of rules are revealed by the tax authorities, the exclusion does not apply. This example serves to prove the uncoordinated and incoherent approach, which weakens the effectiveness of the measures introduced (Interview with the chief of the National Labour Inspectorate).

The regularization of irregular foreign labour has been an element missing from Hungarian policy. Given the structure and the character of the overwhelming majority of unregistered irregular migrants, regularization was not considered as being an effective measure. In connection with the accession to the EU²³, a regularization campaign was initiated, offered by means of the Law on accession and targeting a strictly defined group of undocumented migrants residing in the country. The regularization offered them the opportunity to obtain a 1-year residence permit. This campaign had a modest impact and received almost no response from the media. By the end of the regularization period, some one thousand people, mostly Hungarian citizens, had applied and had their status regularized; the predominate reason for doing so was family reunification, although there were irregular foreigners from various countries who applied: 57 Chinese, 28 Romanian, 13 Serbian and 12 Vietnamese citizens (Népszabadság, 2004).

The main actors involved in shaping and implementing the policy

Since there is no distinct government agency to deal with migration and no migration policy has been drawn up and accepted, issues connected with immigration and irregular migration have been mixed, overrated and misinterpreted. Until recently, the main actor with regard to immigration policy has been the Office of Immigration and Nationality (BÁH) of the Ministry of the Interior, a bureaucratic conglomerate responsible for ‘alien policing’, asylum and naturalisation affairs²⁴. Furthermore, the political and public discourse, shaped by the press and official communiqués issued by the Ministry of the Interior, including the Office of Immigration and Nationality (BÁH), the Border Guard and the Police, often fail to differentiate between the terms ‘irregular aliens’, ‘asylum seekers’, ‘refugees’ and ‘migrants’.

Due to the reorganization of the division of governmental competencies which took place in 2006, the Office of Immigration and Nationality (BÁH) has been subordinated to the Ministry of Justice and Law Enforcement, replacing the Ministry of the Interior. A new independent Department of Migration has also been established under the auspices of the Ministry, in order to develop a migration policy and carry out the preparatory work for the ensuing legislation.

23 Act XXIX of 2004 on amendments, abolishing decrees, and establishing decrees in connection with the accession to the European Union, §145.

24 From the outset, migration policy debates have focused on asylum issues as a main concern, usually strongly associated with the issue of ‘*illegal migration*’. Consequently, migration issues were linked to the Office of Immigration and Nationality (BÁH).

Another strand of the migration policy is that of labour migration in connection with labour market policy. The Ministry of Labour, which is responsible for labour migration, has only pursued short-term interests, without giving weight to the additional values and utmost priorities of the European Union. The task of controlling the employment of foreigners is delegated to the National Labour Inspectorate (OMMF), the same authority responsible for both the legal employment of natives and occupational safety. Neither institutionalised dialogue, nor even an exchange of views has been initiated among the stakeholders in labour migration, that is, the Ministry of Labour, employers, trade unions, social partners, political parties, local communities, NGOs representing migrants, social workers, integration programmes and human rights activists. Academic surveys, conferences and international networks have inspired an exchange of views from time to time. The lack of dialogue on the main migration policy issues underpins the total lack of consultation on irregular labour migration or other sensitive issues.

Recently, there has been some change in the restrictive policy direction, which has occurred during the process of formulating the Law on Integration, with regard to third country nationals²⁵. The provision of assistance to employers who employ foreign labour, by means of a tax allowance, for example, has been suggested, on the basis of the supposition that there is a shortage of native labour. Other suggestions have been made, proposing the preparation of a campaign aiming at the legal employment of foreigners, the provision of support in gathering the documents required to effect this, and assistance in gaining legal protection for foreign employees in terms of legal length of working time, leisure time, remuneration, and so forth. The lack of an adequate forum, such as an NGO or similar organization, is an impediment. A dilemma which arose during the preparation of the integration law was that of how to support the employment of foreigners in the face of public opinion. The devising of a points system in order to favour certain desirable groups of foreign employees, such as, for example, qualified labour, and the provision of assistance if their rights are violated, needs the development of well-prepared and tailor-made campaigns.

Political debates on, and media interest in, the irregular employment of foreigners

When discussing immigration and the employment and irregular employment of foreigners in Hungary, the danger that foreigners will deprive the natives of work has not been a predominant issue in the public debate. Since it is mostly ethnic Hungarians who are involved in labour migration, the discourse has been concerned with the problems and the situation of ethnic Hungarians living in the adjacent countries and the circumstances surrounding their irregular labour. The migration of ethnic Hungarians has been approached and considered with substantial tolerance. According to Kovács and Kriza (2004), there is little media interest in immigrants, foreign communities, and foreign labour; for example, there has been almost no media coverage of the Chinese community which has been flourishing in Hungary since the early 1990s. The media is mostly focused on the relationship of foreigners to political institutions, including the offices responsible for immigration problems, or on crime-related issues, criminal

25 Information based on an interview conducted with a member of the Migration Policy department of the Ministry of Justice and Law Enforcement.

investigations and punishment. When not focused on conflicts, a relatively high number of reports give information about the relationship between everyday Hungarians and immigrants. On the other hand, there has been little media focus or interest in the relationship between the immigrants and the social institutions, or the cultural institutions and community activities of migrants themselves.

Neither the politicians and professionals, nor the general public has so far perceived migration as being a core problem in Hungarian society. Therefore, policy debates and media interest remains isolated, short-term and, usually, ad hoc, being related to a specific legislative proposal. The press draws attention to such events as a large 'catch' of 'irregular immigrants', or complains about perceived labour conflicts (Kováts et al, 2003). Nevertheless, the media has been involved in the issue of migration from the very beginning, although it has often confused various aspects of the matter, with migration issues frequently being connected with crime. According to a concise summary of the situation, made by the Director of the Hungarian Refugee Authority in the 1990s:

Media portrayal and opinion polls show that the issue of refugees and criminals are very often confused. We have found on several occasions that foreigners entering or staying in the country illegally are often regarded as refugees, irrespective of their actual legal status, and that community centres accommodating aliens against whom police measures are being actively implemented are often regarded as refugee camps. [...] The spread of erroneous information may lead to a situation in which the public, which has proven willing to help on the past occasions, will not be able to distinguish between claimants really needing help and the participants and beneficiaries of unwanted and illegal migration. (Jungbert, 1997: 99).

Examples found in the media itself serve to illustrate this questionable media interest. Even the violation of the immigration law has not been the subject of outrage. The Chief Commissioner of the police for the Bács-Kiskun region issued a stipulation that a residence permit may be issued in the region for a maximum period of 30 days. In the press, the reason behind the measures was given as being that the police intended to restrict the inflow and settlement of foreign Mafioso in the region (Népszabadság, 17 July 1998).

The political debate on the 'Hungarian certificate' and the Status Law discussed above touched upon the set of instruments that was intended to ease the seasonal labour of ethnic Hungarians. The public and political debate on ethnic Hungarians and mass migration emerged again in late 2004, when the issue of granting Hungarian citizenship to those who request it and are able to prove their Hungarian origin was raised and a referendum was initiated²⁶. The political argument of the intolerable size of the expected migration was repeatedly brought up, without being supported by expert study.

Recently, since the combating of irregular employment became a focus of policy, the unfavourable representation of irregular foreign workers has become common, with these people being depicted as felons who have violated the law (Kácsor 2007; Piac és profit, 2006). The most frequent stories in the press relate to raids carried out jointly by

26 For details on the debate, in Hungarian, please see: <http://www.kettosallampolgarsag.mtaki.hu/>

the authorities, with labour inspectors present, together with the border guards of the police service and, in addition, an important government representative, such as the Minister of Labour or the head of the Labour Inspectorate; such as, for example, the report carried in *Népszabadság* on 28 May 2005.

In some cases, media interest becomes engaged in the violation of human rights in refugee camps or in cases of trafficking in human beings. Media interest has often echoed the protesting voice of the human rights associations, the *Hungarian Helsinki Committee* or the *Menedék*, working intensively for the human rights of foreigners or refugees²⁷.

2.3.2 The legal framework for combating the irregular employment of foreigners and an analysis of the law²⁸

2.3.2.1. Prevention of the irregular employment of foreign workers

Legal employment of third country nationals

The regulations relating to this issue are somewhat confusing, since some of the Laws and Decrees are still in force, although they have been amended several times, and changes are frequent, especially in the context of the EU enlargement process. Some complex and conflicting Laws and regulations are in force concurrently.

The basic legislation regulating the legal employment of foreigners is the Act on Employment (Act IV of 991), which has been amended several times. Article 7 of the Act entitles the Minister responsible for employment to issue a decree on exemptions from the requirement to hold a work permit and relating to the procedures for obtaining work permits. As a general rule, the employment of foreigners is *subject* to permission, with due regard to the exceptions listed in the Act or the decree on work permits for foreigners.

A work permit can be issued if the employer duly indicates his or her requirement for a foreign worker and if, prior to submitting the vacancy, it has been proved that no national labour was available²⁹. However, in certain cases the requirement to assess the labour market situation can be waived, for example, in cases of employing a person in a key position, limited up to 5 per cent of the staff of companies with foreign majority. However, a company which has been subject to fines or other labour inspection procedures imposed in the previous year due to having engaged in irregular

27 An open letter, addressed to the President of Parliament and the Minister of Interior (2 February 2002) and signed by independent intellectuals, which detailed a long list of violations of human rights, deaths of refugees, detention of foreigners who had applied for refugee status, and so forth, was published of necessity. However, most of the shocking cases are seldom reported, or reported only as short news items. cf. the list of archived information on cases of violations which is either unpublished or only published in part <http://www.helsinki.hu/article.cgi?lang=hu&fo=2&al=7>

28 Acknowledgement should be given for Judit Tóth, who gave valuable assistance, help, advice and the benefit of her research experiences regarding the regulations and legal research in the field of migration.

29 While, prior to the enlargement, the same condition was the national preference, now the Preference of the Community is the priority.

employment is excluded from the right to a waiver and the right to employ a foreigner without a work permit. In a situation where there are strikes or significant lay offs, the employment of foreign nationals is also precluded. In addition, conditions should be met regarding health requirements, qualifications, and a sufficient remuneration of no less than 80 percent of the national average in the particular branch or occupation, and not below the national minimal wage. After being granted a work permit, the foreigner is then required to apply for a long-term visa for the purpose of gainful employment³⁰.

There is a long list of various reasons for the exceptions, where no work permit is needed; for example, acknowledged foreigners in the field of education, science, the arts, and so forth, are also exempted from the obligation to obtain a work permit. The list has existed ever since the regulations were introduced, and it has changed and expanded with the course of time, according to current government preferences. While new exceptions were repeatedly added to the list, not a single exception was withdrawn. One exception is work that involves the commissioning, warranty repair, maintenance or guarantee service activities performed on the basis of a private contract with a foreign-registered company, if such work does not exceed fifteen consecutive days at any given time. It also includes the staff of diplomatic or consular missions, or the branches or offices of such, and work performed by foreign nationals at international organizations or at joint organizations established under international convention. Some education-related cases are also acknowledged; a foreign national winning a tender for post-doctorate related employment, or a public-financed research scholarship for work performed as part of the tender or the scholarship program; and for the employment of a foreign national studying at a foreign institution of higher education as part of an apprentice training program arranged by an international student organization. Foreign nationals are also exempt if they are pursuing full-time studies at vocational schools, secondary school, basic art schools or institutions of higher education; foreign nationals employed in elementary, secondary and higher education institutions for lecturing in a foreign language, if such employment is part of an international school program signed by the relevant ministers of the countries involved, and verified by the Ministry of Education and Culture, are also included in the list of exceptions.

The procedure for legal employment is definitely not simple. It is a long, bureaucratic procedure of authorization, launched by the employer while the potential foreign worker waits at home. In practice, the non-seasonal permit is issued for one year at most, but it is only when it has been issued that the labourer can submit an application for a labour visa, in other words, a residence visa with the right to undertake employment, which also takes weeks, or even months, to process. Thus, the work permit is, in practice, applicable for no more than 10 months, due to the long period of waiting brought about by the bureaucratic procedure. Furthermore, the work permit is issued for a specific workplace and the process for prolongation or obtaining a new authorization is almost the same. In addition to the other reasons contributing to the growth of a shadow

30 According to Act XXXIX, of 2001, on the Entry and Stay of Foreigners. The Act was replaced by two new Laws in July 2007; by Act II of 2007 on the entry and stay of third country nationals and by Act I of 2007 on the entry and residence of persons in possession of the right to free movement and residence.

economy discussed in previous sections, this high transaction cost, in terms of time and energy, may also explain the increase in irregular employment among foreigners.

Employment regulation for ethnic Hungarians

Ethnic Hungarians, as foreigners, are treated beneficially under various aspects of the law. The existing regulations remained in force following EU accession. The most relevant preference accorded them, in terms of labour migration, is that of *long-term resident status*. Those having an open-ended, permanent residence permit are covered by numerous national regulations, rights and obligations. For instance, they are eligible to undertake employment and they have access to free public education and family allowances. *The status of permanent resident can be more easily obtained by ethnic Hungarians*. Instead of a continuous, lawful, three-year stay in Hungary, an application for a long-term resident permit may be submitted on the basis of a previous lawful residence, shorter, and of unspecified duration.

Employment regulation following the EU enlargement

Following the enlargement of the EU on 1 May 2004, some of the old EU countries introduced a transition period, limiting freedom of labour for the citizens of the new member countries. In response, Hungary imposed reciprocal provisions³¹, which have since been abolished in relation to nationals of those countries which have lifted the transition period for Hungarians.

Following the enlargement of January 2007, the main source country of migrants to Hungary, namely Romania, became a member of the EU. The position of the Hungarian government was controversial, and the Hungarian labour market was only partially opened to Romanian and Bulgarian citizens. Access to the Hungarian labour market was not free. Long lists of exceptions were announced for employment which could be undertaken without undergoing the complicated work permit procedure³². A more comprehensive regulation came into force recently, regulating the developments that took place as a result of the enlargement³³.

Particular forms of employment of third country nationals

Various forms of short-term employment are regulated, with the intention of easing the employment of foreigners. The regulations are restricted to certain sectors and specific lengths of employment and partly lift the cumbersome work permit procedures. Short-term seasonal employment in agriculture or casual employment is often part of the irregular labour market.

31 Decree of Government 93/2004. (IV. 27.) on reciprocity and safety measures, replaced by Decree of Government 355/2007. (XII. 23.) on the transitional regulations concerning the free movement of labour.

32 Decree of Government 354/2006. (XII. 23.) on the transition order for the free movement of labour between Hungary and the new members, after the accession of Bulgaria and Romania to the EU.

33 Decree of Government 355/2007. (XII. 23.) on the transitional regulations concerning the free movement of labour, abolishing the previous Decree of Government 354/2006. (XII. 23.).

*Seasonal employment of foreigners*³⁴ allows a foreigner to obtain a visa and seasonal work permit for seasonal employment in agriculture. The permit is given for a maximum of 150 days within a 12-month period, at various places of work if necessary, and is issued on the basis of somewhat easier procedures. The *Labour certificate for casual workers* (*AM könyv*) is a form of employment registration³⁵ that is given to both Hungarians and foreigners. The measure introduced to enable nationals to work with a ‘labour certificate for casual workers’ (*AM könyv*) was extended for foreigners, with effect from August 2005. Foreigners are given the certificate for a maximum of 60 days in one year. They are eligible to be employed on the basis of the casual certificate for a shorter term and under more restricted conditions than natives. Simplified administrative procedures and taxation of labour provides a potential alternative to the employment of irregular casual workers, and the certificate offers some possibility for the regular employment of foreigners in this field.

The measure has mostly been taken advantage of by Slovaks and Romanians and, to a lesser extent, by Ukrainians. In 2006, under the provisions of the regulations, Slovak citizens, as EU members, were entitled to undertake non-agricultural jobs; as a consequence, they were engaged in non-agricultural activities, the overwhelming majority in the border county. Romanian and Ukrainian citizens, as third country nationals, were restricted to taking jobs using the certificate for casual workers in agriculture and they were employed mostly in the eastern border regions. In 2006, the total number of certificates used was 3,874, and 93,000 hours were worked (National Employment Service, 2006), which is the equivalent of 11,625 full-time working days. Certificates are obtained, but only used in the ‘emergency case’ of an inspection. Every third certificate issued was used; this proportion of certificates utilised being even lower than in the case of natives. It is possible that the certificate is used as a safety device, in order to hide irregular employment (Hámor, 2007).

2.3.2.2 Punitive measures

Control tasks of the Labour Inspectorates

The employment of foreigners is regulated by the Employment Act, as discussed above³⁶, as are the consequences of the irregular employment of foreigners. With effect from 2006, the consequences of the irregular employment of foreigners are stipulated in the amended Act on Labour Inspection³⁷. The county level structure of the Labour Inspectorates has recently been reformed with a view to becoming more effective and complex in terms of their operation. The forms which the irregular employment of foreigners might take varies. Apart from the lack of a work permit, there are various other forms of unregistered employment of foreigners, such as overstaying, as well as employment other than that for which the work permit was issued, or work being carried

34 According to the Decree of the Minister of Social and Family Affairs 8/1999. (XI. 10.) SzCsM on the permission for the employment of foreigners (amended by the Decree of the Minister of Employment and Labour 21/2004. (IV. 28.) FMM)

35 Act LXXIV. of 1997. on labour certificate for casual workers

36 Act IV of 1991 on Employment Promotion and Provision for the Unemployed

37 Amended Act LXXV of 1996 on the Labour Inspection,

out at a location other than the one indicated in the permit. The main consequence of any form of unregistered employment of foreigners is the imposition of financial penalties on the employer and the possible expulsion of the foreigner³⁸.

Financial penalties; sanctions imposed on employers

Serious efforts are made to limit irregular employment and to formalize the labour market in Hungary. The sanctions for the irregular employment of foreigners and natives have become stricter and the rules relating to labour inspections changed on 1 January 2006³⁹. As punishment for the unregistered employment of foreigners, the employer should pay a fine to the Labour Market Fund, a central government fund used for the purpose of employment policy measures. The details are stipulated in the regulations, which postulate an amount that is sufficiently high to prevent irregular employment. The employer of irregular foreign labour should pay a fine for each identified irregular worker. The law is progressive and tries to be tolerant. It distinguishes between those violating the law for the first time and those who repeatedly violate the law. In the former case, the fine is 4 times the supposed salary for the supposed period that the employees have been working, but no less than 8 times the minimum wage⁴⁰. In the latter case, the fine is 8 times the supposed salary and not less than 15 times the minimum wage. In addition to differentiating between a first time offender and a person caught on several occasions, there are also more lenient penalties for private households where a worker is employed illegally. If the employer is a private person, the fine is double the minimum wage for a first-time infringement, or when only one unregistered foreigner is employed; in other cases, the fine is 4 times the minimum wage. Inspection of individuals is less frequent than that of companies, although the denunciation of a neighbour who may be employing household help irregularly may result in an inspection. Another distinction made is that overstaying is punished less severely than other forms of irregular foreigner labour. The fine imposed is lower, being the equivalent of the supposed salary, but no less than double the minimum wage in the particular event of irregular employment when the work permit has expired, should the new request for permission to employ the foreigner have been submitted prior to the inspection.

In line with recent efforts and actions to combat irregular activities, a black list of employers violating employment legislation was set up, as mentioned earlier. Information on employers who employ irregular worker(s), including, possibly, irregular foreigners, is published on the home page of the National Labour Inspectorate website. This is a retrospective list of employment infringement cases and dates back to August 2005. The

38 According to the interview conducted with the head of the National Labour Inspectorate, there is some contradiction in the regulation. The task of the Inspectorate is the protection of employees, on the basis of the Labour Code. Illegally employed foreigners are not covered by this law, however. The reason for this is that an illegally employed foreigner can not be employed and thus no labour relations exist. Illegal employment is fined, but not the illegal labour relations of the foreigners, though in the case of natives, illegal employment conditions, such as wages, working time, working conditions and so forth can be controlled and punished.

39 Amended Act LXXV of 1996 on the Labour Inspection, section 7/A. §

40 In the introductory year of the regulation, calculated on the basis of the minimum wage, the fine was not less than approximately 2,000 euros for a first-time infringement and 4,000 euros in repeated cases, per person employed illegally.

list gives the name, residence and tax identity number of the employer, the nature of the infringement committed, the legal consequence, the date when the infringement was ascertained and the date of its publication on the website⁴¹. Since 1 January 2007, all decisions related to fines imposed for employment and labour safety infringements have been published on the National Labour Inspectorate home page.

The amended act on Labour Inspection⁴² granted the Labour Inspectorate the right to investigate the authorization of temporary employment, with regard to both foreign and native workers. If the labour inspectors recognize cases of unlawful employment, they have the right to oblige the employer to pay the temporary employees' wages for the period of ban on employment. They can even suspend the employer's business activities in cases where temporary workers have been employed without authorization. The employment of temporary workers and the operations of agencies placing temporary workers in employment are expanding; control over temporary employment is therefore crucial if the misuse of this form of employment is to be avoided.

Obligation to bear the costs of an irregular employee's return

In a case where 'alien policing' leads to the expulsion of a foreigner, the authority initiating or executing the expulsion requests the employer of the foreigner to cover the costs. In a case where the employer is either unknown or has not been identified, the person who, in principle, invited the person being expelled, is requested to pay the costs. No stricter obligation has been formulated, however⁴³ and no specific criminal sanctions or prison sentences for particularly exploitative forms of irregular employment are provided for in the regulations.

Expulsion order and ban on entry – sanctions against irregular foreign workers

The main financial penalty for the irregular employment of foreigners is imposed on the employer. Another possible sanction imposed for irregular employment is, however, the option of arresting and expelling the foreigner⁴⁴. The Office of Immigration and Nationality (BÁH) of the Ministry of the Interior has the discretionary power to decide on the sanction⁴⁵. The law provides for a ban on entry to be imposed; however, the text is vague, and no specific period is stipulated⁴⁶.

41 1/2006. (II. 2.) Decree of the Ministry of Employment and Labour on the proving of lawfully organized industrial relations, amended with 3/2006. (IX. 15.). Decree of the Ministry Social and Labour Affairs.

42 Amended Act LXXV of 1996 on Labour Inspection.

43 5/2001. (XI. 21.) Decree of the Ministry of Interior (BM) on the execution of Act XXXIX of 2001 on the Entry and Stay of Foreigners, 4. § (1) A Act. 40. §-a (7).

44 Act XXXIX of 2001 on the Entry and Stay of Foreigners.

45 Cases are scarce, however. In 2005 the number of persons removed, for any reason, by the Office of Immigration and Nationality were 725. Half of these people were of Romanian citizenship, the second largest group were Ukrainians (Futó and Jandl, 2005: 132).

46 Act XXXIX of 2001 on the Entry and Stay of Foreigners (7. § (1) e).

The issue of border control

The focus of Hungary's immigration policy, as discussed in detail previously, is on the restricting of entry to, and the stay in, the country. Following the enlargement of the EU, the border control authorities have not apprehended noticeably more irregular immigrants than before. According to border apprehension statistics, in terms of the general structure of irregular migration to Hungary, illegal migration attempts were mostly made by Romanian and Ukrainian citizens; in 2005, the figures were 47 percent and 30 percent respectively and it has since been found that their number has increased, though not greatly. The aim was either to enter Western Europe or to work irregularly in Hungary. Most attempts at an illegal border crossing were made by men; whole families were not common. The apprehended irregular migrants were from the lower classes of their respective societies (Futó and Jandl, 2005:118).

2.3.2.3 Protection against the exploitation of workers*Non-discrimination in employment*

Non-discrimination is regulated, as a basic rule, by the constitution, which enshrines the citizens' right to equality, above all, in issues related to labour. Three provisions are underlined here as being relevant guarantees of non-discrimination in employment. First of all, the constitution states that Hungary shall respect *the human rights and civil rights* of all persons in the country, without discrimination on the basis of race, colour, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. In addition, the equality of *men and women* in all civil, political, *economic*, social and cultural rights shall be ensured and the state attempts to implement equal rights for everyone through *measures that create fair opportunities* for all, with strict *punishments* of discrimination being envisaged. Beyond the Constitution, the Labour Code, the Act on Labour Inspection and the Criminal Code, as well as other provisions and action plans, are together intended to provide equal access to remunerated work.

Under the Labour Code, the principles of equal treatment are protected in three main areas. The principle of equal treatment is laid down in general terms (Section 5 of the Code) in connection with employment relations. This principle must be strictly observed and any consequences of its violation shall be properly remedied; the remedy shall not result in any violation of, or harm to, the rights of another worker.

According to the regulation regarding access to the labour market, equal treatment depends on the regulations and the right of access to the labour market. It is considered a particular violation of the principle of equal treatment if the employer inflicts negative discrimination upon an employee either directly or indirectly, especially in relation to access to employment and to any provision made with regard to establishing and terminating the employment; in relation to training before taking up the work, or during the period of employment; the determination and provision of working conditions; the establishment and provision of employment benefits, especially in relation to wages;

in relation to membership or participation in employees' organizations; the system of promotion; and the enforcement of liability for damages or disciplinary liability.

Control of the labour inspectorates

The Labour Inspectorate Supporting Council⁴⁷ was set up at the beginning of 2006 under the amended legislation of the Labour Inspectorate; its task is to exercise control over the Labour Inspectorate's activities. The Council was set up on a tripartite basis and consists of representatives of the state, the employers' and the employees' organizations. Delegates of the Labour Inspectorate Supporting Council are appointed to represent the employers, employees and the government side of the National Interest Reconciliation Council, each side having the right to delegate 3 members. The Council is obliged to examine all cases brought before it, whether initiated by the representatives of the employers or of the employees. Experience to date suggests that, since the council only has consultative rights, the legal framework is not strong enough to be effective. The Council has the right to make recommendation with regard to the Inspectorates' programmes.

Trafficking in human beings

The smuggling of people is regulated and punished under the provisions of the Criminal Code, which defines trafficking in human beings as being: "Any person who sells, purchases, conveys or receives another person or exchanges a person on behalf of another person; also a person who recruits, transports, houses, hides or appropriates people for such purposes on behalf of another party, is guilty of a felony punishable by imprisonment for a period not exceeding three years."⁴⁸

There were 681 smugglers of human beings apprehended in 2005 and, altogether, 924 persons were smuggled, among them 417 women (Futó and Jandl, 2005:130). The smuggling of people had little influence on irregular employment in Hungary. It is a known fact that the smugglers' citizenship is mostly the same as that of the migrants and that the motivation of most of the people being smuggled is to work.

Regularization as a one-off event related to EU accession

There has been no regularization of individuals or groups of irregular migrants, with the exception of the one which took place in connection with the accession to the EU, provided for by the Law on Accession⁴⁹. The outcome of this regularization was not particularly successful, as discussed above. Despite the campaign launched by the Ministry of Justice and the Interior and the NGOs involvement in legal and social counselling, the number of people who actually turned up to legalize their position was very low⁵⁰.

47 Amended Act LXXV of 1996 on the Labour Inspection, (section 8/D).

48 Act IV of the Criminal Code, Article 175/B.

49 Act XXIX of 2004 on amendments, abolishing decrees, and establishing decrees connected with the accession to the Union, 145. §.

50 In the first month and a half, a total of 138 people applied, consisting of 57 Chinese, 28 Romanian, 13 Serbian and 12 Vietnamese citizens; the remainder of the applicants comprised 17 other citizenships. The regularization period lasted for 90 days. (Oltalomkeresök, 2004)

The regulation was not generous, but rather restricted, opening the gate only very narrowly; it covered people with an undocumented stay in the country of over 1 year in the event that he/she (i) lives with their married spouse, who is either a Hungarian citizen or a foreign citizen living legally in Hungary, or lives with his/her child, who has Hungarian citizenship; or (ii) can prove their income as a manager, director or owner of an enterprise; (iii) speaks acceptable Hungarian and has further cultural connections with Hungary; (iv) has not seriously violated the law. It is a matter of fact that the regularization was not aimed at the major foreign population living and/or working in Hungary.

2.4 Policy evaluation: In search of best practices

2.4.1 Policy implementation

As has been discussed in detail, there is no comprehensive migration policy in Hungary and the actors responsible for the creation of the policy and legislation are diverse. As far as irregular employment is concerned, the main actor responsible for the implementation of the legislation is, in fact, the National Labour Inspectorate (OMMF). One of the inspectorate's main tasks is to fight against irregular labour; however, for the organization to be able to carry this out effectively, essential changes were needed to the regulations. In order to make inspections more efficient, priority was given to specific sectors, the unexpected timing of inspections, repeated return visits to the same workplace, and so forth. To combat the irregular employment of foreigners, labour inspectors have begun to cooperate increasingly with partner authorities, particularly the police and the border guard. In January 2007, a general agreement was implemented, allowing the partner authorities to act in unison, quickly and effectively, against the hidden economy and irregular labour. To provide support and assist the Labour Inspectorate in carrying out its tasks, the Government increased the staff by an additional 100 in 2007, and by another 50 inspectors by January 2008. The institutional reform of the Inspectorate which took place at the beginning of 2006 resulted in a decentralised regional organization operating in accordance with the National Inspectorate guidelines. Coordination is mainly carried out at the national level, with some decentralised tasks in this area.

An important factor shaping policy for the combating of irregular employment is the population's significant tolerance of irregular and undocumented labour. A high share of the population considers undeclared work to be acceptable, and the risk of being detected is generally considered by the population to be low.

According to a survey, the risk of irregular employment being identified is moderate in Hungary. In the case of people who were detected and punished for irregular employment without declaring the income to the tax and social security institutions, resulting in supplementary tax bills and, in some cases, fines, was assessed as high by 37 percent of respondents, and low by 52 percent of respondents, with 9 percent refusing to answer (World Bank, 2008) According to another survey, the Eurobarometer, the evidence shows that the Hungarians' acceptance of undeclared work is among the highest in the EU countries (European Commission, 2007). A more unfavourable characteristic for Hungary is the acceptance of cheating, which is the highest among the

new member countries⁵¹. Acceptance of avoiding taxes or employing a private person in a household is not extremely high in itself, although, again, it is among the highest in the EU (European Commission, 2007)⁵².

Similar to the irregular employment of nationals, there is a considerable economic benefit to the employer in the employment of irregular foreign labour. Since the burden on legal employment is high, due to the considerable tax and social security contributions, tax evasion is of significant benefit to both employers and employees, and pushes the actors into avoiding legal employment. In addition, the flexibility of employment of foreign labour results in a gain that compensates for the increased fines and limited risk of detection. Moreover, the administrative burden of the procedures related to the legalized employment of foreigners acts as an incentive to make use of irregular foreign labour.

As discussed in detail, the irregular employment of foreigners is considered as peripheral to the core issue, which is the irregular employment of natives. However, there have been actions focused on the detection of irregular employment of foreigners. Some were undertaken in connection with the Schengen membership, in order to develop border controls and coordinate the operations of various authorities. Similarly, the recent actions undertaken to combat irregular employment and the informal economy have also had some impact on irregular foreign labour, although, according to the data, the proportion was modest.

There are actors, often members of the ethnic Hungarian communities, who recruit and transport irregular workers across the border, for example, from Ukraine, as commuters, on weekly basis. They are making use of the visa regulation which permits a legal stay of 90 days; however, such a visa does not cover a stay for the purpose of employment. In the experience of the border guards, no one controls the purpose of the visa, for example, checking as to whether it is a visa permitting the holder to work, or issued for tourist or visiting purposes; it is only its validity which is checked (Interview conducted with a border guard).

Human rights activists draw attention to inappropriate practices employed against foreigners, to cases of trafficking in women, to violations of human rights in refugee camps, and so forth; however, their focus is mostly on issues relating to refugees and minorities. For example, the Helsinki Association and the Menedék Association have been famous for their activities since the early 1990s and play an important role in providing everyday help and support to foreigners in need.

Refugees are not allowed to take a job in their first year of stay in refugee camps, which often results in irregular labour. People in a vulnerable situation on the labour market need more protection. Refugees face more serious risks when taking irregular jobs, since

51 Asking people if they tolerate if someone receives welfare payments without entitlement, or would they accept if someone uses public transport without a valid, Hungarians would tolerate this situation the most even among the new members (European Commission, 2007).

52 People were asked if they would tolerate if a private person is hired by a private household for undeclared work or undeclared work including activities of firms will be used or if someone evades taxes by not or only partially declaring income.

the discovery of their activity will result not only in the punishment of the employer, but also with the refugee being punished by expulsion from the country. Due to their vulnerable situation and fear of being expelled, refugees are often employed at an extremely low and unfair wage; they have no other choice than to take very poorly paid legal jobs. As a consequence, both legal and irregular employment can place refugees in extremely vulnerable circumstances (Interview with a refugee association activist).

The need for a stronger and more effective legal protection for irregular foreign workers has been raised by NGO representatives and activists, who have sharply criticized the situation and the vulnerability of foreigners; similarly, the press have reported on the circumstances of irregular employees, mostly refugees. Representatives of local governments, having met the irregular workers in person and experienced the conflicting situation of the irregular employment and the circumstances of the person in need, are also involved in the problem of the irregular employment of foreigners. On the other hand, representatives of the National Labour Inspectorate or National Labour Service, that is, the representatives of the authorities responsible for labour migration and combating irregular immigration, consider the provision of stronger protection for irregular foreigners to be of little importance (Juhász and Szaitz, 2007).

2.4.2 Policy outcomes: identification and evaluation

An important result of this paper is the demonstration of the migration policy's malfunctions in terms of both legal and irregular employment. This corresponds with the findings of Juhász and Szaitz (2007), who conducted a survey of experts in the form of a questionnaire enquiring about their preferred policy instruments and the estimated effect of their implementation. The interviews revealed an important discrepancy between the policy dealing with migration and migration practice. The experts' opinion regarding the reality and possibility of decreasing the volume of irregular employment of foreigners was requested. They were asked to select from a list of frequently proposed arguments as to how irregular migration and employment might be reduced in Hungary; the list comprised the most important issues and potential measures. The research found that, according to the respondents, the most important priorities for migration policy to address should be: (1) decreasing the obligatory paperwork required of the employer by establishing a user-friendly one-window administrative system; (2) increasing vocational training in order to meet employers' requirements as regards skills, and (3) reducing the tax burden on legal employment. In addition, further policy elements were considered by the experts to be only slightly less important: (4) increasing international cooperation among the relevant institutions; (5) the availability of more comprehensive information on the possibilities of legal employment; (6) making the procedure for obtaining work permits faster and easier, and (7) more effective collection of fines imposed for irregular employment.

An aspect of the research findings which is of particular interest is that it reveals a significant discrepancy; the more importance attached to a policy element, the less the likelihood of the relevant policy instrument's being put in place. The largest discrepancies were found to relate to the importance of increasing vocational training in order to meet employers' requirements as regards skills, and the hope of reducing the tax burden on

legal employment. The discrepancies were found to be somewhat less in relation to the obligatory paperwork required of the employer and the establishment of a more user-friendly, one-window administrative system, the more effective collection of fines, and international cooperation. In these instances, the experts considered the instruments less important; however, there was no discrepancy between the intention and the possibility of its implementation. On the basis of this somewhat surprising coincidence, we may suppose that policy focuses on those elements where there is a realistic hope of their successful implementation and the eventual fulfilment of the policy aim. Providing better access to more comprehensive information regarding legal employment, easing the process by which work permits are issued, developing statistical data sources on migration, making labour inspections more rigorous, widening the regulations concerning seasonal employment and creating specific regulations for various sectors, such as seasonal agricultural work and domestic work, are all examples of such policy elements..

2.5 Conclusions

The problems related to the informal economy have been at the core of public debate and politics in contemporary Hungary since the mid-1980s. The attitude towards informality held by the average Hungarian is a mixture of tolerance of, and disagreement with, the activity; however, compared to other EU countries, the Hungarians seem to live in peaceful coexistence with their informal economy.

According to a recent labour force survey and tax authority data, the size of the undeclared labour market is estimated to be approximately 15–25 percent of the total labour force. While the nominal wage level of the most common types of undeclared work doubled between 1998 and 2005, the real wage level decreased.

There are diverse policy measures to combat undeclared work. The state authorities have set up special committees and bodies to combat informal economy, and successive programs have been implemented to reduce the volume of irregular labour. Measures are being taken, directed at various problems which are assumed to be the causes of undocumented employment and targeting the various groups of economic actors involved in informal activities.

An important step towards the prevention of irregular employment, taken in order to provide support for the work of the labour inspectorate, has been the strengthening of the information system. On 1 May, 2004, when Hungary joined the EU, a new Unified Labour Register was brought into force, requiring all employers to register new employees and terminations of contracts, together with details of pay and working hours, in order to create a more transparent labour market by making data available to employees, employers, and authorities alike. This requirement was revised and, in effect from 1 January 2007, the employer's obligation is to pass the required information directly to the Hungarian Tax and Financial Control Administration (APEH).

As a part of the new measures and actions being undertaken to combat all forms of informality, a "Fair Play" campaign has been initiated and repeatedly promulgated

in the media, with the aim of emphasizing the importance of legalized business and employment activities, legalized trade, and so forth. According to the latest data (National Association of Entrepreneurs and Employers, 2008, World Bank, 2007), the campaign to formalize the informal economy has produced some immediate, though moderate, results, such as an increase in the number of tax payers, and an even greater rise in the number of people paying public insurance contributions; there are now 200,000 fewer people earning the minimum wage, 322,000 more tax payers and 150,000 more public insurance payers.

On 17 April 2008, a workshop was held as the closing session of a World Bank project to reduce undeclared employment. The main message of the draft report on the project (World Bank, 2008) was that renewed strategic policy directions are needed in order to combat the undeclared economy in Hungary. The suggestions relating to the labour market are to streamline legislation by, for example, simplifying the procedures related to business start-ups, to enhance transparency, to apply more rigorous sanctions in some instances, but ease certain restrictions, such as those regarding working time, to create new organizational measures and empower and modernize the Labour Inspectorate, as well as utilising such IT developments as electronic registers of, for example, property and public insurance contributions, and to conduct an enhanced risk analysis, increasing its efficiency and the revising the controlling methodologies.

Nevertheless, because policies targeting the irregular employment of foreigners are embedded in the policy measures against irregular employment in general, they comprise no more that a peripheral part of the policies against irregular employment in their entirety.

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MAIN LEGAL ACTS

Hungarian Legislation

Act XX of 1949. The Constitution of the Republic of Hungary (1949. évi XX.-törvény.

A Magyar-Köztársaság-Alkotmánya)

Act IV of 1978 on the Criminal Code . (1978. évi IV. törvény a Büntető Törvénykönyvről)

Act IV of 1991 on Employment Promotion and Provision for the Unemployed (1991. évi IV. törvény a foglalkoztatás elősegítéséről és a munkanélküliek ellátásáról) – (“the Employment Act”)

Act XXII of 1992 on the Labor Code (1992. évi XXII. törvény. a Munka Törvénykönyvéről)

Act LV of 1993 on Hungarian Citizenship (1993. évi LV. Törvény a magyar állampolgárságról)

Act LXXXVI of 1993 on the Entry, Stay in Hungary and Immigration (1993. évi LXXXVI. Törvény a külföldiek beutazásáról, magyarországi tartózkodásáról és bevándorlásáról) – replaced by Act XXXIX of 2001. on the entry and stay of foreigners

Act LXXV of 1996 on Labour Inspection (1996. évi LXXV. Törvény a munkaügyi ellenőrzésről)

Amended Act LXXV of 1996 on the Labour Inspection, (section 8/D). on setting up a Labour Inspectorate Supporting Council to support, coordinate the work of the Labour Inspectorate and on behalf of the effecting combating violation of regular employment.

Act LXXIV of 1997 on labour certificate for casual workers. (1997. évi LXXIV. törvény. az alkalmi munkavállalói könyvvel történő foglalkoztatásról és az ahhoz kapcsolódó közterhek egyszerűsített befizetéséről ...)

Decree of the Minister of Social and Family Affairs 8/1999. (XI. 10.) SzCsM on the permission of employment of foreigners, amended by the Decree of the Minister of Employment and Labour 21/2004. (IV. 28.) FMM

Act XXXVIII of 2001 substantially amended Act CXXXIX of 1997 on asylum 2001. XXXVIII. (Törvény a menedékjogról szóló 1997. évi CXXXIX. törvény módosításáról) – (“the Asylum Act”).

Act LXII of 2001 on Hungarians Living in Neighbouring States (2001. évi LXII. törvény a szomszédos államokban élő magyarokról) – (“the Status Law”)

Act XXXIX of 2001. on the entry and stay of foreigners. (2001. évi XXXIX. Törvény a külföldiek beutazásáról és tartózkodásáról) – “the Aliens Act”. – Replaced by

Act II of 2007 on entry and stay of third country nationals (2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról)
and

Act I of 2007 on entry and residence of persons in possession of right to free movement and residence (2007. évi I. törvény a szabad mozgás és tartózkodás jogával rendelkező személyek beutazásáról és tartózkodásáról)

5/2001. (XI. 21.) Decree of the Ministry of Interior (BM) on the execution of Act XXXIX of 2001 on the Entry and Stay of Foreigners

Act XXIX of 2004 on amendments, abolishing decrees, and establishing decrees connected with the accession to the European Union

Government Decree 93/2004. (IV. 27.) on the reciprocity and safety measures following Hungary’s joining to the EU – out of force following 1st January 2008 and replaced with Government Decree 355/2007. (XII. 23.) on the transitional regulations concerning free movement of labour

Government Decree 354/2006. (XII. 23.) on the transition order of the free movement of labour between Hungary and the new members after joining of Bulgaria and Romania to the EU – out of force following 1st January 2008 and replaced with the Government Decree 355/2007. (XII. 23.) on the transitional regulations concerning free movement of labour

1/2006. (II. 2.) Decree of the Ministry of Employment and Labour on proving of the lawfully organized industrial relations amended with 3/2006. (IX. 15.) Decree of the Ministry of Social and Labour Affairs

The Illegal Employment of Foreign Nationals in Ireland

Jane Pillinger

3.1 Introduction

In the past decade, Ireland has been transformed into a country of net inward migration. It has been characterised by three trends: a substantial increase in temporary migration for work; a small but not insignificant growth of irregular migration, seen in the rise in the numbers of undocumented and irregular migrants; and the feminisation of migration. The illegal employment of foreign nationals¹ has, as a result, become of significant concern to the public authorities, which are now more pro-active in controlling irregular migration and in developing greater compliance with employment legislation in order to combat illegal employment practices. NGOs and trade unions have highlighted the need for an informed debate and new measures to address the twin concerns of labour exploitation arising from migration and the rights of irregular migrants.

The ‘fight against illegal entry, residence and employment of foreign nationals’ has become a major priority for the Irish State in recent years. The political will to develop a managed approach to migration has seen the move towards coherent legislation and a greater emphasis on control measures. Although this report is addressing the illegal employment of foreign nationals, who have either an authorised/regular or unauthorised/irregular status, it is important to stress that the employment of irregular migrants is not isolated from the broader debate of undeclared work and illegal work in the Irish economy. However, it is important to note that although the extent of irregular migration is relatively small, there is a danger that the association of irregular migrants with illegal employment in policy discourses can fuel racism towards the majority of migrants that are working in a regular capacity, by making the connection between migration and criminality.

3.1.1 Scope and content of the report

This report reviews the literature and data on the illegal employment of migrants in Ireland and shows that there are close connections between illegal employment and migration status. In Section 3.2, the report discusses existing evidence and data on the illegal

¹ In this report the terminology of ‘foreign nationals’ is used to describe ‘foreigners’ as this is the common definition used in Ireland. The report refers to migrants from both within the EU and those from non-EEA countries who have an authorised/regular or an unauthorised/irregular status. Throughout the report this terminology is also frequently used in reference to migrant workers.

employment of foreign nationals, and on the situation of irregular migrants in Ireland today. Section 3.3 outlines Irish policy and legislation in the area of employment rights and specific measures that have been put in place to improve compliance with labour legislation and with measures recently introduced to combat workplace exploitation and the illegal employment of migrant workers in the labour market. Section 3.4 provides an analysis of Irish policy and legislation in the area of immigration that is relevant to combating the illegal employment of foreign nationals and measures to prevent illegal employment. Section 3.5 provides an evaluation of the policy measures that have been put in place. Section 3.6 concludes the report and makes suggestions for best practice policy outcomes and areas for further research. The report is intended to contribute to policy debates and to the development of best practice approaches to dealing with the illegal employment of foreign nationals.

3.1.2 Conceptualising the illegal employment of foreign nationals

In this report it is shown that there are a number of ways in which it is possible to conceptualise the illegal employment of foreign nationals, particularly because this area covers the two separate policy domains of employment and immigration. Firstly there are measures to control illegal employment and implement measures to protect the rights of all workers, regardless of their legal status. Secondly, there are policy measures that impact on the employment status of foreign nationals in immigration policy and the regulation of migrants regarding visas, employment permits and rights to residence and citizenship. In Ireland, addressing the illegal employment of foreign nationals has become closely connected to a government policy framework on ‘illegal immigration’, resulting in a broad based framework of analysis that addresses the policy issues connected with tackling irregular migration, such as strengthening external borders, the fight against trafficking in persons and tackling irregular employment. One of the problems is that policy debates often conflate separated issues, for example, around residency status and employment status. According to Fanning (2007), there are also important distinctions to be made between citizen rights and human rights, which have resulted in a contradiction between the policy goals of immigration, equality and anti-discrimination.

The interconnection and overlapping complexities of legal status and employment status arises in the following areas that are relevant to this study:

- Irregular migrants working in illegal employment situations
- Regular migrants working in illegal employment situations
- Regular migrants working in legal employment situations
- Irregular migrants working in legal employment situations

Many of these are over-lapping categories, particularly since many migrants move in and out of legal and illegal employment situations, depending on their migration status. In Ireland the debate has tended to focus on the legal – illegal dichotomy, which does not capture the complexities of labour migration or the experiences of migrant workers. As this report will show, many migrants with an irregular status arrived in Ireland with a legal status and subsequently became undocumented.

There has been relatively little research and data collection on the situation of the illegal employment of foreign nationals. Because of the very recent history of migration in Ireland the issue of migration and the rights of migrant workers has only recently entered the public domain. However, there is a growing public discourse on the situation and experiences of migrants working in illegal employment. Irregular migrants have become important sources of employment, filling gaps in the Irish labour market in a booming economy.

Labour migration in Ireland has been described as the “guest worker trap” (Morrison 2003), with an emphasis on temporary migration rather than permanent residence. One of the problems is that the employment of temporary migrants has the effect of creating a two-tier society, whereby permanent Irish employees enjoy enhanced employee-related rights and security of employment that are not enjoyed by temporary migrant worker. The effect of this differential approach is that it can encourage the illegal employment of irregular migrants, as employers seek to reduce their labour costs. Government policy has increasingly been referring to the need for measures to control illegal immigration, some of which addresses the need for better administrative and legal definitions attached to immigration policy, as well as an increasing focus on the control of borders and access to borders, whilst relying on a deregulated labour market to provide the conditions that give employers access to a supply of flexible irregular labour. The General Secretary of the Irish Congress of Trade Unions, David Begg (2007), describes the Irish economy as being “a virtually unregulated labour market” based on a flexible liberal model, created principally through a series of measures to attract foreign direct investment, particularly from the US.

3.1.3 The context of migration in Ireland

During the 1990s Ireland became a source of valuable foreign direct investment, typified by an expansion of multinational companies locating in Ireland and a significant increase in migrant labour to fuel a booming economy. The unprecedented demand for labour since the economic boom of the early 1990s led to a significant growth of migrant workers coming to work in Ireland. According to Ruhs (2005), the majority of these workers have come from Eastern Europe and Asia, mainly entering on work permits. In 1999 nearly 6,000 work permits were issued and this grew to nearly 50,000 in 2003. The number of work permits has been decreasing in recent years (from 47,707 in 2003 to 27,136 in 2005 and 11,792 in 2007 (new issues and renewals). The introduction of the Employment Permits Act in 2003 enabled workers from the new EU member states to access the labour market freely, whilst at the same time the State took a more interventionist role and a more restrictive work permit system prioritised employment for workers from the new member states over and above those from non-EEA countries. This has resulted in a sharp fall in the numbers of work permits issued to non-EEA countries (O’Connell and Doyle, 2006). Up to the end of 2005 there were over 60,000 workers from the new member states, higher than had been projected (Doyle, Hughes and Wadensjö, 2006); while the Central Statistics Office estimates that the annual contribution of immigration to the workforce has doubled from 21,000 in 2004 to 48,000 in 2007. During the first nine months of 2007, 18,000 work permits were issued, compared to 36,000 for the same period in 2003 (FÁS, 2007). The number of work permits issued

has continued to decline in light of policy changes that have favoured a shift towards skilled immigration and migration from the new EU member states. There are also 25,000 registered students (who have some rights to work while studying). It is argued that much of Ireland's economic growth could not have been achieved without inward migration and, in particular, the decision not to impose restrictions on the mobility of workers from the EU10 countries in May 2004 helped to increase the flow of migrant workers when they were most needed (Begg, 2007).

In the past decade, Ireland developed routes of entry for economic migrants in sectors of the economy where there were labour shortages. This was in parallel to the development of restrictive legislation concerning the rights of asylum seekers to work. In July 1999, a once-off decision was made to allow asylum seekers who were in the country for more than a year to access the labour market. Prior to that date and thereafter, asylum seekers have not had access to the labour market. More recently there has been a move towards the harmonisation of EU policies in areas such as illegal immigration and asylum, although Ireland has not ratified EU policy on family reunification. This approach includes the development of a managed approach to migration in Ireland, including the control of irregular migration and the opening up of channels for skilled migration.

There is generally a higher participation rate of migrants in the labour market compared to Irish people (Barrett, Bergin and Duffy, 2006). There are a number of explanations for this: employment permits are only issued for full time employment, migrants often have a younger age profile than the indigenous population and many have come to Ireland specifically to work. Migrants also have a higher educational profile than Irish people. Barrett and Duffy, (2007) found that even when account is taken for educational levels, migrants, and particularly women migrants, were under-represented in higher-level occupations and over-represented in lower skilled jobs, and are not employed in jobs that match their experience and qualifications (Barrett, Bergen and Duffy, 2006).

The 2006 Census of Population (CSO, 2007) shows that the population of non-Irish nationals had increased to 409,000 (representing 9.4 per cent of the population). This showed an increase from 222,000 (5.8 per cent of the total population) in 2003 (CSO, 2007). The majority are from the EU (85 per cent), and around 30 per cent of EU migrants are from the EU's new member states. Around 5 per cent of all migrants to Ireland are refugees or seeking asylum. Of those migrating to Ireland, 42 per cent were returning Irish emigrants. In Ireland in 2006, there were 4,314 applications for refugee status, compared to 11,630 in 2002 (UNHCR, 2006); 483 applications for Family Reunification were received in 2006 though, as with the data for applications for refugee status, this data is not published. At the end of 2006, 5,350 people seeking asylum were being accommodated in direct provision awaiting a decision on their applications.

The effect of the economic boom can be seen in the transformation of the economy from that of the 1980s, which resulted in substantial outward migration. During the 1980s, inflation was 15 per cent, unemployment was 17 per cent and more than 1 per cent of the population migrated annually. Since 1994, the workforce has doubled, with around 80,000 new jobs being created annually, and in 2007 the rate of growth was around 5 per cent of GDP with an unemployment rate of 4.4 per cent (O'Hagan, 2000). An expanding

labour market and a booming economy have been the main reasons for the growth of migration to Ireland, with immigration representing the most significant actor in labour force growth (FÁS, 2007).

According to the state authority responsible for training and employment, FÁS (National Training and Employment Authority), foreign workers now account for 12 per cent of the workforce, and more than half of the increase in jobs in 2006 (46,800, based on estimates from the CSO, quoted in FÁS, 2007). The largest concentration of EU10 workers in 2006 was in the construction sector (23,600) with significant numbers in manufacturing, hotels & restaurants, retail and wholesale (FÁS, 2007). According to FÁS, the inflow of workers from the EU10 countries has meant that labour shortages have not become a significant problem. In 2007, labour market predictions by FÁS anticipated a slowdown in EU10 workers entering the State to work. They have predicated a 2.8 per cent rise in employment in 2007 (an increase of 57,000), and a continued growth of employment by a more moderate rate in 2008, principally in service sector jobs, although it is predicted that there will be a more significant fall back in the number of construction jobs. In 2007, the construction sector was affected by a small downturn in the economy and economic growth measured as GNP is forecast to decline to 4.8 per cent in 2007 and 2.9 per cent in 2008. Unemployment is also anticipated to rise, from 4.4 per cent in 2007 to 5.6 per cent in 2008 (ERSI, 2007).

Data collected on PPS numbers shows that inflow of EU 10 migrants fell by 8 per cent in 2006, and it is anticipated that this could represent a longer term slowdown as EU10 migrants return to their home countries, whose economies are improving and where job opportunities are opening up. In 2006, 5,500 PPS numbers were allocated to employees from Romania and Bulgaria, with the vast majority being issued to Romanian citizens. However, there are greater difficulties in integrating Romanian and Bulgarian workers into the labour market because of the conditions surrounding their employment, which do not apply to EU10 workers. Currently EU2 workers can stay up to three months in Ireland, but after that have to be either self-employed or obtain a work visa.

3.2 Illegal employment of foreign nationals in Ireland

3.2.1 Introduction

This section examines the evidence from existing data and research on the illegal employment of foreign nationals in Ireland. This data is very limited largely because of the invisible and clandestine nature of both illegal employment and of irregular migration.

In Ireland the illegal employment of foreign nationals arises because of two main factors. First, restrictions on the extent and scope of labour migration in national immigration legislation place barriers to entry, legality and residence. Second, employers may also take advantage of the vulnerability of migrant labour to reduce their costs relative to employing legal labour and to give them access to a pool of cheap, flexible labour. Controlling the illegal employment of foreign nationals is difficult to police and expensive to enforce. In Ireland, while new measures have been introduced on immigration and employment, there still remain significant costs involved in controlling the illegal employment of foreign

nationals; as a result combating illegal employment is often overlooked as a priority, and the emphasis is placed on deterring future irregular migration.

3.2.2 The social acceptance of illegal employment and irregular migration

There are some concerns that irregular migration could undermine public confidence in the ability of the State to manage migration successfully (NESC, 2006). There is evidence from media reports and from cases brought before the Equality Tribunal in Ireland of rising levels of racism and discrimination towards black and minority ethnic people, and some evidence of resentment and xenophobia towards irregular and regular migrant workers, including physical assaults. The Garda Annual Report for 2005 indicates that there were ninety-four racially motivated offences reported in 2005 as opposed to eighty-four in 2004 (Quinn, 2007). According to some NGOs, there has been growing hostility towards migrants in Ireland and in particular to towards irregular migrants in the media. One media commentator who has expressed controversial views on migration issues argued in 2007 that: “We have some 400,000 legal immigrants; but everyone knows that the army of illegals, especially Africans and Chinese, is vast, and probably tops 200,000. In all, Ireland has received 600,000 immigrants, most of them in the last five years. It could be many more. No one has the least idea” (Myres, 2007).

Research on racism experienced by work permit holders and asylum applicants shows that over one-third of respondents had experienced race related harassment at work, race related harassment on the street, in public places or on public transport in Ireland in the past year (McGinnity et al., 2006). In the study, black Africans and asylum applicants reported the highest levels of racism. However, the level of racism was found to be lower than in other European countries. A further study on attitudes to racism was carried out in 2006, under the National Action Plan Against Racism. This survey found that, since 2004 when a previous study was carried out, fewer respondents felt Irish society to be racist (Quinn, 2007).

Opinion polls do suggest that there is a positive attitude to migrants in Ireland and towards the needs of undocumented migrants and migrants that experience labour exploitation. Generally, there is a widespread view that migrants have made a significant contribution to the Irish economy and many have received a positive welcome. A number of opinion polls have given positive responses to migration and employment. For example, one opinion poll carried out by the Irish Refugee Council indicated that the majority of respondents believed that asylum seekers should be given the right to work (Irish Times, 2005).

In an opinion poll of 1000 adults carried out in 2007 by RedC, for the Migrants Rights Centre Ireland (MRCI) and the Forum on Migration and Communications (FOMACS), it was found that three out of every four people in Ireland believe that the Government should give undocumented workers the opportunity to legalise their status. The poll asked respondents their views on what government policy should be towards the estimated 50,000 undocumented migrants working in Ireland. Seventy seven per cent stated that the Government should allow migrants to legalise their status, on the basis that they were working and paying taxes. Nineteen per cent believed that the Government should

require undocumented workers to leave the country immediately, whilst four per cent did not know or declined to answer.

Two opinion polls carried out in 2006 and 2007 by RedC for the Immigrant Council of Ireland (ICI) and the FOMACS, found that the overwhelming majority of people in Ireland think migrant workers from outside the EU should be able to have their families with them and that their partners should be permitted to work. The polling found public support for migrants' rights to family life grew slightly stronger over the 12-month period. Seventy-five per cent believed that non-EU migrant workers should enjoy the right to be joined in Ireland by their partners and children (compared to 72 per cent in 2006). Nearly nine out of ten people believed that migrant workers from outside the EU should have the right to be visited by close family who have the proper documentation and seventy seven per cent of those polled agreed that the partners of migrant workers from outside the EU should be permitted to work in Ireland compared to 74 per cent in 2006).

3.2.3 The causes of irregular migration in Ireland and the links to illegal employment

There is substantial evidence to suggest that illegal work is a significant factor driving irregular migration, and that in turn irregular migration fuels illegal working practices by employers. This awareness has helped to frame Ireland's policy responses to tackling the illegal employment of foreign nationals. According to Ruhs (2005), Ireland's level of illegal immigration in Ireland is likely to be fairly low, with illegal entry into Ireland frequently taking place through the UK and via Northern Ireland. The Common Travel Area agreement between Ireland and the UK means that there are no requirements for border and passport controls for Irish and UK citizens travelling between Ireland and the UK. Papademetriou (2005) argues that the development of measures to address irregular migration and illegal working need to be seen in the context of expanded opportunities for temporary labour migration, particularly those that allow for more circular migration, which provides a 'soft' regularisation option in the initial years of implementation, and gives employers better options to hire regular rather than irregular workers. This, along with measures to tighten up controls on illegal employment, it is argued, would considerably reduce the levels of illegal employment of foreign nationals as: "Unauthorised migrants across the board both fuel, and are drawn to, places with vibrant underground and low-wage economic sectors. Such conditions thus act as magnets for unauthorized migrants and typically overwhelm even the strongest controls" (Papademetriou, 2005: 5).

In reviewing the literature and available data in Ireland, it appears that the most common cause of migrants becoming undocumented results from employers not renewing work permits, or in delaying the renewal or applying for a short term permit. There is widespread agreement that many migrant workers become undocumented through no fault of their own and are often unaware that their employer has not renewed their permit (ICI, 2006; MRCI, 2006a; NESC, 2006a). Being made redundant and the difficulties in renewing work permits immediately after loss of employment are believed to be common causes of becoming undocumented (MRCI, 2006a).

Another category is migrants who have overstayed the terms of their visas and violated their residency conditions. In these situations a migrant may have entered the State legally, for example, with a tourist visa, a student visa, or where the granting of temporary leave to remain has expired. This can include someone who is working on a tourist visa or students who are working more hours than they are permitted. According to NESCS (2006), students who overstay the terms of their visa are a significant source of undocumented workers, since in reality many institutions may have been conduits for labour migration (NESCS, 2006). This is borne out in other studies, which have shown that there are significant concerns about the exploitation of Chinese students, low pay and illegal working practices (MRCI, 2006a, 2007a; NESCS, 2006).

A small number of irregular migrants enter the state through irregular entry whereby an individual enters with false papers or evades the immigration authorities through illegal entry. This is a relatively small share of irregular migration and data only exists on those that are detected and deported. There are also people who arrive in Ireland from non-visa required countries, but who take up employment with no permit to work. There are significant numbers of Brazilians who fall into this category and in response to this the IOM Dublin office has recently established a research project to highlight best practice approaches for the voluntary assisted return and reintegration of irregular Brazilian nationals in Ireland.

Family members of legally resident migrants, including spouses or children who have no independent right of residence or no right to work, are also vulnerable to becoming undocumented and to illegal working. In these cases it is possible for someone to become undocumented as a result of marital breakdown or through domestic violence. There is also evidence to suggest that dependent spouses of work permit holders, who have had the right to join their spouses, but not to work, often work in an illegal capacity. Another group of irregular migrants are rejected or failed asylum seekers who are not granted refugee status. Although the numbers of asylum seekers have been declining in recent years, substantial numbers enter into an irregular status and avoid deportation. Some adults and children disappear out of the system before their cases are heard, often because they can wait up to five years for cases to be processed. Finally, people who have been trafficked for labour exploitation or sexual exploitation are often invisible and open to exploitation, many of whom through the nature of trafficking also have an irregular status, entering the country illegally or through deception. Despite limited data on the extent of trafficking, there is evidence to show that the numbers of victims of trafficking have grown in Ireland in recent years (Pillinger 2006; Ward and Wylie, 2007; Department of Justice, Equality and Law Reform 2006a).

3.2.4 Evidence and data of the legal and illegal employment of irregular migrants

Data on illegal employment of foreign nationals

As mentioned above, there is relatively limited data and evidence of irregular migration and on the employment situation of regular and irregular migrants. The evidence that does exist has largely been collated by service providers and NGOs who provide information and advice services to migrants (Immigrant Council of Ireland, Migrants Rights Centre Ireland), as well as governmental and inter-governmental bodies involved in

advising the government on migration policy issues (National Consultative Committee on Racism and Interculturalism, International Organization for Migration and National Economic and Social Council). Similarly there is limited data and research on the extent of illegal employment in Ireland. Until 2006 there was little evidence to suggest that the authorities were systematically working to end illegal employment practices. According to Ruhs (2005), although no official figures are available for this time, the number of employers fined for illegally employing migrant workers since the introduction of employer sanctions in April 2003 was very low. In recent years, evidence of labour exploitation and the vulnerability of migrant workers have been widely documented in Ireland (Conroy and Brennan, 2003; MRCI, 2004, ICI, 2005; ICTU, 2005, Pillinger, 2007a).

It is estimated that seventy per cent of non-national workers are in low paid employment, many of who work below their potential and are in occupations that do not reflect their qualifications and skill levels (ICTU, 2005). Research on the labour market characteristics of migrant workers in Ireland shows that large numbers are highly educated, although many are not employed in occupations that fully reflect their education levels (Barrett, Bergin and Duffy, 2006), and that overall migrant workers earn around 18 per cent less than Irish nationals, controlling for education and years of work experience (Barrett and McCarthy, 2006).

Evidence of the exploitation of migrant workers can also be found in cases taken by the Equality Tribunal (2006) and this gives evidence of a substantial increase in the number of discrimination cases taken under the Employment Equality Acts on the grounds of race (82 cases of a total 399 in 2005, compared to 51 cases out of 297 in 2004) (Quinn, 2007). The Equality Authority's Annual Report for 2005 (2006) shows that the 'race' ground was the largest category of discrimination in the labour market (32 per cent), in terms of case files under the Employment Equality Acts. Cases involved discrimination against migrant workers in relation to accessing employment, working conditions, harassment and dismissal. The significant increase in casework in this regard exists despite a Labour Court ruling, which stated that there was "a duty on employers to ensure policies and procedures take account of cultural and linguistic diversity" (ICTU, 2005: 15).

Undeclared work

There is, similarly, little or no data on the extent of undeclared work in Ireland (as defined by the ILO as illegal employment and employment that does not comply with the requirements of national laws, regulations or practices). In Ireland, there has been little work undertaken to identify the extent of the hidden economy or undeclared work. There are a number of different definitions of undeclared work, although in Europe there is consensus that undeclared work should be based on an activities-based definition (EIRO, 2005; Williams et. al., 2008) This approach, which has largely been used in Ireland, allows for differentiation between activities that are declared and undeclared work, with undeclared work not being declared to the authorities for tax, social security and/or labour law purposes. One particular problem that has arisen in Ireland is the growth of employers employing people on the basis of 'self-employed contracts'; they are often referred to as 'bogus self-employment'. This has been found to predominate in the construction and meat processing sectors, which hire large numbers of migrant workers (Sexton, 2007).

In Ireland, undeclared work is defined as any work that is not declared to the tax and social security authorities and this largely takes place in the construction, hotel and restaurant and agricultural sectors, where migrant workers predominately work (European Foundation, 2005). Undeclared work, which in practice refers to illegal employment or illicit work, is estimated to range from between seven per cent and sixteen per cent of the EU's GDP, while in Ireland this is reported as being between five per cent and ten per cent (European Foundation, 2005). Dillon (quoted in Sexton, 2007) found that the shadow economy represented between eight and eleven per cent of GDP, and some tentative estimates are given that this share fell between 1990 and 2002, and that recent economic growth and lower unemployment has reduced this further, with measures to ensure tax compliance and a better enforcement system reducing the size of the informal economy and undeclared work (Sexton, 2007).

The European Foundation's (Williams et. al., 2008) report on tackling undeclared work in the European Union provides a useful typology of the potential approaches to, and measures for tackling undeclared work and provides a useful baseline against which current approaches and measures can be assessed. The most common approach adopted in member states is a 'deterrence' approach, although there have been significant increases in the development of preventative measures since the Employment Policy Guidelines of 2003 set out guidelines for transforming undeclared work into regular work on the basis that: "Member states should develop and implement broad actions and measures to eliminate undeclared work, which combine simplification of the business environment, removing disincentives and providing appropriate incentives in the tax and benefits system, improved law enforcement and the application of sanctions" (European Commission, 2003).

The main approach taken to deterrence has been to detect and punish non-compliance and in Ireland there has been an emphasis towards tax and social security compliance and detecting undeclared work through increasing tax inspections by the Revenue Commissioners and detecting illegal practices through the Labour Inspectorate, for example, in areas such as non-compliance with labour legislation and the payment of wages. A number of approaches have been taken in Ireland towards encouraging compliance and deterring undeclared work through the development of joint operations between the relevant government departments in the areas of taxation, social welfare, employment permits and immigration. IBEC, the employers' organisation, have developed a best practice approach to compliance and have developed an advisory and support service for this purpose; whilst the Revenue Commissioners have had a significant role in developing compliance measures with companies and encouraging declared working practices.

Illegal employment practices and the exploitation of migrant workers

The concerns of trade unions and NGOs about the vulnerability of EU10 migrants² were backed up by a study produced by the National Economic and Social Forum which

2 Similar provisions were not introduced for nationals of Romania and Bulgaria, when those two countries acceded to the EU in 2007. The Minister for Enterprise, Trade and Employment stated that nationals of Romania and Bulgaria would continue to require work permits to work in Ireland after accession on 1 January 2007.

highlighted the importance of giving attention to labour market vulnerabilities and exploitation of workers, particularly those with the lowest skills, from the countries which joined the EU in May 2004 (NESF, 2006; Quinn, 2007). Evidence from the Irish Congress of Trade Unions (ICTU) shows that many migrant workers are unaware of their rights and obligations in the Irish workforce, with reports of under-payment of wages, non-payment of wages, excessive working hours, especially for manual workers, and a poor understanding of health and safety regulations and practices (ICTU, 2005). ICTU recommended that the Labour Inspectorate should be increased in size and measures put in place to assure compliance with employment legislation; that the burden of proof regarding compliance with Labour law should be placed on employers; that companies competing for public contracts should show evidence of tax compliance regarding the employment conditions of their workers; that credited union officials be given powers to access employment records of companies in a supporting role to the Labour Inspectorate; and that public procurement directives should contain labour clauses on labour standards (ICTU, 2005).

Data on irregular migration

Many irregular migrants work in exploitative and illegal employment situations. However, there is no official data about the size of the irregular and undocumented migrant population in Ireland, and more specifically, on the numbers that are working in illegal or exploitative employment. Accounts of the numbers of irregular migrants have been estimated to be at least one per cent of the population of the EU25 (around 4.5 million persons) (Papademetriou, 2005). According to the IOM (2006), estimates of the numbers of irregular migrants in Ireland vary widely, ranging from 15,000 to 50,000, whilst other commentators have suggested even higher numbers (NESC, 2006:17; NESF, 2006). In Europe, it is estimated that over 500,000 irregular migrants enter the EU each year, of whom 50,000 enter Ireland. The Immigrant Council of Ireland's research on labour migration finds that official data on the numbers of work permits granted by country shows inconsistencies between this data and anecdotal evidence from migrants rights groups of the higher numbers of migrants working in Ireland from those countries (MacEinri and Walley, 2003). One example shows that in the official figures only four Palestinian workers are recorded, while anecdotal evidence from the Migrants Rights Centre reports over 100 Palestinian individuals and families are living in the inner city area of Dublin alone.

The absence of hard data or any systematic evidence makes it difficult to assess the extent to which Ireland's current immigration and employment laws are actually enforced and the extent of the problem. However the NESC report argues that "increased levels of legislation and deportations suggests that the government is expanding its efforts to combat illegal immigration." At the same time, there is no evidence "to suggest a serious crackdown on illegal working." (NESC, 2006: 114). A report of the Migrants Rights Centre Ireland (MRCI) (2007a) on irregular migration states that:

"If little is known about the extent of irregular migration in Ireland even less is known about the circumstances and realities of living with an irregular status. Generally, these migrant workers are not in a position to give voice to their treatment and experiences

or explain the factors that led them to be in this position. Raising awareness of their difficulties could bring them to the attention of the authorities and thus increase the possibility of being deported. For many it is safer to stay silent and therefore the lived experiences of these migrant workers are largely invisible and unheard”.

Official data

Although the Gardaí collects information on its border activities, data on people refused leave to land at the border is not publicly available. The Garda National Immigration Bureau (GNIB) collects data on irregular migration covering deportations, outstanding deportation orders and those refused permission to land in the State. Their data for 2005 shows that there were 8902 outstanding deportation orders; whilst the Minister for Justice, Equality and Law Reform had refused 4,477 persons in 2004, and 9,000 persons in the period 2002–2003 ‘leave to land’ in the state (Quinn and Hughes, 2005). Since the implementation of the 1999 Immigration Act there have been 11,270 deportation orders issued in Ireland, of which 8,902 are outstanding. However, it is not known how many of those people evading a deportation order remain in the country (Quinn and Hughes, 2005).

The IOM collates data on voluntary and assisted returns as part of its *Voluntary Assisted Return and Reintegration Programmes*. These programmes are open to asylum seekers and irregular migrants who wish to return home voluntarily, but do not have the means and/or the documentation to do so. In 2006, 289 people applied under the various programmes and 176 returned home. One quarter had an irregular status, a further quarter were in the asylum process, and the remainder had an appeal pending, had their asylum claim refused, or were waiting for a decision on humanitarian leave to remain. The majority were from Nigeria, followed by Brazil, South Africa, Croatia, Moldova, Algeria, Kenya, Romania, Russia and Albania.

Data for IOM return programmes carried out in 2007 shows that 391 people applied under the various programmes, with 255 individuals undertaking voluntary return. The majority of these were irregular migrants (71 per cent of all returns), which represents a substantial increase from 2006. The remainder were people with humanitarian leave to remain, people in the asylum process whose asylum applications were refused, withdrawn or pending, and a small number of people on student visas. Another significant change from 2006 was the countries of return, with a substantial increase in the numbers returning to Brazil (46 per cent of all returnees).

Specific data on unaccompanied minors and aged out minors, for whom a separate programme exists, shows that the majority of applicants in 2007 were from Nigeria (19). A special Voluntary Assisted Return and Reintegration Programme for Vulnerable Irregular Nigerian Nationals has also been put in place with 24 applicants and 22 returnees in 2007.

Data collated by NGOs working with migrants

Other evidence of irregular migration, particularly in connection with illegal employment, has been collated by NGOs working directly with migrants that have experienced

exploitation, who are at a risk of becoming undocumented, and who are already undocumented. Both the Migrants Rights Centre Ireland (MRCI) and the Immigrant Council of Ireland (ICI) have collated data on the numbers of undocumented migrants and migrants experiencing exploitation at work who have accessed their information and advice services. MacEinri and Walley (2003) argue that “while it is impossible to put a figure on the numbers of undocumented workers in the absence of any studies, there is undoubtedly, undocumented workers working in the informal economy in Ireland”. The report highlights the increased vulnerability of lower-skilled migrant workers to the dangers of trafficking resulting in ‘indentured labour’ with migrant workers struggling in the black economy to pay off money that they borrowed to pay for loans taken out, or expenses incurred for travel to Ireland.

There is growing evidence that undocumented migrants are facing a range of problems in accessing employment and services, in gaining legal status and in effectively becoming integrated into Irish society and the economy (MRCI, 2007a; ICI, 2006 and 2003; Pillinger, 2007a). As outlined, much of this evidence shows the additional vulnerability of irregular and undocumented workers to workplace exploitation. Examples cited show difficulties experienced in relation to very low pay, long working hours, lack of holiday or sick leave entitlements, breaches of health and safety in the workplace, workplace accidents, fears of prosecuting the employer, lack of social protection and high medical costs. A significant number of cases are cited of employers not renewing work permits, which also highlights difficulties in taking annual leave or leaving the country, and the fear of becoming undocumented. In a number of the cases, a lack of access to social protection and free health care resulted in great hardship for undocumented migrants.

Cases are provided of problems faced by undocumented migrants that experience illness, injury, or those in need of emergency services such as refuge accommodation for women experiencing domestic violence or homeless services. Particular issues are raised by NGOs about the lack of state support available to them and the impact that this has on their vulnerability and risk of exploitation. In practice, many either stay in dangerous circumstances or rely on support from their own community (MRCI, 2007a; ICI, 2006). In addition, the problems faced by migrant women include barriers faced by undocumented migrant women experiencing domestic violence, or who become separated from their partners and who are at risk of having an irregular status (ICI, 2006; Fagan, 2006; MRCI, 2006a). Many of the cases cite undocumented workers being trapped in jobs that are exploitative and the difficulties in seeking protection and redress from employers. Fear of being deported, lack of information on rights and entitlements and lack of affordable legal resources to challenge employers, are recorded as some of the main deterrents (MRCI, 2004, 2006b; MacEinri and Walley, 2003). The ‘fear factor’ experienced by undocumented migrants is highlighted as a major concern, and represents a barrier in accessing services; fear of the Gardai (Police) or state officials and fear of being reported by people they know impacted on the ability of undocumented workers to integrate into their local communities (MRCI, 2007a). There is also specific evidence of problems in accessing health care collated through the consultations with migrants held by the Health Services Executive for the National Intercultural Strategy in Health (HSE, 2008a and 2008b).

ICI data for 2006 shows that approximately 6.5 per cent of queries are received from undocumented migrants (based on statistics from ICI's Information and Support Service, Jan – Jun 2007); whilst almost 100 per cent of clients who were documented at the time of lodging applications became undocumented whilst waiting for a decision from the Department of Justice, Equality and Law Reform. Approximately 25 per cent of clients were undocumented at the time of lodging applications (statistics from ICI's Legal Service, Jan – Jun 2007). This ICI data shows that undocumented migrants are present in all sectors of the economy (formal and informal) and include migrants who entered the State with all types of immigration status including visitors, high-skill workers, work permit holders, family members of workers / citizens, failed asylum seekers, international students, etc. (ICI, 2007).

Data presented in the ICI's report on family matters (ICI, 2006) shows that five undocumented workers participated in this study out of a total of fifty-six participants, seven per cent of whom had become undocumented, having formerly been documented (ICI, 2006). The ICI has stated that the legislation, policy and process on family reunification are unclear and overly reliant on Ministerial discretion in decisions. In particular, the report calls for provisions to be introduced to allow undocumented migrants who have experienced domestic violence and have been separated from their partners to regularise their status by being given temporary leave to remain. One of the biggest problems highlighted in the research is the absence of clear and reliable information on family reunification for those who had become undocumented.

The ICI recommends that all migrants applying for family reunification rights within a broad definition of family, including unmarried individuals whether in opposite or same sex relationships, would enhance provisions for undocumented migrants in these situations.

Migrants whose work permits or employment permits have expired or have not been renewed represent the most significant cause of migrants becoming undocumented. Despite the absence of official data on the numbers of irregular migrants in Ireland, the ICI and the MRCI provide some data from analysis of their own statistics of their services and from studies undertaken with migrant workers. Research by the MRCI (2007a) found that the majority of those interviewed had entered the country legally (thirty-one had work permits, fourteen had tourist visas, eight had student visas and one was seeking asylum; the remaining six entered the country without legal permission; three came in through the North of Ireland via the UK, two left the ships they had been working on and one had her passport taken by immigration officials at the airport but did not return the next day, as directed). Those that had arrived on student visas stated that they had breached the terms of their visas in order to survive, while of the 14 people who had arrived on tourist visas, 12 stated that they came to Ireland in order to find employment. Those that had arrived with work permits became undocumented because their employers had not renewed their permits as a result of delays in the processing of permits in the Department of Enterprise, Trade and Employment. In some cases companies had closed, whilst others had been forced to leave their employment because of ill health or exploitation by employers. Some stated that they lacked information about their rights and entitlements and a number cited a lack of flexibility by government in the issuing of permits and immigration status.

The Migrant Rights Centre Ireland research shows that once a person becomes irregular, there exist few options to move into a regular status and that there are overlapping boundaries between regular and irregular migration, with people moving between the two. An analysis of data from MRCI's Drop In Centre in 2006 shows that, out of approximately 1,000 migrants that entered the country legally on a work permit, one quarter had become undocumented by the time they accessed support from the MRCI. In this period, those employed as domestic workers in the private home were most likely to become undocumented, with both the agriculture and hotel and catering sector also having large shares of migrants becoming undocumented. The most common claim made was that the employer did not renew the migrant's work permit, followed by a migrant worker being made redundant and not being able to secure a new permit immediately. The Centre's analysis makes the link between becoming undocumented and workplace exploitation. More than 60 per cent of all those who lost their legal status had experienced exploitation, a rate of one and a half times higher than any other group (MRCI, 2004). An earlier sample of the drop in centre's cases showed that of 378 people who had reported that they accessed the country with a work permit, 171 had become undocumented (MRCI, 2006a). In the MRCI's study of twenty migrant women domestic workers, it is reported that four of the employers did not renew work permits resulting in the women becoming undocumented (MRCI, 2004).

NGOs have made a number of recommendations which include; the right to access social protection if a migrant worker has experienced exploitation or has been trafficked; the provision of a temporary bridging visa for migrants who have been exploited and have lost their work permits; and the introduction of regularisation programmes for people who have been resident and working in the State.

3.2.5 Specific sectors of the economy

There are a number of sectors of the economy where illegal employment predominates, many of which employ migrant workers. In Ireland large numbers of workers are not covered by collective agreements and this is particularly the case in those sectors that predominantly employ migrant workers. Legally enforceable wages exist in a small number of sectors where workers are protected through minimum wages and Registered Employment Agreements. The main sectors affected by illegal employment are horticulture, construction, hotels and restaurants, sex work and domestic work (IOM, 2006; NESF, 2006; European Foundation, 2005; MRCI, 2007a). It is these sectors that have been targeted in recent campaigns by trade unions, including the trade union SIPTU who have employed Lithuanian, Polish and Latvian organisers to work in the sectors where migrant workers have been most vulnerable to exploitation. Some specific examples from the construction, Irish Ferries, horticultural and domestic work sectors are provided in the remainder of this section.

Construction workers and Irish Ferries

The growth of the Irish economy has partly been based on a boom in construction, much of which has benefited from significant amounts of migrant labour. In 2006, 32,600 foreign nationals were employed in construction and it is generally recognised as being

a sector that employs large numbers of irregular migrants and that has operated with illegal employment practices, including ‘bogus self-employment’ arrangements. Around five per cent of construction workers come from the accession states.

Following the accession of the EU10 member states in 2004, Ireland opened its borders giving full access to the Irish labour market. However, there were concerns expressed by trade unions that migration of EU nationals from the new member states resulted in displacement of Irish labour. In 2005, suspicions were raised that two companies, the construction company GAMA and Irish Ferries, were displacing Irish workers with cheap exploited migrant labour (Quinn, 2007). The GAMA case led to a dispute between unions and the company, and was resolved after the Labour Court recommended settlement terms for eighty Turkish workers who had gone on strike to resolve the issue of the underpayment of migrant workers, i.e., wages paid below the minimum wage level and lower employment standards. In the case of Irish Ferries, the company replaced its Irish workers with cheaper agency workers from Eastern Europe resulting in a huge public protest (Doyle, Hughes and Wadensjö, 2006).

However, a study by Doyle, Hughes and Wadensjö (2006) found no specific evidence of the displacement of Irish workers at a macro level. The study showed that EU10 nationals had a 90 per cent labour force participation rate, compared with 62 per cent for Irish nationals, and were concentrated in the construction, industrial and hospitality sectors of the economy. It is worth noting that during this time, net immigration reached a record high of 53,400 in the post-enlargement year (April 2004 to April 2005), with 40 per cent of migrants coming from the EU10 states. An analysis of labour force survey data (AIB Global Treasury Economic Research, 2006) found limited evidence of displacement; and that despite the increase in employment in EU10 nationals, employment among indigenous Irish workers had continued to grow. Because of these concerns about the exploitation of migrants, the employment rights of EU10 nationals and displacement, the social partners threatened to stall Ireland’s national social partnership agreement in March 2006. The social partners argued that protection of employment standards and the minimum wage are critical to preventing a “race to the bottom” whereby migrant workers are exploited and Irish workers displaced. The dispute was resolved when a new set of provisions to create a culture of compliance with and for the enforcement of labour standards was agreed upon through the creation of a new National Employment Rights Authority and a substantial increase in the Labour Inspectorate (discussed in Section 3.3).

Horticulture

In the horticultural sector, in jobs such as meat processing, fruit picking, mushroom picking and vegetable and meatpacking, there has been a significant increase in the number of migrant workers, many of whom are known to be working in an irregular capacity. There have been a number of cases of exploitation found in evidence collected by the MRCI (2006b) and by trade unions (ICTU, 2005). One group of workers that have been widely reported to experience exploitation are mushroom pickers (MRCI, 2006a; Pillinger, 2006). A number of cases have been taken to the Employment Ap-

peals Tribunal concerning low pay and long hours worked by mushroom pickers, unsafe working conditions, and a lack of knowledge about rights and entitlements. The trade union SIPTU has employed a full-time organiser working with mushroom pickers and a mushroom pickers' support group has been established by the MRCI with SIPTU. There are approximately 3,000 employed in the industry, where the vast majority are migrant women workers from Latvia and Lithuania but also significant numbers are from countries such as Thailand, Ukraine, Moldova, Belarus, and China.

There have been a number of cases of workers becoming undocumented because of delays in the renewal or non-renewal of work permits. MRCI has established a Mushroom Workers Support Group to address the main issues and concerns for migrants working in the mushroom industry, highlighting the exploitative work practices within the sector (MRCI, 2006a and 2007a). The problems faced by undocumented workers in this sector include the denial of entitlements to paid annual leave and problems in renewing work permits. MRCI argue that "...in some cases for those on work permits, employers would either delay renewing the work permit or apply for a short term work permit or let the work permit expire. Making it impossible for workers to leave the country and take their annual leave". In this sector workers whose work permits expired were found to be more vulnerable once they became undocumented and were without any legal right to residency, access to social protection, healthcare and other services.

Domestic work

In Ireland, the migration of domestic workers and care workers has been fuelled by a growth in demand for domestic, health and social care workers. The nature and scale of the international migration of women in the care and domestic service sector arises because of the development of the market in domestic care, in cleaning, domestic work and childcare, and arises in response to the higher participation rate of women in the labour market and a corresponding growth in care provision needs for children and older people. Consequently, working women have used domestic labour from overseas for childcare and other domestic support. In effect, this has resulted in a transfer of female labour from poorer to richer countries to fill the care deficit in work traditionally associated with women's roles as carers and homemakers (Pillinger, 2007a).

Cleaning and domestic work are highly feminised areas of the labour market and there is evidence in Ireland of women working in these sectors experiencing a lack of protections and rights, leading to problems of exploitation and difficulty. The growth of migrant domestic workers recruited in private households in Ireland has also resulted in problems of low pay and long working hours, physical and sexual abuse and illegal employment situations (MRCI, 2004). Because much of the care and domestic work takes place within private households, the vulnerability of women migrant workers to exploitation and abuse is further exacerbated by the invisibility of women working in this sector (MRCI, 2004, Anderson and Rogaly, 2005). It is clear that the oppressive and exploitative nature of much domestic and care work is closely linked to race and class inequalities, as well as the increasing privatisation of care and the employment of domestic workers in the home (Pillinger, 2007a).

There is also substantial evidence of the vulnerability of domestic workers to both exploitation and the risk of becoming undocumented (MRCI, 2005; Pillinger, 2007a). Research by MRCI (2004) highlights the particular vulnerability of migrant workers in domestic and care work in private homes to exploitation and unequal treatment, with problems relating to all elements of the employment cycle from accessing employment, to carrying out their tasks and to leaving the employment. Enhanced protections are needed for migrant women working in private homes to ensure greater regulation and recognition of their work. The research is based on twenty women's experiences highlighting a number of issues including difficulties in relation to pay and working conditions; leave entitlements, lack of privacy and the experience of discrimination. The area causing the biggest problem for the women in this study was reported to be non-renewal of work permits. In the study, it is reported that four of the employers did not renew work permits, resulting in the women becoming undocumented. Many employers neglected to inform the workers or actively misled the workers by saying the renewal process was underway. It was also highlighted by the participants of this study that becoming undocumented can create conditions of racism, as workers are then criminalised and stereotyped as inferior 'illegal aliens'. The report recommends that due to the issues highlighted of exploitation of workers through the work permit system, a four-month residency stamp should be provided in cases where a worker has alleged exploitation and where a work permit has not been renewed without notice.

Concerns about the exploitation of domestic workers have resulted in targeted action by trade unions and NGOs to support domestic workers, particularly in taking cases through the courts. An important initiative has been the development of a Code of Practice for the employment of domestic workers (discussed below in Section 3.4).

3.2.6 Other vulnerable groups and those at risk of exploitation

Victims of trafficking and forced labour

It is in the area of trafficking and forced labour that there is the greatest invisibility of irregular migrants working in illegal and exploitative employment. Trafficking and forced labour arise from a combination of poverty and inequalities between women and men, increasing globalisation of migration networks, and a demand for sexually exploitative services (Pillinger, 2007c). Victims are often deceived by traffickers that they will be entering into jobs such as domestic work or entertaining, only to find that they are forced into working in the sex industry. These women not only experience discrimination because of their gender and race, but also because of their irregular status, which means that they are unable to access healthcare and other services. It is for this reason that NGOs and migrant support organisations have campaigned for access to services such as shelters run by NGOs to protect trafficked women, and improved legal protection for trafficked women, including rights to access health and other supports.

Although it has been stated that the level in Ireland is lower than other countries, there has been a recent and worrying increase in human trafficking, the majority of which is related to the sexual exploitation of women and children. The 2006 *Report of the Department of Justice Equality and Law Reform and An Garda Síochána Working Group on Trafficking in Human Beings* (Department of Justice, Equality and Law Reform (2006a)

states that “Ireland is at risk from the same threats as those facing its EU partners and, in particular, our nearest neighbours”. A series of press reports, a television documentary on trafficking in 2006, and reports from organisations working with trafficked women and children, such as Ruhama and the HSE’s Women’s Health Project in Dublin, point to a substantial increase in the numbers of women and children experiencing trafficking for sexual exploitation (Pillinger, 2007c). Several studies have highlighted the problems faced by those who are trafficked into Ireland. A study of cases of sex-trafficking into Ireland between 2000 and 2006 found that the majority of cases were from Eastern Europe, followed by Africa, in particular Nigeria. The research found that the use of force, coercion, deception and violence were common experiences, and that of the 76 cases that were documented; 36 women disappeared from contact with support organisations, 14 women were repatriated and 22 were granted leave to remain or were in the asylum process, 3 were deported and one was repatriated to a third country (Ward and Wiley, 2007). There are also some concerns that the disappearance of unaccompanied minors in Ireland is linked to young people being internally trafficked into sexual exploitation and exploitative forms of employment (Mooten, 2006; Conroy, 2003). MRCI’s report on trafficking for forced labour identifies trafficking and forced labour as a growing problem in Ireland (MRCI, 2007b).

The MRCI’s (2007b) research on trafficking for forced labour shows that trafficking for forced labour often takes place because traffickers provide false information and deceive their victims. Many people enter legally with a work permit, but have their documents confiscated and subsequently find themselves in a forced labour situation, receiving little or no wages and living in poor accommodation. In many cases the victims are coerced into remaining with their trafficker or employer through threats, physical abuse and intimidation either towards them or their families. Many victims are very isolated, cannot speak English and are unable to seek help.

There is little or no data collected at the national level and, in the absence of a policy framework on trafficking for sexual exploitation and forced labour, a limited recognition and knowledge of the extent of the problem. Although Ireland ranks low as a destination or transit country (DJELR, 2006a) there is growing concern that the absence of data and knowledge may mask the true extent of trafficking. The Garda National Immigration Bureau find that trafficking is particularly prevalent from Bulgaria, Romania and Lithuania and that there is an increase in trafficking for sexual exploitation within ethnic communities.

There are varying estimates of the numbers of women trafficked into Ireland for sexual exploitation. NGOs have estimated that around 200 people were trafficked into Ireland between 2001 and 2005, and that there are between 14 and 35 cases per year; whilst the number currently under police investigation are in single digits (US State Department, 2007: 218). The US State Department’s 2007 *Trafficking in People Report* stated that in 2006 there were no reported trafficking prosecutions or convictions in Ireland. The report goes on to say that: “Ireland is a potential destination country for women and girls trafficked transnationally from Eastern Europe, Africa, Latin America or Asia, for the purposes of commercial sexual exploitation and forced labour. Unaccompanied minors from

various source countries, particularly Africa, represent a vulnerable group in Ireland that is susceptible to trafficking and exploitation” (US State Department 2007: 57).

The Irish government has recently established an Anti-Human Trafficking Unit within the Garda National Immigration Bureau and a National Action Plan on Trafficking was in the process of being drawn up in 2007. The Immigrant Council of Ireland (ICI) has been advocating best practice policy approaches to address the trafficking of women and children for sexual exploitation. In particular, it is recognised that an appropriate policy response will need to locate trafficking in the broad context of gender based violence and the exploitation of women. In the absence of a legal framework concerning the protection, support and security needs of victims of trafficking, most of the attention has been given to the prosecution of traffickers.

Separated children / unaccompanied minors

IOM Dublin have also found that around 50 per cent of the caseload of Unaccompanied Minors (UAM) referred to IOM programmes since 2004 have shown indicators of trafficking. Most of the UAM referrals were nationals of West African countries and Eastern European countries. According to Pauline Conroy’s report (2003) for the IOM up to 40 children a year are being trafficked to Ireland for either economic or sexual exploitation. According to media reports children between 3 and 17 years of age are being trafficked for a variety of reasons—for the sex industry, as child brides, or as workers in the underground economy (Holland, 2004). Child-trafficking investigations have identified children from Romania, the former Yugoslavia, the coastal countries of West Africa and Nigeria (Lane 2003). The Irish Refugee Council (Mooten, 2006) estimate that around 300 children who are unaccompanied minors in care of the State have gone missing in the State.

Students

Working students are a specific group of workers that are also vulnerable to poor working conditions and illegal work. There is anecdotal evidence from NGOs and also some research showing that some non-EEA students, particularly Chinese students, often work longer hours than they are currently allowed under the terms of the Student Visa (currently they are allowed to work 20 hours a week). Many students find it hard to meet day-to-day living costs and as a result engage in illegal work. Anecdotal evidence has also shown that English “language schools” operate illegally, selling visas to non-EEA nationals who wish to migrate and work in Ireland without having to apply for a work permit (MCRI, 2007a). There are substantial numbers of Chinese students working in part-time and temporary jobs, many of which are illegal jobs, which pay ‘cash in hand’. Some research on the situation of Chinese students has been carried out but there is no clear indication of the numbers, or the situation and experiences of working students. NCCRI’s study on the Chinese community in Ireland cites many examples of the exploitation of students working over the hours they are legally allowed to work (Ying Yun and Chiyoli King-O’Rianin 2007).

Provisions for refugees and asylum seekers

Specific provisions are made for refugees and asylum seekers in Ireland. However, asylum seekers are not allowed to work or undergo training courses. Many people slip through the system because of the delays in processing claims and are forced into an undocumented and irregular legal status. The system of direct provision and dispersal has led to concerns about social isolation and exclusion, and problems associated with access to services (Cáirde, 2006; IRC, 2004). In particular, issues have been raised about the limited supports for women asylum seekers with children and the restrictions imposed on people's autonomy and independence resulting from the system of direct provision and dispersal for asylum seekers and refugees. The Irish Refugee Council (IRC 2002) states that direct provision contributes to the institutionalisation and deskilling of asylum seekers, arising from extended stays in direct provision, whilst social exclusion is a direct effect of restrictions on education and training and prohibitions on engaging in paid employment while awaiting decision on their application. The health impacts of living in direct provision have been documented in the Health Service Executive's (HSE's) consultations for the *Intercultural Strategy in Health* (HSE, 2008b) and by organisations representing minority ethnic groups (Cáirde, 2006). For those who get refugee status, difficulties arise in finding accommodation and getting information about how to live independently and find accommodation, training and employment.

Women

Women migrants account for 48.8 per cent of migrants in Ireland and they form a significant number of those migrating alone and as the main income earners. Women migrant workers are very invisible, tending to work in the highly feminised and low paid sectors of the economy and they are found in large numbers in the cleaning, healthcare, hotel and domestic sectors (Pillinger, 2006). Because of the nature of women's employment in invisible forms of employment, they are often absent from official data sources and are much more vulnerable to working in undocumented work. There is very little known about the numbers and experiences of undocumented women. However, they are vulnerable to abuse, exploitation and harassment, they work in jobs that have a high risk factor, and have limited or no rights to education, health, child support services and welfare benefits. Research has shown that there are blurred lines between documented and undocumented work and women often become undocumented when their permits run out or if they lose their job. It is not untypical for women migrants to move between documented and undocumented work, particularly in the care, entertainment, hospitality, cleaning and domestic work sectors (Pillinger, 2006 and 2007a).

Much of the evidence of women in irregular migration tends to be anecdotal and based on individual stories issued from NGOs supporting women migrants. In the area of trafficking, there is substantial international evidence to show that the majority of those trafficked for sexual exploitation are women and children; whereas both women and men experience trafficking for labour exploitation.

Research shows that women migrants experience significant gender, ethnic and racial discrimination in their daily lives, in accessing the labour market and in integrating into

work and life in Ireland (Pillinger, 2006 and 2007a). Gender assumptions, which underpin the experiences of women migrants, are rooted in the policies that influence their arrival, integration and settlement. Women migrant workers are triply disadvantaged. They face inequalities in the Irish labour market that is characterised by gender inequality, they experience a second layer of inequality by virtue of their race or ethnic origin, and they are triply disadvantaged as migrant workers, often with limited legal protection or long-term security in the labour market. In some cases, legislation has restricted gender equality by forcing women into a dependent status, and often they have no choice but to work in an irregular capacity. There is a need for a gender equality approach to be incorporated into the development of new legislation and policies, which will enhance the profile that is given to resolving some of the inequalities and vulnerabilities faced by women migrants in the labour market (Pillinger, 2007a).

Poor working conditions, trafficking for sexual exploitation and forced labour are all outcomes of the growing demand for care and domestic workers, and a global market that has seen a massive increase in demand for entertainment, hospitality and sex industry workers. Research has shown that women's experiences in the workplace include negative experiences such as discrimination, undervaluing of skills and experience, exploitation in terms of low pay or poor conditions of employment, harassment, social isolation, loneliness and stress (Pillinger, 2007a). In particular, interviews with migrant workers show that some women who enter as migrant workers or as family members are located into poorly paid, undervalued and often illegal work. This is backed up by international and national data, which shows that many women migrant workers are vulnerable to exploitation and deskilling (MRCI, 2004; Pillinger, 2006; Kofman et. al., 2003; Piper, 2005; UNFPA / IOM, 2006). In part, this is explained by the low value associated with domestic and caring work and the lack of employment protection in casual employment.

There is also evidence to show that female dependent spouses are often forced into working in illegal employment situations. Data from the Department of Enterprise, Trade and Employment records show that 1,718 spousal work permits were issued in 2006, 1,168 were issued in 2005 and 739 were issued in 2004 (ICI 2006). Dependent status can represent a loss of autonomy and financial independence for women, compared to their home countries. This creates an environment that can lead to abuse, domestic violence and an absence of personal autonomy.

In particular, a number of organisations (Women's Aid, 2005, NWCI, 2005) have called for greater legal protection, and for women who experience domestic violence to be given independent legal status and the right to remain in Ireland, as exists currently in the UK. Without this, women are tied into dependency on their spouses, legally, financially and in accessing services, or they have to become an irregular migrant with no protections. This is seen a discriminatory situation and because work permit holders are usually working in lower skilled work, family poverty and a range of difficulties arise if spouses are not allowed to work. Being prevented from working legally forces many dependent spouses into illegal employment. Overall there is evidence to show that the lower the skill level, and the weaker the rights and entitlements, the more likelihood there is that a woman migrant will slip into undocumented work. Consequently, women are more disadvantaged by the imposition of restrictions in areas such as conditions

of residence, the rights associated with family life and family reunification, access to services, rights associated with residence and citizenship, and difficulties in making a transition between one legal residence and employment status to another.

3.3 Combating the illegal employment of foreign nationals: legislation and policy on the enforcement of employment rights

3.3.1 Introduction

In recent years the control of irregular migration, illegal employment and measures to promote compliance with Irish labour legislation, have become increasingly important in Ireland. In the latter case, the compliance with labour legislation has not been designed specifically to prevent or reduce irregular labour migration. However, the measures introduced have had as their purpose the aim of ensuring that employers comply with labour legislation and therefore deter illegal and undeclared work. The regulation of labour law compliance rests with the Department of Enterprise, Trade and Employment and up to 2006, they played a somewhat limited role in regulating illegal forms of employment. After 2006, measures to address the illegal employment of foreign nationals through compliance with the law took a centre stage. Immigration legislation, on the other hand, has had as its direct aim the reduction of irregular labour migration and promotion of skilled migration from outside of the EU. This is discussed in section 4 in relation to policy and legislation on labour migration, and the emerging legislative framework on a managed approach to migration. This section discusses the specific provisions that have been introduced to ensure that there is enforcement and compliance with employment rights and labour legislation.

The flexible liberal economic model in Ireland sits alongside a very sophisticated social partnership model which embraces the European social model and which is regarded as being an important contributor to the economic boom since the 1990s. The social partners agreements, represented by the government, employers, trade unions, farmers and civil society representatives, have been in place since 1987 and provide the basis for broad policy measures on economic and social development, along with the agreement of wages in the public and private sectors (Hastings, Sheehan and Yeates, 2007). The most recent agreement *Towards 2016* (Department of the Taoiseach, 2006), signed in 2007, was particularly important in putting in place a new set of measures to combat workplace exploitation, particularly of migrant workers. As David Begg, the General Secretary of the Irish Congress of Trade Unions argues: “It was naïve of Government to think that employers, faced with the prospect of an abundant supply of vulnerable, and understandably compliant, labour would not succumb to the temptation to exploit them. This is of course what happened” (Begg, 2007:3).

In Ireland, employment rights enforcement and compliance consists of a range of measures to develop better compliance with legal requirements. These measures were substantially strengthened in *Towards 2016*, with the objective of enhancing public confidence in a more effective system of compliance and enforcement, “on the basis of an informed and empowered working population, who will have simple, independent and workable means of redress, underpinned by the need for fairness and impartiality”

(Department of the Taoiseach 2006: 92). Measures to address illegal employment do not distinguish between migrant and non-migrant workers, nor do they distinguish between a person's legal or immigration status.

3.3.2 Labour Inspectorate and measures to combat illegal employment

In Ireland, the Labour Inspectorate plays a key role in enforcing and promoting compliance with labour legislation on pay and conditions of employment covering minimum wages, working time, industrial relations and the protection of young people. The law makes no distinction between migrant workers and Irish workers regarding employment rights and protections, which apply to all legal workers of all nationalities. The following legislation is covered:

- Organisation of Working Time Act 1997
- National Minimum Wage Act 2000
- Industrial Relations Acts 1946–2001 (EROs/REAs)
- Protection of Young Persons (Employment Act 1996
- Payment of Wages Act 1991
- Employment Agency Act 1971
- Protection of Employment Act 1977
- Protection of Employees (Employers' Insolvency) Acts 1984 – 2003
- Carer's Leave Act 2001
- Parental Leave Act 1998

Employment law in Ireland provides protection for employees whose rights have been breached. Complaints, disputes and grievances are heard before a Rights Commissioner who will listen to both sides before completing an investigation of the complaint and issuing a binding or non-binding recommendation, depending on the type of law under which the case is heard. The Rights Commissioner Service is part of the Labour Relations Commission, and they investigate disputes, grievances and claims in Ireland that individuals or small groups of workers make under employment legislation on unfair dismissals, maternity protection, payment of wages, national minimum wages, terms of employment, protection of young people, parental leave, the organisation of working time, protection of part-time workers, and health and safety at work.

The equality legislation also provides recourse against discrimination in employment and access to services, and cases brought under the equality legislation are brought before the Equality Tribunal. This covers claims brought under the Maternity Protection Act, 1994; the Adoptive Leave Act, 1995; the Employment Equality Act, 1998; and the Equal Status Act 2000.

Section 42 of the Industrial Relations Act 1990, provides for the preparation of draft codes of practice by the Labour Relations Commission for submission to the Minister for Enterprise, Trade and Employment. In this light, and in view of the growing number of cases of exploitation of domestic workers, the social partnership agreement *Towards 2016* (Department of the Taoiseach, 2006) provided for the development by the Labour Relations Commission of a *Code of Practice for Protecting Persons Employed in Other*

People's Homes. The Code was developed in consultation with the Irish Business and Employers Confederation and the Irish Congress of Trade Unions. It sets out the employment rights and protections for persons employed in other people's homes, and aims to encourage good practice and compliance with the law and increase awareness of the application of relevant legislation and codes of practice. It covers the right to a written contract of employment, to a pay slip and to a minimum wage. It specifies hours of work, rates of pay, duties, annual leave, place of work, sick pay and commencement dates, and provides that employers will respect the dignity and privacy of the employee.

3.3.3 Towards 2016: the social partnership process and migration

The outcome of trade union lobbying for improved employment rights for migrant workers can be seen in the outcomes of the social partnership agreement, *Towards 2016*, which identified the need for a greater emphasis to be placed on illegal and exploitative employment practices in the State. Much of this has resulted from campaigns by trade unions and other organisations for the enforcement of legislation as levels of employment and migration have grown substantially in the State. In particular there has been an enhanced awareness of the exploitation of migrant workers in certain sectors and an increase in illegal employment practices. In 2007, these inspections were targeted towards enforcing the minimum wage, protecting young workers and monitoring the construction sector. *Towards 2016* makes it clear that social partnership has a key role to play in the integration of migrants and for the policy and other responses that these changes have required.

The altered circumstances of the Irish labour market arising from the decision to permit direct access by citizens of the new Member States can also be addressed through social partnership, through the attempt to formulate a shared understanding of the issues which arise, the options for responding to them and the combination of public policy and procedural responses which are most appropriate. (Department of the Taoiseach, 2007: 92)

In particular the package of measures introduced has been part of a "more intensive promotion of employment rights obligations and entitlements to employers and employees and to workers from overseas in particular" (Department of Enterprise, Trade and Employment, 2006). As part of this new focus on compliance and enforcement a major package of measures was agreed in *Towards 2016*, the implementation of which began in 2007. This has included the establishment of new resources and a new statutory agency with the role of creating employment compliance; the trebling of the number of Labour Inspectors from 31 to 90; improved record keeping to protect the employment rights of workers; the introduction of new and more accessible forms of employment rights compliance; improved employment rights awareness activities and higher penalties for non-compliance. This new system encompasses employment rights compliance in the areas of the active and responsible contribution of employers, employees and trade unions; the education of vulnerable workers; the promotion of entitlements, with a special emphasis on workers from overseas; information provision to all employees and employers and substantially strengthened arrangements for inspection and adjudication through:

- The creation of the National Employment Rights Agency (NERA).
- The establishment of joint investigation units established between the Revenue Commissioners, Social Welfare and NERA who would work together to target serious abuses of employment standards.
- Reform of the tax system to prevent people in the construction and other sectors from being forced into 'bogus self-employment', in order to let employers off paying tax, social security and pension contributions.
- Employers are required to keep accurate records in a prescribed format for inspection by the Labour Inspectors; failure to do so can result in fines of €250,000 or imprisonment.
- The Minister for Enterprise Trade and Employment has new legislative powers to publish the outcome of investigation into cases of exploitation, such as the case of the Construction Company, GAMA .
- A new Employment Rights procedure is introduced to allow easier access to Rights Commissioners, The Court and the Employment Rights Tribunal with compensation where rights are denied. New powers are given to award up to two years pay as a compensation for rights denied.
- Penalties for non-compliance in all areas of employment are increased up to €250,000.

One of the outstanding issues, that to date has not been resolved and remains a significant concern of trade unions, is the regulation of employment agencies. This is particularly important as there has been a huge increase in employment agencies as a means of recruiting migrant workers and agency staff have been used to enable employers to avoid providing a direct labour contract and applying the equality legislation.

The additional resources put in place have the objective of enhancing compliance with employment legislation. In 2007, the appointment of 45 additional labour inspectors who, in addition to the existing 14 labour inspectors, will also be representative of new migrant communities, with eight inspectors being proficient in a range of Eastern European languages. In addition, five new Rights Commissioners and additional staff have been agreed for the Employment Appeals Tribunal, the Labour Relations Commission and the Labour Court in order to process cases more effectively.

Towards 2016 also introduced measures to address the problem of collective redundancies of Irish workers who are displaced for cheaper migrant labour. A special panel was established to examine whether redundancies in a particular situation constituted displacement. The panel will advise the Minister for Enterprise, Trade and Employment on whether a case should be referred to the Labour Court. If the court found that the case was one of displacement rather than legitimate redundancy, the employer could face penalties under new legislation introduced in 2007.

The creation of a new office for employment rights compliance, the National Employment Rights Agency (NERA), marks an important step towards a more visible and effective form of compliance and enforcement of labour standards. It was considered particularly important to have a greater emphasis on compliance and enforcement given the substantial changes that have taken place in the labour market, not least resulting from inward migration. Improved record keeping has also been introduced to ensure that the rights of workers are protected and to ensure that there is compliance with

Employment Rights legislation, including requirements for employers to improve data through up-to-date Statutory Records in areas such as payroll and working time records, taxation and social welfare. The new compliance model has been put in place to ensure that compliance issues are resolved and developed at the level of the workplace, with enhanced promotional and educational efforts, and a procedural approach regarding the initiation of investigations regarding non-compliance.

The Minister for Enterprise, Trade and Employment and NERA inspectors can issue proceedings relating to offences under employment rights legislation detected in inspections. The process involves employment rights cases being heard in the first instance by the Rights Commissioner Service, with appeal to the Employment Appeals Tribunal or the Labour Court. The Courts can impose penalties relating to the offences and order the payment of arrears due to employees, usually as a result of a breach of the minimum wages legislation. The Minister can also bring proceedings on behalf of employees who are seeking compliance through the Labour Court and the Employment Appeals Tribunal. The process for the enforcement of legislation includes proceedings to the Labour Court and the Employment Appeals Tribunal.

NERA inspectors are authorised to enter workplaces, inspect employment records and interview employers and employees as part of their inspections to determine compliance with employment rights legislation. In some circumstances joint investigations – implemented through Joint Investigation Units - are carried out with the Office of the Revenue Commissioners, the Minister for Social and Family Affairs and the Minister for Enterprise, Trade and Employment in order to exchange information. This is provided for under the Social Welfare and Pensions Act, 2007, and enables there to be more systematic sharing of taxation, PRSI and other employment data to ensure that effective forms of employment compliance are in place. This is considered to be particularly important in detecting undocumented and irregular forms of employment, breaches of employment law and minimum wages. A *Hidden Economy Working Group* has been established with representatives of the Revenue Commissioners, the Department of Social and Family Affairs, the Irish Congress of Trade Unions, the employers organisation IBEC, the Small Firms Association and the Construction Industry Federation.

In relation to the provision of information for migrant communities, NERA's information brochures are available in Arabic, Chinese, Czech, French, Irish, Latvian, Lithuanian, Polish, Portuguese, Romanian, Russian and Spanish. The forthcoming Employment Law Compliance Bill will also allow for on the spot fixed charges or fines for minor breaches of legislation. However, because of concerns about workplace exploitation in certain sectors, including construction, catering and security, there has been a reduction in the number of inspections carried out under the remit of the Protection of Young People (Employment) Act 1996 (from 35 per cent of all inspections in 2005 to 17 per cent in 2007), in favour of inspection of the sectors that have been identified as a priority for inspection.

Three targeted inspections were carried out in 2007 in areas where concerns about workplace exploitation have been highlighted. These include the Construction Sector campaign held during the summer of 2007, the National Minimum Wage Act held in the

autumn of 2007, and the Protection of Young Persons Act. NERA's summary of investigations in 2007 found that 235 (56 per cent) of 416 inspections in the construction sector, 61 per cent of 200 inspections in the catering sector and 58 per cent of inspections in the hotel sector detected breaches of legislation and the payment of arrears of wages to employees. A total of 1909 calls, visits and inspections were carried out in relation to the National Minimum Wage Act, where a total of 180 breaches were detected in minimum wage sectors of the economy. In total 14,000 inspections, calls or visits were carried out in 2007. In the area of the Protection of Young Persons Act, 2466 calls, visits or inspections were carried out and 31 breaches were detected.

Of these inspections held in 2007, 98 cases were referred to the Chief State Solicitor's Office (CSSO) for prosecution, resulting in convictions and fines, with a small number being settled or withdrawn prior to the hearings. The payment of almost €2.5 million in arrears is a significant increase on 2006, where €1.1 million was paid out in arrears in wages resulting from inspections. It is anticipated that the number of inspections highlighting breaches of legislation will increase in future years given the emphasis placed on additional resources and inspectors and the detection of workplace exploitation. NERA has an information service, an inspection service and an enforcement and prosecution service. In January 2008, NERA launched a major awareness campaign on employment rights, which included advertising on the television, radio and press and promotional campaigns to engage employers, employees and the public in order to create a culture of employment rights compliance.

Table 1 provides a summary of inspections and breaches detected in the industry sector in 2007. They cover sectors that are governed by industry-specific agreements covered by Employment Regulation Orders or Registered Employment Agreements. These agreements cover minimum rates of pay and other conditions of employment that are set nationally for each of the sectors. Table 2 provides a summary of inspections and breaches of general rights employment legislation.

Table 3.1: Summary of Inspections and Breaches Detected by Industry Sector

Sector	No. of Inspections	% of total breaches detected	Arrears Recovered (€)
Agriculture	46	59	135.836
Catering	204	61	263.066
Retail Grocery	139	30	39.639
Hotels	90	58	441.330
Contract Cleaning	21	67	72.398
Security	38	53	33.615
Construction	416	56	1,336.824
Electrical	35	43	26.857
Other	35	26	0.000

Source: Information provided from NERA, 2008

Table 3.2: Summary of Inspections and Breaches of Employment Legislation

Breach Type	No. of Inspections	% of total breaches detected	Arrears Collected (€)
National Minimum Wage Act	1.939	10	122.015
Payment of Wages Act	2.655	12	196.000
Organisation of Working Time Act	2.639	48	3.360
Protection of Young Persons Act	2.466	1	617.000
Other	7	14	0.000

Source: Information provided from NERA, 2008

3.3.4 Anti-racism policy

In addition to the provisions introduced to combat illegal working practices, a number of measures have been introduced in Ireland to address racism in the workplace, which covers issues such as creating a workplace free from discrimination and harassment, welcoming black and minority employees, accommodating cultural and linguistic diversity and taking practical steps. Initiatives include the annual Anti-Racist Workplace Week, which has played an important role in raising the issue of racism in the workplace and in developing best practice approaches to the development of intercultural workplaces.

The National Action Plan Against Racism (Department of Justice, Equality and Law Reform, 2005) contains specific issues relevant to addressing workplace racism including measures to include ethnic minorities through employment rights and workplace policies; the inclusion of migrant workers consistent with the requirements of policy on immigration, employment and equality; to focus on migrant workers in raising awareness and compliance with employment rights; and recognition of the role of the social partners in creating awareness and eliminating racism in the workplace (ICTU 2005: 15).

3.4 Combating the illegal employment of foreigners: legislation and policy on immigration

3.4.1 Introduction

This section discusses Irish policy and legislation in the area of immigration, with a particular emphasis on measures to address irregular migration and its connection to illegal employment. The Irish immigration system has in the past been largely discretionary, although the recent legislation on employment permits and the forthcoming legislation on immigration, residence and protection aims to promote a more managed approach to migration, with an emphasis on skilled migration. Increasing levels of migration to Ireland has also resulted in recognition that undocumented migrants are increasing in number and that some groups of migrants have experienced work of an exploitative or 'illegal' nature.

3.4.2 Towards a managed approach to immigration

As this report has shown, from being a country of outward migration, Ireland now is a country of net inward migration. For this reason it has been relevant to Ireland's

evolving policy framework on migration to have a major review of how it can move towards a managed approach to migration resulting in 2008 in the publication of the Immigration, Residence and Protection Bill, which had been previously published in 2006 (Department of Justice, Equality and Law Reform, 2006b). The need for a more managed approach to migration was informed by the publication of two reports that provided a systematic overview of existing policies and identified the need for a new policy framework on migration for Ireland (NESC, 2006; IOM, 2006). The report by the National Economic and Social Council (NESC) recommended that Irish migration policy take a “whole of Government approach”. Based on the position taken in the IOM Report (IOM, 2006) that was commissioned to inform the NESC strategy, illegal work was seen to be more pervasive than illegal entry (NESC, 2006: 4). NESC recommended the continuation of a liberal-entry regime, which existed up to 2003, thereby avoiding large scale illegal immigration and illegal working (NESC, 2006: 143). Of relevance to the issue of irregular migration is that the report cautioned against focusing on entry control and advocated control of labour market standards to reduce demand for, and therefore supply, of poorly paid workers.

In its report, NESC (2006) argued that there is a need to maintain, develop and monitor good labour standards and labour market policy, as it is argued that labour market policy, in key areas, is one of the most important policy responses to migration. The report highlights that the success or failure of migration depends on how well the labour market works for both migrants and Irish citizens. Four main challenges are raised: the need for a whole of government response to a range of cross cutting issues, ensuring the integration agenda is firmly mainstreamed; communicating a clear vision of migration in Ireland’s long-term development; and creating information systems to support individual policy spheres and sufficient connection between them.

The report made three broad policy recommendations in the areas of economic and social development, the rule of law and integration. First, in the area of economic and social development, it was argued that migration policy needed to effectively manage and define channels of entry into Ireland, in order to meet Ireland’s economic goals in the areas of business development, employment, education, the family, culture and with regard to its international commitments. Second, the argument was made that migration had the potential to undermine the rule of law by weakening the State’s ability to define, control and monitor who enters and resides in Ireland, to undermine relationships between employers and employees and create unnecessary inequalities, and also to weaken trust in public institutions. In the third area of integration, the report highlighted the importance of developing policies on integration so that those entering the State could be effectively integrated. NESC’s proposals on integration suggested that the main approach to integration should be the adaptation of mainstream polices and services, rather than the creation of separate policies and services for different migrant groups. Included is the need for adaptation of social policy to migration, with a need for better information within public systems and among citizens and migrants.

3.4.3 Irregular migration and the role of European Union policies in Ireland

The Irish government is influenced by a range of EU policies in this area, particularly because the EU's policy framework on illegal immigration is a central part of its common immigration policy. Measures include the European Commission's returns policy, the reinforcement of external borders and readmission agreements, and more recently, in 2007, discussion has been held on measures on employer sanctions, as well as measures to fight trafficking and strengthen border controls. The Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and a common set of rights for third-country workers legally residing in a Member State, has opened up a debate about the rights of migrant workers in the EU.

The European Commission's Communication of 19 July 2006 highlights the policy priorities in the fight against 'illegal immigration' as measures to tackle illegal migration, including the strengthening of external borders, the fight against trafficking and tackling illegal employment. This is distinct from EU policies on economic and skilled migration, and in a similar light these are treated separately in Irish migration policy. The government is currently engaged in discussion with other member states with a view to agreeing a Directive in this area to be agreed in 2008 and it is likely that the Directive, once transposed, will not take effect until 2010. Areas that will be included for combating illegal employment of foreign nationals are likely to include increases in spot checks on companies to reduce the numbers of companies allowing work 'off the books', which is estimated by the European Commission to represent about 16 per cent of Europe's business. The plans that are being discussed include measures to seek out and prosecute unscrupulous employers by introducing a requirement that employers check that all employees have a residence permit, and if they do not, they would be required to notify the relevant authorities. Fines for offenders would include the repatriation costs, and the costs of any unpaid tax or social security contributions.

The objective of these proposed measures is to remove illegal work and thereby deter irregular migration. Other measures under discussion include the introduction of border controls and electronic travel authorisations for everyone moving around the EU, with the intention of ensuring that those that are legal can move freely, while those that are illegal or involved in trafficking or smuggling can be more easily detected. The measures for the introduction of an electronic register of the entry and exit of third country nationals include the creation of a European border surveillance system to combat illegal border crossings. A recent European Commission report (2008) argues that border controls to ease legal migration must go hand in hand with tougher policies against illegal immigration, in particular illegal employment in the EU by "jointly controlling and managing EU external borders efficiently, in respect of human rights whilst protecting those seeking asylum or international protection".

Migrants from the enlarged EU, with the exception of Bulgaria and Romania, now have full rights to work and live in Ireland. The EU Directive 2004/38/EC on free movement of

persons,³ implemented in 2006, allows entry of family members and partners of EU citizens who are in a relationship, as well as a new status of permanent residence for European Union citizens and their family members after five years' residence in the State. However, there has been a narrow and restrictive interpretation of this by the Irish State, to the extent that non-EU spouses of EU residents are not automatically guaranteed residence.

Other relevant measures include the European Communities (Eligibility for Protection) Regulations, which were signed into Irish law in 2006. These give effect in Irish law to the provisions of Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection (known as the Qualification Directive). The forthcoming Immigration, Residence and Protection Bill will incorporate the Qualification Directive into primary legislation. The Directive provides 'subsidiary protection' for people seeking protection in Ireland, but who may not meet the refugee definition. Subsidiary protection claims will be considered by the Department of Justice, Equality and Law Reform after an application for refugee status is determined. There is currently no appeals mechanism. In general terms, such protection may be available to a person who does not qualify as a refugee but who, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined for the purpose of the Directive.

Ireland's policy framework is also informed by international standards, in particular the European Convention on Human Rights (ECHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and, though not yet ratified by Ireland, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, along with non-binding principles established by the International Labour Organization (ILO, 2006). Trade unions and NGOs, in particular, have been arguing for the implementation of the International Convention and ILO principles, including the non-binding multilateral framework for a rights based approach to labour migration agreed by the ILO in 2006. Ireland has not yet signed the Council of Europe's Convention on the Legal Status of Migrant Workers of 1977, which sets out rights and entitlements of migrant workers and provides for equal rights to migrants in areas such health care, social security and working conditions.

Even though these provisions have not yet been ratified and implemented, it is argued that they should be seen as principles that should inform Irish policy. Whilst the ratification and implementation of the ICMW would possibly require some change of legislation in the employment, education, social welfare and taxation systems, the Irish Human Rights Commission (IHRC) and the NCCRI (IHRC and NCCRI, 2004) have argued that even if these conventions are not ratified and implemented they should still underpin minimum standards in Irish policy. ICTU (2005), amongst others, has argued for Ireland to ratify the three most important conventions affecting migrants⁴, and that even if they are not ratified, they should become "the point of reference for policy makers" (ICTU 2005: 11).

3 European Communities (Free Movement of Persons) Regulations 2006

4 They include the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990); ILO Migration for Employment Convention (Revised) 1949 (no 97); Migration for Employment Recommendation (Revised 1949) (No 86); the ILO Migrant Workers (Supplementary Provisions) Convention 1975 (no 143); and the Migrant Workers Recommendation, 1975 (no 151).

A specific focus has been given to the rights of refugees under the Geneva Convention and, more recently, instruments have been developed in the area of human trafficking, under the Palermo Protocol.

3.4.4 Legislation and policy to restrict or deter irregular migration and illegal employment

In the previous section it was shown that a range of measures have been introduced to reduce the exploitation of migrant workers and to ensure that employers are compliant with labour legislation. There is a general consensus in Ireland on the need for effective action and sanctions for employers who are exploiting migrant workers and who are in breach of immigration law. As shown in the previous section, a broad range of policy measures to tackle labour exploitation were agreed as part of the national partnership agreement *Towards 2016*, including a more effective labour inspectorate and the creation of the National Employment Rights Agency.

The Irish government is currently examining the new EU proposals on sanctions against employers of undocumented workers and irregular migrants in order to ensure that all member states introduce similar penalties and enforcement. This would impose sanctions on employers including fines, with criminal proceedings being considered for those employers using exploitative practices. There are some concerns from NGOs and trade unions that the proposals could use the workplace to police and control immigration, thereby forcing the irregular labour market underground, and making it harder to detect and address exploitation and abuse in the workplace. A number of NGOs have warned against using employers and service providers in the health, education and welfare sectors in the role of policing immigration, for example, by requiring proof of legal status or residence before an offer of employment or a service is taken up.

In Ireland, a range of legal measures have been introduced to restrict illegal immigration and for the deportation of foreign nationals that are in violation of Ireland's immigration laws. For example, the trafficking of illegal immigrants and the transportation of a passenger who does not have immigration papers have been criminalised, and there are measures in place to penalise, fine or imprison employers and workers who do not comply with the Employment Permits Act 2003. However, the emphasis on policies to control and deter immigration is contested. MCRI's (2007a) research argues that although there is a growing emphasis on the control of immigration, control policies in themselves do not always reduce levels of illegal immigration. Similarly PICUM has argued that the EU's strict policies on tackling irregular migration, through community returns policy, reinforcement of external borders and readmission agreements, have not reduced the numbers of undocumented migrants. By restricting access to basic social rights such as health care and fair labour conditions, PICUM has argued that fundamental human rights are not being adhered to (PICUM 2007 and 2007).

The increased activity to restrict entry has been part of the ongoing policy shift in Ireland whereby deterrence is viewed to be an effective control measure. The increasing emphasis on deportations and refusals to land has become an ongoing policy priority of the government. In cooperation with the IOM, the voluntary and assisted return

programmes allow for a voluntary return of and assistance to irregular migrants (discussed in Section 3.2) and there are a range of measures in place to enable repatriation to take place in cooperation with countries of origin.

To date the government has developed return agreements with Poland, Nigeria, Romania, and Bulgaria. The Department of Justice, Equality and Law Reform recently established a visa office in Beijing, in order to process visas for Chinese nationals wishing to enter Ireland. A system of immigration controls has also been put in place in a number of countries including Beijing, Moscow and London, so that papers can be checked prior to departure, in order to deter irregular migrants departing for Ireland. Specific measures are in place to deter Brazilian nationals gaining entry to the State, and although Brazilians are not required to hold visas to enter Ireland, immigration authorities are restricting entry to a large number of Brazilians who are suspected of landing to gain illegal employment. Brazilians represent the largest category of foreign nationals that are given a refusal to land in Ireland.

3.4.5 Legislative provisions

This evolving policy framework on immigration in Ireland has been in response to net inward migration and the need for a managed approach to migration. There are two main objectives in the development of a managed approach: first, to encourage skilled migration and thereby discourage low skilled migration, and second, to put in place measures to deal with irregular and unlawful migration. Immigration policy in Ireland has evolved in a piecemeal way and until 2008 there was no coherent policy framework on immigration. Before the mid 1990s, immigration was managed through the 1935 Aliens Act and evolved on the basis of the EU Rights of Residence Directives, which Ireland transposed when it joined the EU in 1973.

Since then legislation has been introduced to respond to immigration and asylum in the following areas:

- Statute law governing Irish citizenship is found in the Irish Nationality and Citizenship Act 1956, which was amended in 1986, 1994, 2001 and 2004.
- The Refugee Act 1996 established a new system for the processing of asylum applications in Ireland.
- The Immigration Act 1999 established principles, procedures and criteria for the detention and removal of foreign nationals from the State, with provision for the issuing of deportation and exclusion orders.
- The Immigration Act 2003 introduced penalties for carrier liability, making a carrier responsible, and liable to fines, for bringing an undocumented immigrant into the State. Provision was also made for the return of persons refused leave to land.
- The Immigration Act 2004 introduced a number of provisions on a statutory basis to replace the Orders made under the 1935 Act. This included provisions for the appointment of immigration officers, and also introduced criteria for permission to land. The Act gave the Minister power to make orders for the issuing of visas and for limiting the duration of a foreign national's stay. Obligations were also imposed on carriers and persons landing in the State, regarding the requirement to be in possession of a passport

or identity document, as well as requirements for foreign nationals to register with the Gardai (police).

- The Illegal Immigrants (Trafficking) Act 2000 made it an offence to smuggle illegal immigrants and extended the powers of the Garda Síochána (Police) to enter and search premises and to detain people committing an offence.
- The Europol (Amendment) Bill 2006 gives force of law to three Protocols to the Europol Convention which have a number of functions, including to clarify certain powers in relation to participation in Joint Investigation Teams and to streamline certain elements of the internal working of Europol (Department of Justice, Equality and Law Reform, 2006a).

3.4.6 Employment permits legislation

The policy of restricting non-EEA labour migration and promoting skilled migration to areas of the labour market where skills shortages exist or cannot be met from existing EU migrants, has resulted in substantial changes to legislation covering employment permits. In 2000, the Irish State began to actively encourage and welcome migration from highly skilled workers in sectors such as nursing, information technology and finance; these groups of skilled migrants were provided with much greater security and options to stay in Ireland.⁵ A crucial piece of legislation, the Employment Permits Act 2003, was enacted in response to the opening up of the labour market to migrants from the ten new EU Member States in 2004. It introduced offences for both employers/ employees working in breach of employment permit legislation.

In order to further strengthen the rights to settlement and family reunification of skilled migrants, the Employment Permits Act, 2006, which was enacted on 24 January 2007, extended entitlements to highly skilled workers. The Act provides for a new employment permits system covering:

- A “Green Card” for higher paid occupations where there are skills shortages (in a list of occupations with salaries of between €30,000 and €60,000 and for a more extensive list of occupations in the annual salary range above €60,000).
- Work permits (also called employment permits), which can be applied for in respect of particular job sectors, having satisfied a labour market test and commanding a salary of above €30,000, and, in some exceptional circumstances, a salary below €30,000. Some jobs are ineligible
- Intra-company transfer for key staff and trainees in multinationals who have been based in the foreign office for at least one year where salary must be over €40,000.
- Students changing status after completing their course of studies will be able to apply to the Irish Naturalisation and Immigration Service (INIS) for a six-month residence permit following graduation to enable job-search and application for employment permit. Since 18 April 2005, new students granted permission to remain in the State were not permitted access to employment unless they were attending a full-time course of at

⁵ *The Working Visa and Work Authorisation* scheme was introduced in 2000 to enable prospective employees with job offers from employers in Ireland to obtain immigration and employment clearance in advance from Irish Embassies and Consulates. Sectors covered include information technology, professionals in construction and registered nurses.

least one-year's duration and leading to a recognised qualification. Students are entitled to work up to 20 hours per week part-time and full-time during vacation times. Students carrying out preparation courses leading to a full-time course will not be permitted to work until they commence the full-time course.

There have been a number of concerns about the extent to which the Employment Permits Act allows for mobility between different sectors of employment. According to the MRCI (2007a) the restrictions on moving jobs, and between sectors, can potentially result in exploitation, since non-EEA migrant workers do not have the same protections under employment law as Irish or EU workers. The fee for a work permit, set at €1500, is viewed as being prohibitive to mobility, particularly since the fee is not refunded if a worker changes his/her job. Despite the improvements in the legislation, the permit system continues to be employer led, and the lack of flexibility in the scheme can result in migrant workers becoming vulnerable and undocumented.

There have also been changes in the provision of spousal work permits. In February 2004 the Minister for Enterprise, Trade and Employment introduced new measures to attract highly skilled workers, particularly nurses, to Ireland. For these workers, spouses could apply to work in Ireland under the spousal work permit scheme. A simplified scheme was introduced to allow spouses to take up a work permit, including in areas that were deemed ineligible for the work permit scheme. In this case the employer is not required to advertise the job with FÁS in advance of making a work permit application and no work permit fee is levied. In 2006 the spousal work permit scheme was further extended to cover the spouses of all employment permit holders. Some NGOs have expressed concern that take-up of this scheme has been low because the spouses of migrants have found it difficult to secure employment due to what may be a lack of awareness on the part of employers regarding the scheme. The Department of Enterprise, Trade and Employment records show that 1,718 spousal work permits were issued in 2006, 1,168 were issued in 2005 and 739 were issued in 2004.

3.4.7 Immigration, Residence and Protection Bill 2008

The introduction of comprehensive reforms of immigration legislation has resulted in the publication of the Immigration, Residence and Protection Bill. The previous Bill lapsed following a general election, resulting in the suspension of all draft Bills and the dissolving of the Irish Parliament. The Bill covers a wide range of issues including visa applications, permission or refusal to enter, powers of immigration officers, applications for asylum, protection and residence, access to the courts, and removal and deportation from Ireland. A large number of NGOs, human rights and advocacy groups, and immigrant led organisations have argued that the Bill fails to cover all areas relevant to the processing of asylum and protection applications, residency applications and a change of immigration status. The coalition of NGOs and service providers responding to the Bill included Integrating Ireland, Immigrant Council of Ireland, Refugee Information Service, Migrants Rights Centre Ireland, Irish Refugee Council and the Irish Immigration Support Service.

The Bill aims to consolidate immigrant law into a single statutory code. It introduces a range of provisions that impact on irregular migrants, although no provisions are made for regularization. The main provisions of the Bill are as follows:

- A new visa scheme for non-EU nationals seeking to live, work, study or visit relatives in Ireland;
- Permission to live in Ireland to be contained in a residence permit, which will be a document containing biometric data;
- All those seeking refugee status to apply at the frontier for permission to make such application;
- All grounds for protection under international refugee law to be considered under one application;
- A Protection Appeals Tribunal, replacing Refugee Appeals Tribunal, to consider appeals of refusals, with provision for transparency and consistency;
- More restricted access to judicial reviews of asylum refusals, with provision for deportations to continue while awaiting trial, and for costs to be awarded against lawyers who bring “frivolous or vexatious” challenges;
- Provision of long-term residence permits for those in the State for five years or more, and those in certain professions here for two years, with most of the rights of Irish citizens;
- Provision for detention in Garda stations or prisons of those suspected of being in the State illegally, and their immediate deportation without notice if they are not in possession of explicit permission to reside, subject to the protections afforded by international law;
- Non-cooperation with deportation to be made an offence;
- Provision for the deportee to be liable for the costs of the deportation in certain circumstances;
- New rules for recognising marriage between non-EU citizens, and for marriage between non-EU and Irish citizens;
- Provision for a transparent system of family reunification.

The publication of the Bill promoted a significant amount of debate, media coverage and submissions by immigrant, human rights and advocacy organisations. A coalition of immigrant and advocacy organisations made up of the Immigrant Council of Ireland, the Migrants Rights Centre Ireland, Integrating Ireland, the Irish Refugee Council and the Refugee Information Service have argued that the Bill, if enacted, would contravene the Irish Constitution and Ireland’s international human rights obligations. This includes restrictions on the right to marry, limits on access to justice for migrants, provisions allowing for summary deportation, the arrest and detention of protection applicants, inadequate family reunification provisions, and through ‘carrier liability’ provisions which restrict the protection of people seeking to travel to Ireland.

According to the Africa Centre and the New Communities Partnership (2008) there are many ways in which a foreign national can become unlawful in the State, often through no fault of their own. They recommend that the Bill should introduce “a workable arrangement for the many undocumented workers in Ireland to provide them with a means of regularising their situation”.

The Irish Human Rights Commission (2008) has questioned, in their observations on the Immigration, Residence and Protection Bill, whether the legislation is in line with the Irish Constitution and with international human rights obligations. It argues that “the 2008 Bill should be reformulated to strengthen, protect and uphold the human rights of the persons to which the provisions of the 2008 Bill apply” (2008: 3). The Commission has raised concerns about twenty-four areas of the Bill, including the extent of ministerial discretion allowed in the provisions, restrictions on access to justice, summary deportation, the absence of provisions on family reunification, restrictions on the right to marry, limitations on access to services, as well as protections provided for victims of trafficking. Similar concerns have been raised by the Immigrant Council of Ireland, who have stated that while the Bill provides an opportunity to streamline immigration legislation in Ireland, there remain a number of omissions and concerns. These include a failure to set out clear immigration rules in primary legislation, the need for an independent appeals mechanism for the review of immigration decisions, a lack of provision for the right to family reunification, problems concerning summary deportations and the limitation of access to benefits and services for persons who are ‘unlawfully present’ in the State. Other concerns include the problems associated with excessive ministerial discretion, the failure to provide legal safeguards against refusal of entry and the revocation of resident permits. While there are some provisions covering the protection of victims of trafficking, the level of protection is considered to be insufficient.

The specific provisions of the Bill impacting on irregular migrants include proposals for a system for determining whether an individual is either lawfully or unlawfully present in the State. In this case, unlawful presence in the State results in the imposition of a mandatory obligation to leave the State or be removed summarily by force without notice, through arrest or detention for the purposes of securing removal from the State. The Immigration, Residence and Protection Bill, 2008 allows for the deportation without notice of any person who is ‘*unlawfully present*’ in the State. This is a departure from existing provisions (known as Section 3 process established in the 1999 Immigration Act)⁶. The Irish Human Rights Commission (2008) has stated that it is important to provide safeguards and to ensure that removal from the State is proportionate and takes into consideration the human rights of the person being removed. The Irish Refugee Council (2008) has argued that upholding the central principle of ‘non-refoulement’ is essential, on the basis that no one can be returned to a place where they face danger or persecution.

Other specific concerns about the Bill have been highlighted by the ICI (2008). First, there is a lack of clarity about how existing mechanisms will be applied, for example, concerning Ministerial discretion and other ‘remedies’, the transparency of the statutory provision and inconsistencies in the approach to decision making. The difficulties particularly concern the lack of clarity on how the provisions apply to individuals already in the State or those who have applications pending, prior to the introduction of new legislation. The current backlog of pending applications means that: “individuals

6 Currently, a person who has entered and is residing in Ireland without permission can be removed from the State on foot of a deportation order. The deportation order requires notice and the person concerned is given 15 working days to make submissions as to why he or she should not be removed from the State. Those reasons can include matters such as family circumstances, duration of residence in Ireland and humanitarian considerations.

stopped on the street will find it difficult to demonstrate that they are ‘in the system’ awaiting a determination and will find themselves liable to arrest, detention, criminal proceedings, *habeus corpus* application, summary removal, judicial review proceedings. This approach would prove extremely time-consuming, resource intensive, costly for all parties” (ICI, 2008).

The Immigrant Council of Ireland has argued that the introduction of summary deportations will prevent migrants in an irregular migration situation from being able to access voluntary return programmes carried out by organisations such as the International Organisation for Migration (IOM): “Without adequate time to consider voluntary return and for the IOM to make the relevant arrangements, the State will find itself in a situation where more and more deportations will be carried out unnecessarily, at a high cost to the exchequer” (ICI 2007:3). Section 4(5) of the Bill provides for a new statutory power, which could lead to the summary deportation of vulnerable migrants who may have become unlawfully resident in the State through no fault of their own. This inflexibility means that there are no provisions to deal with exceptional circumstances and to provide discretion. The Immigrant Council give the example of a woman who had been resident in Ireland on the basis of her marriage to an Irish national, who suffered domestic violence and so no longer lives in the same household as her husband. She would need to apply for the modification of her residence permit in order to remain in the State. Where she has not done so within three months from the expiry of her current permit, the legislation as drafted does not allow for the renewal of her permit, even if the reason for her failure to apply are threats made by her husband to have her deported if she went near the Gardaí.

This means that once classified as ‘*unlawfully present*’ a foreign national no longer has the possibility to regularise their status. This is particularly important, as the Bill requires that a person with an entry permit who has permission to apply for a residence permit but fails to do so before the expiry of the entry permit has no permission to be in the State and no entitlement to apply for residence permission. The Immigrant Council has argued that a statutory provision is needed to enable a person to apply to regularise their position provided that they can show good reasons why he or she did not apply on time.

The Bill does not provide a defence of ‘reasonable cause’ for entering or being unlawfully in the State and instead provides in Section 4(3) that every foreign national who is present in or enters the State unlawfully “*shall be guilty of an offence*”. This is especially important given that persons with renewable non-long term residence permissions can have their permission revoked effectively for any reason and at any time.

Instead of providing a right to a long-term residence permit after a defined period of legal residence in Ireland, the decision as to whether or not to grant or renew such permits remains at the discretion of the Minister, even if the applicant has met the required conditions. One concern is that a foreign national who has an unlawful presence in the State will not be entitled to any benefits or services provided by a Minister of the Government, a local authority or the Health Services Executive (Section 6.1). Exceptions to this include essential medical treatment, medical or other services necessary for the protection of public health, education services to a person who is under age 16,

the provision of legal aid, emergency social welfare payments, and the provision of other benefits or services that are humanitarian in nature, that alleviate emergencies or that provide assistance for the voluntary return of foreign nationals. This also includes organisations such as the Equality Authority and the Human Rights Commission and concerns have been expressed by a number of human rights and immigrant organisations that this provision reduces the level of protection for vulnerable migrants who may have ended up in a situation where they are ‘unlawfully present’ in the State through no fault of their own (ICI, 2008; NCCRI, 2008; Irish Refugee Council, 2008; Irish Human Rights Commission, 2008).

While many aspects of the Bill have been welcomed, the provision of a fair and transparent system of immigration, including appeals, has been contested by a number of groups who argue that the Programme for Government set out a commitment to create an independent appeals tribunal for immigration decisions. An independent appeals tribunal is particularly important to ensure that there are safeguards provided for administrative procedures that take place within a single government department.

3.4.8 Protection for separated children

Separated children, under the age of 18 years, who are outside of their country of nationality, in some cases stateless, and who are separated from their parents or caregivers, are particularly vulnerable to becoming exploited and undocumented. Although it is not known how many children are open to exploitation, anecdotal evidence is that many of these children end up in exploitative working situations, such as sexual or labour exploitation. There is evidence that 350 children in State care have gone missing and there are fears that many may be exploited by traffickers. One of the problems identified is that some separated children have waited for more than seven years for a decision of their status to be decided, which has resulted in many becoming ‘aged out’ and existing with no legal protection or status. The Irish Refugee Council has stated that there are no specific provisions for separated children in the 2008 Immigration, Residence and Protection Bill. They argue that the government should have incorporated the relevant provisions from the UN Convention on the Rights of the Child (Article 20), which provides for separated children to have an entitlement to special protection and assistance from the State. The Law Society and the Special Rapporteur on Child Protection have similarly argued that a status of temporary permission should be afforded to separated children in order to provide them with legal status while their interests are being assessed (Irish Refugee Council 2008). The Irish Refugee Council has recommended that separated children should be provided with specific safeguards and protections in the Bill in areas such as identification, age assessment, registration, family tracing, guardianship, best interests determination, treatment and care.

3.4.9 Measures to control trafficking

To date trafficking has been dealt with through immigration controls and through existing domestic legislation. In the absence of legislation and a comprehensive strategy to deal with trafficking for sexual exploitation, victims of trafficking have been treated as criminals, usually deported to their countries of origin. Many are not allowed, or

are unaware that they could enter the asylum process. This is despite the fact that the UNHCR guidelines do allow for the status for a victim of trafficking as gender persecution. The ILO's guidance on trafficking and forced labour prepared for legislators⁷ identifies six key areas that can indicate a forced labour situation, usually involving two elements combined. These are physical or sexual violence; restriction of movement of the worker; debt bondage; withholding of wages or refusing to pay the worker at all; retention of passports and identity documents, and threat of denunciation to authorities. The guidance recognises that while forced labour is a relationship not entered into voluntarily, there is a need to recognise the importance of deception.

Comments by the UN Committee on the Elimination of Discrimination against Women in 2005, found a lack of a legal basis to address trafficking of women for sexual exploitation in Ireland. The Committee recommended the adoption and implementation of a comprehensive strategy to combat trafficking in women and girls that should include preventative measures, the prosecution and punishment of offenders and the enactment of specific legislation in this area. The committee also recommended that measure be put in place to provide for the physical, psychological and social recovery of women and girls who have been victims of trafficking, including the provision of shelter, counselling and medical care. It further recommends that border police and law enforcement officials be provided with requisite skills to recognize and provide support for victims of trafficking. The committee requested that state parties provide, in their next report, comprehensive information and data on trafficking in women and girls and on the measures taken to combat the phenomenon.

Currently there are two related pieces of legislation on the statute book:

- The Child Trafficking and Pornography Act 1998 creates an offence of trafficking persons under 17 years of age into, through or out of the State for the purpose of sexual exploitation. The Act prohibits child trafficking for sexual exploitation, including prostitution and child pornography.⁸ It penalises any person who organizes or facilitates the entry into, transit through, or exit from the state of a child for the purpose of sexual exploitation, or any person who accommodates a child for such a purpose while in the state.
- Under the Illegal Immigrants (Trafficking) Act 2000, it is an offence to organise or knowingly facilitate the entry into Ireland of a person who is reasonably believed to be an illegal immigrant or a person who intends to claim asylum. Punishment is imprisonment for 12 months to 10 years, a fine, or both.

New legislation is designed to replace these provisions whilst also implementing the two EU Framework Decisions (on Trafficking in Human Beings and on Children) and to implement international legal norms (UN Palermo Protocol). Two Bills will impact significantly on Ireland's policy response to trafficking if enacted (notably the Immi-

7 ILO Special Action Program to Combat Forced Labor (2005) *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement*, quoted in Belser (2006).

8 According to section 3(3), *sexual exploitation* means (a) inducing or coercing a child to engage in prostitution or the production of child pornography, (b) using a child for prostitution or the production of child pornography, (c) inducing or coercing a child to participate in any sexual activity that is an offence under any enactment, or (d) committing any such offence against a child.

gration and Residence Bill, 2006; and the Criminal Justice (Trafficking and Sexual Offences) Bill, 2007).

A Criminal Law (Trafficking in Persons and Sexual Offences) Bill, 2006, proposed a number of measures to protect children against sexual exploitation and has the effect of implementing two EU Framework Decisions in the area. There has been broad welcome given to the adoption of the Palermo Protocol's definition of human trafficking in the legislation⁹. However, the Bill does not address the issue of residence and protection of victims of trafficking, which has been criticised by several NGOs and the Irish Human Rights Commission. Initially this was not dealt with in the Scheme for an Immigration, Residence and Protection Bill, although the subsequent reissuing of the Bill in 2008 did make these provisions. The Bill was introduced to comply with two EU Framework Decisions: the Framework Decision on Combating Trafficking in Human Beings (for the purpose of labour and sexual exploitation) and the Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography. A new offence of trafficking in persons for the purpose of their sexual or labour exploitation will be created in Irish law. In cases involving trafficking in children (persons under 18 years of age), it will not be necessary to show that use was made of coercion, force, threat, deceit or fraud for the purpose of exploitation.

The Bill deals principally with the criminal law aspects of trafficking, whereas it is envisaged that the immigration division of the DJELR will deal with the issues concerning victims. A number of organisations (Irish Human Rights Commission, Ruhama, Women's Health Council) have argued that there is a need for a more comprehensive legal framework that is also effectively focussed on the support and security needs of women victims of trafficking for sexual exploitation. This also needs to be set in a human rights context.

As the Irish Human Rights Commission (IHRC) argued in their observations on the scheme for the Criminal Justice (Trafficking in Persons and Sexual Offences) Bill, 2007, international human rights instruments make it clear that trafficking is a violation of human rights. IHRC argues that "Any Bill of this type requires a careful balance between the primary human rights objective of protecting victims while ensuring respect for all persons who may be accused or convicted of crimes" (IHRC, 2008: 2). The Bill attempts to differentiate between smuggling and trafficking, it criminalises trafficking of children into or out of Ireland for sexual exploitation and forced labour, and there is a focus on the liability of carriers in their transport of such victims. Key issues of concern that have been raised by NGOs include the need to provide effective forms of protection and security to victims, to define the trafficking of women to include those who have given consent via deception, and the need for definitions to be in line with international standards established by the United Nations, the Council of Europe and the European

9 "The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

Union. Issues were also raised about the need for effective tools for enforcement and for the protection, privacy, security and support measures for victims and witnesses, and the protection of victims rights.

The main provisions concerning the protection of victims of trafficking, as set out in Part II of the Palermo Protocol and Chapter III of the Council of Europe Convention, are largely absent from the scheme. This includes providing for a period of recuperation and reflection; making provision for appropriate health and care needs of a victim; providing resources for accommodation, psychological support, information and legal support services for a victim when a trial is initiated; addressing the risks of deportation and subsequent re-victimisation; and the introduction of measures to prevent re-victimisation such as access to work, vocational training, further education and social welfare benefits.

The Immigration, Residence and Protection Bill, 2008, does, however, contain provisions in relation to victims of trafficking, including a 45 day recovery and reflection period. A number of organisations have argued that the provisions contained in Section 124 of the Bill fall short of Ireland's obligations under the Council of Europe Convention on Actions to Combat Human Trafficking, which entered into force in Ireland on 1 February 2008. While the Convention applies to all forms of trafficking in human beings, whether national or transnational, and regardless of their nationality, the Bill only applies to 'foreign nationals' who are defined in Section 2(f) as a person who is neither an Irish citizen, nor a person who has established a right to enter and be present in the State under the EC Regulations. This means that EU/EEA nationals become excluded from the protections guaranteed by the Convention. Other concerns include the shortness of the recovery period of 45 days (Section 124(1) in conjunction with Section 124(3)), during which time a victim of trafficking can make an informed decision as to whether to assist the Garda Síochána or other relevant authorities. Under Section 124(7), a temporary residence permit may only be issued in circumstances where the Minister is "satisfied that it is necessary for the purposes of allowing the suspected victim to continue to assist the Garda Síochána or other relevant authorities in relation to any investigation or prosecution arising in relation to the trafficking". This will not allow the victim to remain in Ireland in order to pursue a civil action against traffickers and it fails to provide an avenue to residence on humanitarian grounds for victims who are too traumatised to return to their country of origin.

3.4.10 Measures impacting on irregular migration and illegal employment in the UK and particularly Northern Ireland

Although a separate jurisdiction, policy developments in Northern Ireland are important to migration policy developments in the Republic of Ireland. A significant amount of migration to Ireland comes via the UK and specifically through the North of Ireland. In many cases Irish migration policy developments to some extent follow those established in the UK, by virtue of the unique arrangement of the common travel area between the two countries. Specific joint initiatives have been established on a range of migration issues, including trafficking.

Recent UK legislation, the Immigration, Asylum and Nationality Act 2006, designed to deter illegal immigration and encourage skilled migration, was introduced 2007. This has implications for Irish policy, particularly regarding migration from the North of Ireland to the Republic. The Irish government has indicated that it is likely to similarly develop initiatives in this area in order to coordinate action with the UK. The new legislation introduces a UK Border and Immigration Agency, established in May 2007, to strengthen controls at the border, including in Northern Ireland; identity cards for foreign nationals; new sanctions and fines for employers who hire illegal workers of £10,000 for each illegal worker that is employed; larger fines and imprisonment for employers that knowingly employed a worker illegally; and a new points system.

According to the Northern Ireland Human Rights Commission (NIHRC) (2007), the legislation is punitive and creates a climate of fear against irregular migrants, particularly because it regards the use of the terminology of ‘illegal’ to be unhelpful in this context. The Ministerial foreword to the consultation document finishes by stating that through joint working to “clamp down on illegal migrant working we can level the playing field and tackle the exploitation of vulnerable migrants”. The NIHRC argues that there are other measures to prevent unauthorised working, with the focus on sanctions or restrictions on migrant workers, including tougher checks abroad, identity cards for foreign nationals, sponsorship and tougher enforcement. They argue for measures to be introduced to ensure immigration rules are known and the introduction of a document checking service.

The NIHRC argues that the vast majority of migrants entering the UK do so lawfully, remain lawfully, and if applicable work lawfully; that the vast majority of illegal practices in the labour market do not involve migrants; and that migrant workers as a group make a disproportionately positive contribution to the economy: “The present consultation, addressing the small overlap between migration and illegal working, runs the risk of sending a message that the two phenomena are equally problematic and are to an extent the same issue” (NIHRC, 2007: 10). The NIHRC has expressed concern for the lack of reference to the human rights of migrant workers and argue that the actions being introduced largely focus on sanctions or restrictions potentially impacting on the rights of migrants, rather than preventing unauthorised working through rights-based protection. The NIHRC argues that the terminology that is used conflates immigration and criminality, which in turn feeds xenophobia and racism:

“In Northern Ireland this discourse has coincided with an alarming rise in racially motivated attacks, many of which have been directed at migrant workers recently arrived in the region. Instead of attempting to educate public opinion as to the benefits and necessity of inward migration to the UK, Government gives the appearance of being indifferent or hostile to the rights of migrants, and this contributes to the negative reporting and negative discourse around migration” (NIHRC, 2007: 12).

3.4.11 Measures to provide for regularisation

Formal mechanisms for regularisation do not exist in Ireland and there are no guidelines or administrative provisions governing this matter. The Minister for Integration and the

Minister for Equality, Justice and Law Reform have made it clear that there will be no measures introduced, other than those measures that are currently in place, to regularise the status of a migrant with an irregular status. According to Ruhs (2005) there is a need for an informed debate about introducing a regularisation programme for undocumented workers in Ireland, and that despite the lack of data it is likely that there are several thousand undocumented workers in the State.

Nevertheless, the Department of Justice, Equality and Law Reform stated in 2008 that a procedure will be introduced to allow consideration on a case-by-case basis for people who have lost their status due to no fault of their own arising from exploitation. The plan is to introduce a temporary residents' permit for three months, in order to allow them time to renew their permits and seek alternative employment. This is along the lines of the recommendations made by NGOs such as the Migrants Rights Centre Ireland and the Irish Congress of Trade Unions for the introduction of a 'bridging visa' for migrants who have become undocumented through no fault of their own arising from non-renewal of a work permit. This proposed government policy is an important step forward and is intended to ensure those workers with a genuine case can be dealt with fairly and appropriately. Officials in the Department of Justice, Equality and Law Reform view this as a way of addressing the problems faced by migrant workers who have experienced exploitation and at the same time avoiding a person becoming undocumented, which in turn creates administrative and other problems for the State.

Within the current migration policy framework there exist a number of opportunities for an irregular migrant to regularise their status, although service providers have stated that this only exists on a case-by-case and individualised basis, that the determination of cases through the immigration system is *ad hoc*, and that cases are decided on the basis of ministerial discretion. Gaining regularisation can, therefore, be very difficult once a person has lost their legal status and, as a consequence, a number of organisations in Ireland have called for a fair process of regularisation. Many of the provisions to regularise a person's status are based on ministerial discretion and there are delays inherent in the system that create difficulties for a person who is seeking permission to remain and work in the State.

A first method is for a person seeking to gain permission to remain in the State to apply to the Garda National Immigration Bureau (GNIB) to seek permission to be granted an extension to their permission to stay in the State, during which time an application for a work permit, an employment permit or for family reunification or residence can be determined. The Immigrant Council of Ireland's legal service has stated that there is an "inconsistent approach by GNIB officials and may require production of particular documentation, including private health insurance, before facilitating such request" (ICI 2007).

A second method that is currently in place, but that is likely to be withdrawn if the Immigration, Residence and Protection Bill is implemented in its current form, is for an application to be made, setting out immigration and existing circumstances, to the General Immigration Division, INIS, for 'permission to remain'. There are no guidelines specified regarding the timeframe within which an application is considered and there is no policy to acknowledge an application. The outcome is that there is no consistent

response provided to applications for permission of this nature to remain. If a Ministerial notice is issued with notice of intention to deport, the legislation (under section 3, Immigration Act, 1999) allows for an application for 'leave to remain'. A person who is undocumented and has made an application remains undocumented during this process pending determination of an application. In an application, the Minister has to consider a number of factors set out in the legislation such as age, education, public policy, family, etc., but the application is granted on the basis of Ministerial discretion, for which no specific timeframe for decisions is set. According to the Immigrant Council of Ireland, there have been few positive decisions and there is often a lengthy waiting period. Granting permission to remain as an exceptional measure can take place through a Ministerial notice of intention to deport (under Section 3, Immigration Act 1999), which can be overturned on appeal, the outcome of which is dependent on Ministerial discretion. The appeal has to take place within 15 days; however, in practice there are long waiting periods for decisions to be made.

The legislation does, however, allow for a temporary right to remain on the basis of a ninety-day grace period, the provision of which was formalised in Section 12 of the Immigration, Residence and Protection Bill (2008). This allows an individual to be temporarily undocumented for up to three months while awaiting the outcome of a formal application. According to the MCRI (2007a) this practice is not applied consistently across the country.

One of the problems that has arisen is that the Department of Enterprise, Trade and Employment do not have a clear mechanism for regularising the status of migrant workers who become undocumented in circumstances of demonstrable exploitation, and there are currently no provisions in this regard in the Employment Permits Act, 2006. In practice the problem becomes exacerbated because the Department will not issue a permit until there is evidence of permission to remain in the State. In most cases this requires an application for an extension from either the GNIB or DJELR to facilitate DETE issuing a new permit for an alternative employer. As a result, someone can become undocumented and this has been shown to create difficulties for people whose work permits are being renewed but whose immigration status and permission have become out of date. Coordinating the two systems is considered to be a priority if there are to be more consistent and efficient methods for ensuring that people who are legitimately working in the State do not fall foul of administrative procedures and delays in gaining the appropriate permission to remain.

3.5 Policy evaluation

3.5.1 Introduction

As this report has shown policy measures to address the illegal employment of foreign nationals can be found in two specific areas. First, there are measures to combat illegal working practices and the issuing of work permits and employment permits, which fall under the remit of the Department of Enterprise, Trade and Employment. Specific good practices can be seen in the development of a framework for combating illegal and exploitative forms of employment and for compliance with labour legislation, through the

creation of the National Employment Rights Agency, which was established on a statutory basis in 2008. As discussed in the previous section, there have been a range of measures to combat illegal employment through compliance with employment legislation.

Second, there are specific immigration measures that are under the remit of the Department of Justice, Equality and Law Reform. The main immigration policy tools that have been used in Ireland to combat the illegal employment of foreigners include greater attention to border controls, visa policies, the removal or voluntary return of irregular migrants and failed asylum seekers, combating of trafficking and irregular forms of migration and internal enforcement measures. The emerging framework on immigration has been important to providing a coherent legislative basis to migration, although there have been a number of concerns expressed by NGOs and trade unions that this will result in further restrictions on the possibilities for irregular migrants to regularise their status.

Whether these measures have had an impact on reducing and deterring irregular migration and illegal working is not known, and there are mixed views on this. The government's position is that there is a need for greater attention to deterring irregular migration and restricting entry into Ireland. However, NGOs and trade unions share the view of Papademetriou (2005), who argues that greater efforts to control migration at the border have resulted in more dangerous methods being put in place to cross borders, including people smuggling and trafficking, and that this can have the effect of strengthening the underground economy and illegal employment. In this sense tougher visa and entry policies could have an adverse effect by restricting commerce, tourism and legitimate forms of travel, border controls limit circular migration and force people into staying in the destination country. Aside from this, tight border controls can split up families, disrupt the economy, be costly to the court system, and give rise to human rights issues. Similarly, it is argued that measures to control the irregular or informal economy will not alone be sufficient to reduce the population of irregular migrants.

3.5.2 Policy and administrative responsibilities

Recent developments in immigration have seen the creation of a more streamlined and coherent response to the management and administration of immigration decisions. The Department of Justice, Equality and Law Reform is the government department responsible for immigration and the Minister has discretionary powers in relation to immigration and asylum. Within the Department of Justice, Equality and Law Reform the Irish Naturalisation and Immigration Service (INIS) was established in 2005 to provide a 'one stop shop' in relation to asylum, immigration, citizenship and the issuing of visas. The INIS is responsible for the administrative functions of the Minister for Justice, Equality and Law Reform in relation to asylum, immigration (including visas) and citizenship matters. An Immigration and Citizenship Policy Unit has responsibility for immigration and citizenship policy and legislation, while the Garda National Immigration Bureau (GNIB) has the responsibility of policing immigration, including irregular immigration, trafficking, and border controls and deportations. The Immigration and Citizenship (Operations) Division has responsibility for the implementation of policy in relation to the admission, residence and permission to remain for non-EEA nationals in

the State. Applications for permission to remain in the State are referred from the Garda National Immigration Bureau.

The Department of Justice, Equality, and Law Reform is the main government department dealing with trafficking and smuggling issues. Regional and international initiatives are handled by the Department of Foreign Affairs, which has worked with the International Organization for Migration to provide funding support for victims' shelters in other countries.

The Department of Enterprise, Trade and Employment is responsible for the administration and issuing of employment permits and has the overall responsibility for managing the detection of illegal working practices, through the National Employment Rights Agency.

Policy and departmental measures to address irregular migration and illegal work

Policy and departmental developments to address irregular migration and illegal work have included a range of initiatives that aim to provide better coordination between government departments and to provide improved policy responses to the integration of migrants in Ireland. Whilst government policy is increasingly focussed on controlling irregular migration in line with developments in the UK and the EU, many of these measures have been focussed on controlling the borders. The objective has been to deter low skilled and irregular migration, on the basis that opening up legal channels for migration should focus solely on encouraging skilled migration from non-EEA countries and migration from within the EU. On this basis opening up channels of legal migration is not viewed as a policy priority that can help to stem the flow of irregular entry.

In the area of trafficking there have been some good practice developments that are helping to shape a new approach to deterring trafficking, as well as policy measures to provide for greater support and protection for victims of trafficking. These measures include the establishment of a High Level Interdepartmental Group, the production of a National Action Plan Against Trafficking, the creation of a new Anti Human Trafficking Unit in the Department of Justice, Equality and Law Reform, alongside new legislative provisions in the Criminal Law (Human Trafficking) Bill, 2007, and the Immigration, Residence and Protection Bill, 2008. One of the developments emerging from the need for a policy focus to be given to trafficking has been the drafting of a National Action Plan Against Trafficking which will be produced in 2008, and for which submissions from NGOs and human rights organisations were invited. Representatives from government departments and the GNIB have also received training on anti-trafficking measures from the IOM in Dublin. In addition, the creation of a National Referral Mechanism has been important to shaping more effective responses to trafficking, as well as awareness raising and training. Research currently being carried out by the Immigration Council of Ireland, to be completed in 2008, will provide a further evidence base for the extent of trafficking for sexual exploitation in Ireland and the types of policy measures that are needed.

Inter-departmental coordination

There are some specific measures that have been introduced that will help to develop improved information sharing between government departments in order to tackle irregular migration and illegal working practices. In the area of trafficking for labour and sexual exploitation, the creation of a High Level Interdepartmental Group is intended to contribute to better cooperation between government departments, improved referral mechanisms and awareness raising. A good practice development in this respect is that methods for engaging with NGOS will be developed, in order to provide for referral and support.

There has also been the development of a multi-agency approach and inter-departmental coordination for the sharing of information and data between the immigration, visa and control responsibilities of the Department of Justice Equality and Law Reform, with those of the Department of Enterprise Trade and Employment in the area of the issuing of employment permits, and with other relevant departments such as the Department of Social and Family Affairs, who issue PPS numbers for workers legally working in Ireland. Mechanisms have also been created to coordinate these areas of government with those of the tax authorities, the Revenue Commissioners, in order to coordinate and detect breaches in the payment of tax and promote tax compliance, particularly as a mechanism to combat hidden and illegal employment practices. Measures to increase the coordination between government functions in the areas of employment and residence are also being discussed to ensure that illegal working can be identified and traced.

There are currently discussions taking place within the Department of Justice, Equality and Law Reform for the introduction of better data collection and record keeping on the status of migrants in Ireland. One initiative that has been discussed is the introduction of bio-metric registration cards, with a unique identifier, that will be issued for foreign nationals in order to give evidence of identity and registration. Because Ireland does not have a system of identity cards in place, it is recommended that identity cards should be phased in specifically and only for foreign nationals.

The coordination of government measures on the integration of legally resident migrants has been developed through the appointment of a Minister for Integration, under the remit of the Department of Community, Rural and Gaeltacht Affairs. However, the Minister's functions and remit only cover legal migrants in Ireland. The Minister has announced that he will be establishing a Task Force on Integration, with a view to progressing the integration of legal migrants in Ireland.

Collaboration between government departments and with NGOs

In recent years there has been improved collaboration and engagement between government departments and NGOs in a number of areas of immigration and protection. This collaboration has been evident in the series of roundtables that have been developed between the Irish Human Rights Commission, the Immigrant Council of Ireland and other NGOs, alongside representatives of the GNIB and government departments. The objective has been to provide awareness raising, coordination of responses and knowledge sharing. This type of forum has worked well to bring the various stakeholders

around the table to discuss measures to address trafficking. This type of forum would also be a useful mechanism for the development of best practice responses to other areas of irregular migration

3.5.3 The social partners: employers and trade unions

In Ireland, the unique national social partnership process negotiates five year national agreements on economic and social policy and represents a key element of government policy. Social partnership plays an important and unique role in the development of legislative and regulatory frameworks, the management of change in the labour market and economy, competitiveness and the employability and adaptability of employees across the life cycle.

Employers' organisations in Ireland have promoted a climate of compliance with labour legislation. The Irish Business and Employers Confederation (IBEC) is the largest employer body, which covers all sections of the labour market, other than construction. It has developed a model for compliance and good practice through the provision of advice and information in areas such as human resources and industrial relations. Specific advice, guidelines and training are provided for employers on issues concerning work permits, immigration legislation and employment rights. In particular, human resources forums have been run in five regions across the country to inform employers of their responsibilities in relation to the Employment Permits Act, 2007.

IBEC have noted a substantial increase in the numbers of inquiries from employers in this area, which they estimated in 2008 to be between ten and twenty per cent of all inquiries. Some of these inquiries related to the delays that exist in the issuing and re-issuing of work permits and employment permits. In some cases employers have fallen into illegality because of misunderstandings in the system, for example, if a person's permission to remain in the state has lapsed, or if a work permit has not been renewed in time. IBEC also note that an increasing number of employers are checking the nationality of their workers in order to ensure compliance with legislation and to avoid prosecution for employing irregular migrants. However, employers have expressed concerns about document checking and in particular understanding the nature and meaning of the different permissions granted for regular migrants.

Compliance with employment legislation and employment conditions in the construction industry has also been promoted through training and guidance provided by the Construction Industry Federation. This includes health and safety provision, information leaflets in different languages, the requirement for parties to operate the Registered Employment Agreement, payment of minimum wages and other terms and conditions of employment.

Trade unions have taken a pro-active role in the fight against illegal working practices and exploitation in the workplace. The need to address the growth of the illegal employment practices of employers employing migrant workers arose from several high profile cases of workplace exploitation, particularly in the construction company GAMA and a dispute with Irish Ferries over the displacement of Irish workers through the employ-

ment of cheaper migrant labour. In 2005, ICTU held a National Day of Protest, attended by over 160,000 people, against exploitation, displacement and a race to the bottom, with the main slogan for the day being “Equal Rights for All Workers” and the message was clearly made that employment standards, compliance and enforcement in the labour market were central to the new social partnership agreement. The outcome of this significant trade union lobbying and negotiation was groundbreaking legislative changes relating to the creation of a robust legal and enforcement structure to protect against the use of immigration to reduce wages, to prevent workers wages being cut as means of displacing labour and the use of employment practices such as ‘bogus self-employment’ which had predominated in the construction sector. The measures are described as the “single biggest leap forward in social policy initiated in Ireland” (Begg, 2007: 5).

In recent years trade unions have been very active in identifying exploitation of migrant workers. In Services, Industrial, Professional and Technical Union (SIPTU), the largest trade union in Ireland, Polish, Lithuanian and Latvian recruiting and organising officers have been appointed to work directly with migrants from those countries, particularly those that are experiencing exploitation. The union has worked closely with workers in exploited sectors that are currently non-unionised, for example, in meat processing and mushroom picking. The Irish Congress of Trade Unions has been active in ensuring that new enforcement and compliance measures are put in place and that irregular migrants should have access to some form of earned regularisation programme.

3.5.4 Employment standards and access to employment rights

Best practice approaches have been highlighted in this report in relation to the unique role that social partnership has played in addressing labour exploitation and the provision of new mechanisms to outlaw exploitative working conditions. This report has shown that the implementation of labour standards and a more developed system to encourage compliance with labour legislation has been a significant recent development in Ireland. This has been a direct result of the need to identify measures to reduce the exploitation of migrant workers and to provide for a system that combats the displacement of labour, the growth of the hidden economy and illegal working practices. Developing mechanisms for improved compliance with labour legislation have also been introduced through Codes of Practice for employers. A good practice example has been the Code of Practice for employing domestic workers, in response to developing good practice approaches to employment in a sector where there has been substantial evidence of labour exploitation.

Enhancing and providing access to employment rights can help to tackle the incentive to employ irregular workers, which in turn can be important in reducing irregular and illegal working. Whilst the State may also impose sanctions on the irregular worker, it is crucial that having access to the right not to face exploitation is important to removing employer incentives to employ irregularly. This approach is central to the International Labour Organization (ILO) Multilateral Framework principles, whereby States are encouraged to provide “...effective and accessible remedies for workers whose rights have been violated, regardless of their migration status, including remedies for breaches of employment contracts, such as financial compensation” (ILO 2006, para 11.3). This

is particularly important in the light of evidence presented from casework from NGOs and trade union who have shown that exploited migrant workers have been, through no fault of their own, pushed into an irregular status (MRCI 2006a and 2007a, ICI 2007, ICTU 2005).

Developing workable standards and policy frameworks are particularly relevant in the context of measures to avoid exploited workers becoming undocumented. Ensuring that there are effective sanctions against employers is one part of the equation, the other part is to ensure that there are corresponding protections for exploited workers, to enable them to access their rights and protections, whilst also providing opportunities for them to safely report exploitation and seek remedies. In this light the ILO's non-binding guidance issued in the Multilateral Framework on Labour Migration (2006) states that there is a need to implement "policies that ensure that specific vulnerabilities faced by certain groups of migrant workers, including workers in an irregular situation, are addressed" (Guideline 4.4) and to ensure that "labour migration policies are gender-sensitive and address problems and particular abuses women often face in the migration process" (4.5). The guidance also recommends measures including "providing for effective remedies to all migrant workers for violation of their rights, and creating effective channels for all migrant workers to lodge complaints and seek remedy without discrimination, intimidation or retaliation" (10.5). As the Irish Congress of Trade Unions has argued this approach requires the government to: "Be tough on employers using exploitative employment conditions and focus on prevention and on sanctioning those who profit from these abusive situations, including traffickers in human beings, rather than penalising the workers who are their victims" (ICTU 2005: 17).

If there are to be coordinated methods for reducing the levels of illegal employment of foreigners this requires there to be a process of planning and consultation with employers and unions, better enforcement of labour laws, better public awareness, and measures to reduce the existing population of irregular migrants. The Platform for International Cooperation on Undocumented Migrants, PICUM, have argued that there are a range of measures that need to be addressed in protecting undocumented migrant workers (PICUM, 2007). This includes addressing the exploitation of undocumented workers by safeguarding the right to equality in the law, the right to organise, by strengthening the role of the labour inspectorate and ensuring that the role is to protect workers by de-linking it from migration status in the workplace, and to ensure that the most vulnerable undocumented workers are given proper protection, support and complaints measures. Other proposals include opening up and broadening legal channels of migration as a priority and introducing a stronger framework on international standards. PICUM's (2007) publication *Ten Ways to Protect Undocumented Workers* argues that the following issues should be taken into account in government policy:

- Raising public awareness (consumer campaigns)
- Collecting data to influence policy measures
- Informing undocumented migrant workers about rights
- Empowering them
- Promoting undocumented migrant trade union membership
- Advocating for laws holding employers responsible for fair labour standards

- Mediation and collective actions
- Legal system
- Working with government agencies
- Promoting regularisation of undocumented migrants

3.5.5 Regularisation as a policy tool

Regularisation as a policy tool has been discussed to some extent in Ireland and with the increase of irregular immigration in Ireland, the issue has recently been brought into political discourse. Although, as discussed in the previous section, there exist a number of opportunities for people to have access to regularisation on a case-by-case basis, regularisation as a policy tool has not been promoted by the government, who consider it to be particularly problematic, on the basis that it may fuel further irregular migration. NGOs have argued that the policy developments currently shaping Irish immigration policy are resulting in the introduction of more restrictive immigration policy frameworks that have the effect of reducing opportunities for people to regularise their status. The provision of greater flexibility in the system to enable people to move between one immigration status and another could help to reduce levels of irregular migration. However, the new legislation on Immigration, Residence and Protection, places further restrictions in the system by reducing flexibility to allow people to regularise their status. The effect is that this could result in larger numbers of people remaining in an irregular status, which in turn creates problems for the State. Notwithstanding the greater emphasis now being given to controlling irregular entry into the State, migrants currently residing in the State are likely to have fewer opportunities to have mobility between different permit systems and to regularize their status. This is particularly important to the human rights of undocumented migrants. The International Convention on the Protection of The Rights of All Migrant Workers and Members of their Families, has established rights for all migrant workers, including those with an irregular status. NGOs and trade unions are campaigning for Ireland to adopt the Convention and to use this as a basis for best practice policy developments. Similarly, the European Convention on Human Rights, which has been incorporated into Irish law, provides for a rights based framework for the protection of irregular migrants.

One former government Minister and member of the Parliamentary Assembly of the Council of Europe, Noel Davern, has argued that the State should consider regularisation as an option in the future, on the basis that any programme of regularisation should be coordinated across Europe in order to overcome the problem of handling the significant numbers of irregular migrants who are living in the shadows of European society¹⁰. In this light it is relevant to consider the options presented by the Council of Europe, which has stated that regularisation programmes are a means of safeguarding the human dignity and human rights of a particularly vulnerable group of persons in member states of the Council of Europe. The Assembly considers that a number of accompany-

¹⁰ Assembly debate on 1 October 2007 (29th Sitting) (see Doc. 11350, report of the Committee on Migration, Refugees and Population, rapporteur: Mr. Greenway) Text adopted by the Assembly on 1 October 2007 (29th Sitting). MacCormaic (2007).

ing measures should be adopted by member states when implementing regularisation programmes. These include:

- Strengthening the administration in order to enable it to deal with the potentially high number of applicants for regularisation;
- Ensuring that administrative requirements are kept to a minimum;
- Guaranteeing against fraudulent procedures;
- Preparing integration programmes for migrants who are regularised;
- Consulting employers, employees, irregular migrants and civil society in preparing and implementing the programmes;
- Ensuring publicity for the programmes reaches irregular migrants;
- Ensuring that the programmes and their benefits are explained carefully to the media and to the public in general;
- Keeping European partners informed of plans for regularisation programmes and their implementation.

The Assembly argues that employer-driven regularisation programmes are particularly worth examining as a means of meeting the needs of a large number of irregular migrants, employers, trade unions and society in general. It also argues for a process of earned regularisation, “whereby irregular migrants earn the right to regularisation by demonstrating their contribution to society through learning the local language and customs, providing evidence of work and payment of social security contributions, taxes and other steps leading towards a process of integration”. It states that a number of measures should be adopted before implementing regularisation programmes in order to “set the counter to zero” and clear the backlog of irregular migrants. It urges member states to:

- Provide greater opportunities for regular migration in order to reduce the number of irregular migrants;
- Combat illegal employment and accompanying exploitation, including through reinforcing the labour inspectorate and having in place systems of fines and punishments for those offering illegal employment;
- Strengthen, as appropriate, border and visa controls;
- Provide assistance to countries of origin of irregular migrants in tackling the push factors of irregular migration, whether these be economic or environmental, including through co-development and other measures;
- Combat trafficking that is linked to irregular migration, in line with the Council of Europe Convention on Action against Trafficking in Human Beings;
- Protect victims of trafficking, with a view to avoiding their twofold suffering, both as victims of trafficking and as irregular migrants.
- For those irregular migrants who cannot be returned to their countries of origin, member states of the Council of Europe must offer some possibility for them to regularise their situation and integrate into society.
- For those irregular migrants who can be returned, the Assembly reiterates its concern that they should only be returned voluntarily. For those irregular migrants that remain in Europe, they should be entitled to at least the minimum rights as outlined in Assembly Resolution 1509 (2006) on the human rights of irregular migrants, until such time as they may be able to regularise their situation or are returned.

Trade unions and NGOs have argued that regularisation needs to be considered in Ireland as a means of reducing the size of the population of undocumented migrants. In particular, ICTU has developed policy proposals that have been informed by commentators such as Demetrios Papademetriou (2005) who has argued that earned regularisation can prevent the build up of the numbers of irregular migrants to unacceptable numbers and assist with the overall management of migration. ICTU's 2005 Congress Resolution called for a regularisation programme that enables unauthorised workers "to exercise their rights because of their lack of employment or immigration status" since this "hands a huge advantage to the abusive employer" (2005: 23). The argument is that regularisation programmes can be developed through fair and transparent procedures that enable people to earn a regular status and that meet important security, labour market and social policy goals.

Papademetriou (2005) argues that regularisation needs to be considered within a broad strategy of migration management initiatives, which should be designed to prevent increases in the size of the population of irregular migrants and better compliance with legislation on employment rights. These need to be integrated policy solutions designed to control illegal immigration. Measures that provide for earned regularisation should work in tandem to provide opportunities for irregular migrants to enter a phased or tiered approach that enables irregular migrants to first apply for temporary legal status, later to apply for permanent residence and work permission on an agreed set of criteria based on a points system, and then to move into a permanent legal status. The advantage of this tiered approach is that it can provide an opportunity for people to come out of illegal employment and into regular employment status. This can help to remove illegal working practices and can enhance the opportunities for the economic and social integration and contribution of migrants through a clear and transparent process.

Measures that will allow undocumented workers to regularise their status have been similarly promoted by a number of NGOs. This is a key element of PICUM's campaign for protecting undocumented workers, which emphasises the need for clear and well-defined criteria regarding who qualifies for the schemes; the need to ensure that undocumented migrants are not deported while they are lodging a claim for regularisation; and that the law should provide a remedy should a migrant's application be rejected. One specific recommendation, promoted by the MRCI in its campaign for a Bridging Visa Scheme or a six month temporary residency stamp, aims to find a fair system for resolving problems encountered by migrants who have become undocumented through no fault of their own (MRCI, 2007a). The ICI has called for a system of regularisation that has regard for the human rights of migrants and suggests examining examples of amnesties in other jurisdictions (MacEinri and Walley, 2003). The MRCI and ICI have both called for provisions to be made for migrant workers to access social protection if they have experienced exploitation or if they have been trafficked (MRCI, 2007a; ICI, 2006). Recommendations are also made for specific provisions relating to protection for migrant women who have experienced domestic violence, which includes a provision to allow undocumented migrants in this situation to regularise their status by being given temporary leave to remain. (MRCI, 2007a; ICI, 2007; Pillinger, 2007a; Fagan, 2006).

Similar measures were recommended by NESC (2006), alongside proposals for general immigration reform to include procedures for the regularisation of undocumented migrants. NESC make a number of suggestions about how irregular migration can be managed including: “One option is a general amnesty or limited reform (e.g.) to provide temporary visa.” (2006: 162). Other proposals concern the need for clear and effective procedures to penalise employers who employ migrant workers without valid permits and that limiting the use of work permits for meeting Ireland’s need for low skilled workers could play a role in limiting illegal migration.

There are no procedures currently to address the problem arising when migrant workers become undocumented as a result of workplace exploitation, deception or unexpected redundancy. To address this, the MCRI initiated a Bridging Visa Campaign in 2007 in order to avoid undocumented workers becoming the target for exploitation and mistreatment. They argue that “This procedure would grant a fair and just pathway for undocumented migrant workers to bridge back into the system and on course to working and contributing to Irish society” (MCRI, 2007, Press Release: Bridging Visas Campaign). The aim would be to avoid people becoming undocumented, which is viewed as being of benefit to migrants and to the State. MCRI has called on the Department of Justice, Equality and Law Reform to provide a temporary six month residency stamp for non EU/EEA nationals who have entered Ireland lawfully, but have become undocumented for reasons beyond their control. The campaign argues that there is currently no official mechanism to re-enter the system and while some individuals have been able to obtain temporary residency stamps, this is an ad hoc discretionary process which can take up to two years or more to process. MCRI argue that “The current situation is highly unjust and unacceptable” (MCRI, 2007, Press Release: Bridging Visas Campaign).

The ICI has argued that the Irish Government should consider as a matter of policy the existing population of undocumented migrants in Ireland and, in particular, the impact of new legislative provisions on existing administrative arrangements and individuals who are already present in the system or pending decisions. The ICI argues that: “A general regularisation or ‘clearing out’ of the current system would have important benefits for both individuals affected by current deficiencies / inefficiencies of the existing immigration arrangements and also the State in seeking to introduce a binary system of either lawful or unlawful status” (ICI, 2007). According to the ICI, there are several options that could be considered. The first would be to introduce a new system, that provides the opportunity to deal with all cases arising, prior to new provisions being introduced, retrospectively on the basis that all pending cases should be decided on an individual case-by-case basis in accordance with the existing administrative arrangements. The ICI argues that service providers on the ground would have no way of identifying who is who or whether they came before or after the introduction of the new legislation, and that this would result in individuals being refused services to which they are entitled. They argue that this approach would also impose a drain on State resources dealing with legal challenges to illegal arrests / detentions. If these negative type situations do not arise, it is argued that applications may remain pending for several more years, unless the State undertakes to prioritise, determine and enforce all decisions taken under the old arrangements.

A second recommendation is to introduce a formal statutory mechanism to enable individuals to regularise their situation in specific situations, for example, for workers who are exploited and have only recently become exploited, victims of trafficking or victims of domestic violence. One of the problems inherent in this approach is that many individuals in the situation are not aware of their ‘irregular’ status until it is too late. Providing a temporary stamp to enable an alternative work permit to be applied for does not necessarily provide a long-term resolution to the problems that can arise for people whose work permits have not been renewed or whose domestic circumstances have changed. It fails to address the large number of situations that arise under existing administrative arrangements in which people have become undocumented.

In addition to considering a ‘managed regularisation’ scheme for the existing undocumented population, it is likely that there will always be some level of ‘irregular’ migration in any system. The ICI has as a result urged the Government to consider incorporating regularisation mechanisms into new immigration rules/procedures, particularly in terms of affording remedies to migrants in exploitative workplace situations, victims of domestic violence, victims of trafficking and other individuals, including failed asylum seekers and stateless persons, who cannot be removed from the State.

The concern that some sectors of the economy may be dominated by undocumented migrants experiencing exploitative working conditions has led the Irish Congress of Trade Unions (ICTU) to campaign for a regularisation programmes for undocumented workers. The ICTU has developed a proposal for a fair regularisation process on the basis that there is evidence to show that “unscrupulous employers exploit the situation of undocumented workers and often intimidate them into accepting less than decent treatment and unsafe working conditions” (ICTU 2007:1). They argue that undocumented workers are often too frightened to ask for their rights and are afraid of complaining about their exploitation. ICTU has argued that undocumented workers have become an: “underclass of individuals without the opportunity to bring their lives out of the shadows and live their lives without fear. Some form of regularisation is unavoidable if a growing underclass of workers in an irregular situation, who are vulnerable to exploitation, is not to be created” (ICTU, 2007).

The different options being explored include a number of schemes, including earned adjustment, regularisation, normalisation, bridging visas and amnesties. ICTU has also looked to good practice examples from other EU States in order to provide a range of options to give legal status to undocumented immigrants, particularly for those migrant workers that have been living and working in the State for up to six months and can provide evidence that they are in work and support themselves. In particular, ICTU has argued that a fair and transparent regularisation process for undocumented workers in Ireland would provide a bridge for workers out of their irregular situation back into a regular situation. ICTU (2007) has argued that the following considerations should be borne in mind:

- Take a rights based approach, undocumented workers must be guaranteed, in law, access to, and protection under, all employment rights law, including their trade union rights. The *International Convention on the Protection of the Rights of all Migrant Workers*

and Members of their Families provides a useful framework for developing an approach to this. Undocumented workers must be able, without fear of deportation, to seek redress for breaches of their rights.

- Reduce the demand for undocumented labour by increased Labour Inspection (NERA) and by focusing sanctions on employers. This is the approach advocated in the proposal from the EU Commission for a Directive on “*Providing for Sanctions Against Employers of Illegally Staying Third-country Nationals*” (September 2007).
- Provide for a regularisation process that allows people to formalise their situation. This requires, in the first instance, the Department of Justice, Equality and Law Reform to provide a six month ‘*bridging visa*’ that allows people to come forward without fear of deportation and which provides a bridge to return to whatever migration status/work permission they held immediately before they became undocumented. Or, where the justice of the situation demands, to another appropriate work status. We believe that adequate protections against abuse can be developed along with measures to ensure access and consistency with Ireland’s approach to employment rights compliance and to a managed approach to labour migration. It is worth saying here that employers should not be given any say in the decision over who gets/does not get onto the bridging schemes.
- Special protective measures for trafficked persons are needed to recognise the particular situation of these workers, including access to legal and rehabilitative services, only agreed repatriation and access to the bridging visa and regularised work status.

The substantial numbers of migrant workers in Ireland that have become undocumented as a result of exploitation in the workplace has resulted in a number of calls for measures to be introduced to prevent people becoming undocumented. NGOs have argued that there is a need for a method to regularise the status of those people who, through no fault of their own, became undocumented. Trade unions and the Migrants Rights Centre Ireland have argued that a ‘bridging visa scheme’ and a flexibility in the system to respond to cases of exploitation, will help to reduce illegal employment and also enable exploited migrant workers to have recourse to remedies against exploitation in the labour market.

In response to this the government is in the process of introducing measures for a temporary residents’ permission for cases where there is evidence that a person became undocumented as a result of labour exploitation. The Minister for Justice, Equality and Law Reform has indicated that this will be progressed in 2008 and has made it clear that this will not be a regularisation scheme, rather an administrative provision that will allow consideration to be given on a case-by-case basis.

3.6 Conclusions

3.6.1 Summary of the report’s main themes

This report has shown that measures to tackle the illegal employment of foreign nationals, particularly irregular migrants, require a multi-faceted approach, coordination between the relevant authorities and a policy framework that is based on adherence to human rights principles.

The illegal employment of foreign nationals has become an issue of significant political debate in Ireland in recent years. This is not surprising given that Ireland's transformation into a country of net immigration, as in the case of all countries that have experience inward migration, has brought with it an associated increase in irregular migration. In Ireland the majority of migration has been for labour and this has helped to fill labour gaps in a booming economy, whilst people seeking asylum and refugee status represent a small and declining percentage of those migrating. Although around ten per cent of the Irish population are foreign nationals, there is little or no evidence of the extent of irregular migration.

The report shows that there is a close connection between illegal employment practices and irregular migration. Some specific groups of foreign nationals are particularly vulnerable to illegal employment practices, including low skilled migrant workers and victims of trafficking, while specific vulnerabilities are experienced by women and children, as well as people working in the hidden economy and in sectors of the economy that are poorly regulated. Employers are more likely to exploit workers and avoid the standards set out in employment rights legislation if workers have an irregular or vulnerable status.

As a result policy measures to combat illegal employment practices are closely connected to measures to control and tackle irregular migration. While the report has shown that there are complex reasons why people have an irregular status, measures to control irregular migration through detection and border controls often fail to address some of the main reasons why people become unauthorised and undocumented. The report has shown that there are substantial numbers of foreign nationals who arrive legally in Ireland, but through no fault of their own, become undocumented. The crucial issue is that exploitative working practices can be both the cause and effect of a person moving from a regular to an irregular status. As a result policy measures to address this dynamic are needed in order to ensure that the State has adequate administrative capacities and flexibility to resolve these problems and with regard to the human rights of foreign nationals.

A number of significant developments in legislation and policy to tackle the employment of foreign nationals in Ireland have been discussed in this report. Policy measures to address the illegal employment of foreign nationals have been examined in relation to measures to combat illegal working through compliance with labour legislation and through the development of new immigration policy aimed at deterring and restricting irregular migration in favour of regular skilled migration. Although they exist as two separate policy domains, there is evidence of greater policy and administrative coordination between employment and immigration measures.

In the area of employment rights compliance, the report has shown that significant and ground breaking developments have taken place in the protection of migrant workers that are vulnerable to exploitation and illegal employment practices. Trade unions and employers, along with the government and other social partners, have been central to the development of a process of employment rights compliance that remains unique to Ireland. The provisions contained in the social partnership agreement *Towards 2016* which have resulted in an enhanced labour inspectorate and the creation of the National

Employment Rights Agency on a statutory footing, amongst other areas, has been crucial in this respect.

In the area of immigration policy, there have also been significant policy developments. This can be seen in the development of legislation on Employment Permits passed in 2003 and 2007, which have created a set of responsibilities on employers and also a framework to encourage skilled migration. While the policy measures contained in this new legislation have been broadly welcomed, there remain a number of problems in the system that has been introduced, not least in allowing for mobility between jobs and sectors of the economy. These restrictions can create vulnerabilities for migrant workers that do not exist for Irish workers, thereby creating a two-tier system and the potential for migrant workers to be vulnerable to becoming undocumented in the event of labour exploitation or a breach of contract.

A particularly important development has been legislation on Immigration, Residence and Protection, which was issued as a Bill in 2008. This legislation for the first time aims to provide a coherent framework for immigration legislation in Ireland and for this reason has been broadly welcomed. However, a number of NGOs, human rights organisations and trade unions have argued that the Bill provides a framework for control measures that remove flexibilities in the system and which make it harder for people to regularise their status if they become undocumented. This is considered to be a major barrier to the creation of a fair and transparent system of immigration, which recognises the inherent complexities of immigration and the granting of legal status. Controversial measures include the creation of new powers to deport, the lack of adequate safeguards against the revocation of residents permits and the refusal of entry. In particular, a number of organisations believe that the provisions addressed to foreign nationals already in the State, through the introduction of a mandatory obligation to leave the State or to be removed summarily by force without notice, breach human rights. This means that migrants who have become undocumented have little or no right to redress and to regularise their status. Specific measures have been introduced to provide for greater inter-departmental coordination in areas concerning illegal employment and irregular migration, including specific provisions to coordinate measures on trafficking.

Although there are a number of mechanisms already in place to enable foreign nationals to regularise their status, largely through ministerial discretion, the Irish government has ruled out the possibility of further measures being introduced to provide for regularisation programmes or amnesties. Some administrative measures are being introduced to provide for a temporary residents permission for foreign nationals who can demonstrate that they became undocumented through no fault of their own, and which can prevent a person becoming undocumented. However, trade unions and NGOs have argued that consideration should be given to regularisation programmes that address humanitarian issues and also allow for an 'earned' right to regularisation.

3.6.2 Policy recommendations

The following policy recommendations are made:

- *Regularisation*: The government should consider a range of options on how regularisation programmes can be implemented in Ireland. Legislation on employment permits and on immigration should provide for flexibility to ensure that irregular migration can be prevented through regularisation. In particular, the need to provide legal protection and security to vulnerable migrant workers and those that have lost their status will continue to be necessary in the future. For this reason it is recommended that the government consider fair and transparent means by which the regularisation of people who entered the State legally, but subsequently lost their status through no fault of their own, can be introduced. Those irregular migrants who cannot be returned home, and who are in effect stateless, should be provided with an opportunity to regularise their situation. Consideration should also be given to those people who have been deemed to be ‘illegal’ to have the opportunity to regularise their status or to participate in a voluntary return programme in partnership with the IOM.
- *Victims of trafficking*: The protection and security of victims of trafficking is an issue that will need to be discussed in the light of new legislation and new administrative mechanisms to coordinate action in this area. In particular, the outcomes of the research currently being carried out by the Immigrant Council of Ireland will provide a better evidence base on the protection and security needs of victims, and the findings from the research should be considered in the development of future policy developments in this area.
- *Coordination between immigration and employment policies*: Whilst new legislation provides a more coherent approach to immigration and employment, there remain a number of problem areas that need to be resolved. One of these is the difficulties encountered by foreign nationals whose legal status has elapsed and who as a consequence are unable to renew their permits until they have the correct immigration stamp in their passports. Providing systems to more effectively coordinate the issuing of permission to be in the State by the immigration authorities and the granting of employment permits, would help to avoid people unnecessarily becoming undocumented.
- *Employment rights enforcement*: The enhanced framework of employment rights compliance in Ireland should be monitored for its implementation, with a specific remit to provide data on the exploitation of foreign nationals. Specific problem sectors should continue to be targeted and on a regular basis. It will be important to ensure that vulnerable migrant workers have access to information about their rights and responsibilities. Similarly, migrant workers should have improved access to justice and employment equality, with measures built-in to ensure that they are protected and do not lose their legal status in the event of reporting employers that have breached labour legislation.
- *Human rights obligations*: Ireland is a signatory to a number of human rights frameworks, which if fully implemented can provide for the improved protection of the human rights of foreign nationals. These are issues that need to be addressed within the broader framework of specific measures that Ireland has not yet ratified, but which establish principles for the protection of the human rights of all migrant workers as established by the UN and the ILO. It is crucial, in line with observations from the

Irish Human Rights Commission, that the human rights of foreign nationals should remain paramount.

- *Consultations with relevant stakeholders:* Consultations with and the participation of trade unions, employers, NGOs and human rights organisations should be established as the basis for any developments in immigration and employment rights policy. This will be particularly important to best practice developments and the implementation of measures to combat the illegal employment of foreign nationals and programmes of regularisation.
- *Protecting undocumented migrant workers:* The government, in partnership with NGOs and human rights organisation, should consider PICUM's (2007) guidelines, *Ten Ways to Protect Undocumented Workers*, and examine how they can be implemented. These include measures to raise public awareness, collect data to inform policy, inform undocumented workers about their rights, empower them, advocate laws holding employers responsible for fair labour standards, mediation and collective claims, the legal system, working with government agencies and promoting regularisation.
- *The development of good practice approaches:* The IOM Dublin office should organise a seminar for government departments and agencies to discuss the establishment of good practice approaches to addressing the illegal employment of foreign nationals. A similar seminar should also be organised with NGOs and human rights, migrant and advocacy organisations.

3.6.3 Future research

It is proposed that future research should be carried out in the following areas:

- Research should be carried out on the different options for regularisation programmes for migrants who are currently residing in Ireland in order to inform the development of a fair, flexible and transparent mechanism for regularisation. This could be developed along the lines of an 'earned' regularisation programme that allows for migrants, who have been working and paying taxes, the opportunity to remain in the State.
- Research to collate data and provide more systematically analysis of the numbers involved in, the causes of and extent of irregular migration should be carried out in order to inform future and evidenced based policy developments.
- Research should also be carried out on improving methods of coordination and data collection to identify the extent of illegal and exploitative forms of employment. This research could document the roles and responsibilities of government agencies and other stakeholders, and develop best practice approaches to data collection.
- Research on employment rights compliance should examine the extent to which the current inspection process is operating in practice in this area, the sectors that are most vulnerable to exploitation, and the extent to which measures to tackle the hidden economy are being addressed. In particular, it would be relevant to undertake research and collate data on the numbers of foreign nationals who become undocumented as a result of exploitative employment practices.

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ABBREVIATIONS

CSO	Central Statistics Office
DJELR	Department of Justice, Equality and Law Reform
DETE	Department of Enterprise, Trade and Employment
EEA	European Economic Area
ESRI	Economic and Social Research Institute
EU	European Union
FÁS	National Training and Employment Authority
GNIB	Garda National Immigration Bureau
IBEC	Irish Business and Employers Confederation
ICI	Immigrant Council of Ireland
ICTU	Irish Congress of Trade Unions
IHRC	Irish Human Rights Commission
ILO	International Labour Organisation
INIS	Irish Naturalisation and Immigration Service
IRC	Irish Refugee Council
MRCI	Migrant Rights Centre Ireland
NCCRI	National Consultative Committee on Racism and Interculturalism
NERA	National Employment Rights Agency
NESC	National Economic and Social Council
NESF	National Economic and Social Forum
NGOs	Non-Governmental Organisations
NIHRC	Northern Ireland Human Rights Commission
ORAC	Office of the Refugee Applications Commissioner
PICUM	Platform for Coordination of Undocumented Migrants
PPSN	Personal Public Service Number
SIPTU	Services, Industrial, Professional and Technical Union

LIST OF KEY INFORMANT INTERVIEWS HELD FOR THE RESEARCH

- Representative of Migrants Rights Centre Ireland
- Representatives of Immigrant Council of Ireland
- Representative of Irish Congress of Trade Unions
- Representative of Irish Business and Employers Confederation
- Representative of Enterprise, Trade and Employment
- Senior representative of Department of Justice, Equality and Law Reform
- Representative of Garda National Immigration Bureau
- Representative of Garda National Immigration Bureau
- Politician representing Ministry for Integration
- Representative of International Organisation for Migration, Dublin Office

Combating the Illegal Employment of Foreigners in the Enlarged European Union: Polish Country Report

Anna Kicingier, Weronika Kloc-Nowak

4.1 Introduction

The illegal employment of foreigners in Poland is not an important social issue in terms of the coverage it receives in the media and political debate. Few scientific studies have been devoted to the phenomenon and the research published to date has been rather narrow in scope. Even less attention has been given to state policy regarding the illegal employment of foreigners; so far, this has only been treated superficially in studies on Polish migration policy. Thus, this may be considered to be a pioneering report, focusing exclusively on Poland and examining in detail the issues of state policy towards the illegal employment of foreigners.

In Poland, which has traditionally been, and still is, a net emigration country, the inflow of labour migrants is a relatively new phenomenon, which arose after the collapse of the communist system. Even though the illegal employment of foreigners does not draw the attention of either the policy makers or the media, according to expert estimates, its scale is significant, being many times higher than the legal employment of foreigners in Poland. Therefore, it is not a marginal issue without economic or social impact. Foreigners undertaking work illegally are most frequently citizens of Ukraine, or, less often, of Belarus or the Russian Federation, who arrive in Poland with valid tourist visas. In terms of the law, these are people who arrive in Poland legally and reside legally, up to the moment they undertake work.

It follows that public opinion does not hold the phenomenon itself to be a criminal offence, an attitude often found in countries where illegal employment is linked to illegal residence or even illegal border crossing, but tends towards a perception of this as a way of ‘making a living’ under harsh economic conditions. A similar strategy has been employed by Poles in the past, especially during periods of high unemployment, when they have agreed to work illegally, while employers have turned to illegal hiring in order to reduce costs and maintain their hold on the market. Given this experience within the country, coupled with the experience, especially frequent in some regions, of illegal labour migration to Western European countries, Poles display an understanding attitude towards Ukrainians and other foreigners undertaking illegal work in Poland.

These factors explain why, in spite of its scale, the illegal employment of foreigners in Poland does not stir significant social reactions and, at the same time, it accounts for why state policy in this field is of low priority in comparison to other social issues. Although state regulation of the employment of foreigners does exist, (see section 4.3), nevertheless, as this study demonstrates, effective implementation of the law aimed at combating the irregular employment of foreigners poses certain problems, and as a result, illegal employment is tolerated in practice.

In the introduction we would also like to clarify the definitions used in this study. We have consistently used the term ‘illegal employment of foreigners’ when referring to work or to any other economic activity carried out by foreigners in violation of the Polish law on the employment of foreigners or on their economic activity. The adjective ‘illegal’ is used here by the authors solely with the intention of giving a precise name to the phenomenon being studied, that is, to work or economic activity which is undertaken illegally and is thus in violation of the law; its use in this report carries no pejorative connotations whatsoever.

Along with the policy on illegal employment, we present the efforts made by the state to combat human trafficking in Poland, considering human trafficking as the most drastic form of exploitation, forming the end of a continuum that ranges from decent work, through various forms of exploitation, often related to the illegality of the employment, to human trafficking.

4.2 Illegal employment of foreigners in Poland: the scale, nature and reasons behind the phenomenon

This part presents the phenomenon of the illegal employment of foreigners in Poland in the wider context of unregistered employment within the Polish economy. It attempts to evaluate the scale of illegal work undertaken by foreigners in Poland, analyse its nature and forms and draw attention to the most important factors contributing to the proliferation of the phenomenon in certain sectors of the economy.

4.2.1 Illegal employment in Poland – the characteristics and scale of the phenomenon

The role played by the grey economy within Poland’s economy as a whole may definitely be said to be considerable, although it is difficult to estimate precisely. Depending on the year and the methodology applied, its share of the GDP (gross domestic product) has been reported as being between 14% in 2003, according to an estimate produced by the Central Statistical Office (CSO: Główny Urząd Statystyczny) and 27.4% in 2000, as estimated by the Institute for the Study of Labour IZA (both figures quoted in Biletta and Meixner, 2005: 7).

Turning more specifically to the factor of illegal work, according to Polish CSO estimates, the number of unregistered workers increased from 885 thousand in 2000 to 924 thousand in 2003 (Fłaszyńska and Zarański, 2005: 68), while the registered working

population in 2003 reached 12.6 million (CSO, 2007: 19). The most detailed and recent study of the phenomenon was the special module on unregistered work conducted within the Labour Force Survey in the third quarter of 2004. In this survey (CSO, 2005), drawn from an address sample, over 21 thousand people over the age of 15 answered questions concerning their experience as unregistered workers and their opinions on employment as unregistered workers. According to the survey, in the period between January-September 2004, 1.317 million Poles worked illegally, which was over 9% of the total working population (CSO, 2005: 11). For 829 thousand of them, unregistered work was their main or only job. However, the unregistered work was often episodic, with 50% of those involved having worked illegally for no more than 20 days a year (CSO, 2005: 15). On the other hand, for 43.5% of illegal workers, their undeclared pay accounted for between 76–100% of their total income. Mean monthly earnings from illegal work were very low, amounting to 392 PLN, or 448 PLN in the event of its being the person's only job (CSO, 2005: 20–21). In contrast, on the basis of the "Social Diagnosis 2005" survey (Czapiński and Panek, 2006), Czapiński identified a significant group of registered unemployed people who achieved a monthly income above 850 PLN from undeclared work (Czapiński, 2006: 256). It may therefore be proposed that there are, in fact, two groups of Poles involved in undeclared work. One group works occasionally, gaining only small income, as 'pocket money' in the case of students, or as a supplement to old-age pensions, social benefits or regular pay from registered work. The other group regularly works illegally and relies on this source of income. Foreigners working illegally in Poland probably belong, in the majority, to the latter group.

The reasons put forward by Poles for undertaking illegal work were the lack of opportunities for finding registered employment, insufficient earnings from other sources, over-high gross labour costs and, in turn, the higher salaries offered for unregistered work (CSO, 2005). Significantly, the general population gave the same reasons, ranked in a similar order, as the illegal workers themselves. Similar results were obtained for Poland in the 2007 Eurobarometer survey, where 30% of the Poles surveyed were of the opinion that overly low salaries in regular businesses are the primary reason for undertaking undeclared work, combined with the 19% who declared the primary reason as being over-high taxes and/or social security contributions (Eurobarometer, 2007: 41). The lack of regular jobs being offered on the labour market was only the third reason given (11%); the decline of its importance in comparison to the 2004 survey was most probably caused by the rapidly growing domestic demand for labour due to faster economic growth and the massive outflow of workers which occurred after accession to the EU.

Various sectors are affected by illegal work to different extents. Among those which are usually named as the most popular among unregistered workers are construction, agriculture, commerce and the care and domestic services (CSO, 2005: 14; Czapiński, 2006: 256); unregistered employment can be also found in hotels and restaurants (Biletta and Meixner, 2005: 5). Which sectors are generally acknowledged as being predominant in the area of undeclared work also constitutes a kind of common knowledge among officials of the administrative authorities (IIP). One trait which these sectors have in common is that they offer a large number of low-qualified jobs that would not be created legally, as it would no longer be profitable for employers if they had to bear the gross costs of legal employment. In urban areas, there is also a sector of unregistered highly

skilled services, such as translation, private language tuition, legal and financial advice and IT services, which can be offered by well-educated workers and students in order to gain extra income (CSO, 2005: 19; Golinowska, 2005: 98).

Illegal work has a variety of forms. It can easily be hidden as services performed by one private person for another, as in the case of care work, mutual assistance between neighbours, or private lessons. It sometimes involves a greater number of workers, but over a short period of time, as in the case of intensive work in agriculture during harvest. Illegal work is also performed for the large construction companies, but concealed in a chain of subcontractors. In this sector, the system of subcontracting tasks to smaller companies facilitates the reporting of only a small fraction of the labour and the paying of the majority of workers under the table. In addition, the regulations on public tenders and orders mean that contracts will be awarded to tenderers offering prices achievable only by the utilization of illegal work (TU1PL). Thus, according to estimates made by the construction workers' trade union, 30–35% of the work within the sector is carried out illegally, which causes a problem for those companies who make the effort to conform to the law and pay taxes (TU1PL).

An interesting phenomenon within the field of illegal work in Poland is the undeclared work carried out by people registered as unemployed. This has been the subject of several studies since 1989. A 1998 survey showed that 67% of Poles believed that half or more of the unemployed were, in fact, employed illegally (CBOS, 1998). The "Social Diagnosis 2005" survey showed that some people who were registered as unemployed worked and earned a net monthly income above the level of the official minimum wage. 22.4% of these unregistered workers continued to receive unemployment benefit to which they were not entitled (Czapiński, 2006: 256). In the EU27 survey of 2007, 71% of Poles, constituting the highest share among all the countries studied, declared that in all likelihood, the unemployed would carry out undeclared work (Eurobarometer, 2007: 39). The information provided by social surveys is supported by the results of labour legality inspections (Ministry of Labour and Social Policy, 2007). In 2006, labour inspectors identified 5793 cases of registered unemployed people in illegal employment, including 375 who were also receiving unemployment benefits. The majority of these people worked in retail, in other service industries, or in construction. As a result, the state also received more than PLN 218 thousand in returned social benefits which had been paid unduly (Ministry of Labour and Social Policy, 2007: 33–34).

Various social studies conducted during the 1990s and 2000s show a high level of social acceptance for the undertaking of illegal employment both in Poland and abroad. In 1998, 58% of the interviewees found the notion of working illegally and receiving unemployment benefit at the same time to be acceptable, while only 36% held such behaviour in contempt (CBOS, 1998: 2). For the overwhelming majority of Poles, the legal channels for labour migration to EU countries or the US were very limited until 2004, with the only large-scale exemption being seasonal work in Germany. Therefore, in the past, many Poles have engaged in illegal employment in the EU or North America. In a survey conducted in 2006, 12% of the relatives of Polish respondents employed abroad were involved in illegal work in the EU (CBOS, 2006: 5). Among those respondents who declared an interest in labour migration, a strikingly high proportion, 41% in all,

accepted the possibility of working illegally, despite the existing possibilities of being employed legally in at least eight of the 'old' EU countries (CBOS, 2006: 12).

The general distrust felt by Poles towards the authorities and the regulations they impose, a social attitude shaped in reaction to the communist regime, should also be mentioned among the factors contributing to the popularity and acceptability of unregistered work. The surveys show high tolerance for illegal labour as an opportunity for the resourceful and a necessity for the poor. Given the high additional costs imposed on registered employment, Poles are ready to outwit this unfriendly system by working in the shadow economy. The idea that illegal workers fail to contribute to the national budget and thus increase the burden born by the rest of society does not seem to have become commonplace.

4.2.2 *Illegal employment of foreigners in Poland*

The only unquestioned fact regarding the illegal employment of foreigners in Poland is that its scale is much higher than that of the legal employment of foreigners. Therefore, it is worth introducing the topic by presenting some basic information on the limited possibilities of legal work in Poland for non-nationals.

The scale of legal employment of foreigners on the Polish labour market is very low. There are several categories of foreign labour, yet statistics are only available for some of them. The legal forms of employment of foreigners detailed below comprise only about 0.1% of the working population of Poland. The proportion of foreign workers is thus too low to be represented in the Labour Force Survey.

The basic instrument for the legalization of the employment of non-nationals in Poland is the work permit (Table 4.1).

Table 4.1: Work permits granted to individuals by sector, 2001–2007

Year	Total number of permits	Manufacturing and mining	Construction	Trade	Hotels and restaurants	Financial intermediation and real-estate activities	Education	Health and social work	Other
2001	17038	2643	851	4777	966	1865	2646	420	2439
2002	22776	4117	1102	5332	1137	843	3238	468	6539
2003	18841	3785	763	4660	1045	2945	2665	408	2570
2004	12381	3455	416	3798	920	1080	1515	343	854
2005	10304	3145	303	2830	809	1000	1031	305	881
2006	10754	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.
2007 1st half	5750	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.	n.d.

Sources: for 2001–2005 (Kępińska, 2006: 75–78); for 2006 and 2007, the Ministry of Labour and Social Policy (MLSP)¹

1 Data published on the MLSP website: for 2006 <http://www.migracje.gov.pl/?1,9,46,200710>, and for 2007: <http://www.mpips.gov.pl/userfiles/File/Migracje/CUDZOZIEMY%20W%20POLSCE%201%20polrocze%202006%20i%202007.pdf> (accessed on 2nd April 2008).

Over 10 thousand work permits have been issued annually in recent years, most of them in the manufacturing and mining industries and in trade. The number of permits in trade, education and construction has decreased most rapidly. The general number of permits also decreased over the period 2002–2005, mostly due to the fact that many categories of foreigners were granted the right to work legally without obtaining a permit. The major group exercising freedom of employment consists of EU citizens; however, numerous other groups such as academics, students on internships at Polish medical schools etc., may also undertake work without a permit.

A new form of legal work for the citizens of countries neighbouring Poland is that of a six-month period of employment requiring no work permit and based simply on the employer's registered declaration. In September 2006, this form² was introduced in the agricultural sector and was used by 1,500 migrant workers over a period of nine months. In July 2007, it was replaced by a new regulation, which widened its application to all sectors of economy. The initial data show 9,198 cases of declarations registered between July 20th and September 31st 2007 by employers willing to take on such a foreigner; of the 9,198, by nationality, the majority (8,551) is represented by citizens of Ukraine and, by sector, by farming and construction (5,480)³.

In contrast to the limited numbers of legally employed foreigners in Poland, illegal employment is estimated to be much higher. Illegal work carried out by foreigners in Poland has its origins in the petty trade of the citizens of the former Soviet Republics, which was very popular in the early 1990s. By the end of that decade, as retail became more difficult, many of the petty traders turned to illegal work (Okólski, 1997: 42; Stola, 1997: 14). The massive circulation between Poland and the neighbouring countries and the illegal employment of migrants was possible because of the almost unrestricted possibility of staying in Poland for a period of three months as an officially declared tourist. Until October 1st 2003, no visas were required for Ukrainians, Belarusians and Russians. After that date, Poland introduced visas; however, tourist visas were free of charge for Ukrainians and, at a cost of 10 Euros, were relatively cheap for Belarusians and Russians. On the basis of a border survey carried out in 1995, researchers suggested that the number of Ukrainians working in Poland could amount to more than 500 thousand (Iglicka, 2000: 1240). According to other, more recent estimates by Frelak (2005: 6), the number of foreigners working in Poland, illegally for the main part, was between 50 and 300 thousand, most of whom were Ukrainians. The basic assumption behind these estimates was that access to the Polish territory was cheap and easy and that the majority of tourist visa holders from Ukraine in fact undertook illegal work during their stay in Poland, thus violating their visa conditions. According to one survey, 10.5 million tourists⁴ from Ukraine, Belarus and

2 Initially, the permitted period of employment was three months; this was increased to six months with effect from 1st February 2008.

3 Data published by the Ministry of Labour and Social Policy on November 19th 2007, in explanation of the drafting of a proposal for a new regulation in the field: <http://www.psz.praca.gov.pl/main.php?do=ShowPage&nPID=867686&pT=details&sp=CONTENT,objectID,873627> (accessed on 2nd April 2008). According to *Rzeczpospolita* (14.04.2008), 23 thousand declarations were registered in the first half of 2008.

4 Tourists are defined by the authors of the said survey (the Institute of Tourism) as visitors who spend at least one night in a country and whose main aim is not economic activity. However, the survey records the visitors' declarations and, according to the author of the report, labour migrants from the East often use the 'business trip' category as a cover for the real aim of their stay in Poland.

Russia travelled to Poland in 2005 and almost 45% of them declared their journey to have an economic aim; this included work, business and shopping (Bartoszewicz, 2006: 2–3). These conditions of free access to Poland under the guise of tourism changed dramatically in December 2007 and their impact on the scale of the illegal employment of foreigners will be observed in the months to come.

Apart from these estimates, the only data on illegal work performed by foreigners in Poland concerns those illegally employed foreign workers uncovered by the Polish authorities (Table 4.2).

Table 4.2: Number of cases of illegal employment of foreigners uncovered, 2002–2006

Year	2002	2003	2004	2005	2006
Number of cases	2080	2711	1795	1680	1718

Source: For 2003–2006 the Ministry of Labour and Social Policy (2007: 28), For 2002: Zawadzka and Zdrański (2003: 208).

The data concerning the most recent periods were quoted by the interviewees. According to the Border Guards (BG: Straż Graniczna), between January and August 2007, 486 foreigners were held in custody by the BG after being subject to a decision, as provided for by the Act on Aliens, obligating them to leave the territory of Poland as a result of carrying out work illegally (I2PL). In the first half of 2007, the Customs Service (CS: Służba Celna), as one of the institutions with the powers to identify illegal labour of foreigners, uncovered 278 such cases (I3PL). Access to comprehensive recent data is complicated by the reorganization of the control authorities, which took place in the course of 2007.

Additional insight comes from the analysis of the number of foreigners who have been subject to expulsion or a decision obliging them to leave the Polish territory as a result of having been engaged in illegal work (Table 4.3).

Table 4.3: Foreigners subject to expulsion orders or a decision obliging them to leave the territory of Poland as a result of illegal work, 2005–2007

Year	2005	2006	2007*
expulsion order	99	685	334
decision obligating departure from the territory	200	1624	1040

* Data for the period 01.01.2007–05.10.2007.

Source: Office for Aliens – data prepared on request.

Due to the scarcity of data and lack of detailed comparative studies, little can be said with regard to the similarities and differences between the illegal employment of nationals and that of foreigners. Foreigners who come to Poland as temporary economic migrants and with the goal of maximizing their income most probably work much more intensively than most of the undeclared Polish workers, who often have other sources of income and undertake illegal work only occasionally (CSO, 2005: 27–28). Since

foreigners can be denounced and deported, they are much more vulnerable to the abuse of their rights by employers, while, in the case of Polish nationals, it is they who can denounce the employer. There is also a separate labour market consisting of foreigners employing other foreigners, especially their compatriots, for example, women who are employed as waitresses and kitchen maids in ethnic takeaways; this is particularly common among the Vietnamese (Koryś and Kloc-Nowak, 2006: 34–36, 97, 103).

There are no widespread signs of social protest against the employment of foreign workers, as they are usually perceived to be filling the gaps in the labour market, for example, by gathering the fruit that would otherwise be wasted. In addition, it seems that many Poles sympathize with them, as they either work illegally themselves in Poland or abroad, or have had experience of this in the past (see section 4.2.1).

The information provided by inspections conducted by the ‘labour police’ units of the voivodship offices⁵ shows that the largest number of cases of illegal employment of foreigners occurs in retail and trade, other services and construction (Table 4.4). In one sector, that of trade, the illegal work carried out by foreigners is more concentrated than that performed by Poles.

Table 4.4: Available data on illegal employment in Poland, by sector of economic activity

Sector of economic activity	2004		2006	
	Cases of people illegally employed (both Poles and foreigners)	Number of employers recognized as employing illegally	Illegally employed Poles	Illegally employed foreigners
Construction	1214	610	1160	40
Retail & Trade	2451	2166	1570	1399
Other services	1727	1199	1691	151
Other	2049	1034	2918	128
Total	7441	5009	7339	1718

Source: Ministry of Economy and Labour (2005: 10); Ministry of Labour and Social Policy (2007: 33).

In the construction sector, Ukrainians make up the highest number of illegal workers, followed by Belarusians and other former Soviet Union nationalities (Bojar et al., 2005: 66; Kus, 2004: 13). Representatives of trade unions, industrial chambers and employers’ organizations estimated the scale of illegal work being carried out by foreigners in construction at 150 thousand in the high season (Kus, 2004: 13) and as many as 180 thousand in 2007 (TU1PL). In order to comprehend the magnitude of the phenomenon within this sector, these estimates need to be set against the scale of legal employment of nationals at 346 thousand (Bojar, et al. 2005: 66) and the 303 individual permits issued

5 Voivodship is Poland’s first level of regional government. Other are: district (*powiat*) and commune (*gmina*).

to foreigners in 2005 (Kepińska, 2006: 78). Subcontracting and shifts system constitute the primary means by which illegally employed foreign construction workers are concealed. Subcontracting means that illegal work is often done for a small company, or even for a self-employed person, situated at the end of a 'chain' of declared contracts which are subject to taxation. At the same time, according to the experts (TU1PL), while the first shift is mostly constituted of Polish and legal workers, the second, in part, and the third, night shift are predominantly manned by illegally employed Ukrainians, even in the centre of Warsaw. According to Polish workers, the foreigners do not need to fear inspections and can move around freely in Polish towns. However, their number is said to be lower than in the late 1990s (Bojar et al., 2005: 72–75).

The construction workers from the former USSR interviewed by the Polish researchers had usually completed their secondary education; however, some of them were highly qualified, being, for example, engineers and university graduates, but had decided to accept work in Poland for which they were over-qualified, due to the very low salaries in Ukraine. They usually came for the summer season and lived on concealed premises organized by their employers (Bojar et al., 2005: 68). They were predominantly males; young women were only occasionally employed for work in private houses (Koryś and Kloc-Nowak, 2006: 29).

Agriculture is a sector providing employment for a large number of foreign seasonal workers all over Europe, and Poland is no exception. The bulk of Polish farms are small and run by family members, but need additional workers in the harvesting season (E2PL). Migrants are employed in harvesting the fruit and vegetables in the fields and orchards. They also sort, pack and prepare them for transport. In addition, labour is constantly required by large agricultural enterprises using greenhouse cultivation methods and operating throughout the year, storing or even processing fruit and vegetables, (Antoniewski, 2002: 42–43). In larger agricultural enterprises, migrants also work on fruit processing. Male migrants are sometimes involved in the repair of machinery and the construction of farm buildings. Participant observation conducted in the 1990s revealed that the farm workers from Ukraine were usually 30–55 years old and the sex structure was balanced (Antoniewski, 2002: 41). The proportion of people less suited to hard physical work, for example, young women, has recently increased among migrant workers, and especially among newcomers (E2PL).

Until 2007, three-month tourist visas were usually used for legal entry onto Polish territory; the length of the legal stay was enough to permit the undertaking of seasonal work in farming. Both migrants and employers prefer the regular return of the same workers to a given farm (E2PL). Private bus operators often act as intermediaries in the employment process, bringing groups of foreigners to the countryside. The drivers are paid by the employers for finding workers and they also perform services for the immigrants, such as transferring cash or supplies between countries. As the number of immigrants keen to work in Poland diminishes, the fruit growers become even more dependent on the intermediation of the drivers. As a representative of the employers reported, a few years ago the drivers used to provide "full buses" of workers to a single village; now they sometimes arrive with no more than five (E2PL). As a last resort, farmers travel to particular places, where migrants wait in the mornings to be recruited for short-term

jobs (Antoniewski, 2002: 43). In the opinion of the representative of the fruit growers' association being interviewed, it has become more difficult to secure the annual arrival of reliable Ukrainian workers, who are now less interested in low-paid work in Poland as a result of the competition presented by other destinations, mainly in South-Western Europe (E2PL). The solution put forward by the Ministry of Labour and Social Policy was to bring in groups of migrants from Asia⁶; however, this was eventually blocked by the Ministry of the Interior and Administration due to security concerns. Meanwhile, the farmers, accustomed to workers from neighbouring countries, have indicated their preference for the workers from these countries, particularly Ukraine, on account of the linguistic and cultural proximity, both of which are said to enhance cooperation (E2PL).

While the construction sector is male-dominated and the farming sector is balanced as regards the sex of the foreign workers, the domestic services are dominated by irregular female workers. According to the 2001 survey, about 925 thousand Polish households employed regular or intermittent domestic labour, 10% of whom are foreign workers, mostly women from Ukraine⁷. For the most part, the services they provide included general housework (34%), caring for an elderly or disabled person (10%) and child care (6%) (Golinowska, 2004: 189).

Qualitative research indicates that many of the foreign female workers have received a secondary or vocational education and then migrated due to unemployment or not receiving their salary from their employer in their country of origin. The two predominant types of domestic worker are cleaners and carers. The former usually live in rented apartments with other immigrants. They find employment through word of mouth recommendation among employers. If they are trusted, they are given the keys to their employers' homes and can thus organize their own working day, which allows them to minimize the time and cost of transport and maximize their working hours during their short stay in Poland. Until December 2007, the cleaners usually entered the country on three-month tourist visas and, in order not to abandon an employer in the periods between one stay and the next, recommended their relatives or friends as temporary replacements (Bojar et al., 2005: 36).

A specific group is formed by live-in domestic workers, who constitute about 15% of the foreigners employed by private households. They establish a closer link with one employer, usually as a result of their responsibility as carers. In October 2003, a change to the visa regulations was implemented, making a prolonged stay in Poland, which could be renewed by a visit to the border, impossible. This caused a problem for the Ukrainian carers. As it is difficult to use the rotation system described in the previous paragraph when a child or an elderly or handicapped person is involved, some carers found themselves under pressure to prolong their stay illegally or to bribe Polish officials in order to obtain a new visa without the required waiting period (Bojar et al., 2005: 31). It has also been observed that younger women were applying to study in Poland in order to

6 Z. Lentowicz, „Chińczycy zbiorą nasze truskawki” [Chinese to harvest our strawberries], *Rzeczpospolita* 26.03.2007.

7 It is necessary for estimates of the scale of the domestic services sector made on the basis of this survey to take into account the fact that 38% of the cases included represent the employment of workers by small, family-run farms, since a farm was understood as being a household.

qualify as students for a fixed-term residency permit of one year's duration. (Koryś and Kloc-Nowak, 2006: 29).

Another sector employing a large number of foreigners illegally is retail. Petty trade was the first type of economic activity developed in Poland by migrants in the 1990s and it involved many nationalities belonging to the former USSR, such as Russians, Ukrainians or Armenians (Stola, 1997: 5, 7–8). Gradually, with the decreasing demand for cheap and low-quality imported products, such retail became less profitable and thus less popular as an activity for economic migrants. Since that time, some citizens of Ukraine or other former Soviet Republics have either turned to illegal employment or left Poland. Nevertheless, many citizens of Belarus, Ukraine and Russian Kaliningrad continue to be involved in unregistered trade in Poland, especially near the eastern border. Some of them cross the border several times a day with the permitted, small quantities of products, which they sell in the destination country. According to estimates, of the 5.6 million Polish border crossings made by Ukrainians, only 2.5 million were tourist arrivals⁸, while the rest lasted for less than one day; it is probable that the majority of these involved shopping and small-scale trade. Often the products sold are also illegal, for example, untaxed cigarettes, alcohol or fuel. These activities come under the jurisdiction of the customs service; since 2003 this service has had the power to identify cases of unregistered work or economic activity and one area in which it is applied is that of trade.

The Vietnamese form a group that have specialized in the textile trade, both retail and wholesale, from the outset. Although estimates suggest that the community has decreased from 100 thousand to only ca. 30 thousand (Koryś, 2004: 31), they maintain the most complex trade structure, involving both legal and illegal workers. This trade was launched by Vietnamese students and members of the diaspora who had moved to Poland under the communist regime (Koryś, 2002: 26). The first traders noted the demand for cheap Asian textiles and started to import them from China. While the pioneers have since developed large legal trading companies, this is a labour-intensive business which has demanded a supply of manpower. Relatives of earlier migrants began to meet this demand, as did other people, some of whom, facing difficulties with getting Polish visas, were smuggled from Vietnam via Russia and other neighbouring countries (Koryś and Kloc-Nowak, 2006: 103). The people thus smuggled are often indebted to their relatives and/or their employers or to the smugglers themselves. They form the lowest strata of the Vietnamese community, working as porters and cleaners in the marketplaces and warehouses. Many of the salespersons also work and reside in Poland illegally. In “Jarmark Europa”, the largest open-air marketplace in the country, located in the old stadium in Warsaw, renting a trading place requires the lessee to have legal residency status and a registered company. According to the research conducted by Aleksandra Grzymała-Kazłowska, there were ca. 1,100–1,200 Vietnamese stalls rented by only 300 persons, who then employ workers or sub-rent them to others without declaring this fact to the market's authorities (Grzymała-Kazłowska, 2004: 404). The poorest immigrants try to accumulate capital through selling merchandise taken on commission from the more wealthy businessmen (Koryś and Kloc-Nowak, 2006: 86). Only a proportion of the Vietnamese can afford to legalize their activities by registering

8 Institute of Tourism estimates: <http://www.intur.com.pl/itenglish/arrivals.htm>.

a company and securing a residence permit, especially as they rely on costly lawyers and intermediaries to assist them with the procedures (Koryś, 2002: 10). From the qualitative interviews conducted with the Vietnamese, it may be extrapolated that the women put more effort and time into retail, guarding the stalls and selling the goods to Polish customers, often at night, while the men spend more time socializing with other male Vietnamese, although they might also be doing business during these meetings (Koryś and Kloc-Nowak, 2006: 78–79).

To complete the picture of the illegal work carried out by foreigners in Poland, one must also include the activities of highly skilled immigrants which are performed without registration, or separately from their registered work. It is most probable that these illegally undertaken activities are similar to the case of undeclared work carried out by Polish highly skilled nationals; private lessons, legal and financial counselling and translation, for example (CSO, 2005: 19). In the late 1990s, inspections with regard to employment legality also identified cases of the illegal employment of citizens of Western countries, such as Germany, France and the Netherlands; these were usually cases of managers working on large investment projects or for supermarket chains (Okólski, 2000: 21–22). The opening up of the Polish labour market after Poland's accession to the EU has reduced the scale of this problem. The best-described group of unregistered, highly skilled workers are language teachers. Native speakers from the USA, African English- or French-speaking states sometimes work in private language schools with neither a contract nor a work permit. Since many foreigners are employed as language teachers in Polish state schools, it may be expected that a number of them also give private afternoon lessons, just as their Polish colleagues do (Bojar et al., 2005: 9–11).

It is worth pointing out that foreigners who arrived to Poland seeking humanitarian protection also undertake illegal work. First, they look for jobs during the procedure of applying for refugee status, in order to have an additional income and be active during their period of stay in the refugee centre. Then, there are those who are granted refugee status, which entitles them to social assistance for one year, at times engage in illegal employment. In the opinion of social workers employed in regional social assistance centres, they prefer to work illegally in order not to lose the monthly adaptation benefit paid by local social assistance services (Gracz, 2007: 82). The strategy used by the refugees is parallel to the one used by Poles who are registered as unemployed; however, it can also be argued that it is simply a reaction to the unlawful and harmful practice of depriving recognized refugees of their adaptation benefit⁹ the moment they find legal employment, as it punishes those whose integration in Poland is more successful (Gracz, 2007: 81–82).

9 According to articles 7.11 and 91 of the Act of 12th March 2004 on social assistance [Ustawa z dn. 12 marca 2004r. o pomocy społecznej], *Dziennik Ustaw* 2004, No. 64, item 593 (and as further amended), refugees are entitled to assistance during the integration process. This assistance includes a monthly benefit of up to PLN 1,149 per person, the purpose of which is to cover expenditure on subsistence and the costs of a Polish language course. According to the Ordinance of the Minister of Social Policy on the integration of refugees [Rozporządzenie Ministra Polityki Społecznej w sprawie integracji uchodźców], a refugee may be temporarily deprived of this benefit only in certain defined cases, such as failing to attend the language lessons, being put on trial for a crime or if they stay for more than one month in a health care institution (Jasiakiewicz, 2006: 9, 18–23).

There is a complex set of reasons behind the illegal employment of foreigners in Poland. They are similar to the unregistered employment of nationals in some points, but differ in others. In order to explain this phenomenon, one must refer to its economic, legal and social rationale. One of the main reasons for its occurrence would seem to be the shortage of Polish manpower willing to do low-paid, physical work. In agriculture, foreigners, mostly Ukrainians, willing to do seasonal work on Polish farms entered the labour market in the 1990s and soon became indispensable, as farmers were unable to find a reliable Polish workforce prepared to accept the low salaries which they were able to offer. Even in regions with high unemployment levels, either the farmers could not find Poles who were willing to perform hard physical work for the PLN 2.5 per hour or the Polish workforce soon ceased coming to work, often as a result of alcohol abuse (E2PL). The general problem of a shortage of low-skilled labour was aggravated after Poland's accession to the EU, when thousands of people willing to accept unskilled jobs decided to undertake them for much higher pay in the UK or Ireland. In addition, Polish construction workers migrated to other EU countries, not only due to the prospect of better salaries, but also as a result of better and safer work conditions (TU1PL). Labour market mismatches persist, despite the high registered unemployment figures in some sectors; Poles who declare themselves to be, for example, qualified construction workers but remain unemployed are either not interested in legal employment or do not possess the qualifications they declare themselves to have.

Under Polish labour regulations, the high gross costs of salaries are a factor which inclines entrepreneurs to employ both nationals and foreigners illegally. Foreigners are employed mostly in low-paid jobs, where the cost of labour is the crucial factor for the economic viability of the workplaces. Some jobs can only exist as undeclared, since adding the tax and social contributions would be beyond the limit of profitability for the employers. In their opinion, they employ foreigners illegally not to gain extra profit, but in order to gain any income at all (Gmaj, 2005: 7–9).

An additional cost specific to the legal employment of foreigners is the cost and procedure of obtaining a work permit. Until very recently, the fee for the permit was ca. EUR 240, the equivalent of the minimum wage, which was disproportionately high in relation to the employment of a low-paid worker in a seasonal job. Although the fee has been significantly reduced to PLN 100, which is approximately EUR 28, for a first-time permit, the length and complexity of the procedure, which involves a labour market test and collecting and translating numerous documents, are discouraging. Thus, cases have been recorded where employers who intended to employ a foreigner legally, for example, as a carer for an elderly person, and then simply gave up the attempt when confronted with the bureaucratic requirements (Bieniecki et al., 2005: 45). However, this part of the Polish regulations is undergoing a transformation, since not only has the cost of the work permit been so significantly reduced, but new categories of foreigners are also now exempt from the work permit requirement.

Another disadvantage to the legal employment of foreigners is the lack of flexibility of the regulations which apply to such employees. These impose costs or conditions which do not allow entrepreneurs to manage the workers economically and efficiently. For example, in construction and farming, the work is seasonal and linked to the weather

cycle. It is hard to apply the labour regulations to such a situation and it is thus difficult and expensive to employ people in accordance with the law. The work permit states the position which the foreigner will fill, as well as the terms of reference, in detail, and the employer may not promote the holder of the permit or move him/her to another branch or tasks without re-applying for the permit. In comparison, illegal workers are flexible and can be allocated more efficiently. Moreover, the permitted period of legal employment is too short to allow the employer to properly train the worker, especially the three months allowed under the scheme of work without a permit for the citizens of neighbouring countries. For example, employers in construction would prefer to have continuity of workers for 18–24 months, which is the average length of a single construction contract (E1PL). This discrepancy between the employers' economic needs and the legal regulations may also lead to the illegal prolongation of the foreigner's work.

In addition, foreign workers, especially short-term economic migrants, wish first of all to maximize their income. They are not concerned with their or their employers' failure to pay social system contributions as they feel they would gain no profit from this anyway. In the short-term perspective, legal work is less profitable for them, as their take-home pay would then be lower. In this sense, foreign workers share the interest of the employers in keeping the overall costs of their labour low.

Both employers and employees are also inclined towards illegal employment due to the high social acceptance of illegal work in general¹⁰. As stated in the previous section, the acceptance of illegal work carried out by the registered unemployed is high in Poland. Illegal work performed by foreigners is perceived as a necessity for the Polish economy; as one employer put it: "It's in our common interest to have the work done by the Ukrainians or Belarusians or others who are paid under the table and work illegally." (E1PL). At the same time, the availability of illegal employment can also be perceived as positive for the immigrants, as it allows some categories of foreigners to work and support themselves. "Some flexibility on the issue is good for society. Yet the best and safest situation is legal employment." (NGO1PL).

In addition to consensual engagement in unregistered employment, cases of exploitation and forced labour were identified, the majority of them in the sex business sector. Such exploitation, regardless of the aim, whether sexual or not, is a crime named 'trade in persons'¹¹ under Polish law and has been punishable since 1969 (Karsznicki, 2007: 46–47).

According to various estimates, the proportion of foreigners among prostitutes in Poland varies from 25% among street prostitutes (Bianchi, Popper and Luksik, 2007: 38) to 40% among ca. 10,000 prostitutes working on the roads (IHF, 2000: 45). In the late

10 On the other hand, one has to remember that not all employers are keen to employ foreigners, probably due to the lack of information on the subject. In the opinion of an NGO expert (NGO1PL), some are very concerned, or over-careful, unwilling even to employ foreigners with the right to work, such as refugees or spouses of Polish citizens.

11 The present Penal Code [Kodeks karny] of 1997 states: "A person who trades in human beings, even with their consent, is subject to punishment by imprisonment for a minimum period of 3 years." [Art. 253. § 1. "Kto uprawia handel ludźmi nawet za ich zgodą, podlega karze pozbawienia wolności na czas nie krótszy od lat 3"].

1990s, it was estimated that half of these people had been trafficked to Poland by organized crime groups (IHF, 2000: 46). In the period between 1995 and 2007, there were 434 investigations into cases of trade in persons in which Poland was the victims' country of origin, destination or transit for the victims. Among the 2,855 victims identified, there were 549 foreigners, the majority being citizens of Belarus (245) or Ukraine (198). The traders were usually of the same nationality as the victims; among the foreigners accused of trading in human beings between 2001 and 2007, Bulgarians (42) and Ukrainians (29) were most numerous¹². Transit through Poland mostly involved victims from Lithuania, Latvia or Moldova (Karsznicki, 2007: 55).

To date, there has been only one case of trade in persons outside the sex business which ended with the persecutors receiving a sentence for trading in persons under article 253, § 1 of the Penal Code. The victim was a Vietnamese man who was being forced to work in a marketplace by his compatriots as a means of paying off his debt for having been brought into Poland illegally (G2PL; NGO2PL; Border Guards, 2007: 66–67). There are also foreigners forced into begging by organized crime groups such as a Moldavian-Ukrainian group, who lured women by offering them work in Poland and then kidnapped their children in order to force the mothers into begging (Świerczyńska and Walczak, 2007a,b).

Little is known of slavery in the home in Poland. Of the only two such cases handled by La Strada Foundation, an NGO specializing in the fight against human trafficking and slavery, one has already been dismissed. The victim initially agreed to being employed illegally by a family of Polish farmers, but was then gradually terrorized and deprived of freedom in their house. However, her testimony was not sufficient to punish her persecutors for enslavement¹³. In the opinion of the expert (NGO2PL), such cases are very difficult to prove, as the definition of slavery provided in the Polish Penal Code is very narrow¹⁴. If the person came voluntarily and later became enslaved and, in particular, if she somehow managed to escape, her chances of the court's finding that she was enslaved are low.

12 Data on trading in human beings published by the National Prosecutor's Office: <http://www.mswia.gov.pl/portal/pl/391/2001/> (accessed on 14.04.2008).

13 The victim was a Ukrainian woman who undertook to work illegally on a Polish farm. The employers gradually deprived her of her documents, food and pay and used psychological terror against her. The victim could leave the farm, for example, to go to a local shop, but remained in the abusive relationship for a lengthy period of time, as she became depressed and was intimidated. She only decided to escape when she met the Pole who helped her. However, the prosecutor found other Polish witnesses to be more trustworthy and dismissed the investigation. Afterwards, the victim's lawyers managed to bring the case to court but it was eventually dismissed. (NGO2PL; Surmiak- Domańska, 2007).

14 Art. 189. § 1 of the Penal Code of 1997 states: "A person who deprives another of freedom is subject to a period of imprisonment from 3 months to 5 years." (Art. 189. § 1. "Kto pozbawia człowieka wolności, podlega karze pozbawienia wolności od 3 miesięcy do lat 5.") It is supplemented by another regulation, Art. 8: "A person who gives another person into the state of slavery or trades in slaves is subject to a period of imprisonment of no less than 3 years." (Art. 8. "Kto powoduje oddanie innej osoby w stan niewolnictwa albo uprawia handel niewolnikami, podlega karze pozbawienia wolności na czas nie krótszy od lat 3."); the Act on Introductory regulations to the Penal Code of 6th June 1997 [Ustawa z dn. 6 czerwca 1997r. Przepisy wprowadzające kodeks karny], Journal of Laws [Dziennik Ustaw] 1997, No. 88, item 554.

Expert opinion holds that only a small proportion of the victims of forced labour or forced prostitution decide to testify in court. Often the victims are identified as foreigners staying in Poland illegally and are then simply deported immediately (NGO2PL; Karsznicki, 2007: 52). Cases of forced labour are also hidden because the consulates help the victims to return to their countries without addressing the underlying problem; their duties define the rescue of their citizens as being of a higher priority than bringing the criminals to justice (NGO2PL). Therefore, the cases which are actually uncovered should be treated as no more than examples of criminal phenomena on a larger, albeit unknown, scale.

4.3 Combating the illegal employment of foreigners – an analysis of policy and the law

4.3.1 Policy and politics to combat the illegal employment of foreigners in Poland: a general description

As described above, the illegal employment of foreigners became a problem only after 1989, when border crossing rules were liberalized and the considerable inflow of petty traders from the East gradually turned into various forms of hidden seasonal or temporary employment in certain sectors of Polish economy (Iglicka 2001). At the same time, in the first half of the 1990s, along with the liberalization of rules of movement, rules restricting the access of foreigners to the Polish labour market were already being established, as if in anticipation of the labour market disturbances that were to result from the process of economic and political transformation. The first regulations, issued in 1989 and 1991, introduced a work permit procedure based on the examination of the labour market¹⁵. Along with the growing problems of rising levels of unemployment in Poland, the work permit rules became more strict and complex. This was intended to serve the primary role of the system, that is, the protection of the Polish labour market against the inflow of foreign workers.

Given this primary aim of protecting the labour market, the illegal employment of foreigners was treated as harmful to that market and, as such, it was officially strictly combated by consecutive governments. From the outset, the penalization of illegal employment has been the foundation of state policy towards the illegal employment of foreigners. As early as 1991, employing a foreigner without a work permit, in a case where one was required, was penalized by the law. The law of 1994¹⁶ introduced the definition of the illegal employment of a foreigner as employment without the necessary work permit, and established financial sanctions to be imposed on both the employer and the foreigner. At the same time, the labour offices were given inspection and control competences in the field.

15 The Act on Employment of 29th December 1989; [Ustawa z 29 grudnia 1989 r. o zatrudnieniu], *Dziennik Ustaw* 1989, No. 75, item 446; The Act on Employment and Unemployment of 16th October 1991 [Ustawa z 16 października 1991 r. o zatrudnieniu i bezrobociu], *Dziennik Ustaw* 1991, No. 106, item 457.

16 The Act on Employment and Counteracting Unemployment of 14th December 1994 [Ustawa z 14 grudnia 1994 r. o zatrudnieniu i przeciwdziałaniu bezrobociu], *Dziennik Ustaw* 1995, No. 1, item 1.

Currently, the Act on the Promotion of Employment and Labour Market Institutions of 2004¹⁷ provides definitions of both illegal employment and the illegal employment of foreigners. According to the act, illegal work performed by foreigners means the carrying out of work without a work permit, with the exception of cases when a work permit is not required, or the performing of work in a position, or under conditions, other than specified in the work permit, or not in line with the declared purpose of stay, and without a contract of employment (article 2, (14)). ‘Illegal’ means both the carrying out of work by a foreigner under the conditions specified and the giving of work to a foreigner under those conditions (article 2, (13e, 13f)). Moreover, the law widely defines the work of a foreigner as undertaking employment or another gainful occupation, or being a member of the board of directors of given forms of legal persons in Poland.

The fundamental idea behind penalizing both actions is the presumption that any illegal, concealed employment is harmful to the labour market (IPL). It is worth noting that the law penalizes both the undertaking of employment without the necessary work permit and the employment of a foreigner without the necessary work permit. This double-penalization is then reflected in the fines and administrative sanctions to be imposed on both the employee and the employer and provided for by the law.

The work permit system, established with a view of regulating access to the Polish labour market, was originally also intended to play a preventive role in the illegal employment of foreigners. In reality, as further analysis will demonstrate, as a result of the high administrative and financial burden connected with the work permit procedures, the system proved to be one of the decisive factors in prompting foreigners to undertake illegal employment. However, over the course of time, more and more exceptions to the work permit obligation were introduced (Kicingier, 2007). Currently, further efforts to streamline the work permit procedure are also under way¹⁸.

Regularization, a form of decreasing the numbers of irregular migrants often applied in some European countries, has been used only twice, and with great reluctance. One-off regularization measures were launched in 2003 and in 2007, yet the criteria for regularization were very strict and thus the results of the action were extremely limited. What is even more significant is the fact that no possibility for constant regularization exists. This reluctance to implement any form of constant regularization constitutes a very important policy trait and has numerous social results. It adds to the severity of regulations, and in practise, makes it impossible for any foreigner caught in illegal employment or in an illegal stay to revert to a legal status¹⁹.

17 The Act on the Promotion of Employment and Labour Market Institutions of 20th April 2004 [Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy], *Dziennik Ustaw* 2004, No. 99, item 1001.

18 In 2007, the Ordinance of the Minister of Labour and Social Policy of 17th October 2007 on the fee relating to the submission of an application for a work permit for a foreigner [Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 17 października 2007 r. w sprawie wysokości wpłaty dokonywanej w związku ze złożeniem wniosku o wydanie zezwolenia na pracę dla cudzoziemca], *Dziennik Ustaw* 2007, No. 195, item 1409, significantly reduced the cost of a work permit from 936 PLN to 50 or 100 PLN, depending on the period of work covered by the permit.

19 An exception to this exists in the possibilities provided for victims of human trafficking; see Section 4.3.3.

In general, the phenomenon of the illegal employment of foreigners and, likewise, other issues connected to immigration have not been politicized (Kicinger and Koryś, 2008). Political parties in Poland show little interest in migration issues and have not been involved in the migration policy-making process to any significant extent. Only recently did the populist agrarian party Samoobrona, forming part of a government coalition in 2006–2007, devote some attention to the recruitment problems faced by farmers and successfully advocated for the liberalization of admission rules for Ukrainian and other seasonal workers from the East²⁰.

As with the political parties, the media have shown little interest in migration issues in general, and in the illegal employment of foreigners in particular. Recently, most media attention relating to migration has been focused on post-accession emigration from Poland. In this regard, the preventive and educational role of media coverage cannot be underestimated. Reports on “Polish work camps” or other cases of a tragic fate met by Polish migrants who knowingly or unknowingly were involved in illegal employment have, in all likelihood, discouraged a number of potential illegal workers from undertaking the risk of working illegally abroad²¹. However, migration inflows have not commanded the same degree of interest, though labour shortages on the Polish market have occasionally attracted media attention. These reports have pointed to labour needs, the complicated work permit procedure, and the problems with recruitment in agriculture or construction²². They have, on occasion, picked up and highlighted selected stories relating to human trafficking²³. However, reports on these issues have not elicited any serious public debate. Thus it is hard to estimate the media influence on public opinion regarding the issue of the illegal employment of foreigners²⁴.

Combating the illegal employment of foreigners is a non-politicized issue which has awakened a relatively small interest in the media and almost none among the political parties. Therefore, in regard to policy-making, public opinion considerations, relevant in other countries, have been of limited importance in the case of Poland.

The main actor involved in policy-making in the field is the government administration, with the leading role being played by the Ministry of Labour and Social Policy (MLSP: Ministerstwo Pracy i Polityki Społecznej). The Ministry is responsible for all issues relating to employment, including efforts to combat the illegal employment of both foreigners and nationals. What is worth noting is that all the laws concerning employment are created via the social consultation mechanism that encompasses government representatives, employers’ organizations and trade unions. The role of social dialogue in the regulation of working relations is well-developed and constitutionally grounded

20 Since 2004–2005, when the media reported on the high post-accession emigration wave from Poland, several political parties have specified their programmes for emigration issues, yet with no reference to the issues of inflow.

21 It has to be noted, however, that previously the media played an important role in the creation of post-2004 emigration hype, which resulted in unknown numbers of unprepared and vulnerable emigrants who were susceptible to exploitation by intermediaries or employers abroad.

22 E.g. Bojarski (2006); Narbutt and Marszałek (2006); Wielgo (2005a;b); Karp (2007).

23 E.g. Suramiak-Domańska (2007); Cichy and Świerczyńska (2007); Borowiec (2005); Zieliński (2006).

24 The paragraph is based on regular monitoring of all the most important dailies and weeklies in Poland, which has been carried out regularly by CEFMR staff since 2004.

in Poland. It functions quite efficiently at the macro-scale, with the large federations of employers' organizations and of trade unions voicing their major concerns during meetings of the Tripartite Commission. All changes to the law on employment²⁵ were made after consultations within this Commission.

Similar social consultations are carried out as part of the legislative procedure for Ministry ordinances. The proposal for a new ordinance, or for amendments to the law, are sent to the social partners, that is, to the federations of trade union and employer organizations. The opinions put forward by the social partners usually follow very predictable directions, with employer organizations supporting any government initiatives to liberalize access to labour market and advocating even more simplified procedures, whereas the representatives of trade union federations display a high level of distrust toward any liberalization efforts, treating them as a threat to the Polish unemployed (G3PL).

Trade unions argue that their primary interest is to guarantee better pay and work conditions for legal employees. Thus, they obviously promote such regulations as would decrease the opportunity for illegal employment, such as winning contracts by proposing an unrealistic calculation of labour costs (TU1PL). They often perceive the employment of foreigners as a form of wage dumping and therefore, more often than not, they disapprove of government proposals to liberalize access to the Polish labour market²⁶, rejecting the government rationale and claiming that what Poland lacks is not workers but decent wages²⁷.

Characteristic in this regard is the position of trade unions in the construction sector. They acknowledge the existence of labour shortages in certain professions within the sector, yet also claim that their primary interest is in a rise in wages. Labour shortages, in their opinion, facilitate an increase in salaries, whereas the inflow of foreign workers might have the opposite effect (TU1PL). The *Budowlani* Trade Union is especially active in lobbying for construction workers. Interestingly, *Budowlani* addresses the issue of the employment of foreigners in a comprehensive way, calling for more clear and transparent regulations on the labour market in general, and only then for the development of specific regulations allowing selected groups of foreigners easier access to Polish labour market.

Unlike the trade unions, employers actively support the government in any initiatives that facilitate their access to foreign labour. They welcomed the Ministry order allowing workers from the neighbouring countries to undertake short-time legal employment in Poland without the obligation to obtain a work permit²⁸. However, they strongly advocated

25 The name of the act has undergone several changes since 1990. Currently, it bears the title of the Act on the Promotion of Employment and Labour Market Institutions (Ustawa o promocji zatrudnienia i instytucjach rynku pracy) *Dziennik Ustaw* 2004, No. 99 item 1001.

26 Opinion of the All-Poland Alliance of Trade Unions/Ogólnopolskie Porozumienie Związków Zawodowych (OPZZ) of 19.09.2007 on the proposal of the Ministry of Labour and Social Policy to reduce the work permit fee <http://www.psz.praca.gov.pl/main.php?do=ShowPage&nPID=867686&pT=details&sP=CONTENT,objectID,873627> (accessed 12.11.2007). OPZZ claims that the reduction in the cost of the work permit will reinforce the treatment of foreign workers as a source of cheap labour.

27 As above.

28 The Ordinance of the Minister of Labour and Social Policy of 27th June 2007, amending the ordinance on

that the 3-month restriction placed on employment without a work permit for Ukrainian, Russian and Belarusian workers be abandoned, as it failed to meet the expectations of employers, given the need to train the workers first²⁹. Faced with what they declare to be ever-growing difficulties with worker recruitment, employers are actively pressuring the government to legislate less restrictive terms for the hire of foreign workers.

It is among the contrasting demands made by the social partners that the Ministry ordinances regulating the access of foreigners to the Polish labour market are issued. What is worth noting is the fact that the Ministry is not obliged to take these opinions into account, as the role played by the organizations concerned is merely consultative.

Apart from the Ministry of Labour and Social Policy, the Ministry of the Interior and Administration (MIA: Ministerstwo Spraw Wewnętrznych i Administracji) is indirectly interested in the issues relating to the employment of foreigners and is thus involved to some extent in the policy-making process. The MIA is the ministry responsible for migration policy matters, yet with the exclusion of those issues that touch on the employment of foreigners, as these fall within the competence of the MLSP. This division of competence forces both ministries to cooperate on labour immigration matters. The cooperation is not always without tension, for example, despite the MIA's declarations that it would welcome simplified legalisation procedures for people willing to work legally in Poland (G3PL), the MLSP's proposals to meet the needs of the labour market by allowing more labour immigration from the Far East were hindered by the MIA for reasons of security (G2PL, G3PL). This tension between the challenges of security and the needs of the economy, which are represented by the two ministries, will, in all probability, be a source of further clashes within government administration³⁰.

The recently established governmental Working Group on Migration (Zespół ds. Migracji) has become a forum for the presentation of these conflicting interests. The Group constitutes a consultative and coordinating body that gathers high-ranking officials from various Ministries and other selected central bodies with an interest in migration affairs, such as the Border Guard (BG: Straż Graniczna) and the Central Statistical Office³¹. A decisive role within the group was secured to the representatives of the Min-

work carried out by foreigners without the obligation to obtain a work permit [Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 27 czerwca 2007 r. zmieniające rozporządzenie w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę], *Dziennik Ustaw* 2007, No. 120, item 824.

29 The stance taken by the Confederation of Polish Employers on the draft Ordinance of the Minister of Labour and Social Policy on the fee relating to the submission of an application for a work permit for a foreigner [Stanowisko Konfederacji Pracodawców Polskich dotyczące projektu rozporządzenia Ministra Pracy i Polityki Społecznej w sprawie wpłaty dokonywanej w związku ze złożeniem wniosku o wydanie zezwolenia na pracę dla cudzoziemca], <http://www.psz.praca.gov.pl/main.php?do=ShowPage&nPID=867686&pT=details&sP=CONTENT,objectID,873627> (accessed 12.11.2007).

30 The MIA opinion on the proposed reduction of fees for a work permit highlighted the risk that the entire work permit procedure could be open to abuse and a channel for illegal immigration could be created if the fees were too low, <http://www.psz.praca.gov.pl/main.php?do=ShowPage&nPID=867686&pT=details&sP=CONTENT,objectID,873627> (accessed 12.11.2007).

31 Decree No. 12 of the Prime Minister, of 14th February 2007, establishing the Group on Migration / Zarządzenie Nr 12 Prezesa Rady Ministrów z dnia 14 lutego 2007 r. w sprawie utworzenia Zespołu do Spraw Migracji (unpublished), <http://kprm.gov.pl/bip/070216migracja.pdf> (accessed 12.11.2007).

istry of the Interior and Administration, as the Department of Migration Policy, which forms a part of this Ministry, holds coordinative competences in the field of migration policy. The aims of the Group are to initiate legal and institutional changes in the field of migration and an exchange of information between the ministries, as well as to monitor developments at the EU level³². In general, inter-agency cooperation within various government bodies in Poland is still in the early stages.

The main agencies involved in the implementation of government policy on the illegal employment of foreigners include the Border Guard (BG), the Customs Service (CS), and the National Labour Inspectorate (NLI: Państwowa Inspekcja Pracy).

In July 2007, the National Labour Inspectorate became the largest institution involved in the control of legality in the employment of foreigners. The institution has a tradition of over 80 years in the controlling of the employment law, with a special focus on the regulations for health and safety at work. However, the authority to control legality in the employment of foreigners, first established in 1995, was attached to various institutions and it was only in 2007 that this competence was passed to the National Labour Inspectorate.

Since 2003, the Customs Service has also had control over the legality of the employment of foreigners among its competences. This organization naturally focuses its activities on the tracking of illegal goods, which are often connected to illegal trade activities being carried out by foreigners.

The Border Guard has no competence to check the legality of employment, though it has the competence to check the legality of any foreigner's stay in Poland. Understandably, Border Guard officers encounter various cases of illegal work when checking the legality of a person's stay and thus the organization plays an important, yet indirect role in the system controlling work being carried out by foreigners.

Apart from government agencies, there are almost no organizations actively engaged in the policy on the illegal employment of foreigners. There are no NGOs specializing in foreigners' employment rights. The Helsinki Foundation for Human Rights, a major NGO specializing in the provision of legal advocacy for, and legal advice to, foreigners, admits that they seldom encounter employment-related problems (NGO1PL). The focus of the organization's engagement has been to liberalize access to labour market for selected categories of migrants; for example, it successfully lobbied for the regulations that entitle the spouse of a Polish national to employment without the obligation to obtain a work permit.

External factors have not significantly influenced Polish policy; EU influence has also been minimal, as this is not an area covered by Community regulations. Yet, some signs that Polish policy makers have been 'looking to the West' were revealed in the research. The National Labour Inspectorate admitted that the fines for illegal employment were

32 In Resolution No. 2 of 15th October 2007, the Group pointed to the need for the gradual facilitation of access to Polish labour markets for foreigners, as a result of labour shortages. Moreover, it stressed that the employment of foreigners must be accompanied by an effective monitoring system, as well as activities to combat illegal forms of employment.

raised after they had conducted research in other EU countries and found the Polish rates to be extremely low in comparison with the countries studied (I1PL). In contrast, in their attempt to reduce the work permit fees, the Ministry of Labour and Social Policy argued that they were extremely high in Poland and that the lowering of the fee was in line with the level of fees in most European countries³³. Also evident was the influence of the Schengen accession criteria, which made Polish politicians and government officials very cautious about giving the impression that Poland is easily accessible³⁴. Recourse to the Western European experience of massive illegal stays and employment, and the security challenges arising from this was also important to some of the respondents in the study (G3PL).

To sum up, several factors have proved to be important to the Polish policy for combating the illegal employment of foreigners. In the first place, the country's economic situation should be kept in mind. The high unemployment levels of the 1990s and the turn of century served as a justification for the very restricted access by foreigners to Polish labour market. This, combined with the labour market's need for cheap unskilled workers, resulted in large numbers of illegal seasonal or temporary workers from the East. The policy to combat the phenomenon was not effective and, in practice, included a tacit tolerance towards it.

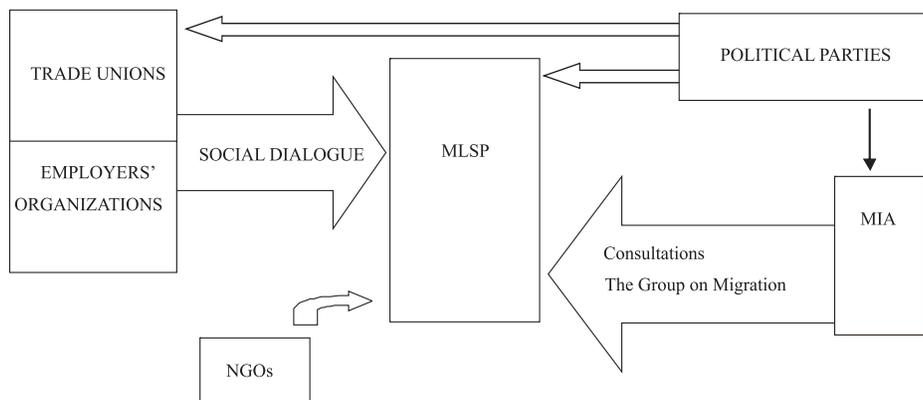
The policy was created by the government with its social partners acting in an advisory-only capacity. The social dialogue, however, served as a forum to present the conflicting views of the labour market held by the trade unions and employers' organizations. Government decisions underwent a gradual evolution from highly restrictive measures, in line with trade union arguments, to cautious steps towards liberalization that took better account of the employers' needs. However, the rather slow and reactive responses to changes on the labour market proved to be insufficient in terms of creating effective employment legalization, while emigration and economic growth after 2004 led to labour market deficiencies, especially in labour-intensive sectors such as agriculture and construction.

In general, just as with other sub-fields of migration policy, the way in which policy is made in the area of combating the illegal employment of foreigners in Poland tends to be administrative and dominated by bureaucracy. The role of the media and public opinion is of limited relevance and the opinions of the social partners are merely consultative in nature. Some influence on the part of political parties has been noted. However, in practice, the policy is created by government ministries in a state of some tension between the Ministry of Labour and Social Policy's cautious pro-market approach and the Ministry of the Interior's more security-orientated, and thus more protectionist, approach. The scheme of policy actors is presented in Figure 4.1.

33 Background and justification for the proposal of the regulation, <http://www.psz.praca.gov.pl/main.php?do=ShowPage&nPID=867686&pT=details&sP=CONTENT,objectID,873627> (accessed 3.12.2007).

34 "in the case of persons planning to arrive to Poland (...) a single declaration that they want to undertake self-employment would offer too easy an access to the Schengen area" (GIPL).

Figure 4.1: A scheme of policy actors in the field of combating the illegal employment of foreigners



Source: authors' extrapolation.

A very special sub-field of policy against the illegal employment of foreigners is the policy of combating the human trafficking. Although, as we stated in the introduction, human trafficking represents the most drastic form of exploitation and forms only a part of the continuum of exploitation, policy in this area is, in fact, shaped by agencies and under a far greater international influence than in case of general policy for the combating of the illegal employment of foreigners. Government policy in this area focuses on the prosecution of the crime and on the protection of the victims and is often carried out in close collaboration with NGOs. Under the provisions of article 253 of the Polish Penal Code, introduced in 1997³⁵, trading in human beings constitutes a crime. Depriving a person of freedom (article 189), subjecting them to unlawful menace (article 190) and procuring for prostitution (article 203 and 204) are also penalized. In these areas, Poland has been always very active in the international arena, adopting and ratifying the ILO Forced Labour Convention³⁶, the UN Palermo Protocol³⁷, and as an EU member, has implemented EU laws in the field³⁸. The crucial article, 253 of Polish Penal Code, states that a person who trades in human beings is subject to a penalty of at least 3 years imprisonment. However, the Penal Code does not itself specify what is to be understood as trade in human beings, and various problems have arisen with regard to judges' interpretation of this article (Ministry of the Interior and Administration, 2007; NGO2PL). Therefore, efforts have been undertaken in order to introduce the definition of trafficking directly into the Penal Code (Ministry of the Interior and Administration, 2007; NGO2PL).

35 Penal Code [Kodeks karny], *Dziennik Ustaw* 1997, No. 88, item 553.

36 Convention concerning Forced or Compulsory Labour, *Dziennik Ustaw* 1959, No. 20, item 122.

37 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, *Dziennik Ustaw* 2005, No. 18, item 160.

38 Council Framework Decision 2002/629/JHA of 19th July 2002 on combating trafficking in human beings; Council Directive 2004/81/EC of 29th 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.

Government engagement in the field is based on a very close collaboration with selected NGOs specializing in providing assistance to victims of human trafficking. La Strada plays the main role here, but Caritas, ITAKA and the Nobody's Children Foundation are also involved. La Strada has organized seminars and training for government officials, officers of the Border Guard, prosecutors, the police and judges. Moreover, protection programmes for the victims or witnesses of human trafficking practices is implemented by La Strada on the basis of an agreement between the organization and the Ministry of the Interior and Administration. All state authorities, including the Ministries, admit that they cooperate closely with La Strada, which serves only to reinforce its role and increases the dependence of the entire system of victim protection on this one NGO (Wiśniewski, 2007: 175).

In government administration, the leading role in combating trafficking in human beings is played by the Ministry of the Interior and Administration. It leads and coordinates the Group on the Combating and Prevention of Human Trafficking (*Zespół ds. Zwalczenia i Zapobiegania Handlowi Ludźmi*), established in 2004. The Group, which gathers representatives from various ministries and central agencies, as well as NGOs in the field, is intended to establish the direction to be taken by initiatives, coordinate cooperation at both the central and local level and elaborate and assess the implementation of national plans to combat and prevent human trafficking.

Since 2003, national plans for combating and preventing human trafficking have been set biannually. The current plan, for the years 2007–2008, accepted by the Government in April 2007, provides for a wide range of training for various institutions involved in the fight against human trafficking, improvements in the practical coordination of cooperation between the institutions and a screening of the law in order to improve current legal regulations and, especially, to introduce a more precise definition of human trafficking into Polish legislation³⁹.

4.3.2 Prevention of the illegal employment of foreign workers

Effective prevention of illegal hiring and illegal employment needs to be based on existing possibilities for lawful behaviour on the one hand, and on effective control and punishment mechanisms on the other. Moreover, a state can actively engage in the promotion of the desired social behaviour and actively persecute non-compliance with the law. The preventive role of punitive measures must thus be taken into account.

The system for the regulation of labour immigration to Poland is based on the work permit scheme. The system was designed with the primary aim of protecting the Polish labour market against the inflow of foreign labour. The main rule behind the establishment of the system was that employment of foreigners must be complementary to, and not competitive with, the employment of the native labour force. In consequence, the labour market test, a system whereby the employer must check the availability or other-

³⁹ National Programme to Combat and Prevent Trafficking in Human Beings 2007–2008 [Krajowy Program Zwalczenia i Zapobiegania Handlowi Ludźmi na lata 2007–2008], <http://www.mswia.gov.pl/portals/pl/390/2174/> (accessed 3.12.2007).

wise of a Polish, or, since 2004, an EU, candidate for the post, was made very demanding, requiring the employer to prove that he/she has actively tried to recruit a Polish or EU worker. A vacancy announcement in the local state labour office is considered insufficient in this regard⁴⁰. This is combined with the large number of documents the employer is obliged to submit in order to receive first the declaration that the work permit will be issued and then the permit itself. The same procedure for obtaining a work permit is provided for even if the potential employer is a physical, and not a legal, person. The work permit is granted only to a given employee for a limited period of time, and only covers a specified employer and a specified position. Therefore, the rigidity of the system may force even those foreigners who have obtained a work permit but are, even temporarily, delegated to another post within the company, into an illegal position. In fact, it is hardly possible to promote a foreign worker, as this would mean re-opening the work permit procedure. In terms of domestic services, the lack of a simplified route for employing a foreign worker makes it administratively costly and also discourages employers from legalizing their domestic staff.

Until recently, the high fiscal cost of the work permit, which required the potential employer to pay a fee at the level of the minimum monthly salary in Poland, also meant that legal hiring was even less economically beneficial, especially in the case of seasonal or short-term employment. However, in October 2007 the fees were significantly reduced⁴¹, which could be perceived as the first step towards making legal hiring within the work permit procedure more attractive to employers.

Nonetheless, despite the recent changes, overall, the high administrative cost of legal hiring which results from the work permit procedure, makes the system de-facto discouraging as regards the legal hiring of foreigners.

However, there is a group of foreigners who are excluded from the very possibility of applying for a work permit, namely asylum seekers. They are not allowed to work during the procedure reviewing their request for asylum, with the minor exception of cases where the procedure lasts for more than a year for reasons beyond the applicant's control. In such an event, the applicant can apply for a certificate confirming that the procedure has lasted for over a year. The certificate must specify the period of time expected for the refugee application proceedings to be completed. The applicant is entitled to enter the work permit procedure for that period of time only and in accordance with the general work permit rules⁴². In practice, asylum-seekers are thus excluded from the possibility of legal employment and any work or economic activity performed by them is illegal.

40 §3.2, Ordinance of the Minister of Labour and Social Policy of 21st July 2006 on the procedure and conditions for issuing a work permit to a foreigner [Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 21 lipca 2006 r. w sprawie trybu i warunków wydawania zezwolenia na pracę cudzoziemca], *Dziennik Ustaw* 2006, No. 141, item 1002.

41 Ordinance of the Minister of Labour and Social Policy of 17th October 2007 on the fee relating to the submission of an application for a work permit for a foreigner [Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 17 października 2007 r. w sprawie wysokości wpłaty dokonywanej w związku ze złożeniem wniosku o wydanie zezwolenia na pracę dla cudzoziemca], *Dziennik Ustaw* 2007, No. 195, item 1409.

42 Article 30a of the Act on Granting Protection to Aliens within the Territory of the Republic of Poland of 13th June 2003 [Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium

All in all, the work permit system, designed to regulate the inflow, in fact constitutes what is, to all intents and purposes, a blockade against legal employment and thus prompts many employers to illegal hiring, as it does not constitute a real alternative to this practice. In general, the difficulties imposed by the work permit system have been vividly highlighted by the media⁴³ and confirmed by experts (NGO1PL).

Given all these factors, it is not the work permit system that regulates legal economic immigration, but the numerous exceptions from that system which constitute the channels of access to the Polish labour market. At the beginning of the 1990s, only foreigners with refugee status or a permanent residence permit were excluded from the obligation to obtain a work permit. Special exclusions were also provided for academics and researchers employed at Polish universities and the Polish Academy of Sciences. Over time, numerous other exceptions to the general work permit obligation were introduced. They encompassed, for example, EU nationals and members of their family, long-term EU residents, people enjoying humanitarian protection, the spouses of Polish nationals, foreign language teachers, but only those teaching their native language, and full-time students during the period of the summer vacation⁴⁴.

From the perspective of combating the illegal employment of foreigners, however, none of these exceptions were as important as the changes initiated by the Ministry of Labour and Social Policy as recently as 2006. Since that year, the nationals of Poland's neighbouring countries have been allowed to undertake seasonal, employment in agriculture for a period of up to three months⁴⁵. The regulation only came into force in September 2006, after labour needs in agriculture had peaked. In 2007, this regime was extended to all employment sectors and a special, simplified procedure for registration at labour offices was introduced⁴⁶. Under this regulation, Ukrainian, Russian and Belarusian workers were allowed to work in Poland for no longer than three consecutive months within a six-month period. In 2008, a new Ministry ordinance allowed for a period of work not exceeding 6 consecutive months within a year⁴⁷. The employer is required to issue a cer-

Rzeczypospolitej Polskiej], *Dziennik Ustaw* 2007, No. 120, item 818.

43 K. Jaroszyńska, "Czekają od nocy" [Waiting from the small hours], *Życie Warszawy* 8.11.2007; J. Wilczak, "Bratnia pomoc" [A helping hand], *Polityka* 24.03.2007. Wywiad z Markiem Frydrychem; *Biuletyn Migracyjny* No. 13/2007.

44 In March 2008, the Act on the Polish Charter [Ustawa z dnia 7 września 2007 r. o Karcie Polaka], *Dziennik Ustaw* 2007, No. 180, item 1280, came in force. It stipulates that people of Polish origin living in the former Soviet Union will be allowed to apply for the Polish Charter, a special certificate confirming their Polish nationality that will entitle them, for example, to work in Poland without the obligation to apply for a work permit. The results of the law are unknown, as it is unsure how many people will apply for, and how many will receive, the Charter.

45 The Ordinance of the Minister of Labour and Social Policy, of 30th August 2006, on work carried out by foreigners without the obligation to obtain a work permit [Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 30 sierpnia 2006 r. w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę], *Dziennik Ustaw* 2006, Nr 156, item 1116.

46 The Ordinance of the Minister of Labour and Social Policy, of 27th June 2007, on work carried out by foreigners without the obligation to obtain a work permit [Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 27 czerwca 2007 r. zmieniające rozporządzenie w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę], *Dziennik Ustaw* 2007, No. 120, item 824.

47 The Ordinance of the Minister of Labour and Social Policy, of 29th January 2008, amending the order on work carried out by foreigners without the obligation to obtain a work permit [Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 29 stycznia 2008 zmieniające rozporządzenie w sprawie wykonywania

tificate of intent to employ a foreigner and register the certificate in the district (*powiat*)⁴⁸ labour office. Based on this registration, Ukrainian, Belarusian and Russian workers can apply in their country of origin for a working visa. These opportunities, in fact, constitute legal labour migration schemes which have been implemented in response to the considerable illegal employment of workers from the neighbouring countries. However, as the law has only recently come into force, its regularizing effects are not yet known.

The border control system could be also treated as an element for the prevention of illegal stays and of illegal work. According to the Act on Aliens, any person may be forbidden entry and their visa can be invalidated if the foreigner does not submit the relevant documents verifying his/her declared purpose of stay⁴⁹. This legal instrument could be perceived as a barrier to the foreigners entering Poland as declared tourists and then becoming involved in illegal work during the validity period of the tourist visa. According to the Border Guard, about 50 thousand people are refused entry to Poland annually (I2PL)⁵⁰. Consequently, “some of the cases [of illegal employment] are already eliminated at the border” (I2PL).

Access to adequate information on the risks connected with illegal employment plays a crucial role in its prevention. Information campaigns are often used in this field with the aim of raising social awareness. This information is sometimes targeted at specific groups, for example, the groups at the highest risk of engagement in illegal employment, or at employers, detailing the consequences of illegal hiring.

Information campaigns directed at foreigners and dealing with the risks associated with illegal work have not yet taken place in Poland⁵¹, with the exception of specific anti-trafficking information campaigns, which are usually run by NGOs. Among these organizations, La Strada took the initiative and engaged in a varied range of activities in the field of public information. According to La Strada’s mission statement, they aim to give the problem of trafficking a visible profile in terms of public opinion, policy-makers and potential victims. Thus, apart from support for victims of trafficking, La Strada has organized a range of training courses for judges, Border Guard officers, policemen and other officials who may encounter cases of human trafficking. Moreover, campaigns have been targeted specifically at the risk groups, mainly young women, with special

pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę] *Dziennik Ustaw* 2008, No. 17, item 106.

48 Poland’s second, intermediary level of regional government.

49 Article 21.4 and 48.2 of the Act on Aliens of 2003, and as further amended, *Dziennik Ustaw* 2006, 234, item 1694. In the earlier versions, this paragraph was worded: “(...) circumstances connected with his/her entry into the territory of the Republic of Poland demonstrate that the purpose of his/her entry is other than the one declared, *Dziennik Ustaw* 2003, No. 128, item 1175.

50 “If (...) a person has passport, a visa and financial means, but the visa is for specified purpose, say a CO2 visa for the purpose of paying a visit and, at the same time, we discover a work uniform, some addresses (...) than he should have a visa containing the right to work. If he has a visa for the purpose of visit and has the intention of working, then we can refuse entry (...).” (I2PL).

51 Obviously, the new opportunities for legal employment without the need for a work permit were announced by the Ministry and highlighted by the media. Branches of employers’ organizations also engaged in the campaign promoting the new regulations, by passing information to their members (Związek Sadowników RP, a branch of the fruit farmers’ organization). The same organization promised its active support to any further liberalization measures (E2PL).

information leaflets at the border, or in the Polish consulates in Ukraine (NGO2PL). The government has actively supported these information campaigns and has based its own information efforts and awareness-raising training of various officials on close collaboration with NGOs⁵². Apart from La Strada, Caritas and the Nobody's Children Foundation have also engaged in the distribution of information leaflets on issues relating to human trafficking. In general, it must be acknowledged that the information campaigns have produced positive results and, according to public opinion surveys, social awareness on human trafficking practices has risen (CBOS, 2005).

In general, the system for the prevention of illegal employment of foreigners in Poland is weak. In certain sectors, the illegal employment of foreigners is relatively high, and it is estimated to exceed their legal employment many times over. One of the reasons for this has been the restrictive work permit system; meanwhile, the recent incentives to encourage legal hiring are insufficient. Although border controls play a role in filtering people heading into Poland with the aim of working illegally, this only addresses the matter to a small extent. There have been no information campaigns on the risks connected with illegal employment and recently the main preventive measures have been focused on preventing trafficking in human beings.

All in all, the preventive efforts have not overcome the economic incentives to illegal work. The cost of labour is extremely high in Poland, regardless of the period of work involved. No legal category of seasonal worker exists in Poland. Thus, hiring a worker, be they a Polish national or a foreigner, for 2 or 3 months, entails the same tax and social security contributions as in the case of permanent employment, with no exemptions. The demand for a cheap and flexible labour force in some sectors of economy, especially agriculture and construction, is therefore met by foreigners who are interested in maximizing their short-term profit and are also often thus not interested in legal work.

4.3.3 Protection against the exploitation of foreign workers

Due to the relative novelty of the phenomenon of employment of foreigners in Poland, and due to the very low numbers of legally employed foreigners, no special system for the protection of foreign workers' rights has been established. Instead, they are covered by the general protection offered to all workers in Poland by the Labour Code. The employment conditions and non-discrimination clauses cover all workers hired by Polish employers or posted to Poland by foreign EU or non-EU companies. If a worker claims his/her rights are violated, then he/she may turn to the trade unions, or to the National Labour Inspectorate (NLI), the primary state agency controlling labour rights. NLI inspectors can make inspections in companies, fine employers in case of minor shortcomings, or take the case to court in the event of more serious violations of the labour code. Additionally, Labour Courts exist in Poland as a dedicated part of the general judicial system, specializing in matters of work relations and labour rights. In general, the system

52 The National Programme to Combat and Prevent Trafficking in Human Beings 2007–2008 [Krajowy Program Zwalczenia i Zapobiegania Handlowi Ludźmi na lata 2007–2008]. <http://www.mswia.gov.pl/portals/pl/390/2174/>.

of protection of labour rights is well-developed, mostly due to the very generous system for the protection of workers' rights which was developed under the communist regime.

The protection of very basic labour rights, such as the right to payment, is theoretically also offered to foreigners who are illegally employed. Even if the foreigner has no right to work in the form of a work permit, the employer cannot violate his rights regarding, for example, payment (I1PL). If such a violation is uncovered by National Labour Inspectorate inspectors, the employer is obliged to make all the necessary payments to the employee. However, there are no data as to whether legally or illegally employed foreigners use this system to defend their labour rights. Illegally employed foreigners always risk deportation, or a decision obliging them to leave the territory of Poland if they openly declare themselves and this probably constitutes an important factor prohibiting them from standing up for their labour rights. The lack of any opportunity to regularize a job after even a very short spell of time working illegally makes the law very tough, and, sometimes, means that it is operating contrary to public interest.

Illegally employed foreigners are the most vulnerable to all forms of exploitation. Occasional press reports⁵³ and qualitative studies among Ukrainian and Vietnamese migrants to Poland confirm the existence of various forms of exploitation of illegally employed foreigners (Frelak and Bieniecki, 2007; Koryś and Kloc-Nowak, 2006). Yet the scale of exploitation is hard to estimate. The Ukrainians claim that, in their opinion, exploitation, in particular, the non-payment of wages, is a relatively scarce phenomenon (Frelak and Bieniecki, 2007: 52). Among the Vietnamese, who are employed by their compatriots in the majority of cases, some forms of exploitation were revealed by the research; however, in only one case was an employer involved in the use of forced labour taken to court and sentenced. The researchers' experience demonstrated that the closed nature of this particular ethnic group makes it very hard to conduct research effectively, especially on such sensitive issues (Koryś et al., 2007: 45).

Human rights activists anticipate that the exploitation of foreigners may increase with the increase in inflow of foreign workers from Asian countries. They argue that different cultures, with different standards of labour rights, might facilitate what, in European terms, is held to be the exploitation of foreign workers by their foreign bosses (NGO1PL).

Special protection is offered to victims of trafficking. A programme, financed by the Ministry of the Interior and Administration and implemented by La Strada, includes psychological, medical and material support to victims of trafficking. A 2-month visa for a legal stay in Poland provides presumed victims with a period of reflection during which they may decide whether to cooperate with the police and the prosecution. Special coordinators in the police force and consultants in the public prosecutors' offices are involved in the programme, creating a relatively wide and well-developed institutional infrastructure for identifying and helping the victims of trafficking. However, to date, only 12 victims in 2006 and 15 in 2007 took advantage of this programme. The programme represents the good practice of the National Referral Mechanism, a co-op-

53 Lewińska A., "Praca Ukraińców na czarno plagą w Polsce" [Black market Ukrainian workers plague Poland] *Gazeta Wyborcza* 27.04.2007; P. Pytlakowski, "Zysk z wyzysku" [Profit from abuse]. *Polityka* 16.12.2006.

erative framework through which the state authorities fulfil their obligations to protect and promote the human rights of people who have been trafficked, co-ordinating their efforts in a strategic partnership with civil society (OSCE/ODIHR, 2004). All the beneficiaries of the programme were involved in forced prostitution; there were no victims of forced labour of any other kind (G3PL). However, the programme's potential has yet to be fully realized, as, to date, too few victims have decided to cooperate (NGO2PL).

4.3.4 Punitive measures: the system of control and sanctions

The system of control and sanctions against illegal employment is relatively well-developed in Poland. The system of sanctions cannot be regarded simply as a punitive measure, since it plays both a preventive and a protective role simultaneously, by discouraging employers from illegal hiring and discouraging foreigners from undertaking illegal employment.

The system was developed in the 1990s, along with the new challenges in the migratory situation of Poland. It was only in 1994 that the first institutions were granted the competences allowing them to verify the legality of foreigners' employment; at the same time, the two-track system of sanctions, including financial sanctions for employers and employees, was introduced. Following several institutional changes, two state agencies currently have the competence to control the legality of employment of foreigners; these are the National Labour Inspectorate and the Customs Service.

The National Labour Inspectorate (NLI) has only been an institution authorized to control the legality of the employment of foreigners since July 2007. Previously, the special divisions within the voivodship offices, known informally as 'the labour police', were responsible for controlling the legality of employment⁵⁴. The rationale for delegating these competences to the National Labour Inspectorate was to concentrate all control competencies in the labour rights field in one institution. However, one of the first legal problems to be solved in the near future involves the difficulties NLI inspectors encounter in carrying out inspections with regard to private individuals involved in illegal hiring. As described in section 2, private households create a huge market for the illegal employment of foreigners in Poland. At the same time, according to the Act on the National Labour Inspectorate, employers and entrepreneurs, for whom physical persons, including the self-employed, carry out work⁵⁵, are subject to control by the National Labour Inspectorate. In a case where a private individual is suspected of illegal hiring, the NLI inspectors are obliged to turn first to the courts in order to confirm the existence of an employment relationship and only then can they carry out an inspection.

Another state organ able to control the legality of foreigners' employment is the Customs Service (CS). The Custom Service's primary aim is to exercise customs control, counter-

54 Along with the institutional changes, staff transfers were carried out between the institutions, with the legality inspectors who, until recently, were employed in the voivodship offices, joining the staff of the NLI staff; article 107 of the Act on the National Labour Inspectorate of 13th April 2007 [Ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy], *Dziennik Ustaw* 2007, No. 89, item 589.

55 Article 13 of the Act on the National Labour Inspectorate of 13th April 2007 [Ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy], *Dziennik Ustaw* 2007, No. 89, item 589.

act custom fraud and fight smuggling. Its competence to control the legality of employment of foreigners results from practise, because, in tracing illegal goods, such as tobacco products on which duty has not been paid, they often encounter foreigners involved in illegal employment or trade activities by, for example, dealing in such goods at bazaars. Since 2003, Customs Service officers have had the authority to check the legality of employment and, since 2007, the scope of their authorities has been better defined and includes, for example, the right to carry out an inspection with regard to a private individual⁵⁶. This latter competency arose from years of occurrences, where CS officers came across foreigners involved in various economic activities, mostly trade, yet had difficulty in proving the existence of the employment relationship. Consequently, they are now able to carry out an inspection in regard to any person they encounter during the course of their duties.

Generally speaking, the level of sanctions imposed on employers involved in illegal hiring used to be rather low in Poland in comparison to EU levels. Recently, however, the fines were raised in order to correspond more closely to the levels of fines in other EU countries (I1PL). Currently, the minimum fine for employers caught in illegal hiring is PLN 3000, which is approximately EUR 833, a sum approximately three times the minimum monthly salary in Poland⁵⁷. This is rather a high fine in the case of employers hiring a single worker illegally for a very short time. On the other hand, in some situations where many illegal employees have been working for a longer period of time, the same sanction definitely represents a sum which is lower than the profits the employer can expect to make as a result of the illegal hiring. Consequently, illegal hiring can be profitable, even in the case of its being discovered.

Apart from financial sanctions, provisions are also made for other administrative sanctions to be levied against employers involved in illegal hiring. An employer convicted of the illegal hiring of foreigners may not apply for a work permit for any foreigner for a period of one year, so is excluded from the legal hiring of foreigners during that time⁵⁸. However, in Poland, no black list exists that would, for example, entail the exclusion from tendering for public procurement contracts in the case of employers caught in the illegal hiring of foreigners⁵⁹.

From the outset, the financial sanctions to be imposed on employers have been accompanied by those to be imposed on illegally employed foreigners. The aim is to discourage foreigners from undertaking illegal work and thus render the system for preventing the inflow of foreign labour more secure (I1PL)⁶⁰. Currently, a foreigner caught in il-

56 Amendments to the Act on the Customs Service were made in article 100 of the Act on the National Labour Inspectorate [Ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy], *Dziennik Ustaw* 2007, No. 89, item 589.

57 As of 1st January 2008, the minimum monthly payment is 1126 PLN.

58 §4.1 point 4 and §4.3 point 3 of the Ordinance of the Minister of Labour and Social Policy on the procedure and conditions for issuing a work permit to a foreigner [Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 21 lipca 2006 r. w sprawie trybu i warunków wydawania zezwoleń na pracę cudzoziemca], *Dziennik Ustaw* 2006, No. 141, item 1002.

59 The Act on the Law on public procurement of 29th January 2004 [Ustawa z dnia 29 stycznia 2004. Prawo o zamówieniach publicznych], *Dziennik Ustaw* 2006, No. 164, item 1163 (and as further amended).

60 It must be noted that Polish law also provides for the imposing of financial sanctions on Polish nationals, registered as unemployed and undertaking employment without notifying the local labour office, and on

legal employment can be punished with a minimum fine of PLN 1000, approximately EUR 277. Moreover, his/her work permit, or the declaration that a work permit will be issued, is waived by the regional governmental representative, the Voivod⁶¹.

Additionally, an expulsion order or obligation to leave the territory of Poland is issued. Pursuant to the law, the decision on expulsion is issued if the foreigner has carried out work contrary to the Act of 20th April 2004 on the Promotion of Employment and Labour Market Institutions, or has undertaken any other economic activity in violation of the laws in force in Poland⁶². The decision on expulsion is issued by the Voivod, *ex officio*, or at the request of the competent authorities, including the Border Guard, the Custom Service and the Police. The decision on expulsion must specify the time limit within which the foreigner must leave Poland; however, this may not exceed 14 days. It may also specify the route and the place where the border crossing should be made and may also oblige the foreigner to stay in a designated place until the execution of the decision (article 90 of the Act on Aliens⁶³). The foreigner can be escorted to the border if he/she does not comply with the time limit for leaving the territory of Poland voluntarily⁶⁴. In general, the costs of expulsion are borne by the foreigner. However, if the expulsion order is issued in relation to illegal employment, it is the employer who should cover all the costs relating to the execution of the expulsion decision⁶⁵. In practice, it has only been possible to exact the costs of expulsion effectively from employers since July 2007, when appropriate tariffs were introduced (I2PL).

If the circumstances of the case indicate that the foreigner will leave Poland on a voluntary basis, an obligation to leave the territory of Poland may be issued instead of an expulsion order⁶⁶. The foreigner is then obliged to leave Poland within 7 days. In order to issue such a decision, there must be positive factors making it very probable that the foreigner will leave the country without being forcefully expelled (I2PL). The foreigner should have a passport, and the means to make the journey. An obligation to leave Poland may be issued by commanding officers of the police force or Border Guard⁶⁷. An expulsion decision is issued against foreigners who do not fulfil the obligation to leave Poland on a voluntary basis.

their employers – article 119, the Act on the Promotion of Employment and Labour Market Institutions [Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy], *Dziennik Ustaw* 2004, No. 99, item 1001. However, in a case of employment without a contract of employment, only the employer is punished and no sanctions are imposed on the employee.

61 Article 88 (12) of the Act of 20th April 2004 on the Promotion of Employment and Labour Market Institutions [Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy], *Dziennik Ustaw* 2004, No. 99, item 1001.

62 Article 88 (1) of the Act on Aliens of 13th June 2003 (and as further amended) [Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach]. *Dziennik Ustaw* 2006, 234 item 1694.

63 The Act on Aliens of 13th June 2003 [Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach]. *Dziennik Ustaw* 2006, Nr 234, item 1694 (and as further amended).

64 Article 95 of the Act on Aliens of 13th June 2003 [Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach]. *Dziennik Ustaw* 2006, Nr 234, item 1694 (and as further amended).

65 Article 96 (4) of the Act on Aliens of 13th June 2003 [Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach]. *Dziennik Ustaw* 2006, Nr 234, item 1694 (and as further amended).

66 Article 97 of the Act on Aliens of 13th June 2003 [Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach]. *Dziennik Ustaw* 2006, Nr 234, item 1694 (and as further amended).

67 Article 98 of the Act on Aliens of 13th June 2003 [Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach]. *Dziennik Ustaw* 2006, Nr 234, item 1694 (and as further amended).

Data on foreigners who are issued with a decision on expulsion, or the obligation to leave the territory of Poland, are stored in the index of aliens whose residence in Poland is undesirable⁶⁸. Foreigners recorded in the index are banned from access to Poland⁶⁹. The names of foreigners issued with a decision on expulsion are placed in the index for 3 or 5 years, whereas foreigners issued with an obligation to leave the territory of Poland are registered there for only one year⁷⁰.

There are selected groups of foreigners who, by virtue of the law do not face the risk of expulsion:

- persons with a permit to settle (article 88 (2) of the Act on Aliens);
- persons holding a long-term resident's EC resident permit (article 88 (2), Act on Aliens);
- the spouse of a Polish national or of the foreigners specified under points a) and b) (article 89 (1), Act on Aliens);
- persons applying for refugee status (article 89(1), Act on Aliens);
- persons who may be granted a permit for a tolerated stay (article 89 (1), Act on Aliens).

However, although if they are caught in illegal employment, people applying for refugee status are not sanctioned with expulsion for the duration of the asylum procedure, they do face other less formal consequences. The fact of having undertaken employment may be interpreted as an indication of having had economic, rather than humanitarian reasons for coming to Poland. In the end, illegal work can lead to a negative decision regarding status⁷¹.

To sum up, the control and inspection procedures, as well as the system of sanctions, are relatively well-developed in Poland. Following years of institutional changes, all competence for control in the field of labour rights were concentrated in one institution, namely the National Labour Inspectorate. The fact that the same, even wider competences have also been placed in the hands of Custom Service officers does not necessarily mean the overlapping of control. In practice, the work carried out by these two institutions targets different sectors of illegal work in general, with National Labour Inspectorate inspectors primarily controlling companies, factories and other work places, while the Custom Service officers mostly target the bazaars and their various forms of illegal economic activity. What remains beyond either institution's control is the household sector, despite formal Custom Service competence in that area.

The system of sanctions, targeting both the employer and the employee and entailing both financial and administrative sanctions should be judged as being rather severe. However, when judging its effectiveness, it is vital to look not only at the formal sanctions themselves, but also at the system by which they are implemented (see section 4.4.1).

68 Article 128 of the Act on Aliens of 13th June 2003 [Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach]. *Dziennik Ustaw* 2006, Nr 234, item 1694 (and as further amended).

69 Article 21 of the Act on Aliens of 13th June 2003 [Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach]. *Dziennik Ustaw* 2006, Nr 234, item 1694 (and as further amended).

70 Article 128 of the Act on Aliens of 13th June 2003 [Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach]. *Dziennik Ustaw* 2006, Nr 234, item 1694 (and as further amended).

71 E-mail correspondence with an NGO lawyer involved in providing legal assistance to asylum-seekers.

The apparatus of control and sanction provided for the fight against human trafficking must be discussed separately. People involved in activities connected with human trafficking face criminal charges and imprisonment for no less than 3 years. Sanctions are also provided for other related, penalized crimes; imprisonment of up to 5 years for depriving another person of their freedom and up to 10 years if this was combined with great torment, while unlawful menace carries a prison sentence of up to 2 years and procurement entails a sentence of up to 10 years⁷².

As in the case of any crime, the law enforcement authorities, the police and the public prosecutors are the main state organs involved in combating human trafficking. Special coordinators and teams to combat this were established in every Police Headquarters at voivodship level. Their main aim is to ensure the implementation of the rules stipulated in the specific procedures laid down to be followed by law enforcement bodies in a case of human trafficking (“Algorytm postępowania funkcjonariuszy organów ścigania w przypadku ujawnienia przestępstwa handlu ludźmi”)⁷³. The teams also carry out reconnaissance and monitor places of potential risk. The team members participate in various training programmes and are involved in international police cooperation in the field. In addition to the voivodship teams and coordinators, in September 2006 the Central Team for Combating Trafficking (Zespół ds. Walki z Handlem Ludźmi) was established and based at the General Police Headquarters. This team coordinates and supervises the activities of the coordinators and teams in provincial police headquarters. Analogically to the structures within the police force, there are also special officers in the Border Guard, who are responsible for ensuring that the special procedure is implemented if a case of human trafficking case is uncovered.

To sum up, the state law enforcement bodies are involved in the fight against human trafficking in Poland and, in order to improve their performance, special organizational structures specializing in cases of human trafficking have been established.

4.4 Policy evaluation: In search of best practices

The aim of this section is to examine policy implementation (4.4.1), in order to evaluate the efficiency of preventive, protective and punitive measures (4.4.2) with a view to identifying best practices (4.4.3).

4.4.1 Policy implementation – how the system really works

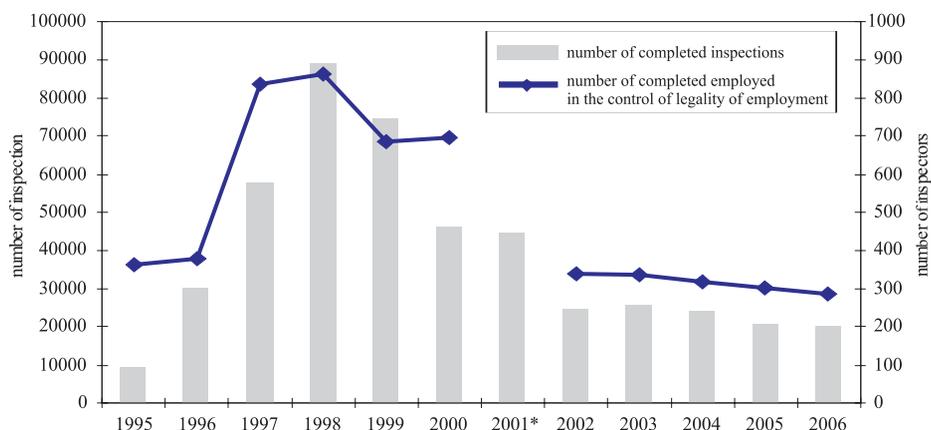
Poland is a unitary country; national policy is therefore developed at government level and then implemented by various country-wide institutions, with little or no local variety in terms of policy design or regulations. Thus, in principle, the implementation of policy in the field under analysis in this report should not display local diversification.

72 Articles 253, 189, 190, 203 and 204 of the Polish Penal Code [Kodeks karny], *Dziennik Ustaw* 1997, No. 88, item 553.

73 <http://www.policja.pl/portal.php?serwis=pol&dzial=303&id=5154&search=306117>

As access to Polish territory has, in general, been relatively easy and it has been possible for many migrants willing to work to enter and stay legally on tourist visas, the key element in the fight against the illegal employment of foreigners has always been control of the workplaces. It is only by frequent and effective inspections that illegal workers can be detected and the readiness of employers to employ illegally be diminished. However, the system for controlling the legality of employment has undergone repeated reorganization, which seems to have had a negative impact on its efficiency. In 1999, the inspectors involved in the field were transferred from the voivodship labour offices to the district (*powiat*) authorities, which dispersed the human and financial resources and reduced the number of cases of illegal foreign workers being uncovered (Okólski, 2000: 22). Between 2001 and 2002, the services were transferred back to the regional level, which required the investment of a great deal of time and effort in initial reorganization and training and led to a further reduction in the number of inspections conducted that year (Zawadzka and Zarański, 2003: 205). The services have not increased the number of inspections; on the contrary, their number has been decreasing (Figure 4.2).

Figure 4.2: Inspection on the Legality of Employment in Poland, 1995–2006



Remarks: In 2001, as a result of reorganization, no data on staffing was collected.

Source: Ministry of Labour and Social Policy, 2007: 7, 37.

The inspections are unevenly distributed between the regions; in 2006, their number varied from 298 in Opolskie to 2294 in Mazowieckie (Table 4.5). The variation is even greater as regards the number of recognized cases of illegal employment of foreigners; while in Lubelskie there were 765 such cases, the highest number of incidents in the country, in Lubuskie there were none, despite a large number of inspections. Podkarpackie, a voivodship neighbouring on Lubelskie had only 14 recognized cases, one of the lowest incident rates in Poland. Given that the two regions are located on the Eastern border, such a difference in scale is rather improbable. However, with a similar number of inspectors, Lubelskie completed almost two times as many inspections as Podkarpackie. This comparison shows how the density and effectiveness of control operations differ between regions.

Table 4.5: Effectiveness of legality of employment inspections in Poland, 2006

Region (województwo)	Number of completed inspections	Number of inspectors	Number of completed inspections per 1 inspector	Employers recognized as employing illegally	Recognized cases of illegally employed foreigners
Dolnośląskie	1855	29	64	565	49
Kujawsko-Pomorskie	902	17	53	228	17
Lubelskie	1936	24	81	964	765
Lubuskie	1434	14	102	124	0
Łódzkie	1195	24	50	260	48
Małopolskie	747	16	47	136	53
Mazowieckie	2294	27	85	494	281
Opolskie	298	9	33	87	4
Podkarpackie	1081	22	49	245	14
Podlaskie	929	9	103	197	304
Pomorskie	1539	13	118	120	10
Śląskie	1312	20	66	237	19
Świętokrzyskie	1030	11	94	350	29
Warmińsko Mazurskie	751	11	68	355	35
Wielkopolskie	1746	26	67	327	40
Zachodniopomorskie	1025	16	64	320	50
Poland – total	20074	288	70	5009	1718

Source: Ministry of Labour and Social Policy, 2007: 10, 15, 26.

Due to the transfer of the control of the legality of employment from the voivodship administration to the National Labour Inspectorate and its regional structures, 2007 was an atypical year with regard to inspections of the legality of foreigners' employment. The National Labour Inspectorate planned to achieve the previous year's ratio of 10 thousand inspections in six months. Despite this, it was late autumn before they were able to launch operations (I1PL); employment of foreigners, however, is usually most frequent in the summer, during the harvest.

Within the structure of the control system, the principal institution, the National Labour Inspectorate, has a long tradition of monitoring issues relating to labour conditions and workers' rights. The Inspectorate has a specific inspection methodology in order to guarantee the quality and consistency of the procedure throughout the country; it also possesses experience with regard to such key areas as the gaining of knowledge in advance, in order not to conduct inspections randomly, and cooperation with other institutions (I1PL). It is perceived as an institution well-qualified and equipped to control both labour conditions and the legality of employment (G3PL). In most cases, its inspectors deal with unsafe working conditions, or the illegal employment of Polish nationals, mainly involving people working without an employment contract. Special focus is also placed on cases where registered unemployed people fail to fulfil the obligation to notify the state labour offices of having undertaken employment.

National Labour Inspectorate inspections are subject to special procedures that guarantee the quality and consistency of control measures throughout the country. In particular, the inspectors' competences during an inspection are specified in detail. They include free and full access to any and every premises occupied by the company under inspection, the right to interrogate all or any of the people concerned, which includes the right to conduct an ID check⁷⁴, and so forth. Although the procedure allows employers to be given advance notification of the inspection, this is never done in the case of employment legality inspections, as such notification would render the control useless (I1PL). If irregularities in the legality of employment are uncovered, the inspector takes the case to court, and, in the case of foreigners, informs the police or the Border Guard if residence regulations have also been violated⁷⁵.

In the previous section, mention was made of the fact that one of the key features of the control of the legality of employment in Poland is the cooperation between institutions with complementary competences. This cooperation is not limited to the exchange of information, but usually takes the form of joint inspections. The principal factor leading to this practice is the fact that neither the National Labour Inspectorate nor the Customs Service have been granted the competence to apprehend a person revealed as an illegal worker. There are also security reasons behind the practice of cooperation; police and Border Guard officers, eligible to carry a weapon, protect the National Labour Inspectorate inspectors or Custom Service officers against possible assault or other aggressive behaviour on the part of the people under inspection (I3PL; I1PL). In 2007, having been granted competences in the field of employment legality, the National Labour Inspectorate then had to establish agreements with the Border Guards and the Customs Service; these agreements are discussed in detail below. At the same time, the Inspectorate had to modify its mode of cooperation with the Social Insurance Institution (Zakład Ubezpieczeń Społecznych) and the fiscal authorities (Urząd Skarbowy) in order to include the illegal work being carried out by foreigners. However, the social security and fiscal authorities do not participate in joint inspections.

In practice, although it is authorized to control legality in the employment of foreigners and in their economic activities, the Customs Service, does not perform independent inspections. The most important obstacle is the fact the Customs Service has no authority to apprehend people recognized as violating the law; for this reason, the Service needs to cooperate with the police or the Border Guard. The necessity of coordinating activities with a partner institution is sometimes a problem; staff of the Customs Service themselves point out that they often receive denunciations and undertake unscheduled inspections in response. Although it is only officers of the Custom Service who have the power to conduct an inspection of private individuals employing foreigners illegally, this competence is not exercised in practice. The institution's resources are too limited, especially in terms of staff, to carry out inspections of private households on a large scale (I3PL). Although the Customs Service has the formal competence to control the domestic services sector, it seems to have little interest in entering this field and only

74 Articles 23–26 of the Act on the National Labour Inspectorate of 13th April 2007 (Ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy), *Dziennik Ustaw* 2007, No. 89, item 589.

75 Article 37 of the Act on the National Labour Inspectorate of 13th April 2007 (Ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy), *Dziennik Ustaw* 2007, No. 89, item 589.

exercises control over work and economic activity related to illegal goods and trade, the Service's main object of interest.

The Border Guard have so far only played an indirect role in controlling the legality of foreigners' employment. This institution also acts on the basis of planned operations and thus joint inspections are scheduled in conjunction with the Customs Service; since July 2007, they have also been set up jointly with the National Labour Inspectorate. Control by intervention is also carried out, in which case the partner institution responsible for illegal employment is informed and might launch their procedure on the basis of the documentation with which they have been provided. The representative of the Border Guard interviewed as part of this research found the joint inspections to be positive, in general terms, but "time-consuming and too complicated". The most "natural" partner for the Border Guard is the Customs Service, as "they work together on the border" (I2PL). The Border Guard, as an institution, finds itself capable of controlling the legality of employment independently and is working on gaining the power to do so. However, the representative of the Ministry of the Interior and Administration interviewed for the purposes of the study considers joint controls to guarantee better quality, as each institution is specialized and trained in a well defined domain, such as the legality of a person's stay, the legality of employment, working conditions and so forth (G3PL).

Another institution involved in carrying out inspections related to the legality of employment of foreigners is the police force. This institution is perceived by the National Labour Inspectorate as being of great assistance, primarily because police officers provide protection for inspectors. Police officers are also useful in facilitating the conducting of an inspection, as employers might not expect an inspection of employment legality when contacted by the police (I1PL).

The National Labour Inspectorate, the Border Guard and the Customs Service undertake inspections on the basis of annual plans, or as an intervention after receiving a complaint or denunciation. The National Labour Inspectorate prepares their annual inspection plans according to previously selected criteria, issues and sectors. In 2007, illegality issues were not included in its plan; however, they do form a part of the plan for 2008 (I1PL). The plans are not made public in advance; their purpose is to allow the institutions involved to coordinate their activities and allocate their staff appropriately. In the case of scheduled joint inspections, each institution is responsible for a different aspect. First, border guards or police officers verify whether or not the foreigners concerned have valid documents and, if required, visas. The labour inspectors then verify the documents concerning the foreigners' employment. Meanwhile, in a case where the inspection involves goods, for example, in a market, the Customs Service officers investigate whether or not those goods have been subject to the proper taxation. If the foreigners are found to have violated the law, they are apprehended by either the police or the Border Guard.

The procedure is more complicated in the case of unplanned interventions. According to the Border Guard officer interviewed, the Border Guard sometimes operates alone and, if they suspect the existence of illegal employment, this is documented and then sent to the National Labour Inspectorate, where steps are taken to verify it (I2PL). Not waiting

for the intervention of the National Labour Inspectorate might lead to situations where an accusation of illegal employment is made by Border Guard, in other words, by an institution without competence in the area of controlling the legality of work.

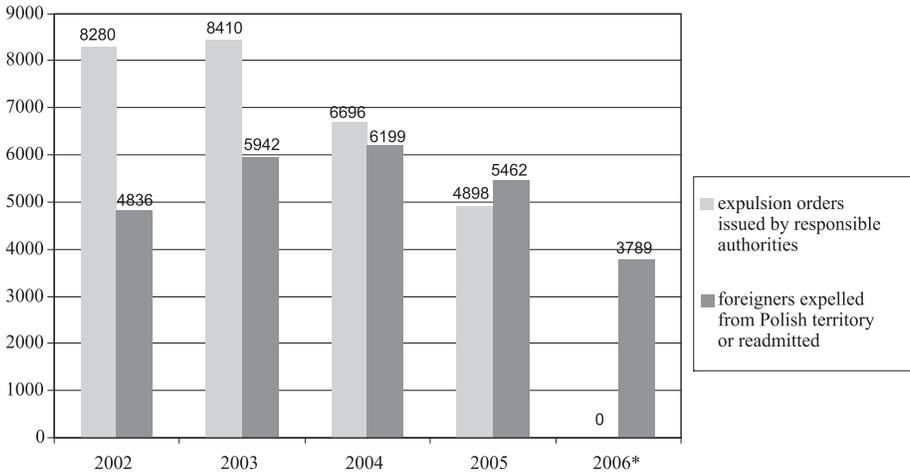
The system of sanctions for illegal employment, as described in detail in section 3.4, involves the imposition of financial sanctions on both parties and the expulsion of the foreigner or the issuing of a decision obliging them to leave the territory of Poland. In practice, the implementation of these sanctions involves certain problems.

Although the National Labour Inspectorate inspectors can impose fines, in practice they cannot impose them on employers who have engaged in illegal employment. The maximum possible fine which National Labour Inspectorate inspectors may impose is PLN 2000⁷⁶; however, the minimum fine for the illegal hiring of a foreigner is PLN 3000. Thus, in this area, the inspectors cannot directly punish the employers with fines, but have to take the case to court, taking on the role of public prosecutors⁷⁷. This prolongs the procedure and increases administrative costs. In addition, the National Labour Inspectorate maintains that the courts often impose fines which are too low (I1PL). It is highly likely that the system would be more effective if the National Labour Inspectorate inspectors could directly punish the employers with the imposition of fines, without the necessity of taking the case to court and changes along these lines are planned (I1PL).

Illegally employed foreigners who have been identified by the authorities and issued with an expulsion order are held in special detention centres. Currently, when the time comes for the order to be executed, they are escorted to the border by the police and then, from the international seaport or airport, the Border Guard escorts them to their country if necessary; however, the Border Guard plans to obtain the power to be responsible for the entire procedure (I2PL). Nevertheless, in many cases, the expulsion order cannot be executed. One of the conditions that must be fulfilled is the positive establishment of personal identity. In practice, apprehended foreigners often have no identification documents and the sending states do not always confirm the identity of their apprehended citizens. In the opinion of the Border Guards officer, it is possible that they are reluctant to cooperate with the authorities of receiving countries due to the profits incurred from remittances sent from abroad by their citizens (I2PL). When such a procedure lasts for more than a year, the Border Guard regularizes the person's status and applies for the foreigner to be granted tolerated stay status. Paradoxically, once they possess this status, the foreigner can work in Poland without a work permit. Nonetheless, if the Border Guard manages to determine the person's identity, this status may be cancelled and the expulsion order executed (I2PL). Although when a foreigner who has received an expulsion order leaves the territory of Poland, this is registered at the border, the efficiency with which the sanctions are implemented is not recorded in terms of particular causes, such as illegal work; therefore, only general data on foreigners expelled from Poland or readmitted are available (Figure 4.3).

76 The maximum amount for all types of fines in Poland; the Misdemeanours Procedural Code of 24th August 2001 (Kodeks postępowania w sprawach o wykroczenia z dnia 24 sierpnia 2001), *Dziennik Ustaw* 2001, No. 106, item 1148.

77 Article 17 (1), the Misdemeanours Procedural Code of 24th August 2001 (Kodeks postępowania w sprawach o wykroczenia z dnia 24 sierpnia 2001), *Dziennik Ustaw* 2001, No. 106, item 1148.

Figure 4.3: Expulsion orders from Poland and their implementation, 2002–2006*

* No data on expulsion orders issued in 2006 have been published.

Sources of data: expulsion orders: from the Office for Aliens <http://www.udsc.gov.pl/Yearly,276.html>; foreigners expelled from Polish territory or readmitted: from data held by the Border Guard. <http://www.strazgraniczna.pl/statys> (accessed 17 April 2008).

In general, the regulations on the illegal employment of foreigners are not very strictly implemented. Reasons for this include inadequate financial resources and staff, an issue which was emphasized in particular by the Custom Service (I3PL). However, perceptions of the phenomenon also play an important role. The illegal employment of foreigners is not seen as a major threat by the state authorities, as is witnessed by the fact that no respondent mentioned this issue. The high level of social acceptance of both illegal employment in general, and of foreigners in particular, produces a correspondingly low level of denunciation of illegal workers and does not improve the capabilities of the controlling authorities. With the exception of the La Strada Foundation and its activities targeted at human trafficking, the absence of a civil society organization focused on the rights of foreign workers demonstrates the fact that the third sector is not involved in the issue. The detection of illegal employment would be advantageous for both legal employers and their employees. However, although their representatives are critical of the efficiency of the inspections (E1PL, TU1PL), no mention was made in either the interviews or the media being monitored of pressure to intensify controls being brought to bear by trade unions or those employers who bear the costs of the legal employment of foreigners.

The fight against human trafficking requires an especially sensitive attitude on the part of the authorities. The staff of the institutions involved must be able to recognize a victim of trafficking and then to employ specially designed protective procedures. This is difficult in practice as, in the opinion of the La Strada Foundation expert, these authorities are, in general, distrustful of foreigners and thus, perceiving somebody as a victim requires a change in this routine attitude (NGO2PL).

In the past, the Ministry of the Interior and Administration, assisted by the La Strada Foundation, has trained the Border Guard and the staff of the 'labour police' in issues related to human trafficking. According to the La Strada expert, during such training sessions, the staff involved in the control of employment legality admitted that they had encountered cases of human trafficking but, being unaware of the phenomena, had treated the victims as illegal workers. In the opinion of both the Ministry of the Interior and Administration and La Strada, Border Guard officers are the best trained in these issues (G3PL; NGO2PL). However, the newly responsible institution, the National Labour Inspectorate, has not yet been trained to identify forced labour and slavery⁷⁸. Thus, rather than offering protection, there is a greater likelihood of their penalizing such a person as an illegal worker and informing other authorities in a case of illegal residence.

The La Strada Foundation reports several problems with the successful implementation of their operations targeted at the victims of trafficking. First of all, the interest of victims in cooperating with the law enforcement authorities is relatively low⁷⁹ and thus the resources available to them are not fully employed. The same is true of the foundation's special phone line, operated by Vietnamese native speakers; to date, no victim of trafficking or forced prostitution has called (NGO2PL). According to the La Strada expert, there is a set of psychological problems which makes the victims of trafficking and forced labour reluctant to seek help. They fear being punished, especially if they have crossed the border illegally. Based on their experiences in their own countries, they distrust the police and NGOs. If there is a group of victims, each one is afraid that the others will fail to testify; if this does happen, the case may be more easily dismissed and the person who did testify is at great risk from the persecutor.

The situation with regard to the abuse of rights and the exploitation of illegally employed foreigners is so complex that the victims are often unable to define their situation properly. People who have gone to work abroad are usually ashamed to return home with nothing, so once they find themselves in an abusive relationship with the employer, they accept it for a long time, counting on receiving their pay, or at least some of it. On the other hand, if they have been employed illegally, their chances of effectively claiming their rights are limited. They have no wish to testify against the intermediaries who offered them the work, as they will not receive another offer if they make trouble. They are afraid, because the chances of the person who organized the forced labour being sentenced are low and there is the risk that they will take their revenge on the denunciator (NGO2PL). All of these factors, together with unclear legal definitions and difficulties in proving a case in court, resulted in the low rates of detection and punishment with regard to the employers exploiting foreign workers in areas other than the sex trade⁸⁰.

78 In principle, the staff was transferred to the NLI from the 'labour police', where training had been given. Nevertheless, the NLI's structures and procedures will have to be adjusted and sensitized to human trafficking issues.

79 According to MIA data, in 2006, 10 people made use of the assistance offered by La Strada and in 2007, only 3 people did so. Source: <http://www.mswia.gov.pl/portal/pl/391/2001/> (accessed 17 April 2008).

80 To date, in Poland there has only been one sentence passed under art. 253 of the Penal Code in a case other than sexual exploitation; cf. section 4.2.2.

4.4.2 Policy outcomes: identification and evaluation

The analysis of the legal regulations presented in sections 4.3.2, 4.3.3, and 4.3.4, as well as the overview of the practical implementation of the regulations given in section 4.4.1, allow for the actual results of the policy to be assessed. The identification of policy outcomes and the evaluation of Polish policy on the illegal employment of foreigners presented below are based on the results of the research conducted for this study. Unfortunately, no social research exists that would allow for more a data-based policy assessment and provide reliable indicators of policy success in support of our conclusions and reflections.

As outlined in the preceding sections, the policy for combating the illegal employment of foreigners has not led to the creation of an effective system for the prevention of the phenomenon; neither has it led to the establishment of an effective system of control and sanctions. Instead, the system that has evolved during the last two decades is marked by a silent tolerance on the part of the authorities towards the illegal employment of foreigners in many areas (Kicingier, 2005). Consequently, the policy to combat the phenomenon might best be described as ambivalent. On one hand, the system of prevention, control and sanction was introduced, while, on the other hand, the inefficiencies in the implementation of the policy have led to a significant gap between the official policy goals and the actual results. Primarily, the inefficiencies encompass the complicated, scattered and overlapping competences of the many state institutions involved, as well as an insufficient allocation of resources for the implementation itself, resulting in understaffed institutions and a low inspection rate.

When evaluating the policy, however, the measures which facilitate the achievement of stated policy goals should be identified. These are the policy measures that are either successful, or allow a prediction that, from the perspective of the policy goals, the changes brought about by a given measure will be beneficial and effective. One such measure which might thus be mentioned is the transfer of control competences and staff from special units in the voivodship offices to the National Labour Inspectorate. The unification of control competences relating to compliance with the legal framework for lawful employment and occupational safety and health within the National Labour Inspectorate should lead to less costly and more effective inspections, since, for example, cases of illegal employment may be revealed during a work safety inspection being conducted by the National Labour Inspectorate. In addition, after training, more staff should be capable of conducting inspections of employment legality, as this will then include both previous and new National Labour Inspectorate inspectors.

Effective collaboration with NGOs in the field of human trafficking is also worth identifying as an example of positive policy action. Delegating the provision of psychological and social assistance for exploited workers and other victims of trafficking to NGOs has proved to be effective, given the traumatic situation of victims of human trafficking.

Last but not least, the simplification of procedures for the hiring of seasonal workers should be considered as a step in the right direction as regards the creation of channels for legal hiring.

There are also examples of unsuccessful, ineffective policy measures that either undermine the system, or fail to contribute to its effectiveness and efficiency. Among these, problems with the legislation itself should be emphasized, as they create a barrier to the effective creation and implementation of policy. The evident gaps highlighted in this study encompass, for example, the lack of regulation with regard to the status of the 'labour police' in the Mazowieckie voivodeship after the transfer of control competences to the National Labour Inspectorate, the lack of a precise definition of human trafficking and the lack of authority for the National Labour Inspectorate to conduct inspections involving private individuals. All these, and other gaps in the legislation, hamper the effectiveness and reliability of state operations in the field under study.

Furthermore, regularization operations should be included as examples of ineffective policy action. The two one-off regularizations carried out in Poland did not succeed in decreasing the scale of illegal stays and work to any considerable extent. This occurred mainly as a result of the fact that, in practice, the very strict regularization criteria meant that the largest groups of illegal workers in Poland were excluded from the possibility of regularization.

Policy effectiveness may also be affected by the tensions between the Ministry of the Interior and Administration, responsible for residence-related issues and the Ministry of Labour and Social Policy, responsible for employment-related issues with regard to foreigners in Poland. The Ministry of the Interior and Administration's natural focus on security, which leads to persisting on a cautious policy of admission often works in direct contradiction to the Ministry of Labour and Social Policy's focus on labour market needs. Given the conflict of interests arising from these different areas of competence, the challenge of creating an effective system for controlling the legality of foreigners' stays and employment of foreigners is even greater.

Most of the non-government policy stakeholders view the state policy as unsatisfactory. From the perspective of human rights and NGOs, the policy on labour immigration to Poland is criticized, first of all, as being too complicated and overprotective. The tightness of the system of legal hiring is held to be responsible for the development of illegal work carried out by foreigners in the country. Obviously, the NGOs advocate that it is better to create incentives for legal hiring, via a more open and simpler system of admission, rather than to attempt to master the system of control and sanction. The pro-integrative role of employment is cited as the most important factor in this regard. Thus, according to NGOs, having a job should constitute a basis for regularization (NGO1PL).

The partners in the social dialogue are also dissatisfied with government policy on legal hiring and with the ineffective efforts to combat illegal employment. Both trade union and employer representatives agree on their criticism of government, although, obviously, from the perspective of various standpoints. While the trade unions are reluctant to accept recent government efforts to open the channels of legal seasonal immigration, the employers are definite in judging it insufficient, given their needs. However, they are unanimous in agreeing that the rate of inspections and, consequently, the probabilit-

ity of being caught, are both so low that employers feel safe and do not fear sanctions (TU1PL; E1PL).

The criticism of government and policy is often combined with comparisons to foreign solutions perceived as effective and thus worth implementing in Poland. In the construction sector, the employers' organizations emphasize that the system of employing migrants must become simpler, with lower fees, established procedures for the recognition of qualifications and, most importantly, they must allow the employer to hire a foreign worker for the entire period of a construction cycle (E1PL). The German system for the employment of foreign construction workers was mentioned by the interviewee (E1PL; see also Wywiad z... Markiem Frydrychem, 2007) as the model of an effective system which is both employer- and employee-friendly. Transparent processes for the recognition of qualifications, low fees and a simple electronic registration system were presented as desirable innovations for Poland.

The agricultural employers' representatives (E2PL) also call for the simplification of the system of recruitment and a reduction in the bureaucracy involved. They pointed out that recruitment should not be based on sending invitations to unknown persons while they are still abroad. The Hungarian system for the simplified registration of temporary workers is mentioned as being effective and as limiting the bureaucracy involved (E2PL). They advocate simple forms for the local registration of foreigners who arrive with the intention of undertaking seasonal employment in agriculture as this would, in their opinion, constitute a real opportunity of employing such workers legally.

4.4.3 Best practices in combating the illegal employment of foreigners in Poland

The aim of this section is to enumerate best practices; in other words, the policy measures used in Poland in the policy field under study that would be successful, innovative and worth recommending to other countries. Few of the measures used in Poland with a view to combating the illegal employment of foreigners meet the criteria of best practice. The ineffectiveness of the system of control and sanctions means that even the best legal regulations are failing to work. However, some of the solutions which have been developed are worth recommending⁸¹.

Among these solutions, the granting of access to the labour market without a work permit to some categories of foreigners who have been earlier pushed into an illegal employment situation must be mentioned. These categories include, for example, the spouses of Polish nationals or persons holding a permit for tolerated residence. The changes in the law should undoubtedly be acknowledged as the success of human rights lobbying by the Helsinki Foundation for Human Rights (NGO1PL). In practice, these solutions have enabled certain groups to enter the labour market without recourse to illegal employment as a result of the fact that their stay in Poland was legalized and, to great extent, guaranteed by the state. The rationale behind such changes is straightforward; if

81 As no research exists in Poland on the effectiveness of given policy measures, it is not possible to support the conclusions of this section with data containing, for example, the indicators of success of a given policy or policy action. Thus the best practices enlisted here have been selected on the basis of the results of the research conducted for this study, and represent the views of the authors.

the state accepts a person's presence on its territory, it would appear to be natural that such a person should be allowed to cater for his/her economic needs by entering the labour market. Participation in the official labour market should therefore be treated as a pro-integration factor. Opening access to the legal labour market for those who have a right to be present on the territory seems to be a good method for dealing with illegality among these particular groups of foreigners.

Another good practice operating in support of government measures involves the activities of employers' organizations in disseminating the legal regulations on the employment of foreigners (E1PL; E2PL). This is very important when there is a change to the regulations, or when there is a lack of clarity regarding their implementation. Employers' organizations have focused on helping their members to publish information dealing with the changes and answering members' questions. In this way they mediate between government and policy on the one side and society on the other. This practice, undertaken voluntarily by the employers' organizations, is a guiding model, which should be disseminated and supported by governments, for whom such an information channel is a benefit.

Another example of good practice can be found in the government's engagement in combating human trafficking. There is a special programme for the protection of victims of trafficking, which grants the right to residence for a period of reflection, during which the victim can make a decision regarding cooperation with the police. Beneficiaries of the programme are given access to social assistance. If they refuse to cooperate they have to leave Polish territory; however, they are not listed as aliens whose residence in Poland is undesirable, as always happens in cases of expulsion or decisions obligating a person to leave Polish territory. What is important is that the programme for the protection of victims of trafficking is implemented not by the public social assistance services, but by a specialised NGO, chosen via the process of open competition. Such a solution has many advantages. First of all, it is more comfortable for the victims, for whom seeking assistance from an NGO may be easier than turning to the state authorities, with whom they could have had a negative experience in the past and in their countries of origin. Also worth underlining is the fact that the programme's efficient functioning strengthens the still underdeveloped cooperation between government and the NGOs in the field of migration policy and it helps to convince the administration that NGOs can implement state-delegated activities fruitfully and efficiently.

The information campaigns, mainly undertaken by NGOs, also represent good practices in the field of preventing and combating human trafficking. These campaigns, described in detail in section 4.3.2, appear to have been successful in disseminating knowledge among the public about human trafficking. In addition, information leaflets targeted directly at possible victims are distributed in the places where they might have access to them, such as Polish consulates abroad, border crossings and the Ukrainian consulate in Poland (NGO2PL). Although we cannot estimate the real efficiency of the leaflets, as we have no knowledge regarding how many women have, as a result of reading them, avoided dangerous situations which could have made them victims of trafficking, it may still be said that the potential benefits of such information campaigns are considerable.

Also worth noting are the training programmes for those state officers who may encounter cases of human trafficking while performing their duties. In Poland such courses are aimed at the officers of the Border Guard and their organization was delegated to the NGOs. Interestingly, the NGO representatives, who usually retain a distance from the Border Guard officials, confirm the efficiency of such training. For example, they point out that the BG officers who had been trained in such issues have proved their usefulness in recognizing a possible victim of forced labour at the moment when she was aiming to return to her country of origin, Ukraine, after an illegally prolonged stay in Poland (NGO2PL).

Last but not least, Poland's efforts to prevent the illegal employment of Poles abroad must be noted as a best practice. It is worth underlining that any measures undertaken by the state with the objective of discouraging its citizens from taking part in irregular labour migration or of hindering their participation in such illegal practices, is important from the European point of view, as they contribute to reducing the illegal employment of foreigners in Europe as a whole.

Various measures have been adopted in Poland with the objective of discouraging Poles from undertaking illegal employment abroad. First, there are government efforts to enable its citizens to undertake legal work. These include bilateral agreements with various European countries and established opportunities for Poles to work in Europe, and especially in Germany, mainly on a seasonal basis (Kicingier, 2005). The Polish government's lobbying to open EU labour markets after EU accession was carried out with the same aim.

In addition, there is a licensing system for employment agencies and labour intermediation in Poland. According to Polish law⁸², all agencies dealing with labour intermediation, both within the country and abroad, are treated as labour market institutions. Before it can start to operate, an agency is obliged to obtain a certificate and confirmation of its registration in the given voivodship. In order to register and obtain such a certificate, the entrepreneur has to prove that he pays taxes and social contributions regularly, has not been sentenced under the law and has the office space, equipment and qualified staff necessary for running the agency. Local authorities at the voivodship level are empowered to grant these certificates and they run a register of certified employment agencies⁸³. The law provides financial sanctions, in the form of a fine of no less than PLN 3000, for running an agency without a valid registration and for obtaining fees from people seeking employment⁸⁴. This system regulates the labour market and reduces the chances of agencies participating in providing workers for illegal employment abroad, although the act does not stipulate sanctions specifically for such activity.

82 The Act on the Promotion of Employment and Labour Market Institutions of 20th April 2004 [Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy], *Dziennik Ustaw* 2004, No. 99, item 1001.

83 Articles 18 and 8.1(17) of the Act on the Promotion of Employment and Labour Market Institutions of 20th April 2004 [Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy], *Dziennik Ustaw* 2004, No. 99, item 1001.

84 Article 121 of the Act on the Promotion of Employment and Labour Market Institutions of 20th April 2004 [Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy], *Dziennik Ustaw* 2004, No. 99, item 1001.

Finally, various forms of information campaigns undertaken mainly by the government and presenting the conditions of employment abroad are another measure aimed at discouraging people from undertaking illegal employment. From the point of view of providing society with widely accessible and reliable information, the period following Poland's EU accession was very important. The limitation of free access to the labour market for the citizens of the new member states resulted in complicated and varying legal conditions for undertaking employment in the old member states. In response to the new legal regulations, several information campaigns based on the notion of "know before you go" were launched. The first was the campaign run by the British government and organized by IOM in cooperation with the Ministry of Labour and Social Policy. The campaign gave information regarding new British employment regulations affecting the citizens of the new member states and, especially, regarding the newly introduced Workers Registration Scheme.

4.5 Conclusions and recommendations

This study, devoted to Polish policy regarding the illegal employment of foreigners, is the first in Poland to encompass both an analysis of illegal work carried out by foreigners and of the measures taken to prevent and control this phenomenon.

As the authors have highlighted in the report, Poland, a country with a fairly low level of immigration, is, at the same time, a country where the illegal employment of foreigners is relatively widespread in several sectors of economy. Although in response to the phenomenon, the Polish state has developed mechanisms for control and sanctions, in practice these are not efficient enough to limit illegal employment. The low likelihood of inspection translates into low risk for employers illegally employing native workers and foreigners. This, coupled with the still complicated and costly procedures necessary for the legal employment of foreigners, and enhanced by the short-term economic gains from undeclared work for employers and employees alike, prompts many entrepreneurs to employ illegally; the phenomenon also concerns private individuals employing foreigners in their households.

The analysis of the phenomenon presented in the report, together with state policy towards it and the implementation of the policy, allow a set of recommendations for future policy towards labour immigration to Poland to be formulated. These recommendations focus on preventing and combating the illegal employment of foreigners and on the protection of their rights.

Among the postulates of a general nature, the need to create more effective mechanisms to monitor the trends on the Polish labour market should be mentioned first. If migration is to be a response to the needs of the labour market, the access to up-to-date and reliable information regarding the present situation on the national and local markets is crucial. Such monitoring should, in particular, cover regional and local supply and demand for work, including various skills expected and available. Also of great importance is that the information be complemented by forecasts on future trends, which could serve the long-term planning of migration policy in the labour migration field. At present, the

contradictory visions of the situation held, on the one hand, by the trade unions, who point to the continuing high numbers of registered unemployed and, on the other, by the employers, who report real problems with staff recruitment, hinder the government's ability to take decisions on a scale of labour immigration that would be based on social consensus. Only the reliable monitoring of the labour market will allow for both knowledge-based decision making on the part of the government and the observation of the effects of immigration on the labour market.

The creation of channels for legal labour immigration, which would provide a real alternative to illegal employment, should also act as an incentive for the legal employment of foreigners. This should be combined with either the further streamlining of the work permit administrative system, or with the creation of supplementary, non-work-permit channels for legal labour immigration. The latter is the direction in which the changes observed so far are moving.

If the goal of the state is limiting illegal employment, it is crucial not only to sanction and punish the people involved in the illegal practices, but also to guarantee some possibility for the people involved to legalize their situation. Therefore, another important postulate for state policy concerning the employment of foreigners is the introduction of a legal means of regularization for people who have been working illegally but want to leave the shadow economy and undertake employment or economic activity legally. Work or entrepreneurship can be treated as a source of profit for the state and, at the same time, as a premise of the integration of the foreigners in Poland. Of course, such a possibility should be used with caution, in order to avoid potential immigrants treating the regularization possibility as a pulling factor.

Among the recommendations concerning the employment of foreigners in Poland, the necessity of strengthening the system for the protection of the rights of foreign workers, employed both legally and illegally, should be noted. In this sphere, it is worth focusing on the idea, based on the German experience, which has been put forward by the NGOs (NGO2PL). This proposes the opening of a centre or, ideally, a network of centres providing legal information and counselling for foreigners. The centres would be open to all, regardless of their residence and/or work status. Such a centre would not require prior identification of the nature of the foreigners' problems when turned to for help. The centres could serve people who, for various reasons, and often unintentionally, have become illegal in terms of their residence and/or work status, as well as potential victims of trafficking, including forced labour.

In combating illegal employment, it is also important to make the services responsible for control more efficient. The practical division of responsibilities between the two main institutions, the National Labour Inspectorate and the Customs Service, is certainly a good practice; however, sectors such as domestic service and agriculture, where the National Labour Inspectorate inspectors rarely intervene, remain outside the scope of the NLI inspectors. It would therefore be worth examining the possibility of granting independent control competences to the Border Guard. While checking the legality of foreigners' residence, this institution often encounters their illegal employment in various forms. This is especially frequent in the agricultural sector, which is neglected

by the National Labour Inspectorate and the Customs Service. The possibility of independent Border Guard action in such cases would save the time and effort of inspectors from other institutions. A coordination of regulations that would allow National Labour Inspectorate inspectors to issue fines to employers involved in illegal hiring would also lead to the simplification of procedures and, hopefully, to more effective controls.

However, in the opinion of the authors, the most important recommendation for future policy is the principle of a sector-based approach to the problems of the illegal employment of foreigners. As was demonstrated in section 4.2, in the vast majority of cases, the illegal employment of non-nationals in Poland is concentrated within a few sectors of the economy. The variations between the sectors in terms of the conditions of employment and the demand for labour results in significant difficulties with arriving at solutions which would satisfy both the employers and the foreign workers looking for work in particular sectors. The simplified procedures for seasonal workers from neighbouring countries, which were introduced between 2006 and 2008, and were appropriate for the work cycle in agriculture, did not meet the expectations of employers in construction and by no means reduced the illegal employment in the latter sector. It seems that only the introduction of sector-tailored measures, in response to the specifics of employment in particular sectors, would create effective alternatives to illegal employment and significantly reduce its scale. The basis for the creation of such solutions could be provided by social dialogue with the representatives of particular sectors, primarily those which report a large demand for foreign workers and are at the forefront in their illegal hiring.

Separate solutions are particularly necessary in the domestic services sector. Households, which are treated as ordinary employers at present, are not able to make their way past the bureaucratic procedure of obtaining a work permit for carers, cleaners and housekeepers. An important precondition in this regard is the creation of the possibility for domestic workers to become self-employed, thus enabling them to offer their services legally and pay taxes and social security contributions to the state budget.

Last but not least, the economic dimension of illegal employment must be re-emphasized. Neither the existing nor the recommended state policy measures would be fully successful if what is meant by successful is the total disappearance of the phenomenon. The economic gain from illegal work, untaxed and unburdened with social security contributions, will always exist and will always attract some employers and employees, both nationals and foreigners, to undeclared employment. Fiscal and other reforms aiming at lowering labour costs would be helpful in this regard, yet the cost of legal work will always exceed the cost of illegal work. Thus any state efforts to combat the phenomenon are limited, to a certain extent, by the very nature of the phenomenon itself.

This report opens the field for further research in Poland. Subsequent studies should focus primarily on the monitoring of labour market needs and the extent to which they can be met by the native labour force, in order to determine migration policy objectives. Such research should encompass labour market needs with respect to various sectors. On the basis of its results, informed migration policy-makers would be able to create channels for the legal inflow of workers from abroad, which would serve as an effective alternative to illegal employment.

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LIST OF INTERVIEWS

G1PL	Department of Migration, Ministry of Labour and Social Policy.
G2PL	Department of Migration, Ministry of Labour and Social Policy (telephone interview).
G3PL	Department of Migration Policy, Ministry of the Interior and Administration.
G4PL	Department of the Labour Market, Ministry of Labour and Social Policy (telephone interview).
I1PL	National Labour Inspectorate.
I2PL	Border Guard.
I3PL	Customs Service.
E1PL	Polish Trade and Industrial Chamber for Construction.
E2PL	The Association of Polish Fruit-Growers.
TU1PL	The “Budowlani” Trade Union.
NGO1PL	The Helsinki Foundation for Human Rights.
NGO2PL	La Strada.

LIST OF ABBREVIATIONS

BG	Border Guards (Straż Graniczna)
CS	Customs Service (Służba Celna)
CSO	Central Statistical Office (Główny Urząd Statystyczny)
HFHR	The Helsinki Foundation for Human Rights (Helsińska Fundacja Praw Człowieka)
MIA	Ministry of the Interior and Administration (Ministerstwo Spraw Wewnętrznych i Administracji)
MLSP	Ministry of Labour and Social Policy (Ministerstwo Pracy i Polityki Społecznej)
NLI	National Labour Inspectorate (Państwowa Inspekcja Pracy)
ZUS	The Social Insurance Institution (Zakład Ubezpieczeń Społecznych).

LIST OF THE MOST SIGNIFICANT LEGISLATION

The Act on the Promotion of Employment and Labour Market Institutions of 20th April 2004 (Ustawa z dnia 20 kwietnia 2004 r. o promocji zatrudnienia i instytucjach rynku pracy), *Dziennik Ustaw* 2004, No. 99, item 1001.

The Act on Granting Protection to Aliens within the Territory of the Republic of Poland of 13th June 2003 (Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej), *Dziennik Ustaw* 2007, No. 120, item 818.

The Act on Aliens of 13th June 2003 (Ustawa z dnia 13 czerwca 2003 r. o cudzoziemcach), *Dziennik Ustaw* 2006, No. 234, item 1694 (and as further amended).

The Act on the National Labour Inspectorate of 13th April 2007 (Ustawa z dnia 13 kwietnia 2007 r. o Państwowej Inspekcji Pracy), *Dziennik Ustaw* 2007, No. 89, item 589.

The Act on the Polish Charter of 7th September 2007 (Ustawa z dnia 7 września 2007 r. o Karcie Polaka), *Dziennik Ustaw* 2007, No. 180, item 1280.

The Act on Social Assistance of 12th March 2004 (Ustawa z dn. 12 marca 2004r. o pomocy społecznej), *Dziennik Ustaw* 2004, No. 64, item 593 (and as further amended).

The Penal Code (Kodeks karny), *Dziennik Ustaw* 1997, No. 88, item 553.

The Protocol for the Prevention, Suppression and Punishment of Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, *Dziennik Ustaw* 2005, No. 18, item 160.

The Ordinance of the Minister of Labour and Social Policy on procedures and conditions for issuing a work permit to a foreigner of 21st July 2006 (Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 21 lipca 2006 r. w sprawie trybu i warunków wydawania zezwolenia na pracę cudzoziemca), *Dziennik Ustaw* 2006, No. 141, item 1002.

The Ordinance of the Minister of Labour and Social Policy on work carried out by foreigners without the obligation to obtain a work permit of 30th August 2006 (Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 30 sierpnia 2006 r. w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę), *Dziennik Ustaw* 2006, No. 156, item 1116.

The Ordinance of the Minister of Labour and Social Policy amending the order on work carried out by foreigners without the obligation to obtain a work permit of 27th June 2007 (Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 27 czerwca 2007 r. zmieniające rozporządzenie w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę), *Dziennik Ustaw* 2007, No. 120, item 824.

The Ordinance of the Minister of Labour and Social Policy amending the order on work carried out by foreigners without the obligation to obtain a work permit of 29th January 2008 (Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 29 stycznia 2008 zmieniające rozporządzenie w sprawie wykonywania pracy przez cudzoziemców bez konieczności uzyskania zezwolenia na pracę) *Dziennik Ustaw* 2008, No. 17, item 106.

The Ordinance of the Ministry of Labour and Social Policy on the fee relating to the submission of an application for a work permit for a foreigner of 17th October 2007 (Rozporządzenie Ministra Pracy i Polityki Społecznej z dnia 17 października 2007 r. w sprawie wysokości wpłaty dokonywanej w związku ze złożeniem wniosku o wydanie zezwolenia na pracę dla cudzoziemca), *Dziennik Ustaw* 2007, No. 195, item 1409.

Combating Illegal Employment of Foreigners in Spain: Scale and Reasons Behind the Phenomenon; Laws and Policies Against

**Rosa Aparicio, Andres Tornos, Mercedes Fernández,
Jose Maria Ruiz de Huidobro**

5.1 Introduction

The government, opposition parties and public opinion all consider illegal access to employment on the part of foreign immigrants to be a key issue in Spain today. The main reason for this, and it affects all migratory issues, is the common view that immigration flows will continue to be ungovernable so long as regular and irregular immigrants manage to find work in the underground economy. The information circulating around social migration networks, i.e. that finding a job in order to survive in Spain is easy and takes very little time, constantly refuels influxes of migrants. These chaotic inflows make it difficult to plan and promote the efficient integration of immigrants into society. In this context, any attempts to protect immigrants' rights are bound to fail, as will the allocation of resources dedicated to the integration of this group, since the native population gain the impression that many immigrants live on the wrong side of the law.

The perception of the negative impacts of easy access to low-level jobs by illegal immigrants is exacerbated in a migratory climate such as the one in Spain today, where the inflow of immigrants has exceeded all expectations over the last years. Table 5.1 makes this abundantly clear.

In other words, in Spain, the importance of the adverse impacts of the shadow economy, such as the marginalization or exploitation of foreign workers, instability in the structure of the labour market, the lack of social security contributions and tax payments from employers and employees, and the rejection of immigrants that this causes among the native population,¹ are not understated. The population is vaguely aware of these impacts. However, both experts and the public opinion claim that these disadvantages are locked into a vicious circle; so long as migration networks continue to transmit the information that illegal work is easy to obtain in Spain, the number of illegal immigrants

¹ In Spain employee social security contributions are paid almost entirely by the employer; and employees in occupations at the low end of the job market are exempt from all tax payments.

crossing the border will continue to rise and, provided that these levels are maintained, many employers, especially small companies, will continue to offer illegal employment. Both sides justify the existence of illegal employment, seeing it as the only way they have at present to continue functioning (see, for instance, Pajares, 2007; also E1ES, E2ES, TU2ES).

Table 5.1: Resident citizens of foreign nationality in selected countries of Europe

Resident citizens of foreign nationality						
	1995	1997	1999	2001	2003	2005
Belgium	922,338	911,921	850,630	861,682	850,077	870,862
Germany	6,990,510	7,314,046	7,319,593	7,296,817	7,335,592	7,287,980
Ireland	96,400	114,400	112,856	155,528	215,473	255,400
Greece				761,438		
Spain	461,364	538,984	748,954	1,370,657	2,664,168	3,371,394
France			3,263,186			
Italy	685,469	884,555	1,116,394	1,464,589	1,549,373	2,402,157
Netherlands	757,138	679,869	662,290	667,802	699,954	699,351
Austria	677,061	743,863	749,126	766,055	755,124	788,609
Portugal	157,073	172,912	178,137	207,607	238,746	
Sweden	537,441	526,594	499,931	477,312	474,099	481,141
United Kingdom		2,121,000	2,297,947		2,760,031	3,066,055

Source: Adapted from *Eurostat Population Statistics 2006*. Last update 14. 11. 2007.

Despite the importance attributed by all parties to the issue, there has been little research into illegal labour immigration to date. This dearth of research can arguably be ascribed to the high costs and limited expectations of success that empirical studies entail, while the opposite is true of non-empirical research, as evidence is readily available on the perceived disadvantages of illegal employment. For this reason, there is an abundance of literature, moralizing in tone, addressing the exploitation suffered by immigrants in illegal employment, particularly women trapped in prostitution rings. There are also so-called substantiated estimates on the revenues the Social Security offices fail to collect due to the illegal nature of the work performed by irregular immigrants, as well as rigorous legal studies on the validity of verbal and implicit contracts in the world of illegal work.

In the light of this, the following chapters address first the scope of the problem of illegal recruitment of irregular immigrants, and the reasons for, and significance of, this phenomenon. Second, we focus on the general policy and legislation to combat these practices, and third, we provide an overview of the policies which have either been implemented in the field, or proposed in order to combat this problem.

5.2 Illegal employment of foreigners in Spain: scale, nature and reasons behind the phenomenon

5.2.1 Main characteristics and magnitude of illegal employment in Spain

For the purposes of this report, we are using the definition of undeclared work given by the European Commission in 1998: "...any paid activities that are lawful as regards their nature but not declared to the public authorities, bearing in mind that differences in the regulatory system of Member States must be taken into account".² This definition excludes criminal activities as well as any work that does not have to be declared. The concept of illegal employment therefore implies a negative impact on social security revenues (CES, 1999).

The percentage of illegal employment in Spain is high at present, both in terms of gross value added and in terms of the employed population; evidence suggests this trend has increased over the last 20 years.

According to European Commission (1998) and other research conducted in Spain (CCOO, 2006; CES, 2002), there are four main categories of undeclared workers; second and multiple jobholders, 'economically inactive' persons, that is, students, housewives and people on early retirement, unemployed people and third-country nationals.³ In addition, undeclared work in Spain is concentrated in specific sectors and geographical areas.

Between 2003 and 2004, Alañón and Gómez carried out an estimate of the scale of the underground economy stemming from undeclared work, placing it at between 18.2 percent and 20.9 percent of the gross national added value for 2002; in other words, in excess of 130 billion euros, depending on the methodology applied to measure this variable.

According to the aforementioned authors, the volume of the informal economy in Spain for the period covered was 5 percent higher than the 15.5 percent recorded at the beginning of the eighties. From the early eighties through to 1992, the year the economic recession started in Spain, the shadow economy grew at an exponential rate. From 1992 onwards, the upward trend continued but the pace slowed slightly. This slowdown is closely related to the creation of nearly 6 million net jobs between 1996 and 2005 (CCOO, 2007). The creation of these jobs was possible due to legislative reforms, implemented in order to make the labour market more flexible, which enabled jobs that hitherto had formed part of the underground economy to surface.

2 http://ec.europa.eu/employment_social/empl_esf/docs/com98-219_in.pdf (accessed 14.02.2008), page 2

3 http://ec.europa.eu/employment_social/empl_esf/docs/com98-219_in.pdf (accessed 14.02.2008), paragraph 2.3, page 7 In this context, 'third country nationals' must be understood as 'illegal immigrants'

The most recent source on the submerged economy that we have been able to find is a report produced by the trade union, CCOO⁴. Page 27 of the report contains a compilation of various surveys on the shadow economy in Spain, dating from between 1979 and 1999 (CCOO, 2006: 27). Another survey can also be quoted. It was conducted by the Instituto de la Mujer in 2005; however, it must be pointed out that it is a study focused on women. LFS data are used in section 2.2.1 to estimate the proportion of foreigners within the illegal employment total. The above-mentioned sources place it at approximately 11.4 percent of the economically active population and 20 percent of the employed population. We have ranked the rates from lowest to highest. 11.4 percent belongs to the 1979 survey and 20.4 percent is the result from 1998. The 1999 result was 15.5 percent of the employed population. In the Instituto de la Mujer study, an estimated 17 percent of female workers in Spain were employed in the black economy.

As far as geographic distribution is concerned, the volume of the underground economy in provinces such as Tenerife, Huelva, Ciudad Real and La Rioja is above 24 percent of the official added value. The volume in Madrid is around average (20.4%) and in Barcelona it is below average (18.1%).

Undeclared work can be found in many activities usually included in the so-called traditional sectors (CCOO, 2006). However, the rapid expansion of innovative sectors and the emergence of new forms of employment, such as care of the elderly, are helping to swell the number of activities in which the incidence of undeclared work is significant (De Cabo et al, 2005).

The traditional sectors, that is, **agriculture, construction, retail sales, hotels and restaurants, and household services**, are labour intensive and operate in local economic circuits. The agricultural sector is subject to seasonal variations leading to situations of underemployment. It has also been affected by the rise in imports from developing countries which, by virtue of being more competitively priced, act as an incentive to reduce labour costs. Retail is also subject to seasonal fluctuations and therefore to periods of underemployment. In the construction sector, there is a high level of subcontracting, over which the authorities have limited control. In the hotel, restaurant and catering sectors, control is likewise very limited, especially as far as sales volume and turnover of employees are concerned. There is no public control whatsoever over household services, as the labour inspectorate does not have access to family homes⁵.

Labour costs are pivotal as regards competitiveness in the **manufacturing and business services sectors**. This is why undeclared work, principally in the form of overtime paid cash-in-hand, is so common in these sectors.

In the **modern, innovative sectors**, the use of electronic communications and computers facilitates the recruitment of highly qualified professionals and, in this case, the place

4 Previous sources on the submerged economy are, for instance, Ybarra (1998 and 2002), Ybarra, Hurtado and San Miguel (2001) and Sanchis (2005).

5 According to one of the experts interviewed, this is the reason why household services are one of the sectors with the highest levels of illegal employment, not only of foreigners in an irregular situation, but also of those in a regular situation. [TU1ES]

of residence of the customer or provider is of little or of no importance. The emergence of new ways of working, which are not fully covered by the legislation, facilitates undeclared work (CCOO, 2006).

According to a number of empirical studies conducted by applying a range of methodologies, the following factors have proved decisive in illegal recruitment: a high tax burden (Ávila *et al.*, 1997), low sanctions, which are unlikely to be imposed (Jareño and Delrieu, 1993), excess regulation of the economy (Aragón Medina and Gutiérrez, 1987), and high labour unit costs (Alañón and Gómez, 2003, 2004).

5.2.2 *Illegal employment of foreigners*

5.2.2.1 **Estimates of the proportion of foreigners within the illegal employment total**

There are two sources of information on foreign workers in Spain: the Social Security records, which account for people who have entered the Social Security system, and the Labour Force Survey (LFS), which is a survey based on estimates. In order to calculate the extent of illegal employment, we have compared the results of both sources. This method has a number of limitations, as what we are comparing are records of persons who have entered the Social Security system and a survey, the LFS, which is based on estimates. Notwithstanding, this comparison is a useful one, in that the LFS provides estimates on the employed population, regardless of legal or illegal status, while the Social Security data give us an idea of the regulated labour insertion of workers. We can thus compare both figures, as the LFS covers both legal and illegal workers, while the Social Security data only include legal employees.

Table 5.2 provides data on the six extraordinary regularization campaigns for illegal immigrants that have taken place in Spain over the last two decades. If we take into account the number of positive resolutions since 1985, 1,107,418 people have regularized their situation through this process. Nonetheless, we should bear in mind that existing legislation on foreigners in Spain grants short-term work permits and that the renewal process for these is very complicated.

Table 5.2: Extraordinary regularization campaigns for illegal immigrants in Spain – applications and positive decisions

Year	Applications	Positive decisions	
		numbers	%
1985	43,800	23,833	54%
1991	130,406	108,321	83%
1996	17,676	14,653	83%
2000	247,598	163,913	66%
2001	351,269	223,428	64%
2005	691,655	573,270	83%
TOTAL	1,482,404	1,107,418	75%

Source: For 1985–2001, *Annual Report on Migrations*. For 2005, *Ministry of Labour and Social Affairs*.

One way of estimating the level of illegal employment among the immigrant population within the underground employment in total is to compare the number of people who entered the Social Security system with the data on the employed population from the Labour Force Survey, which has been coordinated by EUROSTAT since 2005. The data for foreigners are displayed in Table 5.3 and for Spanish natives in Table 5.4.

Table 5.3: Differences between the number of foreigners in employment (according to the EPA) and those entering the Social Security system

Foreigners	1999	2000	2001	2002	2003	2004	2005	2006
LFS -	348,800	531,800	749,200	1,069,900	1,438,800	1,809,700	2,191,200	2,601,800
Social Security numbers issued	334,976	454,571	607,074	831,658	925,280	1,076,744	1,688,598	1,823,973
Difference	13,824	77,229	142,126	238,242	513,520	732,956	502,602	777,827
Estimated percentage of illegal employment	4%	15%	19%	22%	36%	41%	23%	30%

Source: For the LFS, INE. For the number of people affiliated to the Social Security System, the Ministry of Labour and Social Affairs. The estimated percentages of illegal employment were obtained specifically for this paper. LFS: www.ine.es. Social Security affiliates www.mtas.es

Table 5.3 shows that the percentage of foreigners in illegal employment has increased over time, with the exception of the period 2004–2005, when it dipped slightly due to the regularization campaign implemented by the Spanish government. However, for the period 2005–2006, the number of illegal workers returned, in absolute terms, to the level observed for 2004. In percentage terms, this means that one out of three immigrant employees works illegally.

Table 5.4: Differences between the number of Spanish natives in employment (according to the LFS) and the number of people entering the Social Security system

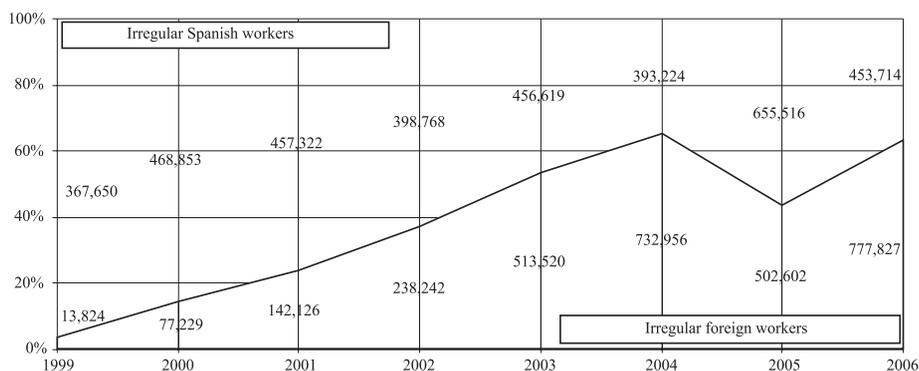
Spanish natives	1999	2000	2001	2002	2003	2004	2005	2006
LFS	14,611,000	15,250,500	15,599,000	15,755,500	16,120,900	16,478,400	17,123,100	17,400,000
Social Security numbers issued	14,243,350	14,781,647	15,141,678	15,356,732	15,664,281	16,085,176	16,467,584	16,946,286
Difference	367,650	468,853	457,322	398,768	456,619	393,224	655,516	453,714
Estimated % of irregular employees	3%	3%	3%	3%	3%	2%	4%	3%

Source: For the LFS, INE. For the number of people joining the Social Security System, the Ministry of Employment and Social Affairs. The estimated percentages of illegal employment were obtained specifically for this paper. LFS: www.ine.es. Social Security affiliates www.mtas.es

As regards the volume of native Spanish workers working illegally, we can see that the figures are relatively stable over the time period covered, both in absolute and relative terms, albeit with a slight rise in 2005; however, this percentage drops again in 2006. These percentages are consistent with the data presented by the Eurobarometer on undeclared work published recently (European Commission, 2007), in which 3 percent of Spaniards state they work in the underground economy.

We now compare the data on illegal foreign and native Spanish workers in Figure 5.1.

Figure 5.1: Evolution of the proportion of illegal foreign workers within the total number of irregular workers. The total number of irregular workers is obtained from the sum of Spanish illegal employees (Table 5.4, third row) and foreign illegal employees (Table 5.3, third row)



Source: Prepared by the author on the basis of data from the LFS and the number of people entering the Social Security System for the years under review. LFS: www.ine.es. Social Security affiliates www.mtas.es

It is clear that the role played by immigrant workers⁶ in the informal labour market has grown. In fact, at the end of 2006, the 453,714 native Spanish workers working in the underground economy represented barely 37 percent of the total number of workers in this situation. In other words, 63 percent of irregular workers are immigrants. Therefore, if the underground economy represents 20 percent of the Spanish GDP, then immigrant work could also be estimated to account for some 63 percent of this figure, that is, nearly 13 percent of the GDP. This estimate takes into consideration the fact that activity rates for immigrants are higher than those for natives and that natives employed in the

6 It must be taken into account that a foreign worker can be employed in the underground economy despite his/her legal status. This fact can be empirically proved through several studies performed by the Institute for Migration Studies (IEM) of the Pontifical University of Comillas. According to these sources, 15 percent of regular Ecuadorian immigrant workers were employed in the submerged economy; the figures were 5 percent for Moroccans and 26 percent for Colombians. Also, an as yet unreleased study by M. Pajares, based on secondary data, suggests that in 2007 the numbers of illegal foreign workers with residence and work permits may outnumber those without 'papers'. This is, nonetheless, difficult to determine because of the relative unreliability of official sources.

shadow economy usually work in the same sectors as immigrants, so that they would also be working in less productive sectors.

5.2.2.2 Nature of the illegal employment of foreigners

In this section of our discussion on the illegal employment of foreigners, we compare the characteristics of the work carried out by foreign workers with the nature of that performed by native workers. First we examine the employment and unemployment rates in Spain; this is followed by an analysis of the economic sectors by activity, professional status and job type. This analysis is once again based on data from the LFS, since, as mentioned above, that survey covers those working both legally and illegally.

Table 5.5: Differences between the participation of Spanish workers, workers who are citizens of EU member states and third country foreigners in the labour market (in thousands)

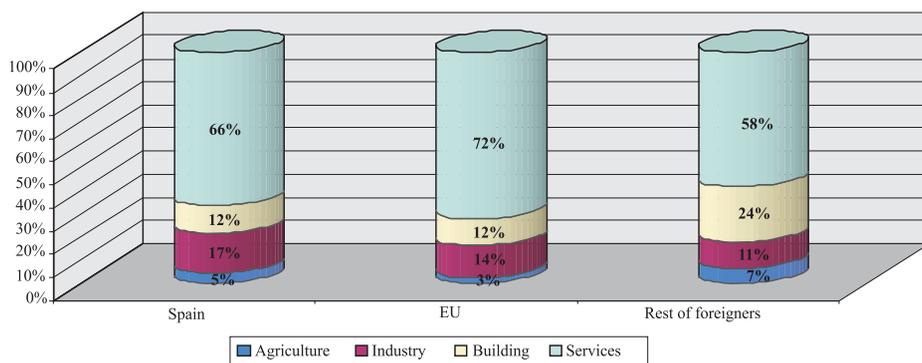
	Total population		Economically active		Employed	
	Absolute	%	Absolute	%	Absolute	%
Spanish natives	39,518.9	90.82	18,623.3	86.97	17,130.1	87.44
EU citizens	617.6	1.42	331.4	1.55	300.0	1.53
Non-EU citizens	3,378.8	7.77	2,458.3	11.48	2,161.1	11.03
Total	43,515.3	100.00	21,413.0	100.00	19,591.2	100.00

Source: LFS, average 2006

The most striking feature revealed in Table 5.5 is the difference between the patterns that can be discerned between the access to the labour market of Spaniards, EU citizens and foreigners who do not belong to the EU 25; while the first two groups show relatively low rates as regards an economically active population, at 47 percent and 54 percent respectively, in the case of non-EU citizens this percentage leaps to 73 percent. However, the pattern is reversed in the percentage of the employed population, which exceeds 90 percent in the case of Spaniards and EU citizens and fails to rise above 88 percent for non-EU citizens. In 2006, the unemployment rate for Spanish people stood at 8 percent, at 9 percent for EU citizens and at 12 percent for non-EU citizens.

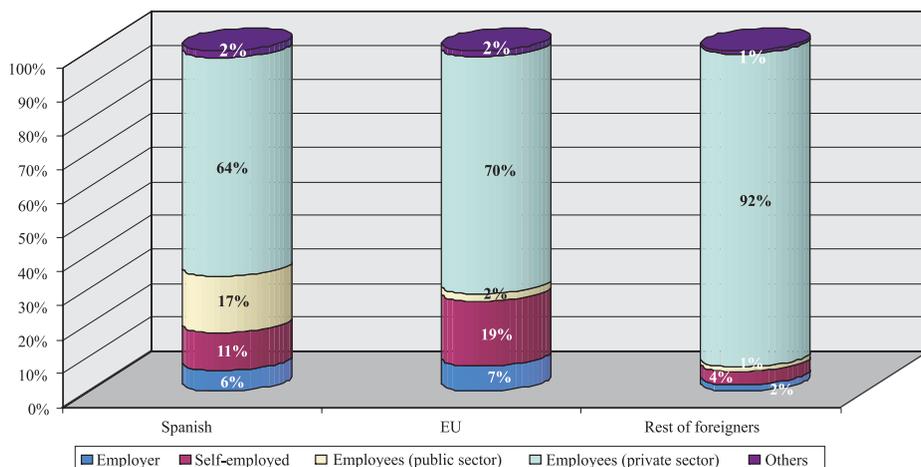
As far as sectoral employment is concerned, there are marked differences between Spanish citizens and those from outside the EU⁷. The first group predominantly works in the tertiary sector, while the second carry most weight in agriculture and construction (Figure 5.2). Nonetheless, in the tertiary sector, the importance of the employment of third country nationals in the hotel and restaurant as well as the household service sectors is also worth noting.

7 An in-depth analysis of the differences in sectoral employment between Spanish citizens and those from outside the EU can be found in Cachón (1997).

Figure 5.2: Employed population by broad nationality groups and economic sectors

Source: LFS, average 2006

Figure 5.3 shows a comparison of the professional status of the three broad national groups; Spanish, EU and non-EU citizens. Apart from a small percentage of self-employed people (4%), nearly all of the immigrant workers are salaried workers. The pattern for Spanish workers is more diverse, and it is worth noting the high percentage of civil servants, at 17 percent.

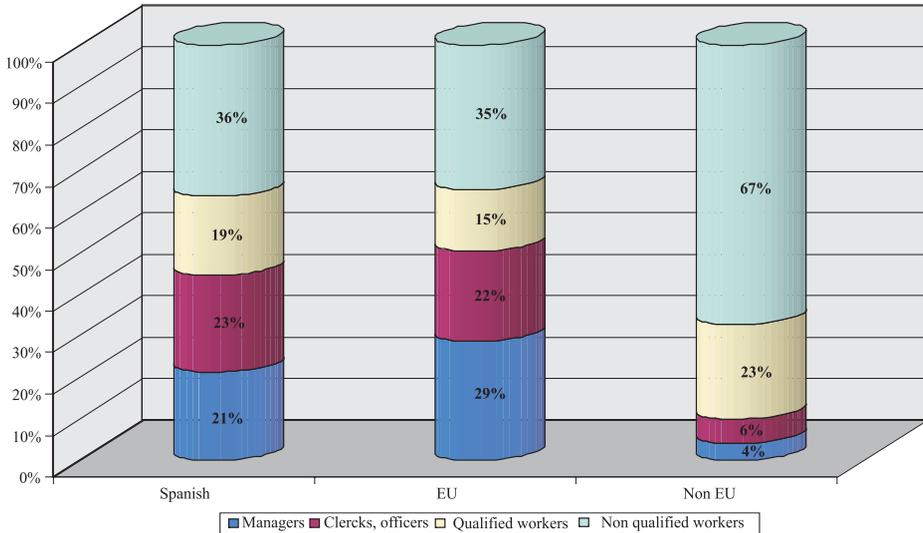
Figure 5.3: Employed population by broad nationality groups and professional status

Source: LFS, average 2006

Finally, we now briefly examine the type of work undertaken by workers belonging to the different broad nationality groups. While patterns for Spanish and EU citizens are relatively homogenous as far as the level of work undertaken is concerned, with half the employed population holding managerial or mid-level positions in both cases, in the case of non-EU citizens there is a predominance of unskilled or semi-skilled jobs.

Moreover, in the case of non-EU citizens, a third of the unskilled work, or 21 percent of the total, is accounted for by hotel, restaurant and personal services (Figure 5.4).

Figure 5.4: Employed population by nationality and job type



Source: LFS, average 2006

The differences noted in behavioural patterns lead to different patterns of illegal employment (Pajares, 2004; 2007):

As far as the **economic sector** is concerned, the bad practices characteristic of underground employment in each sector prevail for both Spaniards and foreigners. These include such practices as employment on an extremely temporary basis, subcontracting, lower salaries, laxer collective agreements, working without a contract, and underemployment, in other words, contracts for less hours than are actually worked, or contracts for categories of work below that which is performed. However, in the case of Spanish natives, the incidences of bad practice stemming from the underground economy are much lower than in the case of foreigners. This could be ascribed to two factors; first, some workers belong to a trade union, which places them under a greater obligation to comply with labour laws and, second, the fact that Spanish natives have gradually left the less regulated sectors, such as agriculture or household service. The informal employment of foreigners has certain sector-specific features. In agriculture, the hiring is carried out on an extremely temporary basis and without a contract, allowing for a reduction in labour costs.

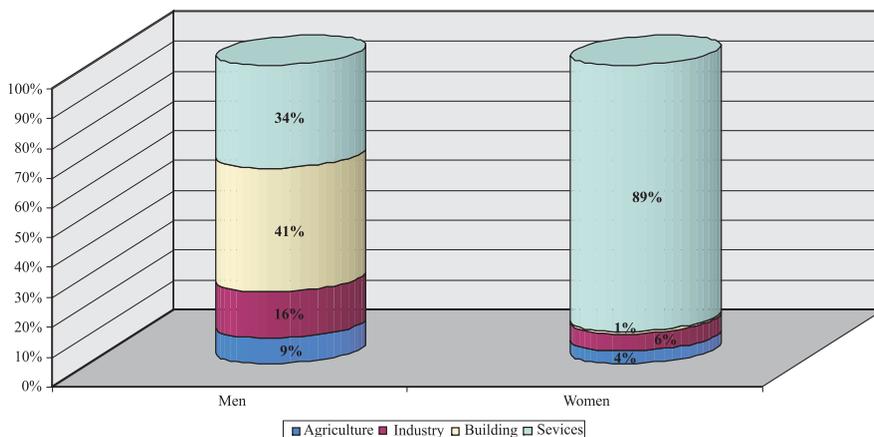
In addition, part of the payment is made in kind, as when, for example, the employer provides the worker with accommodation (Izcara Palacios and Andrade Rubio, 2004; Izcara Palacios, 2005). In the construction sector, subcontracting is a common practice and tends to entail poorer conditions than those stipulated by law, offering lower salaries and laxer collective agreements. In the hospitality sector, some immigrants work without a contract, or are subject to dishonest treatment, receiving contracts for fewer

hours than they actually work or contracts for lower salaries than are appropriate for the type of work being performed⁸. In household service, the type of work performed and the legal difficulties over the control thereof, make this the informal work category *par excellence*. This area is epitomized by work without contracts, low salaries, long working days, no vacation entitlements or poor payment, again, often made partly in kind, in the form of accommodation and subsistence (Colectivo IOE, 1990 and 2001; Banyuls, 2002/2003; Pajares, 2007).

As far as **professional status** is concerned, it is worth noting the importance to Spanish workers of both business owners with employees and the public sector; in the latter of which, we could say that the informal economy does not exist⁹. In the case of foreigners, self-employment without employees is fairly significant, bordering on the subsistence economy in many instances and, therefore, may be considered to be *informal work* (Beltrán et al. 2006), while contracting by third parties predominates for temporary and low skilled jobs¹⁰ which represent the perfect conditions for exploitation. These data are corroborated by the analysis we carried out above into **types of jobs**; unskilled jobs, which are less stable, account for nearly 70 percent of the posts applied for by immigrants.

Finally, we now discuss the issue of gender; the Spanish labour market is much divided along gender lines for both immigrants and Spanish citizens (Fernández, 2006). The diagram focuses exclusively on foreign workers.

Figure 5.5: Non-EU foreign workers by sex and economic sector



Source: LFS, average 2006

8 For conditions of employment in the hospitality sector, the study carried out by the Colectivo IOE (2000) is highly illustrative.

9 This does not mean that other forms of labour instability, such as the abuse of subcontracting or temporary work, do not exist; cf. The CCOO report (2007) or the Comisión de Expertos para el Diálogo Social report (2005).

10 A detailed analysis of this situation can be found in the *Informe del mercado de trabajo de los extranjeros*, issued in 2007 by the Observatorio Ocupacional del Servicio Público de Empleo Estatal (2007).

The diagram, taken from the LFS, refers to both regular and irregular foreign workers. It shows that there is a large difference between the jobs performed by women and men. This clearly has an impact on illegal contracting practices and methods. Moreover, while men are mainly subject to the practices as they exist in agriculture and construction, women are largely caught up in those relating to personal services. All three sectors are liable to irregular employment practices; however, as stated before, these are more significant and more predominant in the area of personal services. The consequence is that women are more often subject to illegal employment than men.

Regarding wage **differentials** between native and foreign workers, recent research (Martín Urriza, 2006) estimates that non-native workers earn between 7 and 17 percent less than Spanish workers, with the difference reaching 30 percent in the case of the underground economy¹¹.

5.2.2.3 Human trafficking and the illegal employment of foreigners

There are few statistics available on the human trafficking of foreigners. According to the data provided by the Ministry of the Interior, 429 human trafficking rings were disbanded in 2006, 29 percent up on 2005, and 1,821 arrests were made, which is a 24 percent increase.

The most important operations conducted were against rings devoted to smuggling immigrants into Spain; 96 rings of this nature were disbanded and 380 arrests were made. These figures represent a rise of over 40 percent on those recorded in 2005. Since 2004, the accumulated increase is 88 percent in the case of disbanded rings and 123.5 percent in the case of arrests¹².

Spain is a transit country for these rings; however, over the last few years it has also become a destination country for human trafficking. The *modus operandi* of these rings is very similar in all the cases examined¹³; they involve the sale of false or forged documentation in the form of residence permits, identity cards and job offers, in exchange for money, which is usually deducted from the salary paid to the victim for their irregular, or illegal, work.

5.2.2.4 Reasons behind the illegal employment of foreigners

The sustained economic growth in Spain, which is founded on unskilled jobs offered in labour intensive sectors such as construction, retail, hotels and restaurants, or household service, is the principal attraction which draws immigrants to Spain. This sustained growth, combined with the gradual insertion of Spanish women into the labour market

11 Research carried out by the Institute of Migration Studies of the Pontifical University of Comillas, showed that for Latin American immigrants in Spain, women's salaries were, on average, 35 percent lower than those of men (Aparicio, 2003).

12 http://www.mir.es/DGRIS/Notas_Prensa/

13 Official information can be found in the press releases provided by the Ministry of the Interior http://www.mir.es/DGRIS/Notas_Prensa/. Some operations have also been covered by the media: cf. ABC, 7 February 2007, El Día.es, 4 April 2007, La Verdad, 16 May 2007 and Minuto Digital, 16 October 2007.

and the higher level of qualifications among young people, who then reject jobs with a low social status, have led to the formation of a well-defined secondary labour market, which foreigners have entered.

From the point of view of demand, employers have a legion of reserves in the form of foreign workers, which makes the cost structure of employment more flexible, increasing temporary labour and making salary conditions less stable. It is also worth noting that, as CCOO indicates in its 2007 report, there have been incentives as regards illegal hiring, especially among small and medium enterprises, stemming from the inefficiency of our current regulatory framework as regards immigration. As Sandell (2005) points out, this is based on an underestimation of our needs for regular immigrant labour¹⁴.

There are also other factors that favour illegal hiring practices from the point of view of supply, namely, those relating to the migrant workers themselves. First, this group tends to overvalue the remuneration received, even though it is considerably lower than the amount paid to native workers, as they compare it quantitatively and qualitatively with the pay they could earn in their home countries; in addition, the instability of underground work is offset to a certain extent by the public services, such as, for example, free healthcare and education, which they receive simply by virtue of being residents; this applies even in the case of irregular migrants¹⁵.

Finally, as will be examined in the next chapter, Spain has a protectionist policy for native workers, in the form of restricted access of foreigners to jobs that have not been taken by nationals. This means that the initial work access conditions favour Spanish people.

5.2.2.5 Social acceptance of illegal employment

According to the findings of the Eurobarometer on undeclared work in the EU for 2007, Spain is not particularly tolerant towards the underground economy. In fact, only 3 percent of Spaniards stated that they received black money and 6 percent stated they acquired services or goods stemming from the underground market, while the EU averages were 5 percent and 11 percent respectively. However, if we look at the 1997 CIS (1998) survey on the underground economy, 58 percent of respondents thought it was standard practice to find Spaniards working and claiming unemployment benefit at the same time. The previously mentioned economic boom being enjoyed in Spain is undoubtedly responsible for this shift in attitudes¹⁶.

14 Under the existing legislation, the paradox exists whereby a company may wish to contract legal foreign workers but is unable to satisfy demand. This can lead it to weigh up the risks of contracting illegal workers. The complicated administrative system that currently governs the hiring of foreigners does not seem to have been designed for the type of jobs migrants take, which are characterised by high volatility and turnover rates.

15 In Spain, irregular migrants have access to most public services simply by being registered in the town hall of the area in which they reside.

16 In fact, in the CIS survey, when questioned on the motives that lead persons to adopt this type of attitude nearly 70 percent of respondents replied "due to necessity".

As far as the illegal employment of foreigners is concerned, we could say that there is not a great deal of sympathy from the general public; the opposite is, in fact, rather more true. According to a survey published in 2007 by OBERAXE, 75 percent of the respondents stated that only immigrants with a work contract should be allowed to enter Spain; while, as far as illegal employment is concerned, 80 percent of the respondents thought that these workers should regularize their situation, making this process dependent on a job (43%) or family ties in the country of destination (22%). Moreover, there is also a perception of illegal immigration as a form of unfair competition with Spaniards occupying a similar post. In fact, a large proportion of respondents (38%) support the current positive discrimination in favour of Spanish natives that exists in labour legislation.

As regards the key agents in the labour market, it should be noted that the **trade unions** support positive discrimination in favour of Spanish natives, but systematically advocate more extensive and better planning as regards immigration and the labour market. This is always presented in terms of declared work and specifically calls for more investment in resources to combat fraud [TU1ES and TU2ES]. **Temporary employment agencies** have offered to assist the government in making the procedure for hiring immigrants more flexible, acting as intermediaries between home country governments and the private sector in Spain [EA1ES, EA2ES, EA3ES]. **Business organizations** state that they do not endorse the hiring of irregular workers, inasmuch as this leads to unfair competition; moreover, like the trade unions, they support the tightening up of work inspections and the need to make hiring procedures and systems swifter, in order to reflect the real needs of the market. Nonetheless, in practice they tend to condone irregular employment, because of the existing legal and administrative difficulties involved in hiring foreign workers legally [E1ES, E2ES]¹⁷.

Thus, despite the unanimous condemnation of the underground economy and the illegal employment of foreigners, the evidence shows they are a reality in Spain. The most plausible explanation for this contradiction can be found in the rigidity of legal and government procedures for the employment of immigrants and the supposedly low effectiveness of the control mechanisms, as well as the relatively low sanctions imposed.

5.3 Combating the illegal employment of foreigners – analysis of policy and the law

5.3.1 Introduction

This chapter addresses the legal framework which regulates the work of foreigners in Spain¹⁸. Its centre of gravity is the issuing/obtaining of a work permit; in principle,

¹⁷ According to interviews with employers, trade unions and temporary work agencies performed within the scope of this research work in October 2007.

¹⁸ This is made up of the following two norms: Organic Law 4/2000, of 11 January 2000, on the Rights and Liberties of Foreigners in Spain and their Social Integration (LOE), the BOE of 12 January 2000, (revised successively by Organic Law 8/2000, of 22 December, the BOE of 23 December 2000, by Organic Law 11/2003, of 29 September, the BOE of 30 September, 2003, and Organic Law 14/2003, of 20 November, the BOE of 21 November 2003) and its Implementation Rules (RLOE), which were approved by Royal Decree 2393/2004, of 30 December, the BOE of 7 January 2004 (revised by Royal Decree 1109/2006 of 8 September, the BOE of 23 September 2006, Royal Decree 240/2007, of 16 February and the BOE of 28

this means that foreigners do not have free access to the Spanish labour market. Thus, employing them without the corresponding work permit, in other words, either without a permit at all, or without the appropriate permit, is illegal and, therefore, penalized. This illegality can be termed *special employment irregularity*, and is specific to, and characteristic of, foreign workers subject to the administrative authorization to work. Apart from this, it may also be illegal for a foreigner with the corresponding work permit to be employed; in this case, the illegality does not differ substantially from the illegal employment of a Spanish worker, therefore, it can be termed *common employment irregularity* in order to distinguish it from the *special irregularity*.

Having established this, the next step is to explain how employment policy on foreigners and the legal regulation of their work in Spain is set up. What follows is a general description of the basic components which make up its legal framework, together with the headings under which these will be analysed.

Starting from the fact that limitations are placed on foreigners' freedom of movement and residence, immigrant foreign workers are subjected to a control system involving the requirement for administrative authorizations in order to enter, stay and work in the country, that is to say, in order to be incorporated *regularly* to the domestic job market (see section 5.3.3). Compliance with, and the effectiveness of, the system of permits is intended to be guaranteed by an ad hoc regime of administrative sanctions, which involves different modalities of expulsion as the most characteristic sanction imposed on the foreign immigrant worker; this is currently reinforced by a group of criminal provisions intended to repress the most serious illegal conduct (see section 5.3.4). As the legal system does not deal with the causes and gives rise to recurrent groups of irregular immigrants, that is to say, those in a situation of *special employment irregularity*, its management is therefore not functional; thus, the latest legislative initiatives and Case Law decisions tend to give irregularity a more precise legal treatment, in order to avoid aggravating the socially precarious situation of the foreign immigrant workers (see section 5.3.5).

5.3.2 Combating irregular employment as an objective of employment and immigration policy

Combating the illegal employment of immigrants has been a constant feature of the policies of every Spanish government since the beginning of the 1990s, which is when Spain became a host country for immigration. This is recorded in the first official text published by a Spanish Government on the integration of immigrants, the "*Inter-ministerial Plan for the Integration of Immigrants*", promoted by the Ministry of Social Affairs and promulgated in February 1995. Its second section, which deals with migration flows, includes the combating of irregular employment as a complement to the measures for guarding borders and refers to a previous Law on Offences and Sanctions

February 2007). For an extensive analysis of the legal framework which regulates the work of foreigner in Spain see Trinidad Garcúa (2005), Ruiz de Huidobro (2006), Espinar Vicente (2006), Balaguer Callejón (2006).

in the Social Order, which classified offences related to both the employment of foreign workers with no permits, and the promotion, mediation and sheltering of the employment of foreign workers with no permits as very serious infringements. At the same point in the document, mention is made of the Inter-ministerial Commission on Foreigners approval, granted to a joint instruction to the Ministries of the Interior, Employment and Social Security, and Social Affairs, on collaboration between the Labour and Social Security Inspectorate and the Security Forces concerning the combating of the illegal employment of foreigners¹⁹.

The issue is more fully developed in the joint document entitled “*Global Programme for the Regulation and Coordination of Foreigners and Immigration in Spain*”, issued by the subsequent government and drawn up with the participation of the Ministries of Foreign Affairs, Justice, Interior, Education, Culture and Sport, Labour and Social Affairs, Public Administrations and Health and Consumption. We can see that this document, which is officially called the “*Programa Greco*”, again includes the matter in the chapter dealing with the control of migration flows. The introductory section of the programme states the following:

*“We must not forget that Spain has... a limited capacity as a host country and this must be based on a strict calculation of the jobs which can be offered to the foreigners who emigrate due to economic reasons in search of the opportunities which they cannot find in their own countries. Precisely because we have to respond to the demands made by these persons with jobs, clandestine immigration and the illegal permanence of these persons among us cannot be permitted. The trafficking of human beings and their subsequent exploitation as labour must always be prosecuted. Clandestine entry, illegal stay, exploitation as labour, social exclusion, poverty, delinquency in order to survive and social confrontation constitute a vicious circle which inexorably involves those persons who are deceived as victims of the mafia networks...”*²⁰.

Finally, with regard to migration, the executive summary of the Strategic Citizenship and Integration Plan adopted by the current Government states the following as the fifth of its objectives in the area of employment: “combat the irregular contracting of immigrant workers in the underground economy”. The terms of this document are similar to those which preceded it, although an important new factor is added; the issue of a residence permit in return for collaborating with the administrative authority. This is granted to those irregularly employed immigrants who collaborate with the Labour Inspectorate with regard to the denunciation of illegal employment. The electronic text states the following²¹:

19 Document cited, page 28.

20 The official edition of the Programme: Delegación del Gobierno para la Extranjería y la Inmigración (2001), Programa Global de Regulación y Coordinación de la Extranjería, Ministerio del Interior: Madrid, page 19.

21 The document we refer to was published by the Ministry of Labour and Social Affairs in 2007, in an abbreviated printed edition, together with a CD containing the complete text. It can be found in pdf format in the web of the Ministry (recently renamed Ministry of Labour and Immigration) <http://www.mtin.es/migraciones/Integracion/PlanEstrategico/indice.htm>.

“Up to the present time, the main obstacle to the prosecution of illegal employment was the fear that the immigrant worker had that he would be discovered, insofar as this could entail his expulsion due to working irregularly. Hence, the legislation created the residence permit for collaboration with the administrative authority, especially planned to protect the immigrant workers who collaborate with the Labour Inspectorate. This innovation also opens up channels for the establishment of protocols of collaboration between Trade Unions and the Labour Inspectorate in order to combat the irregular contracting of immigrant workers”.

In Spain there has been continuity in the governmental perception of the need to combat the irregular employment of immigrants and it is becoming more and more evident that this will be difficult to achieve unless the complicity of the irregular immigrants with both their illegal employers, and the illicit associations which profit by mediation between the parties, is broken. During the first years after economic immigrants arrive in the country, it is the humanitarian associations which offer most support as regards the exploitation of, and discrimination against, immigrants, both of which are contrary to their human rights. However, the problem of irregular employment is directly related to the wider problem of the social integration of immigrants, as this is considered to be necessary to the safeguarding of social peace and the security of all Spaniards. Furthermore, the economic importance of transforming the underground immigrant economy in order to ensure the collection of Social Security contributions justified the grand regularization authorized in 2005 for those irregulars who were, in fact, working and could produce a legal work contract. Finally, it places particular emphasis on the impossibility of achieving a minimum control of the flows if these are organized privately and by illicit associations, bearing in mind that it is not difficult to find illegal employment in Spain.

The following section makes a detailed analysis of the legal instruments with which the Government has endowed itself in order to achieve its objectives, together with the specific measures which have emerged in the field in this regard.

5.3.3 Administrative authorization to work

From a legal point of view, the regulation of the employment of foreigners constitutes the central nucleus of immigration policy, and the administrative authorization to work constitutes the axis of judicial technique around which all regulation is focused.²² In this regard, foreigners do not have free access to the Spanish job market, and suffer unequal judicial treatment as Spanish nationals are not required to have any authorization. Its significance is in that it is an economic specification of the discriminatory effect on foreigners. It involves the recognition of the public power to admit or not to admit

22 Article 36 of the LOE enshrines this as follows, “Authorization for carrying out remunerative activities. 1. In order to carry out any remunerative employment or professional activity, foreigners over 16 will require the relevant previous administrative authorization to work. This authorization will enable the foreigner to reside in the country during its period of validity, and this will be extinguished if the corresponding visa is not applied for once one month has elapsed from the time that the employer is notified of the concession of the authorization. (...) 3. As regards the contracting of a foreigner, the employer must request the authorization referred to in section 1 of this article. (...)”.

foreigners to work in Spain, while safeguarding their general interests. This is confirmed if we take into account the basic criteria for granting the authorization to work; for remunerative activities as an employed person, the current domestic employment situation is a defining criteria (cf. article 38.1 LOE), while for remunerative activities as a self-employed person, the criteria is based on the sufficiency of the investment and the potential creation of employment (cf. article 37 of the LOE).²³ The granting of a work permit also enables the foreigner to reside in Spain (cf. article 36.1 *in fine* of the LOE).

It should be noted that in the legislation on foreigners and immigration, the semantic extension of the notion of worker incorporates any foreigner who intends to, or carries out, remunerative activity as a worker or professional, be it as an employee or as a self-employed person. Thus it goes beyond the technical-legal significance of the legal employment relationship which is the subject of the Employment Law, as well as going beyond the sociological notion of the immigrant as the subject of contemporary international migrations. As regards the regulation of migration flows, the work permit issued to an employee takes on a special relevance, as its regulation is based on the principle of reserving the Spanish job market for the Spanish worker, who has priority over the foreign worker, as stated above.

5.3.3.1 The access of foreign workers to the Spanish job market

In the light of the above, the importance of the initial granting of a work permit for an employee can be deduced, as it is based on the premise of opening the Spanish job market to a foreign worker once the domestic employment situation has been evaluated. This evaluation is the basis of the policy on the management of migration flows.

The current Spanish legal system admits several methods for evaluating the domestic employment situation when initial applications for work permits must be addressed.

In the first place, reference must be made to the management of the applications for work permits by means of individual determination, which entails the individual analysis of each application in order to check whether the domestic employment situation permits the contracting of a foreign worker. To achieve this, article 50 of the RLOE makes provision for two methods: a) the drafting, by the Public State Employment Service, of a Catalogue of Difficult to Cover Occupations; the inclusion of an occupation in this Catalogue allows the possibility of processing a temporary residence and work permit for a foreigner;²⁴ and b) direct management, which consists of the employer presenting

23 Article 58 of the RLOE also specifies the following requisites “e) the stipulation that the exercise of the activity will result in sufficient financial resources at least for the subsistence and accommodation of the person concerned, once what is required to maintain the activity has been deducted”.

24 Article 50 a), second paragraph of the RLOE stipulates the drafting of the Catalogue every quarter, the provincial desegregation (and the cities of Ceuta and Melilla), and the previous consultation of the Three Party Employment Commission, in accordance with the information provided by the Autonomous Community Employment Services. The technical methodology for the drafting is approved by the Resolution of the Public State Employment Service of 8 February, 2005, whereby the procedure for the drafting of the Catalogue of Occupations Difficult to Cover, regulated in article 50.a of the RLOE, the BOE of 24 February 2005, is established. The Catalogue of Occupations Difficult to Cover for the previous quarter of the year in progress can be consulted on the web site of the Public State Service (www.inem.es).

the job offer to the public employment service for its processing; if no appropriate applicants have appeared within fifteen days, the service will issue a certification with the conclusion that there are insufficient job applicants who are suitable and available, thus enabling the contracting of a foreign worker.

Secondly, the determination of an annual contingent is stipulated. This is a method for managing applications through a general numerical determination, whereby the government evaluates the global needs of the domestic job market or, with a less functional objective, evaluates the real possibilities of absorbing immigrant workers, and establishes a determined number of temporary residence and work permits, a priori, to be automatically granted to foreigners who are not present or do not reside in Spain and have a definitive job offer, in strict order of application.²⁵ The contingent enables the desegregation of the number of administrative authorizations offered by economic sector and even by functional category, by country of origin, should this constitute an instrument in favour of current foreign policy, and by region or geographical area.²⁶

There is a third channel which may be mentioned here, the mixed access channel to the domestic job market, which is constituted by bilateral agreements on the regulation of migration flows. Although they open up a channel for the management of migration flows, each agreement is circumscribed to foreigners from a specific country.²⁷ However, it should be said that these have achieved little at a practical level.

From the procedural point of view, once the work permit and temporary residence as an employed person is granted, the worker then has to apply for the relevant visa; the validity of the permit is subject to obtaining the visa. Reasons must be given for the refusal to grant a visa, such as, for example, in a case where there are sufficient indications to raise doubts as to the identity of the applicant, the validity of their documents, or the veracity of the reasons given for applying for the visa (cf. article 51.9 of the RLOE in relation to article 27 of the LOE).

5.3.3.2 The system of administrative authorizations for carrying out remunerative activities

The legal regulations incorporate a group of judicial techniques which provide the system of work permits with the degree of diversification and specialisation required by the complexity of the job market and, in general, by the Spanish economy, as well as by contemporary migration flows. For reasons of brevity, these techniques are simply listed, together with an indication of where the relevant legal regulation may be found.

25 Regulated in article 30 of the LOE and articles 77 to 83 of the RLOE.

26 The 2007 contingent and its regulation were published by a Resolution of the Secretary of State for Immigration and Emigration of 26 December 2006, whereby provision is made for the publication of the Agreement of the Council of Ministers, of 22 December 2006; wherein the contingent of non-EU foreign workers is regulated in Spain for 2007, the BOE of 9 January 2007.

27 To date, these have been entered into with Ecuador, Colombia, Morocco, the Dominican Republic, Poland, Romania and Bulgaria. It should be borne in mind that the last three countries are members of the European Union, although there are still restrictions on the free movement of the nationals of Romania and Bulgaria in Spain during the transitory period currently in force.

In the first place, there is a wide range of modalities and classes of permits, each with a set of characteristics concerning their granting and the field of work for which the holder is enabled, and a clear distinction is made between initial concessions and the renewal of permits. According to Serrano Villamanta (2006:147–8), the system of permits stipulated in the RLOE may be presented as follows:

Ordinary temporary residence and work permits.

The permits are granted for reasons of employment, or of a professional nature, and are stable, as they are renewable until permanent residence is obtained. The sequence is as follows: an initial permit for a 1-year period; the first permit is then renewed for 2 years; and this second permit is renewed for a further 2 years.

1. Temporary residence and work permit for an employee (Section 1, Chapter II, Title IV of the RLOE).
2. Temporary residence and work permit for a self-employed person (Section 3, Chapter II, Title IV of the RLOE).

Temporary residence and work permits which are not stable.

These permits are also granted for employment and professional reasons, but they are neither stable in nature, nor do they relate to a permanent vocation and, although they may be extended, they do not facilitate the obtaining of a permanent residence permit:

1. Temporary residence and work permit for an employee with a fixed term contract of employment (Section 2, Chapter II, Title IV of the RLOE).
2. Temporary and work permit issued within the framework of the transnational provision of services (Section 4, Chapter II, Title IV of the RLOE).

A work permit linked to a pre-existing residence permit:

Here we can distinguish the following:

1. Cases in which it is necessary to apply for a work permit:
Reunited family members who are old enough to work, are holders of residence permits and do not receive more than the minimum inter-professional wage. Holders of residence permits due to exceptional circumstances, except in the case of settlement and residence as a result of reasons involving international protection, as provided for in article 31.3 of the Regulation of Asylum (cf. respectively, article 96 and article 98 of the RLOE).
2. Cases in which the residence permit includes the authorization to work:
Holders of residence permits issued as a result of exceptional circumstances of settlement or for reasons involving international protection (cf. article 45.7 of the RLOE).

A work permit not linked to a residence permit.

These are work permits which are not linked to a pre-existing permit:

1. Work permits for students and researchers (cf. articles 90 and 91 of the RLOE).
2. Work permits for transborder workers (cf. Title VI of the RLOE).
3. Work permits for aliens applying for asylum (cf. the Seventeenth Additional Provision of the RLOE).
4. Work permits for enrollment (cf. article 50, of the final paragraph of the RLOE and the Department of Immigration Instruction of 29 July 2005).
5. Other authorizations relating to non-regulated cases and approved by the Council of Ministers (cf. the First Additional Provision, section 4 of the RLOE).

A second component which adds to the diversification of the system is the definition of a group of cases which exclude the need to obtain a work permit in order to carry out activities for profit (cf. article 41 of the LOE and articles 68 to 70 of the RLOE). Some exceptions may be subjective or personal; for example, people who have obtained refugee status, those who have obtained permanent residence, or those who were originally nationals and then lost their Spanish nationality. Others are of an objective nature, that is to say, they depend on the activity to be carried out and, therefore, the exception is limited to this activity; for example, technicians, guest alien researchers and scientists, or those contracted by public bodies or universities; alien social media correspondents; ministers, monks, nuns and representatives of churches or confessions, and so forth.

Finally, a third judicial technique is constituted by what is termed preference for obtaining work permits, that is to say, the definition of cases in which the domestic employment situation is not taken into account in order to evaluate the application for a work permit.²⁸

There are also groups of people who are not obliged to obtain work permits as they are totally or partially excluded from the application of the general legal regulations concerning foreigners and immigration, that is to say, the LOE and the RLOE. Among these, mention should be made of people under the direct protection of Public International Law, for example, diplomatic agents and consular staff accredited in Spain, the representatives and delegates of permanent missions to inter-governmental bodies with establishments in Spain, and civil servants in international organizations with establishments in Spain²⁹; refugees, who have their own, separate judicial regime

²⁸ These are included in article 40 of the LOE, for example, on subjective grounds a permit may be granted to the spouse or child of an alien resident in Spain with a renewed permit; the child of a EU foreigner with one year's residence in Spain, and where the EU law is not applicable; the child of a nationalised Spaniard; a foreigner who is responsible for grandparents or descendants of Spanish nationality; the child or grandchild of a person of Spanish origin. Other objective grounds are stipulated under articles 50 of the final paragraph, 66; 90.1; and 92, 5 of the final paragraph; and 95.1; 96.1 of the RLOE; they include a foreigner who has been designated to hold a position of trust, a foreign assembler or repairer of imported production installations or equipment. The Seventeenth Additional Provision of the RLOE provides for nationals from the countries which have most recently joined the European Union, for the duration of the transitory period.

²⁹ cf. article 2 a., b. and c. of the LOE.

and do not require residence or work permits³⁰; and people included within the scope of the community regime³¹.

5.3.3.3 Effects of special employment irregularity and common employment irregularity

To conclude this section, it should be remembered that, in accordance with the terminology proposed in this study, if a foreigner works without the cover of the relevant authorization, his situation will constitute a *special employment irregularity*, and will give rise to the activation of the sanctioning regime stipulated in the legal regulations concerning foreigners and immigration.

However, it should also be remembered that there is a *common employment irregularity* when a worker, regardless of his nationality, is employed and is not registered with the Social Security authorities and the obligation to pay contributions is not complied with;³² in addition, there is also the failure to pay income tax.³³ Such failures to comply with these obligations constitute administrative infringements, which incur penalties for the violation of Social Security and tax legislation³⁴. As regards *common employment irregularity*, the most serious violation of the law can be criminally penalized³⁵. It is

30 cf. article 34.3 of the LOE.

31 Article 1.3 LOE establishes that, “*The nationals of the Member States of the European Union and those to whom the community regime applies will be regulated by the legislation of the European Union, and the present law will apply to them as regards those aspects which might be more favourable*”. Thus they have the right to undertake any work, both as employed persons and as self-employed, under the same conditions as Spaniards, without prejudice as regards the limitation regarding the exercise of the public function, which is established in article 39.4 of the Treaty constituting the European Community; that is to say, the *ex lege* right of these persons to work in Spain is recognized and, therefore, this work is not subject to the requirement to obtain previous administrative authorization.

32 cf. articles 7.1, 12 and 15 of Legislative Royal Decree 1/1994, of 20 June, which approves the Revised Text of the General Law on Social Security (LGSS), the Official State Gazette (BOE) of 29 June 1994.

33 As regards the employer, the obligations are to maintain an accounting system which records the actual financial status of the company and to make the appropriate Income Tax payments. The worker is obliged to declare his income in his Income Tax Return.

34 The first are specified in chapter III of Offences regarding Social Security, in article 22 of Legislative Royal Decree 5/2000, of 4 August, which approves the Revised Text of the Law on Offences and Sanctions at Social Level (LISOS), the BOE of 8 August 2000 and of 22 September 2000. In general, the penalties are monetary, although, in certain cases, accessory penalties may be imposed, involving the loss of grant aids and allowances (cf. article 46 of the LISOS). There is a specific regime of responsibility when a temporary employment company is involved (cf. article 16.3 of law 14/1994, of 1 June, whereby the temporary employment companies are regulated, the BOE of 12 June 1994). With regard to article 20.d) of Legislative Royal Decree 2/2000, of 16 June, whereby the Revised Unified Text on the Law of Contracts of Public Administrations (LCAP) is approved in the BOE of 21 June 2000, those who have been sanctioned definitively due to a serious offence against the social order are forbidden to enter into contracts with the Public Administrations. Offences and penalties concerning taxation are generally regulated in Title IV, entitled The sanctioning power; articles 178 a 212, of Law 58/2003, of 17 December specifies penalties relating to General Taxation (LGT), the BOE of 18 December 2003. Supplementary, as well as monetary penalties may be imposed, such as the loss of the possibility to obtain subsidies or public funding and tax benefits, and a prohibition to enter into contracts with the Public Administration, in accordance with article 186 of the LGT. In relation to contracts with the Public Administration, cf. also article 20.j) of the LCAP.

35 Article 305 of the Penal Code considers a fraud to be the withholding of payments due to the Inland Revenue which exceed 120,000 euros. Article 307 of the CP provides parallel regulations with regard

also stipulated that calls for applications for public grants or subsidies or for public tendering require that the applicants be up to date as regards their tax and Social Security payments³⁶. The Labour and Social Security Inspectorate is in charge of compliance with employment legislation (ITSS)³⁷. In addition, the Inland Revenue is responsible for the management of the state taxation system, including the prosecution of tax evasion. Independently of this, there is also a legal framework which formalizes positive policies in order to encourage regular employment, providing measures such as allowances for contributions, tax incentives, and so forth³⁸.

As mentioned above, there are no substantial differences as regards the consequences of *common employment irregularity* in the case of a national and in that of a foreign worker, the holder of the corresponding work permit; the most important difference is the fact that the foreign worker might lose his status as a legal resident. Once the residence and initial work permit is granted, if the worker is not registered in the Social Security system within one month of his entering Spain and, in any case, at the time of his application for an identity card as a foreigner, the permit will expire through a reasoned or motivated resolution (cf. article 75.2.c. of the RLOE). Moreover, the renewal of the temporary residence and work permit may be hindered if, during the period of its validity, employment activity is not registered (cf. article 54 of the RLOE)³⁹.

to Social Security dues involving amounts greater than 120,000 euros, which, among other reasons, are unpaid as a result of the failure to pay contributions. Article 312 of the CP makes provisions for the illegal trafficking of labour.

36 As regards subsidies, article 14.1.e) of Law 28/2003, General on Subsidies, of 17 November, the BOE of 18 November 2003. As concerns the contracts with the Public Administration, article 20. f) of the LCPA establishes the prohibition on this as a result of “*not complying with tax or Social Security obligations imposed by the provisions in force, in the regulation terms determined*”.

37 This is regulated by Law 42/1997, which regulates the Labour and Social Security Inspectorate (LITSS), the BOE of 15 November 1997. The Inspectorate is competent to prosecute failure to comply with the employment and Social Security regulations. Article 3 of the LITSS stipulates that, among the tasks of the Labour and Social Security Inspectorate, is the supervision and enforcing of the legal norms, regulations and regulatory content of collective agreements in the following areas: 1. the legislation on employment and Trade Union relationships; 2. prevention of occupational risks; 3. the Social Security system; 4. employment and migration; 5. other areas specifically entrusted to the Employment and Social Security Inspectorate, in particular, those concerning cooperatives and other social economy institutions. It should be noted that section 4 corresponds to the specific legal regulation of the work of foreigners. The human and technical resources of the Employment and Social Security Inspectorate are currently insufficient for it to be able to properly supervise the job market and the Social Security authorities.

38 Law 56/2003, on Employment, of 16 December, the BOE of 17 December, 2007 should be mentioned. This establishes coordination between internal and external migration as one of the general objectives of employment policy, with the central State Administration and the Autonomous Communities collaborating in accordance with their respective competences. It requires the guaranteeing of an effective equality of opportunities and non-discrimination as regards access to employment and the actions oriented towards achieving this; the free choice of profession; and the assurance of adequate policies on employment integration. It stipulates that the Public State Employment Service, the former INEM, manage the implementation of the intermediation programmes and active employment policies in the countries of origin, with the objective of facilitating the immigrant workers' employment integration. It also stipulates that the Government and the Autonomous Communities will adopt specific programmes intended to encourage the employment of persons with special integration difficulties, including immigrants; in this regard, the public employment services will ensure the design of insertion itineraries which combine the different measures and policies, duly ordered and adapted to the professional profile of unemployed persons and their specific needs.

39 Article 54.3, first paragraph of the RLOE establishes that the renewal will apply, as a general rule, if the continuance of the employment relationship for which the permit's renewal is intended is accredited.

5.3.4 Sanctioning regime

In order to guarantee compliance with, and the effectiveness of, the legal regulation of the employment of foreigners in Spain and, in particular, its system of work permits, there is a group of norms which are established in the form of sanctions. Among these norms, we must distinguish those of an administrative nature and those of a criminal nature.

5.3.4.1 The administrative employment sanctioning regime

The LOE sets out a specific sanctioning regime for administrative offences against the legal systems regarding foreigners and immigration. This constitutes another manifestation of the recognition of the sanctioning power of public authorities within the scope of their functions, such as, for example, the recognition of the sanctioning power of the traffic police or the tax administration. In this case, it concerns the control of foreigners and the regulation of migration flows. Of interest here are the disciplining of the job market and the participation of foreigners in this market⁴⁰.

In compliance with the constitutional principles of the sanctioning law, the LOE defines minor⁴¹, serious⁴² and very serious offences⁴³. The types of sanctions stipulated are

Three exceptions are then established. First, the renewal applies if the habitual execution of the activity for which the authorization was granted is attested to for a minimum of six months per year of validity, on the condition that there is a new work contract in line with the nature of the work for which the permit is issued; that the holder is registered in the Social Security system; or that the holder has a new job offer which complies with the requirements generally established for obtaining the initial residence and work permit as an employee, without taking the evaluation of the domestic employment situation into consideration (cf. article 54.3, second paragraph of the RLOE). Secondly, the renewal also applies if a period of activity of at least three months per year is attested to, on condition that the employment relationship for which the authorization to be renewed was issued is interrupted by reasons beyond the control of the foreigner, who has actively sought employment and, at the time of the application for renewal, has a work contract in force (cf. article 54.4 of the RLOE). Third, failure to pay Social Security contributions will not prevent the renewal, on condition that the holder's habitual execution of the activity in question is attested to, in which case, the competent authority will notify the Employment and Social Security Inspectorate of the failure to pay, in order that it may implement the relevant procedures (cf. article 54.6 of the RLOE).

40 Apart from this, in the LISOS, which contains the general sanctioning regime as regards social order, Chapter IV deals with Offences regarding emigration, migratory movements and the employment of foreigners, which partially overlaps with the sanctioning regime regarding foreigners.

41 Included in article 52 of the LOE. As an example, “*a) the commission or delay in notifying the Spanish authorities of changes of nationality, marital status or address, as well as other circumstances which determine the person's employment situation when these are required by the applicable legislation*”.

42 Included in article 53 of the LOE. As an example, “*a) Be on Spanish territory irregularly, due to not having obtained an extension of stay, the lack of a residence permit or the expiry of this authorization more than three months previously, on condition that the person concerned has not applied for its renewal within the period stipulated by the regulations. b) Be working in Spain without having obtained a work permit or a previous administrative authorization to work, when the person does not have a valid residence permit...d) Failure to comply with the measures imposed as regards public security, periodical reporting or prohibition from approaching borders or specified towns, in accordance with the stipulations set out in this law...f) The participation of the foreigner in activities contrary to public order and stipulated as serious in Organic Law 1/1992, on the Protection of the Security of Citizens, of 21 February*”.

43 Included in article 54.1 of the LOE. As an example, “*a) Participating in activities contrary to the external security of the State, or which might damage the relations of Spain with other countries, or being involved*

finés⁴⁴, confiscation of the resources employed in the illegal trafficking of persons⁴⁵, closure of the establishment or premises⁴⁶ and the different modalities of expulsion⁴⁷.

Expulsion, in the wide sense, entails the compulsory departure of the foreigner from Spanish territory and is a clear and strict manifestation of the logic of the legal regulation of foreigners and immigration; the legislator establishes channels for admission, via the administrative residence and/or authorizations, and, in the event that the foreigner does not accede to these legal measures, the administrative authority can terminate his presence on Spanish territory by transferring him to the border or repatriating him. The modalities of expulsion set out in the LOE are as follows: in the first place, preferential expulsion⁴⁸ and ordinary expulsion⁴⁹, both unmistakable forms of sanction, which are differentiated by the procedures followed to issue them; and, in the second place, removal⁵⁰ and return⁵¹; rather than being sanctions, these are administrative measures by which the legal system relating to foreigners is applied at the border. Among other precautionary measures stipulated by the LOE in order to ensure the expulsion are those of precautionary detention and preventive internment in internment centres. It should be noted that the last two precautionary measures entail the foreigner's being deprived of his freedom of movement⁵².

A more detailed analysis of offences concerning the employment of a foreigner without the relevant work permit now follows. These are classified as offences against social order and a specific procedure is stipulated for the imposition of sanctions in these

in activities contrary to public order and stipulated as very serious in Organic Law 1/1992, on the Protection of the Security of Citizens, of 21 February. b) Inducing, promoting, favouring or facilitating the clandestine immigration of persons in transit, or whose destination is Spanish territory, or their permanence in Spain on condition that the occurrence does not constitute an offence, and is not instigated for profit, either individually or as part of an organization...d) The contracting of foreign workers without having previously obtained the relevant work permit; each foreign worker employed will constitute a separate offence". Article 52.2 of the LOE includes a number of offences on the part of carriers who transfer foreigners to Spain and fail to comply with the legal obligations concerning foreigners as set out in article 66 of the LOE.

44 Included in article 55 of the LOE.

45 Included in article 55.5 of the LOE.

46 Included in article 55.6 of the LOE.

47 Regulated in articles 57 to 64 of the LOE.

48 cf. articles 63 of the LOE and 130 to 134 and 138 to 142 of the RLOE. *Preferential expulsion* applies in the cases of offences recognized in letters a) and b) of article 54.1. and a), d) and f) of article 53 of the LOE, details of which can be found in footnotes 41 and 42.

49 cf. article 63 of the LOE and articles 122 to 129 and 138 to 142 of the RLOE. *Ordinary expulsion* may apply as an alternative to the fine if the competent sanctioning body so decides in cases where foreigners commit offences classified as very serious (cf. article 54 of the LOE) or offences classified as serious in sections a), b), c), d) and f) of article 53 of the LOE, as prescribed by article 57.1 of the LOE. Articles 57.7 and 8 of the LOE also provide for *ordinary expulsion* in relation to the commission of certain offences.

50 This administrative measure is directly aimed at terminating the stay of a foreigner on Spanish territory when he has attempted to enter Spain avoiding the border posts or has contravened an entry prohibition. It is included in article 58.2 of the LOE.

51 This administrative measure, implemented at the border, is aimed at repatriating those foreigners who are not allowed to enter Spanish territory. It is set out in article 60 of the LOE.

52 cf. articles 61 to 62 of the LOE and 153 to 155 of the RLOE. The LOE makes provision for the possibility of interning the foreigner for up to a maximum of forty days in an internment centre which is not of a penitentiary nature, once judicial authorization has been obtained.

cases; this is justified by the fact that their regulation comes within the brief of the Labour and Social Security Inspectorate⁵³.

Employers

The offence is that of the contracting of foreign employees with no work permits; the specific designation being “*the contracting of foreign workers who have not previously obtained the relevant work permit; each worker employed will constitute a separate offence*” (article 54.1.d. LOE). This offence is classified as very serious and may be sanctioned with a fine ranging from 6,001 euros to 60,000 euros⁵⁴; in addition, the closure of the establishment or premises for a period of between six months and five years may be decreed. If the offender is a foreigner, the sanction may entail expulsion from Spanish territory instead of a fine; in this case, ordinary proceedings correspond with the specific aspects relating to the imposition of an expulsion order.

Foreign workers

The first offence which might apply to foreign workers is when a person holding a temporary residence permit works as a self-employed person without having applied for authorization⁵⁵. Strictly speaking, this case is not one of employment irregularity, as there is no contracting of a worker. What is significant here is that employed work is not provided for; that is to say, that work carried out by an employed foreigner who has a residence permit, but no work permit, is not sanctioned here. However, the contracting of such a person by an employer constitutes a very serious offence under article 54.1.d. LOE. The offence of working as a self-employed person without having applied for authorization is classified as a minor one and may be sanctioned with a fine of up to 300 euros⁵⁶. The recurrence of this minor sanction gives rise to a serious offence⁵⁷, which may be sanctioned with a fine of between 301 euros and 6,000 euros.

53 This is regulated in Chapter IV of Title XI of the RLOE (articles 148–149). In order to regulate the commencement of such a procedure and the content of certificates, notifications and allegations, reference is made to the General Regulations on procedures for the imposition of sanctions for offences of a social nature, and for proceedings involving the settlement of Social Security contributions, approved by Royal Decree 928/1998, of 14 May, the BOE of 3 and of 25 June, 1998.

54 As the gradation of sanctions for offences of a social nature applies, the amount will be as follows: for an offence which is serious to the minimum degree, a fine from 6,001 to 12,000 euros; to the intermediate degree, from 12,001 to 30,000 euros; and to the maximum degree, from 30,001 to 60,000 euros (cf. article 149.4 of the RLOE).

55 This is legislated as follows “*to work in Spain without having applied for an administrative authorization to work as a self-employed person when the person has a temporary residence permit*” (article 52.e. of the LOE). Note should be made of the deficient drafting, which states, *without having applied for authorization*, when it should state *without having obtained authorization*, in order to comply with the provisions of article 37 of the LOE.

56 As the gradation of sanctions for offences of a social nature applies, the amount will be as follows: for an offence which is serious to the minimum degree, with a fine from 30 to 60 euros; to the intermediate degree, from 61 to 150 euros; and to the maximum degree, from 151 to 300 euros (cf. article 149.4 of the RLOE).

57 “*The commission of a third minor offence, on condition that the person has been sanctioned for two minor offences of the same nature within the previous year*” (article 53.e. of the LOE).

The second offence which is typical of foreign workers is “*working in Spain without having obtained a work permit or previous administrative authorization to work, when he does not have a valid residence permit*” (article 53.b. of the LOE). The offence is classified as serious and may be sanctioned with a fine of between 301 euros and 6,000 euros⁵⁸ or with expulsion from Spanish territory. Although the foreigner is a self-employed worker, this is not the specific procedure for social offences which we indicated above, but the ordinary procedure. The recurrence of this serious offence gives rise to a very serious offence⁵⁹, which may be sanctioned with a fine of between 6,001 euros and 60,000 euros or with expulsion from Spanish territory.

5.3.4.2 Criminal provisions

Finally, mention should be made of criminal legislation as a more intensive instrument for controlling conduct which most seriously infringes the legal order. Independently of other provisions⁶⁰ in relation to *special employment irregularity*, there is legislation on the following conduct: the illegal employment of foreign labour⁶¹; clandestine immigration of labour, or deceitful emigration⁶²; and the illegal traffic in persons, or clandestine immigration of persons⁶³; as can be seen, this legislation is directed toward employers and traffickers.

58 If the worker is self-employed, as the gradation of sanctions for offences of a social nature applies, the amount will be as follows: for an offence which is serious to the minimum degree, with a fine from 301 to 1,200 euros; to the intermediate degree, of 1,201 to 3,000 euros; and to the maximum degree, of 3,001 to 6,000 euros (cf. article 149.4 of the RLOE).

59 “*The commission of a third serious offence on condition that the person has been sanctioned for two serious offences of the same nature within the previous year*” (article 54.1.e. of the LOE).

60 The provisions regarding foreigners are: expulsion for the commission of an offence *mens rea* (article 57.2 of the LOE); expulsion as a measure substituted for the order to proceed with criminal proceedings (article 57.7.a of the LOE); expulsion as a measure substituted for compliance with a penalty imposed in criminal proceedings against a foreign person residing illegally on Spanish territory (article 89 of the CP); expulsion as measure substituted for compliance with the security measures imposed in criminal proceedings against a foreign person residing illegally on Spanish territory (article 108 CP).

61 Article 212.2 of the CP in fine punishes those who “*employ foreigners who have no work permits under conditions which damage, suppress, or restrict their recognized rights under the legal provisions, collective agreements and individual contracts*”.

62 Article 213 of the CP punishes those who “*promote or encourage the smuggling of workers into Spain or another European Union country by any means*” and those who “*determine or encourage the emigration of any person to another country, simulating a job contract or by using similar deceit*”. Article 313.1 of the CP has been revised by Organic Law 13/2007, of 19 November, the BOE OF 20 November 2007.

63 Article 318 bis is drafted as follows: “*1. A person who directly or indirectly promotes, encourages or facilitates the illegal trafficking in, or the smuggling of, persons from, in transit through, or with destination to Spain or another European Union country, will be punished with four to eight years imprisonment. 2. If the intention of the illegal trafficking or the smuggling of persons is the sexual exploitation of those persons, punishment will be 10 years imprisonment. 3. Those who carry out the activities described in either of the previous two sections with the intention of making profit, or by using violence, intimidation, deceit, or by abusing a situation of superiority over, or the special vulnerability of, the victim, or if the victim is a minor or disabled, or by putting the lives, health or the integrity of those persons in danger, will be punished with the upper half of the range of penalties. 4. Those who carry out these activities by availing themselves of their condition of authority, or are agents of the authority, or civil servants, will incur the same penalties as set out in the previous section and absolute disqualification of six to twelve months. 5. Penalties of a higher degree than those stipulated in sections 1 to 4 of this article will be imposed in the respective cases, as will special disqualification with regard to profession, trade, industry*

5.3.5 Alternative non-sanctioning processing of irregular employment

As pointed out above, the regulatory legal framework of foreigners and immigration can usually be penetrated and, thus, gives rise to recurrent groups of irregular immigrant workers, that is to say, persons in a situation of *special employment irregularity*. In order to prevent both the aggravation of their socially precarious status and their suffering from employment abuse and exploitation, the judicial processing of irregularity has further evolved and, while maintaining the aspects of sanctioning, other legal techniques have been also been drafted in order to achieve a more just and less socially dysfunctional judicial ordering of migration. In addition, this is being applied to areas where the legal system lacks the human, technical and financial resources which are essential for its efficacy. Evidence of this is the evolution of the consideration of the work contract of the irregular employee from the judicial point of view, the legal formulation of an ordinary regularization channel and the protection established for victims of trafficking in human beings.

5.3.5.1 The work contract of the irregular immigrant from the judicial point of view

What are the legal consequences regarding a work contract when there is no work permit? On the basis of article 7.c of the Workers' Statute, and the legislation on foreigners previous to the LO 4/2000, the traditional doctrine gave the interpretation that a foreign worker with no work permit lacked employment capacity and, therefore, any work contract which he attempted to enter into would be null in law; that is to say, it would have no legal force at all. However, it soon became clear that this solution was far from being satisfactory because it led to the unfair enrichment of the employer, who benefited from the work done by the foreigner but was not obliged to pay him a salary. In order to prevent this unfair enrichment, the right of the worker to be paid the due salary was recognized. Despite the ambiguity and imprecision of its terms, the current regulation of the LOE⁶⁴ has made it possible to change the Case Law doctrine, which no longer doubts the validity of the work contract made with a foreigner who has no work permit⁶⁵. Thus, besides the effects concerning remuneration, Case Law recognizes the right of a worker with no permit to receive legal indemnity from the employer

or commerce for the period of time of the conviction, where the guilty person belongs to an organization or association involved in such activities, even if this is transitory. When the leaders, administrators or persons responsible for these organizations or associations are involved, the upper half of the range of penalties will be applied, and this may be raised to the level immediately above. In the cases stipulated in this section, the judicial authority may also decree one or several of the measures laid down in article 129 of this Code. 6. Taking into account the seriousness of the activity and its circumstances, the condition of the guilty person and the intentions of this person, the Courts may impose the penalty at a lower level than that stated in this regard". Article 318 bis.1 of the CP has been revised by Organic Law 13/2007, of 19 November, the BOE of 20 November 2007.

64 Article 36.3 of the LOE states, "*The fact that the entrepreneur lacks the relevant authorization, without prejudice to the responsibilities this gives rise to, including those related to social security, will not invalidate the work contract as regards the rights of the foreign employee, nor will it be an obstacle to obtaining the services which might be due to him*".

65 The change occurred with the STS, Social Court on September 29, 2003 (Aranzadi Jurisprudencia 2003/7446).

in the event of death, retirement or incapacity and to legally challenge a dismissal for disciplinary reasons. Also recognized is Social Security protection with regard to occupational accidents and diseases. However, the delimitation of the consequences of a work contract of a foreigner with no work permit will not be an easy task for the judges and the courts as a result of the legal terms⁶⁶. Nonetheless, the change which has taken place has entailed a substantial reduction of the precarious and defenceless status suffered by irregular workers.

5.3.5.2 Ordinary regularization

Among measures to manage irregular migration, frequent extraordinary regularizations, or, in other words, amnesties, are used, insofar as access to regularity is afforded to irregular, immigrant foreigners, with no need to comply with the ordinary formalities; from the employment point of view, foreigners are granted the due employment authorization. Spain, which is a recent host country to immigration, has followed this trend and has used this process relatively frequently over the last twenty years⁶⁷.

Furthermore, since LOE 4/2000 came into force, a permanent, ordinary regularization procedure of a one-off nature has been legally formulated (Aguilera Izquierdo, 2006). Its meaning is clear; given the way in which the legal system concerning foreigners and immigration can be penetrated, and the dysfunctions inherent within it, a procedure which is an alternative to the visa was drafted, in order to allow access to regularity. This foresees non-compliance with the legal framework and opens up a way to rectify the situation through regularization on the basis of settled residence, with the recognition of an individual's right to regular residence based on real or de facto residence, *extra* or *contra legem*. With regard to employment, this means that, on obtaining the relevant temporary residence and employment permit, immigrants are no longer in an irregular situation as regards employment.

Regularization due to settled residence (*arraigo* in Spanish) is stipulated in article 31.3 of the LOE and is developed in articles 45 to 47 of the RLOE. It involves three modalities:

- a) Settling for purposes of employment, which requires a continued stay in Spain for a minimum period of two years and the existence of employment relationships for a period of less than one year; the accreditation of the employment relationship will be implemented by the submission of a judicial resolution which recognizes the relationship, or an administrative resolution confirming the infringement certificate of the Labour and Social Security Inspectorate which accredits it.
- b) Social settlement, which requires a continuous stay in Spain for a minimum period of three years, a work contract whose duration is no less than one year and either

66 For a recent, complete study of the question see Charro Baena and Benloch (2007) and Martínez Moya (2006) which contains significant case law information.

67 Without taking into consideration the years in which the contingents, in fact, constituted concealed regularization, extraordinary regularization processes took place in 1985–86, 1991, 1996, 2000, 2001 (re-examination), and 2005.

accrediting family ties with other foreign residents, these being spouses, grandparents and descendents in the direct line, or the submission of a report which accredits the persons social insertion, issued by the Town Hall of the place where the foreigner has his usual address; the report may also recommend that the foreigner be exempt from the requirement to have a work contract, on condition that he can provide accreditation of the fact that he has sufficient resources on which to live.

- c) Family settlement, when it involves the children of a father or mother who were originally Spanish.

A temporary residence permit is thus issued, on condition that the person has no criminal record in Spain or in his country of origin; unless the person is a minor, this will include a work permit.

In practice, settlement as a result of employment settlement constitutes a narrow channel since, due to the terms of the law, employers are reluctant to cooperate as, by doing so, they expose themselves to a sanction; it should be remembered here that contracting an irregular worker constitutes a very serious offence. It can also be seen that the application of social settlement is dependent, in part, upon the very divergent practices of municipal governments when issuing a report on integration.

5.3.5.3 The protection of the victims of illegal trafficking

The victims of illegal trafficking are protected through the granting of the corresponding residence authorization in the event that they cooperate with the authorities against the networks involved in the illegal trafficking of immigrants. This is stipulated in Community legislation⁶⁸ and, in Spanish law, it is included in article 59 of the LOE and article 117 of the RLOE.

In fact, the drafting of article 59 of the LOE preceded the Directive, and article 117 of the RLOE was drafted a few months after. This means that the transposition of the Directive into Spanish legislation has deficiencies, as it does not include some of the guarantees stipulated, such as, for example, the protocol for information to the victims, or the period of reflection and, given the terms of article 59 of the LOE, which relate to organized networks, its scope of application is restricted. In practice, its application is insufficient and disparate.

68 Directive 2004/81 of the Council, of April 29, 2004, concerning the issue of a residence permit to nationals from third countries who have been the victims of the trafficking of human beings or have been victims of an action involving illegal immigration, who cooperate with the competent authorities, DOCE L261/19, de 6/8/2004.

5.4 Policy evaluation: in search of best practices

5.4.1 Starting point: the failure of the control system

The data presented in chapter 2 reflect a large and growing volume of irregularly employed foreign workers in Spain. Such a large volume raises questions as to the efficiency of labour policies and the legal system of control of the labour market with regard to the participation of foreigners.

From an economic perspective, the labour market is rigid. This stems from the protection due to the individual worker and the high costs of social contributions, which are borne by the employer and constitute the main financing source of the Social Security system. Both aspects of this rigidity are powerful invitations to the illegal employment of workers, even though, of late, there has been an improvement in the mechanisms of control and vigilance, more flexibility has been introduced to the labour market and the cost of Social Security contributions borne by the employer have been somewhat reduced. These elements are crucial in the determination of the volume of what we have termed common irregular employment, including that of foreigners with work permits. Nonetheless, in general, estimating this volume is not easy and it is even less so in the case of foreign workers; for instance, the records for infringement of the norm by which workers have to be registered in the Social Security System do not distinguish between foreign and Spanish workers, if the foreign worker is regularized.

5.4.2 Characteristics of the Spanish labour market: the actors

The legislative and regulatory measures aimed at combating the underground economy and outlined in the previous chapter serve as the backbone for government policy in Spain as regards protecting immigrants from the abuses commonly suffered as a result of illegal employment. But the government is not the only social agent implementing policies in the labour market, nor is the effectiveness of such implementation fully guaranteed, as these policies need to keep pace with the changes that appear in the forms of the said abuse. This section concentrates on this issue, starting with an overview of the labour market in Spain and going on to highlight which social agents and authorities play a role in the market, the political culture underlying the way they act, and the systemic effects stemming from the current state of play.

The first consideration is to analyse the type of enterprises that offer jobs in Spain and then which other social agents are involved in the recruitment process, together with their respective criteria and resources.

The fabric of Spanish business, as at 1 January 2006, is set out in the Table 5.6, which is based on data from the Spanish Institute of Statistics (Instituto Nacional de Estadística⁶⁹):

69 Press release issued by the aforementioned Institute, 9 August 2006.

Table 5.6: Economically Active Enterprises by Economic Sector and Number of Salaried Employees

Number of salaried employees					Economic sector
	Total	Industry	Construction	Retail	Other services
TOTAL	3,174,393	242,310	448,446	83,276	1,648,361
No salaried employees	1,616,883	75,322	207,131	415,696	918,734
1–2 salaried employees	881,748	63,437	111,755	257,277	449,279
3–5 salaried employees	328,820	36,514	57,640	88,828	145,838
6–9 salaried employees	154,635	22,004	29,535	37,810	65,286
10–19 salaried employees	105,470	21,818	24,086	21,689	37,877
20+ salaried employees	86,837	23,215	18,299	13,976	31,347

We can observe that this table does not include agriculture as, due to the nature of the work performed, the statistics on this sector are monitored in the ten-year agricultural census which applies the same methodology across the entire European Union. In Spain, the last publication dates from 1999 and states that there are 1,790,162 holdings working in 1,188,894 work units / year, of which 805,260 are family-run holdings and 383,634 are not.

The most striking aspect of these figures is the high number of family-run holdings recorded in the census; it is similar to the high number of non-agricultural enterprises that, according to official records, do not employ salaried workers or employ less than 10 salaried workers. The latter amounts to 2,982,086, in other words 94 percent of the total number of salaried employees. If we then add those enterprises that employ less than 20 salaried workers to this figure, we find that, altogether, they generated 89 percent of jobs in 2006⁷⁰. This means that, in Spain, many employers come from relatively low socio-economic backgrounds and we will return to the impact this has on the evaluation of illegal employment policy further on in this chapter.

The workers, like the employers recruiting them, are enormously varied and fragmented as regards their qualifications, aspirations and negotiating abilities. Obviously, negotiating capabilities are negligible among the less skilled and, therefore, policies in this respect are dependent on the trade unions which, in theory, represent the working class, and the ITSS, the Spanish Labour Inspectorate, which is the body responsible for overseeing compliance with employment rights.

However, a fourth group of social agents recruiting immigrants in Spain today must also be included, namely, the illicit organizations that facilitate or enforce illegal access to work. Such organizations are many and varied; at one end of the scale are groups verging on criminal activity, commonly known as ‘mafias’, in other words, closed, secret organizations that are associated with all manner of violent acts operating from

⁷⁰ Press release issued by Europa Press, 10 April 2006.

the countries of origin by offering false or real jobs and then enslaving migrants, as in, for example, prostitution rings, or simply facilitating irregular employment; at the other end of the scale are less organized and sometimes simply opportunist outfits, which operate by contacting immigrants in designated places to take them to building sites or agricultural holdings and by recruiting workers for sporadic jobs *in situ*.

Policies to combat the illegal employment of immigrants therefore need to take into account the interaction that occurs between these four types of agents. Furthermore, policy makers have to surmount the difficulties stemming from the dispersed and fragmented world of the employers and the relative weakness of the trades unions.

Arguably then, a Marxist approach is needed in order to obtain a realistic analysis of such policies, one which goes beyond the explicit verbal formulations of specific proposals to explore the real powers that are brought to bear via their implementation. Furthermore, in Spain, there is a consensus of opinion among critics of the present migration processes that the driving force of immigrant labour trajectories is money, thus favouring influxes of workers willing to work for low salaries and in poor conditions.

From this standpoint, in order to gauge how to combat this phenomenon or limit its impact effectively, official policies on illegal employment have to first address the power exerted by economic interests. In other words, public policy would have to co-exist with the policy of the underground, which results from financial concerns, and encompass the specific policies put into practice by the three sectors involved in access to the labour market; money, the workers themselves and the regulatory authorities.

This is, however, a highly abstract way of approaching the issue. Seeking to understand the policies implemented, we need to ask three questions. What is the nature of the social agents that represent the interests of the four sectors? Based on what understanding of labour relations does one side, or another, view the underground economy? With what powers are they invested, in the pursuit of their respective interests?

To do this, it demands a departure from the received wisdom that talking about economic interests in Spain has very negative connotations; this gives rise to stereotypical discussion expressed in unsubstantiated politically correct terms. Such connotations suggest, as they do in labour relations other than those applying to immigrants, a confrontation between a weak worker and a greater power which steers and dominates all other authorities, from the public or private sector, or from the media.

But in Spain, it is not the classical Marxist relationship between capital and labour which underpins specific policies targeted at combating illegal employment. The reason for this is clear; as mentioned above, most jobs (89%) are not offered by big companies. On the contrary, based on the figures, if we were to go out in search of regular and irregular immigrants in illegal employment, we would find the majority working for small enterprises. The reason for this is that big companies, with a longer tradition, boast relatively stable workforces and have few openings for recent migrants, unless it is in their interest to have recourse to illegal employment for some reason. Therefore,

policies against the illegal employment of irregular or regular immigrants should not focus on big companies.

Thus, we need to look to other areas, such as small enterprises which are managed in an improvised fashion by the owners themselves, with survival rather than huge profits in mind. This includes small agricultural holdings, small hotels and restaurants, garages, builders specialising in refurbishment and redecoration, local shops, as well as medium enterprises, which are usually subcontracted by larger companies to undertake a significant proportion of the work to be done.

5.4.3 The labour and social security inspectorate

It is in this setting that the fight against the illegal employment of foreign workers has to be placed. These are the spaces in which a third party, potentially present in the negotiations between employers and workers, has to play its part in representing the State in the regulation of labour contracts. As stated in chapter 3, this is the function of the National Labour and Social Security Inspectorate (Cuerpo Nacional de Inspectores y Subinspectores del Empleo y la Seguridad Social or ITSS). The Inspectorate was set up in 1906 and, having been subjected to reform most recently in Royal Decree 138/2000, is presently dependent on the Department (*Subsecretaría*) of Employment and Social Affairs of the Ministry of Labour and Social Affairs (MTAS). Its function is to monitor and enforce compliance of socio-labour regulations, as well as to provide advice and information for all interested parties as regards labour and social security matters; it is invested with the authority to demand the execution of administrative responsibilities from companies and workers in breach of the regulations in force.

It thus transpires that the effectiveness of the policies to combat the illegal employment of foreigners will depend on the way the Inspectorate acts. However, it is also evident that, in the long run, the staffing structure and the number of inspectors will determine what they attempt to achieve to a greater extent than will the explicit aims of their operations.

In this respect, it is interesting to note that, according to the documentation prepared by this Inspectorate and the information gathered from its members for the purposes of this survey, its central mission is to promote the *voluntary* compliance with labour and Social Security obligations on the part of employers and workers. Moreover, its actions focus on preventive and corrective guidelines; that is to say, on the prevention of the organization and implementation of illegal employment networks and the elimination of in situ recruitment practices, rather than on sanctions. Why?

We will try to answer that question later in this chapter, but before we do so, we need to pause to reflect on the actions taken by the Inspectorate recently, during the course of 2006. The statistics in the following tables come from the ITSS website.

General data

Total number of inspection visits	388,677		
Total No. of breaches detected	73,994	Sanctions total	€ 253,051,826.06

From which:

• For labour relations	4,116	Sanctions total	€ 16,373,607.58
• For risk prevention	24,074	Sanctions total	€ 115,997,060.62
• For employment and immigration	7,220	Sanctions total	€ 7,427,974.60
• For Social Security	33,650	Sanctions total	€ 39,331,699.88
		Amount in contrib.	€ 922,306,708.60
• For other areas	4,934	Sanctions total	€ 8,921,483.38

This shows that the inspection operations of the ITSS pertaining to the underground economy account for more than 50 percent of its activities, although it is not possible to determine the number of breaches detected for non-compliance with Social Security regulations which affect regular foreign workers.

Data relating to the employment and immigration of foreign workers

For the sake of clarity, we have not distributed the data according to the 52 provinces in Spain as the ITSS web page does, but by the 17 autonomous communities and two territories that these provinces comprise (columns 8 and 9) (Table 5.7.).

These figures show that up to 65.6 percent of the inspections carried out focused on issues relating to work being carried out by foreigners, and that regions such as the Canary Islands (77.3%) or Catalonia (76.7%) easily surpass this figure, whereas the figures for Extremadura (22.7%) or Andalusia (39.7) fall below this percentage. Why?

This must be related to the way the ITSS operates, as the Inspectorate usually carries out inspections either to investigate a specific complaint, generally lodged by employees or trade unions, or in a targeted way; that is to say, *requested* or *scheduled* inspections respectively. The inspectors interviewed for this survey explained to us that requested inspections are in the minority, due to poor trade union presence⁷¹ in this field and the fact that illegal workers are reluctant to come forward as they are concerned about losing their only source of income. In contrast, the *scheduled* inspections are currently being conducted on a regular basis through *targeted campaigns* in regions and sectors which are under suspicion as they frequently have recourse to illegal recruitment practices, such as, for instance the province of Almeria, where several NGOs have alerted the ITSS to a number of breaches of this nature.

71 Cataluña seems to be an exception to this. According to one of the people interviewed for this report, trade unions in Cataluña have taken it upon themselves to request the presence of inspectors whenever they come to hear about infringements to labour regulations and these inspections appear to have been effective in curtailing such infringements. However, the person who referred to this was connected to a trade union.

The data are as follows:

Table 5.7: Inspections by the Spanish Labour Inspectorate (ITSS): breaches detected, sanctions and workers affected by breaches, by autonomous community and province, in the area of EMPLOYMENT AND IMMIGRATION - Year 2006

Autonomous Community	No. of inspections carried out		No. of breaches detected		Sanctions (euros)		No. of workers affected by breaches	
	Total area	Immigration	Total area	Immigration	Total area	Immigration	Total area	Immigration
Andalusia	18,467	7,339	1,555	1,429	€9,396,170.91	€8,815,805.74	1,557	1,429
Aragón	2,522	1,312	286	268	€1,889,588.76	€1,739,099.09	1,040	268
Canary Islands	6,611	5,108	1,142	439	€3,250,955.43	€3,001,247.08	1,143	439
Cantabria	818	372	191	190	€1,152,156.73	€1,149,151.67	191	190
Castilla y León	8,330	4,508	771	599	€4,270,966.13	€3,807,101.36	2,825	599
Castilla-La Mancha	3,933	2,703	966	951	€6,360,178.81	€6,324,310.54	1,074	951
Catalonia	12,965	9,950	1,761	1,643	€11,079,660.20	€10,803,467.87	1,784	1,643
Ciudad de Ceuta	2,240	2,188	109	109	€416,831.36	€416,831.36	109	109
Madrid Region	14,682	10,214	1,732	1,586	€10,250,190.51	€9,975,752.57	7,515	1,586
Navarre	1,125	920	90	87	€510,347.94	508,347.42	334	87
Valencia Region	12,367	10,154	1,488	1,377	€8,972,468.72	€8,657,874.21	3,940	1,377
Extremadura	1,500	341	165	125	€789,315.68	€758,201.55	167	125
Galicia	6,498	4,289	491	470	€2,985,976.29	€2,951,894.34	492	470
Balearic Islands	2,142	1,882	470	465	€2,915,140.17	€2,905,476.84	478	465
La Rioja	1,047	743	179	169	€1,126,872.61	€1,081,259.33	181	169
City of Melilla	872	867	122	122	€819,675.40	€819,675.40	122	122
Basque Country	5,722	3,357	248	228	€1,667,674.21	€1,619,132.40	248	228
Principality of Asturias	1,000	374	131	120	€713,977.04	€696,848.08	131	120
Murcia Region	6,273	5,010	626	604	€3,859,827.70	€3,784,944.91	808	604
Special Brief	1	0	0	0	€0.00	€0.00	0	0
TOTAL	109,115	71,631	12,523	10,981	€72,427,974.60	€69,816,421.76	24,139	10,981

Indeed, 60.7 percent of all inspections relating to immigration regulations in Andalusia are made in order to monitor compliance with labour laws in Almeria, whereas in the rest of that autonomous community this figure stands at 39.7 percent. Moreover, although figures are not available, the data collected for this survey show us that such inspections are targeted at the agricultural, construction, transport, household service and hotel and restaurant sectors.

In 2006, a total of 71,631 inspections pertaining to the illegal employment of immigrants were conducted by the ITSS throughout Spain. What did they find and what did they sanction?

The data show that there were 10,891 breaches detected relating to foreign workers, out of a total of 71,631 inspections carried out in this respect, a figure which represents slightly under 1 breach for every 7 inspections carried out, or 15.3 percent; however, interesting differences emerged. For example in Murcia, breaches were found in 12.1 percent of the inspections dedicated to issues relating to foreign workers, representing slightly over 1 case in every 8; in Asturias, however, this proved to be the case in 32.1 percent of inspections conducted, or slightly over 1 case for every 3 inspections. Why is this the case, given that regions like Murcia are known for the illegal employment of immigrants in various sectors?

According to the information gathered for this survey from the ITSS inspectors, this can be ascribed in part to the requirement that municipal agents and authorities in rural areas be notified about the inspections in advance, although no prior notice is given to employers⁷². The municipal authorities, in turn, inform the employers and the latter cover up all traces of illegal employment. In these areas, the authorities usually have either family connections or friendly relations with the owners of the holdings to be inspected. Another factor is the recruitment culture prevalent across Spain, in which a distinction is drawn between abusive contracting by large companies aiming to reap the biggest profits they can and the jobs offered by small holdings and entrepreneurs, working hard to make ends meet rather than to reap huge profits⁷³.

From this point of view, which is often shared by the local authorities, this type of illegal contracting by small enterprises is neither anti-social nor does it merit a sanction; it also justifies the covering up of practices that could be subject to such sanctions. In certain 'suspicious' areas, when the inspectors need to proceed with their investigations accompanied by the police, it is not unusual to ask for police officers from outside the area as they have no relationship to the employers under investigation.

Given this mentality, it is not surprising that the number of breaches detected is thought to be lower than the real number, although this figure is still fairly high. The economic

72 According to ITSS regulations, inspections should be carried out without giving prior notice, as this could lead to the covering up of breaches of the law and thwart the purpose of such investigations.

73 In an interview, a member of the Independent Business Confederation of Madrid / Confederación Empresarial Independiente de Madrid suggested that, although his organization does not include companies from the black economy, in his view it is simple need, and not the desire to increase profits, that is the driving force behind the offering or accepting of illegal employment.

sanctions imposed on those in breach of the law are also high; in 2006 they amounted to nearly 70 million euros, as indicated above.⁷⁴ This would be the deterrent implicit in the official policies currently in force to combat the illegal employment of immigrants.

5.4.4 Alternative solutions to the one-off control of work permits

Since the mid-90s, NGOs and employers have repeatedly argued that it would be more effective to offer legal employment, rather than prohibit and sanction illegal employment. The government has tried out various policies in pursuit of this goal; these have primarily consisted of extraordinary regularization campaigns, consultations with employers as regards the volume of inflows required to meet labour force needs and, more recently, recruiting workers in their country of origin.

These attempts have not been very successful. The extraordinary regularizations have not led to a drop in the number of irregular and regular immigrants willing to work illegally, but, instead, seem to have increased it by virtue of the so-called *efecto llamada*, whereby regularization encourages other migrants to come to Spain; this, at least, is how various EU organizations have interpreted the phenomenon. Thus, the official line has been not to repeat these regularization campaigns for the time being.

Attempts to quantify beforehand the number of immigrants needed in each labour sector for any given year have fared even worse. On the one hand, estimates have fallen short, undoubtedly because the employers consulted did not want to take the risk of overestimating the number of jobs they could offer; on the other hand, despite the conservative estimates, the posts could not be filled. This can no doubt be put down to the fact that, according to information received from the migration networks, the procedures for those wishing to migrate were considerably more complicated, and the costs considerably higher, than the comparative difficulties that illegal immigrants have to circumvent.

Finally, we need to consider the recent attempt to channel migration flows by recruiting immigrants directly in their home country for legal jobs, either via private initiatives or government agreements, made in order to secure temporary or stable migrations. But, for this practice to gain ground, it needs to be embraced by the large service companies, as this is the only feasible approach to such enterprises. Recruitment abroad is too onerous a process for small companies, as they only need a small number of workers. Moreover, this approach is not appropriate for the agricultural holdings, due to the temporary nature of the work being offered⁷⁵.

74 Pursuant to the existing legislation, employers are sanctioned with fines of between 6,001 and 60,000 euros (arts. 54.1.d and 55, L.O. 4/2000) per worker employed without a work permit.

75 The Union de Pagesos, a farmers' union, has, for several years now, successfully been leading a programme which yearly recruits temporary workers from several countries in Latin America, in particular Colombia and Ecuador, as well as in Eastern Europe, to do agricultural work in Catalonia; the recruits are then returned to their home country once the season is over. However, this only represents a very small number of the foreign workers employed in agriculture each year.

It is early days yet to pinpoint the results of regularizing workers who cooperate with the Labour Inspectorate to report illegal practices in the workplace. But thus far, there have been no indications that this is breaking up relations between illegal immigrants and their employers; if anything, the information available suggests that the opposite is true. While there has been a significant increase in the number of migrant workers recruited in their home countries by large companies,⁷⁶ the number of small employers adopting this method is still small,⁷⁷ as is the number of immigrants reporting violation of their rights.

Overall, government policies designed to combat both underground and abusive employment of illegal immigrants focus on control, on acting as a deterrent and on sanctions, which are implemented by the ITSS, but also on finding better alternatives for immigrants in this respect. These policies are clearly not fully effective and the root of the problem lies in the structure of the Spanish business sector, combined with Spanish attitudes towards such irregularities.

As far as the Spanish business fabric is concerned, a very high proportion of companies are registered as *companies without any salaried workers*, or with less than twenty, or even with less than ten. As a corollary, the first step needed to ascertain and monitor the practices adopted by such companies is an extensive network of inspectors, certainly larger than the one that currently exists in Spain.

Moreover, as a result of this situation, many companies offering work are managed by people of relatively low socio-economic status whose aim is to survive rather than increase profits. Given the culture in Spain, what these individuals and enterprises do, albeit illegal, is deemed a reasonable need rather than an offence. Indeed, many of the people, and even many of the local authorities involved with inspections of such companies, excuse this practice.

But it is not only small enterprises which find it difficult to recruit foreign workers using the channels opened up by the government with the aim of combating illegal employment. As stated in chapter 2, there is a great demand for foreign labour in the sectors of domestic work and personal services; however, for the families who are the main contractors in this case, it is even more difficult to recruit such labour in the countries of origin. Through the Directorate for the Integration of Immigrants of the Ministry of Labour and Social Affairs, the government has become aware of this problem and has set up a programme by which they bring in, on an annual basis, a number of workers, mainly female, and mostly from specific countries in Latin America, as well as from Morocco, and find a job for them in

76 Very positive views are expressed by the restaurant chain VIPS (in the magazine ADIF, 2–12–2007) on recruiting in home countries, as are very negative comments, made by a Trades Union representative from Comisiones Obreras in *Latinoamérica Exterior* (15–11–2007). On the website of the Coordinadora de Agricultores y Ganaderos, Andoni Garcia explains the difficulties entailed in agriculture, saying that the temporary nature of agricultural work and the small size of many holdings mean they are unable to meet the costs of recruiting workers abroad or guarantee the latter the appropriate period of residence in Spain; illegal employment is mostly found in agriculture and in the construction sectors.

77 Small enterprises are further hindered from recruiting employees in other countries as legal norms do not favour them by, for instance, stipulating that recruitment through a contingent has to be done in groups of at least five workers.

these sectors. The total number brought in this way during the period 2002–2007 has been 1,331, hardly a significant number considering the need⁷⁸.

As regards the alternatives sought by the government to address the problems of illegal border crossing and subsequent illegal employment, we can first mention its attempts to tighten border controls over the last two years, supported by European institutions, but less strongly by public opinion in Spain. Second, we can refer to the regularization campaigns that confer regularized status on illegal migrants when employers, without incurring sanctions, agree to give the worker a *bona fide* contract valid for at least one year. The promotion of recruitment in home countries has achieved positive results as far as big companies are concerned, although this does not extend to the smaller enterprises where illegal employment is concentrated.

Based on these findings, we could therefore argue that there is still a long way to travel before these objectives are met and that the current approach may have made conditions worse by encouraging human trafficking.

5.5 Conclusions

To sum up, this work has shown how the intention to combat the illegal employment of irregular immigrants has been a constant factor in the policies of successive Spanish governments since the arrival of immigrants became noticeable at the beginning of the 1990s.

The humanitarian NGOs boosted this endeavour, preoccupied by the violation of immigrants' human and employment rights. However, politicians and scholars soon realized the need to reduce the opportunities to work illegally if an elementary control of migration flows was to be achieved. In addition, it was not long before stress was being laid on the incompatibility of these illegal practices with the development of the integration policies which would facilitate the maintenance of social peace and citizen security in Spanish society. Finally, it also became obvious that it was important to put a stop to the failure to pay employment taxes occasioned by clandestine work, in order to balance the costs of the Social Security and the welfare services.

However, despite these constant efforts to combat illegal contracting, it continues to be a frequent practice in terms of the population involved, and is economically significant in terms of the amount of money it represents in fiscal fraud. In addition, evidence suggests that this trend has intensified over the last 20 years, mainly due to the development of illicit associations involved in the recruitment of workers for this specific labour market.

The broader context of the underground Spanish economy is estimated as being approximately 18.2 to 20.9 percent of the gross domestic product (GDP), and this

78 Data provided by the General Directorate for the Integration of Immigrants, Ministry of Labour and Social Affairs.

situation facilitates the illegal immigrant work which represents a significant part of the total. Among natives, the subjects involved in this parallel market are often people with more than one job, and others who are either officially unemployed or non-active, that is to say, students, housewives, or retired people, for instance.

The irregular work of immigrants is most common in sectors such as agriculture, construction, the hotel and catering trade, transportation, and personal services. These illegal practices are also more likely to occur in smaller business than in big companies, and in subcontracting rather than in direct contracting work regimes. Moreover, according to several empirical studies, the following factors have proved decisive in illegal recruitment: the high tax burden, the excessive regulation of the economy, high labour unit costs and the problem of identifying the offender. In addition, the difficulty of renewing permits means that regularized persons can easily resort to undeclared work again; in fact many of the people regularized in the successive processes had previously been regularized in preceding campaigns. In addition, although the efficiency of the strategies to eliminate the associations which act as agents in the recruitment of illegal workers has recently improved, these bands of intermediaries still play an important role in the organization of migration movements which reach into Spain.

The legislation against all these abuses is abundant and detailed, and the penalization imposed as a result has increased in the last 10 years. Nevertheless, what has not increased significantly is the number of civil servants in the *Labour and Social Security Inspectorate*, the organization with responsibility for controlling employment activities. In the framework of a political culture such as the Spanish one, which excuses and hides illegal labour practices when the offenders are socially and economically weak, this institution comes up against many obstacles when attempting to combat the complicity between employers and illegal immigrant workers.

This study has not found any original proposals of good practice in the attempt to eliminate the illegal work of irregular immigrants. Those who argue that the solution would be to increase the number of public inspectors or the intensifying of penalties are not proposing anything original. On the contrary, it seems more advisable, in the long run, to develop strategies of prevention and correction, which would lead to the voluntary observance of obligations in relation to labour through the transformation of the political culture which currently leads many of the people involved to elude them. In undertaking this line of action, it is also advisable to continue the prosecution of the networks which organize and promote irregularities and the more common practices of in situ recruitment.

It is crucial to offer attractive alternatives to both the small employers and the immigrants who are presently tempted to take advantage of irregular work. One way of doing this is to adapt the policies for the granting of residence and work permits. The current system strictly limits the volume of groups of foreign workers, that is to say, the contingents⁷⁹, to the known necessities of the labour force per sector; although it endeavours to promote recruitment in the country of origin and thus prevent illegal migration, this is not useful for

⁷⁹ According to one of the interviewees from an employers' organization, the contingent only accounts for 3 percent of the annual contracting of foreign workers.

small employers who have problems identifying their needs in advance and at a distance. Small and family businesses cannot afford to recruit employees by means of the ‘contingent’ model, and, since the number of regular immigrants who can legally work is reduced, they are easily tempted to establish irregular employment relations.

The facts and the difficulties involved in resolving these issues are well known. It seems obvious that a better knowledge of the networks recruiting illegal workers would contribute to the effectiveness with which they are combated. It may also be useful to find a way to involve the media in the process of changing the mentality of the people who concur with illegal practices and underground work.

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ANNEX I: INTERVIEWS

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EA2ES	Senior staff member, Adecco (private recruitment agency, Madrid Branch).
EA3ES	Senior staff member, Randstadt (private recruitment agency).
NGO1ES	Staff member, Asociación de Trabajadores Inmigrantes (ASTI).

ANNEX II: List of legal acts and institutions

(in alphabetical order)

LEGAL ACTS

- * Employment Law (Derecho del Trabajo)
- * **RLOE:** Implementation Rules of Aliens Law, approved by Royal Decree 2393/2004, of 30 December, the BOE of 7 January 2004 / Reglamento de ejecución de la Ley Orgánica de Extranjería (RLOE), aprobado por el Real Decreto 2393/2004, de 30 diciembre, BOE de 7 de enero de 2004.
Revised by Royal Decrees 1109/2006, of 8 September, the BOE of 23 September 2006 and 240/2007, of 16 February, the BOE of 28 February 2007).
- * Law 14/1994, of 1 June, whereby the temporary employment companies are regulated, the BOE of 12 June, 1994 / Ley 14/1994, de 1 de junio, por la que se regulan las empresas de trabajo temporal, BOE de 12 de junio de 1994
- * Law 28/2003, of 17 November, General on Subsidies, the BOE of 18 November 2003 / Ley 28/2003, de 17 de noviembre, General de Subvenciones, BOE de 18 de noviembre de 2003
- * Law 42/1997, which regulates the Employment and Social Security Inspection, the BOE of 15 November 1997 / Ley 42/1997, ordenadora de la Inspección de Trabajo y de la Seguridad Social, BOE de 15 de noviembre de 1997
- * Law 56/2003, of 16 December, on Employment, the BOE of 17 December 2007 / Ley 56/2003, de 16 diciembre, de Empleo, BOE de 17 de diciembre de 2007
- * Law 58/2003, of 17 December, General Taxation (LGT), the BOE of 18 December, 2003 / Ley 58/2003, de 17 de diciembre, General Tributaria (LGT), BOE de 18 de diciembre de 2003
- * **LGSS:** Legislative Royal Decree 1/1994, of 20 June, which approves the Revised Text of the General Law on the Social Security, Official State Gazette (BOE) of 29 June, 1994 / Real Decreto Legislativo 1/1994, de 20 de junio, que aprueba el Texto Refundido de la Ley General de la Seguridad Social, Boletín Oficial del Estado (BOE) de 29 de junio de 1994.
- * **LCAP:** Legislative Royal Decree 2/2000, of 16 June, whereby the Revised Unified Text on the Law on Contracts of Public Administrations is approved, the BOE of 21 June 2000 / Real Decreto Legislativo 2/2000, de 16 de junio, por el que se aprueba el texto Refundido de la Ley de Contratos de las Administraciones Públicas, BOE de 21 de junio de 2000

- * **LISOS:** Legislative Royal Decree 5/2000, of 4 August, which approves the Revised Text of the Law on Offences and Sanctions at the Social Level, the BOE of 8 August 2000 and of 22 September 2000 / Real Decreto Legislativo 5/2000, de 4 de agosto, que aprueba el Texto Refundido de la Ley sobre Infracciones y Sanciones en el Orden social, BOE de 8 de agosto de 2000 y de 22 de septiembre de 2000
- * **LOE:** Organic Law 4/2000, of 11 January 2000, on the Rights and Liberties of Aliens in Spain and their Social Integration, the BOE of 12 January, 2000. The so-called ‘Aliens Law’ / Ley Orgánica 4/2000, de 11 de enero de 2000, sobre Derechos y libertades de los Extranjeros en España y su Integración Social, BOE de 12 de enero de 2000. Comúnmente llamada “Ley de Extranjería).
Revised successively by Organic Law 8/2000, of 22 December, the BOE of 23 December 2000, by Organic Law 11/2003, of 29 September, the BOE of 30 September 2003, and Organic Law 14/2003, of 20 November, the BOE of 21 November, 2003.
- * Penal Code / Código Penal

INSTITUTIONS

- * Inland Revenue / Agencia Tributaria
- * **ITSS:** Inspectorate of Employment and Social Security / Inspección de Trabajo y de la Seguridad Social
- * Ministry of Labour and Social Affairs / Ministerio de Trabajo y Asuntos Sociales.
- * Ministry of Labour and Social Security (before 1996) / Ministerio de Trabajo y de la Seguridad Social.
- * Ministry of Social Affairs (before 1996) / Ministerio de Asuntos Sociales.
- * Public State Employment Service / Servicio Público de Empleo estatal (former INEM)
- * Social Security (public system of) / Seguridad Social (sistema público de)

Irregular Employment of Migrants: an ILO Perspective

Beate Andrees, Blanka Hancilova, Piyasiri Wickramasekara¹

Migrant workers are an asset to every country where they bring their labour. Let us give them the dignity they deserve as human beings and the respect they deserve as workers.
Juan Somavia, Director General of ILO

6.1 Introduction

Irregular migration has emerged as a major policy issue affecting the governance of international migration globally. In the European Union, campaigns for ‘fighting’ and ‘combating’ irregular migration are becoming increasingly popular. Most policies of destination countries seem to ignore the complex issues involved in irregular migration and focus on a ‘security’ or ‘law and order’ approach. For example, the European Commission has issued several communications on the issue of ‘illegal’ migration, with focus on border management and controls (European Commission, 2006). This paper however, argues for more neutral terminology in the discussion of irregular migration and greater attention to root causes and demand factors leading to irregular migration. It argues for a rights based approach to address irregular migration in line with international norms, with less emphasis on control and security mechanisms.

6.2 Terminology and ILO perspectives

While there are several popular terms to describe irregular migration, they are not comprehensive enough to capture different aspects of irregular movements (Wickramasekara, 2002). For example, the term ‘undocumented’ does not cover all cases of irregularity because some may enter with valid documentation, but later become irregular by violating the stay conditions. The term *clandestine migration* has undertones of suspicious, covert or secret movements, and should be avoided because it can easily be associated with criminality. The term *‘illegal’* is a negative term, reflecting the current tendency on the part of host governments for criminalization of irregular migration (Bustamante 2008). In a number of cases, the migrant may simply be a victim forced into an irregular situation by traffickers and recruitment agents. Irregularity is rarely a matter of choice

¹ Listed in alphabetical order

for the migrant worker. Irregularities in migration can occur at every stage of the migration process – pre-departure, transit, destination and return, and can range from simple unauthorized border crossings for work to forced labour through trafficking and smuggling of human beings.

Anderson and Ruhs (2006) argue that the term ‘irregular’ or ‘undocumented’ does not provide sufficient clarity as to whether the breached regulations are those of residence rights or those of employment rights. While from a strictly legal point, breach of any of the above-mentioned areas results in a situation which violates the law, non-compliance with labour legislation is perceived by migrants as well as by the state authorities differently than violation of the right to stay. Migrants perceive non-compliance with labour legislation as being ‘tolerated’ by the state authorities. Thus labour law violations incite much less fear of sanctions than violations of immigration rules, which can be sanctioned with deportation (Anderson and Ruhs, 2006: 29 and 38).

The terms ‘irregular migration’ and ‘migrant workers in irregular status’ are the preferred terms used by the international community, especially the International Labour Organization (ILO). The paper adopts the same terminology for replacing the more common terms ‘illegal’, ‘clandestine’ or ‘undocumented’ migration. The ILO migrant worker instruments have not formally defined irregular migration or migrant workers in irregular status. The International Convention on the Protection of the Rights of All Migrant Workers and their Families, 1990, in its definition of irregular migration (Article 5) used the terms ‘undocumented or irregular’. Currently, it is only the European Commission which seems to be consistently using the term ‘illegal’ in referring to migration or migrant workers (Koser, 2005).

In ILO’s view, irregular migration should be minimized since migrant workers in irregular status, especially women workers, are extremely vulnerable to gross violation of their human and labour rights. It can also undermine working conditions of regular workers, and also cause tension between source and destination countries. Irregular migrants are often confined to the informal sector and shadow economy where there is extensive exploitation with little or no social protection, and can be subject to blackmail by the local mafia, labour brokers, criminal gangs, etc. They are often not paid wages, and deportation may eliminate any chances of claiming back pay. Fear of detection may keep migrant workers away from even legitimately available services (Wickramasekara, 2005).

Irregular migration and regular migration are closely inter-related, since lack of regular and legal opportunities in a context of strong demand for migrant labour is a major cause of irregular inflows. Thus, irregular migration should be treated as part of the broader decent work agenda and a labour market issue, and not only as a legal and security issue. All migrant workers – whether in regular and irregular status – contribute to the prosperity of home and destination economies, and this contribution should be explicitly acknowledged. As argued later, workers in irregular status have internationally recognized rights spelled out in international conventions (and synthesized in the ILO Multilateral Framework on Labour Migration, 2006a). They should enjoy basic human rights, and core labour rights included in the ILO Declaration (ILO, 1998). All labour standards (occupational safety and health, conditions of work, etc) also apply to all

migrant workers including those in irregular status in the workplace (unless otherwise stated in the instruments). All stakeholders – source and receiving country governments, social partners, civil society, international and regional agencies, and migrant workers themselves – need to cooperate in reducing irregular migration.

6.3 Europe – destination for irregular migrants

Over the past three decades the developed world, including Europe has become a more attractive destination for immigrants. Today, 60 per cent of the world's immigrant population resides in the developed nations, compared to 40 per cent thirty years ago (Lowell, 2007, par. 7)². The immigration flows take place at a time when only six out of ten persons actively participate in the labour markets and ageing of European population puts at strain its social welfare systems (ILO, 2008a: 38).

Migrants tend to be concentrated in the service sectors and in low skilled, labour intensive or very high skilled jobs (Reyneri 2001; OECD, 2007: 72–73). Some are employed in compliance with the respective national legislation, while others are employed irregularly, that means outside of the formal frameworks and in violation of the country laws, for example migration, labour or tax regulations. Migrants in highly paid professions have at their disposal relatively many resources and in general they are able to protect their interests and ensure that their human rights will be respected. At the other end of the spectrum are migrants in 'irregular' or 'undocumented' status. In general, they command few resources and their access to human rights and justice is often limited. The failures to guarantee basic human rights have often dire, at times fatal outcomes for some of them.

Despite a growing body of research on migration in Europe, there is limited research on many issues relevant to migrant workers in general and even more so to their irregular employment. To start with, there are limited data sources which would allow exploring migrant workers' characteristics. Where data are available, comparisons between countries are impossible due to international data incompatibility (Wren & Boyle, 2002). The lack of studies is telling in so far as it highlights the low priority assigned to data collection, and inherent methodological difficulties to collect data on this very mobile, fluid group.

It is difficult to compare this group to the general population because there are hardly any migrants and native workers doing the same tasks in the same organization and under the same working conditions (EASHW, 2007: 45). The lack of data is especially evident in relation to informal or irregular employment of foreigners. Undocumented migrants often shun contact with researchers, who may be seen as proxies of the host country's authorities and as a result remain to a large extent a hidden and marginalized population. Information on migrant workers in irregular status in particular may come

2 There are significant migrant populations in many European countries – Luxembourg with 45 per cent, Switzerland with 25 per cent and Germany and Austria, where migrants account for about 15 per cent of the workforce. Several countries changed their migration profile from countries of origin to destination countries. In nearly all OECD countries the number of foreign-born workers increased over the past five years by 20 per cent, with growth especially pronounced in south European countries (OECD, 2007: 64).

from one-off, small scale and qualitative studies carried out by individual researchers and research institutions.

Yet, importantly, the results of qualitative studies are often remarkably coherent, pointing out to structural issues underlying irregular migration and some of its determinants and characteristics, which will be further discussed below (ILO, 2004a; EASHW, 2007).

6.4 Demand for flexible labour and irregular migration

Over the past few decades, increasing competition has had a profound influence on labour practices globally and in Europe. Today, various sub-contractors, self-employed persons and agencies providing temporary labour play an increased role in the European labour market (ILO 2003b).

The limited research on demand for migrant labour by employers suggests that employers welcome access to workers without work authorization or in irregular status providing a source of cheap and flexible, work force (Andrees, 2008). They are often easier to retain and significantly overqualified for the type of work they perform. This reduces the employers' costs relative to employing legal labour and thus increases their competitiveness.

In the European Union countries, there is a persisting demand for low-skill labour in the 'bottom-jobs' which are unattractive to the native workers due to poor employment and working conditions, low remuneration and their social prestige (Reyneri 2001; OECD, 2007: 72–73). The demand is especially pronounced in labour intensive sectors, such as agriculture and horticulture, food processing and packaging, construction, cleaning services, retail sale, sex services, hotel and restaurant sector, household services and also increasingly in health and care services. Some of these sectors, for example sex services and often household services, are in many countries unregulated. In others, safety, health and working conditions regulations are not enforced rigorously. This then creates room for employment in substandard conditions, including irregular employment of migrants, who are often sought by employers, because they are "flexible and can be allocated more efficiently" (Chapter 4, this volume).

The country studies document that clandestine work is often hidden in the chain of subcontractors. For example, in the construction sector in Poland, "the system of subcontracting (...) facilitates reporting of a fraction of labour and paying the majority of workers under the table. According to the trade union of the construction workers', about one third of the sector's work is carried out illegally, which is a problem for those companies who make effort to stay legal and pay taxes" (Chapter 4, this volume). As the Irish case (Chapter 3) in this volume shows, there has been a significant increase in employment agencies providing temporary labour. The use of agency staff enables employers to avoid providing employment contract and applying equality legislation.

In some cases, employers do not wish to enroll employees on their payroll, but prefer to contract them as providers of services. This led to the rise of bogus self-employment

where a self-employed person works for one and the same employer. In Poland and Hungary, for example, “double contracting” consisting of a formal contract providing for pay at the level of the national minimum wage and an informal contract reflecting actual pay became relatively widespread during 1990s (Chapters 2 and 4, this volume). Work without contract seems to be widespread in household services, agriculture and other sectors (Chapter 5, this volume).

The country studies prepared for this publication and other research (Anderson et al., 2007) also suggest that employers do not fear serious sanctions for employing migrants in violation of the immigration and labour laws since enforcement of measures against such employment practices is inefficient and the “detection probability is infinitesimal” (Chapters 1 and 5, this volume). Sometimes the degree of non-enforcement leads to the impression that the state authorities “silently tolerate” (Chapters 2, 4 and 5, this volume) clandestine employment³.

The demand for cheap and flexible labour is met by the growing migrant population, as observed by the rise in both regular and irregular migration to Europe over the last decades. The good match between the employers’ demand for low-skill labour and the supply is demonstrated also by the fact that migrants tend to be overrepresented in low-skill, labour intensive sectors with the least desirable jobs reserved for those migrants who are in a precarious legal situation, i.e. without right to stay and/or to be employed.

6.4.1 Low bargaining power of migrants

Are migrants and especially migrants in irregular status better suited than other workers on the labour market to meet the employers’ demand for cheap and flexible labour?

As one of the migrants put it, employers prefer to employ undocumented migrant workers because “*they [employers] can do to that person [irregular migrant] everything they want...they want to get as much as it is possible from people, but to pay as little as they can*” (Anderson & Ruhs, 2006: 25).

The single most important factor affecting negatively bargaining power of some migrants on the labour market is the irregularity of their stay, which in contrast with irregularity of employment, is rarely the result of choice. Migrants who are not authorized to stay in the host country fear that any contact with the authorities could result in their deportation. Indeed, in some EU countries, as the country chapters in this study document, civil servants who learn in the course of exercising their duties about an irregular residency status of a migrant are required to pass this information on the immigration police (Chapter 1, this volume). In some countries, there are legal provisions for punishing persons who assist foreigners to prolong their illegal stay (Chapter 1, this volume).

In contrast, migrants that have the right to stay in their host country but cannot engage in the formal labour market seem to have a higher degree of bargaining power than

3 For example, in Spain, the municipal agents and authorities in some rural areas have notified employers about scheduled inspections (Chapter 5, this volume).

undocumented migrants. They do not fear removal and feel that the state ‘tolerates’ their irregular employment. Though they engage in irregular employment with all its negative characteristics described further below; for many this may be a rational decision to maximize their earnings under given constraints. Although they lack access to social and health protection, the net income from their irregular employment may be comparable to that of legally employed workers in the same type of job and in any case it is likely to be higher than their income back home. The higher degree of independence often enables these migrants to prevent their exploitation.

The precariousness of stay of migrants who reside in their host countries in violation of immigration rules makes them flexible and thus easily exploitable labour force. In some cases the degree of exploitation may amount to forced labour, as suggested by available evidence from several European countries (Andrees, 2008).

Often migrants in irregular status lack access to legal redress. That means that they cannot enforce their rights such as the right to agreed upon remuneration for work or compensation for work-related accidents. They fear that filing a complaint with the court would lead to their deportation, often before the court would initiate hearing of their case. In most cases, they do not have the necessary financial means to initiate often lengthy and costly legal proceedings nor information where to turn for assistance. In some European countries, the courts will consider that any employment contract would be null and void due to the applicant’s lack of legal capacity to engage in employment relations. Should an undocumented migrant nonetheless succeed in initiating a case, he or she will almost certainly face a difficulty to prove an actual employment relation: since they were employed clandestinely, there is most likely no written employment contract, pay slip or other document proving actual employment relation. It may also be the case that their colleagues, often undocumented migrants themselves, will not agree to testify in the court out of fear of deportation or retaliation by the employer.

An important factor constraining migrants is their often precarious financial situation. In many cases migrants come from countries with lower economic standards. They may have had incurred debts to finance their travel and left behind families who rely on remittances. To honour their financial obligations, migrants need income and this increases the pressure to secure some employment now, even if it means that they have to accept substandard work and pay conditions. ILO research (Andrees, 2008; Poisson & Yun, 2005) shows that in many cases migrants cannot enforce the financial arrangements and their debts are manipulated. Corruption and extortion networks can further exacerbate the debt spiral and reduce the bargaining power of indebted migrants. Migrants’ vulnerability often increases over time as they are under pressure to repay their debts, or as they have been subjected to extortion from criminal networks and debt plays an important role in coercive employment relationships rendering migrants servile and exploitable.

Many migrants are not authorized to seek employment on the formal labour market due to the fact that legal employment opportunities are to a large extent open to regularly admitted workers. For low-skilled workers only few options are available such as seasonal work in agriculture. However, these often come with a relatively high transaction

costs – the lengthy and complex procedures would result in a work authorization for a limited period, usually of three to six months in low-paid sectors.

In many countries, work permits tie the worker to a particular employer or a particular job. This reduces the worker's bargaining power. It serves as a powerful retention factor and makes the employee dependent and more readily agreeable to substandard work conditions or pay. While it is increasingly recognized that this practice is problematic from a human rights point of view, it is still widely used.

Apart from legal barriers to enter labour markets, many migrants face difficulties due to language barriers, problems with recognition of qualifications and also lack of social capital. Undocumented migrants often limit their contacts with the host society and also their own ethnic communities due to fear of denunciation, which could result in deportation.

As a consequence of language and cultural barriers, migrants rarely know relevant information such as applicable law and regulations and which mechanisms would help them to address their concerns. They are not aware of 'citizens advice bureaux', civil society organizations and others, who may extend assistance. Also, agencies specialized in labour or labour health issues do not always have personnel trained to address the specific vulnerabilities and concerns of migrant workers.

Migrants are often not unionized. In part this is the case because they often perceive their current situation as short term and transitory and do not see the benefits of union membership. In some countries, however, there are legal barriers to unionization (ILO, 2004a: 41) or trade unions do not welcome undocumented workers. In many cases migrants simply lack information about unions. This is especially the case for migrant workers coming from countries where trade unions are prohibited, discouraged, or under-developed.

Other reasons why migrants have relatively low bargaining power on the labour market include xenophobia and discrimination in host countries, where immigration is a touchy political issue and "hostility to immigration is becoming mainstream" (The Economist, 2008: 7).

6.4.2 Consequences of low bargaining power

As a result of their low bargaining power, migrants tend to be concentrated in low-paid, precarious jobs and in sectors or occupations where there are existing health and safety concerns (McKay, Craw and Chopra, 2006). In the face of institutional barriers to enter formal labour market, migrants often accept work in the undeclared, shadow economy, which is by its very nature outside of the regulation and the purview of the state authorities. These jobs tend to be in many respects substandard – with poor employment practices (e.g. hiring and firing practices, sexual harassment, discrimination) and poor working conditions (e.g. substandard occupational safety and health, no holidays, no social benefits, wages under the national minimum wage).

Migrants are often employed below their actual qualifications. In part this reflects legal barriers to recognize certificates of qualification from foreign countries. In other cases, migrants simply have to accept a job in the shadow market and these are often under their qualifications or in a different field.

Many migrants perceive their employment abroad as temporary. This motivates some of them to accept substandard working conditions over a limited period of time or over a period which they perceive as limited. This perception helps them to cope with the difficulties and nuisances in the hope of improving their situation in the future or accumulating a capital that will be substantial in their home countries.

Work in the shadow economy often puts migrants at increased risk of work accidents and other negative health outcomes (EASHW, 2007). Low bargaining power and pressure to earn more in a short time may also induce migrants to accept hazardous work because sometimes this work is better paid than some other or it is the only job available.

At the workplace, low bargaining power has a number of consequences for migrant workers which all tend to make them more vulnerable to workplace accidents than the general population: Many migrants are fatigued from overly extensive work since they work in two or more places to increase their low incomes or to earn as much as possible within a short time span. Migrants are more likely to suffer occupational accidents due to the very fact that they changing jobs rather quickly and thus are often ‘new on the job’. In addition, employers are less likely to ‘invest’ into occupational safety and health training or equipment for a workforce which is seen as transient and which is unlikely to be able to prove the actual employment relationship. Migrants are also disadvantaged by their limited ability to communicate with their co-workers and supervisors and their ability to comprehend occupational safety related information.

Migrants have also limited access to health services, though there are disparities across countries and significant differences in access between migrants with regular migration status and undocumented migrants. The latter are much more likely to postpone or avoid seeking medical assistance, due to their fear of dealings with the state authorities. Some will not seek medical assistance because they cannot afford the loss of income. Many undocumented migrants or migrants without access to the labour market will not be able get quality medical assistance because they simply do not have the financial means to afford it. In addition, in many countries access to health insurance is conditioned by legal employment. Therefore, those employed illegally have to rely on weak income to cover their medical expenses, and tend to avoid or delay treatment.

Some migrants are also vulnerable to exploitation which may amount to forced labour, as evidenced by research and also by recent decision by European Court of Human Rights in case of *Siliadin v. France*. ILO research on forced labor in Europe identified cases of severe exploitation in numerous European countries in the commercial sex industry, but also in domestic services, agriculture, construction and other sectors (ILO, 2003a; Yun, 2004; Ghinararu & van der Linden, 2004; Cyrus, 2005). Poissoin and Yun (2005) in research on the Chinese community in France points out to hard working and “inhuman” living conditions coupled with a high degree of indebtedness, which often

amounts to debt bondage. These conditions are in some cases accepted by the workers in the expectation that they are temporary and unavoidable part of their journey to a better future. Cyrus (2005) in his study on forced labour in Germany described 42 cases of forced labour, including forced sex work, exploitation of domestic workers, seasonal work in agriculture, construction work, catering and meat processing.

The research findings point to widespread forms of coercion that do not have to involve outright physical violence or movement constraint but that are, in their totality, powerful means of exercising control over migrant workers, who are then coerced into exploitative arrangements. Among these manipulated debt, withholding of wages, retention of passports and identity documents, threats of denunciation to authorities, threats of or actual violence against the worker or his family seem to be particularly important. Certain administrative measures aiming at regulating access to labour market for foreign workers, for example employment permit tied to a particular employer or a particular position, make migrant workers vulnerable to exploitation, for example when employers deliberately fail to take steps to regularize employment and/or status of workers thus turning them into irregular migrants (MRCI, 2007: 30).

6.5 Policies to address irregular migration

The employment of migrant workers in irregular status is closely related to labour market policies and the functioning of labour market institutions in source and destination countries. In the following, we will briefly discuss policy approaches: regulation and monitoring of private employment as well as labour contract agencies; worksite inspections and enforcement of labour law, control policies and regularization measures. The protection mechanisms for migrant workers in irregular status will be taken up in the next section including recently adopted anti-trafficking laws and protection mechanisms for migrant workers.

6.5.1 Regulation and monitoring of private employment and recruitment agencies⁴

As discussed in the previous section, many migrants find employment through informal and sometimes illegal channels of recruitment. In many Eastern European source countries, laws and policies to regulate private employment agencies are weakly developed. Law abiding agencies find it difficult to compete against illegal intermediaries, such as travel agencies or outright criminal organizations. Most agencies that are able to sustain their business have specialized on skilled migrants. Research has also shown that many migrants leave their country with a tourist visa and seek employment in the destination country through their social networks or other intermediaries, such as private employment agencies.

Private employment agencies can play a double role – as recruiters as well as employers (in a triangular employment relationship). In the latter case, employment agencies maintain control over the worker who is hired out to a user enterprise, usually on a

⁴ For details, please see ILO, 2007 and OSCE, ILO, and IOM, 2006.

temporary basis. This is often happening along complex sub-contracting chains. In the event of a problem, these agencies frequently close down and workers are left on their own (Pereira and Vasconcelos, 2008). Agencies that operate in low-skilled and labour-intensive markets, e.g. agriculture, construction or cleaning, also recruit and/or employ undocumented migrant workers alongside regular workers. The placement and contracting of undocumented migrant workers has therefore to be addressed in source and destination countries alike.

Over the last two decades, European countries have liberalized restrictive regulations on recruitment and allowed private employment agencies, including temporary work agencies, to play a bigger role in the labour market. Consequently, their overall role in the labour market expanded alongside increased cross-border mobility. Portugal, for example, saw an increase of temporary work agencies of over 50% between 1997 and 2002 (Arrowsmith, 2006). Many Portuguese migrants are recruited through these agencies for employment abroad (Pereira and Vasconcelos, 2008). Frequent media reports of cheated and exploited migrant workers employed by temporary work agencies or “gangmasters” as in the UK and other European countries, have led to a new debate around regulations and monitoring mechanisms. The UK, for example, introduced the Gangmaster Licensing Act in 2004, following serious incidences of exploitation of irregular migrant workers. In 2006, the Council of Europe issued a report on the situation of migrant workers in temporary employment agencies, highlighting several cases where migrant workers were recruited in their source countries under false pretences and ended it up as undocumented workers in the destination countries, suffering severe exploitation (Council of Europe, 2006).

According to ILO standards, workers should not pay recruitment fees. They should also be protected from false job offers and other abusive recruitment practices. In addition, there should be an institution, usually the labour inspectorate, responsible for the enforcement of recruitment regulations (ILO, Private Employment Agencies Convention, 1997 (No. 181). Workers recruited through temporary work agencies, including migrant workers, should have the right to be part of collective bargaining in the host countries and join a trade union, to enjoy the same treatment with regard to working hours, wages and other working conditions, to receive statutory social security benefits, and protection in the field of occupational safety and health (ILO, 2007). Despite the fact, that the Convention enjoys a fairly high level of ratification across Europe, most national practices fall short of these international standards⁵. This is largely due to weak enforcement mechanisms. The ILO has developed guidance and training material on how to monitor the recruitment of migrant workers in order to prevent their exploitation (ILO, 2005).

6.5.2 Workplace inspections

Monitoring of private employment agencies is closely linked to workplace inspections. The International Labour Conference adopted the Labour Inspection Convention in 1947 (No 81). This Convention provides an overall guideline to labour inspection, taking into

5 The following European countries have ratified C. 181: Albania, Belgium, Bulgaria, Czech Republic, Finland, Hungary, Italy, Lithuania, Republic of Moldova, Netherlands, Portugal, Spain

account divergence in labour law as well as different cultures with regard to workplace inspection. The most crucial element of C. 81 is a provision that empowers labour inspectors to enter any workplace liable to inspection without prior notice. In addition, labour inspectors have a wide range of dissuasive measures at their disposal in order to bring employers into compliance. Some economists have argued that compliance of private firms is influenced by two important variables: the probability of inspection and the severity of sanctions (Squire and Suthiwart-Narueput, 1997). Country reports in this book also indicated that low risks of detection and sanctions are the main factors influencing employers' behaviour.

Despite their important role, recognized in international and national law, labour inspectors face many obstacles. The most serious obstacle is the lack of political will to adequately staff and train labour inspection services, which is often linked to an overall weak labour administration system. Albracht et al. (forthcoming) estimated that there is a global shortfall of more than 45.226 labour inspectors. This estimate is based on the gap between the estimated number of labour inspectors per region and ILO benchmarks for a minimum number of labour inspectors according to the number of workers and the development stage of the country. Industrial market economies, for example, should have one inspector for every 10.000 workers, and transition countries one for every 20.000. The shortfall in industrialised economies is over 20.000 and in transition countries over 4.000. This has been calculated per country and multiplied by a population expansion factor (Albracht et al., forthcoming).

Most countries in Europe assign labour inspectors the task of supervising the legality of employment and prosecuting violations, including both clandestine workers as well as migrant workers in an irregular situation. Many countries have also increased penalties against employers using irregular labour over recent years (e.g. UK, Germany, and France). The proposed Employers' Sanctions Directive of the European Commission has a similar objective (European Commission, 2007). But sanctions will not act as effective deterrent if they are not adequately enforced. Legal provisions and support for migrant workers in irregular status to claim their rights and denounce exploiters is a key element in enforcement (ILO, 2006a).

The ILO Committee of Experts on the Application of Conventions and Recommendations recalled in its 2006 General Survey on Labour Inspection (ILO, 2006b) that the primary duty of labour inspectors is to protect workers and not to enforce immigration law as a primary activity. It also noted the fact that workers residing illegally in a country are often doubly penalized: in addition to losing their job they face the threat of expulsion. Labour inspectors should therefore focus on the abusive working conditions to which irregular workers are most often subjected, and they should ensure that all workers benefit from statutory rights resulting from the employment relationship. In practice, however, penalties against employers using migrant workers in irregular status are not strictly enforced whereas migrants face many difficulties claiming their rights, especially if they are in an irregular situation. Law enforcement authorities find it difficult to prosecute cases linked to criminal practices and exploitation of migrants, as long as migrants in irregular status are not protected from immediate deportation (ILO, 2005; Chapter 1, this volume).

6.5.3 Control policies

The most common response to irregular migration has been to enforce tighter border controls. Both the European Union and the United States have poured increasing resources to border enforcement and controls. Destination countries have urged source countries to control migration pressures with the threat of sanctions. At the EU Seville Summit, for example, some suggested tying of foreign aid to control of emigration by third countries. The European Union has entered into several re-admission agreements with some countries of origin (China, Sri Lanka) to return migrants in irregular status. The Communication on 'Policy priorities in the fight against illegal immigration of third-country nationals' (European Commission, 2006) has identified the following priority areas: cooperation with non-EU countries, border security, integrated management of external borders, secure travel and identity documents, the fight against trafficking in human beings, regularization of the status of non-EU nationals in irregular situations, combating illegal employment, return policy, improving the exchange of information using existing instruments and carriers' liability.

Unfortunately rigid controls of destination countries are only making trafficking and smuggling more lucrative occupations, and thereby aggravating irregular migration and violations of human rights of migrants. The impact of these rigid controls has been limited in curbing irregular migration in both the USA and Europe (Castles, 2007). According to United Nations Secretary-General Kofi Annan (Annan, 2003):

"Few if any states have actually succeeded in cutting migrant numbers by imposing such controls. The laws of supply and demand are too strong for that. Instead, immigrants are driven to enter the country clandestinely, to overstay their visas, or to resort to the one legal route still open to them, namely the asylum system. This experience shows that stronger borders are not necessarily smarter ones. And it shows that they can create new problems of law enforcement and lead almost inevitably to human rights violations".

6.5.4 Regularizations

Faced with large numbers of irregular migrants, governments frequently choose to declare amnesties through which migrants can leave the country without any penalties, or regularise their status (ILO 2004a). It is also an internationally recommended good practice to reduce irregular migration. The ILO Convention No. 143 mentions that Member states have the option to give persons who are illegally residing or working within the country the right to stay and to take up legal employment. Many states seek to avoid declaring amnesties for fear of encouraging more irregular movements but some already faced with large irregular foreign populations may see no other humane option. There have been recent amnesties, for example, in Southern Europe – Italy, Greece, Spain and Portugal – which are key ports of entry of migrants from across the Mediterranean. Spain carried out a bold regularisation exercise in 2005 turning 690,000 undocumented workers into regular status, which caused some concern among other member states of the European Union (Arango and Jachimowicz, 2005). It is also important to provide for an earned right to regularization when migrant workers satisfy specified criteria such as

long duration of stay, good contribution and behaviour, and proven attempts to integrate as an ongoing process.

The forthcoming French EU Presidency is proposing measures to prevent member states from using “mass regularisation” programmes, as part of its proposed common European Pact on Immigration and Asylum (cited in Open Europe, 2008). This cannot be defended on grounds of labour market efficiency (since demand for labour is the cause of large irregular migrant populations), historical experience or migrant rights. It will only accentuate exploitation of workers in irregular status and force them to go underground and prolong their stays.

6.6 Protection of migrant workers in irregular status

As highlighted in previous sections, migrant workers in irregular status are an especially vulnerable group with limited access to rights and justice in destination countries. The UN Human Rights Commission (UNOCHR 1996) stated: “Migrant workers face the gravest risks to their human rights and when they are recruited, transported and employed in defiance of the law”. Many host countries fail to recognize that migrant workers in irregular status also have fundamental rights as human beings and labour rights as workers, recognized in ILO and UN international instruments. International instruments (United Nations and ILO) provide for the protection of basic human rights and most workplace rights for workers in irregular status as well but serious gaps exist in policy and practice regarding such rights. There are several reasons for this situation as explained in previous sections (Wickramasekara, 2006). Fear of detection and deportation prevents them from asserting any rights: Lack of access to information and awareness of rights. States generally have a negative attitude towards irregular migration, and are often under political pressure to convince the public that migration is under control. There also gaps in existing international instruments, their ratification and enforcement and access to redress mechanisms. There are also no international standards relating to regularization of migrant workers in irregular status. Lack of effective social dialogue and consultative mechanisms involving all stakeholders accentuates these problems.

International instruments provide a solid foundation for formulation of migration policies. The ILO has pioneered the development of international instruments for the governance of labour migration and protection of migrant workers since the 1930s. At the same time, the emphasis should not only be on the human rights of migrants as human beings, but also on their labour rights as workers. Universal human rights are applicable to all human beings irrespective of nationality. Moreover, the core labour rights – fundamental Conventions of the ILO enshrined in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session on 18th June 1998 – are applicable to all workers including migrant workers, without distinction of nationality, and regardless of migration status. These relate to eight core Conventions covering forced labour, child labour, trade union rights, and non-discrimination. The ILO Declaration states: *“All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize,*

in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions.”

Forced labour is closely related to human trafficking, and combating trafficking has been a priority of European policy makers over recent years. In particular, there is growing recognition that anti-trafficking action cannot be reduced to law enforcement alone and that comprehensive responses need to address issues of prevention as well as victim protection. In addition, efforts to curb human trafficking should not only be placed on source but also on destination countries by focusing on the forced labour outcomes of the process. This is also reflected in the report of the EU Expert Group on human trafficking: “to effectively counter trafficking, policy interventions should focus on the forced labour and services, including forced sexual services, slavery and slavery like outcomes of trafficking – no matter how people arrive in these conditions, rather than (or in addition to) the mechanisms of trafficking itself” (European Commission, 2004: 53).

The recommendations of the expert report were instrumental in shaping the new EU Action Plan. In 2005, the Council adopted a plan on best practices, standards and procedures for combating and preventing trafficking in human beings⁶. Chapter 4 focuses specifically on demand factors related to employment regulations. The Action Plan also refers to trafficking for labour exploitation that requires “new types of specialization and cooperation with partners, e.g. agencies responsible for the control of working conditions and financial investigations related to irregular labour” (paragraph 4/iv). The adoption of the EU action plan has spearheaded the development of national policies in some EU member States. From an ILO point of view, however, mechanisms to protect victims as well as to empower them to claim their rights need to be strengthened in destination countries (ILO, 2008b).

Most Conventions and Recommendations adopted by the International Labour Conference are of general application, that is, they cover all workers, irrespective of citizenship. There are, however a number of instruments which contain provisions relating to migrants, or the ILO Committee of Experts has referred to the situation of migrant workers in supervising their application in recent years. These cover areas such as employment, labour inspection, social security, maternity protection, protection of wages, occupational safety and health, as well as sectors such as agriculture, construction and hotels and restaurants where migrant workers are often concentrated. A number of these Conventions, which also apply to migrant workers, are listed in Annex 1 of the ILO Multilateral Framework on Labour Migration (ILO, 2006a). The idea is that unless otherwise stated, most ILO labour standards apply to all migrant workers in the workplace.

The ILO Migrant Workers Convention, 1975 (No.143) was the first international instrument to deal with irregular migration or migration under abusive conditions. The Convention 143 specifies the following rights:

6 <http://europa.eu/scadplus/leg/en/lvb/l14168.htm>

- (i) basic human rights of all migrant workers should be respected (Article 1);
- (ii) entitlement to past dues for wage payments and social security (Article 9(1));
- (iii) due process to be followed in case of disputes (Article 9 (2));
- (iv) cost of expulsion should not be borne by the migrant (Article 9 (3)).

It is also the first Convention to prescribe punishment for the employers of such workers, organizers of such movements and those assisting through administrative, civil and penal sanctions including imprisonment (Article 6). The Convention has been ratified only by 23 countries, but several important destination countries in Europe (Italy, Portugal, Norway, Slovenia and Sweden) have ratified it. The Convention also states clearly that States are free to regularize such workers (Article 9 (4)).

The International Convention on the Protection of All Migrant Workers and Their Families, 1990, contains more elaborate provisions regarding protection of workers in irregular or undocumented status. Part III of the Convention on the human rights of all migrant workers and members of their families spells out the fundamental civil and political rights and economic and social rights apply to all migrants. All migrant workers and their families are entitled to equal treatment with nationals regarding following economic and social rights: conditions of work /terms of employment; trade unions rights; social security linked to national legislation and applicable bilateral /multilateral treaties; emergency medical treatment; access to education for migrant children. Part VI relates to State obligation to consult /cooperate to ensure labour migration takes place in humane and sound conditions, and contains provisions for sanctions against smugglers, traffickers and employers. The 1990 International Convention stipulates that loss of employment shall not lead to loss of residence rights and thereby irregular status, a position shared by ILO Convention 143 although the latter confined this right to the period of the employment contract.

The ultimate objective of both instruments is to minimize irregular migration through a number of measures including bilateral cooperation

The Resolution on a fair deal concerning migrant workers in a global economy adopted at the ILO International Labour Conference in 2004 (ILO, 2004b) recognized that the existing ILO instruments contained gaps in relation to protection of workers in irregular status, temporary migrant workers and women migrant workers. In relation to workers in irregular status, it called for:

- (i) *providing due consideration to the particular problems faced by irregular migrant workers and the vulnerability of such workers to abuse;*
- (ii) *ensuring that their human rights and fundamental labour rights are effectively protected, and that they are not exploited or treated arbitrarily;*
- (iii) *developing best practice guidelines on preventing and combating irregular labour migration including amnesties and regularizations.*

The ILO Multilateral Framework and rights of migrant workers in irregular status

The ILO Multilateral Framework (ILO, 2006a) negotiated by a tripartite meeting of experts in late 2005, and endorsed by the Governing Body of the ILO in March 2006, has drawn upon these and other international instruments and best practices to compile a set of principles, guidelines and best practices to guide countries in the formulation and implementation of labour migration policies. It offers all countries considerable scope to apply the principles and good practices contained in the above instruments for improving their migration policies and practices. Several principles of the multilateral Framework apply to workers in irregular status. These are mainly in the sections dealing with effective management of labour migration, protection of migrant workers, and prevention and protection against abusive migration practices. Box 1 highlights the major principles which are particularly relevant to their situation. These re-affirm that all ILO labour standards – core Conventions, migrant-specific standards and all other labour standards – apply to all migrant workers in the workplace irrespective of their status.

Box 1: Major Principles of the ILO Multilateral Framework which apply to migrant workers in irregular status (ILO, 2006a)

Principle 4. *While all States have the sovereign right to develop their own policies to manage labour migration, relevant international labour standards, and multilateral rules and, as appropriate, guidelines, should play an important role to make these policies coherent, effective and fair.*

Principle 8. *The human rights of all migrant workers, regardless of their status, should be promoted and respected. In particular, all migrant workers should benefit from the principles and rights in the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, which are reflected in the eight fundamental ILO Conventions, and the relevant United Nations human rights Conventions.*

Principle 9 (a). *All international labour standards apply to migrant workers, unless otherwise stated. National laws and regulations concerning labour migration and the protection of migrant workers should be guided by international labour standards and other relevant international instruments.*

Principle 9 (c). *National law and policies should also be guided by other relevant ILO standards in the areas of employment, labour inspection, social security, maternity protection, protection of wages, occupational safety and health, as well as in such sectors as agriculture, construction and hotels and restaurants.*

Principle 11. *Governments and the social partners should formulate and implement measures to prevent and eliminate abusive migration conditions, including irregular labour migration, smuggling and trafficking in persons and other abusive practices.*

The ruling of the Inter-American Court of Human Rights on the juridical condition and rights of undocumented migrants (17 Sept 2003) is a reiteration of international acceptance of this position. It clearly upheld that the migratory status of a person cannot consti-

tute a justification in depriving him/her of the enjoyment and exercise of his/her human rights, including those related to work (Inter-American Court of Human Rights, 2003).

Among the corresponding guidelines of the ILO Multilateral Framework (ILO, 2006a), the following are particularly relevant:

4.4. ensuring that policies address specific vulnerabilities faced by certain groups of migrant workers, including workers in an irregular situation;

8.4.2. protect migrant workers from conditions of forced labour, including debt bondage and trafficking, particularly migrant workers in an irregular situation or other groups of migrant workers who are particularly vulnerable to such conditions;

9.5. adopting measures to ensure that all migrant workers, including those in an irregular situation, who leave the country of employment are entitled to any outstanding remuneration and benefits which may be due in respect of employment and are given a reasonable period of time to remain in the country to seek a remedy for unpaid wages;

9.9. entering into bilateral, regional or multilateral agreements to provide social security coverage and benefits, as well as portability of social security entitlements, to regular migrant workers and, as appropriate, to migrant workers in an irregular situation;

10.4. providing for effective remedies to migrant workers for violation of their rights, regardless of their migration status, and creating effective and accessible channels for all migrant workers to lodge complaints and seek remedy without discrimination or intimidation.

Guideline 10.4 demands special attention in view of lack of access of migrant workers in irregular status to justice and redress mechanisms.

The pertinent issue is how far the Multilateral Framework principles and guidelines would be effective given that is a non-binding framework. An important development is the strong support of the global trade union movement and NGOs for the framework. It is important to mobilize the support of all stakeholders including governments, the Global Migration Group⁷, international agencies, broader civil society and the media to popularize the framework as a toolkit to guide labour migration policy and treatment of migrant workers.

6.7 Conclusions

In this paper, we have argued that irregularity is the result of complex processes and rarely a free choice of migrant workers. Irregular migration should be treated as part of

7 <http://www.un.org/esa/population/migration/gmg/index.htm>

the broader decent work agenda that is supported by EU member States. Border controls and tighter visa policies have not proved effective in many contexts. Consequently, labour market dynamics, including factors of demand in certain industries as well as their relationship with employment and migration regulations have to be taken into account. Labour market institutions, such as labour inspection systems and labour administration, need to be strengthened in source and destination countries as to bring employers into compliance with labour law and to support integration of migrants into the regular labour market. We have further argued that regulation and monitoring of recruitment processes across source and destination countries is of key importance to any strategy against irregular migration. This also includes temporary work agencies that are part of complex sub-contracting chains and that make it easy to conceal abuses. The involvement of social partners in the formulation of such regulations and policies is essential.

Finally, the paper has advocated strategies that reverse the low bargaining power of migrant workers in irregular status, and that strengthen mechanisms of protection. While significant progress has been made in many EU member States to combat trafficking in human beings and improve victim protection schemes, more needs to be done to empower migrants in irregular status in the labour market (including potential trafficking victims) to denounce their exploiters and to claim their rights. International conventions and recommendations, including those of the ILO, provide a sufficiently strong normative framework. By way of conclusions, we list good practices based on international norms and experience that should be a cornerstone of strategies and policies to address irregular migration⁸:

- Approach irregular migration in a comprehensive manner looking at root causes, protection needs of workers, and accountability of all actors involved, adopt a broad range of policies covering preventive and control policies and employer sanctions based on cooperation among all stakeholders including countries of origin and destination;
- Base policy on internationally accepted norms and instruments, promoting a rights based approach as elaborated in the ILO Multilateral Framework on Labour Migration (ILO 2006a); ensure respect for basic human rights and all labour rights in the workplace for migrant workers in irregular status;
- Treat irregular migration as a labour market and decent work conditions issue, not only as a legal/security issue,
- Expand legal migration opportunities and options for low skilled labour in line with labour market needs;
- Address root causes by promoting decent work in countries of origin to reduce migration pressures;
- Address irregular employment and undeclared work in destination countries which act as magnets for attracting migrants in irregular status;
- Use a broadbased consultative process among all stakeholders in finding solutions to the issue of irregular migration by promoting industry-government cooperation, and consultation with unions, NGOs and other civil society;

8 This section draws upon Wickramasekara (2005); See also The Platform for International Cooperation on Undocumented Migrants (PICUM 2005) which has also highlighted good practices in their publication: Ten Ways to Protect Undocumented Migrant Workers.

- Disseminate information and education to employers on hiring of workers in irregular status and to potential migrants on risks and dangers of migrating under irregular situations;
- Promote bilateral and regional cooperation – as recommended in ILO Convention No. 143 and the 1990 International Convention – to reduce irregular migration and make migration a driver for development.

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Addressing the Irregular Employment of Migrants - Concluding Remarks and Recommendations

Marek Kupiszewski

7.1 Introduction

The most important deliverables of IOM's ARGO 2006 project, **Combating the illegal employment of foreigners in the enlarged EU**, are seven national case studies covering Belgium, Germany, Hungary, Ireland, Poland, Romania, and Spain. To maintain comparability, the studies were carried out according to a common methodology and the report outline was agreed among the research teams at the beginning of the project.

The unified structure of the national studies includes an assessment of the role of irregular employment and the role of irregular labour migrants in the given country, the measures to combat the illegal employment of foreigners, including an analysis of policies and law, the prevention of the illegal employment of foreign workers, protection against the exploitation of workers and punitive measures. This is followed by the researchers' evaluation of the policies and their identification of best practices, including an assessment of policy implementation and the identification and evaluation of policy outcomes. The final section presents conclusions and recommendations on policy measures to be adopted. It is the structure of the national chapters which serves as a backbone for this summary chapter.

7.2 Irregular employment, irregular labour migrants and their social acceptance

The European labour and migration scenes are far from uniform. The significance of the irregular employment of migrants is even more differentiated and strongly depends on two factors: the role of irregular employment and the informal economy within the entire economic system of a country, and the number of migrants in a country. Clearly, in all the countries concerned, the issue of irregular labour is present on the agenda to a greater or lesser degree. However, the significance of the irregular labour of foreigners differs, from being a very important issue in Spain and important in Germany or Belgium, to being marginal in Hungary, Romania and Poland. Moreover, the difference in estimates of the numbers of irregularly employed foreigners varies to a large extent, with, for example, brackets from 50 to 500 thousand in Poland (Kicinger and

Kloc-Nowak, Chapter 4, this volume). In Germany (Junkert and Kreienbrink, Chapter 1, this volume), there are assessments of between 100 thousand and one million illegal foreigners; however, there is no reliable estimate of irregularly employed migrants¹. In any cases, such far-ranging discrepancies make any assessment a matter of judgment rather than science. In general, however, we may say that in countries of immigration, especially those with a long history of immigration, such as Belgium and Germany, and enjoying buoyant economic development, such as Ireland and Spain, the importance of irregular migrant labour is by far larger than in the countries of emigration, such as Hungary, Poland and Romania.

It is also clear that the reasons for hiring unregistered foreigners are the same in all the countries; the irregular migrant workers constitute a pool of cheap and flexible labour, employed mostly on the secondary labour market. Their employment serves as an ideal illustration of Piore's (1979) dual labour market theory. In addition, the illegality of their stay and/or employment makes them easy prey for unscrupulous employers. Pillinger (Chapter 3, this volume) notes that in Ireland the most important cause of irregularity in the employment of foreigners is employers' negligence or their premeditated non-extension of employees' work permits.

Acceptance of illicit employment in the societies of the European Union was investigated recently in the Eurobarometer questionnaire (European Commission, 2007a). Extracts from the replies to a question on illegal behaviours are presented in Table 7.1. In all the countries, unregistered work carried out for a private person is considered more acceptable than unregistered work for companies. Ireland is by far the most tolerant country toward undeclared employment, while Belgium, Hungary and Poland are quite tolerant. German society shows substantial acceptance for unregistered work carried out for private individuals, combined with a lack of tolerance for undocumented work for companies. With levels of acceptance well below the EU average, Romanian and Spanish society does not accept unregistered work. In all the countries except Spain, irregular work carried out for a private person is held to be more acceptable than using public transport without paying.

Social acceptance of both irregular employment in general and of the irregular employment of foreigners in particular is an important factor in the shaping of irregular employment. If it were not tolerated at all, it would not exist. Quite simply, no one would employ a worker irregularly.

¹ Junkert and Kreienbrink (2008, this volume) quote, after Schneider (2003), 1200 thousand illegally employed migrants, but are skeptical as to the methodology used for this estimate.

Table 7.1: The social acceptability of various aspects of the shadow economy

	Someone receives welfare payments without entitlement	Someone uses public transport without a valid ticket	A private person is hired by a private household for undeclared work	Undeclared work including activities of firms	Someone evades taxes by not or only partially declaring income	Total
EU27	1.9	2.8	3.5	2.3	2.5	2.5
BE	1.8	2.7	4.2	2.7	3.0	2.8
DE	1.7	2.6	3.9	1.9	2.3	2.3
ES	2.1	3.1	2.7	2.1	2.2	2.3
IE	2.2	3.2	6.2	4.2	2.6	2.7
HU	2.6	3.0	4.0	2.7	3.0	2.9
PL	2.1	2.8	3.9	2.7	2.6	2.7
RO	2.1	3.1	2.7	2.1	2.2	2.3

Tabulation of the replies to the question: "Now I would like to know how you assess various behaviours. For each of them, please tell me to what extent you find it acceptable or not. Please use the following scale: '1' means that you find it 'absolutely unacceptable' and '10' means that you find it 'absolutely acceptable'".

Source: Quoted after the European Commission, 2007a: 44.

7.3 Combating the irregular employment of foreigners – policy and law analysis

Due to the multifaceted character of the illegality of employment of migrants, both its analysis and the design of relevant policies are difficult. Irregularity arises in a variety of ways. The first of these is that a migrant arrives in a country illegally, either by crossing the boundary beyond the designated border crossings, by using a fake visa, or by using genuine documents, but having obtained a visa on the basis of an untrue statement or false documentation. Among the countries covered in this book, illegal entry into the country from beyond a designated border crossing seems only to be a problem in the Mediterranean, that is, in Spain (Carling, 2007). However, in Europe, a vast majority of unregistered migrants arrive in a country legally and turn illegal because they violate some regulations. Many migrants come for a limited period of time, typically up to 3 months, on tourist visas or under visa-free tourist regimes, and overstay. Others stay legally, but undertake employment without a valid work permit. Finally, there is a group whose stay and work are legal, but who turn to illegality at a given moment because their work permit expires or they move to another job or employer. In the latter case, it is very often the employer who should take steps to ensure the legality of employment, but fails to do so (Pillinger, Chapter 3, this volume). This variety of circumstances makes the analysis of policy quite difficult, as different measures address different categories of irregular labour migrants.

In countries which started receiving migrants relatively recently, such as Spain, and post-communist countries such as Hungary, Poland and Romania, in which the issue of illegal employment arose after the fall of communism, the core legislation was adopted

in the early 1990s (Aparicio et al., Chapter 5, this volume; Kicinger and Kloc-Nowak, Chapter 4, this volume; Hárs and Sik, Chapter 2, this volume), or after 1999, as in the case of Romania (Alexandru, 2008). Countries with a long history of immigration started to shape their legal and enforcement systems much earlier. However, all of them have reshaped their systems in the last two decades, in order to adapt to the increasing inflow of migrants.

Basically, we can distinguish three categories of policies aiming to curb the irregular employment of migrants: 1) creating possibilities to substitute irregular forms of migration and employment with regular ones; 2) creating channels for the regularization of irregular migrants; and 3) the deterrence, criminalization and penalization of irregular employees and their employers.

The first category of measures focuses on promoting and facilitating legal employment. The measures vary from schemes for highly skilled workers, such as the German ‘green card’ in the past, or the Irish version currently in operation, through a system of work permits which allow a specified job, and that job only, to be taken, to schemes for students which allow them to work part-time during the period of their studies and to take a job upon graduation (Pillinger, Chapter 3, this volume; Junkert and Kreienbrink, Chapter 1, this volume). However, most irregular migrant workers are in low-skilled and semi-skilled jobs, which are often linked to seasonal or circular migration, and for which the work permit system is unsuitable, as it is too complex, too costly and too time-consuming. Many migrants are interested in short-term seasonal work, in order to supplement their income in their country of origin. For them, bilateral agreements on access to labour markets play a vital role. The Polish – German agreement (Korczyńska, 2003), on the basis of which there were some years when over 300 thousand Poles took up employment in Germany, may be considered as exemplary. Unilateral arrangements opening labour markets to nationals of specific countries, or facilitating the employment of foreigners in certain industries, should be mentioned. Recent changes in Polish legislation, making the employment of short-term workers from Ukraine, Belarus and Russia feasible, may be an example; however, the scheme is so new that it is difficult to assess its effectiveness. Spain operates a special scheme dedicated to the employment of seasonal workers in agriculture.

Measures allowing for the transition from an irregular to a regular status belong to the second category. A typical approach is to introduce a periodic regularization mechanism, allowing irregular migrants who meet certain conditions to obtain a legal status in the country of destination. Sunderhaus (2006) noted that until 2006 there had been nine regularization programmes in Spain, one in Hungary, three in Belgium and 27 in other European countries; he did not, however, mention two regularizations in Poland (2003 and 2007) (Kicinger and Kloc-Nowak, Chapter 4, this volume). There is a noteworthy debate on the benefits and costs of the regularization. Among the former, probably the most important is the creation of a path for irregular migrants to obtain a regular status and eliminate all the disadvantages associated with irregularity. Security issues are also mentioned, as it is better for a state to know who is on its territory. Among the disadvantages, the key criticism points to regularizations as being an invitation for irregular migrants to come to a country and stay there until the next regularization is implemented.

Regularizations are also costly for the administration to conduct and often the results are not those which were expected. In some countries, regularized irregular migrants return to irregular status after a period of time, often because of the disfunctionality of the legislation in force.

Much less popular are measures which keep some permanent channels opened, allowing for legal status to be obtained; most countries do not allow such an option. Belgium operates a scheme allowing a work permit to be obtained (labour card B; Pauwels and Wets, 2008) to fill vacancies which have not been taken for a given length of time. In 2000, Spain (see section 5.3.5.2 in Aparicio et al., Chapter 5, this volume) introduced a permanent ordinary regularization.

The third category of policy measures focuses on the control, policing and penalization of irregularly employed migrants and, in most cases, of their employers as well. The tightening of the regulations for the issue of visas, increased border checks, labour control, the penalization of both employers and employees, and the blocking of channels allowing for the transition from illegal to legal status all belong to the classical implementation tools for these policies. Their main aim is to deter migrants and their employees from irregular employment. In some countries, the policy responses to the irregular employment of migrants are embedded in the policy towards irregular employment in general; in other countries there are measures specifically addressing the employment of foreigners. Apparently, the most important policy measure implemented by governments has been the tightening of control measures and policing. In almost all the countries under study, labour inspection and labour market policing have been reorganized and enhanced in recent years and these changes have often targeted the irregular employment of migrants. In some countries, such as Germany (Junkert and Kreienbrink, Chapter 1, this volume) or Belgium (Pauwels and Wets, 2008), the fiscal control authorities have been enhanced, empowered and trained to tackle the issues of irregular employment, including the irregular employment of foreigners. In Spain (Aparicio et al., Chapter 5, this volume), the semantic meaning of the term ‘worker’ has been widened, in legislative terms, to cover a person undertaking any form of gainful activities.

In most cases, restrictive policies have the strong support of the trade unions, while employers mostly plea for liberalization of the regulations, as they need cheap labour. Simultaneously, business organizations and trade unions are unanimous when it comes to advocating the strengthening of labour inspections (Aparicio et al., Chapter 5, this volume).

7.4 Policy evaluation

The most widespread policy measures implemented by governments are those of control and policing of the labour markets, and the detection and penalization of irregular foreign employees and the employers for whom they work. The efficiency of these measures is difficult to assess in quantitative terms. The data on the irregular employment of migrants are scarce and charged with unknown errors. Moreover, we have no way of assessing what the magnitude of irregular migration would be if certain measures had not been implemented and were not in force. The assessment of the effectiveness of

control systems was carried out by the country researchers. The Polish (Kicinger and Kloc-Nowak, Chapter 4, this volume) and Spanish (Aparicio et al., Chapter 5, this volume) studies state blatantly that the control systems implemented in their countries are ineffective. The report from Germany, which has the most elaborate of the enforcement systems, and is saturated with officers and resources, suggests that policing is effective, but the execution of financial fines is not (Junkert and Kreienbrink, Chapter 1, this volume). The authors note that the execution of financial fines oscillated at around one fifth of the fines imposed in the first stage of control in 2005–2006 and that a substantial proportion of them was withdrawn in the course of appeal procedures. This suggests that there is also a problem of inefficiency in the escalation of repression, with increased enforcement and judiciary costs, which are non-proportional to their effect.

In terms of irregular employment, the EU member states are somewhat away from an annual inspection rate of 10% of all enterprises (article 15, Proposal for Directive providing sanctions for employers of illegally staying foreign nationals; European Commission, 2007b). Given what was said above with regard to the low efficiency of the controlling procedures, this may, in fact, be good news.

The success of other policy measures aimed at curbing the irregular employment of foreigners is even more difficult to assess, as they are country specific rather than universal. The bureaucratic and administrative frameworks of the visa and work permit systems is clearly indicated as a culprit in leading to the irregular employment of foreigners. The Polish case study underlines the fact that it is better to improve the system by allowing simpler access to legal employment, rather than investing in increased policing (Kicinger and Kloc-Nowak, Chapter 4, this volume). A similar opinion is voiced in the Hungarian study (Hárs and Sik, Chapter 2, this volume), which recommends reducing the paperwork needed in order to obtain a work permit and setting up an easy client service administration system, while the Romanian study points out that the bureaucratic procedures are too complex (Alexandru, 2008). One of the problems identified by the Irish study (see Pillinger, Chapter 3, this volume) is that a great number of legal foreign workers become illegal as a result of either negligence on the part of the employer or his premeditated inaction, or simply because they lack knowledge of the legal regulations. Another clearly identified issue is that the construction of work permits in a way which makes it impossible for a migrant to move between jobs without applying for a separate job-related work permit often results in the migrant being pushed into the irregular sphere.

It is somewhat surprising that reducing the cost of regular labour in order to make irregular employment less attractive economically for both employees and employers has not been mentioned as a policy issue. Does it make a difference? The German study (Junkert and Kreienbrink, Chapter 1, this volume) noted, after the IAW (2007), that the reduction in the unemployment insurance contribution led to a decrease in the irregular economy of between 2.3 and 4 billion euros, while making the cost of household services a deductible item reduced the shadow economy by between 1.5 and 3 billion euros (Junkert and Kreienbrink, Chapter 1, this volume, following IAW, 2007). These data refer to all employees, rather than exclusively to migrant employees; however, they demonstrate a very significant feature of the economics of employment; charging low skilled, low paid jobs with all the costs of the modern welfare state makes them too

costly to sustain on the regular labour market and, as Kicinger and Nowak note (Kicinger and Kloc-Nowak, Chapter 4, this volume, p. 222) “All in all, the preventive efforts have not overcome the economic incentives to illegal work”.

7.5 Conclusions and recommendations

Let us start with a recapitulation of the main factors favouring the irregular employment of migrants. The ARGO 2006 research has revealed that there are five: 1) a limited and poorly adjusted mechanism of admitting migrants to national labour markets; 2) complex, costly, and lengthy procedures for obtaining visas and work permits; 3) a legal system which, without due concern, shifts legal migrant workers into illegality; 4) a lack of mechanisms allowing for transition from the status of irregular to that of regular employee and 5) the high costs of legal employment which, for secondary market, low skilled jobs, may make legal employment unviable from the economic point of view.

Tackling the regulations governing the obtaining and the cost of visas, residence permits and work permits

In all likelihood, policy recommendations for the first two of the points listed above should be made together. Many migration researchers believe that the predominant effect of policing and the monetary and non-monetary costs of legal migration is to shift migrants between the legal and illegal streams, rather than to reduce migration². If this holds true, the key question is that of what measures facilitating legal migration are acceptable for a state. There will be slightly different measures for those migrants who aim at the primary labour market, in the understanding of Piore’s (1979) dual labour market theory, and those aiming at the secondary labour market. It makes sense to make the access for both groups of migrants as easy as labour market conditions will allow; for example, by legislating for a visa, residence permit and work permit to be issued in one administrative procedure. It would also be desirable not to link a work permit to one specific job, but to a class of jobs, which may be taken within a certain period, and, possibly, with some geographical restrictions. This proposed relaxation of administrative procedures leads to the question of decoupling the process of applying for a work permit application from the employer’s obligations. Migrants should be allowed to apply for a work permit in certain occupations or certain regions, and to look for a job upon receiving it. New World point systems operate by taking into account the employability of prospective migrants, with their professions and skills being amongst the determining factors. One important consequence of such a measure would be the increased choice and mobility open to regular migrant workers. Such an empowerment of immigrants would, perhaps, not be so popular in the eyes of the employers, who would lose at least a part of the influence that they have enjoyed over undocumented workers.

For low-skilled, low-paid workers it is essential to offer channels for legal migration by means of bilateral or multilateral agreements between governments. Such a system would

2 However, very low costs of migration, both in terms of ease of access to the host country’s territory and labour market, and in monetary terms, may result in a significant increase in migration.

operate on the basis of a simplified administrative procedure, such as, for example, an initial invitation issued in the destination country by the employer or employment office and/or the subsequent notification of the police or employment office in the destination country upon accepting the job. The effect of this would be to allow migrants to take seasonal or short-term employment without the need for a work permit. There should be also a mechanism for the renewal of work permits with a minimum of administrative efforts. These measures should serve to increase the regular employment of migrants at the expense of the irregular, should reduce the chances of falling involuntarily into an irregular situation and should have a humanitarian impact through reducing the situations whereby some irregular migrants are deprived of access to the justice system.

Not only should the administrative and legal aspects of the issue of visas and work permits be reformed, but the cost of their issue should also be examined. As Salt (2001) noted, migration is a kind of business, not only for companies but also for governments. However, governments should keep the costs of the various permits moderate; the shorter the period of migration and the less secure the work assignment, the lower the cost of the permits. This should be low enough not to deter people from applying for them.

Preventing the shift of legal migrant workers into illegality and opening channels allowing for the transition from irregular to regular status

Points three and four are mutually related and pertain to the shift between regular and irregular migration and employment status. It is important to design legislation concerning residence and work permits in such a way as to reduce the number of migrants who lose their regular status due to negligence, or to a lack of knowledge on the part of either their employers or themselves. The measures may include the possibility of applying for a visa with the right to work; the opportunity for holders of visas without the right to work to apply for a work permit; and the retroactive issuing of work permits in cases where the application for renewal was not lodged on time.

One-off regularizations of irregular migrants constitute a highly debatable issue. From the legalistic point of view, which is especially common in Northern Europe, such a solution is unacceptable, as people violating regulations should not be rewarded for this violation. Even if we set the moral considerations aside, the mechanism which allows for periodic regularizations of irregular migrants may result in the attraction of new irregular migrants in the future. For these reasons, mass one-off regularizations, which attract intense media attention, should be avoided. However, for economic, humanitarian and security reasons, the reduction of the number of irregular migrants should be high on governments' agendas. Therefore, there should be a mechanism allowing for some form of regularization for those migrants who have found their permanent place on the receiving country's labour market.

Reducing the high costs of legal employment for certain categories of migrant workers

In order to reduce the irregular employment of migrants, policymakers should design a system for the legal employment of immigrants that reflects the economic advantages of illegal employment. Existing guest worker programmes, as well as those for circular and short-term labour migration, usually failed to account for the economic incentives that drive irregular immigration. There are two aspects of employment costs: one relates to flexibility and mobility and the other relates to the direct pecuniary costs, such as contributions to various insurance and security schemes.

Job mobility and flexibility constitute an economic category for both migrants and employers (Hanson, 2007). From the employer's perspective, they influence the pecuniary cost of employment; the inability to shift a worker legally from one job to another either indirectly increases the cost of the employee, or forces him to undertake irregular employment in jobs which are not covered by his work permit. For the migrant worker, they determine that part of his income which is related to the ease of changing jobs. This is particularly important for migrants in seasonal and short-term employment whose strategy is to maximize income and minimize the time spent in employment, in order to maximize the pecuniary gain per unit of time. It therefore makes sense to reduce barriers to mobility between jobs, as they may have a profound influence on both the migrant worker's and the employer's decision as to whether the employment will be legal or illegal.

The legal employment of a migrant is highly dependent on the state-managed system of controlling access to the labour market. Work permits are issued for specific posts and many countries allow neither the type of a job nor the employer to be changed unless a separate work permit application is lodged. Some countries also require that an applicant is resident outside the country of application at the time of applying. In contrast, an irregular migrant may easily shift employment as they are in contravention of the regulations anyway. Therefore, the restrictions placed on regular migrants should certainly be changed and, wherever possible, specific job-linked employment permits should be replaced with general permits specifying the broad category of jobs a migrant may take and the timeframe within which he may work in the receiving country.

As argued above, one of the reasons underlying irregular employment in general and the irregular employment of migrants in particular, is the high cost of legal employment. Legal migrant workers employed on short-term assignments are, in most cases, subject to the same compulsory contributions to a variety of health and accident insurance, social security, and other similar funds, as people in stable, long-term employment. However, short-term migrant workers are unlikely to ever become users of most of the funds or insurance policies to which they should contribute, as they will be in the receiving country for too short a period to qualify as such. Therefore it makes sense to create a special streamlined package of insurance, covering health and accident insurance as a minimum, for short-term migrant workers. Both employer and employee would contribute only to selected insurance schemes and would thus gain limited protection. Such a package would be considerably cheaper than the full set of contributions, reducing the incentives for both employers and employees to turn to illegality. Similar packages, featuring, for example, the suspension of retirement benefit contributions for a given period of time, are offered in some countries, usually to graduates entering the labour market for the first time.

Is such a deal fair to migrants? It depends on the length of stay and legal status. Short-term migrants, from which category a great many irregular migrant workers originate, will, in most cases, only be likely to benefit from health insurance and accident insurance during their stay in the receiving country. They are unlikely to become users of the pension system, or of unemployment benefit and other benefits which are conditional on the length of time over which the contributions were paid. So they will not be harmed by the proposed solution, which would also reduce the transfer of social security benefits from migrants to natives. However, such a deal should be offered for only a very limited period during a year and to short-term migrants only, otherwise it may create a two-strata society, with some migrants being deprived of social protection.

Is the deal fair on local employees? Reducing the costs of employment of migrants should not have a significant effect globally, but may be very significant locally. The key factor of the effect of the proposed solution is whether the employment of migrants is competing with, or complementary to, the employment of nationals. If it is complementary, it will not harm local people. If, however, the employment of local and migrant workers is competitive, the reduced cost of employment of foreigners should not be offered, as it could introduce unfair competition with local workers.

To summarize, the reduction of the costs of employment of foreign workers on the basis of reduced social security costs can be offered on labour markets where migrant labour is complementary to, rather than competing with, local labour and should only be offered for short-term migrants. However, there should be a transition path to full payment of social security contributions and, in consequence, to full benefits.

If we want to reduce the irregular employment of foreigners we need to first think about the main reasons for the existence of such a phenomenon. Illegal employment exists because it offers a much cheaper option for employers to hire immigrants who are either without valid residence and/or work permits, which have not been obtained because they are not available to unskilled immigrants, or whose documents have expired. Such vulnerability offers the employers the opportunity to take advantage of the cheap option; an option which is cheaper not only in the predominant pecuniary terms, but also in terms of the effort and time needed to obtain the appropriate authorizations. It is also an option which proves cheaper in that it allows the pecuniary consequences inherent in the lack of flexibility imposed by permits to be avoided. Reforming the control system, in order to shift migrant workers from irregular to regular status is a major challenge for the European Union and each of its member states. Clearly, there is a need for more flexibility in the administrative systems for the admission and for the issue of residence and work permits; for the opening of paths allowing for the transition from irregular to regular status; and for a reduction in the cost of employment of regular migrant workers. These are all measures which would help to meet the employers' demand for migrant workers.

Another unresolved problem is that of the mismatch between the demand and supply of labour. The states are under contrasting pressures, sometimes originating from the same social groups. When employers demand more low-cost, unskilled labour and, at the same time, lobby for increased policing of the labour market, it is difficult for the states to mitigate these differences. The challenge for migration policies is to decide the extent

to which the labour market should be opened to migrant workers, in order to make the best use of available labour without harming either labour markets or security. It is clear that most of the policy problems need to be resolved on a subregional level, as this is the level on which labour markets operate. A solution excellent for one subregion may be harmful in another. This only adds to the complexity and difficulty of making policy decisions at a national level.

Finally, the changes themselves need to be introduced with care, in order not to disadvantage any of the actors on the labour market, and to allow the states to maintain control over migration and employment markets. The problem of the integration of migrants is not a subject of this study; it should, however, be a part of the solution adopted by the policy makers responsible for migration and labour market policies.

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