

October 2009

**Comparative Policy Brief -
Pathways and Policies**

CLANDESTINO PROJECT OVERVIEW

*The project
aims*

The CLANDESTINO research project was designed to support policy makers in developing and implementing appropriate policies regarding undocumented migration. **The project aims** were to (a) provide an inventory of data and estimates on undocumented migration (stocks and flows) in selected EU countries, (b) analyse these data comparatively, (c) discuss the ethical and methodological issues involved in the collection of data, the elaboration of estimates and their use, (d) propose a new method for evaluating and classifying data/ estimates on undocumented migration in the EU.

*The countries
studied*

The project covered twelve EU countries (Greece, Italy, France and Spain in southern Europe; Netherlands, UK, Germany and Austria in Western and Central Europe; Poland, Hungary, Slovakia and the Czech Republic in Central Eastern Europe) **and three non EU transit migration countries** (Turkey, Ukraine and Morocco) have been under study in this project.

*Methods, Data
and Period of
Reference*

Country reports. Individual country reports review all relevant data sources on irregular migration, assess the validity of the different estimates given and where appropriate produce a new estimate for the country studied. The country reports cover the period between 2000 and 2007. This quantitative analysis is complemented by a critical review of qualitative studies and by interviews with key informants with a view to exploring the pathways into and out of undocumented status in each country. It is noted that the non-registered nature of irregular migration makes any quantification difficult and always produces estimates rather than hard data.

*Classification
of data & esti-
mates*

The main output of the project is a **database** (<http://irregular-migration.hwwi.net/>) which presents and classifies (as low, medium or high quality) estimates and data on irregular migration in the European Union and in selected member states. The presentation is innovative in its consistent structuring and its carefully developed quality classification, which indicates whether estimates are more or less trustworthy. Quantitative information is accompanied by substantial background materials, both on issues of general concern and on the situation in individual countries. In addition, the database provides aggregate EU level estimates for the years 2002, 2005 and 2008.

Terminology

The terms irregular (with no regular/legal status), undocumented (without the appropriate papers) and unauthorized (without legal permission for entry, stay or work) migration denote different facets of the wider phenomenon of irregular migration. These terms are accepted and used by the Clandestino consortium as synonyms. The term illegal is accepted by the consortium when referring to a condition (e.g. illegal work or illegal entry) but not in relation to a person (illegal migrant).

Definitions

For this project, **irregular or undocumented residents** are defined as residents without any legal resident status in the country they are residing in, and those whose presence in the territory – if detected – may be subject to termination through an order to leave and/or an expulsion order because of their status. **Irregular entrants** are persons who cross an international border without the required valid documents, either un-inspected over land or sea, or over ports of entry. For more information see: <http://clandestino.eliamep.gr/category/irregular-migration-ethics-in-research/>

*Trafficking &
Asylum Seeking*

The CLANDESTINO project is not concerned with Trafficking in Human Beings because it considers this as a separate even if related phenomenon. But in some countries it touches upon asylum seeking and asylum processing issues as they are related to irregular migration issues.



PATHWAYS INTO IRREGULARITY: The Social Construction of Irregular Migration

Key Findings on Pathways into Irregularity

There is no single explanation for irregular migration. Instead, it results from a complex interplay of individual migrants, economic forces and employers, and politics and law. Notably, there is a lack of legal migration channels as well as failure in making existing ones work.

Despite the political intention of managing migration and preventing and reducing irregular migration various legislations contribute to the emergence of irregular migration. This can be attributed to unintended-side-effects, policy gaps such as lack of implementation and enforcement, and unrealistic policy goals.

There is no commonly agreed definition of irregular migration in the legislation of the European Union's member states. Instead definitions are diverse and based on different legal cultures.

Irregular migration is avoidable and there is scope for accordingly reforming national laws.

Main Pathways into Irregularity:

- Legal entry and overstaying or legal entry and stay whilst working or engaging in self-employment in breach of immigration regulations are the main paths into irregularity (most relevant pathway).
- Another path is related to refused asylum seekers who do not return, are not removed and/or who are de facto non-removable because of lack of documents, unclear identity, unsafe country of origin, family links or health, age and gender related constraints, (second most relevant pathway).
- Frequently reported is bureaucratic failure in processing residence and work permit applications, inefficient renewal and appeal procedures resulting in withdrawal or loss of status (third most relevant pathway).
- Clandestine entry - often of individuals who subsequently apply for asylum - is high on the agenda though comparably low in numbers and rather the exception than the norm (least relevant pathway).

Main Mechanisms Contributing to Irregular migration:

- Lack of legal migration channels (Spain, Italy, Greece, Czech Republic, Poland),
- Overcomplicated, bureaucratic, time-consuming and inefficient procedures in applying for immigration, employment or prolonging permits (Greece, Spain),
- Constantly changing and difficult to follow regulations (France, UK) and/or complex legislations (Austria),
- Strict conditions placed on work permits (UK, Czech Republic) and/or residence permits requesting a myriad of conditions that are prone to be overstepped (Germany),
- Inefficient procedures and hostile organisational cultures frustrate migrants and employers (Spain, Greece).
- Informal economies (both prevalent and less extensive ones) provide ample employment opportunities for migrants who remain irregular (all countries). and/or prevent migrants from finding regular jobs and thus maintain or regularise their status (Greece, Spain, Germany).

Background

The rise of the concept of 'illegal migration' in Europe dates back to the 1920s, 1930s, and 1940s and referred to Jewish migration to Palestine. It was then occasionally applied during the 1970s referring to spontaneous labour migration, was more widely used from the late 1980s and became popular from the 1990s onwards denoting irregular migrants and refugees. In Central and Eastern Europe, the history of the concept of 'illegal migration' and its political meaning differs completely from the western and southern countries in so far it referred to unlawful and often politically motivated exit and flight from the communist countries.

Only when states issued legislations that declared unwanted immigration illegal and made it punishable *and* introduced technologies, administrations and enforcement procedures migration finally became irregular. Thus, irregular migration is not an independent social phenomenon but exists in dependence from state policies and is socially, politically and legally constructed.

Immigration restrictions to some extent succeed in limiting regular immigration, access to regular employment, public services and regular housing. Undoubtedly, an unknown proportion of would-be migrants are prevented from coming. But continuous inflow of irregular immigrants as well as overstaying of those who are already in the country suggest that such policies to some extent fail in preventing or reducing irregular migration. Instead, the (unintended) effects of limiting immigration and restricting employment are that migration is driven into informal, shadow and niche activities.

Explanations and Causes for Irregular Migration

There are three major forces in irregular migration, human agency, economic forces, and politics. Individuals wish to migrate but if this is prohibited some nevertheless migrate and violate the law. Employers require workers and if these are not legally available some turn to irregular supply. States negotiate between these interests, public opinion and cultural and political considerations. Frequently, an asymmetry is created between demand and supply of labour. But when labour or services are not regularly available, or when demand exceeds regular supply irregular supply, hence irregular migrant labour becomes the likely response.

Furthermore, countries display different levels of tolerance towards regular or irregular migration and irregular employment. Some are tolerant to regular but not to irregular migration, others tolerate both, some accept little regular but are tolerant to irregular migration. Often, countries that are tolerant to irregular migration are also tolerant to irregular economic and other activities. Thus, different legal cultures in the interpretation and enforcement of the law contribute to different responses to irregular migration.

Lack of Legal Migration Channels

In all EU countries immigration is managed with more or less success, legal migration channels are limited, and often cumbersome procedures or inefficient bureaucracies obstruct implementation. Germany and Austria restrict migration from non-EU and EU countries, France and the Netherlands too discourage labour migration, all with the exception of highly skilled migrants. Poland, Czech Republic and Slovakia have strict immigration laws and offer few legal migration channels. Quota systems in Greece (metaklisi) and Spain offer very little opportunities, whilst in Italy where applications could be filed in-country, it was a disguised regularisation. Despite certain quotas and programmes the majority of immigrants remain excluded from legal entry channels. With respect to asylum seekers Greece, Spain, Italy and Slovakia have long procedures and comparably low recognition rates, thus even genuine refugees often remain irregular.

Irregular economies and lack of regular employment for immigrants

All EU countries display some level of shadow economies. These are (a) a reflex to inflexible labour market regimes (Germany, Greece, Spain, Italy), (b) a response to remaining cumbersome bureaucracies in post-socialist economies (Poland, Slovakia, Czech Republic, Hungary), (c) related to lax enforcement in certain economic sectors (UK, Netherlands) and (d) combined with legal cultures that are tolerant to deviations from the rule of law. On the one hand, these shadow economy niches provide ample employment opportunities for irregular immigrants and enable them to economically survive. On the other hand, the prevalence of informal arrangements prevents migrants from finding regular jobs; this undermines their chances to comply with immigration requirement and thus results in refusal or loss of immigration status.

Policy gaps and Unintended Side-Effects

Legal entry - from visa and visa-free countries - and overstaying or legal entry and stay whilst working or engaging in self-employment in breach of immigration regulations are the main paths into irregularity. Another important path is related to the asylum system, notably refused asylum seekers who do not return, are not removed and/or who are de facto non-removable. Equally frequently reported are over-bureaucratic and deterring residence and work permit applications, inefficient renewal and appeal procedures or withdrawal or loss of status for various reasons which result in irregular stay. Clandestine entry - often of individuals who subsequently apply for asylum - instead is the least frequent path and rather the exception than the norm. These patterns shall now be analysed in greater detail.

Employment restrictions, limited opportunities in switching immigration status, strict conditions on family reunification, loss of employment or social emergencies are all regularly reported to result in irregular migration. Lengthy, bureaucratic and cumbersome application procedures reinforced by understaffed authorities deter or frustrate migrants and employers from applying for certain permits or renewing or prolonging existing permits and eventually compel them to turn to irregular practices or accidentally result in irregularity. Finally, repeated immigration policy reforms create confusion amongst applicants and lawyers and contribute to irregularities.

Whilst some countries are strict on immigration, rigid on employment and tough on asylum seekers they remain lax on enforcement (e.g. Netherlands) or whilst the policy goal is to combat irregular immigration little efforts are made to enforce these goals (e.g. Czech Republic, UK until 2004). This gives way to a *de facto* toleration and contributes to the emergence of an irregular immigrant population. Indeed they often come from war-torn countries and are de facto refugees entitled to protection under international refugee law. Those immigrants who lack a legal status often cannot be legally deported, for instance because they have family (France, Austria), or because they lack adequate travel documents (Germany and Greece), or because of lack of readmission agreements (Spain), or because of lack of resources to deport irregular immigrants. In some countries (Germany) such migrants are put back onto the system and receive a toleration status (*Duldung*), in the Netherlands or Spain they remain on municipal registrars whilst in France or the UK they remain in limbo.

Divergent Legal Definitions

In the **UK**, immigration in violation of the law is judicially defined as ‘illegal entry’. This covers different behaviours, such as entering, staying or working in breach of the immigration regulations. Hence, ‘illegal entry’ is an umbrella term and grossly misleading. **Germany** holds the principle that ‘entry is not normally but only exceptionally permitted’, thus entry is irregular as long as no explicit permission is granted. Irregular migration is defined as ‘unlawful entry’ and individuals as foreigners not ‘possessing a necessary residence title and a right of residence’ and ‘required to leave the Federal territory’. In the **Netherlands**, irregular migration is legally defined as ‘the presence of foreign nationals who are not in possession of a valid residence permit and are therefore obliged to leave the country’. A new concept, ‘unlawful stay’, also includes legally present ‘tolerated immigrants’. **French** legislation refers to ‘irregular immigration’, ‘irregular entry and work’ and ‘foreigners in an irregular situation’. Irregular migration is defined as ‘penetrating or working without conforming’ with the law and ‘stay on the territory of France for a duration not authorized by a visa’. In **Austria**, irregular migration is defined as ‘illegal residence’ which includes entry and stay. Regulations of EU accession country migration introduced the categories of (semi-) legal migration, persons staying legally but working without permit, and/or not conforming to employment regulations. In **Italy**, just like France, irregular migration is defined as ‘foreigners in an irregular position’. **Spanish** primary legislation lacks a clear-cut term or definition; instead it is defined implicitly through how things ought to be. Secondary legislation refers to ‘irregular immigration’ and foreigners in an ‘irregular situation’ and the penal code to ‘clandestine migration’ and ‘foreigners not legally staying in Spain’. In **Greek** law the term ‘paranomos’ is used which literally means beside or outside the law. **Czech** primary migration legislation lacks definition of irregular migration and irregular immigrant employment, instead the category of ‘illegal work’ embraces indigenous and immigrant workers working informally and immigrant workers working in breach or without a permit. Thus, the point of reference is work status and not immigration status. Equally, the law on ‘irregular business activities’ does not make a difference between indigenous and foreign perpetrators. **Slovak** law refers to ‘undesirable migration’ and ‘unauthorised stays of foreigners, their illegal enterprise and employment’. In **Poland**, the law refers to ‘illegal crossing of the border’ and defines irregularity as ‘residing on the territory without the required visa, the residence permit, the permit to settle or the long-term EC resident permit’, as ‘carrying out work contrary to the law or failing to ‘possess the financial means necessary to cover the costs of residence’. Individuals are categorised as aliens who are subject to expulsion or an obligation to leave the territory.

Sometimes, immigration statuses are not clear-cut and migrants are neither regular nor irregular. Instead, migrants’ statuses are often a mix of regular and irregular aspects. For instance, migrants have residence status but work in the absence of permission to work or they

fall somewhere on a scale between regularity and irregularity, e.g. by working on another job or longer hours than permitted. Often, the threshold between regularity and irregularity, for instance the number of hours worked, is unclear or a matter of (legal) dispute. This legal ambivalence is interpreted as semi-legality, legal illegality, formal informality or semi-compliance.

Table 1

Country	Term/Definition	Law
UK	Illegal entry	1971 Immigration act
Germany	unlawful entry, foreigners no longer possessing a necessary residence title and a right of residence [and] required to leave the Federal territory	Ausländergesetz (Foreigners law)
Netherlands	the presence in the Netherlands of foreign nationals who are not in possession of a valid residence permit and are therefore obliged to leave the country unlawful stay illegals	Aliens Act, 2000 Linking Act (Benefit Entitlement and Residency Status Act) Illegalennota (Ministry of Justice, Policy document on Illegal Aliens, 2004)
Austria	illegal residence	Fremdenpolizeigesetz (Aliens police act)
France	irregular immigration, irregular entry and work, foreigners in an irregular situation, penetrating or working without conforming [to the law and who] stay on the territory of France for a duration not authorized by a visa	Loi no 2007-1631 du 20 novembre 2007 relative à la maîtrise de l'immigration, à l'intégration et à l'asile Code de l'entrée et du séjour des étrangers et du droit d'asile, 2005 Circulaire: Mesures à prendre à l'endroit des ressortissants étrangers dont le séjour en France est irrégulier et dont au moins un enfant est scolarisé depuis septembre 2005. Code de l'entrée et du séjour des étrangers et du droit d'asile, 2005
Spain	No term in main legislation irregular immigration irregular situation Clandestine migration foreigner not legally staying in Spain	Ley organic 8/2000 Reglamento de la ley organica 4/2000, de 11 de Enero, sobre derechos y libertades de los extranjeros en Espana y su integracion social (Rules of Implementation of the Law on Foreigners) Penal code
Italy	foreigners in an irregular position	Bossi-Fini Law no. 189/2002
Greece	Paranomos, literally paralegal or parallel	L.1975/1991, L.2910/2001
Poland	Nelegalni (non-legal), illegal crossing of the border, residing on the territory without the required visa/permit etc	(Act on Aliens)
Slovakia	undesirable migration, unauthorised stays of foreigners, their illegal enterprise and employment	Principles of migration policy, Resolution no. 846/1993, also see Act No. 48/2002 on the Stay of foreigners Conception of the Migration Policy of the Slovak Republic (Resolution No. 11/2005)
Czech Republic	Absent unauthorized stay not allowed border crossing	Act on the Residence of Aliens in the Territory of the Czech Republic (Act No. 326/1999 Coll) Penal Code (Act No. 140/1961 Coll)
Hungary	crossing frontiers illegally, third-country national (tcn) who no longer has the right to reside, tcn who fails to comply with the requirements set out in this Act for the right of residence tcn who engaged in any gainful employment in the absence of the prescribed work	Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals

Table 2

Category I Tolerant to regular migration Tolerant to irregular migration Tolerant to irregular work	Category II Tolerant to regular migration Intolerant to irregular migration Tolerant to irregular work	Category III Tolerant to regular migration Intolerant to irregular migration Intolerant to irregular work
Category IV Intolerant to regular migration Tolerant to irregular migration Tolerant to irregular work	Category V Intolerant to regular migration Intolerant to irregular migration Tolerant to irregular work	Category VI Intolerant to regular migration Intolerant to irregular migration Intolerant to irregular work

Table 3

Category I	Category II	Category III	Category IV	Category V	Category VI
Italy Spain	UK (until 2004) NL	Germany UK (since 2004) Austria	Poland Czech Republic Slovakia Greece	n/a	Norway Denmark Sweden

**Different
Legal
Cultures**

There are three categories of immigration countries, (a) those with some legal migration channels (usually the Northern countries), (b) those with few legal migration channels who instead offer *a posteriori* regularisation (Southern countries, to some extent also the Netherlands and Belgium) and (c) those who neither offer significant legal migration channels nor regularisation opportunities (Eastern EU countries, Austria). Scandinavian countries represent a separate sub-category as basically the only legal migration channel for non-EU nationals is asylum, notably resettlement programmes.

There is no commonly agreed terminology or definition of irregular. Instead each state has its own legislation, point of reference and definition. One category of countries (UK, Poland) applies a criminalising term, another set of countries uses less biased definitions (France, Spain, Italy, Greece) and a third category prefers descriptive terms (Germany, Hungary). Definitions are usually based on a mix of references to irregular borders crossing, entry and stay; lack of residence and/or work permits; obligation to leave the territory or violation of expulsion orders. Sometimes, there is no clear definition of irregular migration, instead it is the result of what is defined as regular (Spain). In other cases definitions are blurred and either conflate entry with stay (e.g. UK, Austria) or regular with irregular immigrants (Germany, Netherlands). Often, no clear distinction is made between informal employment and irregular immigration and the concepts are conflated. Sometimes, even across various laws of one and the same country terminology and definitions are incoherent (Spain). Finally, incoherencies are found between law and policy documents; whilst law documents rarely refer to ‘illegal migration/foreigners’ it is nevertheless often applied in policy documents (Germany, Netherlands, Hungary, Czech Republic).

**Suggestions to
Prevent
and
Reduce
Irregular
Migration**

- (A) Prevent irregularisation through
 - (a) Introducing more legal migration channels, including legal access for family members and asylum seekers;
 - (b) Keeping immigration regulations flexible and allowing for some discretion in legal/administrative decisions;
 - (c) Allocating adequate resources to and monitor immigration/permit issuing/appeal authorities;
 - (d) Addressing the phenomenon of informal economy i) by eliminating unduly legal, bureaucratic and fiscal regulations, ii) increasing incentives for regular employment, iii) eliminating barriers for foreign workers, iv) monitoring and enforcing the rules.
- (B) Reverse irregularisation, for example, by granting legal status to those who are not or cannot be removed;

(C) Improve enforcement measures;

(D) Avoid

(a) Inactivity and long-term de facto toleration and

(b) Ideological battles and instead seek pragmatic solutions.

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All Project Reports and Policy Briefs as well as the Database are available through the project's web site <http://clandestino.eliamep.gr>

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For more information on the Social Sciences and Humanities Research Programme of the European Commission please see: http://ec.europa.eu/research/social-sciences/index_en.html

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