

COUNTRY REPORT  
**AUSTRIA**



# Undocumented Migration

Counting the Uncountable. Data and Trends across Europe

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**CLANDESTINO**

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### **Undocumented Migration: Counting the Uncountable Data and Trends across Europe**

This interdisciplinary project is a response to the need for supporting policy makers in designing and implementing appropriate policies regarding undocumented migration. The project aims (a) to provide an inventory of data and estimates on undocumented migration (stocks and flows) in selected EU countries, (b) to analyse these data comparatively, (c) to discuss the ethical and methodological issues involved in the collection of data, the elaboration of estimates and their use, (d) to propose a new method for evaluating and classifying data/estimates on undocumented migration in the EU. Twelve selected 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) are under study in this project. Three non EU transit migration countries used as key ‘stepping stones’ by undocumented migrants en route to the EU, notably Turkey, Ukraine and one Maghreb country, are also analysed. Where relevant, the project considers the factors affecting the shift between legal and undocumented status among migrant populations. The project work programme is complemented by two regional workshops with policy makers and academics, 12 field visits each resulting in a series of meetings with key policy actors, NGOs and journalists working on migration in each of the EU countries studied. The CLANDESTINO database on irregular migration in Europe, the Project reports and Policy Briefs are available at: <http://clandestino.eliamep.gr>

Each country report reviews all relevant data sources on irregular migration (e.g. apprehended aliens at the border or in the inland, expulsion orders, people registered through health or other welfare schemes for undocumented immigrants, municipal registers, statistical estimates from national and European statistical services), assesses the validity of the different estimates given and where appropriate produces a new estimate for the year 2008 for the country studied. The country reports cover the period between 2000 and 2007 and the last year for which data or estimates were available when the study was finalised in 2009, notably in some countries 2007 and in other countries 2008. 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.

The Hellenic Foundation for European and Foreign Policy (ELIAMEP) is the coordinating institution of the CLANDESTINO consortium. CLANDESTINO Partners include the International Centre for Migration Policy Development (ICMPD) in Vienna, the Hamburg Institute of Economics (HWWI), the Centre for International Relations (CIR) in Warsaw, the COMPAS research centre at the University of Oxford, and the Platform of International Cooperation on Undocumented Migrants (PICUM) in Brussels.

The **International Centre for Migration Policy Development (ICMPD)**, Vienna, is an inter-governmental organisation with UN Observer status. ICMPD was created in 1993 at the initiative of Switzerland and Austria. Its headquarters are located in Vienna. More than 30 governments actively support ICMPD in various ways. The 11 ICMPD Member States are Austria, Bulgaria, Croatia, Czech Republic, Hungary, Poland, Portugal, Slovakia, Slovenia, Sweden and Switzerland. Bilateral co-operation agreements and Memoranda of Understanding have been concluded with Albania, Bosnia and Herzegovina, Canada, Cyprus, Estonia, Georgia, Latvia, Lebanon, Lithuania, FYR Macedonia, Russia, Sri Lanka, Turkey

and Ukraine. The Centre shares close co-operation with the European Commission, international organisations such as Europol, FRONTEX, the International Organization for Migration, the United Nations High Commissioner for Refugees, the Organization for Security and Co-operation in Europe, the Council of Europe, the United Nations Development Programme, the United Nations Office on Drugs and Crime, Interpol and many others. ICMPD's aim is to promote comprehensive and sustainable migration policies and research and to function as a service exchange mechanism for governments and organisations, including research institutions on mainly European migration issues.

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## Summary

In Austria, irregular migration became an issue of public and policy debates only in the 1990s. In the wake of the break-down of the communist regimes, the disintegration of ex-Yugoslavia and a massive increase of migration and in particular asylum related migration as well as the increasing politicisation of migration, the policy framework governing migration and dating from the „guest worker“ period was completely overhauled in the early 1990s. The reform shifted the emphasis of control from control of access to the labour market – the main mode of migration control until then – to control of entry and residence. It is these changes in the regulation of migration which can be largely credited for producing “illegal migration”, both as a discursive space and as an empirical phenomenon. Irregular (migrant) work has consistently been a second major focus of public debates on irregular migration in a broader sense and for a considerably longer period of time. In contrast to illegal entry and residence which was and continues to be largely associated with asylum and hence with migrants from major asylum sending countries, irregular work has been largely associated with migrants outside the asylum nexus and in terms of country of origins, mostly with migrants from Eastern Europe. In addition, irregular migrant work seems to be linked to various semi-legal forms of entry and residence and non-compliance rather than with illegal entry or residence in a narrow sense.

A recent estimate elaborated in the framework of the Clandestino project indicates that the number of persons with an irregular residence status has decreased significantly in the past years from some estimated 78,000 in 2001 to approximately 36,000 in 2008 (central estimate). Other available indicators, including apprehension statistics, show a similar decline. The recent waves of EU enlargement in 2004 and 2007 as well as the decrease irregular inflows from third countries to Austria, which in turn is partly related to EU enlargement, are the main explanations for this decrease.

The same might not be true in regard to irregular employment. According to expert assessments, the extent of illegal employment, in particular illegal employment linked to illegal residence has significantly dropped during the past decade or so. By contrast and although the evidence is inconclusive, experts suggest that semi-legal, i.e. non-compliant forms of employment might have increased. Any increase, however, reflects above all the effects of enlargement and the participation of citizens of new EU Member States in particular in pseudo-self employment. Other non-compliant forms of employment (undeclared work, underdeclared work, etc.), reflect the general decline of fordist forms of standards employment and the rise of precarious forms of employment, including self-employment, fixed contract labour etc. In the current context, however, the dominant form of irregular migration in Austria thus seems to be of a semi-legal and above all, of a transitional nature.

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# Part I: Understanding irregular migration in Austria

## I. 0. Setting the frame

Generally, illegal migration cannot be discussed outside the context of state regulation of migration. Indeed, it is state regulations that give illegal migration its specific meaning and which creates the category *illegal migrant* as a category of exclusion (See Kratzmann 2007: 131). To rephrase an observation Christian Joppke made in relation to migration in general, only in a world neatly divided into nation-states which define explicit rules on legal (and hence illegal) entry and stay of immigrants, is there “illegal migration” (Joppke 1998: 5; see also Doomernik et. al. 2005: 35-36). In historical perspective, the fact that states define such rules is a relatively recent phenomenon. Thus, “illegality” is not a static given – not only has something like “illegal migration” and “illegal migrants” as objects of a set of distinct state policies emerged only in the latter half of the 19<sup>th</sup> century, in tandem with the birth of modern migration policies, but the understanding of what constituted “illegal migration”, “illegal residence”, “illegal work” or “illegal border crossing” has been subject to great variation, both historically and geographically ever since (see Schrover et al, 2008).

During the past century or so, the meaning of illegality in Austria was subject to several major shifts. Until the passing of the first law on the employment of non-nationals in 1925 (Protection of Native Workers Act [*Inlandarbeiterschutzgesetz*]) which established legal employment as the major boundary between legal and illegal migration, illegality was defined mainly in terms of lack of means and criminality – exclusion criteria that continue to be important until today. In addition, illegality was not something explicitly defined, but rather followed from relevant enforcement action by state authorities (i.e. removal) and thus in a sense only after the fact. While residence permits became more important as control instruments after World War II, the main mechanism of control remained work permits. The adoption of the Employment of Foreign Workers Act in 1975 which ended labour recruitment and increased the barriers to employment, work permits were actually strengthened as a control instrument. It was only in the 1990s, with the shift towards the paradigm of “managed migration” (*geregelt Zuwanderung*), that control of entry and residence became a main feature of migration controls in Austria and hence, illegal residence and stay defining features of illegal migration. The main novelties by the Residence Act 1993 were a systematic categorisation of non-nationals by purpose of stay and the definition of a differentiated set of rights attached to this set of categories and intended as a mechanism of migration control, together with the annual quotas of immigrants for different categories of immigrants introduced by the 1993 Act. The 1997 Act established a distinction between short and long term residence permits, a distinction which was further entrenched by the 2005 reform of aliens legislation. At the same time, residence and employment were constructed as interdependent categories; the lack of the residence permit could lead to the loss of the employment permit and the other way round.

In the Austrian context, the distinction between informal work and formal work, defined by payment of taxes, social security contributions and remuneration at rates not below minimum rates defined by industry wide agreements between employer organisations and trade unions, has traditionally been an additional highly important boundary between “legal” and “illegal”.

Austria's accession to the EU and the Union's eastern enlargements in 2004 and 2007 brought further shifts in the meaning of illegality and led to the creation of new categories of (semi-) legal<sup>1</sup> migration, comprising persons staying legally, but working without work permit, and/or not conforming to formal employment regulations. The shifting meaning of illegality has major implications for estimating the irregular resident population – if the meaning of illegality is subject to historical variations, so is the size of irregular migrant population. We thus argue that in order to understand estimates on irregular migration one first has to analyse the regulatory framework defining the nature of regularity and irregularity in a specific local and temporal context.

As has been argued by Martin Baldwin-Edwards (2008), Saskia Sassen (1988) and others, illegal migration is not only an expression of the political regulation of migration, but also has to be seen in the context of economic restructuring and the emergence and consolidation of segmented labour markets, which, if not exactly creating demands for certain categories of immigrants, create specific opportunities for immigrants in certain, marginal niches of the labour market and thus contribute to the positioning of immigrants at lower echelons of the labour market. Economic dynamics have been an important factor in semi-legal immigration from South-Eastern and Eastern Europe to Austria in the late 1980s and early 1990s. More recently, from about the turn of the millennium, the specific demand for domestic and care workers has led to an increase in the informal and partly illegal employment in these sectors. Equally, if not more important than demand side factors, however, have been supply factors. Indeed, it could be argued that irregular migration to Austria has been largely supply driven in the 1990s and 2000s, in particular as non-European immigrants is concerned. This said, supply side factors seem to be less important for specific sectors such as care, tourism and agriculture, where demand is arguably the main driving force. A third factor are the increasing restrictions for immigration from third countries since the early 1990s, which considerably reduced the legal opportunities for legal migration, not only for work related but also family related and other types of migration (see in more detail below).

Taking all this into account, irregular migration is not a given, but is the result of a complex constellation of factors and is structurally embedded in current economic dynamics and the political regulation of migration. Yet political and public discourses on irregular migration generally problematise the phenomenon of irregularity itself and tend to blind out its structural causes and embeddedness. The first part of this report provides a brief overview of the recent evolution of legal immigration. Secondly, it discusses the regulatory frameworks producing and defining “illegality” in Austria and accounts for the major shifts in the meaning of “illegality” over time. These considerations then serve as a basis to contextualise the estimates on irregular migration evaluated in the second part of this report.

## **I. 1. The regular migration framework**

Post-war migration and policies toward migration in Austria have been largely shaped by so called ‘guest worker’ recruitment. However, in particular after the stop of labour recruitment in 1974, migration developed more permanent features based on self-reproducing mechanisms (family migration, chain migration, and migrant networks). As a result of the ‘new

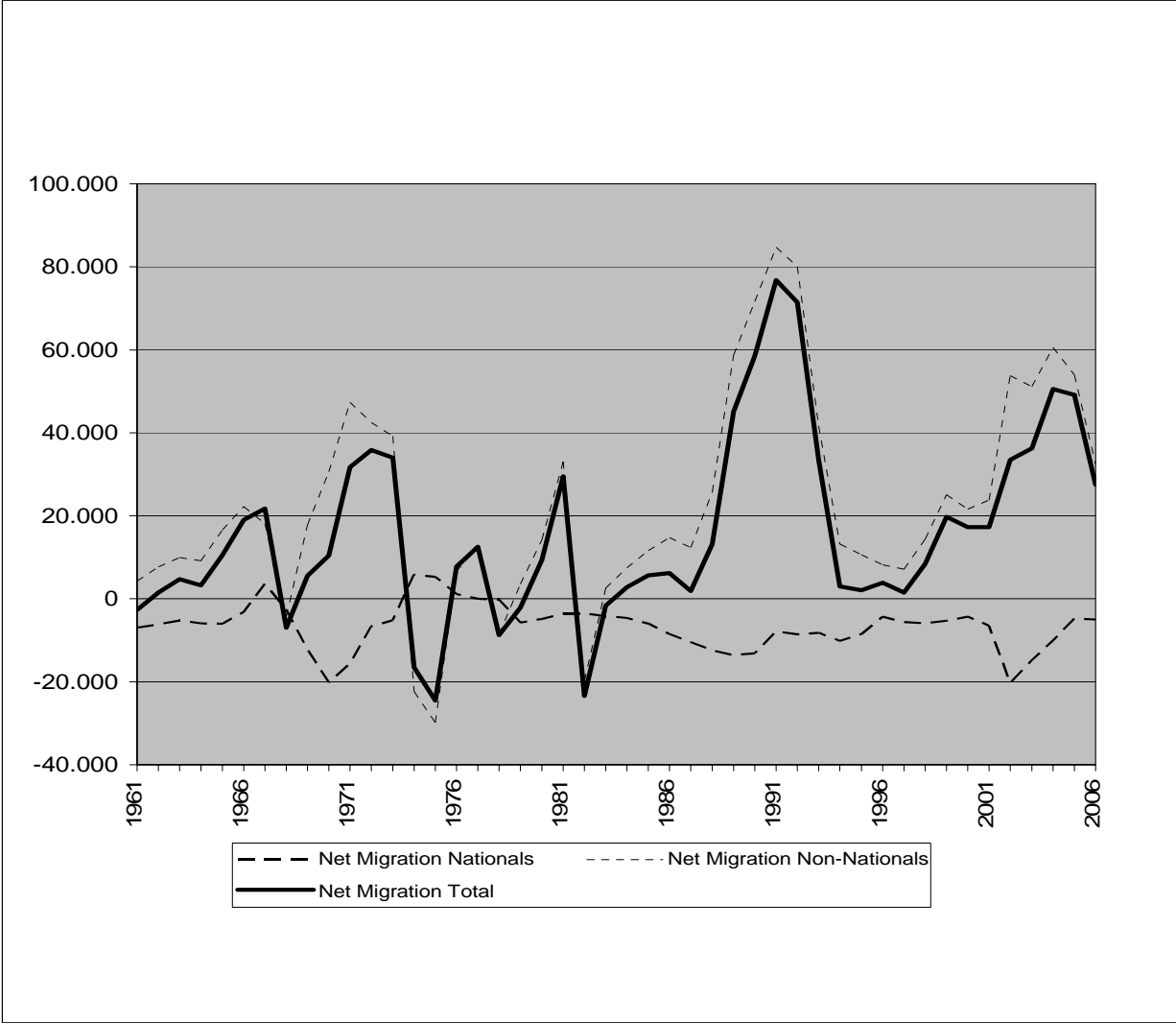
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<sup>1</sup> Recent studies on migrant employment focused on various forms of ‘semi’, ‘quasi’, or ‘pseudo’-legal employment, referring to combinations of legal/illegal residence and legal/illegal, as well as formal/informal employment (see for example Jandl et al. 2008, Anderson/ Ruhs 2006).

immigration' from other European, mostly Eastern Europe, Asia, North and Sub-Saharan Africa, the immigrant population is increasingly diversifying.

In the Cold War period, Austria also was an important country of transit and to a lesser extent, a country of asylum, for refugees from communist ruled Eastern Europe. During the 1980, however, the importance of 'cold war refugees' declined and the share of asylum seekers from other countries of origin, notably third world countries progressively increased. As a result of rising numbers of asylum applications, immigration for work purposes from Eastern Europe after the end of exit controls in 1989 and refugees from the former Yugoslavia after 1991, the population of foreign citizenship almost doubled between 1988 and 1993, from 344,000 to an estimated 690,000 (Kraler, forthcoming).

**Figure I. 1: Net Migration, 1961-2006**



Source: Chart based on data from Statistics Austria. Figures for 1961 to 1995 are estimates based on intercensus population estimates. Figures for 1996 to 2001 are based on aggregate migration statistics derived from municipal population registers. Figures for 2002 to 2006 are calculated on the basis of the Population Register (POPREG).

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after 1991, the population of foreign citizenship almost doubled between 1988 and 1993, from 344,000 to an estimated 690,000.

After 1993, the foreign resident population continued to grow, but at a much lower rate (see figure 1). After 1997, but in particular after 2001, immigration has again dramatically risen, mainly due to a rise of immigration from within the European Union, notably Germany, and after 2004, the EU-10 (Gächter 2006: 2f).

After immigration peaked in 2004, however, there has been a marked decrease of immigration. Total net migration has almost halved from over 50,882 in 2004 to 27,477 in 2006, due mainly to the decrease of net migration of non-nationals from 60,621 in 2004 to 32,480 in 2006, itself a consequence of the 2005 Settlement and Residence Act, which significantly restricted immigration of third country nationals. Throughout the past decade, net migration of nationals has been negative. By contrast, net migration of foreign nationals has been positive throughout the decade, with a total of 892,166 non-nationals immigrating to Austria between 1996 and 2006 and 518,452 emigrating. With the accession of Poland and four of Austria's neighbouring states to the European Union in 2004, net migration of those countries substantially increased compared to previous years. As August Gächter suggests, the rise in immigration from new EU Member States may not necessarily reflect actual inflows but de facto regularisations of hitherto undocumented migrants (Gächter 2006: 6).

**Table I.1: Net immigration by citizenship, 2002-2006**

	EU-14	Percentage of total foreigners	EU-10	Percentage of total foreigners	Third Countries	Percentage of total foreigners	Total foreigners
<b>2002</b>	6,142	11.4%	2,852	5.3%	44,796	83.3%	53,790
<b>2003</b>	8,182	16.0%	3,040	5.9%	39,877	78.0%	51,099
<b>2004</b>	9,534	15.7%	8,842	14.6%	42,245	69.7%	60,621
<b>2005</b>	12,033	22.3%	8,398	15.6%	33,544	62.1%	53,975
<b>2006</b>	11,320	34.9%	6,425	19.8%	14,735	45.4%	32,480

\* Until 2004 EU-10 countries belong to the category "Third Countries", however, for reasons of better comparison the category "EU-10" is also applied to previous years.

Source: Statistics Austria, [www.statistik.at](http://www.statistik.at), 24<sup>th</sup> April 2008

In 2007, the Austrian resident population stood at just below 8.3 million of whom about 826,000 persons (400,000 women) were foreign citizens. A further 1.2 million persons (about half of them women) were born abroad (see table I.2). At the beginning of 2006, about 38 per cent of those persons holding a non-Austrian citizenship were citizens of one of the post-Yugoslav states and 14 per cent held a Turkish citizenship. Among citizens of other EU Member States, German citizens take the largest share with 12.8 per cent, followed by 9.5 per cent with a citizenship of an EU-10 state (accession in 2004), and another 5.5 per cent being citizens from another "old" EU Member State. These figures reflect a decisive shift in the structure of the Austrian immigrant population, at the end of 1994 post-Yugoslav and Turkish citizens together made up 66 per cent of the population with non-Austrian citizenship (Gächter 2006: 1).

Naturalisations have been a major demographic factor in the 1990s and early 2000s – between 1998 and 2007 alone about 295,500 non-nationals were naturalised. However, as a

consequence of the new Citizenship Act introduced in 2005, the naturalisation rate (1.7% in 2007, down from 3.1% in 2006) dropped to its lowest rate since over 15 years.<sup>2</sup> Naturalisations not only increased the share of the foreign born population holding Austrian citizenship, but led to a rise in immigration of family members of Austrian citizens, including family members of citizens of an immigrant background.

**Table I.2: Austrian population according to citizenship and country of birth, 1 January 2007**

	<b>Citizenship</b>	<b>Percentage of total population</b>	<b>Country of birth</b>	<b>Percentage of total population</b>
<b>EU-14</b>	161,803	1.9%	240,217	2.9%
<b>EU-10 (since 1 May 2004)</b>	84,123	1.0%	179,800	2.2%
<b>EU-2 (since 1 Jan. 2007)</b>	29,958	0.4%	60,091	0.7%
<b>Serbia and Montenegro</b>	137,289	1.7%	190,163	2.3%
<b>Germany</b>	113,668	1.4%	173,779	2.1%
<b>Turkey</b>	108,808	1.3%	154,705	1.9%
<b>Bosnia and Herzegovina</b>	86,427	1.0%	132,262	1.6%
<b>Stateless</b>	217	0.0%	92	0.0%
<b>Citizenship unclear</b>	9485	0.1%	9,932	0.1%
<b>Foreigners total</b>	826,013	10.0%	1,236,282	14.9%
<b>Total population</b>	<b>8,298,923</b>	<b>100.0%</b>	<b>8,298,923</b>	<b>100.0%</b>

Source: Statistics Austria, [www.statistik.at](http://www.statistik.at), 24<sup>th</sup> April 2008

In mid-2007, out of the total of about 550,000 third country nationals residing in Austria, about 456,000 held a residence or settlement permit, from which about 320,000 are unlimited (BMI 2008).

#### *Labour market*

In 2007 about 413,000 foreigners were employed in dependent employment, which amounts to a share of foreign labour force of 12 per cent in total dependent employment (excluding self-employed and persons working less than 12 hours per week). The large majority of non-nationals in dependent employment comes from non-EEA states (see FORBA 2007). In general, foreigners, and in particular third country nationals are more affected by unemployment than Austrian nationals for a number of reasons (discrimination, concentration of migrants in low-wage, seasonal and labour-intensive sectors, migrants' levels of qualification, non-recognition of qualifications, etc.). Thus, in 2007 out of a total of 222,248 unemployed, 39,536 (18%) were foreigners (AMS 2007). The higher vulnerability of non-nationals to become unemployed is also reflected in unemployment rates. Thus, between 2004 and 2007 the unemployment rate of foreigners has been on average 5-6 percentage points higher than the total unemployment rate and stood at between 11.6 (2004) and 9.4 (2007), respectively. The difference has actually grown compared to the period 2000 to 2003, when the difference was on average 4 per cent. Unemployment rates of third country nationals again

<sup>2</sup> Statistics Austria, Statistics of Naturalizations, compiled on 13 February 2008

are higher than the average for non-nationals: with unemployment rates ranging between 13.3 per cent (2004) and 11.3 per cent (2007), unemployment rates of third-country nationals are on average 5-6 percentage points higher than that of citizens of other EU Member states.<sup>3</sup>

While labour market access for family members was facilitated in recent years and students have limited access to the labour market, labour market access for asylum seekers was further restricted. After the limited opening of the labour market to long-term resident family members of third country nationals in 2000 and a more far-reaching liberalisation in 2005, the unemployment of Turkish and former Yugoslav citizens increased significantly, as most of the affected persons found employment only temporarily, and thus the total of unemployed persons increased (Gächter 2006: 7f).

**Table I.3: Dependent labour force by citizenship 2002-2006**

	EU-14/ EWR	Percentage of total foreigners	EU-10*	Percentage of total foreigners	Third Countries	Percentage of total foreigners	Total foreigners
<b>2002</b>	39,415	11.8%	38,168	11.4%	256,849	76.8%	334,432
<b>2003</b>	45,024	12.9%	39,790	11.4%	265,547	75.8%	350,361
<b>2004</b>	53,103	14.7%	42,576	11.8%	266,620	73.6%	362,299
<b>2005</b>	61,997	16.6%	46,034	12.3%	266,156	71.1%	374,187
<b>2006</b>	71,000	18.2%	48,000	12.3%	271,200	69.5%	390,200

\* Note: EU-10 refers to EU-8 plus Malta and Cyprus. Until 2004 EU-10 countries belong to the category “Third Countries”, however, for reasons of better comparison the category “EU-10” is also applied to previous years. Source: Statistics Austria, *Arbeitskräfteerhebungen*, [www.statistics.at](http://www.statistics.at), 24th April 2008

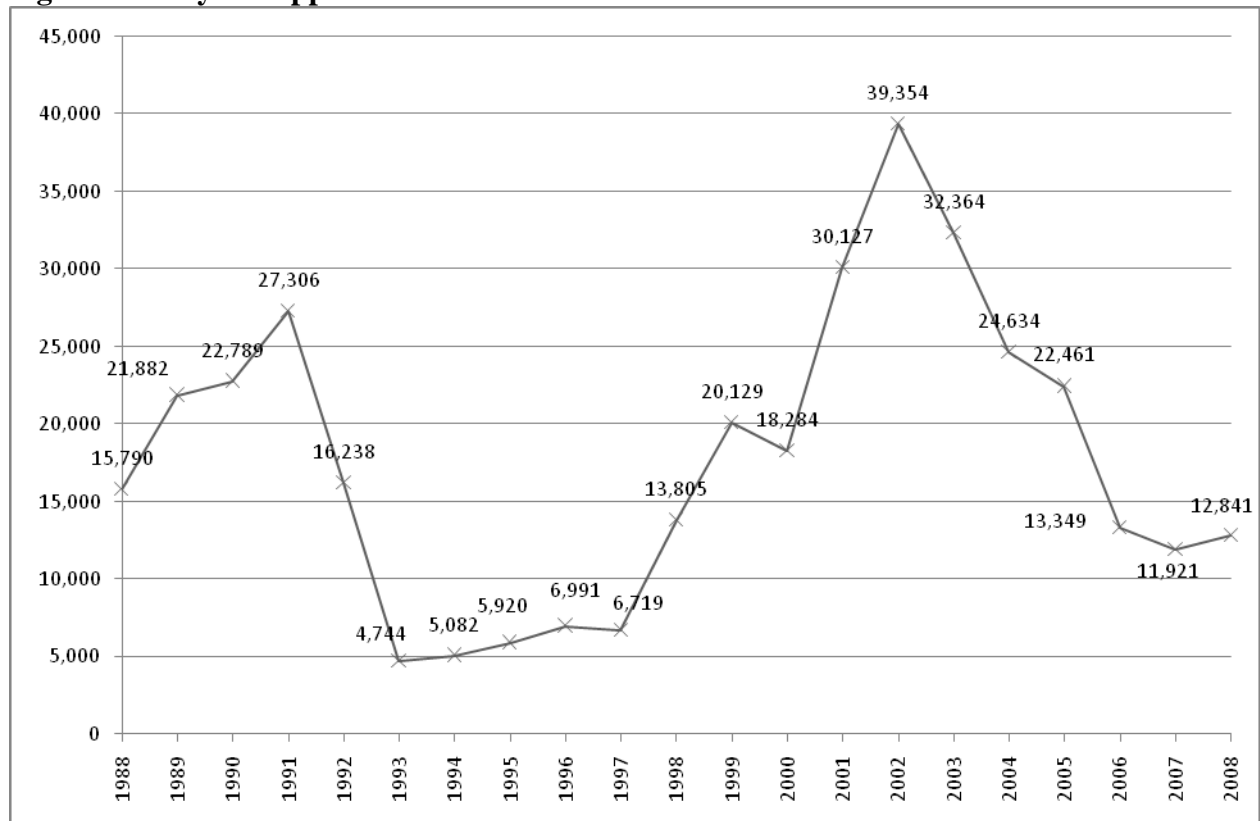
### *Asylum*

After an all-time high in 2003, the number of asylum applications has steadily decreased. Thus, in 2006 a total of 13,349 applications were lodged, a decline by over 40 per cent in comparison to the previous year. The number of male asylum applicants was almost twice that of female. In 2006, 26 per cent of asylum procedures were completed with a positive decision, while 38 per cent of asylum claims were rejected. 36 per cent of all asylum procedures were discontinued (see part II). Most asylum applications were lodged by persons from Serbia and the Russian Federation. Recognition rates were highest for persons coming from the Russian Federation, Afghanistan and Iraq and lowest for persons from India, Moldova, Mongolia and Nigeria. In 2006, about 1,000 persons were granted subsidiary protection (about 7,900 procedures were pending) (BMI 2007).

Like in other EU Member States, applicants are not admitted if coming from a safe third country, if another state is responsible for examining the application according to the Dublin rules, or if the application is found to be manifestly unfounded (see Schumacher/ Peyrl 2006: 192). If an asylum application is rejected, the applicant may be granted subsidiary protection if he/she cannot be expelled or deported to his/ her country of origin or a third country. The status of “subsidiary protection”, however, only implies a temporary permit to stay and is not convertible into an ordinary residence permit. Since 2008, persons under temporary protection have unrestricted access to the labour market.

<sup>3</sup> LFS unemployment rate. Source: Eurostat database under [http://epp.eurostat.ec.europa.eu/portal/page?\\_pageid=1996.45323734&\\_dad=portal&\\_schema=PORTAL&screen=welcomeref&open=/&product=EU\\_MASTER\\_labour\\_market&depth=2](http://epp.eurostat.ec.europa.eu/portal/page?_pageid=1996.45323734&_dad=portal&_schema=PORTAL&screen=welcomeref&open=/&product=EU_MASTER_labour_market&depth=2) (13 October 2008)

**Figure I.2: Asylum applications 1988 - 2008**



Source: Ministry of the Interior

### *The current migration regime*

Currently, entry, residence and employment of Third Country Nationals on Austrian territory is regulated by four main laws, the Asylum Act (*Asylgesetz*), the Aliens Police Act (*Fremdenpolizeigesetz*), the Alien's Employment Act (*Ausländerbeschäftigungsgesetz*), and the Settlement and Residence Act (*Niederlassungs- und Aufenthaltsgesetz - NAG*). The last comprehensive reform of all four laws was made in 2005 and entered into force on 1<sup>st</sup> January 2006. The 2005 reform further reinforced the dichotomy between EEA and non-EEA citizens, as well as between persons entitled to permanent and persons only eligible for temporary residence, itself first introduced in 1997. While EEA citizens are required to register their residence, they do not require a permit to stay in the narrow sense and have full access to the labour market, with the exception of citizens of the EU8, for whom transitional rules apply.

By contrast, legal immigration of third country nationals has been further restricted and is limited to very high- or very low-skilled labour migration, temporary migration of students and, importantly, family reunification. Asylum is another important route of entry. Thus, in 2006, a total of 20,636 first permits were issued to third country nationals (excluding permits issued to children born in Austria), while the number of asylum applications stood at 13,349. Of the 20,636 first permits issued to Third Country Nationals only 20 per cent were subject to quotas, signalling the importance of quota-free channels of immigration such as temporary statuses and family reunification with Austrian and EEA citizens. The 2005 Act reorganised immigration of third country nationals more stringently according to “purpose of residence”, mainly divided into “purpose of gainful employment”, family reunion and “training and education” purposes.<sup>4</sup> With the 2005 reform, the often unclear parallel system of employment

<sup>4</sup> “Aufenthaltszwecke”. In: <http://www.bmi.gv.at/niederlassung/> [25 March 2008]

and residence, characteristic for the 1990s, was completely harmonised: a specific purpose of stay is now tied to a specific category of residence that either entitles to temporary or to permanent residence (see table I.4 for an overview of the current residence regime). While this distinction is not new, status switching between these two principal categories has been significantly restricted in the 2005 amendment (see Schumacher/ Peyrl 2006, FORBA 2007): Persons holding a temporary residence permit thus can no longer consolidate their residence status over time and their actual length of stay is no longer taken into account. Generally, if non-nationals wish to change the purpose of stay, they have to file a new application, which is then considered as a first application.

**Table I.4: Overview of the residence permit regime under the NAG 2005**

	Categories of citizenship	Usual length of validity	Categories of purpose of stay	Consolidation
<b>Residence permit</b> ( <i>Aufenthaltsbewilligung</i> )	TCN	1 year	- Temporary workers - Students - Artists - Journalists	No consolidation
			- Self-employed - TCN dependants	
<b>Settlement permit</b> ( <i>Niederlassungsbewilligung</i> )	TCN	18 months; 5 years; unlimited	- Highly skilled professionals - Private reasons (no employment) - Dependants of TCN	Permanent settlement EC (unlimited)
<b>Residence title dependant</b> ( <i>Aufenthaltsstiel-Familienangehöriger</i> )	TCN		- Dependants of Austrian citizens	Permanent settlement Dependant (10 years)
<b>Documentation of residence</b> ( <i>Anmeldebescheinigung</i> )	EEA, Suisse	Unlimited	- EEA dependants	
<b>Permanent residence card</b> ( <i>Daueraufenthaltskarte</i> )	EEA, Swiss, TCN	Unlimited	- TCN dependants of EEA and Swiss citizens with mobility rights	

Source: Based on Schumacher/ Peyrl 2006

The restrictive “spirit” of the reform is also reflected in the reform of the Citizenship Act naturalisation undertaken almost simultaneously with the reform of aliens legislation. Amongst others, the reform raised the minimum period of residence prior to application from three to six years for privileged categories such as spouses of Austrian citizens, minors and recognized refugees while the standard minimum period for all other categories remained unchanged at 10 years. However, since the 2006 reform, the overall duration of residence (and legal residence at the time of application) no longer is sufficient for applying for citizenship. While proof of registration with the population register as well as a valid residence title at the time of application was sufficient as proof of eligibility for naturalisation in terms of the required waiting periods under the old regulations, applicants now have to prove that they were continuously in the possession of a long term residence permit for at least five out of 10

years.<sup>5</sup> In addition, applicants now have to pass a formal exam on knowledge of Austrian history and culture as well as a language test.<sup>6</sup> Generally, the main objective of the reform was to bring citizenship legislation in line with aliens legislation, indicating that citizenship is now regarded as an integral part of the overall migration regime.

### *Regulations on irregular migration*

Generally, all third country nationals whose stay exceed the period of three months have to be in the possession of a residence permit, or, if the stay does not exceed 6 months a residence visa (visa D) or a residence/working visa (visa C+D). Persons entering or staying on Austrian territory without valid visa or residence permit are considered as unlawfully staying. Unlawful entry or residence may result in a fine (up to EUR 2,000), an expulsion order and consequently, in deportation. In addition, a migrant may lose residence status by overstaying the visa, working without permit, being involved in human trafficking, not fulfilling residence requirements (e.g. minimum monthly income, adequate accommodation), committing severe crimes, or consequent to the rejection of an asylum application. Analytically, **five principle pathways into irregularity** can be distinguished in Austria: (1) irregular entry (irregular border crossing); (2) overstaying after the expiry of a visa or residence permit; (3) loss of status because of non-renewal of permit for not meeting the residence requirements or breaching conditions of residence; (4) absconding during the asylum procedure or failure to return after a negative decision and (5) non-enforceability of a return decision for legal or practical reasons (toleration).

In terms of pathways out of irregularity, regularisation is of relatively minor importance in the Austrian context, despite the recent reform of the provisions for humanitarian stay in April 2009 (see also below). In policy terms much more important are expulsions, residence bans and deportations. In juridical terms it is important to distinguish between expulsion (*Ausweisung*) or residence ban, both defined as summons to leave the country; and deportation, which is the forced *implementation* of an expulsion order or a residence ban (see Schumacher/ Peyrl 2006: 283). Asylum seekers may only be issued a so-called return ban (*Rückkehrverbot*) instead of a residence ban, as they are granted an actual protection of deportation for the time of the asylum procedure. In order to control for the compliance with an expulsion order, the powers of the aliens police to take migrants into custody pending deportation were significantly expanded in 2005, especially in regard to asylum seekers, who can be taken into custody pending deportation already during the asylum procedure. Furthermore, the absolute protection of deportation for persons with non-Austrian citizenship born or grown up in Austria introduced in 1997 was abolished in 2005. Minors born or grown up in Austria may still be removed if they have been served with a sentence for a criminal offence of more than two years.

Although irregular employment can also lead to the loss of residence status, in practice this applies only for third country nationals who do not have long term residence status. Like EU citizens third country nationals who are long term residents can be issued a residence ban only under specific, grave circumstances. However, controls for regularity/ irregularity of

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<sup>5</sup> Although there is little concrete evidence, persons who have been in an irregular situation at some stage of their immigration career were thus theoretically eligible for acquiring citizenship if they met all other conditions for naturalisation at the time of submitting their application. This possibility is now largely excluded.

<sup>6</sup> Integration conditions (mainly language requirements) have already been introduced in the 1998 amendment of the Citizenship Act which was assessed by the official administering the application. In addition to introducing a formal test, the 2006 reform significantly increased the level of language proficiency required from the applicant. See Kraler (forthcoming).

employment relationships were generally tightened up in recent years, as semi-legal (e.g. pseudo self-employment) and non-compliant employment relationships (e.g. registered as part timer, but working full-time) have increased significantly (see Jandl/Hollomey/Stepien 2007).

## **I. 2. Irregular migration discourses and policies**

### **I. 2. 1. The evolution of Austrian immigration control and the discourse on irregular migration**

In Austria, irregular migration only became a major topic at the end of the 1980s when, following the breakdown of the Soviet Union and the Yugoslav crisis at the turn of the decade, an increasing number of persons immigrated to Austria – as refugees, family members and for employment related reasons. The massive rise of immigration triggered a major reform of immigration regulations which significantly restricted the opportunities for legal migration. The most important piece of legislation was the so-called Aliens and Residence Act 1993, which introduced a hierarchically structured residence permit regime and maximum quotas for different categories of immigrants (König 2000: 84). In its main features – restriction of “new” immigration, tightening of conditions of stay, enforcement of immigration control by police authorities – the regulatory framework adopted in the early 1990s is still in place. Its relevance as a mechanism of immigration control, however, has greatly decreased, following Austria’s accession to the European Union in 1995 and the two recent waves of enlargement in 2004 and 2007, respectively. Thus, in 2006, only 20 per cent of all immigrants were subject to immigration control<sup>7</sup> and a mere 4 per cent subject to quotas (Kraler 2008). The increasing restrictiveness and, at the same time, differentiation of immigration regulations not only had an impact on the number of Third Country Nationals entering and staying in the country in an irregular fashion; but also brought along a shift in the meaning of “illegality” itself (Hollomey/Bilger/Gendera 2008).

Until the beginning of the 1990s Austrian immigration policy was mainly concerned with labour market control and not much attention was paid to regularity/ irregularity of migrants’ entry or residence in the country. Overstaying one’s visa or “legalising” one’s stay via employment was a common phenomenon then. Thus, persons immigrating to Austria as asylum seekers or via tourist visa could usually obtain a legal residence permit by taking up employment (König 2000: 84).

In the beginning of the 1990s immigration to Austria increased, but at the same time the state’s ability to regulate these flows decreased. As a consequence of these developments, also the public and political discourses on migration as well as related policy responses changed. The first legal reactions on this new immigration situation still focused on the labour market. Thus, in 1990 a “ceiling” of the maximum number of foreigners to be employed, initially set at 10 per cent of the labour force was introduced. First measures explicitly addressing irregular migration such as the one-off “regularisations” of the 1990s (e.g. “*Sanierungsaktion 1990*”, “*Rumänenaktion*”), only aimed at legalizing irregular employment, especially in regard to asylum seekers (Nowotny 1991: 57; König 2000). At the same time, the amendment of the Aliens Police Act in 1990 already reflected the emerging fear of uncontrolled immigration flows. This shift in public perception of and political responses to migration reflects much broader changes.

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<sup>7</sup> i.e. third country nationals legally immigrating and thus excluding asylum applicants

During the 1980s, migration policy had turned from a rather technical issue rarely featuring in public debates to a major issue in political debates and key topic in election campaigns. This reflects above all the profound transformation of the Austrian political system in this decade, brought about by a broad range of developments, including the decline of “social partnership”<sup>8</sup>, the emergence of a new social movements and new political parties, the erosion of the two largest political parties – the Socialist Party (*SPÖ*) and the conservative Austrian People’s Party (*ÖVP*) and the populist turn and enormous growth of the far-right Freedom Party (*FPÖ*), amongst others. Reflecting the crisis of the welfare state, the decline of the state sector and rising unemployment, the main focus of debates on immigration, however, continued to be on labour migration, other labour market related aspects of migration and migrants and the welfare state until the early 1990s.

In the context of the geopolitical changes after 1989 and in particular the rise of the number of asylum applicants from Romania and from the disintegrating Yugoslavia, immigration increasingly became rephrased as a security issue, a frame pushed in part by the populist Freedom Party under Jörg Haider. But it was the governing coalition between the Social Democrats and the conservative People’s Party who was responsible for the introduction of the 1992 Asylum Act and the 1992 Aliens and Residence Act (*Fremden- und Aufenthaltsgesetz 1992*), which came into force in 1993. These legal innovations mark a major paradigm shift in Austrian immigration policy, shifting the focus of immigration control from labour market measures to regulations of entry and residence (König 2000: 85).

The explicit aim of the Residence and Aliens Act was to restrict new immigration and prevent “asylum abuse” (König 2000: 85), two objectives that continue to be important in the current context. The general tenets of the law are also reflected in public debates on irregular migration which have two focal points: asylum on the one hand and labour migration, and in particular, irregular employment, on the other. As Karin Sohler (1999) argues these two strands of public debates on immigrants are subject to slightly different logics: while irregular border crossings are perceived as a threat to state sovereignty and are seen as undermining the state’s capacity to control borders, irregular work is considered a threat to the welfare state. Irregular immigrants, but by extension immigrants in general, thus were increasingly perceived as potential threat that could severely disrupt the cultural, economic and public cohesion of society (Kratzmann 2007: 142) and as a potential security risk. Indeed, the latter – the securitisation and criminalisation of irregular migration, i.e. the association of illegal entry and stay with crime, and in particular, organised crime, was one of the main tenets of public discourses on irregular migration in the 1990s. Contrary to public perceptions of irregular migration as a crime, however, illegal entry and stay are only administrative offenses under Austria law, comparable to fast driving or illegal parking (König 1994: 1)

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<sup>8</sup> The origins of social partnership date back to the First Republic with the establishment of statutory representative bodies for employees (Chamber of Labour), employers (Chamber of Commerce, now Austrian Federal Economic Chamber) and agricultural employers (Chamber of Agriculture). After World War II, and especially in the latter half of the 1950s, these organisations were given a much more powerful role in policymaking. Collectively, including also the Austrian Federation of Trade Unions and the Federation of Austrian Industrialists, the institution is known as “social partnership”. Although formal institutions exist(ed) (e.g. the parity commission), social partnership was largely an informal institution. Social partnership was one of the cornerstone of Austria’s consociationalist post-war arrangements and widely seen as a guarantor of economic stability and social peace. Since the 1980s, its role has significantly diminished, even in the core areas of social, economic and labour market policy.



Institutionally, the securitization of migration has been reflected in the shift from labour market authorities to the ministry of the interior and the aliens police as the lead agencies in the formulation and implementation of migration policy, initiated in the late 1980s and largely completed by 1993 (Kraler, forthcoming). Asylum seekers are especially affected by the securitization of migration as they find themselves at the intersection of regular and irregular migration, often involved in both irregular border crossings and irregular employment (Sohler 1999, Jandl/ Kraler 2006). The rhetoric of “asylum abuse” is manifested in a number of regulations intending to combat unlawful access to the asylum system. Thus, in 2006, a formal “obligation to cooperate” during the asylum procedure was introduced, mainly in regard to the verification of the applicant’s identity. The consequence of non-compliance may be exclusion from the asylum procedure and deportation. Also, in order to secure this cooperation duty, asylum seekers may be held in custody until the finalization of the proceedings (Vogl 2007: 25).

The association of undocumented forms of migration with criminal activities also is reflected in discourses on irregular employment. Although in recent years the focus of control measures has been on non-compliance with labour, tax and social security regulations in general and the focus has increasingly been on employers rather than employees<sup>9</sup>, it is irregularly employed *foreigners* which are the focus of (negative) public discourses and *employees* rather than their employers.<sup>10</sup> This became obvious in recent public debates on irregular care when it was illegally employed foreign care givers, not their employers which were labelled “illegal”. Indeed, employers of irregularly employed care givers received considerably sympathy in media coverage of the “care crisis” and in sense, were the actual targets of the recent amnesty for irregularly employed care workers.<sup>11</sup>

A parallel, even if marginal discourse mainly sustained by non-state and civil society actors since the mid 1990s is the discourse on a right to stay for illegally staying but long-term resident and/or well-integrated foreigners. First discussed in the context of the aftermath of the 1993 reform to the aliens legislation, after which a significant number of foreign residents lost their legal residence status, this issue recently regained in prominence and public interest. Following a number of incidents that were widely covered by Austrian media, such as the situation of long-term resident families without legal residence status threatened with deportation, and the ruling as unconstitutional of the arbitrary awarding practice of the status of humanitarian residence (a residence status that could be awarded to illegally staying foreigners by the Ministry of Interior on a case by case basis) by the Austrian constitutional court in 2008 fuelled a broad public and political debate on the situation of well integrated but illegally resident foreigners in Austria. Contrary to the discourse on securitization, the core of this debate is characterised by humanitarian concerns and ethical issues, such as the protection of the right to private and family life. Although the government tried to limit its concessions as far as possible, in April 2009 the aliens legislation had to be amended to firstly deal systematically with the hitherto untouched situation of illegally resident foreigners who cannot be deported or have established substantial familial, professional or private ties in Austria.

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<sup>9</sup> Irregular employment in Austria is controlled by the KIAB (Kontrollstelle illegaler Arbeitnehmerbeschäftigung), a task force of the Ministry of Finances.

<sup>10</sup> This is also reflected in the use of different terms for informal work of natives and non-nationals. In public discourse the colloquial term “Pfusch” is often used to denote undeclared work of non-nationals (especially in construction and small-industry) whereas the term “Schwarzarbeit” more often refers to both illegal and undeclared work of non-nationals.

<sup>11</sup> See on the amnesty p.46

## I. 2. 2. States production of and responses towards irregular migration

Due to the focus on unlawful, and by implication, illegitimate access to residence and labour rights, the state's very own structural production of irregularity becomes invisible. One-off measures to correct the most drastic "side-effects" of inadequate immigration policies are very rare and in principle limited to labour market measures at the beginning of the 1990s (see above). With the introduction of humanitarian stay in 1997, Austria's "regularisation policy" is characterised by selective and individual regularisations, awarded by the Ministry of Interior, however, without any legal entitlement to such a status or a judicial review of administrative decisions on humanitarian stay. The official language refers to these de facto legalisations as "rehabilitated cases". As Heinz Fronek, the head of an Austrian NGO in the area of asylum (Asylkoordination) criticises, this terminology reflects the state's understanding of undocumented persons as "problem" that must be solved individually, rather than working on comprehensive legal adjustments (Fronek 2000). However, in June 2008, the constitutional court ruled part of the regulations on humanitarian stay, notably that individuals can not apply for a humanitarian status, unconstitutional.<sup>12</sup> In an amendment of aliens legislation in April 2009 on humanitarian stay were completely overhauled. Most importantly, the reform introduced a right to apply for regularisation under certain conditions. As of October 2009, however, the reform seemed to have relatively little quantitative impact, indicating that the new potentially more liberal provisions are implemented in a rather restrictive manner.

How immigration regulations produce irregularity, however, became most drastically visible after the introduction of the Aliens and Residence Act in 1992, when a large number of persons lost their legal residence status, mainly because the law did not foresee transitional arrangements for carrying over long-term residents from the old into the new residence regime (König 1999). Numerous persons, including a significant number of children lost their residence status because they missed application deadlines or could not fulfil the new defined residence requirements. Two groups most affected by the new regulations were asylum seekers and minor children of immigrants. In regard to the first, the newly introduced principle of "save third countries" was not only applied to new applications, but also to those brought in before the new law. As a consequence, already integrated asylum seekers faced the threat of being deported. Secondly, minor children of immigrants were among one of the main groups losing their legal status after 1992 and were partly not able to regain it any more. The quotas for family reunification introduced for the first time were quickly exhausted, resulting in up to three-year waiting periods. The principle of external application would have required the children to wait in the country of origin until their application would be dealt with.<sup>13</sup> Many parents thus brought their children to Austria via tourist visa, or let their visa expire if they were already in the country.

The most serious of these shortly delineated state-produced "illegality traps", as Sohler (1999: 82) puts it, were only alleviated in 1997, when under the slogan "Integration before new immigration" (*Integration vor Neuzuzug*) possibilities to consolidate one's residence status over time were introduced. In response to the consequences of the 1992 law, the amendment of the aliens and residence law in 1997 additionally installed the possibility to award the status of "humanitarian residence" (a temporary residence status with option on consolidation) to persons who had lost their residence status through no fault of their own, respectively to whole groups of persons by ministerial order (e.g. refugees from Bosnia and Kosovo).

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<sup>12</sup> See Die Presse, 27 June 2008, "VfGH fordert Reparatur des Bleiberechts", online under <http://diepresse.com/home/politik/innenpolitik/394332/index.do?from=suche.intern.portal> (July 1<sup>st</sup> 2008).

<sup>13</sup> Interview with Karin König, 27 February 2008

However, individuals could not apply for this status until the April 2009 reform, and the status was granted by the Ministry of Interior on its initiative and on its discretion, only loosely circumscribed by certain broad criteria mentioned in the law.<sup>14</sup> While the constitutional Court acknowledged this status as a way of alleviating the long waiting periods for family reunification, a petition on undocumented teenagers brought in 1999 by NGOs and youth organisations confronted with an increasing number of undocumented children and teenagers in their daily work, argued that these measures especially due to restrictive practice of the Ministry of Interior of awarding humanitarian statuses were inadequate to solve the problem of undocumented teenagers swiftly. Between 1998 and 2005, however, the involvement a broad range of stakeholders, including NGOs in decisions on humanitarian stay through their membership in the Advisory Council on Asylum and Migration Affairs (established by the Aliens Law 1997) mediated the lack of clear criteria to award the status to some degree. Although only an advisory body, the council's recommendations apparently were largely followed by the Ministry of the Interior.<sup>15</sup>

### I. 2. 3. Current Possibilities to regain one's legal status

The year 2009 marks a crossroads in Austrian policies on regularisation. As a consequence of a judgement of the constitutional court, the provisions on humanitarian stay were thoroughly revised. The judgement obliged the government to establish a formal right to apply for humanitarian stay and a right to appeal against negative decisions. The reform which entered into force on 1<sup>st</sup> April 2009 in the form of an amendment to the Asylum the Aliens Act and the Settlement and Residence Acts of 2005, essentially adjusted the procedure for the award of humanitarian stay permits to the procedures used in the normal residence regime.<sup>16</sup> While the actual impact of the reform so far seems to be very limited, the reform is significant from a principled perspective, as Austria's immigration policy for the first time foresees a legal pathway for specific categories of long-term and/or well-integrated yet unlawfully resident third country nationals to apply for a regularisation of their stay.

Also under the previous framework the provisions on humanitarian stay presented a limited regularisation mechanism. The main difference of the reformed framework is that the humanitarian stay explicitly is meant to address the situation of illegally staying migrants. The provisions cover two distinct categories: irregular migrants who had been staying in Austria for an extended period of time and those who cannot be deported on grounds of Article 8 ECHR (private and family life). In the case of the latter, third country nationals have to be *automatically* issued a settlement permit if their expulsion is found to be "permanently inadmissible"<sup>17</sup>, even if they do not fulfil the general residence requirements (e.g. adequate accommodation, health insurance, sufficient income) or if they have violated regulations on entry and stay (illegal entry, overstaying), or received a negative asylum decision. While the criteria to be considered are not new they were defined in more precise terms and include length and legitimacy of stay, actual existence of a family life, protection of private life, degree of integration, ties to the country of origin, criminal record, offences against the public order (e.g. illegal entry and residence), and whether the family relation was founded at a time when both parties knew about the insecurity of residence. In addition, German language proficiency is a central criterion and only if the applicant can prove sufficient German language skills<sup>18</sup> she/he obtains a permanent settlement permit, if not, only a temporary residence permit (restricted to one year) is issued. NGOs pointed to the ambivalence of this

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<sup>14</sup> This provision was ruled unconstitutional, see FN **Error! Bookmark not defined.** above.

<sup>15</sup> Interview with Karin König, 27 February 2008

<sup>16</sup> BGBl. I Nr. 29/2009, of 31 March 2009

<sup>17</sup> BGBl. I Nr. 29/2009, of 31 March 2009

<sup>18</sup> Fulfillment of the „integration agreement“, Module 2.

provision: asylum seekers or other foreigners with an insecure or even unlawful residence status mostly would have no resources to visit German language classes exactly because their status was insecure, according to this regulation they would however remain in an insecure, temporary status.

To address the situation of persons residing in an unclear legal situation, e.g. asylum seekers with a negative asylum decision who cannot be deported, the amendment introduced the possibility to apply for a temporary settlement permit if they have been continuously, and at least half of the time legally resident in Austria since 1<sup>st</sup> May 2004, even if they were issued an expulsion, entered illegally or overstayed. Similarly to the ordinary residence requirements, applicants have to prove that they are well integrated, have accommodation, health insurance and a sufficient income<sup>19</sup> - criteria that persons in an irregular situation may find difficult to comply with. If an applicant cannot sustain her/himself, a mentor – be it a civil person or an organisation – may take over the legal responsibility to bear all costs related to health insurance, accommodation, and living expenditures for a *minimum period* of three years – a rule that was introduced despite it was a target of harsh criticism for reinforcing dependencies and vulnerability.<sup>20</sup> Finally, similar to the regulation on humanitarian stay before 2009, the Ministry of Interior in such cases remains the sole decision-making actor, although assisted by an advisory board.<sup>21</sup>

Similarly to the 1997 alien law, the 2009 amendment partly aimed at alleviating “illegality traps” the amendment of 2005 created. For example, since 2005 marriage with or adoption by an Austrian citizen does no longer automatically lead to the legalisation of the residence status of an irregularly resident person. The initiative “Marriage without borders” (*Ehe ohne Grenzen*)<sup>22</sup> criticises that since 2006, when the NAG came into force, family members of Austrian citizens have to file the application for a residence permit from abroad; thus, the state does not guarantee the right to family life as laid down in the European Convention of Human Rights. Also, the NGO fights against the increasing “criminalisation” of Austrian citizens marrying persons from outside the EU – they are considered as suspicious of supporting bogus-marriages, which since 1997 can result in deportation of the foreign partner (Sohler 1999: 91/f)<sup>23</sup>. Under the current legislation, such couples can at least refer to the right on the protection of private and family life if facing the deportation of a family member. In addition, the hitherto legally unclear situation of rejected asylum seekers or other persons whose deportation is found to be permanently inadmissible was finally solved. However, the situation of persons whose expulsion is found only “temporarily inadmissible” (e.g. in case of sickness, or if the reference person her/himself only holds a temporary permit) remains unresolved; they are only issued an adjournment of deportation but not a residence permit and hence remain in the country as “tolerated illegal residents”. In addition, the provision was also criticised as insufficient to solve the situation of asylum seekers whose procedure has been pending for an extended period of time, as they can apply for humanitarian residence only after their asylum procedure has been completed.

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<sup>19</sup> BGBl. I Nr. 29/2009, of 31 March 2009, §44, par. 4.

<sup>20</sup> “Das neugestaltete Bleiberecht für Ausländer auf dem Prüfstand. Experten Hearing im Innenausschuss”, available at: [http://www.parlament.gv.at/PG/PR/JAHR\\_2009/PK0158/PK0158.shtml](http://www.parlament.gv.at/PG/PR/JAHR_2009/PK0158/PK0158.shtml) (6.3.2009)

<sup>21</sup> BGBl. I Nr. 29/2009, of 31 March 2009, §75NAG.

<sup>22</sup> Marriage without borders, 22 May 2006, see <http://no-racism.net/article/1691/>, 23 March 2008

<sup>23</sup> Marriages only entered in order to obtain a legal residence status may lead to the annulment of citizenship of the former alien (Schumacher/ Peyrl 2006).

In addition to these cases, also the situation of other categories of short term residents remains insecure, including sex workers, artists, foreign journalists and researchers. Ironically, many of these cases who are de facto long-term residents could obtain a better residence status if they would risk to be illegalised and then apply for a settlement permit on humanitarian grounds. If this treatment of temporary professionals in fact contradicts the EU Directive on long-term residents is currently examined by the Austrian Highest Administrative Court.<sup>24</sup> But the 2009 amendment also created new illegality risks, such as the introduction of a rigid application deadline for the renewal of residence permits. If an application for extension is lodged only one day after the old permit ceased to apply, the applicant's stay is considered illegal. This rigid provision might also result in an unnecessary high number of cases that have to be examined according to article 8 ECHR, as most of the applicants would claim their right on protection of private and family life.

Despite these limitations, the April 2009 reform represents a marked shift in the Austrian approach towards irregular migration. The continuing debate over the reform which followed its adoption and implementation, however, also signal the ambivalence of the new provisions. On the one hand the government was criticised for only changing those sections they were compelled to change in the wake of the judgement of the Constitutional Court, while publicly continuing to follow a restrictive migration control and security rhetoric and presenting plans for new restrictions of asylum legislation.<sup>25</sup> On the other hand, the law is outstanding, as it for the first time since the early 1990s foresees ways for unlawful residents to regularize their stay within the ordinary residence regime. However, as some of the law's provisions leave room for restrictive interpretation by the competent administrative authorities and the Ministry of Interior especially, the impact of this law will very much depend on its implementation in administrative practice.

### **I. 3. The quantitative dimensions of irregular migration**

Reflecting the shifts in the regulatory framework, the number of persons illegally residing or working in Austria has been subject to considerable changes over time.

Despite the difficulty to assess the quantitative dimensions of irregular migration, all available evidence suggests that the magnitude of illegal migration - defined in terms of illegal entry and residence – has considerably decreased in response to the two recent waves of enlargement and broader changes in patterns of irregular migration.

Statistical indicators on irregular migration are available from various state bodies, including the aliens' police under the Ministry of Interior and the Control Body for Illegal Employment (*Kontrollstelle illegaler Arbeitnehmerbeschäftigung - KIAB*), an agency under the Ministry of Finance (see table I.5). Statistical indicators of irregular migration need to be interpreted with great caution, as they are directly related to specific policies and changes of these as well as changing policing strategies. In particular, the latest two waves of EU enlargement have had a major impact on migration control practices, clearly reflected in statistics on apprehensions and in particular refusals of entry at the border which have been sharply decreased since 2006 (see table I.5).

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<sup>24</sup> See Interview Neugschwendtner, 19<sup>th</sup> March 2009

<sup>25</sup> See for example: „Fekter plant schnellere Abschiebungen“, DerStandard.at, 12. June 2009, available at: <http://derstandard.at/fs/1244460420703/Asylrecht-Fekter-plant-schnellere-Abschiebungen> [24.23.2009].

**Table I.5 Selected statistical indicators on irregular migration**

	Apprehensions					Rejections at the borders	
	Illegal residence and entry		Irregular employment			Immediate removal ( <i>Zurück-schiebung</i> )	Refusal of entry ( <i>Zurückweisung</i> )
	Illegal entry or stay	Smuggled persons	Ap-prehended persons <sup>1</sup>	Number of controlled enterprises	Ap-prehended persons per control		
<b>2003</b>	5,568	18,533	5,690	21,140	0.27	3,135	22,371
<b>2004</b>	1,966	15,607	6,021	23,222	0.26	4,132	26,280
<b>2005</b>	7,982	20,807	7,593	18,142	0.42	1,895	27,043
<b>2006</b>	6,321	12,270	8,417	21,038	0.4	1,685	31,189
<b>2007</b>	4,375	9,842	12,165	27,885	0.44	1,700	7,612
<b>2008</b>	5,940	8,734	11,480	26,330	0.44	1,652	2,695

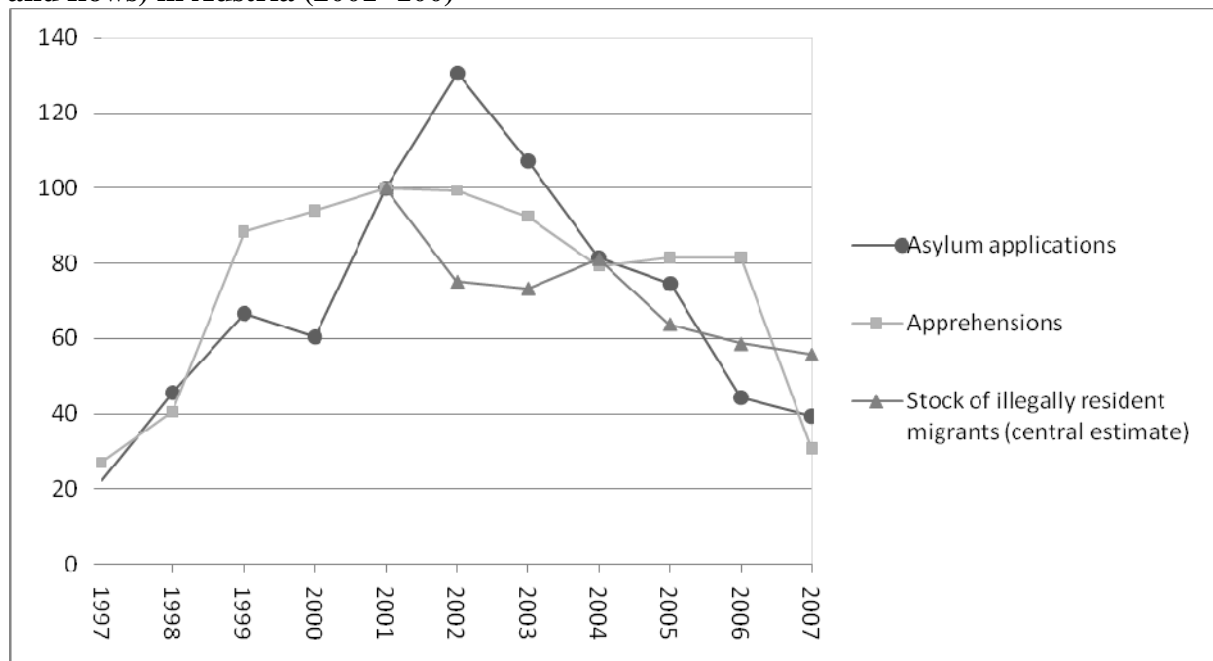
Note: detailed data is presented and discussed in part II of this report

Sources: BMI, KIAB

Generally, very few estimates on irregular migration in Austria exist and, they largely date from the period before the EU's first Eastern enlargement in 2004. These estimates include a large number of estimates on irregularly employed persons, reflecting the importance of labour market related irregularity in the Austrian context. The most robust estimate of the stock of irregular migrants produced so far has been elaborated in the framework of the project *Clandestino* (Jandl 2009). The estimate is an extrapolation based on the percentage of illegally residing migrants among foreign crime suspects according to police crime statistics. Based on police crime statistics of various years, the estimate also provides a time series for the years 2001 to 2008, using an extrapolation derived from the number of legally residing crime suspects relative to the total foreign resident population. The estimate suggests a total stock of irregular residents of about 36,250 persons (central estimate) in 2008, which is a remarkably low figure compared to the estimated stock of irregular migrants in other northern European countries, for example Belgium, the Netherlands or the UK (see for a discussion of the estimate section II. 2. 1. 2, below). Mirroring a similar decrease in statistical indicators of irregular migration – notably in the number of apprehended persons – the estimate also suggests that the stock of irregular migrants has sharply decreased since about 2001 – for 2001 the irregular migrant stock can be estimated at around 78,000 (central estimate).

Like in other European Union Member States, asylum related migration to Austria is closely linked to irregular migration. Indeed, asylum has become increasingly important as a route of entry into the European Union as other admission channels have become closed and both internal and external migration controls massively stepped up in the course of the 1990s. In this context, the notion of “mixed migration flows” has been invoked to denote the fact that a considerable share of asylum seekers are not granted refugee or subsidiary protection status. Thus, although asylum related migration should not be conflated with irregular migration, irregular migration is closely linked with asylum. In this context, asylum statistics also can be interpreted as indicators of irregular migration flows. The general trend of asylum applications is consistent with both apprehension statistics and the stock estimate for the irregular resident population for various years (see figure I.3, below).

**Figure I.3: standardized indicators on the development of irregular migration (stocks and flows) in Austria (2001=100)**



Source: Own calculations and presentation based upon data from the Austrian Federal Ministry of the Interior, Asylum Statistics and Aliens statistics (various years) for the number of asylum applications and apprehensions; and Jandl 2009 for the estimated stock of irregular migrants.

## **Part II: Estimates, data and assessment of total size and structure of irregular migrant population**

This section provides an overview and evaluation of estimates and indicators on the size and structure of the irregular migrant population in Austria. The focus of the analysis which follows is on evaluating available estimates and indicators. A discussion of possible conclusions that may be drawn from the survey of data on the irregular migrant population will be provided in part III of the country report.

### *General introduction about indicators and estimates on irregular migration in Austria*

The most commonly used sources for quantitative assessments of illegal migration in Austria are statistical indicators derived from various administrative datasets, notably police records on the number of apprehended aliens found illegally present or apprehended while crossing the border and statistics of asylum applications. Generally, these statistics are usually used for illustrative rather than analytical purposes and primarily for illegal flows rather than stocks. There are relatively few estimates on illegal migration in Austria; even fewer are based on some kind of methodology. Several factors may help to explain the relative scarcity of estimates, including the specific nature of illegal migration in Austria, notably the primacy of labour market controls and the lack of attention to legal entry and stay before 1993 (see above, part I) and the close association of illegal migration with the asylum system. These factors will be dealt with in more depth below. Reflecting the primacy of labour market controls until the early 1990s and the continuing importance of labour market controls well until the end of this decade<sup>26</sup>, the overwhelming majority of estimates focus on illegal employment rather than irregular entry or stay and usually pertain to both third country nationals and EU nationals, in particular citizens of new EU Member states. Generally, there is a surprising lack of global estimates of the illegally resident population or estimates of particular categories among illegally resident aliens. Most of the more recent estimates on illegal employment focus on illegally employed foreign, domestic and care workers, which reflects the current focus of public debates on illegal care.

### **II. 1. Most relevant data sources and studies**

#### *The “Smugglers database”*

Perhaps the most important source for data on irregular migration is the “smugglers database” held by the Criminal Intelligence Service Austria (*Bundeskriminalamt – BKA*) within the Federal Ministry of the Interior. This database contains information on all persons who were apprehended at the Austrian borders (illegal border crossings) or on the federal territory (illegal residence) as well as on smugglers. The database exists since 2003 and holds personal data (name, date of birth, citizenship, etc.), data about the apprehension (place, time) and several data which are important for the police proceedings regarding such persons.<sup>27</sup>

The micro data is not accessible to non-staff members; neither is access to anonymised data, and hence researchers are restricted to published data for analysis.

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<sup>26</sup> Until the beginning of the 1990s the regular employment status was far more important for foreigners in Austria than their regular residence, see above part I.

<sup>27</sup> Interview with Colonel G. Tatzgern, Head Central Service Combating Alien Smuggling THB, 02 Jan. 2008.



Statistics based on the “smugglers’ database” are published annually in the report on “organised criminal smuggling”. The main focus of the report lies on the differentiation whether a person was smuggled or not<sup>28</sup> (cf. BMI, 2007).

For 2006 and 2007, the Criminal Intelligence Service reports figures as illustrated in the following table:

**Table II.1: Smuggled persons and persons staying/entering illegally by place of apprehension in 2006**

	When entering	In the territory	When leaving the country	In course of compensatory measures <sup>29</sup>	<b>Total</b>	<b>Total 2007*</b>
Smuggled persons	2250	8401	1057	562	<b>12270</b>	9842
Persons staying/entering illegally	590	7683	11341	6707	<b>26321</b>	4375
<b>Total</b>	<b>2840</b>	<b>16084</b>	<b>12398</b>	<b>7269</b>	<b>38591</b>	14217

\* For 2007 figures by place of apprehension are not available

Source: BMI (2007, 2008) and authors’ calculations

A total of 38,591 persons were apprehended and 817 smugglers recorded in 17,100 cases in 2006. In 2007, the number of persons staying or entering illegally dropped sharply from 38,591 to 14,217. This sharp decrease can mainly be traced back to the decrease of persons staying or entering illegally, which decreased by roughly 83 per cent to 4,375. The report also contains statistics by gender, age and nationality for each of the three main categories used in the report (smuggled persons, smugglers, persons entering/ staying illegally). Thus, it is not possible to differentiate the statistics on demographic characteristics of apprehended persons by whether they were apprehended in the territory, when leaving or when entering the country.

#### *The Aliens Information File/ the Asylum Information System*

The Aliens Information File is a database kept by the Ministry of Interior which contains data on all aliens residing legally in Austria. The data base stores data for each person separately. In addition to information on the legal status of a person and information related to applications, the database also records information on enforcement measures of the alien’s police, including rejections at the border, expulsions, residence bans as well as deportations. Statistics are published monthly and annually at the website of the Ministry of Interior ([www.bmi.gv.at/publikationen/](http://www.bmi.gv.at/publikationen/)). There are no further differentiations of the numbers (e.g. gender, citizenship, age, etc.), although the database in principle would allow these additional breakdowns. Information on asylum seekers comes from the Asylum information system. Statistics are published both monthly and annually. Neither the asylum information system nor the aliens information file is linked to the smugglers database. However, traditionally, the number of applications for asylum closely correlates with apprehension figures. This correlation held true only before the introduction of the Eurodac system (see Jandl 2004).

<sup>28</sup> The decision, whether a person was smuggled or illegally entering or staying without any help of a smuggler, relies on the assessment of the responsible police officer

<sup>29</sup> After omission of border controls (i. e. dragnet controls nearby borders)

### *Data on apprehended irregularly employed foreigners*

Within the Ministry of Finance, there is a special unit (KIAB – *Kontrolle illegaler Arbeitnehmerbeschäftigung*<sup>30</sup>) responsible for controlling illegal employment in Austria. The unit keeps data on the number of persons found to be illegally employed in Austria. Data can also be broken down by citizenship and economic sector. KIAB collects three types of data: statistics on the number of worksites controlled, statistics on the number of controlled persons and statistics of persons found to be illegally employed. The mandate of KIAB pertains to the control of illegal employment and undeclared work in general and thus their data also include citizens. Generally, individual data is not accessible for researchers and analysis is thus restricted to published aggregate data or data provided by KIAB on request.

### *The Delphi study as a part of the MIGIWE study*

Results from the Delphi survey, which was carried out in the framework of the project “Migration and Irregular Work in Austria – MIGIWE” (2005-2007), are another major source of information for this report. Although estimates were generated in the framework of the Delphi study, the focus of the survey was on characteristics and dynamics of irregular migrant employment more generally.

The Delphi method is a multi-wave interview technique developed mainly for purposes of identification of future trends, forecasting and research of “hidden” or difficult to research phenomena (cf. Haeder, 2002: 21-22).<sup>31</sup> In essence, the Delphi technique is a method to generate a consensus among experts in a certain social field on characteristics, dynamics and trends in this field. In a preparatory step (that may be left out), semi-structured expert interviews are conducted with experts in the field under study to generate a questionnaire, which presents a synthesis of expert assessments statements collected in the expert interviews in the form of questions. Experts then anonymously complete the questionnaire; in a third step the Delphi researchers synthesize the results of the survey and ask experts to comment on the statements presented in the questionnaire, again anonymously. After this the procedure is repeated. However, as the Delphi technique is basically a method to generate a consensus among experts, it is not a proper estimation technique, rather it is a method to reach a consensus about existing estimates and experts’ own opinions about estimates. In addition, the results of a Delphi survey are greatly influenced by the selection of expert and the nature and the scope of the social field under study, i.e. to what extent one can speak of a cohesive social field at all.<sup>32</sup>

The overall focus of the Delphi study conducted in the framework of the MIGIWE project was on dynamics and structural dynamics of this segment of the labour market in general. However, experts were also asked to provide estimates on the extent of irregular migrant employment, defined as paid employment of foreigners (non-citizens) who are in conflict with one or more regulations governing the employment of foreign nationals, including the Settlement and Residence Act, the Employment of Foreign Workers Act, social insurance laws, tax laws, labour legislation and trade legislation (Jandl/Hollomey/Stepien, 2007: 9). 37 experts participated in the first round and 22 experts in the second round of the MIGIWE interview survey (Jandl/Hollomey/Stepien, 2007: 13).

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<sup>30</sup> [Agency for the] Control of illegal employment

<sup>31</sup> Therefore, the name of the interview technique derived from the name of the Greek oracle

<sup>32</sup> One could argue that the field under study in the MIGIWE project – irregular employment – is characterized by heterogeneity and itself highly fragmented. As a result of the fragmentation and segmentation of the social field under study, experts are likely to have no comprehensive view of irregular employment, but rather on different segments most familiar to them.

## II. 2. Estimates, data and expert assessments on stocks

### II. 2. 1. Total stock

#### II. 2. 1. 1. Irregular employment

##### *80,000 to 100,000 illegally employed foreigners at the beginning of the 1990s*

In an article published in 1994 Pichelmann estimated the stock of illegally employed foreigners in Austria at 80,000 to 100,000; however, he did not provide any source of his estimate, nor any information about the methodology used to arrive at this figure (Pichelmann, 1994: 67). According to Jandl (2004: 148), Pichelmann extrapolated the number of illegally working foreigners who were apprehended by the labour market inspectorate (the agency then in charge of controlling illegal employment) during routine controls. However, no source for this additional information on methodology, absent from the original source itself, is provided. As work place controls are not random and moreover, are usually only undertaken in selected economic sectors with a presumably high share of illegally employed immigrants, estimating the total stock of illegally working foreigners on the basis of control statistics needs to be regarded as problematic<sup>33</sup>.

##### *50,000 to 70,000 illegally employed foreigners in 2000*

Gudrun Biffl (2002) provides two estimates of the number of illegally employed foreigners in Austria ranging between 47,000 and 70,000. Her first estimate (50,000 to 70,000) is based on the assumption that the total size of the so called shadow economy constitutes approximately 10 per cent of the GDP and that the share of the foreigners of the shadow economy does not differ from the share of all foreign employees of all employees in Austria, in spite of the unequal composition of citizens and non-citizens in the different industrial sectors. Following these assumptions the share of the irregular working foreigners in Austria equals about 35,000 full-time equivalents. Considering that only a considerable share of employees are not in full-time employment the number of foreign people working in the shadow economy has to be somewhat higher. At the same time, Biffl argues that the number is not detached from the number of foreigners residing in Austria. Based on these assumptions and considering foreigners in Austria who are at an employable age, Biffl arrives at a figure of 50,000 to 70,000 irregular working inhabitants who are not citizens of Austria (Biffl, 2002a: 362 - 363).

##### *Discussion*

The first point of criticism is the assumption that the relative share of foreigners working in the shadow economy does not deviate significantly from the share of Austrian citizens working in the shadow economy. Biffl herself points out that the occupations of legally employed foreigners in the industrial sectors are differently distributed as compared with the occupations of Austrians. This implies different chances for working in the shadow economy and as a consequence, a different composition of irregular employment which could be an indicator for different shares in illegal employment. Furthermore, there is no indicator for a relation of full-time-equivalents and persons<sup>34</sup>.

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<sup>33</sup> For more criticism on this method, see below.

<sup>34</sup> It could also be assumed that some persons work more than one full-time-equivalent due to the absence of control mechanisms in undocumented/irregular employment. Conversely, there is some evidence that the number of persons in marginal and casual employment, i.e. person working significantly less than full time is higher in the case of non-nationals.

### *47,000 illegally employed foreigners in 2000*

The second (somewhat more sophisticated) estimate Biffl is a composite estimate, for which Biffl adds up estimates for specific groups of irregularly employed migrants in Austria.

Biffl assumes that many marginally employed (*geringfügig beschäftigte*)<sup>35</sup> in Austria, whether Austrian or not, underdeclare the extent of employment and thus work in an irregular fashion. This assumption is based on a study (Biffl, 2001 quoted in Biffl, 2002), where the number of marginally employed people in the register of social insurance cases of the Main Association of the Social Security Institutions was compared to the data of the Microcensus<sup>36</sup>. This comparison led the author to the conclusion that most marginally employed people work irregularly beyond their employment. Regarding the number of persons who are solely marginally employed (3 per cent of all employees) the estimated number of foreigners working irregularly beyond their marginal employment is about 10,000.<sup>37</sup> This group of persons is legally resident and legally employed in Austria; however, these people also work irregularly (Biffl, 2002a: 363). As a next step Biffl takes the number of persons who were expelled (*Ausweisung and Aufenthaltsverbot*) from Austria due to illegal employment (1,100 persons in 1999) and adds up the number of people who were expelled from Austria because they were in a marriage of convenience, destitute, illegally resident or without legal employment and unemployable, as potential clandestine employees. Biffl thus arrives at a total of 15,000 persons (Biffl, 2002a: 363-364). Moreover, Biffl assumes that 70 per cent of all students who are third-country citizens and therefore – at that time when the study was written - not permitted to be employed legally, are clandestinely employed in Austria; however, according to Biffl not to a significant extent and only casually. The number third country national students likely to be illegally employed equals 11,000 persons (Biffl, 2002a: 364; see also Bittner, 2002: 111). As a last estimate, Biffl uses the average number of persons who were not permitted to enter Austria because of the suspicion of illegal employment (1,500) and who were not permitted to enter Austria because they were destitute (3,400). Using a multiplier of 2, which she justifies as a standard multiplier used for similar calculations, she arrives at an estimated 10,000 persons (Biffl, 2002a: 364).

Adding up these estimates, Biffl puts the total number of irregular working foreigners in Austria at around 47,000. Thus, the majority of illegally employed foreigners do reside legally in Austria, including around 10,000 persons who work beyond their marginal employment, another estimated 10,000 people who work clandestinely alongside their studies and about 10,000 to 15,000 persons who work clandestinely because their residence status does not permit employment in Austria. Foreigners without a valid residence permit and hence, without a valid working permit are an estimated group of 10,000 persons (Biffl, 2002a: 363 – 365).

### *Discussion*

Biffl carefully examines different circumstances under which foreign nationals might be illegally employed and bases her global estimate on specific estimates for carefully delineated

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<sup>35</sup> “Marginally employed” is a technical term in social security legislation. It is defined as employment below a certain income threshold (currently: around 350 EUR per month). For incomes under this level no income tax and only limited social security contributions have to be paid; as a corollary, employees are not covered by health, unemployment and pension insurance and only are covered by accident insurance. However, employees may opt for social insurance for a relatively small payment (insurance of marginally employed is subsidized).

<sup>36</sup> Special survey on employment issues

<sup>37</sup> An analysis of the data of the Social Insurances showed that there are no significant differences between citizens and non-citizens in respect to these cases.

categories of (potentially) illegally employed foreigners, for which she uses available indicators. In this sense, the estimate is a conservative estimate, and actually, she does not take into account an important category of potentially illegally employed third country nationals, namely family related migrants (see below). However, several of her assumptions are problematic:

The second category in which Biffl uses data on expulsion orders and residence bans issued for an estimate of the number of persons covered by these measures is problematic, since it combines statistics on persons *actually* found illegally working and several categories *potentially* illegally working. Although a certain share of persons in the categories of potentially illegally employed may in fact have worked illegally, many others may have not. Her estimate of working students who are not allowed to work in Austria has become obsolete since, after restrictions for employment of students from third countries have been relaxed and the dividing line between illegality and legality has become blurred as a consequence. Surprisingly, another important category of legally resident third-country nationals without labour market access, namely foreigners admitted as family members were not considered by Biffl's estimate. At the time Biffl produced her estimate, for example, spouses of third country nationals only had access to employment after 5 years of residence.<sup>38</sup>

Her final estimate, which is based on rejections at the border on grounds of suspicion of illegal employment and destitution, is problematic on several grounds. First, it is questionable whether these persons would actually have worked illegally and are likely to be heavily influenced by border policing practices and "selective suspicion". Secondly, the approach is also problematic since it uses flow indicators to estimate stocks, without any consideration of the nature of the (potential) employment of these persons, notably in terms of temporality (seasonal employment vs. long term employment). Third, it is not obvious that the multiplier of 2 Biffl uses makes sense in regard to Austria. This specific multiplier originally has been derived from a study on the Mexican-U.S.A. border, done in 1995 using data from 1977 to 1988. According to the author of the study (Espenshade, 1995: 545 – 565) the number of persons who enter successfully is 2.2 times higher than the number of persons who are apprehended at the border, also considering multiple attempts of persons. Even regarding the US, it is very likely that the multiplier would be quite different today, reflecting changed border policing practices.

Notwithstanding these considerations, the estimate provided by Biffl is still one of the most sophisticated and considerate estimates existing on irregular employment of foreigners in Austria.

### *57,000 irregularly employed foreign workers in 2003*

In an unpublished presentation before the Austrian Statistical Society in 2003, Michael Jandl estimated the total stock of illegally employed foreigners in Austria at 57,000. Like Biffl's estimate, his estimate is a composite estimate based on – in his case – separate estimates for different types of illegal employment, including foreigners working in Austrian companies, foreigners working in Austrian households as cleaners and as caretakers and the number of foreigners working illegally as prostitutes.

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<sup>38</sup> Partly in response to this study (which was originally undertaken and submitted in 2001) the so-called "integration decree" ("Integrationserlass") was passed which gave family members access to employment after 1 year of residence (subject to discretion).

**Table II.2: Composition of estimates concerning irregular working foreigners**

Companies	30,000
Cleaning in households	19,000
Care in households	5,000
Prostitution	3,000
<b>Sum</b>	<b>57,000</b>

The estimate on irregularly employed foreigners in Austrian companies is based on data of apprehensions of irregular working foreigners. These apprehensions are multiplied by ten (the multiplier was suggested by the Central Office for the Control of Illegal Employment “based on experience”) which equals about 30,000 (2001: 3,010 found illegally employed foreigners). The estimate for foreigners who are illegally employed in Austrian households as cleaners is based on the assumption that every tenth household in Vienna employs a foreigner illegally and every irregular employed foreign cleaner is employed in about ten households. Hence, on the basis of 800,000 households in Vienna, the number of illegally employed foreigners is about 8,000. For the about 2,200,000 remaining households in Austria Jandl assumes on the basis of studies in other countries that the density of irregular migrants in rural areas is below that in urban areas and uses a factor of 20, instead of 10 and thus arrives at a figure of 11,000 persons. Moreover, Jandl estimates the number of persons working as caretakers (health care and child care) at about 5,000 and assumes, following police reports, that there were about 3,000 illegal prostitutes<sup>39</sup>.

As Jandl points out himself, the problem for the multiplication of the apprehended illegally working foreigners in Austrian companies is that the controls of companies are not random but systematically targeted companies suspected to of illegally employing foreigners. Similarly, the multiplier of ten advanced by KIAB, the agency controlling illegal employment of foreigners, can not be taken as reliable for similar reasons: The main problems are the selectivity of controls (only certain companies in certain industries, thus the multiplier might work for certain sectors which are heavily controlled, but not for others), the varying intensity of controls over time (both staff and control activity increased significantly) and the subjectivity of the multiplier.

The main problem of Jandl’s estimates on domestic work and care is that they are made on the basis of rule of thumb. However, there are no empirical indicators which could confirm the assumption that every irregularly employed foreigner who works as a cleaner works in ten different households nor is there any basis for the assumption that every tenth household employs foreign cleaners, nor that the respective ratio is 1:20 in rural areas.

*97,000 full-time-equivalents working in the shadow economy in 2007*

In successive publications Friedrich Schneider (partly with Dominik Enste) has provided estimates on foreigners working in the so called shadow economy for successive years. In his most recent publication, he estimates that around 97,000 foreigners [defined as full time equivalents rather than persons] worked in the Austrian shadow economy in 2007 (Schneider, 2007: 9). For 1995, the figure is 75,000 (Schneider, 2002: 3 and Schneider 2007: 9) and

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<sup>39</sup> The Viennese police estimated that there were some 7,000 prostitutes in Vienna, about 80 per cent of which foreigners. Some among these were legally employed holding specific work permits for dancers, entertainers, etc. The illegal foreign prostitution outside of Vienna was considered much lower. Email communication with Michael Jandl, 2 December 2007

109,000 for 2002 (Schneider, 2002: 3)<sup>40</sup>. According to Schneider, these numbers represent a fictive size in the sense that they represent full-time-equivalents, not persons. Schneider states that his estimate of the share of foreign workers in the shadow economy is based on the number of “apprehended foreigners” and on results of opinion surveys on attitudes towards irregular employment conducted in Austria (and other countries).<sup>41</sup>

**Table II.3: Development of “fulltime-domestic-clandestine-workers” and the illegal foreign employees in thousands for Germany, Austria and Switzerland 1995 to 2007**

	Germany		Austria		Switzerland	
	Fulltime-domestic-clandestine workers	Illegally employed foreigners	Fulltime-domestic-clandestine workers	Illegally employed foreigners	Fulltime-domestic-clandestine workers	Illegally employed foreigners
<b>1995</b>	7.320	878	575	75	391	55
<b>1996</b>	7.636	939	617	83	426	61
<b>1997</b>	7.899	987	623	86	456	67
<b>1998</b>	8.240	1.039	634	89	462	69
<b>1999</b>	8.524	1.074	667	93	484	74
<b>2000</b>	8.621	1.103	703	99	517	79
<b>2001</b>	8.909	1.149	734	104	543	84
<b>2002</b>	9.182	1.194	746	109	556	88
<b>2003</b>	9.420	1.225	769	112	565	90
<b>2004</b>	9.023	1.103	789	114	560	89
<b>2005</b>	8.549	1.002	750	104	520	82
<b>2006*</b>	8.124	952	716	98	493	78
<b>2007*</b>	8.206	961	709	97	490	77

Notes: “Domestic-fulltime-clandestine-workers” is a fictive parameter, which is calculated according to hours worked in the shadow economy. The illegal foreign employees constitute an initial estimation of the illegally (in the shadow economy) employed foreigners.

\*Prediction/estimation, because the statistics of the labour market are not available at the moment.

Source: Schneider, 2007: 18

<sup>40</sup> See also Schneider 2005, Enste/Schneider 2006 and for more working papers and publications on the shadow economy: <http://www.econ.jku.at/Schneider/publik.html>.

<sup>41</sup> Email from Friedrich Schneider, 25 October 2007.

Furthermore, Schneider states that two thirds of the added value to the shadow economy is contributed by Austrian citizens or foreigners who reside legally in Austria (Schneider, 2007: 9).

Schneider and Enste define shadow economy as an area where legal goods and services are produced or provided illegally. The shadow economy or irregular sector differ from the criminal sector where goods and services - and thus also its production and provision - are illegal, and from the informal sector (and, presumably, the household and the official sector) where the goods and services are produced and provided legally. The work in this sector comprises breaches of the trade law, fiscal fraud and irregular employment (Schneider and Enste, 2005: 2-4).

For the estimation of the overall shadow economy Schneider and Enste use a combination of two kinds of techniques, namely the so called Currency Demand Approach and the so called Model Approach (or DYMIMIC procedure) (Enste and Schneider, 2006: 42 – 45). The Currency Demand Approach is based on the assumption that transactions in the shadow economy are always paid cash and therefore, the currency demand increases due to an increase of activities therein. The dependent variable for the regression equation for the currency demand is the ratio of cash holdings to current and deposit accounts. The independent variables are the weighted average tax rate (as a proxy for changes in the size of the shadow economy), the proportion of wages and salaries in national income (to capture changing payment and money holding patterns), the interest paid on savings deposits (to capture the opportunity cost of holding cash) and the per capita income. An increase in currency – explained with the conventional factors above – is attributed to the rising tax burden and other factors leading people to work in the shadow economy. As a next step, figures for the size and development of the shadow economy are initially calculated by comparing the development of currency when taxes and government regulations are at their lowest values, with the development of the currency at the higher levels of taxation and regulations. Then, the size of the shadow economy is computed and compared to the official GDP (Schneider and Enste, 2000: 94). The model approach measures the shadow economy with observable indicators and causes. There are three main possible causes for the rise of the shadow economy, namely high taxation, heavy regulation, and declining “tax morality” defined as the attitudes of citizens towards the state (Schneider and Enste, 2000: 98).

The use of the currency demand approach has been criticized in the literature and the main criticism is quoted by Schneider and Enste (2000: 95 - 96).

Some points of criticism are:

- not all transactions in the shadow economy are paid cash;
- the increase of the currency demand is not only due to the increase of the shadow economy;
- the velocity of money cannot be considered the same in the regular and in the shadow economy;

### *Discussion*

Unfortunately the authors do not disclose the exact indicators and causes used for the measurement of the shadow economy. According to Schneider and Enste, their model is based on a LISREL procedure, that is a statistical programme to correlate latent/unobservable variables. However, the exact details of the model are not indicated. Due to this lack of transparency of the method – the authors speak about factor analyses and structural equations for the model approach and about regression analyses for the currency demand approach (see Schneider and Enste, 2000: 94, 97 and 98) – the criticism is restricted to the available outputs



or tables. This also applies to the connection of the two above mentioned methods – the currency approach and the model approach. It remains unclear how the authors connect these two methods. Moreover, the authors count full-time-equivalents of people working in the shadow economy but they do not define the (assumed) ratio of full time equivalents to actual persons. Thus, it is not clear on what the estimate on the number of persons working in the shadow economy is based.

More questions arise in regard to estimating the share of foreigners in the shadow economy which is crucial for this project. Schneider states that this assessment is an “initial estimate” of foreigners working in the shadow economy. Yet, although the size of the shadow economy changes, the proportion of foreigners working in the shadow economy is constantly about 12 per cent in successive publications (co-)authored by Schneider.<sup>42</sup> As mentioned above, Schneider uses the number of “apprehended foreigners” for the calculation of the share of foreigners, which is presumably the number of foreigners apprehended for irregular employment. The problems of using this number have already been discussed above. Another problem of the estimate(s) is a statement about the share of illegally resident foreigners who are working in the shadow economy. Schneider states that the contribution of illegally resident foreigners to the value of the shadow economy is one third, but it remains unclear if this third is already included in his estimate or not. Generally, he speaks about illegally employed foreigners without determining their residence status.

A further critique of Schneider’s and Enste’s estimates is the use of surveys/opinion polls for the estimation of illegal employment in general. On the one hand, results of surveys depend on several methodological decisions such as the way questions are asked, which categories are allowed to answer, how the interviews are conducted and how the sample is drawn. On the other hand, the results of surveys also depend on the general attitude of people towards undeclared work in different countries. Finally, it is entirely unclear, whether attitudes towards undeclared work translate into actual practice. The results of the recent Eurobarometer module on undeclared work suggest that such surveys need to be taken with extreme caution. Thus, the survey results suggest that Denmark is the country with the largest share of persons doing undeclared work, whereas the share of undeclared work in Greece, Bulgaria or Italy, which are usually much more associated with the informal economy, is below the EU average (See European Commission 2007: 18).

Again, the main points of criticism of the estimate(s) are:

- Lack of transparency of used indicators
- Question of usability of indicators
- Lack of transparency of used method
- No clear definition of full-time-equivalents
- No exact definition of foreigners
- No transparency of calculation of the share of foreigners

Considering all this criticism, the estimates produced by Schneider and Enste have to be assessed as not very reliable due to the accumulation of many uncertainties. In addition, Schneider states (Schneider, 2002: 8) that the size of the shadow economy, shown for Germany, Austria and Switzerland, is not fully comparable due to differences in specifying the currency demand (different number of causes of irregular work).

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<sup>42</sup> Author’s calculations

Comparing the estimates existing for Austria, there is a large gap between the different estimates of irregular work. As far as it is not defined how many persons apply for one fulltime equivalent in Schneider's (and Enste's) estimate, a comparison of the estimates is impossible, however, assuming the number of people working in the shadow economy is higher than the number of fulltime-equivalents, the estimate of Schneider is much higher than the estimate of Biffl (99,000 full-time-equivalents and 47,000 persons in the year 2000). Considering the numbers, the estimate of Biffl seems much more plausible than Schneider's, because 100,000 (or better 200,000 or even more) foreigners working in the shadow economy seems to be far too many in regard to the legally resident foreign population in 2000, which was roughly 700,000.

#### *About 150,000 irregularly employed migrants?*

The project Migration and Irregular Employment in Austria (MIGIWE) also tried to quantify the overall extent of irregular employment of migrants in Austria, using the Delphi method. The experts' estimates of the share of irregularly employed migrants in total employment in Austria amounts to five per cent (average value), however, only 10 of the 22 experts of the second round of the Delphi questioning gave an answer to this question (Jandl/Hollomey/Stepien, 2007: 34).

This estimate seems very high because five per cent of the total employment represents roughly 165,000 persons according to the average overall employment in 2006<sup>43</sup>. In addition, in 2005 the average size of the (legal) foreign labour force was only about 370,000 persons (266,156 of whom were third country nationals or citizens from new EU member states<sup>44</sup>). However, the MIGIWE study employs a definition of irregular migrant work which captures a broad range of employment relationship, including illegal employment and under- and undeclared work and MIGIWE estimates are thus not directly comparable to other estimates.

#### *Statistical indicators*

According to the Agency for Control of illegal employment (KIAB), an agency within the Ministry of Finance, a total of 11,982 non-nationals were found illegally working in 2007. Of these, 8,767 foreigners had no permission to work in Austria in the meaning the Aliens Employment Act.

### **II. 2. 1. 2. Illegal stay**

#### *From 77,000 in 2001 to 36,000 illegally resident foreigners in 2008 – a clear downward trend*

The most recent as well as most sophisticated estimate on third-country nationals without regular status in Austria so far has been elaborated by Michael Jandl (2009) in the framework of the Clandestino project by. The estimate is based on statistics on criminal suspects in Austria which are available for nationals and non-nationals broken down by residence status (and thus including persons without a regular residence status). Jandl adjusts the data, for example, by excluding offenses linked to irregular migration which are largely, or exclusively committed by foreigners from the calculation. Jandl uses the share of criminal suspects with Austrian citizenship in the total population with Austrian citizenship as the upper limit of the estimate. The lower limit is defined as the share of non-national suspects in the total number of resident non-nationals in the same year. Jandl thus assumes that the relative share of

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<sup>43</sup> See: <http://www.ams-forschungsnetzwerk.at/downloadpub/info101.pdf>

<sup>44</sup> See Zur Niederlassung von Ausländerinnen und Ausländern in Österreich, Biffl and Bock-Schappelwein, 2006, WIFO. Available at: [http://www.bmi.gv.at/downloadarea/asyl\\_fremdenwesen/NLV\\_2006\\_endg\\_08\\_2006.pdf](http://www.bmi.gv.at/downloadarea/asyl_fremdenwesen/NLV_2006_endg_08_2006.pdf)

illegally resident crime suspects falls between the two extremes of the foreign and national resident populations. The results of the estimate are shown in Table II. 4, below.<sup>45</sup> According to this estimate between 39,000 and 116,000 TCNs without proper legal status were resident in Austria in 2001. These numbers decreased steadily until 2008 to an estimated number of some 36,000 TCNs without residence status with a lower estimate of 18,000 and an upper estimate of 54,000 TCNs.

While the estimate is the most transparent and sophisticated estimate for Austria so far, it is based on certain assumptions whose accuracy is difficult if not impossible to know. First, Jandl makes several adjustments, each of which is based on certain assumptions. While these all are laid out in a transparent manner, they also contribute to a certain bias of the estimate. Secondly, the data are based on crime statistics. Crime statistics are known to be biased due to different detection probabilities of different population groups (e.g. different nationalities, different skin colours, different gender ratios, etc.). Finally, the differences in the shares of suspects between nationals and non-nationals are quite substantive and the (reasonable) assumption that the share of crime suspects of irregular resident third-country nationals lies somewhere between those of nationals and non-nationals results in a relatively wide large range. Nevertheless central estimates might only purport to be the ‘best values’.<sup>46</sup>

**Table II. 4: Estimates of third-country nationals without regular resident status in Austria 2001 to 2008**

YEAR	Max. estimate	Min. estimate	Central estimate
2001	115,687	39,456	77,572
2002	86,964	29,660	58,312
2003	84,837	28,934	56,886
2004	95,027	30,934	62,980
2005	73,838	25,174	49,506
2006	67,978	22,905	45,442
2007	63,504	22,981	43,243
2008	54,064	18,439	36,252

Note: value for 2004 reflects pre-EU-Enlargement

Source: Taken from Jandl 2009: 7

*70,000 or 80,000 to 100,000 illegally staying foreigners in 2003*

In an earlier estimate of the irregular resident population Jandl (2003) starts off from the estimate on irregular migrant work discussed in section II.2.1.1 above. Comparing the estimate with data on legal residents from the most important source countries of irregular migrant workers (basically Central, Eastern and South Eastern Europe) he concludes that some 80 per cent of them have no residence permit. On the other hand, he assumes that there are only around 20,000 foreigners without a residence permit who do not work irregularly (as most would have to find means to sustain themselves). Additionally, there are foreigners who appear to be legal residents even in case their papers are checked by the police – for example those who are in deceptive marriages, who are adopted illegally or who use forged passports or the identity of other persons. Adding up these component estimates, Jandl concludes that on average there are around 70,000 foreigners who are staying illegally in Austria.

<sup>45</sup> 2004 was used as the year before EU enlargement from EU15 to EU25. Jandl subtracted the share of EU citizens among the suspects without regular residence status from the adjusted numbers of irregularly resident crime suspects. For 2001 to 2004 the share of EU 15 citizens was subtracted, for 2005 to 2006 the share of EU 25 citizens and for 2007 and 2008 the share of all EU 27 citizens among all crime suspects was subtracted from the adjusted numbers.

<sup>46</sup> For a discussion on different crime levels and the usage of suspect statistics, see Vogel and Aßner 2009 (<http://www.diakonie-hamburg.de/illegale>).

It must be added that both the former and the latter estimate produced by Jandl refer to 2003, that is before the recent EU enlargements, which established free residence (though not yet free employment rights) for citizens of these 10 new EU countries in Austria. In later (2006) comments to the press, Jandl indicates that he considers the former estimate on irregular migrant work to be too low for 2006 and the latter estimate on illegal residence as too high for 2006<sup>47</sup>. In methodology (common sense reasoning on the basis of available indicators, composite estimate), Jandl's estimate is relatively similar to Biffl's methodology to estimate the illegally employed workforce and is fraught with the similar kinds of problems.

There is another estimate on foreigners staying in Austria irregularly provided by the **Federal Government for Health and Women** (BMGF, 2003: 73-74). This estimate originates from Mr. Blumauer of the Federal Ministry of the Interior who puts the number of foreigners staying in Austria illegally at 80,000 to 100,000. This estimate is based on the number of apprehensions of "illegal persons" at the Austrian border, or within the territory, which was in 2002 48,436. Although it was not stated, this estimate is obviously based on the often used multiplier technique (multiplier: two) which is very problematic because there is no reason for using this multiplier for Austria. Moreover, the estimate includes no clear definition of illegal stay or any other further explanations and the number is not a good basis for an estimate as it includes persons who entered or stayed illegally in Austria, persons who were smuggled to Austria and smugglers (BMI, 2004: 14). This number also includes asylum seekers and persons who tried to leave Austria illegally.

According to the assessment of the Criminal Intelligence Service Austria (*Bundeskriminalamt*) the different origins of the persons apprehended have to be considered when using the multiplier technique. There are persons who do not care about being apprehended because they are willing to lodge an asylum application (Russian citizens from Chechnya for instance) and hence the multiplier is equal to one. On the other hand, there are persons using Austria as a transit country or otherwise don't use the asylum system and therefore, are endeavoured not to be apprehended in Austria (persons from China for instance) which leads to a higher multiplier.<sup>48</sup>

### *Statistical Indicators*

According to the report of the Criminal Intelligence Service, in 2006 16,084 persons were apprehended on grounds of illegal residence within the territory of Austria (BMI, 2007: 20).

## **II. 2. 2. Gender composition**

The "smugglers' database" provide some indication as to the gender composition of illegal migrants. However, the published statistics on gender, age and nationality (see above, description of the dataset) do not distinguish between persons apprehended in the country from those leaving and entering the country, thus adding an additional factor of uncertainty.

According to the Federal Criminal Police Office there were more smuggled men apprehended than smuggled women (69 per cent men and 31 per cent women in 2006). There were also more men apprehended who were illegally entering or residing in Austria (56 per cent men and 44 per cent women in 2006), however, this difference is not that striking. The pooling of different groups allows no further analysis of the gender composition, due to the lack of

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<sup>47</sup> Email from Michael Jandl, 2 December 2007

<sup>48</sup> Interview with Colonel G. Tatzgern, Head Central Service Combating Alien Smuggling THB, 02 Jan. 2008.

possibilities to control possible covariates (age, place, asylum seeker, visa overstayers, police methods etc.) (BMI, 2007: 29 and 33).

#### *Balanced gender ratio for irregular working migrants*

The MIGIWE project (Jandl/Hollomey/Stepien 2007) also provides an assessment of the gender composition using the Delphi interview methodology.

More than 70 per cent of the interviewed experts<sup>49</sup> put the gender ratio for all sectors combined as balanced between women and men. 28 per cent of the experts think that there is a male dominance in the irregular migrant work in Austria. Concerning specific sectors, the assessment of experts are quite traditional, as quoted in the following:

- Construction: explicitly dominated by men
- Care: explicitly dominated by women
- Cleaning: explicitly dominated by women
- Trade and industry: balanced with a tendency for male dominance
- Agriculture: balanced with a tendency for male dominance
- Catering and tourism: balanced with a tendency for female dominance

(Jandl/Hollomey/Stepien, 2007: 28)

#### *Discussion*

Experts were only ask to provide a very general assessment on the gender ratio and do not provide an exact estimation. Moreover, the assessment does not deviate from the distribution of non-migrant men and women according to general convention and hence does not provide information on peculiarities of gender related irregular migrant work<sup>50</sup>.

## **II. 2. 3. Age composition**

#### *Data*

Statistics on the age composition of apprehended aliens can be found in the “report on human smuggling”, published annually by the Ministry of the Interior.

**Table II.5: Smuggled persons and persons illegally staying or residing differentiated by age groups 2006**

	0 – 7 years	8 – 14 years	15 – 18 years	19 – 30 years	31 – 40 years	41 – 50 years	51 – 60 years	60 + years
Smuggled person	5.8 %	4.8 %	9.4 %	48.2 %	20 %	8.3 %	2.1 %	1.3 %
Persons illegally staying/entering	1 %		3 %	47 %	28 %	14 %	5 %	2 %

Sources: BMI, 2007: 30 and 34

In both categories (smuggled/ illegally staying and/or entering), roughly half the persons are aged between of 19 and 30 years. In case of persons who were apprehended because they were staying or entering (or leaving) illegally, the number of persons younger than 19 is very low (4%), however, this difference could result from police practice, that is to say that teenager and children are not controlled by the police that often as adults are.

<sup>49</sup> In Delphi round 1

<sup>50</sup> For more detailed criticism of the Delphi method see section 2.5

### *Estimates*

There are no global estimates for the age composition of undocumented migrants in Austria. However, there is an estimate of the number of students in the age group 6 to 15 years old residing in Austria irregularly. This estimate is also the only example that the residual estimation technique - a comparison of stock data from two (or more) different data sources - has been applied in Austria. As we show in the following, the example also shows the potential problems of the residual estimation technique.

#### *5,000 to 7,000 irregular students*

The estimate produced by Biffl (2002) concerns students in compulsory education<sup>51</sup> residing in Austria illegally. Biffl uses the residual estimation technique by comparing the stock data of students in grade 1 to 10 derived from school statistics (1999/2000) with the annual average (1999) for single age groups derived from the “extrapolation of the resident population” (*Bevölkerungsfortschreibung*).<sup>52</sup> Biffl shows that the number of foreign students (attending grades 1 to 10) for 1999 is about 13,500 or 17 per cent higher than the number of foreign children (aged 6 to 15 years). She also shows that the data of the microcensus in Austria better matches the data of the school statistics than the extrapolation of population. Biffl explains these differences with problems of the extrapolation of the sample of the microcensus on the one hand and a certain rate of illegality on the other hand. Biffl concludes that these deviations are clear indicators for the irregular/undocumented residence of students, i.e. immigration outside official family reunification channels. On the basis of these considerations, Biffl estimates the number of students in the age group 6 to 15 years who are residing illegally in Austria to be between 5,000 and 7,000 (Biffl, 2002b: 102-103). Biffl’s estimates have been widely quoted in Austria and also gave rise to an intense, if brief, debate on whether schools should control the legal status of children at enrolment.

### *Discussion*

It is unclear how Biffl arrives at her estimate of 5,000 to 7,000 illegally resident students aged 6 to 15 years and why she does not take the absolute difference between the two main sources considered as her basic estimate. Presumably, the estimate is based on a consideration of the differences between the microcensus and the extrapolation of the resident population. Although Biffl refers to the problems of the sample of the microcensus, in particular, as non-nationals are concerned, there are also known problems of the extrapolation of the population on the basis of the census 1991 data. The results of the 2001 census showed that the estimated resident population, calculated in the framework of the extrapolation of the population was too high. In the specific age group on which Biffl focuses, by contrast, the original extrapolation underestimates the number of non-nationals. According to the former head of the Population Statistics Division, already the figures for the total population for the 1991 census were too high. The main reasons seems to be frequent cases of double counting as well as the general lack of mechanisms to double-check figures collected by municipalities.<sup>53</sup>

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<sup>51</sup> i.e. primary school (grade 1 to 4) and lower secondary school pupils (until grade 9). Students are normally enrolled at the age of 6 if born before August/ September of a given year.

<sup>52</sup> The extrapolation was based on the results of the 1991 census which was adjusted annually by birth, death and naturalization statistics as well as estimates on net migration flows (1991 to 1995) and migration statistics (1996 onwards), respectively, .

<sup>53</sup> Interview with Richard Gisser – Head of Population Statistics Division of Statistics Austria from 1985 to 2001, 18 December 2007

The revised estimate for children in the age group six to 15-year olds in 1999, based on the 2001 census and available from Statistics Austria<sup>54</sup>, deviates from the original extrapolation as quoted by Biffl (2002, 102).<sup>55</sup>

**Table II.6: School statistics and extrapolations of population 1999**

A	6-15 years, original extrapolation	Austrians	861438
		Non-nationals	80084
B	6-15 years old, revised extrapolation	Austrians	858730
		Non-nationals	89064
C	School Statistics 1999/2000 (grades 1 - 10)	Austrians	875122
		Non-Nationals	93554
Difference A-B		Austrians	2708
		Non-Nationals	-8980
Difference A-C		Austrians	-13684
		Non-nationals	-13470
Difference B-C		Austrians	-16392
		Non-nationals	-4490

Sources: A, C: Biffl 2002, 103; B: ISIS database, Statistics Austria

As the table above shows, the difference between the school statistics and the extrapolation of the resident population is reduced to 4,490. The remaining difference can probably be better explained by measurement problems (reference date, bias of sources) than by an illegal status of the children in question. Most importantly, in none of the two main sources Biffl uses – the extrapolation of the population and school statistics – the legal status of persons is recorded. Thus, there is no a priori reason why differences between the two main data sources considered should be explained by the legal status of persons (which is not measured) rather than any other variable. In addition, it is questionable whether the statistics of students in different grades used are a good indicator for the age of students. Not only are children enrolled into school at either 6 or 7 years and hence, may leave school at either 14 and 15 years, but children may also have fragmentary and non-standard educational careers (e.g. repeating grades, enrolling at a slightly later age, etc.), which presumably concerns a significant share of migrant children. Also, the extrapolation used by Biffl is an annual average for the 1999, based on quarterly estimates, while school statistics are collected at the beginning of each school year (i.e. September).<sup>56</sup> Comparing the extrapolated figure for single age groups of the population aged 6 to 15 for the last quarter would have eliminated differences due to shifts between different quarters. Finally, recent investigations by Statistics Austria suggest that data on citizenship collected by school statistics are rather poor, presumably, because citizenship is only recorded when children are enrolled. In subsequent years, citizenship tends to be reported as initially recorded. Thus, change of citizenship by naturalisation may not be reflected in the data.<sup>57</sup>

<sup>54</sup> IsisDatabase, 22 January 2008, Segment R3C, „Wohnbevölkerung im Jahresdurchschnitt gemäß Bevölkerungsfortschreibung“, access via [http://www.statistik.gv.at/web\\_de/services/datenbank\\_isis/index.html](http://www.statistik.gv.at/web_de/services/datenbank_isis/index.html)

<sup>55</sup> Although the study was published in 2002, the revised extrapolation (considering the results of the census 2001) was not available for Biffl at the time of her study.

<sup>56</sup> See the entry on statistics on school attendance in the COMPSTAT database ([www.compstat.org](http://www.compstat.org))

<sup>57</sup> E-mail, Josef Kytir (Statistics Austria), 31 January 2008

## II. 2. 4. Nationality composition

### Data

The citizenship of persons apprehended by the police is illustrated in the “smugglers report”:

**Table II.7: Smuggled persons and persons illegally staying or entering by citizenship 2006 and 2007 (main countries)**

	Smuggled persons				Persons staying/entering illegally				Total			
	2006		2007		2006		2007		2006		2007	
	Total	in %	Total	in %	Total	in %	Total	in %	Total	in %	Total	in %
Romania	137	1,1%	8	0,1%	21293	80,9%	294	6,7%	21430	55,5%	302	2,1%
Serbia and Montenegro*	2223	18,1%	1447	14,7%	490	1,9%	603	13,8%	2713	7,0%	2050	14,4%
Russian Federation	1506	12,3%	1664	16,9%	189	0,7%	166	3,8%	1695	4,4%	1830	12,9%
Moldova	1250	10,2%	772	7,8%	196	0,7%	175	4,0%	1446	3,7%	947	6,7%
Bulgaria	19	0,2%	3	0,0%	1373	5,2%	41	0,9%	1392	3,6%	44	0,3%
Ukraine	724	5,9%	612	6,2%	275	1,0%	329	7,5%	999	2,6%	941	6,6%
Turkey	611	5,0%	510	5,2%	155	0,6%	205	4,7%	766	2,0%	715	5,0%
Georgia	476	3,9%	309	3,1%	164	0,6%	130	3,0%	640	1,7%	439	3,1%
India	530	4,3%	402	4,1%	93	0,4%	152	3,5%	623	1,6%	554	3,9%
Mongolia	445	3,6%	235	2,4%	59	0,2%	34	0,8%	504	1,3%	269	1,9%
Other	4349	35,4%	3880	39,4%	2034	7,7%	2246	51,3%	6383	16,5%	6126	43,1%
<b>Total</b>	<b>12270</b>	<b>100%</b>	<b>9842</b>	<b>100%</b>	<b>26321</b>	<b>100%</b>	<b>4375</b>	<b>100%</b>	<b>38591</b>	<b>100%</b>	<b>14217</b>	<b>100%</b>

\* For better comparability the numbers of persons from Serbia and Montenegro were added up in 2007, although the countries were counted separately (partly since 2006).

Source: BMI, 2007: 22; BMI, 2008: 29

In 2006, 21,293 of those persons illegally staying or entering held Romanian citizenship, by far the largest group. Citizens of Serbia and Montenegro were second (2,713), followed by Russians (1,695), Moldovans (1,446), and Bulgarians (1,392). However, in 2007, almost no Romanians were apprehended due to irregular stay or entering, and the main countries of origin of those persons were Serbia and Montenegro<sup>58</sup> (2,050), followed by Russians (1,830), Moldovans (947) and Ukrainians (941). There are big differences in the share of persons who were smuggled. While almost none of the Romanian and Bulgarian persons were smuggled (in 2006 and in 2007), almost all persons from Serbia and Montenegro, Russian Federation and Moldova apprehended at the border have been smuggled. A comparison of asylum statistics and statistics on smuggled persons shows a strong correlation between the use of the asylum system and being smuggled in regard to particular nationalities, notably persons from Serbia and Montenegro, Russians and Moldovans. Thus, in 2006 there 2,515 asylum applications from Serbians, 2,441 applications from Russians and 904 applications by Moldovans; (BMI, 2007c: 5).

<sup>58</sup> Citizens from Serbia and from Montenegro were added up for better comparability.



The Agency for the Control of illegal Employment (KIAB) maintains information on the country of origin of foreigners found illegally employed. The data show all persons apprehended because of illegal employment in the meaning of the Aliens Employment Act in 2007, broken down by region of origin. The absolute majority (57 %) of persons apprehended originate from the new EU member states (EU-12), followed by persons from European countries outside the European Union, constituting 22 per cent of all apprehensions. Persons with citizenships from Asian countries constitute 8.6 per cent of all apprehended people and persons from the EU 14 make up 5.5 per cent. Further 5.5 per cent of all apprehensions concern persons who were stateless, whose citizenship was not assigned or unknown. Persons originating from Africa, America or Australia are of minor importance.

However, the data are likely to be biased in several ways:

First, the main mandate of KIAB is to combat the evasion of taxes and social security contribution in employment. The aim of work site inspections thus is to detect illegal employment in general, although it is unclear to what extent nationals are subject to controls. Second, inspections are not random, but usually focus on economic sectors with an (assumed) high share of undeclared work. Third, inspections consist not only routine controls, but persons may also be controlled on the basis of denunciations and/ or suspected engagement in undeclared work. Fourth, there is a clear relationship between the number of persons found illegally employed and the number of work site inspections (“control intensity”). In addition, data are also biased by the fact that there are strong legal constraints limiting the scope for the control of private households. Fifth, the numbers of foreigners found working illegally in a given sector is linked to the general share of foreigners working in this sector. Given that there is a control bias towards sectors with a high share of foreign workers (notably Construction and Accommodation and Food Services), there is also a strong bias in statistics on foreigners in irregular employment.

**Table II.8: Persons apprehended due to illegal employment in the meaning of the Aliens Employment Act in 2007 differentiated by region of origin**

Unknown, not assigned or stateless	EU old*	EU new**	Remaining Europe	Asia including Middle East	Africa	America	Australia	Total
478	485	4980	1916	755	121	28	4	<b>8767</b>
5.5%	5.5%	56.8%	21.9%	8.6%	1.4%	0.3%	0.0%	<b>100%</b>

\* Before 2004 \*\* All states which acceded the EU in 2004 and after

Source: KIAB<sup>59</sup> and authors' calculations

### *Estimates*

There are no estimates trying to quantify the composition of undocumented migrants by citizenship for Austria. However, the MIGIWE Delphi survey also attempted to rank the most important countries of origin of migrants illegally employed by their quantitative importance in different sectors.

### *Poland as the leading sending country for irregular working migrants*

According to the Delphi study of the MIGIWE project, most irregular working migrants originate from Poland, successor states of former Yugoslavia, Slovakia, Hungary, Turkey and Romania, however, the countries of origin are differently distributed in the various sectors (Jandl/Hollomey/Stepien, 2007: 30).

<sup>59</sup> The data were generously provided by A. Stary (Federal Ministry of Finance) via Email, 10 April 2008.

According to the study, the construction sector is dominated by irregular working migrants from Poland and the successor states of former Yugoslavia. Agriculture is also dominated by migrants from Poland, followed by persons from Hungary, Slovakia, and Romania. In the sector of catering and tourism irregularly employed migrants mostly originate from the former Yugoslavia, Slovakia and Hungary. For women working in bars and night clubs (sex workers), sending countries such as the CIS-countries, Hungary, Bulgaria, and Romania were mentioned most often by the experts. In domestic work the main countries of origin are Poland, Ex-Yugoslavia and Slovakia; while the most important countries of origin in the care sector are Slovakia and the Czech Republic for the North, Centre and West of Austria, and Poland and Hungary for the eastern parts of Austria. In trade and industry the former Yugoslavia, followed by Poland, Turkey, Hungary, Slovakia, Czech Republic and Romania were regarded as the main countries of origin; however, for this sector a large number of experts declined to give a response (Jandl/Hollomey/Stepien, 2007: 30).

## II. 2. 5. Economic sector composition

*Construction and Catering and Tourism as sectors with the highest shares of irregular migrant work*

Again, the MIGIWE project is the only study which is able to provide any estimates; however, experts were requested only to estimate the share of the irregular migrant workforce in certain sectors.

**Table II.9: Estimated share of irregular migrant work in total employment by branches - expert estimations (Delphi II)**

	Minimum	Average	Maximum	Number of estimates	No estimates	Total respondents
Construction	10	15,4	30	13	9	22
Catering and Tourism	10	15,0	30	13	9	22
Agriculture	3	13,3	20	10	12	22
Trade and Industry	5	5,2	7	10	12	22
Whole Economy	2,5	5,0	7	10	12	22

Note: If a range was given, the average of the range was taken

Source: Jandl/Hollomey/Stepien, 2007: 34

The large number of experts who declined to provide an estimate, however, reduces the value of the estimates finally arrived at. Nine and twelve, respectively, out of 22 experts refused to provide any estimate, which indicates a lack of consensus among experts and thus suggests that in terms of the method's own internal logic, the final estimate has to be seen as problematic. The lack of consensus in turn may also be taken as an indicator of the fragmented knowledge on irregular work in general, again suggesting that estimating irregular work through Delphi may be inherently problematic. In addition, several sectors are not included in the survey, such as sex work, domestic work or care work.

### *Data*

Data collected by the agency for the control of illegal employment (KIAB) on the number of persons found to be illegally employed or engaged in undeclared work also provide information on the sector composition on persons apprehended during work sites controls. Data are differentiated by economic sectors (broadly following the NACE classification) and place of control. However, as controls are targeted on "high-risk" sectors, the sector composition reflects above all the control activities of the agency.

**Table II.10: Apprehended illegally employed foreigners 2005 - 2007**

Sector	2005		2006		2007		Total	
	Illegally employed foreigners	Enterprises inspected	Illegally employed foreigners	Enterprises inspected	Illegally employed foreigners	Enterprises inspected	Illegally employed foreigners	Enterprises inspected
1. Construction	1855	6098	2359	7277	3419	9062	<b>7633</b>	<b>22437</b>
2. Accommodation and food service activities	2012	4502	2142	4777	2896	5915	<b>7050</b>	<b>15194</b>
3. Private households*	793	512	748	506	1155	742	<b>2696</b>	<b>1760</b>
4. Real estate activities, leasing of movable objects, company related services	557	1101	782	1649	1339	2282	<b>2678</b>	<b>5032</b>
5. Agriculture and forestry	629	646	464	490	789	799	<b>1882</b>	<b>1935</b>
6. Trade; Repair and maintenance of motor vehicles and other hard goods	507	1356	574	1480	729	2619	<b>1810</b>	<b>5455</b>
7. Production of material goods	517	1083	413	1139	565	1529	<b>1495</b>	<b>3751</b>
8. Information missing	238	603	346	1055	330	1314	<b>914</b>	<b>2972</b>
9. Other service activities	232	496	270	637	358	1024	<b>860</b>	<b>2157</b>
10. Traffic and intelligence service	190	1618	271	1857	327	2156	<b>788</b>	<b>5631</b>
11. Health, veterinary and social services	46	44	25	44	37	59	<b>108</b>	<b>147</b>
12. Energy and water supply	10	21	22	34	9	38	<b>41</b>	<b>93</b>
13. Financial and insurance activities	10	7	4	10	16	16	<b>30</b>	<b>33</b>
14. Education	3	6	8	13	5	18	<b>16</b>	<b>37</b>
15. Mining and quarrying	5	46	3	55	5	52	<b>13</b>	<b>153</b>
16. Fishing and fish farming	0	0	8	4	1	2	<b>9</b>	<b>6</b>
17. Extraterritorial organisations and bodies	3	3	1	4	2	2	<b>6</b>	<b>9</b>
18. Public administration, national defense, social insurance	1	9	4	12	0	18	<b>5</b>	<b>39</b>
<b>Total</b>	<b>7608</b>	<b>18151</b>	<b>8444</b>	<b>21043</b>	<b>11982</b>	<b>27647</b>	<b>28034</b>	<b>66841</b>

\*Note: The fact that the number of apprehended persons is higher than the number of worksite inspections is likely to be due to the fact that it was employment agencies rather than individual households upon which worksite inspections focused.

Source: KIAB<sup>60</sup> and authors' calculations.

In the years 2005 to 2007 approx. 28,000 non-nationals were apprehended because of illegal employment or engagement in undeclared work. Most of them (27%) were found in the construction sector, followed by 'accommodation and food service activities' (25%). These two sectors constitute more than the half of all apprehensions of illegally employed foreigners. The third most important sector, where illegally employed foreigners were found,

<sup>60</sup> The data were generously provided by A. Stary (Federal Ministry of Finance) via Email, 10 March 2008.

is ‘private households’ (9.6%). ‘Agriculture and forestry’ as well as ‘trade together with repair and maintenance of motor vehicles and other hard goods’ each constitute around 6 to 7 per cent of the apprehensions.

#### *40,000 irregular care workers in Austria – a popular myth*

After it was revealed in 2006 that the family of the then Austrian chancellor Wolfgang Schüssel employed an illegally employed care worker to care for the chancellor’s mother in law, which was followed by similar revelations about other high-ranking politicians, including the president (Die Presse, 23 August 2006), illegal employment of foreign care workers became a focus of public debates, which, at the time of writing, continue unabated. In the course of the public debates numerous estimates on the number of illegally employed care workers in Austrian private households were quoted by various media.

Most often the number of 40,000 care workers was quoted<sup>61</sup>, however, the basis or source of this estimate are unclear. Recently, the Federal Ministry for Social Affairs and Consumer Protection corroborated the figure by own estimates. According to the Ministry<sup>62</sup> its estimate is based on estimates of several Federal provinces. The estimate of the number of illegally employed care workers in Vorarlberg seems to have been based on information or estimates obtained from general practitioners, for other Federal provinces the basis of the estimate is entirely unclear. Nevertheless, the global estimate for Austria as a whole derived from this exercise was in the same order as the figures already reported by the press. In a second step, the Ministry compared the estimate of 40,000 with the number of persons who receive long term care benefit (*Pflegegeld*) at levels 4 or 5 to 7 (app. 100,000 persons in 2005<sup>63</sup>). Considering persons in institutional care or clients of (legal) mobile care services, the estimate seemed plausible to the Ministry. However, the representative of the Ministry contacted by the research team stressed that the figures should be treated only as a rough estimate and that the real number of illegally employed foreign care workers was possibly smaller.<sup>64</sup> Overall, the objective of the exercise undertaken by the Ministry of Social Affairs was to check the plausibility of the most widely quoted estimate of 40,000 illegally employed care workers, rather than providing an original estimate.

There are also indications that the figure of 40,000 is a historical legacy of earlier debates on illegal employment and undocumented migration. It seems to have been in use in the early 1990s<sup>65</sup> and can be traced back to Matuschek (1985:176). She somewhat imprecisely quotes Gehmacher (1978: 153), who estimated the number of tourists working in Austria (“tourist employment”) in the mid-1970s at 36,000, without specifying the source or assumptions on which this estimate was based.

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<sup>61</sup> See Schmid and Prochazkova, 2006: 458; LBIMGS, 2005: 36 and Oberösterreichische Nachrichten, 26 September 2006; Die Presse, 13 March 2007

<sup>62</sup> The estimate was also used by Minister of Social Affairs, Erwin Buchinger. See <http://derstandard.at/?url=/?id=3100857>

<sup>63</sup> [http://www.bmsk.gv.at/cms/site/attachments/0/4/9/CH0356/CMS1078919110304/pflegegeldbezieherinnen\\_.xls](http://www.bmsk.gv.at/cms/site/attachments/0/4/9/CH0356/CMS1078919110304/pflegegeldbezieherinnen_.xls)

<sup>64</sup> Telephone interview Mr. Hofer, Federal Ministry of Social Affairs and Consumer Protection; 03 January 2008

<sup>65</sup> Interview, August Gächter, 21 November 2007

### *1,000 to 6,000 full-time equivalents working irregularly as care workers*

The estimated number of 40,000 illegally employed foreign health care workers is far too high, according to the final report of an assessment of the situation of the mobile home care in Austria, published by the Ludwig Boltzmann Institute for Medicine and Health sociology in 2005.

The work provides two main reasons for the rejection of the often stated estimate:

- The mobile home care sector is much smaller than the care in hospitals which is about 40,000 care workers (full-time-equivalents).
- There is doubt of the availability of so many qualified health care workers for irregular employment in Eastern and Central European countries.

(LBIMGS, 2005: 37)

Based on considerations and assessments of the availability of qualified care workers, irregular workers could only be assessed to comprise a tenth of the regular working care workforce. Thus, the magnitude of foreigners working irregularly as care workers in Austria is between 1,000 to 6,000 full-time-equivalents. 60 per cent are considered to be care workers and 40 per cent domestic workers which is the same ratio as for the regular sector (LBIMGS, 2005: 37).

### *Discussion*

The main criticism for this estimate is that the authors use a very narrow definition of care. The authors only consider qualified nursing in the narrow sense, and exclude other care work, which is probably more important in quantitative terms. However, the authors stress that theirs is a preliminary estimate and should not be a substitute for a more thorough research and a more sophisticated estimate.

### *Around 50,000 irregularly working migrants in private households*

In the course of the MIGIWE project the number of irregular employed health care workers was attempted to be quantified with the Delphi technique<sup>66</sup>. The estimates were differentiated by care workers and housekeepers. The average estimate for irregular working foreign nurses in Austrian private households is 26,636 (between 15,000 and 50,000) and for foreign housekeepers 24,444 (between 20,000 and 40,000). However, estimates for irregular care workers were only provided by 11 experts out of 22 and estimates for housekeepers were provided only by 9 out of 22 experts (Jandl/Hollomey/Stepien, 2007: 35).

The main criticism for these estimates is the lack of consensus reached by the experts, represented through the large amount of refusals of estimates by the experts. The refusal of 50 per cent or more of the interviewed experts is a clear indicator for the problems and inaccuracies of these estimates.

### *20,000 healthcare workers working irregularly*

Another estimate on the number of illegal foreign health care workers is provided by Schmid and Prochazkova (2006). The authors assume that there are 20,000 irregularly employed caretakers working in about 10,000 private households. These foreign care workers are served by special agencies and are mainly from the Czech Republic and Slovakia. The estimate is based on considerations of the size of the regular home care sector and the numbers of registered foreign care workers in the files of the agencies which distribute health care workers in Austria. These (limited) numbers of registered persons are obtained via interviews

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<sup>66</sup> See chapter 1.

with such agencies. The estimate concerns caretakers and not housekeepers and cleaners; however, the differences between these kinds of jobs are not clearly determined.

According to Schmid and Prochazkova, there is also an unknown number of undocumented foreign housekeepers (Schmid and Prochazkova, 2006: 458-459).

A problem of this estimate is that the derivation of the number is not illustrated entirely; however, the authors of the article are well acquainted with the field of care and the estimate can be treated as an expert estimate.

### *Discussion*

One of the problems of estimating the number of irregularly employed foreign care workers derives from the problems of an exact definition what care (or nursing) actually means. However, it clearly makes a difference whether a person works as a nurse, as a cleaner, caretaker, or is involved in more activities at a time.

In summary, the popular estimate of 40,000 irregular employed foreign health care workers in private households has to be rejected for various reasons, most importantly because neither the source nor the methodology underlying the estimate is known.<sup>67</sup>

## **II. 2. 6. Former asylum seekers and refugee related groups**

There are no estimates on the number of former asylum seekers who still remain in the country after their application was rejected and their status is illegal. This concerns persons who stay in the country and persons who are further migrating to another country illegally.

It is also hard to provide data on former asylum seekers in general. There are the numbers on rejections in the first and second instance, but these numbers do not provide sufficient information on asylum seekers who are staying on illegally, because on the one hand there is a further possibility for an appeal at the administrative court (*Verwaltungsgerichtshof*), and on the other hand, rejected asylum seekers are often deported after the rejection of their application. According to a representative of the asylum co-ordination Austria, an Austrian umbrella NGO of refugee advocacy organisations, the number of rejected asylum seekers, who definitely lost their right to remain in the country, is estimated at lower than 1,000 in 2006.<sup>68</sup> However, it is not known how many of those persons have remained in the country after the rejection of their asylum application.

**Table II.11: Number of discontinued asylum procedures 2003-2006**

	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>
<b>Number of all asylum applications</b>	32359	24634	22461	13349
<b>Unfounded</b>	7065	5905	1399	1303
<b>Discontinued asylum procedures</b>	18029	7603	6765	4023
<i>Share of discontinued asylum procedures in Percentage of total asylum applications</i>	55.7%	30.9%	30.7%	30.1%

Note: A discontinued asylum procedure does not necessarily refer to an asylum application lodged in the same year. Consequently, the percentages in the table are only approximations.

<sup>67</sup> None of the following institutions was able to specify the source of the estimate or the assumptions behind it: Federal Ministry of Economics and Labour of the Republic of Austria, the Public Employment Service Austria (AMS) and the Caritas.

<sup>68</sup> E-mail from Herbert Langthaler, 25 February 2008

Source: Ministry of the Interior

In this respect, the number of discontinued asylum procedures is more appropriate to estimate the number of former asylum seekers who “went underground” or migrated to another country illegally. The number of discontinued asylum procedures is published by the Ministry of Interior annually.

Since 2003 the number of discontinued asylum procedures has decreased steadily. This reflects the overall decrease of asylum applications in Austria and especially for 2003 and 2004, the introduction of the Eurodac-System in the newly acceded neighbouring states of the European Union.

However, it is not known how many of these persons migrated to another country in Europe, or to another continent, even returned to their country of origin, or whether these persons stayed in Austria illegally.

In the context of a recent campaign to regularise rejected asylum seekers without a legal status who have resided in Austria for more than five years led by the Austrian NGOs Diakonie and SOS-Mitmensch, the spokesperson of the Diakonie Austria, Michael Chalupka, put the number of persons eligible for such an “earned regularisation” programme at 4,000 persons, presumably on the basis of concrete cases known to the NGOs supporting the campaign.<sup>69</sup>

## II. 2. 7. Other groups raising specific concern

### *No estimates on undocumented sex workers*

One group raising specific concern is the group of sex workers, who are often victims of trafficking and forced labour. There are no sophisticated estimates for this special group of persons, but two estimates exist which are rather made by rule-of-thumb.

According to the Security Report (*Sicherheitsbericht*) of the Austrian government (BMI and BMJ, 2005: 225), there are about 7,000 unregistered prostitutes in Austria who work in establishments, dwellings and on the street. The authors refer to experts’ estimates which assume the number of unregistered (thus irregular/illegal) sex workers to be double the number of registered prostitutes which is about 3,500 in Austria. However, the estimate does not consider the share of foreigners (nor their status) to assess the amount of foreign women who live (or are forced to live) without status in Austria.

For 2003 Michael Jandl assumes that there are only 3,000 foreign sex workers working irregularly<sup>70</sup>.

### *Hundreds of ‘illegal spouses’*

Following the entry into force of the 2005 Settlement and Residence Act (replacing the 2002 Aliens Act as amended) in January 2006, asylum seekers and persons illegally staying can no longer obtain a residence permit by virtue of a marriage with an Austrian citizen. As a result, an estimated 1,000 persons – the majority of whom were former asylum seekers – became illegal.<sup>71</sup> The estimate is based on the number of cases of bi-national couples involving

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<sup>69</sup> Die Presse, 21/22 June, 2008: „Humanität mehr gehorchen als Gesetzen“ – Die evangelische Kirche fordert Bleiberecht für 4000 Menschen und kokettiert mit zivilem Ungehorsam.“ Available online at <http://diepresse.com/home/panorama/oesterreich/392806/index.do?from=suche.intern.portal>

<sup>70</sup> Section 2. 1. 1.

<sup>71</sup> The introduction of an absolute requirement for out-of-country applications for permits for family reunification in case of family members of Austrian citizens in itself only explains part of the problem. The

Austrian citizens and an illegally staying third country nationals as reported by the NGO “Ehe ohne Grenzen” (Marriage without borders) (cf. DerStandard, 23 July 2007; ORF, 08 February 2008). Until 2005, the aliens police and/or immigration offices usually recommended asylum seekers who had married an Austrian citizen to withdraw their asylum claim (a precondition for being able to apply for a residence title) and to apply for a settlement permit for family reunion. This usually involved a couple of weeks to some months during which such persons were technically illegal. To some degree, the 1000 or so persons who slipped into illegality are due to an administrative reorganisation and the shift of the competence of processing applications for family reunion from the aliens to police to immigration offices of the Bundesländer. Because of the pending implementation of the law, the aliens police stopped processing applications for in-country made applications for family reunification in the last quarter of 2005. The immigration offices, however, had to process the applications in terms of the new legislation, irrespective of the date of submission. Because it is not entirely clear whether this number includes only persons who became illegal because of the change of law or also other persons who had married an Austrian citizen, who have not withdrawn their asylum applications, but whose asylum claim was rejected, the figure should be treated as a stock rather than as a flow figure.

## **II. 3. Estimates, data and expert assessments on flows**

### **II. 3. 1. Demographic flows (birth and death in illegality)**

There are no estimates or data available on the number of births and deaths in illegality. In Austria every birth of a child within the territory has to be reported and for this, several documents are needed, including birth certificate of the mother, confirmation of notification of residence, passport and certificate of citizenship; however, no proof of legal residence is needed for foreign parents.

For reporting the death of a person, a proof of legal status is also not required. Thus, undocumented persons are likely to be included in birth and death statistics, but there are no indications as to the share of illegal residents in both data sources. It might be possible, however, to estimate the share of illegally born children by comparing statistics on residence titles to birth statistics by country of birth and citizenship. However, even then it is unclear whether possible differences between the data-sources can be explained by the status of the children in question.

### **II. 3. 2. Border related flows (entry and exit over ports of entry and green/blue border)**

There are no estimates concerning the inflows or outflows of irregular migrants for Austria. As mentioned above, the apprehensions of persons at the border are often used as an indicator of irregular flows to Austria.

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institutional shift from the aliens police to the provincial administrations meant that over a one to two months period before the entry into force of the new Settlement and Residence Act applications under the old regulations were no longer dealt with. Because the new act did not foresee any transitional rules, applications submitted under the old law had to be decided on the basis of the new act, thus creating a new “illegality trap” (Sohler 1999).



However, one could interpret differences between flow data based on administrative sources (first permits issued, asylum applications) on the one hand, and migration statistics based on the population register as an indication of illegal inflows. Thus, in 2006 altogether 22,966 first permits were issued to third country nationals, while 13,349 asylum applications<sup>72</sup> were lodged, giving a total inflow of 36,315 third country nationals. Migration statistics based on the population register on the other hand put the total inflow of third country nationals in 2006 at 45,684. There are several explanations for the difference of 9,369 between administrative data sources on the one hand and the population register on the other. First, previous research has shown that residence permit data may not be completely accurate (see Bilger/Kraler 2006), although the direction of the distortion is not entirely clear. Secondly, since 2003, seasonal workers no longer need a residence permit but instead are given a national visa C+D valid up to 6 months. Visas, however, are not recorded in the aliens information file and thus no statistics on the number of work visas issued are available, while statistics on the number of work permits issued are difficult to interpret.<sup>73</sup> Seasonal workers in tourism might in fact stay for a longer period of time and might, for various practical reasons, also register with the population register. Similarly, there might be a number of persons staying on residence visa (visa D), which is similarly valid up to 6 months but does not give access to employment. Against this background, it is difficult to take the difference between administrative data and migration statistics as a good indicator of illegal inflows.

In 2006, 31,189 rejections at the border (*Zurückweisungen*) were reported. This includes persons who were not eligible to enter Austria, due to several reasons, and persons who were eligible to enter Austria, however, they were suspected to come into conflict with the Austrian law (BMI, 2007d: 34). In 2007, however, the number dropped to 7,612. This steep decrease can be attributed to reduction of the SIS-requests (SchengenInformationSystem) from almost 14,000 in 2006 to 245 in 2007 and the reduction of unlawful entries (*unrechtmäßige Einreise*) which almost halved from 10,075 in 2006 to 5,334 in 2007 (BMI, 2007d: 34, BMI 2008b: 30).

According to the Criminal Intelligence Service Austria, no individual data on persons rejected at the border is collected, the entry is just refused and counted as a case; hence, double counting cannot be excluded. In 2006, the number of persons apprehended when entering the country is reported by the Criminal Intelligence Service in their annual report and was 2,840.<sup>74</sup> The number of persons who are leaving Austria, but were not allowed to stay in Austria are shown in the report of the Criminal Intelligence Service Austria for 2006. These 12,398 persons<sup>75</sup> were apprehended while leaving the country, and 8.5 per cent of these persons were smuggled. However, it is not known how many of these persons were residing in Austria and how many of these persons were just transiting. The report of the Criminal Intelligence Service (BMI, 2007: 4) states that most of these persons were foreigners working within Schengen countries who were on their way back home.

For 2007, 2,838 deportations of illegally residing foreigners were reported; 1,595 voluntary departures were confirmed by the border control and 848 departures were not confirmed. The

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<sup>72</sup> It is reasonable to assume that a majority of asylum seekers will register with the population registry (an authority independent from the police) upon or shortly after submitting an asylum claim, in other words, both “inflows”, even though they might not be inflows in a demographic sense, probably occur at the same time.

<sup>73</sup> Statistics are collected by season rather than by year

<sup>74</sup> See table II.1.

<sup>75</sup> See table II.1.

absence of a confirmation may mean that the concerned person left the country without notifying the authorities or that the person is still residing in Austria in an irregular status.

**Table II.12: Measures of the Aliens Police 2006 and 2007**

Measure	2006	2007
<b>Expulsion (Ausweisung)</b>		
Illegal residence	3276	1748
Other	461	525
Total	3737	1843
<b>Residence ban</b>		
Legal binding conviction	1795	1763
Lack of means of subsistence	1347	981
Threat to the public security	845	822
Deceptive marriage	508	399
Other	799	577
Total	5294	4542
<b>Return ban</b>		
Legal binding conviction	817	518
Threat to the public security	99	36
Other	59	75
Total	975	629
<b>Voluntary departure</b>		
Confirmed	4123	1595
Not confirmed	1532	848
<b>Deportation</b>		
Total	4090	2838
<b>In custody pending deportation</b>	8694	6960

Source: BMI, 2007d: 34 – 35; BMI, 2008b: 30 – 31

### II. 3. 3. Status related flows (regular to irregular, irregular to regular)

#### II. 3. 3. 1. Change from a legal to an illegal status

In 2007, a total of 6,385 expulsions (*Ausweisungen*) and residence bans (*Aufenthaltsverbote*) on several different grounds were reported. Additionally, 629 return bans (*Rückkehrverbote*) for asylum applicants were reported (BMI, 2008b: 30 – 31)<sup>76</sup>.

An expulsion is the legal obligation to leave the Austrian territory and a residence ban is the legal obligation to leave the territory which is coupled with a ban to return for a certain time period.

<sup>76</sup> See table II.11.

As asylum seekers are protected from expulsion during the asylum procedure, they are issued return bans which are pending until the end of the asylum procedure. If an asylum seeker is granted asylum the return ban is suspended and if an asylum seeker is granted subsidiary protection the return ban keeps pending until the subsidiary protection expires (Schumacher and Peyrl, 2006: 302). Thus, return bans do not immediately lead to illegal residence.

The quantitative most important measures are expulsions due to unlawful residence (1,748 in 2007), residence bans due to legally binding convictions (1,763 in 2007), the lack of means of subsistence (981 in 2007), being a threat to the public security (822) and deceptive marriages (399). The most important reason for issuing return bans to asylum seekers is a legally binding conviction (518).

As returns/ residence bans are not consistently enforced, it is likely that a certain number of persons against whom a residence ban/expulsion order has been pronounced while in the country remain. The number of persons whose status became illegal in this way but who are still staying in the country can be considered to be very low due to the reason that the majority of these persons were either deported or left the country voluntarily. In 2007, 848 persons' departure was not confirmed by the border control. Although this group of persons potentially remain in the country illegally, the absence of confirmed departure may simply mean that such persons have left without notifying the authorities, whether they have left to another Schengen country or whether they have returned. Persons who are obliged to leave the country may be kept in custody to assure the execution of the expulsion or residence ban. In 2007, 6,960 persons were kept in custody pending deportation.

Another flow from legality to illegality is the upon mentioned group of asylum seekers<sup>77</sup> whose application was rejected (legally binding). Considering the negative decisions of the Independent Federal Asylum Review Board (2,651 in 2006), the number of appeals at the administrative court (*Verwaltungsgerichtshof*) of these decisions (2,504 in 2006) and the rejections of these appeals (700 in 2006), the number of asylum seekers who lost their legal status in 2006 is lower than 1,000 (cf. Langthaler et al., forthcoming).

### **II. 3. 3. 2. Change from an illegal to a legal status**

No explicit regularisation programmes have been implemented in Austria. However, the so-called "*Sanierungsaktion*" implemented in 1990, in the course of which irregularly employed migrants could obtain work permits effectively also regularised the residence status of applicants and involved about 30,000 irregular migrants (Nowotny 1991).

Before 2005, marriage with a citizen constituted another important route into legality. Although Austrian citizens still enjoy a strong entitlement for family reunion with family members from third countries, applications now have to be submitted from abroad and thus no longer enable irregular migrants to obtain a residence permit by virtue of a marriage. However, no estimates on the numbers involved exist. It is difficult to interpret the only quantitative indicator – the number of persons who "became" illegal as a result of the introduction of the obligation to submit applications from abroad estimated at around a thousand (see above, p. 47) – as an indicator for the number of irregular migrants who were regularized as a consequence of marriage.

Since the 2005 Settlement and Residence Act obtaining a humanitarian status is one of the few remaining pathways into legality. This status, first introduced by the 1997 Aliens Act<sup>78</sup> was also granted to rejected asylum seekers who were staying in the country illegally. However, humanitarian statuses have also been awarded on grounds of family ties (for family reunification) and other reasons and also include an unknown share of other categories of aliens.

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<sup>77</sup> See section 2.6.

<sup>78</sup> See part I.

In the last years the numbers of persons who were granted humanitarian stay was decreasing sharply.

**Table II.13: Grants of humanitarian residence permits\***

	Humanitarian residence permit ( <i>Aufenthaltstitel</i> )	Humanitarian settlement permits ( <i>Niederlassungsbewilligung</i> )	Total
2001	1,500	-	1,500
2002	1,466	-	1,466
2003	711	237 (+627)**	1,575
2004	464	196 (+667)**	1,327
2005	254	112 (+478)**	844
2006	144	91 (+61)**	296
2007	188	93 (+150)**	431

\* The numbers include only first permits

\*\* The numbers in brackets are issued for family reunification which are issued when quotas (which define the maximum number of permits issued per category per year) are exhausted

Source: BMI 2007b, 1753/AB XXIII.GP Anfragebeantwortung and BMI Fremdenstatistik 2002 to 2007

#### *Asylum applications as indicators of a transition from an irregular to a (temporary) legal status*

In general, a certain share of asylum applications is likely to be submitted by persons who have been staying illegally before submitting an asylum claim. In these cases, submitting an asylum claim involves a transition from an irregular to a regular status, if often only temporarily for the duration of the asylum procedure. In the Austrian, context, however, asylum applications in general are not a useful indicator for outflows from an irregular to legal status. First, published asylum statistics are not differentiated by place of application (i.e. inland, either at any police post or at reception centres; at the border; abroad) and it is thus not easily possible to distinguish asylum applicants who have submitted an asylum claim at or before entry from those who claimed asylum only after entry.<sup>79</sup> Secondly, there are neither quantitative nor qualitative indications on how long asylum applicants have been staying in Austria before submitting an asylum claim and it is therefore impossible to identify those asylum applicants who can be regarded as having been part of the stock of illegally staying third country nationals. The close correlation of asylum applications with apprehension figures in itself does not provide clear evidence to what extent asylum is linked to stocks of irregular migrants or rather new inflows (see Jandl 2004 on the correlation of apprehensions of smuggled persons and asylum). Thus, the correlation only indicates that the asylum system is linked to irregular migration, but – in the absence of more detailed breakdowns and cross-tabulations of asylum and apprehension figures – does not allow any conclusions on the nature of the link.

#### *The „amnesty“ for irregularly employed care workers*

In response to the “care crisis” and the widespread irregular employment of migrant care workers an amnesty for illegally employed care workers and their employers in Austria was carried out in 2007 and 2008. The amnesty suspended any enforcement action against

<sup>79</sup> In principle, the data is available. According to a recent study on airport asylum procedures, 495 asylum applications were submitted at the Vienna airport between February and August 2007 (Hungarian Helsinki Committee 2007). This figure represents approximately 7.5% of all asylum claims received in the same period - the overwhelming majority of asylum seekers submit their claims from within Austria (see for 2007 figures by month, BMI 2008).

households employing a care worker illegally and the care worker herself/himself for breaches of employment, social security and the Aliens Employment Act on the conditions that households registered employees or, alternatively, care workers registered themselves as self-employed workers. Because the amnesty was only moderately successful initially, the deadline for registrations was extended until 30 June 2008.<sup>80</sup>

Legally, every third country national who is not yet a long term resident in the meaning of directive 2003/109/EC as well as citizens of new Member states found in breach of the Aliens Employment Act or other employment legislation technically also breach the conditions of their stay in Austria and are liable to be deported. To what extent deportation orders are actually pronounced and deportations actually enforced in cases of illegal employment as care workers, however, is unclear.

According to the Ministry for Social Affairs, more than 9,000 registrations were received until 30<sup>th</sup> of June 2008.<sup>81</sup> As the data only counts new registrations, the figure may include persons who have not been employed (irregularly) prior to registration, in other words, the data may include new registrations proper. Between 90 to 95 per cent of those registering registered as self-employed workers. The amnesty basically required legal residence and principle access to employment<sup>82</sup>, based on the assumption that a majority of care workers come from neighbouring new EU member states. Indeed, although the Ministry of Social Affairs does not have detailed statistics on nationality of applicants for the amnesty, the majority of persons registering under the programme are thought to have been Slovaks, followed by Romanians. A small number of Austrian citizens also seem to have benefited from the amnesty, reflecting its basic focus on labour law. Apparently, no or only an insignificant number of third country nationals seem to have benefited from the amnesty. The main reason seems to be a very restrictive practice of the Labour Market Board in regard to issuing work permits – which third country nationals who are not long term residents require. It is unclear why no long term residents (but a small number of Austrian citizens) should have benefited from the amnesty.

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<sup>80</sup> Federal law: 43. Bundesverfassungsgesetz: Pflege-Verfassungsgesetz (NR: GP XXIII IA 547/A AB 430 S. 46. BR: AB 7889 S. 753.)

<sup>81</sup> Telephone Interview, Mr. Hofer, Ministry of Social Affairs, 18 July 2008.

<sup>82</sup> Strictly speaking, however, this requirement was waived as citizens of the 8 new Member States to whom transitional rules apply have been granted access to this specific sector of the labour market only through the amnesty and thus in a sense, after the fact.

## Part III: Discussion and policy implications

As shown in part two, there are relatively few scientific estimates on irregular<sup>83</sup> migration in Austria. The few that do exist focus on irregular employment rather than on irregular residence. Generally, administrative records of apprehensions and enforcement actions are the main sources used to account for irregular migration in public debates. During much of the 1990s, asylum applications were treated as indicators of irregular flows, often being used as synonymous to “illegal migration”, human smuggling and trafficking (and vice versa). And asylum continues to be strongly associated with irregular migration in the current context. Generally, the total number of persons entering Austria illegally and subsequently staying or otherwise without a residence status has to be considered as very low.<sup>84</sup> This said, flows and possibly also stocks have undoubtedly been much higher in the early 1990s and again between in the late 1990s and early 1990s than they are today.

Generally, the quantitative dimension of irregular migration in Austria both in terms of stocks and flows is a marginal issue in public debates and is only occasionally taken up by politicians, policy makers or civil society actors, including trade unions. One factor explaining the low interest in quantitatively accounting for irregular migration may be found in the fact that policy makers and to some degree also academics considered irregular migration to be largely associated with the asylum system. In other words, asylum, not irregular migration has been the focus of public debates during much of the 1990s and up to this date. Although asylum has often been associated with irregular migration in public debates, irregular migration has rarely received much attention in its own right. Demands to use humanitarian stay more extensively and current campaigns for a right to stay (*Bleiberecht*) for persons who have been staying in an irregular situation for more than five years, however, might rekindle a certain interest in the quantitative dimensions of irregular migration, as it raises the question of how many persons would be eligible for regularisation. Similarly, recent developments on the European level, in particular the adoption of the return directive raise certain data issues, notably in regard to the number of non-deportable and informally tolerated persons.

Overall, most estimates on irregular migration fail to take into account the complexity of the phenomenon of irregular migration. As has been argued in part I, irregular migration in Austria cannot be understood following a simple dichotomy of illegal vs. legal migration. Rather, irregular migration involves a whole “spectrum of compliance” (Anderson and Ruhs 2006). Thus, irregular migration often involves persons with a marginal, unclear or transitional status or persons who are legally resident but breach the conditions of stay in a way that makes them liable to be deported. From the perspective of migrants, irregularity is usually a transitory phenomenon – indeed, (non-representative) research results of a study on experiences of immigrants with aliens legislation in Austria suggests that a fair number of migrants have been in an irregular situation at least once during their migration career (Reichel 2006).<sup>85</sup>

Similarly, the majority of asylum seekers, although not illegally staying, have entered the country illegally and thus have at least temporarily been in an illegal situation and may fall

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<sup>83</sup> In part III the term ‘illegal’ is used rather than alternative terms as this is the main term used in the public discourses on irregular migration.

<sup>84</sup> Cf. Reeger and Hofmann, forthcoming: 6 – 9

<sup>85</sup> Among the respondents of the study – a quantitative survey of a snowballed sample of 108 migrants in Lower Austria - almost a quarter had been illegally employed (i.e. working despite they did not have a work and/or a residence permit) at least once during their immigration career (see Reichel 2006, 101).

back into illegality if their claim is rejected or the procedure discontinued; conversely, persons who have been granted subsidiary protection may lose their legal status upon reconsideration of their case if the situation in the country of origin has changed and the reasons for granting subsidiary protection no longer apply. Furthermore, some groups of persons might be technically illegal (rejected asylum seekers; others against whom enforcement action has been taken) or likely to be declared illegal (e.g. asylum applicants with weak claims for asylum; persons in breach of conditions of stay). However, they are largely documented and known to the authorities and are often informally tolerated. In principle, it would be relatively easy to collect data on these persons, but so far no systematic data collection is carried out. Recent changes in the legal framework governing migration and the impact of EU legislation in the area of migration and asylum as well as the accession of 12 countries to the EU in 2004 and 2007, respectively, have complicated the picture even further. As a result, defining and estimating the illegal resident population is increasingly a question of enormous legal complexity.

### **III. 1. Talking numbers: the data production, use and public discourses**

Public discourses linked to production, dissemination and use of indicators and estimates of irregular migration in at least three ways. First, figures – whether estimates or statistical indicators – are employed in public debates, to dramatise, or on the contrary, to downplay the extent of the problem or only to otherwise underpin statements on irregular migration. Thus, figures may play a direct role in public debates, although, as we will see, numbers and number games play a rather minor role in Austrian debates on irregular migration. Secondly, the production of estimates may be heavily influenced by the focus of public debates and thus may in a sense reflect the focus of public debates much more than broader scientific considerations. Generally, however, the relationship between public debates and the production of estimates is probably best conceptualised as a two way relationship, with one influencing the other and vice versa. Third, estimates may be strategically produced or data consciously collected to inform and steer public debates.

In the following, we discuss the main aspects of public debates on irregular migration and in particular, the use of statistics, indicators and estimates in these debates.

#### *Focus on employment*

Part II suggests that overall the focus of available estimates on irregular migration in Austria has been on employment, reflecting the important role of controlling the employment of non-nationals within the wider framework of the regulation of migration. In particular from the perspective of trade unions, however, controlling foreign employment always concerned two dimensions – controlling access to employment AND controlling compliance with industry wide wage agreements, social security and tax obligations and other employment regulations. Available estimates reflect this dual concern and often are not solely about illegal employment in the narrow sense (i.e. about migrants without formal access to the labour market, whether illegally staying or not) but irregular work in general (i.e. non-compliant employment AND illegal employment).

The focus on employment is reflected in existing estimates and in the focus of research in general. Although there are more estimates on irregular employment than on other issues, those estimates do not play an important role in the public discourse, with the exception perhaps of estimates on irregularly employed care workers. In general, discussions on

irregular employment often point out the costs that are caused by irregular employment and the damage of undeclared migrant work for the Austrian economy and thus are not so different from broader debates on undeclared work (involving Austrian citizens).<sup>86</sup>

In the framework of the recent debates on irregularly employed care-givers various estimates were put forward, with the figure of 40,000 care givers being the most widely quoted. Interestingly, alternative (lower) estimates never made it into public debates. Indeed, the figure itself was hardly discussed at all. That the figure of 40,000 was widely accepted as plausible or at least, as legitimate indication of the scope of the problem, however, indicates a consensus over the existence of a major problem regarding the organisation and provision of care, notably care for the elderly, much more than a consensus over the figure itself. In the same vein, the issue was hardly discussed as an issue of irregular migrant employment but as an issue of care provision. As a corollary, it was the perspective of clients (i.e. patients) and employers (family members of clients) rather than that of care providers, which was the focus of public debates.

#### *Asylum seekers and irregular migration*

As discussed in part I, asylum has been frequently associated with irregular migration. Historically, certain groups of refugees were first problematised as “illegitimate” in the 1950s,<sup>87</sup> when Yugoslav migrants applying for asylum were labelled “economic refugees” and denied refugee status.<sup>88</sup> Generally, however, refugees and asylum seekers were – at least in public discourses – perceived in rather positive terms during much of the cold war period, not unlike elsewhere in Europe. To some extent the positive perception of refugees had to do with the fact that the overwhelming majority of refugees from Communist countries only transited Austria. With the influx of Polish refugees in 1981-82 – of whom a much larger share remained in Austria – the positive attitude towards refugees changed for the first time, reflected in particular in the imposition of a visa requirement for Polish citizens. However, the general attitude only changed in the late 1980s, when the framing of asylum seekers as “economic refugees” resurfaced. In a later stage asylum seekers became associated with criminality and illegal migration. In the current context, the association of asylum with irregular migration primarily results from the fact that virtually all asylum applicants enter the country illegally. In public discourse asylum seekers are often associated with issues such as ‘asylum abuse’ or are labelled ‘economic refugees’ and presented as “undeserving” and “cheating”. In this context, statistics of asylum applications are often taken as representing “illegal migrants”. Similarly, changes in the number of asylum applications – a rise or conversely, a decrease in numbers – is often credited to the “failure” or “success” of policy measures against illegal migration.

#### *Irregular migration and security*

With the major geopolitical changes towards the end of the 1980s, the rise of asylum applications, the increasing politicisation of migration policy and institutional shift from

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<sup>86</sup> See for instance:

[http://www.konvent.gv.at/pd/steno/PG/DE/XXII/NRSITZ/NRSITZ\\_00055/SEITE\\_0162.html](http://www.konvent.gv.at/pd/steno/PG/DE/XXII/NRSITZ/NRSITZ_00055/SEITE_0162.html), 14 April 2008

<sup>87</sup> The history of opposition to refugee flows in general is much longer. Thus, many refugee groups in the interwar period were considered “unwanted”. The most important of these were refugees from Galicia and other Eastern European Parts of the disintegrated Austrian-Hungarian Empire immediately after World War I. Although one can argue that “illegal migration” also connotes “undesired” and “unwanted”, it is not the fact that these refugees were in breach of any rules that was the matter of concern and reason for state action, but anti-semitism (in the case of Jews) or anti-communism (in the case of Communist and socialist refugee groups in the interwar period) (See Heiss 1995).

<sup>88</sup> As a corollary, Yugoslav refugees were – with the support of the Intergovernmental Committee on European Migration (ICEM, later to become IOM) – returned to Yugoslavia (See Sensenig 1998).



labour market authorities and the ministry of social affairs to enforcement agencies and the ministry of interior as the lead agency in migration policy, asylum and hence irregular migration became increasingly associated with (organised) crime and security.<sup>89</sup> In this context, terms like trafficking, smuggling and illegal migration were largely used synonymously. Although public debates today are perhaps more nuanced, the basic association of irregular migration to crime and security persists.

Thus, the very title of the annual Ministry of the Interior report on human smuggling ('Organised THB crime'/ *Organisierte Schlepperkriminalität*, informally known as "Smugglers report") associates 'illegal migration' with organised crime and is a telling reflection of the dominance of a security perspective on irregular migration. Similarly, a recent article published by the Ministry of the Interior in the magazine *Öffentliche Sicherheit*<sup>90</sup> titled 'Austria stays secure' after the 2004 enlargement, discusses irregular migration and security on the basis of apprehension data on illegal border crossings and illegal residence. The article frames the opening of the borders as a security threat and interprets the decrease of apprehensions after enlargement as a consequence of closer co-operation between Austrian authorities and authorities in neighbouring states and hence as an indicator of policy effectiveness without considering alternative explanations, including the regularising effect of enlargement for citizens of new Member States.

#### *Dramatising numbers*

The dramatisation and exaggeration of numbers and estimates generally is an important rhetorical device in political debates on the whole. In the context of debates on irregular migration in Austria, the dramatisation of flows and stocks of irregular migrants has implicitly or explicitly aimed at showing that authorities are losing control or policies are ineffective and not surprisingly, this strand is largely linked to rightwing populism. Thus, in a recent parliamentary debate a right wing MP suggested the number of 400,000 illegal migrants in Austria (which would represent about half the legally resident population of foreign citizenship),<sup>91</sup> while earlier similarly inflated figures circulating during the discussions leading to the 1992 Residence act variously put the numbers of illegal migrants at 100,000, 250,000 and 400,000, respectively, implicitly or explicitly suggesting that more drastic measures were need to remain in control (Sohler, 1999: 12).

#### *The (incorrect) use of numbers/indicators*

While estimates can easier be rejected as incorrect, this is not so easy for 'hard facts' like apprehension data that are treated as more credible in public debates than estimates. In Austria, apprehension data are used more often than estimates as indicators; however, these data always bear the risk of being used incorrectly.<sup>92</sup>

The main message given by reports and press releases issued by the Ministry of the Interior is whether apprehensions have increased or decreased. Thus, the so called smugglers report published by the Ministry of Interior use headings such as, 'Number of illegal migrants 2006

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<sup>89</sup> Among the political parties, the Austrian Freedom Party (FPÖ) is the main proponent of the view that immigration present a danger and threat to the national security (Sedlak, 2000: 151).

<sup>90</sup> *Öffentliche Sicherheit* Nr. 11-12/2004, available at: <http://www.bmi.gv.at/oeffentlSicherheit/>, 01 April 2008.

<sup>91</sup> See

[http://www.parlinkom.gv.at/pd/steno/Pg/DE/XXII/NRSITZ/NRSITZ\\_00155/SEITE\\_0143.html?P\\_PM=SEITE\\_0143](http://www.parlinkom.gv.at/pd/steno/Pg/DE/XXII/NRSITZ/NRSITZ_00155/SEITE_0143.html?P_PM=SEITE_0143), 25 March 2008

<sup>92</sup> The reports are published annually by the Ministry of the Interior since 2003. The Ministry and media mainly use the name 'smugglers report' although the correct title of the report is 'Organised THB Crime, Illegal Migration'.

halved’, ‘More illegal immigrants smuggled’, or ‘Fewer illegal border crossers – more smugglers’. Media reports on the smugglers report generally describe irregular migration from a security and crime prevention perspective, while humanitarian considerations are rarely raised. More importantly perhaps, media reports lack any serious discussions of what the data actually describe and what conclusions can be drawn from the data. The results are wrong conclusions and erroneous interpretations of the data. Thus, the overall number of apprehensions is often taken as the number of persons trying to enter the country, despite the fact that this number also includes persons trying to leave the country. Secondly, numbers of irregularly entering persons are often equated with irregularly staying persons, although the majority of apprehended persons are thought to submit asylum applications, thus becoming legally staying.

In addition, apprehensions data may be misleading as they also include persons who were apprehended while transiting Austria irregularly and neither have been resident nor intended to be resident in Austria.<sup>93</sup>

### **III. 2. Concluding remarks**

On the basis of the available evidence, it is estimated that the number of persons without a regular residence status has decreased considerably since 2001 and the number of persons without a regular residence status is estimated to lie between 18,000 and 54,000 in 2008 (down from between 39,500 and 115,700 in 2001). Other indicators for irregular migration, such as apprehensions statistics of persons with irregular residence status, corroborate this general trend and also indicate a significant decrease of both irregular migration flows and stocks of irregular residents in Austria.

The EU enlargement is one of the main factors for the sharp drop in apprehension figures. The stock of irregular residents can similarly be assumed to have decreased largely as a result of enlargement. Although citizens of new EU Member States still can be technically unlawfully staying over a transitional period, they do enjoy limited freedom of movement rights and are unlikely to be refused entry at the border; similarly, citizens from new Member States seem to be less likely to be forcibly returned if detected illegally working.

Available statistical data – basically apprehension data – cannot be regarded as good indicators of either irregular migrant stocks or migration flows. In addition, many crucial statistical data which in principle should be relatively simple to collect are not available, including the number of non-deportable aliens (both formally and informally tolerated), cross-tabulations of asylum data with apprehension data and cross-tabulations of return and enforcement data, etc. Such data would be important, both to get a more reliable basis for estimating the irregular resident population and in itself, namely to quantify the number of persons in precarious and transitional status or under informal toleration and thus as a measure of administrative practice regarding irregularly staying persons. From a human rights perspective, it would be crucial to have good information on duration of residence of such persons. Generally, the available evidence suggests that a relatively low share of irregular migrants in Austria (i.e. the total population with no or an unclear legal status) is completely undocumented. However, no or very little statistical information on “documented” irregular migrants is available.

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<sup>93</sup> See: Öffentliche Sicherheit 3-4/08; For a more detailed discussion see Jandl & Kraler (2006b)

While all available evidence points to a considerable decrease of stocks of irregular migrants, the same might not be true in regard to irregular employment. According to expert assessments collected in the MIGIWE project (Jandl et al., 2006), the extent of illegal employment, in particular illegal employment linked to illegal residence has significantly dropped during the past decade or so. Although the evidence is inconclusive, experts suggest that semi-legal, i.e. non-compliant forms of employment, by contrast, seem to have increased. The increase reflects, among others, the effects of enlargement and the participation of citizens of new EU Member States in particular in pseudo-self employment or outright undeclared work in circumvention of transition rules, whereas in relation to other groups non-compliance (undeclared work, underdeclared work, etc.) reflect much broader labour market patterns, notably the general decline of fordist forms of standards employment and the rise of precarious forms of employment, including self-employment, fixed contract labour etc. The phenomenon then is not migrant specific, although the consequences of engaging in irregular work certainly are different for non-nationals, in particular recent migrants with a less secure residence status.

#### Evaluating the quantitative importance of individual pathways into illegality

As described in part I, in Austria five principle pathways into irregularity can be distinguished: (1) irregular entry (irregular border crossing); (2) overstaying after the expiry of a visa or residence permit; (3) loss of status because of non-renewal of permit for not meeting the residence requirements or breaching conditions of residence; (4) absconding during the asylum procedure or failure to return after a negative decision and (5) non-enforceability of a return decision for legal or practical reasons (toleration).

Because no, or insufficient quantitative indicators or estimates on each of these pathways exist the exact quantitative importance of those different ways into irregularity must remain unclear. However, in the following, we attempt an approximate assessment of the quantitative importance of individual pathways on the basis of available indicators and plausibility considerations.

#### *Geographic Inflows*

All available data suggests that **irregular entries** to Austria have considerably decreased over the past decade. Two reasons help to explain this decline: first, a decline of asylum related migration, which partly reflects increasing barriers for asylum applicants to reach European destinations, and secondly, EU enlargement which has turned citizens of EU member states staying in an irregular manner into legally staying residents. EU enlargement, however, partly also explains the decline of irregular entries of third country nationals, as the EU's Dublin rules render Austria's neighbouring states responsible for taking back asylum seekers and other irregular migrants, who can be proven to have transited any of these countries.

#### *Status related inflows*

**Overstaying** after expiry of a short-term visa appears to be of comparably minor importance in Austria. The – presumably – minor importance of overstaying in Austria can be explained, amongst others, by the relatively strict visa issuing practices vis-à-vis third-country nationals subject to visa requirements, the substantial financial guarantees required from sponsors and/or visa applicants themselves as well as the higher level of scrutiny of visa applications in countries with 'high migration risks'. With respect to third-country nationals certain non-compliant forms of migration on a circular basis are more likely to occur in Austria (e.g. irregular employment of tourists, underdeclaration of employment of seasonal workers plus subsequent return and regular reentry). A special case are citizens from the new EU Member States without access to the labour market. Those persons lose their right to remain in the

country in case of irregular employment, however, de-facto they hardly have to face any consequences regarding their residence as the possibilities to expel EU citizens are limited.

**'Loss' of regular residence status** is another important pathway into irregularity. While there are only very few persons whose status is withdrawn (largely for a criminal offense), a larger but still relatively small number of persons fail to renew their permits because they do not or no longer meet residence requirements. It can be estimated that this affects some 400 to 600 persons annually.<sup>94</sup> In addition, changes of the legal framework can lead to 'creation' of irregularity in the sense that migrants legally staying find that they cannot meet new requirements or, under new regulations, are no longer eligible for a residence permit. Thus, as a consequence of the new Settlement and Residence Act 2005 a significant number of persons and their families couldn't meet the new income requirements and failed to renew their permits. Although an expulsion was found inadmissible in most cases, many applicants were left without a status for some time. In addition, the new law - in force since 2006 - stipulated that persons applying for family reunification need to have entered the country legally. Consequently, the applications of around a thousand persons who applied for family reunification before 2006 but were processed under the new law slipped into an irregular status.

The **asylum system** constitutes a fourth, distinct pathway both into and out of irregularity. The asylum system may be a pathway into irregularity in two ways: a) absconding during the asylum procedure, reflected in the numbers of discontinued procedures and b) negative decisions and subsequent absconding or failure to return. The production of irregularity in the context of the asylum system is linked to both status-related modes and geographical modes of becoming, or ceasing to be an irregular migrant at the same time. In a sense, a negative asylum decision 'deprives' asylum seekers of their (temporary) status as asylum seekers and thus is status related. On the one hand, most asylum seekers have entered the country in an irregular manner and irregularity thus is linked to both status transition and geographical movement. Similarly, absconding during the asylum procedure can be assumed to be largely linked to onward migration (i.e. geographical movement), although a certain share of absconded asylum seekers may also stay on in Austria as irregular migrants. The **failure to return or leave the country after a negative decision on an asylum application or the discontinuation of an asylum procedure** presumably is a major pathway into irregularity in Austria, although hard facts are again not available. However, the share of discontinued asylum procedures as well as the share of rejected asylum applications suggests that there is considerable scope for absconding. Thus, in 2008 52% of all asylum procedures (excluding subsidiary protection) ended with a negative decision and 23.5% were discontinued. Although there are no data on returns or onward movements of rejected asylum seekers, it is safe to assume that not all persons concerned (can) return to their country of origin.

Finally, **non-enforceability of return/ deportation** constitutes a fifth pathway into irregularity. Persons in a removal procedure whose expulsion is found inadmissible or otherwise not enforceable are issued an 'adjournment of deportation' for a maximum period of one year, after which the case is re-examined. At the same time, however, an adjournment of deportation is not a legal status and does not change the unlawful nature of the person's stay in Austria. No data on adjournments of deportation is released by authorities, however.

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<sup>94</sup> According to the Aliens Police in Vienna, in some 200-300 cases annually applicants fail to have their permits renewed (Interview with Willfried Kovarnik, head of the Aliens Police in Vienna, 2 April 2009). Given that about half of all permits issued in Austria concern Vienna, the total number of persons whose permit is not renewed can be estimated at 400-600 for the whole of Austria.

### Evaluating the quantitative importance of pathways out of illegality

Like pathways into irregularity, pathways out of irregularity are of an enormous complexity. The systematic implementation of the principle to apply for residence permits from abroad, which was extended in the last immigration reform to family members of Austrian citizens has left relatively few options to regularise one's status from within the country. In addition, no information on the extent of status acquisition by marriage to a citizen (or, to EU citizens for that matter) is available. Judging from the number of persons estimated to be without a status as a result of the change of the law in 2005 (about a 1000) regularisation by marriage has been a pathway to legality only for a relatively small number of persons. Considering that the imminent change of the law in 2005 led a higher number than usual to apply for residence on the basis of marriage to a citizen than in previous year and given that the estimate also is likely to include a certain number of persons who submitted their application before or after 2005, the number of persons who regularised their stay through marriage may have been around 500 a year before 2005. However, mostly, these consist of asylum applicants who withdrew their application and then submitted applications for family reunion. Thus, it is unclear to what extent status transitions in the narrow sense (not considering short periods of lack of status as a result of withdrawal of an asylum application) actually took place.

Regularisation – being granted humanitarian status – similarly is of minor quantitative importance. In addition, residence permits on humanitarian grounds are also used for family reunifications once quotas are exhausted, reducing the number of regularisations even further. However, in April 2009 the regulations on humanitarian residence were changed creating a new limited regularisation mechanism in the form of residence titles issued for humanitarian reasons. With this recent reform, humanitarian residence titles can be applied for and at least in theory provide a systematic mechanism to address the situation of irregular migrants who had been staying in Austria for an extended period of time and those who cannot be deported on grounds of Article 8 ECHR (private and family life). The impact of this new regulation and the practice of issuing those residence titles are still to be seen in the future.

As explained in the above, asylum is closely linked to irregular migration in Austria. In this context, the asylum system is also a major pathway to regularity and in many respects can be interpreted as functionally equivalent to regularisation (see Finotelli 2009). While it is difficult to interpret the granting of asylum as a status transition, in a sense it is if the status of asylum applicants is interpreted as the status of persons applying for regularisation of their stay. Status grants – including subsidiary protection – have increased from 2,084 in 2003 to more than 6,000 in 2004 and have since remained in that order (see Kraler and Hollomey, forthcoming).

Generally, however, return seems to remain the main pathway out of illegality. Not considering irregular exits – in regard to which proportion of persons who actually had been staying in Austria in an irregular manner as opposed to transiting migrants is unclear – total numbers of recorded voluntary and forced returns have fluctuated between around 9,000 and more than 12,000 between 2001 and 2005 and have sharply decreased since. However, in the absence of more precise information on effective return rates for persons apprehended or issued an expulsion order or a residence ban, the relationship of returns to stocks of irregular residents is entirely unclear.

### III.3 Policy Implications and Policy Recommendations

Independently from the overall quantitative importance of irregular migration as measured in terms of the share of irregular migrants in total stocks and flows of legal migrants, irregular migration must be regarded as an issue of major concern from a humanitarian and political perspective. For those in an irregular status, irregularity decisively and directly impacts on living and working conditions and access to services, resources and rights. And, irregular migration has also broader implications for society as a whole. Indeed, as a communication from the European Commission in 2003 argues “integration policies cannot be fully successful unless the issues arising from the presence of [illegal immigrants] are adequately and reasonably addressed”, which, by implications suggests that return should not be seen as the only option available, in particular, if return cannot be effected (European Commission 2003, 25f). In a more recent communication of 2006 the Commission similarly argues that it is difficult on principled grounds to tolerate “the sustained presence of significant numbers of third-country illegal immigrants” (European Commission 2006, 7). Politically, addressing irregularity in an effective, pragmatic and flexible manner which is compatible with broader humanitarian and human rights concerns thus must be a major priority. Indeed, the main conclusion of this study – that irregular migration is likely to have significantly declined in recent years, both in terms of flows and stocks – seems to support a pragmatic approach. Not only is the size of the irregular migrant population relatively small, but a fair share of irregular situations may actually be the result of legal deficiencies and status loss rather than illegal entry or overstaying.

The complexity of the phenomenon demands a comprehensive approach including a review of the overall framework for legal migration, prevention and control, avoidance of putting persons at risk of falling into irregularity and measures regarding the irregular resident population (return and regularisation).

#### *Measures directed at the overall framework for legal migration*

Although the relationship between legal opportunities for migration and irregular migration is contested, the creation of new opportunities for legal immigration for employment provide legal alternatives in particular for migrants from the near abroad, notably the Western Balkans. In addition, as the quota system – the very core of admission policy in Austria – is now largely obsolete a new basis for managing migration has to be found.

#### *Avoidance of risks*

Immigration regulations often unwittingly put migrants at risks of falling into irregularity. The following measures could help to avoid these risks: Principal labour market access for all persons possessing a regular residence status; strengthening and expanding the principle of long term residence, including automatic acquisition of the status; critical appraisal and evaluation of income requirements regarding its consequences for certain groups.

#### *Measures targeting the irregular resident population*

For a variety of reasons return is often not a viable option over a longer period of time. Such persons need to be given a clearly defined legal status for the duration of their stay in Austria and in certain cases of long-term non-enforceability regularisation should be considered as a pragmatic solution.

## Monitoring and analysis

In this final section, we make several recommendations regarding the improvement of statistical indicators of irregular migration. While enforcement agencies, policy makers and other actors linked to state authorities or supranational institutions see the primary value of statistical information on irregular migration as indicators of patterns of irregular migration and related phenomena and in assessing the efficiency of enforcement (usually defined in rather narrow terms as combating and preventing irregular migration) we argue that statistical indicators on irregular migration are also of interest for a wide range of other actors and other purposes. Generally, statistical indicators provide evidence of a certain phenomenon, evidence that should be used by policy makers, but also civil society actors, including NGOs and academics to evaluate policy and its implementation and thus as a basis for policy development. Thus, statistical evidence on irregular migration not only provides a basis to narrowly evaluate the effectiveness of policies (according to their stated objectives), but also provide a basis for the identification of problem areas from a human rights or critical governance perspective.

By definition, irregular migration is a phenomenon which is inherently difficult to quantify. However, there are several ways in which data collection on irregular migration could be improved, notably in respect to apprehension statistics, statistics on persons found illegally working, statistics on return and other enforcement action and statistics on asylum and informally and formally tolerated persons. Although the improvement of statistical data collection may still not be enough to better estimate irregular flows or stocks of irregular residents, the improvement of data collection would allow to better monitor state practices in regard to irregular migrants and to better monitor the situation of irregular migrants who are known to the authorities and against whom enforcement action has been initiated. Some of the data which we recommend to collect are in principle already available, but either are not systematically exploited or only for policing purposes. In some cases, data may not be exploited on grounds of data protection. In general, we would suggest seeing data collection and exploitation of data as a purpose in its own right which need not, and in cases where strong reasons for data protection exists, should not be used for other purposes, notably law enforcement. Thus, in sensitive cases, efforts should be made to collect data in an anonymised form rather than discarding data collection or exploitation of available information altogether. The generalisation of the principle – to collect statistical information in its own right, avoid linkage with other concerns, ensure data protection and use anonymised data for statistical analyses–would also help to undertake register matching exercises and to apply residual estimation techniques without adverse consequences for persons irregularly staying and possible unintended knock-on effects (non-use of health institutions or non-enrolment in schools by irregular migrants, etc.).

### *Improving apprehension statistics*

Authorities should collect personalised information on apprehended non-nationals, which should be systematically linked to other data collections (asylum statistics, statistics on return and other enforcement action, Eurodac, Schengen information system, residence permit register, statistics on persons found illegally working, amongst others). This would allow to

- identify repeat apprehensions and thus would eliminate double counting,
- to establish the share of apprehended persons submitting asylum claims
- to establish whether enforcement action has been taken against apprehended persons and whether enforcement, notably return, has been effective;
- to establish whether apprehended persons have been legally resident
- to establish whether persons have been apprehended illegally working

- to establish whether persons have been recorded already in other Member States

In addition, apprehension statistics should be systematically distinguished by place of apprehension and, as far as possible and possibly also relying on assessments by enforcement agencies, whether persons have been apprehended in the country, or while exiting or entering the country.

#### *Improving statistics on enforcement and return*

Currently, only very rough indicators on enforcement (residence bans, expulsion orders, etc.) are available. However, to effectively monitor state practices, more sophisticated data is needed. Thus, statistics on enforcement and return (both recorded voluntary returns and enforced returns) should be systematically linked to allow to establish what share of enforcement actions are successfully completed. As a corollary, information on both formally and informally tolerated persons (as argued above, we would argue against informal toleration practices) should be systematically collected to allow to assess both the efficiency of law enforcement and to assess the size of the population in situations of toleration.

In addition, information on effective length of residence of tolerated persons should be collected, in particular in view of setting time limits within which return has to be effected and establishing regularisation on grounds of long residence as an alternative, should return not be a viable option.

Finally, statistics on enforcement should be systematically linked to residence permit data to establish the type of status persons against whom enforcement action has been initiated or effectively implemented have had before enforcement was initiated.

#### *Improving asylum statistics*

As argued in the above, asylum statistics should be systematically linked to statistics on enforcement and return and apprehension statistics. However, asylum statistics themselves could be improved. Thus, information on applications should be systematically distinguished by place of application (at the border (airport), abroad, police post, reception centres) and linked to information whether applicants have been resident (or are likely to have been resident) in Austria before submitting an application. .

In the case of discontinued cases, information on the status of affected persons (absconding, effective return, transition to another legal status, etc.) should be collected. To assess the efficiency of asylum procedures, systematic information on length of procedures should be collected and published.

#### *Improving statistics on persons found illegally employed*

Statistics on persons found illegally employed should be systematically linked to residence permit data and data on enforcement action. Thus, data should show whether persons found illegally employed are at risk of losing their residence status and which type of enforcement action has been initiated. This would in particular allow to establish the link between irregular employment and irregular residence and would make enforcement action in both instances more transparent.



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