

Germany's regularisation of November 2006: Committed to an EU immigration policy?

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At their meeting on 16-17 November 2006, the sixteen German Länder ministers of interior adopted a decision allowing for regularisation of irregular residents in Germany. This measure aims at finally providing a first answer to one of the most pressing and deplorable peculiarities of German immigration law, the so-called 'chain-toleration' (*Kettenduldung*). Foreign residents who are legally obliged to leave the country and whose deportation is imminent yet for practical or legal reasons cannot be executed, are issued a document stating that they have received a "suspension of deportation", known as "toleration" (*Duldung*). This document is regularly issued for a period of days, weeks or a few months, mainly three. A 'toleration' bestows no rights or legal status on foreigner, nor is he – in principle – allowed to work. If the obstacle for deportation persists, the toleration is prolonged, again for a short period, theoretically without any limit. The new German immigration act (*Zuwanderungsgesetz*), which entered into force on 1 January 2005, initially aimed at abolishing this hybrid status but did not succeed in the long run. Currently a total of 156.593 tolerated foreigners live in Germany, 100,589 of whom have been there for more than five years. And some 40,831 – and this actually is the scandal, regularly criticised by churches, NGOs, lawyers, etc. – have lived there since 1995 or even earlier. That means an existence of more than ten years without any reliable stability, and living under the threat every day of being rounded up by law enforcement authorities for coercive deportation.

Classic regularisations, which are motivated mainly by economic considerations as they form part of some member states' immigration policy, are not provided for by German law. For humanitarian or political reasons, however, German law exceptionally allows Länder ministries to grant residence permits to foreigners from certain countries or other specified groups of foreigners. This possibility has now been used in the November 2006 regularisation. High hopes had been attached to the ministers' deliberations, but the outcome has eventually been disappointing. According to the ministers own estimations, only 20,000 to 30,000 applications will turn out to be successful as the required criteria they have imposed in the regularisation decision are very strict. Political divisions and an unequal allocation of power between the different German Länder governments have prevented them from taking a more generous approach. It is feared furthermore that regularisations may act as a pull factor for new irregular migrants. Finally there might also be some truth to the observation that German legal and sociological culture is rather unaccustomed or even opposed to general amnesties, no matter which area (criminal law, tax, migration, etc.) is concerned.

But why is this national regularisation measure a European issue?

It is a European issue because member states have agreed to adopt a common European immigration policy. This commitment, enshrined in Art. 63 (3) of the EC Treaty, however,

does not – until today – prevent member states from taking unilateral decisions that might turn irregular migrants into legal residents or even Union citizens. So far, European member states have only been willing to agree at least on a mechanism informing each other about this kind of national measure, a ‘brand new’ mechanism, in fact.

It is of particular interest to note that nearly two weeks before the German ministers decided upon the regularisation, this mechanism – Council decision 2006/688/EC of 5 October 2006 (OJ L 283/40 of 14.10.2006) - entered into force imposing an obligation on EU Member States to “communicate to the Commission and the other Member States information on the measures which they intend to take, or have recently taken, in the areas of asylum and immigration, where these measures are publicly available and are likely to have a significant impact on several Member States or on the European Union as a whole”(article 2 (1)). On the basis of public sources, it seems as if Germany has not yet informed the relevant European actors of its recent regularisation. This is surprising given the legislative history of this Council decision and the role Germany played in championing it.

The new mutual information mechanism dates back to the JHA Council meeting of 14 April 2005. It was the response of fellow EU Ministers of Interior to their Spanish colleague: in 2005, Spain offered a large-scale regularisation of illegal residents which came under fierce attack by some member states fearing that once regularised in Spain the profiteers will have nothing better to do than to ‘flood’ (presumably) more attractive labour markets in northern countries. As noted above, Germany and its then Minister of Interior Otto Schily were at the forefront of such criticism. In a CEPS Commentary published at that time, Joanna Apap and Sergio Carrera showed that these fears might have been exaggerated. They took a less critical approach towards the Spanish measure but stated that regularisations as such don’t constitute the ultimate answer to the multidimensional challenges of European society and that they are mere “homeopathic and temporary approaches to addressing the symptoms rather than the cause” (cf. J. Apap & S. Carrera, *Spain’s New ‘Regularisation’ Procedure: Is this the way forward?*, CEPS Commentary, February 2005).

Subsequent events seem to have proven them right. So far, at least, there have been no reports that the feared ‘mass influx’ of regularised migrants from Spain to other EU member states has actually taken place. At the same time, the challenges posed by irregular migration are as imminent as ever. The EU interior ministers’ outcry in relation to the Spanish regularisation, however, eventually served a positive outcome. It illustrated the potential effects that unilateral national measures in the field of immigration and asylum law might have not only for the Area of Freedom, Security and Justice (AFSJ) but also for the internal market as such. They thereby highlighted the need for a common and coherent immigration policy. Considering immigration policy and immigration law – including legal and economic migration – as exclusively subject to national sovereignty can be no longer the only answer within this common area.

It is therefore somewhat ironical – but also characteristic - that at the very same meeting during which German Länder interior ministers decided on the 2006 regularisation, they formulated some stark calls to the German federal minister of the interior – the current JHA Council president – in relation to a common European immigration policy. They asked him – inter alia – “to

- (1) work in the Council and with the Commission towards ensuring the Member States’ competence in economic migration and adhering closely to the principles of subsidiarity and proportionality;
- (2) emphasise that there exists no Community competence to regulate labour market access for third country nationals;

- (3) clarify that there exists no uniform EU-wide labour market and that labour market policy must follow regional needs and prerequisites;
- (4) oppose the Commission's allegation that continuous immigration into the EU or facilitated family reunification for economic migrants from third countries are necessary due to demographic reasons;
- (5) call the Commission's attention to the fact, that taking the situation of labour markets in EU Member States into account, there is no shortage of labour force;
- (6) point out to the Commission that most of the people willing to migrate are not sufficiently qualified to meet the requirements of the specialised and differentiated EU labour markets; and
- (7) underline that absorption capacities of Member States are limited and that integration of already-residing migrants must be given priority before allowing new immigration.”
(Beschlussniederschrift über die 182. Sitzung der Ständigen Konferenz der Innenminister und – senatoren der Länder am 16./17.11.2006 in Nürnberg, pp. 3-5)

This approach illustrates the somewhat short-sighted, inconsistent and sometimes even hypocritical attitude of national politics towards European developments. While taking a unilateral decision of regularisation potentially affecting other member states without prior information – a decision, for which the same German ministers would heavily criticise any other member state, thereby acknowledging the European dimension of this issue – these ministers at the same time are determined to emphasise that Europe actually should have no say in this field and ‘order’ the Federal minister of interior to use the Presidency post to act accordingly.

However, it would not be advisable for Germany to use the Council Presidency to push a national agenda through; such an effort would most probably fail. Instead, Germany should be dedicated to a common European agenda based on the Community method, promoting reasonable policies anchored to shared constitutional values. This is particularly necessary in a policy area in which legislative measures may directly affect fate and future of individual human beings as it is the case for asylum and immigration policy. In a European Area of Freedom, Security and Justice where freedom of movement within common external borders is guaranteed, calls for ‘less Europe’ are misplaced.

First and foremost, Germany should provide a good European example and adhere to the commitments, rules and mechanisms it has previously agreed upon. This comprises – in the short term and at quite low but still important level – informing the relevant European institutions and fellow member states about its recent regularisation of irregular residents.

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