The Incipient Immigration Policy of the European Union and Regularisation of Aliens in Spain

Dr. Elena Crespo Navarro
Assistant Lecturer in Public International Law
Universidad de Alcalá

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I. INTRODUCTION

Early in January 2005, a little over a year after the publication of the latest amendment of *Organic Law 4/2000*[1] *on the rights and freedoms of aliens in Spain and their social integration* (hereafter OL), the *BOE* published Royal Decree 2393/2004 of 30 December (hereafter RD) approving the Regulation implementing the said OL.[2]

The result of a high degree of consensus,[3] this decree is intended to facilitate orderly legal immigration without relenting in the fight against illegal immigration. In that context it introduces some changes regarding the requirements and conditions applicable to consolidated channels for the admission of aliens to live and work Spain while tightening the precautions to prevent legal fraud.

The regulation also takes into account the real situation in Spain at the time of its enactment – that is, the presence of thousands of aliens in irregular situations. Indeed, according to the provisional statistics furnished by the National Institute for Statistics (INE),[4] of the 43.97 million inhabitants accounted for in Spain at 1 January 2005 (770,000 more than the previous year), 3.69 million are aliens, many of whom (almost 1.5 million) are living in Spain in an irregular situation.[5]

In order to deal with this reality, the RD provides an exception to the general rules governing the granting of residence and work authorisations with a view to normalising the situation of all those aliens who have been continuously in Spain since at least six months prior to its entry into force and can show that they have employment for the future. This exception is justified, then, not only by the enormous number of immigrants living in Spain in irregular situations, but also and most importantly, by the desire to bring them formally into the Spanish labour market.[6]

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1 OL 4/2000 of 11 January, amended by OL 8/2000 of 22 December and by OL 14/2003 of 20 November (*BOE* no. 279 of 21 November 2003, pp. 41193–41204). For the consolidated text, see Fernández Rozas, C. and Fernández Pérez, A. (Eds.), *Ley de extranjería y legislación complementaria*, 4th ed., Madrid 2005, pp. 275–414.

2 *BOE* no. 6 of 7 January 2005, pp. 485–539.

3 As the Government reported, the regulation, which has the support of the vast majority of political parties and the Forum for Social Integration of Immigrants and has merited the favourable opinion of the Council of State, the Economic and Social Council and the General Council of the Judiciary, was agreed with the social agents in the Committee for Dialogue, and in its drafting account was taken of proposals from Autonomous Communities, Local Authorities, professional associations and NGOs. (See press note "Government gives green light to Aliens Regulation with increased consensus", of 30 December 2004, at *http://www.tt.mtas.es/periodico*).

4 See INE press note of 27 April 2005, published at *http://www.ine.es/prensa*.

5 Note, however, that these figures are for registered aliens, around 1.5 million of whom are known not to have an alien's card. But there is no way of knowing the number of aliens living in Spain irregularly without having registered, or how many may have left the country without having notified the Registry.

6 In this connection it should be borne in mind that a significant proportion of the persons

The object of this article is precisely the normalisation process initiated by the Third Transitional Provision of the RD. However, because it is exceptional, it will be well to begin with a brief analysis of the rules of authorisation for temporary residence and work as laid down in a general way by the Regulation. And in addition, in view of the progressive communitarisation of EU immigration and aliens policies initiated by the adoption of the Amsterdam Treaty, we need to examine how well these internal Spanish regulations sit with the legal *acquis* of the EU in these matters.

II. THE REGULATION OF IMMIGRATION IN THE EU

1. Communitarisation of EU immigration and aliens policy

The process of communitarisation of EU immigration policy commenced with the adoption of the Amsterdam Treaty in 1997.[7] The objectives of the Union cited there include maintaining and developing the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.[8]

To that end, a new Title IV was included in the TEC, entitled "Visas, asylum, immigration and other policies related to free movement of persons", with the aim of preparing and implementing a set of common rules to regulate, among other things, EU immigration policy (articles 61 to 69 of the TEC). Our particular interest here is in article 63.3, whereby the Council was to adopt:[9]

"3) measures on immigration policy within the following areas:

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who would qualify for inclusion in the transitional scheme referred to were already doing some kind of work in Spain, if irregularly, being exploited as cheap labour in the submerged economy.

[7] In force from 1 May 1999 (*BOE* no. 109 of 7 May 1999, pp. 17146–17202) until 1 February 2003, the date of entry in to force of the version amended at Nice (*BOE* no. 24 of 28 January 2003, pp. 3426–3427).

[8] See Article 2 of the TEU. On the creation of that area of freedom, security and justice by the Treaty of Amsterdam, see also Escobar Hernández, C., "Extranjería y ciudadanía de la Unión Europea", in *Extranjería e inmigración en España y la Unión Europea,* Colección Escuela Diplomática, no. 3 (1998), 103–126, pp. 120–126; González Vega, J. A., "En torno a los otros europeos: Derecho Internacional y Derecho europeo ante la inmigración", in VVAA, *Ética, pluralismo y flujos migratorios en la Europa de los 25*, Oviedo 2005, 103–151, pp. 124–138; Martín y Pérez de Nanclares, J., *La inmigración y el asilo en la Unión Europea. Hacia un nuevo espacio de libertad, seguridad y justicia*, Madrid 2002; and Valle Gálvez, A., "La refundación de la libre circulación de personas, tercer pilar y *Schengen*: el espacio europeo de libertad, seguridad y justicia", in *RDCE no.* 3 (1998), 41–78, pp. 46–56.

[9] Note, however, that the transfer of competences in matters of immigration to the EU does not exclude national competence; as the penultimate paragraph of Article 63 itself

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,
(b) illegal immigration and illegal residence, including repatriation of illegal residents".

Shortly after the Treaty of Amsterdam came into force,[10] the European Council of Tampere in October 1999 reaffirmed the importance of creating such an area of freedom, security and justice and agreed on the need to develop a common immigration policy based on four essential elements: collaboration with the countries of origin, definition of a common European system of asylum, fair treatment of the nationals of third States and management of migratory flows.

More specifically, having regard to this last aspect – that is, management of migratory flows – the European Council at Tampere acknowledged the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin. To that end it requested rapid decisions by the Council, on the basis of proposals by the Commission, such decisions to take into account not only the reception capacity of each Member State, but also their historical and cultural links with the countries of origin.[11]

In response to this demand for the building of a common immigration policy, in November 2000 the Commission presented a communication to the European Parliament (EP) and to the Council on "a Community policy on migration",[12] in

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states that measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements. This is, then, an area of shared competences, which are normally implemented by means of Directives, which by their very nature require intervention by the Member States (Article 249 TEC).

[10] Even before the Treaty came into force, in order to assure that this new common regulation was adopted in a reasonable time, in June 1998 the Cardiff European Council asked the Council and the Commission to prepare an Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice (see the conclusions of the cited European Council in *EU Bulletin*, 6-1998). In compliance with that request, on 3 December 1998 the Council of JHA Ministers approved the Action Plan drawn up jointly with the Commission. Both institutions based themselves on the shared idea that asylum and immigration are independent spheres, and as regards action in connection with immigration they recommended that particular priority be given to combating illegal immigration while ensuring the integration and rights of third-country nationals legally present in the EU and affording the necessary protection to whoever requires it (See the text of the Action Plan in *OJEC* C 19 of 23 January 1999, pp. 1–15. Para. 8 cited).

[11] See Conclusions of the Tampere European Council of 15 and 16 October 1999, particularly conclusion no. 20 (*EU Bulletin* 10-1999, pp. 7 *et seq.*).

[12] COM (2000) 757 final of 22 November 2000.

which it proposed a means of translating these general guidelines into concrete actions. Since then, work has proceeded in the four areas identified by the European Council at Tampere, and on the basis of the Commission's proposals progress has slowly been made towards the definition of a common legal framework through the approval of an array of Directives.[13]

2. The EU's position on the management of economic immigration

In its communication on "a common immigration policy", the Commission had addressed the need for a change of approach in matters of immigration, whose starting-point should be the abandonment of the idea which had underpinned the restrictive policies of the Member States for the past thirty years – namely that Europe did not need economic and labour immigration.[14] In the future, then, the issue should be tackled on the basis of an analysis of the existing economic and demographic context of the EU: in other words, taking full account of the population decrease forecast for the coming decades, shortage of skilled and unskilled manpower in certain sectors, and increasing migratory pressure. It should also consider the fact that, along with immigration for humanitarian reasons and immigration resulting from family reunion, the EU receives ever more economic immigrants, many of whom are compelled to seek work in an irregular fashion owing to the difficulty of joining the labour market by way of the legally established channels.

In this connection the Commission warned that while immigration cannot of itself be considered a solution to the problems of the labour market, proper regulation of immigration could be a positive factor for the labour market, for economic growth and to assure the continuity of social security systems in the EU, and thus help facilitate compliance with the Lisbon objectives.[15]

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[13] This is illustrated for example by the adoption of the Directive on the right to family reunion (Council Directive 2003/86/EC of 22 September 2003, *OJEU* L 251 of 3 October 2003, pp. 12 *et seq.*). On this subject, see García Rodríguez, I., "The Right to Family Reunification in the Spanish Law System", in *SYIL*, vol. VII (1999-2000), 1–37, pp. 10–18. The same goes for the Directive on third-party nationals with long-term resident status (Council Directive 2003/109/EC of 25 November 2003, *OJEU* L16 of 23 January 2004, pp. 44–53). On this last see Crespo Navarro, E., "La Directiva 2003/109/CE relativa al estatuto de los nacionales de terceros Estados residentes de larga duración y la normativa española en la materia", in *RDCE*, no. 18 (2004), 531–552.

[14] In effect, as the Commission itself explained in a later communication, following the crisis of the 1970s and the increase in flows of illegal immigration during the 1980s and 1990s the controls on admission of third-party nationals to work were tightened up in the laws of the Member States to protect their own domestic labour markets, and in some cases they went so far as to freeze the hiring of aliens. See document COM (2004) 412 final of 4 June 2004.

[15] It should be remembered that at the Lisbon European Council of 23 and 24 March 2000

This new, more flexible and better coordinated approach to immigration was to materialise in the definition of a common policy that would allow for the complexity of the phenomenon, the various interconnected aspects and their impact on the countries of origin and destination. At the same time, given the differences among the Member States on this subject, the best way to regulate and manage that common policy would be to define a global, EU wide legal framework within which each Member State could develop and apply its own national policies.

Such an approach necessitated in the first place the establishment of proper channels for legal immigration, and that in turn required the implementation of an open method of coordination among the Member States.[16] To that end the Commission determined to develop, in consultation with the Member States, a common legal framework for the admission of economic immigrants from third countries, leaving the specific measures to applied at a national level up to each Member State. But it was also necessary to reinforce the fight against illegal immigration, not only by intensifying cooperation and consolidation of border controls but also by guaranteeing that labour legislation would be applicable to nationals of third States.

In a report on the said communication[17], compiled at the Commission's request, the Economic and Social Committee (ESC) stressed the need to put an end to the high level of irregular immigration on the basis of an analysis of the main factors behind it, specifically the lack of expectations in the countries of origin combined with growing demand for unskilled labour in certain sectors such as agriculture, construction, catering and domestic service. In short, it pointed to the existence in

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the EU set itself a new strategic objective for the coming decade: "to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion". And to that end it agreed on a number of global objectives in employment for 2010 (see conclusions of the Lisbon European Council in *EU Bulletin* 3-2000, pp. 7–19). In order to accomplish these objectives, on 22 July 2003 the Council adopted a set of Guidelines for employment policies of the Member States, which took into account the role of immigration. Guidelines nos. 5 and 7 in particular addressed the need to regularise undeclared working, an issue which is directly linked to irregular immigration. (See Council Decision 2003/578/EC on the guidelines for employment policies of the Member States, in *OJEU* L 197 of 5 August 2003).

[16] Since the responsibility of deciding on the needs for different categories of workers would still lie with the Member States, depending not only on the needs of the labour market but also on other factors, such as agreements concluded with the countries of origin. That approach was later complemented by the Commission in its communication on "an open method of coordination for the Community immigration policy" [COM (2001) 387 final of 11 July 2001].

[17] ESC opinion on "Communication from the Commission to the Council and the EP on a Community policy on migration", (2001/C260/19), *OJEC* C 260 of 17 September 2001, pp. 104–112.

the EU of a demand for labour which, because of the restrictive immigration policies maintained by the Member States, has come to be satisfied by means of irregular immigration, to the detriment of lawful competition among employers, of the rights of workers and of the very social security system existing in all the Member States.

The ESC then proposed three mechanisms for combating irregular immigration. The first, as proposed in the Commission's communication, was to reform the existing legal framework so as to facilitate legal entry for economic immigrants. To that end, two possible options were considered: a prior offer of employment as a blanket requirement, or alternatively the option of a visa to seek employment in sectors where employers need to interview prospective employees first. For the rest, it did not rule out the possibility of establishing annual quotas, provided that the ordering and application of such quotas was conceived flexibly and that they could not be applied in cases of admission for humanitarian reasons or for family reunion.

A second line to staunch irregular immigration would be to combat the submerged economy which offers work to irregular immigrants, by means of legislative and fiscal measures and sanctioning mechanisms, the latter not confined to penalising illegal trafficking in immigrants but also illegal hiring and exploitation of such workers by employers.

Finally, to supplement this, the ESC proposed dealing with the existing situation by means of measures to achieve a gradual regularisation of the situation of the huge number of immigrants living irregularly in EU territory, on the basis of circumstances such as an employment relationship, family ties, the existence of ties in the host society, and others.

On the basis of all these proposals, in July 2001 the Commission adopted a draft Directive on "the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities". Although it was favourably received by the institutions and bodies consulted,[18] it could not be approved by the Council due to the objections of some Member States, and the debate in the Council was confined to a first reading of the draft.

The Commission's proposal was intended to establish common definitions, criteria and procedures regarding conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, based on forms already used successfully in the Member States. Thus, among other things it laid down common criteria for admission, such as analysis of

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[18] See the draft Directive in the document COM (2001) 386 final of 11 July 2001. See also the opinions of the EP of 12 February 2003 (document A5-0010/2003); of the Economic and Social Committee of 16 January 2002 (document 2002/C 80/08, in *OJEU* C 80 of 3 April 2002, pp. 37–40); and of the Committee of the Regions of 13 March 2002 (document CdR 306/2001, *OJEU* C 192 of 12 August 2002, pp. 20–23).

economic needs; it granted rights to third-country nationals while respecting the right of Member States to limit economic immigration; and it envisaged the establishment of a single national application procedure for the issue of a residence and work permit in a single document, which could moreover by applied for by the employer. On the other hand, the only circumstance that it recognised as allowing legal entry for purposes of employment was possession by the immigrant of a prior offer of employment.

In view of this situation, in its Report on the Draft Directive[19] the ESC reiterated its position in favour of the admission of a second avenue, namely the temporary visa for job-seekers, at least in certain sectors such as domestic service, especially the care of children and old people, where prior acquaintance of employer and employee is essential.

Later on, a study on "links between legal and illegal immigration" undertaken at the request of the European Council of Salonica[20] and published by the Commission[21] pointed to the need to adopt a new approach to the question of regulation of legal avenues of economic immigration at an EU level, to which end the Commission announced the start-up of a process of consultation and the presentation of a Green Paper, in which the proposals originally presented would be re-examined in the light of the difficulties raised at the Council. For the rest, the study highlighted the existence of some kind of link between legal and illegal immigration, albeit this is a complex and not a direct relationship, in which a variety of factors are involved. The study concluded that, irrespective of whatever legal avenues are opened up, there will always be some level of illegal immigration, and therefore the fight against it must continue to be a part of the management of immigration. In particular, it proposed the adoption of preventive measures and the elimination of incentives such as the non-regulated labour market.[22] In this connection, the fight against the submerged economy must necessarily be incorporated as a common objective of EU immigration and employment policies.

Also among the future priorities declared by the Commission in its communication on "the area of freedom, security and justice: assessment of the Tampere Programme and future orientations",[23] is the promotion of a genuine common policy

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[19] Document 2002/C 80/08, *OJEU* C 80 of 3 April 2002, p. 38.

[20] Held on 19 and 20 June 2003 (see conclusions in *EU Bulletin* 6-2003, pp. 9–28).

[21] COM (2004) 412 final of 4 June 2004, cited *supra*. That study analysed the question of whether the existence of legal channels for the admission of immigrants reduces illegal immigration, and to what extent a policy of legal migration influences flows of illegal immigration and cooperation with third countries to combat it.

[22] The existence of that link between undeclared working and illegal immigration, and the need for action to render it less attractive to employers and to potential irregular immigrants, had already been highlighted by the Commission in a communication regarding the common policy on illegal immigration, dated 15 November 2001 [COM (2001) 672 final].

[23] COM (2004) 401 final of 2 June 2004.

on the management of migration flows. The Commission stresses that a realistic approach based on the EU's economic and demographic needs ought to facilitate the legal admission of immigrants under the aegis of a coherent policy that assures fair treatment of third-country nationals. A policy that includes respect for Community preference and guarantees the right of Member States to limit third-country nationals entering their territory seeking to take up paid employment or self-employed economic activities to a concrete number. And be it understood once again that the credibility of a positive and open common approach will depend to a great extent on the capacity of the EU to control illegal immigration.

For its part, the Treaty establishing a Constitution for Europe[24] also recognises the importance of the issue. Thus, Article III-267 states that:

"1) The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2) For the purposes of paragraph 1, European laws or framework laws shall establish measures in the following areas:

a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion (. . .);

5) This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed".

In response to the ambitions declared in that Treaty and with a view to preparing the EU for its entry into force, five years after the Tampere meeting, the European Council at Brussels[25] saw fit to adopt a new five-year plan, to be called "The Hague Programme".

Reiterating the links between submerged economy, illegal employment and irregular immigration, the Programme invited Member States to accomplish the targets for reduction of the submerged economy established in the European employment strategy. In addition, it invited the Commission to present, before the end of 2005, a plan for policy on legal migration which should include admission procedures capable of responding rapidly to fluctuating demand for migratory work on the labour market, reminding it that the setting of admission allowances for migratory labour is still a matter for the Member States.

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[24] Adopted by the European Council at Brussels on 17 and 18 June 2004, signed at Rome on 29 October 2004, and pending ratification by the Member States.

[25] See Conclusions of the Brussels European Council held on 4 and 5 November 2004, in *EU Bulletin* 11-2004, particularly Annex I which contains the Hague Programme referred to, especially section III 1.4).

To this end the Commission presented a Green Paper entitled "An EU approach to managing Economic Migration"[26] the purpose of which, as it had already announced, was to highlight the main problems, bearing in mind the concerns expressed by the Member States at the Council during the debate of the Draft Directive on conditions of entry and residence for economic immigrants, and the possible options for definition of the much-awaited EU legal framework for economic migration. The object of all this was to inaugurate a debate on the issue among all the interested parties,[27] upon conclusion of which it would be in a position to present the Plan requested by the European Council.

3. Regularisation processes in the EU

The adoption of exceptional measures for the regularisation of immigrants is not an isolated phenomenon affecting Spain alone. Indeed, as the Commission points out in its "Study on the links between legal and illegal immigration",[28] this is in fact a relatively frequent practice in the EU, to the extent that there have been more than twenty-six regularisation operations since the seventies, and especially starting in the nineties. On the other hand, this does not mean that all Member States have adopted measures of this kind; some have always been reluctant to do so.

At all events, as the Commission notes, most of the Member States acknowledge that in certain circumstances it may become necessary for practical reasons to undertake a regularisation process so that persons who do not meet the requirements established by law for the acquisition of legal residence can do so nonetheless. In particular, one of the considerations that lead States to adopt mechanisms of this kind is the need to integrate such people in society, and above all to attract them to the legal labour market.

In any case, the way in which regularisation is put into practice is not always the same. Some States opt for temporary regularisations while others also allow permanent schemes. Some only favour such measures in exceptional cases and only allow regularisation for humanitarian reasons or for protection; normally linked to asylum policy, these measures are intended to normalise the situation of specific categories of persons who are unable to apply for international protection but who cannot be repatriated. For example in Germany, where the situation of Bosnians affected by the war was regularised in 1999,[29] there are many individuals

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[26] COM (2004) 811 final of 11 January 2005.

[27] In particular, the Commission invited contributions to the debate not only from Community institutions and bodies and the Member States, but also from regional and local authorities, social interlocutors (especially unions and employers), NGOs, candidate countries, associate third States, academic sectors and individuals.

[28] COM (2004) 412 final, cited *supra*.

[29] In this connection see Decision no. 159 adopted by the *Sitzung der Ständigen Konferenz*

from Afghanistan, Iraq or the Balkans living without a legal permit who do not qualify for asylum as they cannot prove they have been persecuted in their own countries but who cannot be returned to their countries of origin for humanitarian reasons, or in some cases because they are unable to prove their nationality.

The Commission's study also analyses the phenomenon in terms of efficacy. In that respect, the advantages to be derived from these processes would include enabling governments to manage the population better through enhanced information on the population actually present in the country, helping to reduce illegal working and to increase public revenue from taxes and Social Security payments, insofar as the granting of a residence permit is contingent on the alien's having a job.

There are, however, not inconsiderable negative consequences that we could mention. In the first place, there is the possible stimulation of illegal immigration, what has come to be known as the *call effect*, which means that the wrong message is being sent, namely that living irregularly in the territory of the State concerned will be tolerated in the long run. In its communication the Commission illustrates this negative consequence by means of a case study of Belgium, where two large-scale regularisation programmes have been implemented, one in 1974 and the other in 1999. *Ex-post* assessments of the latter programme have shown that as a result the number of aliens residing irregularly actually increased. In practice, then, regularisation processes tend to be repeated after a number of years, which means that illegal immigration persists and that such measures – at least as they have tended to be applied – do not reduce irregular immigration in the long term. And that is not to mention possible implications for other Member States given the removal of controls on internal EU borders.

It was precisely in view of those possible consequences for other Member States, and partly because of the reactions in some Member States[30] to the process initiated in Spain, that the Commission, together with the Presidency of the EU, proposed to the Council of JHA (Justice and Home Affairs) Ministers that a system of prior mutual information and alerts be set up linking the persons responsible for immigration and asylum policies in the Member States, to be applicable to any major decision concerning immigration that one or more States propose to adopt. This initiative was welcomed by the JHA Council, which at its session of 14 April 2005 asked the Commission to present a proposal in that respect.[31]

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der Innenminister und-senatoren der Länder held on 18 and 19 November 1999 at Görlitz; and also the parliamentary question *Antwort der Bundesregierung auf die Kleine Anfrage der Abgeordneten Ulla Jelpke und der Fraktion der PDS, BT-* Drs. 14/1072.

[30] We refer to the request for explanations by Germany and the Netherlands in January.

[31] See the joint press communiqué by the Presidency and the Commission of 11 February 2005, which contains the text of the letter sent by the representatives of the two bodies to the Council proposing the start-up of such a mutual rapid alert information system, at

III. TEMPORARY RESIDENCE AND WORK AUTHORISATIONS IN SPAIN UNDER THE GENERAL REGIME

1. Introduction

Title II, Chapter II of *OL 4/2000 on rights and freedoms of aliens in Spain and their social integration* refers to the different situations in which aliens may find themselves in Spain, distinguishing between visitors and residents. A visitor may stay in Spanish territory for a limited period of time, in principle not exceeding ninety days, and requires no prior authorisation.[32] The situation of a resident, on the other hand, is precisely defined, under article 30bis of the OL, as requiring the person to possess a residence authorisation. Such residence may be temporary – from ninety days to five years – or permanent, meaning of indefinite duration.

To be granted a temporary residence authorisation, article 31 of the OL requires alien applicants to provide evidence that they have sufficient means to cover their living and other expenses, and those of their family where applicable, without needing to undertake any paid activity throughout the duration of their stay; or else that during such time they intend to take up employment or undertake self-employed activity and have obtained the requisite administrative authorisation therefore, or lastly, that they qualify for family reunion. Saving exceptions, permanent residence, on the other hand, can only be granted after the subject has lived in Spain continuously for five years.[33]

We shall now concentrate briefly on the case of temporary residence tied to the undertaking of paid employment,[34] since the normalisation process provided in the

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http://www.eu2005.lu/fr/actualites/communiques; also the press communiqués published after session no. 2642 of the Council of JHA Ministers held on 24 February 2005 at Brussels, and no. 2652 of 14 April the same year, both at *http://www.ue.eu.int/Newsroom.*

[32] Quite apart from the requirement of a visa to enter the country where applicable. On countries whose nationals are required to obtain a visa to cross the EU's external borders, see Council Regulation (EC) 539/2001 of 15 March 2001 establishing a list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (*OJEC* L 81 of 21 March 2001, pp. 1–7), amended by Council Regulation (EC) 2414/2001 of 7 December 2001 (*OJEC* L 327 of 12 December 2001, pp. 1–2) and by Council Regulation (EC) 453/2003 of 6 March 2003 (*OJEU* L 69 of 13 March 2003, pp. 10–11). See also the web page of the Spanish Ministry of the Interior, which shows a list of the countries whose nationals do not require a visa to enter Spain: *http://www.mir.es/sites/mir/extranje/control_fronteras/documentos_entrada.html#dina.*

[33] Article 32 of the OL.

[34] For cases of residence linked to the exercise of self-employed activities, see articles 58 to 62 of the implementing Regulation, and for the other two cases mentioned, see articles 34 to 37 regarding residence without paid economic activity and articles 38 to 44 regarding the case of residence for family reunion.

Third Transitional Provision of the RD, the main object of this study, is available only for this category of temporary residence. That is logical if we consider firstly, that most of the aliens living irregularly in Spain have come with the intention of taking up employment, and secondly that the measure is intended to bring into the legal labour market those aliens who are already in Spain working illegally. For that reason those wishing to benefit from the measure are required to demonstrate a real and effective link with the labour market.

2. General regime for temporary residence and work authorisations: hiring of aliens in unpopular occupations or on a quota basis

According to the general regime provided in the Regulation, application for an employee's residence and work authorisation may be made by aliens residing outside Spain and in possession of the requisite visa where applicable, and aliens who are resident or on study visits in Spain, without the need of a visa, and holders of a job-seeker's visa as established in the agreement on quotas. In any case, all alien workers living in Spain on an irregular basis are excluded.[35]

Leaving aside the special situations contemplated in the Regulation, such as temporary residence and employment for a fixed term or within the framework of trans-national provision of services, or activities for which no authorisation is required,[36] the granting of an employee's temporary residence and work authorisation is subject to prior application by the employer who intends to hire a non-resident alien worker.[37]

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[35] The duration of the authorisation will be one year in the first instance and may be limited to a geographic area and sector of economic activity as determined in accordance with the guidelines laid down for these purposes by the Secretary of State for Immigration and Emigration (Article 49.2 of the Regulation). In the case of resident aliens the duration of the authorisation will depend on how long they have previously been living in Spain in a regular situation (Article 49.3 of the Regulation). Regarding the exclusion of aliens in an irregular situation, see articles 50 g) and 77.2 of the Regulation.

[36] According to article 55 of the Regulation, authorisation in cases of fixed-term employment is for seasonal work (Article 42 OL); works or services for the assembly of industrial or electric plants, construction of infrastructures, buildings and electricity, gas, railway, telephone and other networks; temporary activities carried out by senior executives, professional sportspeople, performing artists and other groups as may be determined by order of the Ministry of Labour and Social Affairs; or, lastly, activities for training in and undertaking of professional practices. Authorisations of this kind are dealt with in Title IV Chapter I section 2 (Articles 55 to 57) of the Regulation. Having regard to transnational provision of services, see article 43 of the OL and Title IV Chapter I section 4 (Articles 63 to 70) of the Regulation. And finally, regarding activities for which no authorisation is required, see article 41 of the OL and articles 68 to 70 of the Regulation.

[37] Article 36.1 and 3 of the OL.

But the Regulation only recognises two circumstances in which an employer can hire a non-resident alien. The first is when the national employment situation permits hiring, in the case of an unpopular occupation, or else where the employer furnishes evidence of difficulty in finding employees to cover the vacancy. The second is by way of scheduled hiring of alien workers on the basis of quotas approved annually by the Government.

Having regard to the first case, it is envisaged that every three months, on the basis of the available information on management of the job offers submitted by employers to the public employment services, a catalogue of unpopular occupations will be compiled for each province and for Ceuta and Melilla. The inclusion of a given occupation in the catalogue will enable employers to make the appropriate application for a residence and work authorisation to cover the vacancy by hiring a non-resident alien, provided that all the other requirements for its granting are fulfilled. Similarly, when the public employment service certifies that an employer's efforts to cover a vacancy show that the position is a difficult one to fill, despite its not being classified as an unpopular occupation, it will be assumed that the national employment situation permits such hiring.[38]

Article 39 of the OL and Title V of the Regulation regulate the second of the circumstances referred to, that is hiring on a quota basis. Under the terms of these norms, in light of the national employment situation and taking the proposals of the Autonomous Communities and the most representative trade union and employers' organisations into consideration, the Government may approve a quota of alien workers.

The purpose of the quota is to facilitate programmed hiring of alien workers by setting a provisional number[39] of stable job offers and defining the characteristics of these. But in addition, the order establishing the quota may also set a certain number of visas for job seekers. Of this type of visas, some may be intended for children or grandchildren of native Spaniards, and others may be reserved for certain sectors of activity or occupations in a specific geographic area.[40]

In any event, hiring through the quota system does not apply to aliens already present or resident in Spain, since workers are to be selected in their countries of origin on the basis of blanket offers made by employers, with priority going to countries with which Spain has signed an agreement on the regulation and ordering of migratory flows.[41]

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[38] See article 38 of the OL and articles 48 to 54 of the Regulation.

[39] What makes this provisional is the fact that it can be reviewed in the course of the year to bring it into line with the evolution of labour market. As noted in RD 2393/2004, the idea of making the quota adaptable to the circumstances is to help move up from a simple numerical estimate to a concept that encompasses everything from the possibilities of training and selection at source (in which employers can play a part, see article 80.3 of the Regulation) to subsequent social intervention to facilitate integration.

[40] Articles 39.3 of the OL and 82 of the Regulation and article 39.4 of the OL and 83 of the Regulation, respectively.

[41] A case in point is Ecuador, the country of origin of the second largest contingent of

3. Authorisation of temporary residence and work authorisations in consideration of ties

As we saw, the basic idea underlying regulation of the granting of work authorisations to aliens in Spain is that the hiring be done in the country of origin, so that it is not possible in principle to hire aliens who are already living in Spain in an irregular situation. Nonetheless, an individual always has the possibility exceptionally of regularising his or her situation by seeking a temporary residence and work authorisation in consideration of ties as provided in article 31.3 of the OL and implemented by article 45 sections 2, 6 and 7 of the regulation implementing it. According to these sections, the Administration may grant a temporary work authorisation in consideration of ties, in three cases.

The first is employment, provided that the person has no criminal record in Spain or his/her country of origin[42] and produces evidence of having lived continuously in Spanish territory for at least two years and of having been in employment for not less than one year. The second is when an alien with no criminal record provides evidence of having lived continuously in Spain for at least three years and has a contract of employment lasting not less than one year, signed by the employer at the time of applying for the authorisation. In the latter case the applicant must also provide evidence of being the spouse, ancestor or direct descendant of other resident aliens, or else must present a report from the Local Authority where he/she is habitually resident demonstrating his/her social integration. Finally,

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aliens registered in Spain (492,000 according to provisional INE figures at 1 January 2005) after Morocco (with more than 500,000). On 29 May 2001 Spain signed an Agreement with Ecuador for the regularisation and regulation of migratory flows (provisional application of the Agreement *BOE* no. 164 of 10 July 2001, pp. 24909–24912). In addition, article 14.3 of that Agreement allowed the Government to carry out a campaign to regularise the situation of aliens of Ecuadorian nationality present in Spain irregularly. Spain has concluded agreements of this kind with other States apart from Ecuador, including Colombia, the Dominican Republic and Morocco in 2001 (provisional application of the Agreement between Spain and Colombia of 21 May, in *BOE* no. 159 of 4 July 2001, pp. 23724–23726; provisional application of the Agreement between Spain and Morocco of 25 July, in *BOE* no. 226 of 20 September 2001, pp. 35091–35093; and provisional application of the Agreement between Spain and the Dominican Republic of 17 December, *BOE* no. 31 of 5 February 2002, pp. 4414–4417, rectification in *BOE* no. 70 of 22 March 2002, p. 11561); with Romania on 23 January 2002 (*BOE* no. 289 of 3 December 2002, pp. 42170–42172); or more recently, with Bulgaria on 28 October 2003 (provisional application *BOE* no. 299 of 15 December 2003, pp. 44453–44455; and entry into force, *BOE* no. 81 of 5 April 2005, p. 11477) and with Peru on 6 July 2004 (Provisional application in *BOE* no. 237 of 1 October 2004, p. 32770–32771). On agreements of this kind, see Ripoll Carulla, S., "Spain's Bilateral Agreements on Foreign Workers: a New Instrument of Spanish Immigration and Development Policy", in *SYIL*, vol. VII (1999–2000), 39–49, pp. 42–47.

[42] It is worth noting that the requirement of a check of criminal records in the country of origin is a novelty introduced by the Regulation.

the children of a mother or a father who was originally Spanish may obtain a residence authorisation in consideration of ties. Such authorisations are valid for one year only, as are the work authorisations granted along with them in consideration of ties.

It must be stressed that the opportunity of obtaining a Spanish residence authorisation in consideration of ties has been extensively used and in practice has enabled numerous persons to obtain work authorisations. This is borne out by a Resolution of the Directorate-General for Regulation of Migrations of 23 April 2002 in which, precisely because of the problems of excess labour in certain provinces and sectors of activity caused at that time by the large number of work authorisations granted through this procedure, it was decided to expand the geographic validity of these authorisations from the applicant's province of residence or a specific sector of activity, to which they were restricted in principle, to the entire national territory and all sectors of activity.[43]

IV. THE REGULARISATION PROCESS CONTEMPLATED IN THE THIRD TRANSITIONAL PROVISION OF ROYAL DECREE 2393/2004

1. Background

As we noted in the Introduction, the Third Transitional Provision of RD 2393/2004 contains a temporary exception to the general rules for admission of alien workers laid down in the Regulation. The purpose of this provision is within a period of three months to permit the normalisation of the situation of immigrants who are living in Spain irregularly by allowing them to obtain a temporary residence and work authorisation.

The procedure for these purposes, regulated by the cited Third Transitional Provision and implemented by Order PRE/140/2005 of 2 February,[44] was set in motion on 7 February last, when both instruments came into force, and concluded on 7 May 2005.

Be it noted that this is not the first time that a special regularisation process like the one discussed here has been opened in Spain. Already during the Partido Popular government, precisely as a result of the establishment of a new aliens regime with the approval of OL 4/2000 of 11 January, the presence of a large number of immigrants in an irregular situation was taken into account, and it was decided to introduce extraordinary measures to regularise them. Thus, in its First

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[43] For the text of the Resolution, see Fernández Rozas, C., and Fernández Pérez, A. (Eds.), *Ley de extranjería . . ., op. cit.*, pp. 310–311.

[44] *BOE* no. 29 of 3 February 2005, pp. 3709–3723.

Transitional Provision the cited OL charged the Executive with the task of determining a procedure to allow what were then called residence or residence and work "permits"[45] to be obtained by aliens who had been in Spain continuously since 1 June 1999[46] and could produce evidence of having applied for a residence or work permit at any time or having possessed one in the last three years.

In obedience to that mandate, the Government approved Royal Decree 239/2000 of 18 February[47] laying down a procedure to implement the regularisation, further extending its sphere of application to asylum seekers whose request[48] had been denied, to relatives of those accepted under the procedure and to aliens who were relatives of EC residents or Spaniards.

Only a few months after the conclusion of the term allowed for regularisation under that procedure, following an election victory which gave the *Partido Popular* an absolute majority in parliament, OL 8/2000 of 22 December introduced the first thoroughgoing reform of OL 4/2000.[49] The fourth Transitional Provision of the new Organic Law provided for the initiation of a process to re-examine those regularisation applications which had been refused only for failure to produce evidence of having lived continuously in Spain since 1 June 1999. In pursuance of Royal Decree 142/2001 of 16 February establishing the requirements for these purposes, the competent administrative organs proceeded *ex officio* to re-examine such applications, for which they were allowed a period of three months.

2. Procedure

A) *Legitimation*

This latest normalisation process targets extra-Community nationals who are in Spain on an irregular basis but possess a real and verifiable link with the labour market. This is borne out by the sphere of application of the cited regulation, and particularly by the subjects who are legitimised for purposes of applying for normalisation, and by the requirements for applicants.

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[45] The sole additional provision of OL 14/2003 of 20 November ordains that all references to the term "permit" in OL 4/2000 be replaced by the word "authorisation".

[46] To accredit this, a certificate of registration in the municipal roll as in the 2005 regularisation process was not required; it was sufficient to present a copy of the passport, a registration voucher or a valid travel document along with the application.

[47] *BOE* no. 43 of 19 February 2000, pp. 7578–7581. Correction of errata in *BOE* no. 59 of 9 March 2000, p. 9696.

[48] Presented before 1 February 2000 (article 1.2 of the Royal Decree).

[49] Besides adding a preamble and seven new articles, OL 8/2000 amended practically all of the provision of OL 4/2000 and replaced the previous additional provision with two new ones. On that reform and the international legal context, and especially the Community context within which it took place, see Jiménez Piernas, C., "La comunitarización de las políticas de inmigración y extranjería: especial referencia a España", *RDCE* no. 13 (2002), 857–894, p. 858.

More specifically, except in the case of hourly-paid domestic service, it is up to the employers wishing to hire alien workers in that situation, or their legal representatives, to make the initial application for a residence and work authorisation on their behalf. For these purposes, the employer or his legal representative must appear personally before the competent organ to process the application.[50]

Having regard to domestic service, the regulations distinguish between two situations which are subject to different rules. On the one hand there is domestic service for a single employer or householder, which for purposes of applying for normalisation is the same as other types of paid employment. On the other hand there is domestic service on a part-time or occasional basis, carried on simultaneously for more than one householder. In the latter case it is up to the alien worker him/herself to present an initial application for residence and work authorisation, for which purpose he/she must make a personal appearance.

B) *Requirements*

Some of the requirements to qualify for this normalisation process are common to the two situations mentioned, while others are specific to each category.

a. *Common requirements*

Among the common requirements we would highlight first that the alien worker must have been registered in the municipal roll of a Spanish town for at least six months prior to the entry into force of the RD – that is, since 8 August 2004 at the latest – and must present a passport, travel document or registration certificate accrediting his/her continuous presence in Spanish territory throughout that period.

In addition, both in cases of part-time domestic service and in all other cases of paid employment, the services agreed or the conditions stipulated in the contract, as the case may be, must conform to the conditions of employment established by the current regulations for the same activity, occupational category and locality.

Again in all cases, the alien worker must have no criminal record entailing offences classified in the legal system, either in Spain or in the countries in which he/she has resided in the last five years; and also he/she must not have been barred from entering the country,[51] except where such prohibition is solely in connection

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[50] The personal attendance requirement, affecting both the employer and the alien worker, provided that the latter is in Spain, was introduced in the third Additional Provision of OL 4/2000 by OL 14/2003.

[51] As provided in article 26 of the OL 4/2000 and article 10 of the implementing Regulation, entry to Spain is prohibited for: aliens who have previously been expelled or in respect of whom an expulsion order has been issued (unless the procedure has lapsed or the limitation on the violation or sanction has expired), for the duration of the ban on entry imposed by the expulsion order; aliens for whom a return order has been

with an unenforced expulsion order issued in respect of infringements of stay entitlements or irregular working as provided in OL 4/2000.[52]

Finally, the worker must be guaranteed a minimum period of employment, which as a general rule is set at six months. In cases of paid employment where the employer presents the application, he must also demonstrate that there is a contract signed by the worker, setting forth his undertaking to maintain the employment for the said minimum period,[53] although logically the force of such a contract will be contingent on the worker's obtaining the requisite residence and work authorisation.

b. *Specific requirements for each category*

To obtain an authorisation in the case of paid employment other than hourly-paid domestic service, the employer applying must be registered in the appropriate Social Security register, must not be in arrears in respect of social security contributions and taxes, and where appropriate must provide evidence of possessing adequate financial, material and personal means with which to hire the worker. For

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issued and in respect of whom the ban on entry established by the return order still stands; those in respect of whom it has been learned through INTERPOL or any other channel of international judicial or police cooperation that they are wanted by the authorities of other States on criminal warrants for serious common crimes which constitute offences in Spain, and who may be arrested where appropriate; those whose entry is prohibited by international conventions to which Spain is a party (save exceptionally for humanitarian reasons or reasons of national interest); and finally, aliens who have been expressly forbidden by order of the Ministry of the Interior to enter the country because of activities contrary to Spanish interests or to human rights, because of known connections with domestic or international criminal organisations, or for other judicial or administrative reasons warranting such a measure, which persons may be liable to arrest where appropriate.

[52] Such infringements, which are considered very serious, are set forth in sections a) and b) of article 53 of the OL and refer to cases in which the worker's situation in Spanish territory is irregular through failure to obtain an extension to their stay, because they have no residence authorisation or it expired more than three months previously, unless they have applied for a renewal in due time; or where the worker is working in Spain without a work authorisation or a prior authorisation to work when he/she does not possess a valid residence authorisation.

[53] Nonetheless, there are some exceptions depending on the sector of activity in which it is proposed to work. For instance, in the agricultural sector the minimum period is to be three months; in construction and catering there is a maximum period of twelve months in which to honour the undertaking; in the domestic service sector where there is a single employer, there is a minimum of eighty effective working hours per month or forty hours per week, without prejudice to the number of hours that the parties agree the worker is to be at the employer's disposal. Finally, for part-time contracts the duration of the employment is to increase in proportion to the reduction of the working day, so that the sum of all the daily hours worked under different contracts of part-time employment concluded during the lifetime of the authorisation is equal to at least the minimum period stipulated as a general rule.

his/her part, the worker is required to possess duly recognised qualifications if necessary or to provide evidence of having the training required for the job that he/she is to do.

On the other hand, if the applicant engages in part-time domestic service, working simultaneously for more than one householder, provided that he/she is not one of the persons expressly excluded from the scope of application of the Special Regime for Domestic Employees,[54] he/she must satisfy the requirements established to qualify for that Regime. In particular, he/she must carry out exclusively domestic tasks in the home where the householder dwells, for an aggregate of at least thirty effective working hours a week distributed over at least twelve days per month, and must receive remuneration of some kind in return.

C) *Processing and effects*

If all the above-mentioned requirements are met, the employer – or the worker where appropriate – may present the requisite application to the competent organs, along with all the documents accrediting compliance with the requirements in each case and the identity of the employer or the householder of the home where the service is to be provided. Where applications are presented by the employer, they must be accompanied by a declaration from the latter that he is not in any of the situations causing denial of residence and work authorisation for employees provided in the Regulation.[55]

Because this is an exceptional procedure, applications are processed preferentially, and acceptance for processing automatically entails *ex* officio shelving of any other residence or residence and work application previously submitted in the name of that alien. The Government Delegate, or Sub-Delegate depending on whether the unit involved is a uniprovincial Autonomous Community or a province, must notify the interested party, whether the employer or the worker, of its decision within a maximum of three months as from the day following presentation at the appropriate registry.

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[54] The Special Regime for domestic employees expressly excludes relatives of the householder down to the second degree of consanguinity or affinity, save in exceptional cases; adopted or *de facto* or *de jure* foster children; persons providing services on a basis of friendship, benevolence or good neighbourliness; drivers of motor vehicles in the service of private individuals; and persons providing gardening or child-care services where such services are not part of the generality of domestic tasks.

[55] The reference is specifically to the causes of denial listed in sections d), e) and k) of article 53.1 of the Regulation, namely: having rendered the job posts it is sought to fill vacant in the last twelve months by dismissals considered unfair or void; having been sanctioned by firm decision in the last twelve months for violations classified as very serious in OL 4/2000, or for violations relating to aliens classified as serious or very serious in the consolidated text of the Law on infractions and sanctions in breach of the social order, approved by Legislative RD 5/2000 of 4 August; or having been convicted by firm decision of offences against workers' rights or against foreign citizens, unless the offences have been expunged from the record.

If notice is not received within that time it must be understood that the residence and work authorisation has been denied. A favourable resolution implies that the authorisation will be granted; however, this is not automatic but is conditional upon compliance with the requirement that the worker register or be registered with the Social Security. This step, and payment of the fiscal charges for granting of the authorisation, must be completed within one month as from notification of the resolution. Only then will the authorisation come into force;[56] this will last for one year and will cause the shelving of any outstanding expulsion orders and the revocation *ex officio* of any resolutions sanctioning the grantee for infringements of stay entitlements or irregular working as noted earlier.[57] The worker is then required to apply personally, within a maximum of one month thereafter, for an alien's identity card,[58] which will be issued for as long as the authorisation is valid.

3. Course of the process

One of the criticisms most commonly levelled at the exceptional normalisation process for immigrants analysed here has been that it is excessively strict to require a certificate from the municipal roll as proof that an alien worker has been continuously in Spanish territory for the six months required by the RD.

This criticism is founded on the fact that in practice, although registration in the municipal roll is open to all individuals regardless of whether their situation as regards residence in the municipality concerned is regular or irregular, and even despite the advantages attendant on registration,[59] many of the aliens resident in

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[56] Conversely, if one month elapses without the worker becoming affiliated or registered with the Social Security, the authorisation will be void and the applicant will be required to state the reasons for failure to satisfy the condition required, with a warning that if this is unjustified or the reasons adduced are not considered adequate, future applications presented as part of the normalisation process may be denied.

[57] It is interesting to note in this connection that during the course of 2004 the Ministry of the Interior was only able to enforce 26% of the expulsion orders issued for immigrants. More specifically, of 50,644 expulsion orders issued in 2004, only 13,296 were carried out, leaving a total of 37,348 immigrants for whom expulsion orders were issued in the last year (*El País*, 3 March 2005, p. 29).

[58] Article 4.2 of OL 4/2000, in the final wording after the amendment introduced by OL 14/2003, provides that: "All aliens to whom a visa has been issued or an authorisation to remain in Spain for longer than six months shall be issued with an alien's identity card, *for which they must apply in person* within one month of their entry in Spain or the granting of the authorisation as the case may be" (our italics). As the document warranting administrative authorisation to stay, the alien's identity card will conform to the terms of Council Regulation 1030/2002 of 13 June 2002 establishing a uniform model of residence permit for third-country nationals (*OJEC* L157 of 15 June 2002, pp. 1–7).

[59] Registration in the municipal roll entitles the alien to health care, education and other services available to any foreigner in Spain regardless of whether his/her situation is regular.

Spain in an irregular situation are not included in the population census. Failure to register has been the result of lack of motivation in some cases and fear of expulsion in may others, especially since the promulgation of OL 14/2003 of 20 November,[60] article three of which amended the *Local Government (Bases of Regulation) Act*, Law 7/1985 of 2 April, and introduced a new seventh Additional Provision allowing the Directorate-General of Police to access data from municipal rolls.[61]

Thus, practically since the outset of the process, various sources have been calling for flexibilisation of the requirement, to avoid numerous persons being excluded from regularisation despite having a contract of employment and having in fact been in Spain since the established date. Such calls have come from the Ombudsman, the Council of Attorneys, employers, NGOs and immigrants themselves, asking for the admission of documents other than the certificate from the municipal roll as proof of uninterrupted presence in Spain.

The Government for its part systematically refused to amend the Royal Decree. However, in response to the results of the first two months of the process, the Ministry of Labour announced the possibility of a meeting with the Committee for Social Dialogue to examine ways of achieving the flexibilisation called for on the basis of the legislation currently in force.[62] At that meeting it was agreed with the representatives of employers and unions to ask the Census Council for an assessment of the feasibility of resorting to a legal formula in existence since 1997, namely "registration by omission",[63] so that aliens who were not registered in the municipal roll before 8 August 2004 but were able to present reliable public documents demonstrating that they had been in Spain since then could apply for normalisation.

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[60] *BOE* no. 279 of 21 November 2003, pp. 41193–41204. Cited *supra.*

[61] According to the first paragraph of the cited additional provision: "Solely for purposes of the exercise of the competences established in the Organic Law on rights and freedoms and social integration of aliens in Spain with regard to the control and continuance of aliens in Spain, the Directorate-General of Police shall have access to data for aliens registered in Municipal Rolls, preferably via telematic media".

[62] According to the *Situation Report* made public by the Ministry of Labour and Social Affairs on 7 April 2005, two months after the commencement of the process, almost 310,000 applications had been received, 64.1% of which were presented in the Autonomous Communities of Madrid, Catalonia and Valencia (the Report can be found at *http://www.tt.mtas.es/periodico*). Although the Government judged the figure to be positive, there can be no denying that it falls far short of the 800,000 applications which were hoped for at the outset of the process. This is perhaps one of the reasons why the Executive eventually acceded to flexibilising the registration requirement.

[63] This formula is contained in the Joint Resolution of 1 April 1997 by the President of the National Institute of Statistics and the Director General of Territorial Cooperation issuing technical instructions to Local Authorities regarding management and reviewing of the Municipal Roll (*BOE*, no. 87 of 11 April 1997, pp. 11449–11473).

The eventual solution to this problem, which was set forth in a Resolution of the President of the National Institute of Statistics and the Director-General for Local Cooperation,[64] was not, as had been mooted, to allow retrospective registration in the municipal roll. In fact it was simply to accept the inclusion in municipal roll certificates requested for normalisation purposes[65] of a note specifying the documents accrediting that the applicant had been in Spain since the date established in the third Transitional Provision of the RD. This did not of course affect the date of registration, which would be that of application in all cases.

In order to avoid having Local Authorities apply different criteria, the abovementioned Resolution listed seven documents, which were the only ones that they would consider valid for the issue of certificates.[66] In addition, given the imminence of the conclusion of the process, the Resolution provided for the eventuality that a Local Authority might not be able to issue a certificate at the time it was requested. In such cases, the applicant should be issued with a duly-registered copy of the application to enable him/her to commence the procedure for normalisation of his/her situation within the time allowed.

It is also worth noting that the employers had previously succeeded in getting the Ministry of Labour and Social Affairs to accept a flexible interpretation of the requirements applicable to hiring in the agricultural sector for purposes of the

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[64] Resolution of 14 April 2005 by the President of the National Institute of Statistics and the Director General of Territorial Cooperation issuing technical instructions to Local Authorities regarding the issue of registration certificates accrediting residence prior to 8 August 2004 for aliens affected by the normalisation and registered later than that date (*BOE*, no. 91 of 16 April 2005, pp. 13164–13167). The Minister of Labour and Social Affairs expressed the hope that the Resolution of 14 April would affect "tens of thousands" of immigrants (see *El País*, 16 April 2005, p. 30).

[65] The regulation refers, of course, to certificates requested by aliens not satisfying the requirement of having been registered before 8 August. More specifically, the reference was to applications for certificates in respect of municipal roll registrations effected after 8 August 2004, or else applications for certificates presented along with an application for registration or inclusion by reason of omission in cases where the alien had never been registered before.

[66] The regulation specifically includes among the documents acceptable as accrediting presence in Spain: 1) Copy of the application for registration, pending or denied and duly registered in the municipality; 2) Health care card from a public health service showing the date of registration, or where applicable a certificate showing the date of first registration; 3) Copy of the application for schooling of minors, duly registered; 4) Copy of the application for social help, duly registered, certification of the Social Services report, or notice of granting of social help; 5) Employment registration document or certificate thereof issued by the Social Security; 6) Copy of application for asylum, duly registered; 7) Notification of decisions under the aliens regulations issued by the Ministry of the Interior. It is further required that these be original documents or certified copies, that they have been issued and/or registered by a Spanish Public Administration; that they contain the identification details of the interested party, and that they have been issued or registered or refer to acts or documents dated before 8 August 2004.

normalisation process. In support of greater tolerance in the deadlines, the agricultural employers, and also some Autonomous Communities such as Murcia, pointed at the time to the difficulties that had been caused by frosts in January and February, which had seriously affected harvests. As a result, with regard to the requirement obliging the employer to provide evidence of a contract of employment concluded with the worker in which the former undertook to retain the latter in employment for at least three months, allowance was made for the possibility, as in the catering and construction sectors, of the undertaking to hire materialising over three consecutive months or on aggregate within the period of one year.

4. Final assessment

The deadline for presentation of applications was midnight on 7 May 2005, by which time a total of 690,679 applications had been submitted. Of these, more than half came from only three Autonomous Communities: Madrid (171,012), Catalonia (139,485) and Valencia (107,012). As to the nationality of the applicants, a very large number were Ecuadorians (more than 20% of the total), followed by Romanians (over 17%) and Moroccans (almost 13%). The rest, each accounting for less than 10%, were Colombians, Bolivians, Bulgarians, Argentines, Ukrainians and others. Also, domestic service is the sector most implicated in regularisation, accounting for almost a third of all applications, followed by construction and then agriculture.

Upon conclusion of the term provided for completion of the regularisation process, the procedure for obtaining residence and work authorisations in Spain will have to be adapted to the general regime laid down in the Regulation. Thus, leaving aside the possibility, which remains open, of applications in consideration of ties, the Government has stressed that this is the last time that there will be a campaign of regularisation of the situation of aliens living irregularly in Spain and has given particular notice to employers that any measures adopted in future will be specifically designed to combat irregular employment.

In this connection it is intended to intensify work inspections and to prosecute and severely sanction offences by employers;[67] the unions have announced that they will be collaborating with the Government by reporting employers who fail to take the opportunity to regularise the situation of their workers.

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[67] On 12 May, on the occasion of a meeting with the Committee for Social Dialogue to report the outcome of the normalisation process, the Minister of Labour and Social Affairs presented the Action Plan of the Work and Social Security Inspectorate to combat irregular employment. The action plan had been announced in February, with the expectation that there would be almost half a million inspections by the end of 2005. To see the Ministry of Labour and Social Affairs press note of 12 May, go to *http://www.tt.mtas.es/periodico/Laboral/200505/LAB20050512_2.htm.*

V. COMPLIANCE OF SPANISH REGULATIONS WITH EU POLICY

One of the chief objectives pursued by the Government in enacting RD 2393/2004 of 30 December was to facilitate legal, orderly immigration while seeking at the same time to deal with the large numbers of irregular immigrants in Spanish territory. To that end, the sole article of the RD approves the Regulation implementing the OL which establishes the rules applicable to the admission of economic immigrants and seeks to flexibilise the regular channels of admission. In addition, to deal with the large numbers of immigrants actually living in Spain in irregular situations, the third Transitional Provision introduces an exceptional regularisation process. The question is: are such measures consistent with EU immigration policy?

First of all, the fact is that at this point in time a common EU immigration policy cannot be said to exist, especially as regards the question of migratory flows, where it has not yet been possible to reach agreement on the definition of a common legal framework. Nonetheless, given the complexity of the phenomenon of migration, the number of different interconnected aspects making it necessary to approach the subject from a variety of different perspectives at once, and the repercussions that any national measure adopted in this field will obviously have on the other Member States, it is most desirable that in the not-too-distant future, the work currently being done by the Commission produce agreement in the Council so that a Directive can be issued defining such a common legal framework.

For the moment, in the absence of a genuine common EU immigration policy, there are signs nonetheless of some movement towards definition of such a policy. To begin with for instance, it seems clear that a change of approach is needed to deal with the new situation – the new economic and demographic context – in which the EU has been immersed in the last few decades. Also, there seems to be little doubt that this brings with it, first and foremost, a need for proper regulation of economic immigration based on common criteria which will facilitate legal admission, including the analysis of economic needs and based upon collaboration with the countries of origin. It likewise seems clear that this is not the only way to put an end to the high level of irregular immigration in EU territory and that since irregular immigration and employment are mutually-fomenting phenomena, it is essential to supplement measures combatting irregular immigration with measures to deal with the submerged economy.

As regards regulation of the admission of economic immigrants in particular, both the practical and the theoretical approaches of the EU reveal certain generally-shared lines of action to which the provisions of the Spanish Regulation conform. For instance, like the draft Directive originally presented by the Commission, this Regulation is founded on the distinction between a general regime and certain special cases (such as fixed-term jobs or the provision of transnational services) and the channels it introduces for legal admission of workers are based on justified economic needs as determined by the national employment situation, alongside a

quota system. In addition, in response to reiterated calls from the ESC to deal with the demands of reality, it introduces a visa for job-seekers as a supplement to selection in the country of origin. Finally, it facilitates the application formalities by establishing a single procedure for residence and work authorisations and involves the employer in the processing by allowing the latter to present the application.

At a EU level regularisation processes are seen as a type of measure that is necessary exceptionally to deal with a situation that cannot readily be tackled in any other way, and a number of Member States have used measures of this kind. For its part, the ESC does not rule out recourse to regularisation as an instrument in the fight against irregular immigration. The Commission itself has highlighted some of its positive effects, such as the fact that it gives the State a greater degree of control over immigration in its territory, it brings a good number of aliens who had hitherto belonged to the submerged economy into legal employment, and it augments public revenue from taxes and Social Security contributions, which in turn facilitates the social integration of immigrants.

However, in terms of appropriateness for accomplishing the objective pursued – namely to put an end to irregular immigration – a regularisation process like the one considered here cannot be conceived as an end in itself, that is as an actual instrument for managing immigration. It must rather be considered as an additional measure, of an exceptional nature, within an overall programme of action to combat irregular immigration. An overall programme that provides more flexible legal channels of immigration, taking into account not only the needs of the labour market but also the possibilities of integrating nationals of third States, that awards priority to collaboration with the countries of origin, that simplifies the formalities for renewal of authorisations once granted, and above all that introduces follow-on control and punitive mechanisms to deal firmly with irregular employment, the principal stimulus for irregular immigration. This is the rationale behind the statements and warnings issued by the Ministry of Labour and Social Affairs regarding a forthcoming campaign of work inspections targeting employers who have not taken advantage of the opportunity to regularise the situation of their workers. Otherwise any mass regularisation initiative like the one analysed in this article becomes no more than a stopgap solution that will inevitably have to repeated at a later date – as witness the fact that in Spain such measures have become necessary on several occasions in the last five years.