Part III – Outlook

I examined in Part I the concepts of irregular migration and regularisations and outlined the framework under EU law. The regularisations in Austria, Germany and Spain were examined from a comparative perspective in Part II. The analyses in Parts I and II thus serve as a foundation for provoking the discussion concerning the legal instruments regarding irregularly staying migrants. Part III builds on this foundation with a proposal for a future EU Regularisation Directive. In particular, it can take stock of the advantages and disadvantages of the common and different approaches in Austria, Germany and Spain and refer to the respective national requirements and conditions to plant the seed for future EU legislation.

Chapter 5 – An EU Regularisation Directive[2272]

The following proposes an EU Regularisation Directive, though such EU legislation is presently unrealistic under the current *Realpolitik*.[2273] My proposal has already been acknowledged by *Bast/von Harbou/Wessels*, who use the title 'Directive of the European Parliament and the Council on common standards and procedures in Member States for regularizing illegally staying third-country nationals'.[2274] A regulation is not considered as the legislative form: imposing mandatory rules on the Member States without allowing any discretion in transposing the rules into national law is even less politically viable.[2275] Despite such political reality, I remain

2272 Individual sections and ideas have been published in *Hinterberger*, Maastricht Journal of European and Comparative Law 2019 and, in German, in *Hinterberger* in *Lanser/Potocnik-Manzouri/Safron/Tillian/Wieser*. See Introduction D.III.

2273 See the detail given in Chapter 2.C.I. and especially *Lutz*, EJML 2018, 49f. Also *Desmond* in *Czech/Heschl/Lukas/Nowak/Oberleitner* 312 referring to the COVID-19 pandemic.

2274 *Bast/von Harbou/Wessels*, REMAP 205ff, in particular 206.

2275 See how the negotiations concerning reforms of the Common European Asylum System and Resettlement have stalled: *Council of the European Union*, Note from the Presidency to the Council Concerning the Reform of the Common European Asylum System and Resettlement (30.5.2018), 9520/18, 4.

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convinced that there are benefits to providing more detail on legislation that would supplement the EU's current immigration policy: 'There are no easy answers, but their absence does not render the quest for appropriate solutions obsolete'.[2276] In this respect, examples of scholars who have also undertaken such quest include *Menezes Queiroz*, who provides an overview of the potential balancing role of regularisations at supranational level.[2277]

It is therefore prudent to present the core content of a Regularisation Directive, but to respect the political reality by not drafting specific legislative provisions. The remarks below build on Part I, with particular emphasis on the explanations in Chapter 2 concerning with the EU's immigration policy, its objectives and competences. The comparison in Part II (Chapter 3 and Chapter 4) is, however, the central element.

This Chapter first presents the complementary notion of 'immigration from within' (A.) in which I present the reasons why current EU immigration policy concerning irregularly staying migrants needs a new direction that can be best supplemented by an EU Regularisation Directive. I then present the basic concept underpinning such a Directive (B.) and discuss the most important areas of its content (C.). Finally, I present a plea for developing the general part of EU migration law with a horizontal Regularisation Directive (D.).

A. 'Immigration from within'

The remarks at the beginning of this Chapter give rise to the question whether the EU's mandates and competences under primary law do not even (implicitly) call the EU to realign its immigration policy also with regard to irregular migration, whereby I refer specifically to the irregular stay. In this respect, the EU's push towards more effective returns accords with the TFEU, yet in the same breath it must also be recognised that the measures thus far have not been able to significantly reduce the number of irregularly staying migrants or have had only a limited effect. The poor enforcement of returns shows the need for action from the EU in the 'fight' against irregular migration.[2278] Just like returns, regularisations end

2276 *Thym*, CMLRev 2013, 734.
2277 *Menezes Queiroz*, Illegally Staying 167ff. See further *Schieber*, Komplementärer Schutz 334ff.
2278 See Introduction A., Chapter 2.A. and Chapter 2.C.I.

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the irregular stay.[2279] The EU mandate to 'combat' irregular migration would be fulfilled through the use of this measure.[2280]

The analysis in Chapter 2 allowed me to conclude that Article 79(2)(a) and (b) TFEU afford the EU legislator broad competences to pass legislation on regularisations. The substantive provisions and the procedure as well as the rights attributable to the status and freedom of movement could be regulated in EU legislation.[2281] Residence permits issued on the basis of pure national law could be equipped with status and freedom of movement rights. Based on Article 79(2)(c) TFEU, EU law could also create a form of tolerated status.[2282] Two – expressed somewhat exaggeratedly – approaches thus seem conceivable for the EU's future immigration policy:

Firstly, to focus just on effective returns.[2283] Regularisations will continue not to be viewed as part of the solution. This would mean a continuation of the present policy, which aims at a more consequent enforcement of the current provisions.[2284]

Secondly, the alternative favoured here is linked to the rules under the Return Directive, supplementing these with the harmonisation of the Member States' regularisation policies.[2285] This complementary approach could be entwined with the current efforts towards more consequent enforcement and actually lower the number of irregularly staying migrants.[2286]

An EU regularisation policy would fall within the ambit of EU primary law, as shown in Chapter 2. This reform proposal would, however, not strike the core of the return policy, as the return of irregularly staying migrants would continue, as was also emphasised by the ECJ in *El Dridi*. However, the Court did stress in *Zaizoune* that the Member States may at any moment grant a residence permit instead of enforcing the return

2279 See Chapter 2.B.I.
2280 See Chapter 2.C.I.
2281 See Chapter 2.D.I. and Chapter 2.D.II.
2282 See Chapter 2.D.II.3.
2283 In this sense COM(2017) 200 final and see the comments in *Lutz*, EJML 2018, 49 and *Kraler*, Journal of Immigrant and Refugee Studies 2019, 94ff.
2284 See COM(2015) 668 final, 2. Cf. in this context *Bommes*, Illegale Migration in der modernen Gesellschaft – Resultat und Problem der Migrationspolitik europäischer Nationalstaaten in *Alt/Bommes* (eds), Illegalität: Grenzen und Möglichkeiten der Migrationspolitik (2006) 95 (108).
2285 Cf. *Uriarte Torrealday*, Revista de Derecho Político 2009, 315.
2286 Also *Bommes* in *Alt/Bommes*, 108. Cf. *Böhning*, International Migration 1983, 161.

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procedure. My proposal is thus for regularisations to be used as a means to supplement current EU policy.

The EU has so far refrained from employing regularisations as a tool to manage immigration and thus it seems to me that the introduction of a regularisation legal framework in the form of a directive would fill a gap in the common immigration policy. Consequently, the 'fight' against irregular immigration is understood in accordance with primary law and, to quote *Bast*, as '*Einwanderung von innen*'[2287] – immigration from within. I see this as an opportunity for the EU to 'fight' irregular migration more effectively, with regularisations as the key tool in the toolbox.[2288] As has been the case so far in this study,[2289] an individual-rights perspective is adopted.

Regularisations are often criticised for 'rewarding' foreigners who have ignored the legal requirements to leave the country.[2290] Such criticism is indeed justified, but examples from construction or tax law show that the 'legalisation' of illegal structures or 'tax amnesties' are widespread.[2291] Accordingly, the criticism of this behaviour by irregularly staying migrants needs to be considered in the discussion of a Regularisation Directive, but should not be an obstacle.

This is supported by the fact that regularisations are already part of the 'toolbox' of the differentiated, contemporary migration management at national level,[2292] as was clearly shown in the comparison in Part II, in particular in Chapter 4. As under the Return Directive, they also represent – in addition to return[2293] – the main way out of irregularity.[2294] By using regularisations, the requirements under EU primary law would also be (more effectively) fulfilled; for instance, immigration policy would be further developed in all phases, i.e. continuously and with regard to all stages of residence.[2295] This would prevent the state of limbo in the administra-

2287 *Bast*, ZAR 2012, 6.
2288 In this sense *Costello*, Human Rights 101. Though see to a much lesser degree and in part with a different opinion *Menezes Queiroz*, Illegally Staying 167ff.
2289 See Introduction D.II.3.
2290 In this sense *Pico Lorenzo*, Jueces para la democracia 2002, 68f.
2291 See Chapter 1.A.
2292 Cf. *Kraler*, IMISCOE WP No. 24 (February 2009) 21 and *Desmond* in *Acosta Arcarazo/Wiesbrock* 70.
2293 See Chapter 2.B.I.
2294 Cf. *Triandafyllidou/Vogel* in *Triandafyllidou* 297.
2295 See Chapter 2.C.II.

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tive practice of the Member States with regard to non-returnable persons, as recognised in ECJ case law.[2296]

A harmonised approach at EU level would counteract[2297] the fragmentation of regularisations at national level identified in the comparison in Part II and could contribute to reducing the number of persons with an irregular stay. It has already been indicated that a Regularisation Directive would bring advantages for the respective domestic budgets and the rule of law.[2298] The consistency with the principle of subsidiarity has also been discussed above, in so far as the EU makes use of regularisation as a legal instrument.[2299] Harmonisation would also lead to administrative simplifications.

Furthermore, a Regularisation Directive could contribute to the efficient management of migration flows. According to the TFEU's design, this is reflected in a convergence of the EU *acquis* and legal reality.[2300] Through regularisations the EU could reduce the enforcement deficit of returns and pursue an active migration policy that exerts influence on the legal reality.[2301] In this way, both the fundamental rights of irregularly staying migrants[2302] and the management interests of the Member States would be strengthened and satisfied by striking the appropriate balance.[2303]

B. Underlying concept – holistic approach

My concept underlying a Regularisation Directive is based on a holistic approach that addresses all irregularly staying migrants and combines the matters identified in the comparison in a single instrument. This is the best possible way to supplement the Return Directive and to harmonise the fragmentary approach pursued to date by the EU and the Member States. On a substantive level, all regularisations that fall under one of the

2296 See Chapter 2.B.II.2.b.
2297 In this sense also *Schieber*, Komplementärer Schutz 333f.
2298 Cf. e.g. *Bast* in *Fischer-Lescano/Kocher/Nassibi* 71 referring to *Dauvergne*, Illegal 9ff.
2299 See Chapter 2.D.IV.
2300 See also *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 15.
2301 *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 15.
2302 Cf. *Bast*, ZAR 2012, 6 and *Thym*, CMLRev 2013, 715 referring to the area of freedom, security and justice.
2303 See *Bast*, Aufenthaltsrecht 143.

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six purposes of the regularisation should be covered.[2304] In other words, all those measures that are to be understood as regularisation in the sense of the present study are taken into account.[2305]

An independent Regularisation Directive could contain different conditions for issuing permits, as reflects the current practice in Austria, Germany and Spain. The Directive conceived to supplement the Return Directive should be clearly distinguished from the Return Directive, the content is indeed the same in so far as the task of 'combatting' irregular migration is concerned, but the substantive content differs entirely. I therefore propose a two-tier model to adequately address the fragmented legal landscape in the world of regularisations.

Before presenting this model, however, another option should be discussed. The Return Directive could be reformed and – in addition to Article 6(4) Return Directive – further provisions concerning regularisations could be introduced.[2306] These could define both the return procedure and minimum standards for granting residence permits, covering for instance those cases in which return is impossible for legal or factual reasons and thus making regularisation necessary.[2307] Legal reasons would result from the non-refoulement principle and the right to respect for private and family life, as discussed in Chapter 4.[2308] It would also be especially important to set procedural guarantees and strict minimum conditions for granting protection as otherwise there would be a risk that the recast Return Directive could be undermined in practice by the Member States or that the standards of international and EU law could be watered down ('race-to-the-bottom').[2309] As already indicated, however, a Regularisation Directive should be given preference over a recast Return Directive to maintain the distinction between return and regularisation in future EU legislation.

Finally, it should be noted that the Qualification Directive could also be supplemented. However, this approach will not be pursued further, as the distinction between beneficiaries of international protection and irregularly staying migrants should be maintained, especially in order not to lessen the protection afforded to the former.

2304 See Table 1 in Chapter 1.B.III.
2305 See Chapter 1.A.II.
2306 See COM(2018) 634 final on the European Commission's current proposal.
2307 See Chapter 2.B.II.2.
2308 See Chapter 4.A.II. and Chapter 4.B.–C.
2309 Cf. *Bausager/Møller/Ardittis*, Study (11.3.2013) 84.

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I. First harmonisation phase

The first phase of harmonisation should comprise and define the minimum standards under international and EU law on the basis of the comparison undertaken in Part II. More precisely, this concerns Articles 3 and 8 ECHR in international law, and in EU law the Return Directive, the Human Trafficking Directive, the Qualification Directive as well as the Charter of Fundamental Rights. The corresponding ECtHR and ECJ case law must also be considered.

With regard to the first phase, this means determining all the minimum requirements for each of the regularisations that are derived from international or EU law and thus fall under the purposes of the regularisation 1 to 4.[2310] A legal entitlement to regularisation should also be determined for all of the cases in which – in line with this study – there is a regularisation obligation,[2311] such as may be derived, inter alia, from Articles 3 and 8 ECHR and the Return Directive. Such step could allow the EU to be more effective in its 'fight' against irregular migration and reduce the number of irregularly staying migrants. The provisions of higher-ranking laws should themselves serve as a basis for the minimum requirements to be set in order not to weaken the current practice in Member States, which often exceeds the level set by the higher-ranking norms.[2312]

This approach would place human rights or the corresponding EU legislation at the centre of the Regularisation Directive. With a foundation in universal human rights the Directive would have a 'cosmopolitan basis'.[2313] *Schmid-Drüner* takes a similar direction by calling in 2007 for a Directive 'for the protection of elementary fundamental rights of illegally staying migrants'.[2314] Her proposal should ensure, inter alia, the respect for the human dignity, private and family life, right to healthcare and to education of 'illegally staying migrants'.[2315] Although some of her demands in this respect do proceed in a different direction, human rights are nonetheless at the core.

2310 See Chapter 1.B.III.1.–3.

2311 See Chapter 2.B.II.2. as well as Chapter 1.B.III.2.

2312 Cf. *Bausager/Møller/Ardittis*, Study (11.3.2013) 84.

2313 As stated by *Bast*, Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff, ZAR 2018, 41 (46) regarding subsidiary protection; cf. also *Bast/von Harbou/Wessels*, REMAP 205ff.

2314 *Schmid-Drüner*, Einwanderungsrecht 477: '*eine Richtlinie zum Schutz elementarer Grundrechte illegal aufhältiger Drittstaatsangehöriger*'.

2315 *Schmid-Drüner*, Einwanderungsrecht 477.

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The harmonisation of regularisations based on international and EU law should not, however, lead to the fact that regularisations issued on the basis of context-specific circumstances would become incompatible with EU law.[2316] Accordingly, a provision with the same wording as Article 6(4) Return Directive should be included in the Regularisation Directive, with its first sentence being of particular relevance: 'Member States may at any moment decide to grant an autonomous residence permit or other authorisation offering a right to stay for compassionate, humanitarian or other reasons to a third-country national staying illegally on their territory'.

II. Second harmonisation phase

In a second phase, minimum standards could then be introduced regarding the purely national regularisations categorised in the purposes of the regularisation 5 and 6. The Member States would have to be given sufficient scope to be able to take into account – as is currently the case – the respective geographical, economic and political factors that have already played a role in the determining national regularisations. In light of this, no special minimum requirements should be set in order to allow the Member States to respond to domestic circumstances by means of regularisations, as they have done so far in accordance with Article 6(4) Return Directive. The regulation of aspects of procedural law would also be meaningful with regard to this type of regularisation. However, priority should be given to the first harmonisation phase, with the second phase only beginning when an agreement is reached regarding the first phase – a staggered approach, so to speak.

C. Content

Following on from the underlying concept, this section now turns to the regulatory content considered necessary for the Directive and which should be taken into account in a possible legislative process at EU level. In doing so, I will refer back to comments already made in the course of this study.

With regard to content, the 2017 Return Handbook prepared by the European Commission can serve as a starting point for the more detailed

2316 See Chapter 4.G.

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design of such a directive.[2317] Amongst other things, the Handbook addresses the wide discretion of the Member States in issuing residence permits and recommends that the Member States take into account both individual and horizontal (policy-related) criteria, such as:

- 'the cooperative/non-cooperative attitude of the returnee;
- the length of factual stay of the returnee in the Member State;
- integration efforts made by the returnee;
- personal conduct of the returnee;
- family links;
- humanitarian considerations;
- the likelihood of return in the foreseeable future;
- need to avoid rewarding irregularity;
- impact of regularisation measures on migration pattern of prospective (irregular) migrants; (and)
- (the) likelihood of secondary movements within Schengen area'.[2318]

These criteria represent the most important points taken into consideration by the European Commission in the development of a regularisation legal framework already in 2017. Comparing these with the results of the comparison of Austrian, German and Spanish law, soon shows the number of overlaps. This underlines to an even greater extent the central role a comparison of national laws can play in a future Regularisation Directive.

I. Personal scope of application

The personal scope of application is an essential element of a Regularisation Directive. It should align with the Return Directive to cover all irregularly staying migrants[2319] in order to fit coherently into existing EU law and, in the sense of an 'immigration from within', contribute to the reduction of irregularly staying migrants.

II. Requirements for granting regularisations

The substantive and formal requirements must be clearly formulated and must not give the competent authorities too much discretion, otherwise

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2317 Along this line *Lutz* in *Thym/Hailbronner* Art 14 Return Directive mn 14.

2318 Return Handbook 2017, 139.

2319 See also Chapter 5.D. and Chapter 1.A.II.1.

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there is no legal certainty.[2320] This was clear in relation to some regularisations examined in Chapter 4.[2321] For example, in the case of the Spanish 'temporary residence permit for exceptional circumstances due to collaboration in the fight against organised networks', it is not clear how the term 'collaboration' is to be interpreted.[2322]

The comparison of the national laws has revealed several requirements that play a central role in connection with many regularisations and have thus been mentioned. The period of residence spent in the Member State is an essential requirement, whereby the quality of the residence status is assessed differently. Accordingly, periods of lawful residence are generally valued more highly than those during which the person concerned was tolerated or staying irregularly. If a measure terminating the residence of the irregular migrant exists, this can constitute a reason for refusal. As a rule, the absence of criminal convictions is a necessary requirement for granting a residence permit or, conversely, a criminal conviction may constitute a ground for refusal. Another aspect usually taken into consideration is whether the migrant was at fault for the impossibility of departure. In this context, it is assessed differently whether the cause for the impossibility of leaving the country is already taken into account when the residence permit is granted (Austria) or only when access to social benefits or the labour market is granted (Germany).[2323] The latter is to be preferred.

Furthermore, whether, and if so, under which conditions, there is a legal entitlement to regularisation. Such an entitlement should be defined for those cases in which a regularisation obligation is argued in this study.[2324] Consequently, non-returnable migrants should be granted a right to stay after a certain period of residence. This was already discussed by the Danish delegation in 1997 during the negotiations on the introduction of subsidiary protection.[2325] In line with the view expressed here that there is

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2320 In this sense *Trinidad García*, Revista de Derecho Migratorio y Extranjería 2002/1, 101f, 110f, on the problems arising from the Spanish regularisation programme in 1999.

2321 See also Chapter 4.A.I.3.a. on the problems acquiring toleration on factual grounds in Austria.

2322 See Chapter 4.F.II.1.

2323 However, one must consider the toleration of 'persons whose identity is not verified' and its effects on German law; see in particular Chapter 4.A.I.2.a.

2324 See Chapter 2.B.II.2. and Chapter 1.B.III.2.

2325 *Council of the European Union*, Aufzeichnung der dänischen Delegation für die Gruppen „Migration“ und „Asyl“ betreffend subsidiären Schutz (17.3.1997), 6764/97, 9.

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an obligation to regularise in cases of permanent non-returnability, I therefore propose a period of 18 months, which is derived from the maximum period of detention.[2326]

III. Right to stay

Further central aspects to be determined include not only the duration of the right to stay but also the possible extensions or change to a different basis for the right. It is also conceivable that EU law introduces a kind of tolerated status that proceeds the grant of a right to stay. This could provide even greater legal certainty as a 'transitional solution' under residence law, i.e. in the phase before granting a right to stay or until voluntary return. However, two points need to be considered should toleration be introduced as a precursor to a right to stay: acquiring tolerated status must not be made impossible by affording the authorities extensive discretion[2327] and long-term irregularity is to be avoided. In this latter respect, it would be counter-productive to create problems such as the 'chain tolerations' in Germany and for irregularly staying migrants to become stuck in a situation of permanent non-returnability.[2328]

A right to stay that is acquired in relation to a Regularisation Directive must in any event constitute lawful residence.[2329] Here, it is key that irregularly staying migrants are able to extend their right to stay or to switch to the 'ordinary' residence regime. In practice, many irregularly staying migrants often 'fall back' into a state of irregularity after regularisation, which is certainly a problem[2330] – the situation in Spain in the 1990s was particularly striking in connection with the regularisation programmes that were implemented.[2331] Similar problems can also be seen in current Spanish law with the different requirements for 'roots', as shown by *Sabater/Domingo*.[2332] In order to avoid a return to an irregular status, the conditions for an extension or the change to a different permit should therefore be formulated in such a way that they can be met by the mi-

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2326 See Chapter 2.B.II.2.b.
2327 See Chapter 4.A.I.3.a.
2328 See Chapter 4.A.I.2.d.
2329 See Chapter 1.A.II.2.
2330 *Triandafyllidou/Vogel* in *Triandafyllidou* 295f.
2331 See *Cabellos Espiérrez/Roig Molés* in *Aja/Arango Joaquín* 114 and Chapter 3.C.I.
2332 See *Sabater/Domingo*, International Migration Review 2012/46, 203ff and Fn 1341 and 1342.

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grants concerned. The explanations in Chapter 3 can be used as a starting point for this. Furthermore, it should be regulated whether permanent residence can be obtained after an extension or a change, and under which conditions this would be possible.

The right to stay should be accompanied by certain rights linked to the migrants lawful residency, in particular access to the labour market,[2333] social benefits and healthcare. In this respect, the REGANE I study from 2014 should be taken into account: the 'Feasibility Study on the Labour Market Trajectories of Regularised Immigrants within the European Union', which shows the complex relationship between regularisations and employment.[2334]

IV. Procedural aspects

A Regularisation Directive must also regulate the procedural aspects. The Return Directive and the Single Permit Directive could serve as models, particularly as the latter established a single procedure for a single residence and work permit. In addition to the procedure, the Single Permit Directive also contains procedural guarantees and certain rights, such as the right to equal treatment. Furthermore, there should also be provisions concerning the possibility of appeal, which corresponds to the right to an effective remedy according to Article 6 ECHR and Article 47 CFR.

D. Expanding general EU migration law

My proposal for harmonisation has to be designed to allow it to fit coherently into the EU and domestic immigration and residency systems. It is for this reason that I consider an independent Regularisation Directive to be the best approach. Such Directive could not only find a balance between the interests of the EU (and the Member States) and irregularly staying migrants but could also create clear basic requirements.

2333 The Member States may not invoke Art 79(5) TFEU in order to introduce national quotas for access to the labour market. See Chapter 2.D.II.2.

2334 *Kraler/Reichel/König/Baldwin-Edwards/Şimşek*, Feasibility Study on the Labour Market Trajectories of Regularised Immigrants within the European Union (REGANE I). Final Report (February 2009), https://ec.europa.eu/social/BlobServlet?docId=12612&langId=en (31.7.2022) 81. For detail see the analysis of the study in *Kraler*, Journal of Immigrant and Refugee Studies 2019.

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It is prudent in this respect to refer to *Tewocht*, who has shown that only four current EU Directives (including the Return Directive) pursue a horizontal regulatory approach.[2335] *Tewocht* uses the term 'horizontal' to describe the fact that the personal and material scopes of application are comprehensive, i.e. addressed to all third-country nationals and covering all residence permits. Transferring this notion to a Regularisation Directive, it would be desirable if the Directive were to take account of all irregularly staying migrants and all types of regularisations. Adopting a sectoral approach, i.e. rules specific for individually definable groups such as non-returnable persons, would only lead to further (deliberate) differentiation.[2336]

Accordingly, the EU should make use of its competences in the sense of a horizontal regulatory approach so that a future Regularisation Directive becomes an element of the 'general part' of EU migration law.[2337] The criticism of the lack of a migration concept or the slow development of the harmonisation of the area of freedom, security and justice could thus be avoided, at least for this area.[2338]

Referring back to the complementary concept of 'immigration from within', introducing a Regularisation Directive would thus fill a gap in the common immigration policy.[2339] If one understands 'combatting' irregular immigration in accordance with EU primary law and in the sense of *Bast's* 'immigration from within',[2340] the EU has the opportunity to 'combat' irregular migration more effectively. The EU could use regularisations to reduce the enforcement deficit of returns and pursue an active migration policy that exerts influence on the legal reality.[2341] In this way, both the fundamental rights of irregularly staying migrants and the management interests of the Member States would be strengthened and satisfied through striking the necessary balance.

2335 *Tewocht*, Auf dem Weg zur Gleichstellung von Drittstaatsangehörigen und Unionsbürgern? – Zu Inhalt und Reichweite der sogenannten ‚Rahmenrichtlinie', ZAR 2012, 217 (219) and *Tewocht*, Drittstaatsangehörige 411f, 449.

2336 Cf. *Tewocht*, Drittstaatsangehörige 417ff, 449, 451.

2337 *Tewocht*, Drittstaatsangehörige 411 refers to this as a general part of European immigration law ('*allgemeiner Teil des europäischen Einwanderungsrechts*').

2338 Cf. for criticism *Tewocht*, ZAR 2012, 219 Fn 29 with further references.

2339 See Chapter 4.A.

2340 *Bast*, ZAR 2012, 6.

2341 *Thym* in *Grabitz/Hilf/Nettesheim* Art 79 AEUV mn 15.

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