

PICUM POSITION PAPER

**EMPLOYERS’  
SANCTIONS:**  
IMPACTS ON  
UNDOCUMENTED  
MIGRANT  
WORKERS’ RIGHTS  
IN FOUR EU  
COUNTRIES

APRIL 2015



PLATFORM FOR INTERNATIONAL COOPERATION ON  
UNDOCUMENTED MIGRANTS

The Platform for International Cooperation on Undocumented Migrants (PICUM) was founded in 2001 as an initiative of grassroots organisations. Now representing a network of more than 140 organisations and 100 individual advocates working with undocumented migrants in 33 countries, primarily in Europe as well as in other world regions, PICUM has built a comprehensive evidence base regarding the gap between international human rights law and the policies and practices existing at national level. With over ten years of evidence, experience and expertise on undocumented migrants, PICUM promotes recognition of their fundamental rights, providing an essential link between local realities and the debates at policy level.

This position paper analyses the practical impacts of the European Union Employers' Sanctions Directive, focusing on specific provisions of the directive aimed at protecting undocumented workers' rights: availability and accessibility of complaint mechanisms, recuperation of outstanding wages and access to residence permits in Belgium, Czech Republic, Italy and the Netherlands.

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# EXECUTIVE SUMMARY

The EU Employers' Sanctions Directive<sup>1</sup> entered into force in July 2009 as a central component of the EU's migration policy to prevent irregular migration. The directive establishes sanctions for employers who hire undocumented workers in order to curb irregular employment, which is seen as a "pull factor" for irregular migration. Prior to the adoption of the directive, civil society organisations and trade unions raised concern<sup>2</sup> about the purpose of the directive, finding that the overwhelming majority of migrant workers would rather be employed in a regular manner, pay taxes and contribute to the social security system, than live outside the legal system under a constant threat of deportation. They were concerned that the sanctions foreseen in the directive might further deteriorate the situation of these precarious workers.

This position paper analyses the practical impacts of the Employers' Sanctions Directive, focusing on specific provisions of the directive aimed at protecting undocumented workers' rights: availability and accessibility of complaint mechanisms, recuperation of outstanding wages and access to residence permits. Drawing on the transposition of the directive in Belgium, Czech Republic, Italy and the Netherlands - four countries chosen based on

input from key member organisations in PICUM's network and also representing a sample of EU member states both geographically and in terms of the labour migration situation – this policy brief offers a set of policy recommendations to European institutions. Representing the practical experience of implementation of the directive at member state level, this policy brief complements the Communication of the European Commission<sup>3</sup> published in May 2014 on the application of the directive.

The analysis concludes that the adopted regulation varies greatly amongst member states, with many issues remaining concerning the implementation of the directive at national level, in particular the safeguards for undocumented workers.

Many NGOs working directly with undocumented workers observe that employers' sanctions have indeed not improved and in some cases have even degraded the situation of undocumented workers. Although the directive foresees mechanisms to protect and enforce the labour rights of undocumented workers, they have proved ineffective or are nonexistent. Many procedural, financial and administrative barriers remain in the application of specific provisions related to workers' rights. For

- 1 Directive 2009/52/EC of the European parliament and of the Council of 18 June 2009 *providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals*, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009L0052:EN:NOT>
- 2 *Joint Comments of ETUC, PICUM and Solidar on Expected Commission Proposals to Fight 'Illegal' Employment and Exploitative Working Conditions*, 2007. [http://picum.org/picum.org/uploads/file\\_/joint\\_comments\\_ETUC\\_PICUM\\_SOLIDAR\\_2604507\\_EN\\_final.pdf](http://picum.org/picum.org/uploads/file_/joint_comments_ETUC_PICUM_SOLIDAR_2604507_EN_final.pdf)
- 3 Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM(2014) 286 final. [http://www.europarl.europa.eu/meetdocs/2014\\_2019/documents/com/com\\_com%282014%290286\\_/com\\_com%282014%290286\\_en.pdf](http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com%282014%290286_/com_com%282014%290286_en.pdf)

example, the state has failed to put in place binding obligations to ensure unpaid wages or provide residence permits for workers reporting exploitation. As the directive expects labour inspectors to act as the responsible body for “effective complaints facilitation” this should mean that undocumented workers have the opportunity to safely file complaints with these officials without fear for repercussions. However, PICUM members in many EU member states report that as the police accompany labour inspectors, nearly all contacts result in apprehension on grounds of their migration status and consequent deportation even before the undocumented worker has had a fair chance to defend their labour rights.

The EU should support member states in ensuring better implementation of the directive by creating adequate data collection mechanisms linked to the enforcement of labour rights in this directive. Comparative data on how many complaints have been lodged should be gathered, as well as data on how many cases compensation was received and how much and how many sanctions were imposed.

Based on the information collected from the four countries, it is doubtful that the aim of the directive - to reduce the demand for irregular work - is being achieved, as repercussions for employers remain very limited and facilitation of complaints insufficient. PICUM member organisations report that the sanctions foreseen in the directive do not represent a real deterrent to employers as the risk of being inspected combined with the financial sanction is in most cases much lower than the costs associated with fully declared and formalised work contracts<sup>4</sup>. Policy makers should consider if adequate regular employment and residence opportunities for migrant workers would be more effective policy tools to address the presence of irregular migrants. To this end, this brief concludes with recommendations for the EU to establish a more adequate labour migration policy through the creation of more entry and stay opportunities for third country migrant workers across skill levels and labour sectors.

4 Ed. K. Slubik, *Unprotected: Migrant workers in an irregular situation in Central Europe*, 2014, p.112-113. <http://interwencjaprawna.pl/en/files/unprotected.pdf>

# 1. LABOUR RIGHTS OF UNDOCUMENTED MIGRANT WORKERS IN THE EMPLOYERS' SANCTIONS DIRECTIVE

The European Union Employers' Sanctions Directive establishes minimum standards across the EU<sup>5</sup> on sanctions and measures against employers of irregularly-staying third-country nationals. Prior to the adoption of the directive on 18 July 2009, almost all EU member states (26 out of 28) already had laws sanctioning the employment of undocumented workers, with 19 out of the 26 having criminal sanctions. However, there was a great difference amongst the content and enforcement of these member state policies.<sup>6</sup>

## Inspections and sanctions

The aim of the directive is to prevent irregular migration by reducing what is viewed by the European Commission as a major pull factor: the possibility of finding work in the EU.<sup>7</sup> After adoption of the directive in 2009, the deadline for transposition was 20 July 2011.

The directive focuses on the prohibition and sanctioning of the employment of undocumented workers. It requires employers to verify the residence permits of their workers before the start of a working relationship (Article 4.1.a), as well as to inform the responsible authorities of the start of employment of a foreign worker (Article 4.1.c) and to implement effective and adequate labour inspections (Article 14.1). Inspections should be based on risk assessments and member states should regularly identify the sectors of activity in which the employment of irregular migrants is concentrated on their territory (Article 14.2).

The directive establishes sanctions for employers who have not fulfilled these responsibilities or are nevertheless found to be employing undocumented workers, which range from financial sanctions to criminal penalties in serious cases.<sup>8</sup>

- 5 The Employers' Sanctions Directive does not apply to the United Kingdom, Ireland and Denmark; they are not bound by it or subject to its application.
- 6 EU Commission Impact Assessment, 16.5.2007 SEC(2007) 603, p.9. [http://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/docs/ia\\_2007/sec\\_2007\\_0603\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2007/sec_2007_0603_en.pdf)
- 7 Preamble (2) of the directive
- 8 Different kind of penalties are proposed: financial sanctions including the costs of returning irregular migrants to their home countries (Art. 5); exclusion from entitlement of public benefits, aid or subsidies (Art.7 a); temporary or permanent closure of the place of work (Art. 7 d) and criminal penalties (Art. 9) in serious cases (if infringement continues or persistently occurs, relates to the employment of significant numbers of undocumented workers, is accompanied by particularly exploitative conditions, the workers is known to the employer to be a victim of human trafficking, or if it relates to the irregular employment of a minor).

## Workers' rights

In an effort to balance the migration law enforcement elements in the directive, which aim to detect, apprehend, arrest and deport undocumented workers, several safeguards to protect the labour rights of undocumented workers were introduced.

The directive introduces measures to reinforce the rights of undocumented workers, stating explicitly that the employer, and not the worker, should be punished for the irregular employment.<sup>9</sup> According to the directive, member states must ensure that employers repay any outstanding wages to their workers. It establishes a presumption of at least the minimum wage (Article 6.1.a) and duration of at least three months for the working relationship in the

absence of evidence (Article 6.3). Member states are required to introduce procedures that facilitate complaints by undocumented workers in case of abuses by employers (Article 13.1). The possibility to issue residence permits of limited duration on a case by case basis is also provided (Article 13.4), in cases where the irregular employment is considered a criminal offence because the employment conditions are particularly exploitative or the undocumented worker is a minor.

The directive establishes responsibilities not only for employers but also for subcontractors (Article 8.1). Member states should ensure that in addition to or in place of the employer, subcontractors should be liable to pay any financial compensation and/or any back payments.

9 PICUM, "Comments on the Proposal for a Directive of the European parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals", October 2007, [http://picum.org/picum.org/uploads/file\\_/PICUM\\_Comments\\_on\\_COM\\_2007\\_249\\_final\\_Employer\\_Sanctions.pdf](http://picum.org/picum.org/uploads/file_/PICUM_Comments_on_COM_2007_249_final_Employer_Sanctions.pdf)

# 2. IMPACTS OF THE EMPLOYERS' SANCTIONS DIRECTIVE

## 2.1 Complaint mechanisms (Article 13.1)

The Commission reports that very rarely organisations of migrant workers are given the right to lodge complaints on behalf of irregular migrants (only in the Czech Republic, Finland, Hungary, Latvia and Sweden)<sup>10</sup>.

In **Belgium**, the new law<sup>11</sup> transposing the Employers' Sanctions Directive came into force on 4 March 2013. It does not introduce a new complaints mechanism because the previous law<sup>12</sup> was seen as effective. Nonetheless, the new law specifies that third parties can intervene on behalf of undocumented migrant workers. In particular, the law mentions the Centre for Equal Opportunities and Opposition to Racism. However, the Belgian government can appoint other organisations fulfilling the necessary criteria to also take on this role.

The labour inspectorate is the institution responsible for the implementation of the new act. In theory, neither the police nor the immigration authorities need be involved. If an undocumented migrant worker files a complaint directly to the labour authorities, there is no risk that his/her information will be transmitted to the immigration authorities. The labour court is not obliged to communicate the name of the undocumented migrant worker to the immigration office.

*Article 13.1 establishes that "Member States shall ensure that there are effective mechanisms through which third-country nationals in irregular employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations."*

However, there remains a substantial difference between the guarantees foreseen in the law, and actual practice: the police accompany the labour inspectors during inspections for their safety, and the police have an obligation to check the residence permits of workers. As civil servants, labour inspections are bound to report a crime<sup>13</sup> and since irregular stay is criminalised in Belgium, labour inspectors must report all persons found without residence status to the immigration authorities. Therefore, labour inspections and immigration enforcement are linked and cannot constitute an effective complaint mechanism.

In the **Czech Republic**, the transposition of the Employers' Sanctions Directive was complicated as it included changes in 50 different laws. The three main

10 Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, page 7. See footnote 3.

11 Loi prévoyant des sanctions et des mesures à l'encontre des employeurs de ressortissants de pays tiers en séjour illégal, 11 février 2013. [http://www.ejustice.just.fgov.be/cgi/article\\_body.pl?language=fr&pub\\_date=2013-02-22&numac=2013200528&caller=list](http://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2013-02-22&numac=2013200528&caller=list)

12 *Ibid.*, Chapter 4.

13 Article 29 of the Code of Criminal Procedure obligates civil servants to report all crimes ([http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1808111730&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1808111730&table_name=wet)) and irregular migration is criminalised under Article 75 of Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen ([http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1980121530&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1980121530&table_name=wet))

laws are the Act on the Residence of Foreigners, the Act on Criminal Liability and the Act on Employment, which was implemented in January 2012. Contrary to the provisions of the directive, there are no specific provisions in the legislation on how to make a complaint and no possibility for undocumented migrant workers to complain through third parties.

Both the labour inspectorate and immigration authorities are responsible for the implementation of the relevant laws. As a result, there is no separation between labour inspections and immigration controls. According to the NGO Association for Integration and Migration (SIMI), there may be some formal or informal agreements between labour inspectors, immigration officers and the police, which are not made public.

In **Italy**, the Employers' Sanctions Directive was transposed into national legislation in July 2012<sup>14</sup>. Italian law criminalises both the employment of undocumented migrants and the serious exploitation of workers. The new Italian law does not facilitate the filing of complaints by undocumented migrant workers.

In practice, most of the inspections are carried out by the Department of Labour, the Inspector of the National Institute for Insurance against Workplace

Accidents and the National Institute of Social Security. Inspections are aimed at detecting typical violations of labour law and social insurance rather than other crimes. The police, *carabinieri* and financial police are involved in investigating organized crime and are therefore not able to intercept "informal networks of exploitation" in the context of undeclared work. As a direct consequence of criminalisation of "illegal" entry and residence, officials who conduct workplace inspections must denounce undocumented migrant workers<sup>15</sup>.

In **the Netherlands**, the transposition of the directive consisted of amendments of the existing law (Alien Employment Act) that was in place before the directive was adopted. The labour inspectorate (Inspectie SZW) is the institution responsible for implementing the law. There is a formal separation between labour inspectors and police/immigration enforcement during inspections. In practice, however, both labour inspectors and police/immigration authorities visit workplaces making the formal separation unclear, especially for migrant workers. Furthermore, labour inspectors are also tasked with detecting undocumented migrants, so if they come across an undocumented worker, they have to denounce them to the police/immigration authorities.

## ITALY

### Case example: Criminal court considers case of labour exploitation of undocumented workers

A trial against the employment and exploitation of undocumented migrant workers in the Salento area, Apulia region in Italy, started on 31 January 2013 at the Corte d'Assise in Lecce city.

It is the first time that such a case has been brought to court since Article 603 bis, which criminalises the exploitative recruitment of workers, was introduced in the Italian Penal Code under the law 148/2011. Four undocumented migrant workers have accused their employers, guided by Yvan Sagnet, a Cameroonian student who led the revolt of the day labourers in the summer of 2011. Investigations revealed a cartel between local employers and migrant traffickers, several of whom are of African origin. The accused employers and traffickers could be sentenced to several years in prison and fines of several thousand euros.<sup>16</sup>

14 Decreto Legislativo n.109/2012. Before the transposition, the Consolidated Immigration Act contained several provisions relating to the employment of undocumented migrants. In particular, according to Article 22 par.12 of the Immigration Consolidated Act the employment of undocumented migrants is punishable by imprisonment from six months to three years and a fine up to 5,000 euros. The new formulation of the art.22 par.12 bis provides for an increased penalty if the undocumented worker employed is a child or are more than three.

15 In January 2014, the Italian Parliament decriminalised irregular entry and stay [http://www.camera.it/leg17/995?sezione=documenti&tipoDoc=lavori\\_testo\\_pdl&idLegislatura=17&codice=17PDL0015760&back\\_to=http://www.camera.it/leg17/126?tab=2-e-leg=17-e-idDocumento=331-B-e-sede=-e-tipo=](http://www.camera.it/leg17/995?sezione=documenti&tipoDoc=lavori_testo_pdl&idLegislatura=17&codice=17PDL0015760&back_to=http://www.camera.it/leg17/126?tab=2-e-leg=17-e-idDocumento=331-B-e-sede=-e-tipo=) However, this measure has not taken effect in practice yet.

16 S.Farolfi, *Pomodori e angurie tra le accuse di schiavitù: a processo gli imprenditori*, Corriere della Sera, 21 October 2014. <http://www.corriere.it/inchieste/reportime/societa/pomodori-angurie-le-accuse-schiavitù-processo-imprenditori/bde8d57a-5910-11e4-aac9-759f094570d5.shtml>

## 2.2 Outstanding wages (Articles 6.1, 6.2 and 6.3)

**Article 6.1 of the directive stipulates that “Member States shall ensure that the employer shall be liable to pay:**

- a) any outstanding remuneration
- b) an amount equal to any taxes and social security contributions
- c) any cost arising from sending back payments to the country to which the irregular migrant worker has returned or has been returned

**Article 6.2 Member States shall enact mechanisms to ensure that irregular migrant workers:**

- a) may introduce a claim against their employer for any outstanding remuneration, including in cases they have, or have been returned
- b) start procedures to recover outstanding remuneration without the need for them to introduce a claim.”

**Article 6.3 adds that “Member States shall provide that an employment relationship of at least three months duration be presumed unless it can be proved otherwise.”**

The Commission reports that most member states refer to a generic provision on the right to bring cases to the labour courts and that very few member states have explicitly transposed the right of irregularly employed migrants to make a claim against their employer for any outstanding remunerations while present in the member state (only Bulgaria, Cyprus, Greece and Slovenia), or when they have been returned (only Cyprus, Greece, Poland and Sweden)<sup>17</sup>. Only four member states have put in place specific procedures for the transfer and receipt of any payments owed including after the worker has been returned to the country of origin (only Belgium, Greece and France).

In **Belgium**, the new act added the presumption of the employment relationship being at least three months, for outstanding minimum wages. The obligation for the employer to pay outstanding minimum wages and taxes was already mentioned in the previous law. However, in practice it is almost impossible for undocumented migrant workers to claim unpaid wages due to their limited access to legal assistance, lack of knowledge about their rights and the lack of an effective complaint mechanism. The worker has

to recover unpaid wages from the employer himself. They can also get assistance from a third party but this is not systematic.

In the **Czech Republic**, if it is not possible to prove the amount of the actual wage to which the worker would be entitled, the presumption of at least a minimum wage and three months employment will be taken into consideration. According to the Association for Integration and Migration (SIMI), this presumption would come at the very last stage of the claim and it is unclear if this measure would work in practice.

The **Italian** new law states the presumption of at least three months of employment for the determination of wages and contributions. However, it does not provide precise indications on minimum wage. Further, the system for labour inspections should provide information about the payment of unpaid wages to undocumented workers. While the decree determining that such information should be made available was adopted in Italy almost two years ago, it has not yet been published.<sup>18</sup> Therefore, despite the enactment of this legislation, migrants are still being denied their right to be “systematically and objectively informed” of

<sup>17</sup> Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, page 7. See footnote 3.

<sup>18</sup> Article 1.3 of Legislative Decree n. 109, 2012. See footnote 22.

the relevant information. It also strengthens workplace inspections on the basis of periodic risk assessments and the duty to communicate the inspections to the European Commission.

In the **Netherlands**, the previous law contained a responsibility to pay any outstanding wages, assuming an employment relationship of six months, and was maintained.

## GREECE

### Impunity for gross violations of migrant workers' rights

The shooting of Bangladeshi migrant workers during a pay dispute for outstanding wages on a strawberry plantation in Manolada, Greece on 17 April 2013, brought to light the plight of thousands of migrants mainly working in the agricultural sector. Several foremen opened fire at a crowd of about 200 mostly Bangladeshi migrant workers, including some whom were undocumented and who were reported to have lived in **modern day slavery conditions without access to drinking water and sanitation**. 35 of the 155 workers were seriously wounded and were taken to the hospital with critical injuries. A 'blood strawberries' campaign calling for a boycott on fruit from the region was created and spread internationally, mainly through social media.

Despite assurances from the Greek government that the perpetrators would be appropriately prosecuted and workers given protection, only the 35 seriously injured victims have been granted a temporary residence status and have been recognised as victims of trafficking for labour exploitation. The majority of the other 120 victims remain undocumented in Greece, with no access to justice. Seven victims have been either detained or deported.<sup>19</sup>

Following a judgment dated 30 July 2014, **the accused were acquitted as regards the most serious charge of human trafficking. No sanctions were given for the charge of employing undocumented migrant workers nor any back wages paid to the workers**. Two of the perpetrators were sentenced for multiple dangerous bodily harm and illegal use of firearms to 14 years and 7 months and 8 years and 7 months in jail, respectively. Yet the penalties were immediately converted into money fines and the appeals have had suspensive effect.<sup>20</sup>

## 2.3 Residence permits (Article 13.4)

*Under Article 13.4, in cases of criminal offences regarding particularly exploitative working conditions or the irregular employment of a minor, Member States shall define in national law the conditions under which they may grant, on a case-by-case basis, permits of limited duration, linked to the length of the relevant national proceedings to the third-country nationals involved, under arrangements comparable to those that apply to third-country nationals under Directive 2004/81/EC (i.e. for victims of human trafficking).*

According to the Commission report, only a limited number of member states have explicitly transposed the obligation of member states to define the conditions under which they may grant residence

permits.<sup>21</sup> The ability to effectively access justice is dependent on the right of the worker to be heard and to participate in any proceedings taken in his case.

19 As reported by Greek Council for Refugees, the organisation representing victims in this case. See more on their work [www.gcr.gr](http://www.gcr.gr)

20 The lawyers representing the victims requested the Prosecutor of the Supreme Court to declare the trial invalid and to ask for a new, fair trial to be conducted. The Prosecutor, after examining the request, concluded that the trial was fair and that the verdict would be final. See Hellenic League for Human Rights Press Release 31 October 2014. <http://www.hlhr.gr/index.php?PageLang=english>

21 Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, page 8. See footnote 3.

In **Belgium**, there is no possibility to get a temporary residence permit, except in cases of human trafficking, in which case the permit may be for an indefinite period upon conviction of the accused<sup>22</sup>.

According to Belgian law, extreme cases of economic exploitation can be seen as human trafficking. However, these are a small proportion of the total number of economic exploitation cases.

In the **Czech Republic**, when there is an on-going criminal procedure in which a migrant worker is a witness, a victim or under investigation for a crime, they will be granted a temporary residence permit in order to attend the procedures, however only on the condition that they will cooperate with the law enforcement agencies.

In **Italy**, the new law provides that a residence permit may be issued on humanitarian grounds to migrant victims of severe labour exploitation.<sup>23</sup> The residence

permit lasts for six months and can be renewed for one year or for the period necessary to conclude the criminal proceedings. In practice, residence permits can only be issued if the migrant worker filed a complaint and if he or she is involved in the investigation.

In the **Netherlands**, as in Belgium, the only possibility to receive a temporary residence permit is in cases of human trafficking.<sup>24</sup> The permit is only valid for the duration of the criminal case, meaning it is retracted should the case be suspended. However, if the case takes over 3 years or if the accused is convicted, the victim is entitled to a permanent permit. The level of such residence permits granted is comparatively low<sup>25</sup> in comparison to the overall numbers of estimated victims of trafficking, although there has been some improvement<sup>26</sup> in recent years. It is felt that law enforcement will only accept such cooperation where they can make a strong case against a potential trafficker.

## ITALY

### Using the Directive as an Opportunity to Regularise Workers

The legislative decree n.109/2012 implementing the directive contained a provision designed to allow employers to make a declaration to regularise their employees between 15 September and 15 October 2012. However, only 135,000 applications were submitted compared to the 230,000 submitted in 2009.

According to the NGO ASGI (Associazione per gli Studi Giuridici sull'Immigrazione), the main reason was the high cost of the regularisation. For each worker to be regularised, the law stated that a fine of 1,000 euros had to be paid by the employer. In practice, this cost was paid by migrant workers themselves. ASGI also highlighted other critical points, such as the obligation of the employee to demonstrate through official documentation their residency in Italy before 31 December 2011 and the impossibility to regularise part-time or temporary jobs (except for domestic workers).

22 Article 61/2 and 61/5 of Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen ([http://www.ejustice.just.fgov.be/cgi\\_loi/change\\_lg.pl?language=nl&la=N&cn=1980121530&table\\_name=wet](http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=1980121530&table_name=wet))

23 Article 22 par. 12 bis ASGI notes that the formulation of this article is not clear. The residence permit should be the same as the one given for sexual exploitation, i.e. residence permit for social protection. This permit would allow victims of labour exploitation access to the protection programs given to victims of trafficking and facilitate effective mechanisms for complaint. ASGI recommends that the residence permit should be not only in cases of severe labour exploitation but also in cases of exploitation through violence, extortion or when the employer is taking advantage of the irregular situation of the migrant worker.

24 Under the Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004L0081>

25 Report from the Commission to the European Parliament and the Council on the application of directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, COM/2010/0493 final. <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52010DC0493>

26 EUROSTAT, *Methodologies and Working Papers report on Human Trafficking*, 2013. [https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/trafficking\\_in\\_human\\_beings\\_-\\_dghome-eurostat\\_en\\_1.pdf](https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/trafficking_in_human_beings_-_dghome-eurostat_en_1.pdf)

# 3. CONCLUSIONS

The transposition of the the directive varies greatly amongst member states and has not been adequate in most countries. There has been no improvement of existing complaint mechanisms or development of adequate new structures to protect and enforce the labour rights of undocumented workers. Labour inspectors, seen in the directive as the main link between undocumented workers and enforcement of protective measures, are not often perceived as defending the labour rights of this group due to, largely, the implicit or explicit obligation to report irregularly staying workers to the immigration police. The lack of separation between labour inspectors and immigration enforcement mechanisms remains the key barrier to labour rights enforcement for undocumented workers and to addressing exploitation.

One of the key concerns of PICUM in relation to the adequate implementation and efficient monitoring of the directive is the absence of adequate data collection mechanisms linked to the enforcement of labour rights in this directive, more specifically comparative data on how many complaints have been lodged by or on behalf of undocumented workers, in how many cases compensation was received and how much, how many residence permits were issued to the workers, how many sanctions were imposed to the employers and how many employers are sanctioned repeatedly. PICUM members estimate the figure being extremely low. This omission is indicative of the political priorities behind the implementation of the directive, which appear not to include the realisation of labour rights for all migrants irrespective of status.

On the other hand, there is no evidence that the priority aim of the directive, to reduce the demand for irregular work, is being achieved through the directive.

Repercussions for employers remain very limited and facilitation of complaints insufficient, indicating that the directive does not deter employers from employing undocumented workers and cases of exploitation are not being reported. While undocumented workers remain disempowered from enforcing their labour rights, the costs and risks associated with the irregularity of their employment are often displaced from the employer to the worker. Through inspections, workers risk retaliation from employers, loss of employment and income, and immigration enforcement (detention and deportation). Without a separation between immigration enforcement and labour rights protection, undocumented workers are not in a position to denounce exploitative employers and the exploitative practices are allowed to continue.

Barriers to successful lodging of complaints include lack of clarity in provisions, lack of adequate policy and procedures within labour inspectorates, lack of access to legal advice and residence permits in cases of exploitation and lack of access to representation and information about rights. PICUM members report that residence permits are mainly only granted in cases of human trafficking. It remains commonplace to deport undocumented workers instead of or before examining the violation of their labour rights.

In conclusion, PICUM members find that due to the above mentioned shortcomings of the implementation of the directive, coupled with a general lack of channels for undocumented workers to work and reside regularly in the EU, it remains to be proven if the employers' sanctions regime can have an impact on both reducing irregular migration, as well as addressing the labor exploitation of undocumented workers.

# 4. RECOMMENDATIONS TO THE EUROPEAN INSTITUTIONS

## Legislation and Policy:

- Remove barriers preventing undocumented workers from reporting exploitation and abuse by supporting member states in setting up a **“firewall”** - a clear separation in law and practice between the powers and remit of labour and social inspectors and migration law enforcement authorities. Requirements for labour inspectors to report undocumented migrants to immigration authorities should be eliminated and sharing of personal information for immigration enforcement purposes should be prohibited.
- Promote the facilitation of **residence permits** for exploited undocumented workers and **promote ongoing regularisations** based on employment and social security contributions.
- Urge member states to put in place **specific procedures for the transfer and receipt of any payments owed** including after the worker has been returned to the country of origin.
- Address the demand and supply for irregular work by establishing a better regulated EU labour market by facilitating the **creation of more entry and stay opportunities** for third country migrant workers across skill levels and labour sectors in member states.
- Allow for **transition to permanent migration** in circular and temporary migration schemes as labour shortage in these sectors is not temporary and could lead into more irregularity and undeclared work.
- Reduce undeclared work and irregular migration by **strengthening the residence status of third country migrant workers by uncoupling residence and work permits** so that loss of employment would not automatically lead to loss of residence status.

## Policy Coordination:

- Integrate the **specific concerns of undocumented migrant workers in all EU instruments and initiatives** designed to improve working conditions and labour rights, including in the work programme of the EU Senior Labour Inspectors Committee.
- **Enhance coordination** between DG HOME (Home Affairs and Migration), DG EMPL (Employment, Social Affairs, Skills and Labour Mobility), social partners and civil society organisations working with migrant workers concerning the enforcement of labour rights in the directive through regular consultations.

## Reporting and Data Collection:

- › Urge member states to hold **regular consultations with civil society members** assisting undocumented workers as an integral part of their reporting process to the EU Commission on the implementation of the directive and consult regularly with **national and European civil society organisations during the EU level monitoring process** of the implementation of the directive.
- › Improve **data collection mechanisms linked to the enforcement of labour rights in the directive** by urging member states to collect comparative data on numbers of complaints lodged, number and amount of wages received and number and amount of sanctions imposed.
- › Improve EU-wide collection of disaggregated **data on work place accidents of migrant workers** and promote access to labour accident compensation for all workers irrespective of immigration status.

## Funding:

- › Support the creation of more effective complaints mechanisms by creating direct funding opportunities for civil society organisations, trade unions providing **first-line assistance to undocumented workers with labour rights complaints** in addition to channelling allocated structural funding for this purpose.



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