

## Summary of findings in Belgium and the Czech Republic on the implementation of the Employers' Sanctions Directive

The EU Employers' Sanctions Directive entered into force in 2009 and establishes sanctions on employers who hire undocumented workers. Built into the directive are specific provisions aimed at protecting undocumented workers' rights, including the availability and accessibility of complaint mechanisms (Article 13.1), the recuperation of outstanding wages (Articles 6.1, 6.2 and 6.3) and access to residence permits (Article 13.4).

While the European Commission collects data from member states on the number of inspections carried out and the sanctions imposed on employers through an annual reporting template, there is currently **no requirement for member states to collect or provide data related to the provisions on undocumented workers' rights in the directive**, making it extremely difficult to monitor whether these provisions are being upheld.

PICUM's initial analysis of the transposition of the directive, which was conducted in 2015 and based on input from our members working with undocumented workers in Italy, the Netherlands, Belgium and the Czech Republic, revealed that regulations remained varied between member states, with many problems concerning the transposition of the safeguards for undocumented workers.<sup>1</sup>

In 2016, PICUM conducted an in-depth analysis in Belgium and the Czech Republic, focusing on implementation of the measures foreseen in the directive regarding complaints mechanisms, unpaid wages, and the granting of residence permits. Issues of accountability in sub-contracting were not directly addressed, but remain another concern regarding implementation of the directive.

Drawing on data collected through interviews with NGOs, trade unions, lawyers, and labour inspectors in these two countries, the analysis concludes that the **mechanisms foreseen to protect and enforce the labour rights of undocumented migrant workers have proved ineffective or are non-existent**.

The findings in both Belgium and the Czech Republic indicate that the repercussions for employers remain very limited and the facilitation of complaints inadequate. **Across both countries stakeholders were only aware of one case in which a worker actually received unpaid wages, and there were no cases of a worker being granted a temporary residence permit under the directive**.

By lodging a complaint, undocumented migrant workers risk retaliation from employers, loss of income, and detention and deportation. Following inspections, it remains common practice to issue removal orders and detain undocumented workers without examining the violation of their labour rights.

While there are more promising practices in Belgium with regards to the implementation of the rights provisions in the directive, both countries face similar problems when it comes to ensuring a clear separation between labour inspections and immigration enforcement, the inability to access residence permits in cases of labour exploitation, and the limited priority given by inspection services and the labour courts to cases of labour rights violations of undocumented workers.

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<sup>1</sup> See PICUM, Employers' Sanctions: Impacts on Undocumented Migrant Workers' Rights in Four EU Countries, 2015. [http://picum.org/picum.org/uploads/publication/EmployerSanctions\\_Final.pdf](http://picum.org/picum.org/uploads/publication/EmployerSanctions_Final.pdf)

## **Findings in Belgium**

Interviews with relevant stakeholders working with the Employers' Sanctions Directive in Belgium (see Annex for a list of stakeholders interviewed) revealed a number of inconsistencies in how the provisions meant to uphold the rights of undocumented workers have been implemented.

The following is a summary of the main problems that were identified for each of the safeguards in the directive.

### **Safeguard #1: Access to complaint mechanisms for undocumented workers in cases of labour exploitation or abuse (Article 13.1)**

#### **The absence of a firewall – lack of a separation between labour inspectors and immigration control**

According to interviews with the Belgian labour inspectorate, trade unions and migrants' rights organizations working with undocumented workers, the police often accompany labour inspectors on worksite inspections, particularly on inspections to worksites where there is a suspicion that a high number of undocumented workers are employed. The police will report any undocumented worker to the immigration authorities who will then issue a removal order or detain them. Most often, the undocumented worker has no chance to file a complaint, and in cases where the worker does manage to lodge a complaint to the labour inspectorate, by the time the complaint is processed the undocumented worker has likely been deported.

The presence of the police at the worksite also makes it difficult for the undocumented worker to cooperate with the labour inspector and provide accurate information—i.e. number of days worked, conditions of work, and wages paid—due to lack of awareness about their rights and fear of repercussions from the employer and/or immigration authorities. The migrants rights' organization OR.C.A. and trade union CSC stated that the police can be very aggressive during inspections, intimidating and pressuring workers, making it difficult for undocumented workers to be very cooperative with inspection services. It is not surprising then that the labour inspector reported that undocumented migrants will often report having worked at the site for only one or two days, when in reality they have been working at their place of employment for much longer.

While there are situations when the police does not accompany the labour inspector on worksite inspections, the labour inspectorate still has the legal duty under Belgian law to inform the police of any irregular migrant being employed at the worksite. Therefore, even when the police is not present, the undocumented worker is still faced with the same obstacles to file a complaint.

#### **The need for evidence of a working relationship**

While in Belgium there exists the possibility for an undocumented worker to go directly to the labour inspectorate and file a complaint without fear of being reported to the police and immigration authorities, the undocumented worker often faces the challenge of proving that a working relationship exists between themselves and the employer. Various types of evidence collected by the worker are often not considered admissible although they do indicate a working relationship. The clearest proof is the labour inspectorate actually witnessing the worker at the worksite. Without this evidence, the labour prosecutor will rarely pursue the case and the undocumented worker will not be able to claim any outstanding wages.

If the undocumented worker is still employed and manages to arrange with the labour inspector to come and do an inspection while the worker is at the worksite (to prove the existence of a working

relationship with the employer) he/she risk being reported to the immigration authorities. Hence, while in theory the possibility to file a complaint directly to the labour inspectorate office without fear of being reported to the immigration authorities exists in Belgium, in practice it does not work. The labour inspector will still need to do a worksite inspection to collect evidence, which will put the undocumented worker at risk of detention and removal due to the legal obligation of the labour inspectorate to report them to the police.

### **Inability to access to all places of employment**

The labour inspector is not able to access all places of employment, particularly private residences where undocumented workers in the domestic and care sector are often employed. This was an issue raised not only by migrants' rights organisations and trade unions, but also by the labour inspector, who mentioned being unable to follow up on complaints brought by domestic workers due to lack of access to the private residence where the undocumented worker was employed. The exploitation of domestic and care workers in Belgium is a real concern. Working in an economic sectors with limited regulation, migrants employed in domestic services are particularly vulnerable to labour rights abuses, including frequent under-payment or non-payment of wages. Without access to effective complaint mechanisms they remain invisible and at an increased risk of exploitation.

### **Safeguard #2: Ability to claim unpaid wages (Article 6.1, 6.2 and 6.3)**

#### **The complaints body—limited implementation of rights provisions in practice**

The labour inspectorate in Belgium reported on average 600-700 cases in 2015 where an undocumented worker was found on the work site following a spontaneous inspection. While inspection services have the responsibility to begin the administrative procedures to sanction the employer and claim the social security benefits that the employer owes to the Belgian state for the duration that the undocumented worker was employed, it also has the responsibility to request the unpaid wages that the undocumented worker is owed for the duration of their employment. In cases where there is an absence of the length of the working relationship, the presumption of at least three months is respected in practice.

The problem, however, is that the labour inspectorate will often start the administrative procedures to sanction the employer and claim social security benefits owed to the state, but will seldom start the procedures to claim the unpaid wages owed to the undocumented worker. The labour inspector identified this as a problem in existing practice and flagged it as an area where labour inspectors needed to be better trained and informed.

While there are a limited number of cases where an undocumented worker was able to introduce a complaint and receive compensation for their outstanding wages, they were all cases where the undocumented worker filed the complaint directly to the labour inspector office with the support of OR.C.A. and the CSC (not after a spontaneous inspection). In all but one of these cases, the amount of compensation was very limited, and not in line with the three-month presumption provided by the directive.

The one case the organisations interviewed are aware of where unpaid wages were awarded in line with the directive concerned an undocumented worker in a snack bar in Liege who was owed several months of back wages. With the support of OR.C.A., the worker lodged a complaint directly to the labour inspectorate office who arranged with the worker to do an inspection at the worksite in order to have proof that the undocumented migrant was working at the site. OR.C.A., in collaboration with the labour inspector, also arranged with immigration authorities to not issue a removal order during the period that the claim was being processed. In the end, the labour inspector was successful in

claiming three months' unpaid wages for the undocumented worker, he was also able to claim the social security benefits owed by the employer and sanction the employer for employing an undocumented migrant. As a result of this arrangement, the worker was also able to receive his outstanding wages without fear that he would be deported.

The success of this case however has not been replicated. OR.C.A. has tried to negotiate with immigration authorities to grant this stay of removal for all complaints brought forward by undocumented workers, but the immigration authorities only agreed to issue a removal order with a stay of removal for 30 days, during which the inspection services can prolong it for another 30 days if the case is not yet resolved. OR.C.A. reported that without the guarantee that the undocumented worker will not be issued a removal order, it is understandably difficult to convince an undocumented worker to file a complaint to the inspectorate because they risk being detained and removed from the country.

OR.C.A. cited an example where an undocumented worker employed in a butcher shop went directly to the labour inspector office to file a complaint. They arranged with the inspector to conduct an inspection while the worker was at their place of employment. Upon witnessing the undocumented migrant at the worksite, the inspectorate contacted the police, the immigration authorities were then notified by the police and a removal order was subsequently issued to the migrant. The inspection services followed up by contacting the employer, who denied the claim and created a story surrounding the case. The claim went further up to the labour prosecutor, but was subsequently dropped because it was deemed low priority by the labour prosecutor.

This is a common occurrence according to the CSC, a trade union that assists undocumented workers through mediation and support to lodge complaints in cases of labour rights abuses. Because the labour prosecutor gives such little priority to these cases, and considers valid only very limited proofs of the working relationship - meaning an onsite inspection is often required as evidence and the undocumented worker could be issued a removal order, detention and deportation due to the onsite inspection - the chances of a just outcome from lodging an official complaint with the labour inspectorate are very low. Therefore, the trade union and the worker often prefer to put pressure on the employer and negotiate directly to recuperate outstanding wages. While CSC admits that it is very rare that the undocumented worker will receive all the wages owed to them in accordance with the labour law, they will often receive some amount from the employer.

The fact that out of approximately 200 cases where CSC intervened in 2015 to support an undocumented worker reclaim their wages, less than 30 complaints went to the labour inspectorate, and none have up to now been able to recuperate their outstanding wages through this official process indicates how ineffectively the rights provisions in the directive have been implemented. Similarly, OR.C.A. has indicated that out of the approximate 30 complaints lodged in 2015 to the labour inspector office with their support, only the case of the undocumented worker employed in the snack bar in Liege was successful in recuperating his outstanding wages. As is the case with the trade unions, since 99 percent of the complaints they help file often get dropped by the labour prosecutor after 1 to 2 years, the majority of undocumented workers that they assist often prefer to negotiate directly with the employer to recover their outstanding wages as they have a better chance of actually receiving some compensation without the risk of being deported.

### **Lack of priority given to cases of rights abuses of undocumented workers by the labour prosecutor**

According to reports from OR.C.A. and the trade union CSC, by the time complaints are brought to the attention of the labour prosecutor (the procedure is very lengthy and could take up to 2 years)

the undocumented worker has already been deported and unable to receive their unpaid wages. Furthermore, according to OR.C.A., the labour prosecutor often has little incentive to pursue cases where there are less than four undocumented workers found on the worksite, which means that these cases are often dropped and not pursued by the labour courts.

**Lack of a precise mechanism to ensure that unpaid wages are received by the undocumented worker**

Currently there is no precise mechanism in place where undocumented workers who have been deported can actually receive their unpaid wages. According to the Belgian labour inspectorate, if the undocumented worker does not have a bank account or is no longer in the country, any unpaid wages that have been claimed are deposited in a special account run by the Ministry of Finance in Belgium where it remains for a duration of 30 years. The worker can retrieve that deposit with the appropriate identification but they would have to be physically in Belgium to be able to do so. For an undocumented worker who has been deported this is a significant barrier, as they're no longer in the country and are barred from re-entering for a period of three years after they have been deported. The labour inspector interviewed was not aware of any cases up to now where a worker has successfully received their unpaid wages after being deported.

**Safeguard #3: Access to Residency Permits (Article 13.4)**

According to the labour inspectorate and other migrants' rights organizations interviewed, there have been no cases reported in Belgium where an undocumented worker was able to have access to a residence permit under the Employers' Sanctions Directive due to labour exploitation. Under Belgian law, cases of severe labour exploitation are treated under trafficking legislation, where it is possible to get a temporary residence permit if the worker cooperates with the police in the prosecution of their trafficker. Further, according to organizations who work with victims of trafficking, the burden of proof for victims of trafficking is often much higher and thus difficult to obtain in cases of labour exploitation. Thus, the provisions to access residence permits in cases of labour exploitation under the Employers' Sanctions Directive have not been properly transposed in Belgium. The provision for a residence permit to be granted in cases of child labour under the Directive has not been transposed either.

**Insufficient Data Collection**

Based on the information collected in Belgium through the labour inspectorate and key stakeholders working with undocumented migrant workers, it is doubtful that the aim of the directive – to reduce the demand for irregular work – is actually being achieved, as the repercussions for employers remain very limited and the facilitation of complaints remains insufficient due to the various barriers identified. It is quite telling that out of the approximately 600-700 spontaneous inspections where undocumented workers were found on the worksite—besides the example of the undocumented employed in the snack bar in Liege—the labour inspector could not cite other examples where an undocumented worker introduced a claim against their employer for outstanding remuneration following an inspection and *actually* received their outstanding wages before they were removed from the country. The examples and data gathered demonstrate that there is no adequate data collection system currently in place linked to the enforcement of labour rights in the directive. While data is available on the number of sanctions imposed and the amounts collected, comparative data on how many complaints were lodged, the number of cases in which compensation was received, and the number of residence permits issued is not being systematically collected.

## **Findings in the Czech Republic**

### **Safeguard #1: Access to complaint mechanisms for undocumented workers in cases of labour exploitation or abuse (Article 13.1)**

#### **No provisions in the law on how to file a complaint**

There is no specific legislation currently in place in the Czech Republic on how to file a complaint, and no possibility for undocumented migrant workers to file a complaint through third parties. Any worker, including undocumented workers, may file a complaint with the labour inspectorate. However, the claimant will not be a party to the procedure, and has no possibility to appeal the decision. According to the labour inspectorate interviewed in the Czech Republic, their only responsibility under the Employers' Sanctions Directive is to conduct inspections and start the administrative procedures to sanction the employer if undocumented migrant workers are found on the work site. They do not have the responsibility to assist undocumented migrant workers file a complaint. Undocumented workers can also file a complaint directly to the labour court.

#### **No opportunities for third parties to file complaints on behalf of undocumented workers**

There are a limited number of organizations such as the Association for Integration and Migration (SIMI) who support undocumented workers who wish to file a complaint. SIMI provides undocumented migrant workers with information on their rights and the law and assists with legal representation if they wish to file a complaint to the labour court, but unlike the case in Belgium, there are no provisions in the legislation that authorizes third parties like SIMI to file complaints on behalf of undocumented migrant workers.

#### *The absence of a firewall — no separation between the labour inspectorate and immigration control*

According to the labour inspector, the police will accompany them on inspections the majority of the time. If an undocumented worker is found on the worksite the police will report them to the immigration authorities. Even in cases where the police are not present during an inspection, the labour inspector has the legal responsibility to report the undocumented migrant worker to the immigration authorities, which usually leads to apprehension, detention and removal. The undocumented worker therefore has no chance to file a complaint to the labour court for labour rights abuses because as soon as they are detected by inspection services and immigration authorities are notified, the removal procedures begin.

### **Safeguard #2 - Ability to claim unpaid wages (Article 6.1, 6.2 and 6.3)**

#### **Lengthy and expensive procedures to claim unpaid wages**

According to the Czech Law on Employment, in cases that the employer is fined for employing an undocumented worker, they are also obliged to pay unpaid wages, as well as health insurance and social security payments for the period of 3 months. However, this mechanism relies on a fine first being imposed on the employer. According to the labour inspector interviewed, out of the 9583 inspections conducted in 2015, only 17 administrative procedures were opened by the inspectorate to sanction employers, fourteen are still in progress and only three were actually finalized, and sanctions imposed.

At the same time, taking a complaint against the employer directly to the labour court requires the undocumented migrant worker to hire a lawyer. This can be a very expensive and lengthy process. Workers may be represented by NGO's active in protecting migrants' rights but no policy measures,

systemic support or funding are provided to ensure this legal representation can be carried out. Thus in practice, access to justice is not ensured.

Further, according to lawyers working in the area of labour rights in the Czech Republic, a court case can take up to three years to be resolved. Even if their employer is fined and required to pay back wages, or the worker manages to make a complaint through the labour courts, it is likely they will no longer be in the country by the time the case is resolved, due to their precarious status. There is no mechanism for an undocumented worker to introduce a claim against their employer for any outstanding remuneration or receive their outstanding remuneration in cases where the worker has already been deported. None of the NGOs, lawyers, or the labour inspectorate interviewed were able to cite an example where an undocumented worker was successful in recovering their unpaid wages.

### **The need for evidence of a working relationship**

Another obstacle for the undocumented worker to file a complaint is that he/she risks being reported to the police and immigration authorities by their employer if they initiate the proceedings to claim their unpaid wages. There is also the problem of evidence. The worker must prove that a working relationship actually existed between the employer and the undocumented worker, which is very difficult to do without corroboration from the labour inspectorate. But as the labour inspector has indicated, the undocumented worker would likely be detained and deported before any substantial evidence could be gathered to support their case. Furthermore, because the labour inspector does not have the responsibility to claim any unpaid wages owed to the worker, when they conduct an inspection and sanction the employer it is very unlikely that they would ever note in their files whether the undocumented migrant worker is actually owed any outstanding wages.

### **Presumption of three months' employment not respected in practice**

While it is often not possible to prove the actual amount that the undocumented worker would be entitled to due to lack of a working contract, the presumption of at least minimum wage and three months' employment is in theory taken into consideration. However, according to lawyers and migrants' rights organizations interviewed this provision in practice never applies.

### **Safeguard #3: Access to Residency Permits (Article 13.4)**

Only undocumented workers in criminal proceedings may be granted a temporary residence permit for the duration of the proceedings, and cooperation with criminal authorities is required. The latter condition goes beyond the requirements of the directive and excludes workers that only submit an accusation without becoming a party to the criminal proceedings. This provision stems from the pre-existing national regime for victims of trafficking; the conditions for undocumented workers that are only involved in civil proceedings to get a residence permit have not been defined.

Lack of access to a temporary residence permit makes it difficult for an undocumented worker to effectively access justice and to participate in any proceedings taken in his/her case.

Further, only a very limited number of those undocumented workers that can get a temporary residence permit for the duration of the criminal proceedings are eligible for a prolongation of their residence, in the form of a long-term permit for tolerated stay, should the civil proceedings still be pending after the criminal proceedings end.

So far, there have been no residence permits granted to undocumented workers in accordance with Articles 6(5) or 13(4) of the directive because of the very limited scope of cases theoretically eligible.

## Insufficient Data Collection

One of the key concerns of PICUM in relation to the adequate implementation and effective monitoring of the directive is the absence of adequate data collection mechanisms linked to the enforcement of labour rights in this directive. Interviews with the labour inspector in the Czech Republic revealed that currently there is no data being collected at the national level on the number of claims introduced by undocumented migrant workers, the number of cases where unpaid wages were awarded and the amount received, or whether a residence permit was granted to the undocumented worker during the proceedings. Interviews with various stakeholders indicate that this number is likely to be very low, if not zero, as none of the parties interviewed could cite any cases during the last few years linked to the enforcement of labour rights for undocumented workers under the directive. Furthermore, there is currently no data being collected on the number of undocumented workers who have been detained or removed from the country following an inspection.

The labour inspectorate does however collect data on how many sanctions were imposed on employers but not how many employers were sanctioned repeatedly. Out of the three procedures that were finalized in 2015, the total amount in sanctions imposed was 161 000 CZK (approx. 6000 euros), although the inspectorate was not aware what the penalty was for each individual case. The data shows that repercussions for employers remains very limited. Only three administrative procedures were actually finalized and the penalties imposed remained quite low, thus indicating that the priority aim of the directive, to reduce the demand for irregular work, is not effectively being achieved through the directive. Another telling figure is the fact that the inspector had no data on the number of cases where claims by undocumented workers were lodged through the labour courts, which points to the fact that the facilitation of complaints for labour rights violations remains non-existent.

