

PICUM Inputs to DG Home consultation on implementation of the Employers Sanctions' Directive

April 2021 (updated June 2021)

Contents

Introduction	2
What are the challenges in the implementation of the Directive?	2
1. Existing complaints mechanisms and procedures to recuperate outstanding wages are not effective in most countries	2
2. Lack of information and only ad hoc access to rights for undocumented workers who are in immigration proceedings	6
3. Actual receipt of back payments, including when the person is no longer in the country	7
4. Lack of access to residence permits	9
5. Lack of accountability in sub-contracting chains	12
What are the challenges in conducting inspections? What measures could be taken to overcome these challenges?	12
In relation to inspections, the role and duties of labour inspectorates seem to differ between Member States with regards to the need to inform migrants on their rights and on the available complaint mechanisms as well as the requirements to report the irregularly staying third country nationals to police or immigration law enforcement authorities. What are your views on these?.....	15
What are the challenges in relation to sanctions applied to employers (financial, criminal)? What measures could be taken to overcome these challenges?	15
What are the challenges in implementing the protective measures for the irregularly staying third country nationals (introducing a claim for outstanding remuneration, receiving back payments, lodging complaints etc.)? What can be done to overcome these challenges?	17
What are your views on the protective measures provided for in the Directive and do you find them sufficient to protect the rights of the irregularly staying migrants?	17
How can the Commission help strengthen the effectiveness of the Directive?	19

Introduction

In PICUM's experience, the most important challenges in the implementation of the Employers' Sanctions Directive (hereafter, "ESD") are the very limited implementation of the provisions aimed at ensuring:

- back payments
- facilitation of complaints
- residence permits.

The Fundamental Rights' Agency's forthcoming study on the implementation of the ESD provides a detailed up to date analysis of the implementation of these and other provisions. It finds major gaps in both the full and meaningful transposition and implementation into national law and practice.¹

PICUM's report [A Worker is a Worker: How to ensure that undocumented migrant workers can access justice](#) (2020) also analyses in detail the accessibility of complaints mechanisms for undocumented workers in 15 EU member states, 13 of which are bound by the ESD.² It provides information on major challenges as well as positive examples. Some of the practices highlighted as facilitating the rights of undocumented workers are linked to implementation of the Directive.

This submission therefore complements these resources by highlighting some key challenges and observations regarding the implementation of the Directive, responding to the questions posed in the consultation.

What are the challenges in the implementation of the Directive?

1. Existing complaints mechanisms and procedures to recuperate outstanding wages are not effective in most countries

The role of effective complaints mechanisms

Articles 6.2 and 13.1 require that EU Member States ensure there are effective mechanisms and procedures through which third-country nationals working irregularly may lodge complaints against their employers (either directly or through third parties), introduce a claim and eventually enforce a judgement for any outstanding remuneration, including when they are no longer in the country. The possibility for competent authorities to also initiate procedures for recuperation of unpaid wages without a claim being introduced is also provided.

Effective complaints mechanisms enable the exercise of a full range of rights of undocumented workers - as persons, workers or as victims of crime - stemming from various legislation, including inter alia, Article 6 of the ESD.

¹ For prior analysis, see also PICUM (2017), [Summary of findings in Belgium and the Czech Republic on the implementation of the Employers' Sanctions Directive](#); PICUM (2015), [Employers' Sanctions: Impacts on undocumented migrant workers' rights in four EU countries](#).

² The report also includes analysis of access to complaints mechanisms for undocumented workers where countries that opted out of the ESD: Ireland and the United Kingdom (UK) (which was still an EU member state at the time).

In addition to protecting workers, effective complaints mechanisms for undocumented workers are intrinsically linked to the functioning of the ESD, representing the mechanisms and procedures by which employers can be required to pay due wages, social security and taxes, and sanctions. Effective complaints mechanisms enable authorities to target enforcement activities, build strong cases in cooperation with workers and third parties, and ultimately hold perpetrators accountable.

Existing complaints mechanisms

In the 13 member states that are bound by the ESD in PICUM's 2020 report,³ there are – in theory – civil and administrative procedures through which workers can file claims for unpaid wages (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and Spain). In all 13 of these EU member states, employment tribunals or civil courts will consider claims for unpaid wages from undocumented workers. In 11 of the 13 countries, there is also an inspection body with the competence to take individual complaints from workers regarding issues related to underpayment of wages, including overtime (Belgium, Bulgaria, Cyprus, Czech Republic, France, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain).

However, there remain significant challenges in accessibility and outcomes, which make the mechanisms ineffective in practice and therefore in violation of the ESD.

PICUM has analysed the characteristics that make complaints mechanisms *effective*, including when workers are undocumented or have precarious residence status. These are set out in [Undocumented Migrant Workers: Guidelines for Developing an Effective Complaints Mechanism in Cases of Labour Exploitation or Abuse](#).

Core challenges to complaints mechanisms being effective

The following are the issues that should be a priority for the European Commission to address within the scope of ensuring proper implementation of the ESD provisions:

- [Risks of detention and deportation prevent workers from filing complaints](#)

Risks of facing arrest, detention and deportation as a result of filing a complaint to civil courts or employment tribunals stem largely, in most countries, from the possibility that the employer denounces the worker in order to impinge the proceedings and evade payment.

In addition, the situation in Germany is of particular concern. Labour courts are not technically excluded from the obligation on public bodies to report persons with irregular status.⁴ This has a strong deterrent effect on workers, as it is likely their data will be transferred, and they will face sanctions for coming forward. At the same time, labour courts are the only potential mechanism for undocumented workers to recuperate due wages, as there is no administrative complaints procedure managed by an inspection authority that handles wage disputes.

Labour inspection authorities have for the most part been tasked with checking work permits of workers, in order for sanctions to be imposed on employers in the case of irregular employment. Practices of labour inspectorates transferring this personal information on undocumented workers to immigration authorities, or to police who then transfer the information, vary greatly, as does whether they are based on law, a formal cooperation agreement/ policy or common practice. There is also

³ PICUM (2020) [A Worker is a Worker: How to ensure that undocumented migrant workers can access justice](#), PICUM: Brussels.

⁴ Schools and other educational institutions are exempted from the obligation to report undocumented migrants § 87 Abs. 2 Aufenthaltsgesetz.

some variation in how immigration authorities use data on undocumented workers who file complaints against their employers.

The proposal for the ESD clarified the intentions of the law to punish employers and not workers.⁵ A mechanism or procedure to claim due wages, or other rights, cannot be considered accessible or effective if the person/ injured party risks being sanctioned and penalised for engaging. The risk of deportation for most people with precarious or irregular status is equivalent to losing everything, being uprooted from your life, repeat victimisation and exposure to significant hardship and risk.⁶ Risks of immigration enforcement completely undermine the meaning and application of this provision in practice.

- Immigration enforcement against workers rewards exploitative employers

This reality means that the immigration system can be used as a tool for exploitation. The main incentive for employing undocumented workers is the possibility to reduce labour costs. Workers threatened with deportation are liable to accept poor pay and conditions. Deported undocumented workers can easily be replaced by others and the gains made through systematically under-paying workers and not declaring work (and paying associated taxes and social security contributions) make it financially worth the risk of sanctions.

For example, in a recent case in Belgium,⁷ a calculation was made during the procedure that the employer owed €327,585.04 in unpaid salary, tax and social security related to the employment of an undocumented worker between 2013 and 2018, based on information provided by the worker. However, the case filed before the criminal court only pursued sanctions for various infringements of employment law and for the employment of an irregular worker; no claim for the workers' wages was included. The employer was given a fine of €10,800 with €2,500 to be paid immediately and the remaining amount suspended for 5 years and only due if they commit further infringements during this time period. The employer was also prohibited from exercising commercial activities in the same sector for 3 years, with this sanction also suspended (only to be applied if further infringements are committed). FAIRWORK Belgium knows of several undocumented migrants who have worked for this business.

By holding employers account for due wages, taxes and social security, the financial implications are much more significant, and, fundamentally, the mechanisms serve the state, public purse and social security system, the labour market and workers.

Authorities also face significant barriers to imposing sanctions without the evidence and engagement of workers.

As such, effective complaints mechanisms are intrinsic to the functioning of the Sanctions regime, as well as a protective measure.

- Challenges around proof

Undocumented workers face significant challenges to gather the evidence required to prove the existence of their employment relationships, as well as hours worked, etc. Challenges around proof impact both the likelihood of a being granted due wages through a procedure, and the possibility to

⁵ 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.

⁶ See e.g. PICUM (2020) [Removed: Stories of hardship and resilience in facing deportation and its aftermath](#).

⁷ Information provided by FAIRWORK Belgium, 29 April 2021.

file a complaint in the first place. This is particularly the case for complaints before civil courts and employment tribunals where workers might be liable for costs if the case is lost. It can also be more difficult to get legal representation when there is insufficient proof.

The ESD provisions that provide for a presumed employment relationship of at least 3 months in the absence of proof to the contrary and a presumed level of remuneration of at least the wage provided for by applicable legislation or collective agreements are extremely important.

However, there remain major gaps in how these presumptions are implemented.

- There remains a lack of awareness of the provisions among labour inspection authorities, as well as legal professionals and other third parties who assist and advise undocumented workers.
- People are largely unable to claim compensation for non-payment for work that is not legally considered as work, for example, in sex work and forced begging.
- The burden of proof for workers to show the existence of an employment relationship remains very high, and inspection authorities do not always consider sufficient the various types of proof available to undocumented workers without a written contract (e.g. messages, photos, videos, testimonies). Undocumented workers face particular challenges to be recognised as workers and not as self-employed or freelancers in particular sectors (e.g. construction workers in the Netherlands).
- The presumption of 3 months is not interpreted in all countries as a presumption of at least full-time employment – the working hours still need to be proved, which can completely undermine the effect of this provision (e.g. in Germany, Austria).
- In the Netherlands, the inspection body indicates that they will consider various types of evidence of the employment relationship and hours worked, but in practice are not claiming unpaid wages when they lack formal administrative proof that the minimum wage has not been paid, to calculate the wages still owed. As this proof is almost never available for undocumented workers, the labour inspection refers third parties supporting undocumented workers to the labour courts as the competent body to hear claims about their unpaid wages.⁸
- In Belgium, when prosecutors pursue criminal sanctions for non-payment of wages (it is a criminal offence in Belgium), they do not refer to the 3-month presumption.

Further, even when the employment relationship has been established and the presumption of 3 months applied, it is extremely difficult for workers to prove their real working hours, which are usually more than full-time, and for those who have worked for more than 3 months to prove the real length of their employment relationship. It is worth noting in this regard that, in the Netherlands, the employment relationship is presumed to be 6 months unless the employer can prove otherwise.

○ Third parties

Article 13.2 stipulates that third parties with legitimate interest may engage either on behalf of or in support of undocumented workers in relevant administrative or civil proceedings.

Through this provision the ESD recognises the need for independent bodies to assist undocumented workers to claim their rights. Workers with precarious or irregular status are cautious to approach organisations linked directly to the government and face various practical barriers. The forthcoming

⁸ Correspondence with FairWork, 19 April 2021.

FRA report finds that in most of the cases they identified, where undocumented workers filed complaints and claimed back pay, third parties played an important role.

Although some support by third parties is allowed in the laws of most member states, the legal recognition and support for the role of these organisations needs to be strengthened in several countries. It is essential for third parties to both be able to support undocumented workers, and engage directly on their behalf as their representatives in relevant proceedings, as provided for in the ESD.

For example, in Belgium, there is a legal provision that organisations can be recognized as third parties to represent undocumented workers in legal proceedings related to their labour rights. The law provides for third parties to be nominated by a royal decree, but this royal decree was never published.

- Length of procedures and associated costs

The length of procedures and potential financial implications for workers are also major barriers which can render complaints mechanisms ineffective in practice. Even national workers do not always have the time, resources and incentive to take a lawsuit or complaint against their employer. Court cases can take several years. Legal costs can be insurmountable if the worker is not able to qualify for pro bono or trade union legal representation. The worker also risks having to pay the legal costs of their employer should they lose the case.

These challenges are often felt more acutely by migrant workers with dependent or irregular status due to the precarity of their situation, limited employment opportunities and low income, and exclusion from social welfare support.

For complaints mechanisms to be effective, investments need to be made to increase resources and timeliness of decision making.

2. Lack of information and only ad hoc access to rights for undocumented workers who are in immigration proceedings

According to Article 6.2, undocumented workers shall be systematically and objectively informed about their rights under the ESD before the enforcement of any return decision. Early provision of impartial information and referral of workers to organisations that can provide further independent advice and support are crucial to facilitate complaints, gather evidence and launch investigations. Information about available procedures to apply for residence permits is also crucial at an early stage.

However, in PICUM's experience it is rare for undocumented people to be provided information about their rights under the ESD by competent authorities, either before a return decision is issued or enforced. Where provided, there are concerns regarding timeliness, quality and objectivity of information provided.

During inspections, labour inspection authorities are not systematically providing information to undocumented workers about their rights under the ESD, including how to file a complaint and what will happen with their personal data. While information materials for migrant workers in general are made available online by some inspectorates, efforts to actively engage with undocumented workers onsite remain for the most part dependent on the awareness and will of individual inspectors.

For example, in Italy, a positive step towards the provision of information was taken; a ministerial decree⁹ adopted a specific form to be delivered to undocumented workers identified by the labour inspection during inspections or through complaints. The form contains information on their rights, including the obligation for the employer to pay outstanding wages, pension and social insurance contributions and information on how to enforce their rights against the employer. However, the decree does not require that the information be provided systematically, nor in different languages. Actual use of the form in practice remains limited. In addition, the form does not include information about the possibility to apply for or be granted a residence permit.

There is an increase in specialised units and training on indicators of severe labour exploitation and trafficking. Nonetheless, our members report gaps in information provision and appropriate referrals of potential victims when they are irregularly residing. Indeed, undocumented workers are even less likely to be provided information if police are present, as the interaction focuses on their irregular status.

Interviews with undocumented workers are frequently carried out in the presence of employers, at times even with the employer acting as an interpreter. There are also considerations regarding objectivity of information if it is being provided in the context of checks of work permits and potential apprehension.

Even within return proceedings, there is a dire lack of mechanisms. Most member states have processes in place to identify and refer potential victims of trafficking in human beings who are in return procedures, but implementation nevertheless remains a major issue in many countries, even when there are clear indicators of exploitation. La Strada International reports some cases where people even indicate to authorities that they are a victim of exploitation and wish to report the crime, but are not appropriately referred and rather told to report the crime in their country of origin.¹⁰

Similarly, while there are some important efforts by actors who have access to detention centres to identify victims of exploitation and refer them to appropriate supports and procedures, this remains insufficient and ad hoc. Information is sometimes provided, but in a context and timeframe where it is not realistic for people to file complaints and exercise their rights.

Provision of information and referrals of undocumented workers who have experienced significant under payment of wages and other labour abuses to organisations that can support them remains largely occasional and dependent on the initiative of individuals.

3. Actual receipt of back payments, including when the person is no longer in the country

Even when undocumented workers are able to file a complaint and are awarded financial compensation by the competent body, there remain significant barriers to actually receiving the due funds. These include, for example:

- Where additional legal proceedings are required to enforce the decision, all the associated barriers (e.g. challenges around access to information, legal assistance, language, costs, time)

⁹ Ministerial decree of 10 February 2017 (Determination of information modalities under Article 6(2), Directive 2009/52/EC)

¹⁰ Correspondence with La Strada International, 25 April 2021.

- Employers' strategies to evade payment, such as changing company structures or closing the business and moving their assets without officially filing for bankruptcy, or simply refusing to pay.
- Even if the employer officially files for bankruptcy, challenges to access state financing of claims in case of employer insolvency (lack of awareness that undocumented workers are equally eligible, challenges around proof, administrative procedures).
- Prioritisation of the state's claim above the worker's, such that if the employer does not settle the full amount due, the state will first recuperate due contributions to tax and social security, even if this means the worker will not then receive their due wages and salaries.
- The significant barriers/impossibility in many countries for undocumented workers to open bank accounts,¹¹ and therefore challenges to organise the payment. It can be possible to have the money paid into the bank account of a friend, legal firm or support organisation, but this remains a major challenge, especially for significant sums of money.

Thanks to the efforts of individual labour inspectors, trade unions and civil society organisations, some undocumented workers have received due wages from their employers. However, these arrangements are largely informal; they do not constitute the mechanisms necessary to ensure payments are received.

For example, in Belgium, if the Control of Social Law inspectors determines that wages, or a part of them, have not been paid correctly and the workers are not immediately available, the employer must pay the salary into the Federal Deposit and Consignment Fund. There is no department or administration that has the obligation to inform the workers involved. In one case in 2017, salary arrears for 31 Polish workers totalling €61,739.08 were collected and available in the Federal Deposit and Consignment Fund. Through the efforts of an individual labour inspector, FAIRWORK Belgium and the Association for Legal Intervention (SIP) in Poland, 25 workers were located, and €57,527.27 in due wages returned, representing 93.18% of the total amount.¹² Without these individual and informal efforts of inspectors and civil society organisations, the workers would never have known that their wages had been recuperated, nor received any money, even in this case involving EU national workers, who had returned to another EU member state.

In addition, while member states do not require people to be physically residing in the state to claim back pay, PICUM is not aware of any mechanisms to facilitate claims for people who are no longer in the country. If a procedure has been initiated while in the country, it may be possible for the person

¹¹ EU law does not currently oblige member states to ensure access to basic banking services for all undocumented residents. Article 16 of the [Payment Accounts Directive \(PAD\)](#) provides access to basic banking services for those with no fixed address, asylum seekers, and those who are without residency but "whose expulsion is impossible for legal or factual reasons". Given then the increasing digitalisation of payment across all commercial activities, and its acceleration due to the COVID-19 pandemic during which cash payments have been completely stopped in many contexts, lack of access to bank accounts can undermine peoples' access to basic necessities and survival. In practice, undocumented residents, including those who are unable to return or be deported, often remain excluded from even basic banking services. In some countries, banks are systematically requiring documents that undocumented residents are unable to produce, and in Belgium, for example, individuals' accounts are increasingly being automatically blocked when the residency card they used to open an account expires, despite having since obtained a new residence status. For more information see PICUM, "[Cash only: Measures imposed to counter money laundering are having serious implications for undocumented people](#)", 26 February 2020.

¹² Information provided by FAIRWORK Belgium c.f. PICUM (2020) [A Worker is a Worker: How to ensure that undocumented migrant workers can access justice](#), PICUM: Brussels.

to receive due wages when the funds are received by the state, even if they are no longer in the country, but in our experience, such cases are extremely rare and have relied heavily on the involvement of third parties. This again underlines the need for an appropriate legal, institutional and financial environment for third countries acting on behalf and in support of workers, as well as specific attention to developing processes and mechanisms to ensure workers actually receive the wages they are due both from within the country and from another country.¹³

4. Lack of access to residence permits

Residence permits are an important and effective tool to stabilise and regularise a person's residence and employment, and to facilitate their recovery from harm and access to a remedy. Indeed, residence permits can themselves be an important remedial measure and tool to prevent future victimisation. When well designed and implemented, they promote trust in authorities.

However, across the EU possibilities for undocumented workers to access stable permits remain extremely limited, including in the context of facilitating access to justice.

The ESD's provisions under Articles 6.5, 13.4 and Article 15 focus on permits of limited duration in consideration of relevant national proceedings related to particularly exploitative working conditions or child labour, and the receipt of due compensation. The FRA's forthcoming study maps how member states have implemented either distinct legal provisions to this end, or covered these situations under provisions on permits for trafficked persons. It includes some data on permits issued, and indicates both problems with availability of data and that a very limited number of permits has been issued. Where permits for particularly exploitative working conditions are included within provisions on trafficked persons, it complicates the evaluation of the precise impacts of the ESD.

In any case, it is possible to conclude that the possibilities to grant residence permits to undocumented workers under the ESD are under-used. Observations from practice on whether or not undocumented workers who have experienced labour exploitation and/or labour accidents are able to access a residence permit to enable them to receive due wages raise the following main challenges:¹⁴

Access to residence permit procedures:

- Lack of access to information and legal advice for undocumented workers, on the availability of permits and how to apply or request consideration. This is also linked to lack of awareness and knowledge among key actors who could provide information and refer on victims, such as health professionals and victim's rights services.

¹³ In North and Central America there are NGOs that are dedicated to 'portable justice' and ensuring migrant workers receive outstanding wage claims when they have left or been deported from the country. See [Justice in Motion](#) and [Centro de los Derechos del Migrante](#). It is highly likely that processes and mechanisms in the EU would involve close cooperation with civil society organisations.

¹⁴ See also PICUM (2020) [Insecure Justice? Residence Permits for Victims of Crime in Europe](#); PICUM (2021), [Preventing Harm, Promoting Rights: Achieving Safety, Protection and Justice for People with Insecure Residence Status in the EU](#); PICUM (2017) [Guide to the EU Victims' Directive: Advancing Justice for Undocumented Migrants](#); Johanna Schlintl & Liliana Sorrentino (2021), [Residence Permits, International Protection and Victims of Human Trafficking: Durable Solutions Grounded in International Law](#), REsidency STATUS: Strengthening the protection of trafficked persons.

- Obtaining a residence permit under provisions implementing the ESD often depends on the police, either to provide key documents or to initiate the process itself. The absence of safeguards ensuring that victims and witnesses that approach the police will not face immigration control prevents victims from coming forward, as they risk prosecution and penalties themselves.
- Issuing of return decisions and detention orders as a result of labour inspections, meaning workers do not have the opportunity to file a complaint, and vital information and indicators of labour exploitation are lost.

Conditions on a permit being granted:

- Granting of permits largely depend on whether or not prosecutors decide to pursue criminal charges in a particular case, rather than the experience of the victim. Prosecution authorities do not prioritise procedures related to residence permits.
- Permits are for the most part also contingent on victims' participation in criminal proceedings, a major barrier for many victims for many reasons. The ESD provision does not restrict permits on this basis as such, and Directive 2004/81/EC refers to intention to cooperate with authorities though not direct participation in criminal proceedings. This is therefore an overly restrictive implementation of the ESD, as well as problematic more generally.

Proving the level of exploitation:

- Conceptions that actors at each step of the process around what labour rights violations rise to the level of "particularly" exploitative working conditions, forced labour or trafficking in human beings mean workers risk not being identified and referred to appropriate procedures and supports, and not being recognised as a victim, even if they have experienced severe exploitation. This is particularly problematic in sectors less often associated with severe exploitation, such as the food service industry and cleaning.
- Organisations who work with victims with precarious status say that the existence of permits can have the perverse effect of reducing a victim's credibility, because law enforcement assumes that they are making a complaint to obtain the permit rather than because of genuine mistreatment. For undocumented women, this coincides in some cases with gendered assumptions questioning the veracity about women's claims to have been mistreated.
- Challenges to gather sufficient evidence to warrant criminal charges.
- In Italy, the concept of "particularly exploitative working conditions" has been implemented in a very restrictive manner, only applying to cases where there are four or more workers involved or the worker was exposed to great danger compared to health and safety standards.¹⁵

The characteristics of the permit:

- Available permits do not always provide access to adequate income support and the labour market though necessary to enable permit holders to earn a decent living and participate in society in accordance with their personal situation, during prolonged legal proceedings. The ESD refers to arrangements similar to Directive 2004/81/EC which provides for permit holders to be granted standards of living capable of ensuring their subsistence and access to the

¹⁵ Information provided by ASGI, 26 April 2021.

labour market, so permits under the ESD should likewise provide for, at least, labour market access and basic income.

- Even if they are recognised as a victim of human trafficking or particularly exploitative working conditions, the length of the residence permit granted is, in many countries,¹⁶ only for the reflection period (where provided), for the duration of the proceedings, or for as long as they are considered useful for the prosecution.¹⁷

Extensions of permits to ensure due wages are actually received are rare. For example, in Germany, it is possible for the permit for criminal proceedings to be extended if the remuneration owed to the worker has not yet been paid in full. However, the victim has to show that they would face particular hardship to pursue their unpaid wages from abroad, despite the fact that such procedures are extremely difficult to access from outside the country, even with the support of specialised counselling centres.

People face an order to leave the territory or deportation when this period ends, with limited possibilities to access residence and work permits on other grounds. They may even face administrative expulsion from the territory, accompanied by an entry ban. For example, in Czech Republic, in cases where it is clear that the person is a victim of exploitation, some police officers issue an order to leave the territory with which an entry ban is not imposed, so people are able to re-enter with valid authorisation. However, this remains up to individual police officers and some officers issue an order to leave with immediate effect/ administrative expulsion which is accompanied by an entry ban.¹⁸

While the ESD is not directive on the length of residence permits, it indicates that both the length of proceedings and the actual receipt of due wages should be considered, implying that permits of longer duration would better respect the intentions of the ESD.

Beyond the limited requirements of the ESD, this is also a broader issue that could be addressed to improve the impact and efficiency of the ESD (see more in our answer to the later question on how to strengthen the effectiveness of the Directive).

¹⁶ Countries such as Belgium and the Netherlands do grant permanent residence permits to some victims. In Belgium, victims may be granted an indefinite residence permit in cases where their complaint or statement was significant in the judicial proceedings, regardless of whether the proceedings resulted in a conviction or not (GRETA, [Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Belgium](#), Second evaluation round, adopted 7 July 2017, published 16 November 2017). In the Netherlands, a victim of trafficking in human beings who has cooperated with the criminal proceedings and in whose case there has been a conviction will be granted a permanent residence permit. The same applies if the victim has cooperated with the criminal proceedings and they have lasted for over three years, in which case, the result of the investigation does not matter for the validity of the residence permit. (GRETA, [Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands](#), Second evaluation round, adopted 13 July 2018, published 19 October 2018).

¹⁷ For example, research carried out in the framework of the Justice at Last project found that “In many instances, criminal proceedings are initiated for the offence of human trafficking and then the case is dismissed for insufficient evidence. At this stage, if timely informed, the victim’s lawyer can appeal the decision of no prosecution and seek a review of that decision in accordance with domestic legal procedures. However, where the legal qualification of the case is changed and the prosecution continues for other crimes, the victim may lose his or her status and the entitlement to a temporary residence permit and be unable to take a civil action for compensation. (Liliana Sorrentino, [Working Paper - Legal Assessment: Compensation Practices](#), La Strada International).

¹⁸ Information provided by SIMI, 8 June 2021.

5. Lack of accountability in sub-contracting chains

Undocumented workers are often employed through complex employment relationships involving sub-contracting arrangements, recruiters and temporary work agencies, making it extremely difficult to identify and hold accountable employers. Article 8 of the ESD on liability for main, intermediate and sub-contractors is very important in this regard, but has yet limited impact in complaints procedures. Some specific challenges regarding implementation include:

- In Belgium, an extra threshold was added in the transposition of this article. If companies put in the contract a provision where the subcontractor declares not to work with undocumented migrants, the main contractor can no longer be held accountable, unless it can be proven that the main contractor was aware or should have been aware can they be held accountable. This adds an additional layer to the burden of proof, and undermines the application of this provision in practice.

What are the challenges in conducting inspections? What measures could be taken to overcome these challenges?

Contradictory objectives of inspections

Aside limited resources and powers of labour inspection authorities, the biggest challenges to effective labour inspections are the imposition of immigration enforcement duties on employment standards enforcement bodies and practices of simultaneous inspections. Current practices of labour inspectors either carrying out simultaneous inspections with police who carry out immigration enforcement, even if they are accompanying inspectors for their safety, or of inspectors transferring information on undocumented workers identified during inspections to police or immigration enforcement authorities, are widespread.

The International Labour Organisation (ILO) Labour Inspection Convention (C81) stipulates that the functions of the system of labour inspection shall be to enforce provisions related to conditions of work and protection of workers, as far as their legal competence and powers provide; provide information to support compliance; and inform competent authorities of defects or gaps in existing legal provisions.

“Any further duties which may be entrusted to labour inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers.”

The ILO Committee of Experts has underlined that giving labour inspectors duties to enforce immigration law interferes with their primary duties.¹⁹

¹⁹ Article 3 [ILO C081 - Labour Inspection Convention, 1947 \(No. 81\)](#). See also Article 15. See for example: ILO Committee of Experts, [Report on the Application of International Labour Standards \(Conventions and Recommendations\): General Report and observations concerning particular countries](#), February 2017; [Resolution concerning fair and effective labour migration governance – ILC 2017](#); International Labour

[Links to effective complaints mechanisms and procedures](#)

If an inspection might lead to immigration enforcement against the undocumented worker or other undocumented colleagues, it can also undermine the implementation of the ESD, as far as this prevents undocumented workers from lodging complaints and having access to effective procedures.

For example, if an inspection might result from a complaint being lodged or if an inspection is required as proof of employment, risks of immigration enforcement resulting from inspections are directly linked to the accessibility and effectiveness of complaints procedures. As described above, one of the challenges for recuperation of outstanding wages from employers is the lack of adequate evidence of the employment relationship. A labour inspection which would find the worker on site is a widely accepted form of proof of the employment relationship but is not currently a possibility for most undocumented workers, due to risks of immigration enforcement during inspections.

In addition, undocumented workers are frequently unable to lodge complaints during inspections where immigration checks take place, by labour inspectors or police; they are neither informed of the possibilities nor provided the opportunity to do so.

More analysis and evaluation are needed to understand whether giving the role of checking the validity of work permits to labour inspectors for any purpose undermines their relationship of trust with migrant workers to the extent to interfere with their primary duties, even when there are clear safeguards to ensure this information is not used for immigration enforcement purposes.

Based on existing national practice, it may be possible for labour inspectors to check the validity of work permits within their role of protecting workers, to facilitate their access to their rights and refer them to appropriate procedures to regularise their status, and in order to initiate proceedings against employers, as long as cooperation and data transfer and use is very clearly defined, so all actors are assured that the information will not be used to sanction workers.

Conference 2017 – report [Addressing governance challenges in a changing labour migration landscape](#), April 2017; International Labour Organisation non-binding [General principles and operational guidelines for fair recruitment](#), 2016; International Labour Office – Labour Inspection, [General Survey 2006](#) c.f. PICUM (2020) [A Worker is a Worker: How to ensure that undocumented migrant workers can access justice](#), PICUM: Brussels.

To overcome these challenges:

- ❖ Establish clear policy and training to ensure workers do not risk of immigration enforcement as a result of filing a complaint to labour inspection authorities, civil courts or labour tribunals, or engaging with labour authorities during inspections.
- ❖ Duties on labour authorities to report for immigration enforcement should be lifted.
- ❖ Cooperation agreements should be overhauled, and well-defined, such that personal data gathered during inspections and via complaints mechanisms are used to initiate relevant administrative and legal proceedings in relation to labour, social and financial laws, including sanctions on employers of undocumented workers, and not used for immigration enforcement purposes.
- ❖ Inspections that are carried out by labour, social or financial authorities together with police should have clear objectives to uphold standards related to employment and protect workers. Activities of all enforcement actors present must serve these objectives. In other words, if police accompany inspectors, for their safety or any other reason, they should not carry out immigration enforcement actions, under any circumstances, as these would undermine the objectives of the inspection. If a joint inspection by police and labour inspectors is carried out in the context of a criminal investigation, all workers must be treated as victims and not subject to negative consequences due to their status.

In relation to inspections, the role and duties of labour inspectorates seem to differ between Member States with regards to the need to inform migrants on their rights and on the available complaint mechanisms as well as the requirements to report the irregularly staying third country nationals to police or immigration law enforcement authorities. What are your views on these?

As described above, it is crucial that labour inspectorates are required to inform migrant workers of their rights and available complaints mechanisms and procedures, and do so systematically and as soon as possible.

Requiring labour inspectorates to report people working irregularly to police or immigration law enforcement authorities violates workers' fundamental rights, and additional rights as workers and potential victims of crime stemming from various legal frameworks, including the provisions under the ESD on access to back wages and mechanisms and procedures that are effective. It also violates international regulations and standards on labour inspections (ILO C81).

On the other hand, when workers are able to securely engage without risk of immigration enforcement, and cooperate with labour authorities, employers that seek to exploit their workers can be required to pay fair wages, taxes, social security and appropriate sanctions. This in turn, reduces incentives to employ irregular migrants, employer retaliation and exploitation and contributes to the state budget.

What are the challenges in relation to sanctions applied to employers (financial, criminal)? What measures could be taken to overcome these challenges?

As described above, the lack of effective and secure complaints mechanisms for undocumented workers is also a major barrier to the enforcement of sanctions. Cooperation with workers and support organisations are crucial for enforcement authorities to be signalled abuses, target resources and gather the evidence in order to impose dissuasive financial penalties (regularising tax, social security, wages and applicable sanctions). The same recommendations regarding effective complaints mechanisms apply.

Such safeguards and mechanisms within labour and immigration authorities are also crucial to enforce labour rights and impose penalties on abusive employers of regular migrants, as permits are often linked to a particular job.

To provide an illustrative case, Ms. A arrived to the Czech Republic after getting visa to collect her Employee Card (combined residence and work permit). She started to work for her employer, but after a complaint about the working conditions, the employer decided to terminate her contract with an immediate effect. The employer informed the Department of Asylum and Migration Policy that the contract was terminated, despite this being unlawful.²⁰ Ms. A followed the necessary procedure as an employee, sending a letter of disagreement to the Ministry of the Interior and informing them that

²⁰ This is only possible in cases where the worker is sentenced to prison or if there are such severe circumstances that it would be unjust to demand the employer to follow the two-months notice period (such as physical violence against employer), which was not the case.

she had both found a new employer and filed a civil case for wrongful termination. Nonetheless, the Ministry refused to issue her Employee Card, and she was left undocumented and with significant debt in relation to her relocation to the Czech Republic. The court decided that the termination was unlawful and awarded compensation for loss of salary from the day the contract was terminated until the decision was made. The defendant's appeal was denied on 24 June 2021. While this procedure is ongoing, Ms. A remains undocumented.²¹

Challenges related to liability and actual payment of financial penalties should also be prioritised, through a strengthening of related mechanisms and legal regulations.

The sanctions provided for under Article 7 also remain very much under-used despite the clear potential for such sanctions to have a greater impact on companies that systematically exploit workers. For example, ASGI has indicated that these provisions have not been implemented in Italy.²²

Other challenges related to sanctions imposed on employers of people without permission to work, include that the risks of financial penalties are actually passed on to precarious workers. Our members report cases where employers tell undocumented workers that deductions have been made from their salaries or even that they have to pay the employer money to make up for the risks being taken on by the employer in hiring them. Tactics that employers might use to evade detection can also have significant impacts on the working conditions, health and safety, and well-being of workers, for example, if they are systematically required to work during the night.

In addition, sanctions and responsibilities on employers to ensure that their employees have valid authorisation to work can contribute to discrimination of people of colour and ethnic minorities, in terms of discriminatory requirements to provide documents and actual recruitment. Rules around authorisation to work are very complicated in many countries, with a wide variety of residence statuses with different permissions and conditions attached to their employment. Some employers discriminate against candidates perceived to potentially be migrants in order to avoid navigating this legal framework and risking sanctions. There are also concerns around inadequate safeguards to protect sensitive personal data, including their residence status, of migrant workers collected, processed and stored by their employers.

To overcome these challenges:

- ❖ An independent evaluation to critically assess the real impacts of sanctions on employers should be carried out to identify the measures to overcome these challenges. This review should be based on an independent and transparent evaluation, with consultation of all stakeholders including representatives of labour inspectors and migrant workers, and anonymized data on complaints lodged, inspections, labour violations registered, compensation, residence permits and sanctions.

²¹ Correspondence with SIMI, 8 June 2021.

²² Correspondence with ASGI, 26 April 2021.

What are the challenges in implementing the protective measures for the irregularly staying third country nationals (introducing a claim for outstanding remuneration, receiving back payments, lodging complaints etc.)? What can be done to overcome these challenges?

See previous answers.

What are your views on the protective measures provided for in the Directive and do you find them sufficient to protect the rights of the irregularly staying migrants?

As described above, PICUM underlines the importance of the protective measures provided for in the ESD and the imperative for their full implementation. There are examples of positive outcomes based on efforts to implement these measures. For example, in 2018 the Austrian Minister of Labour and Social Affairs explained that providing funding for UNDOK, the drop-in center for undocumented workers (Anlaufstelle zur gewerkschaftlichen Unterstützung undokumentiert Arbeitender), was a means to contribute to implementing the ESD.²³

In Belgium, the Law providing for sanctions and measures against employers of irregularly staying third-country nationals states that employers shall pay undocumented workers a remuneration equivalent to what they would pay a regular worker in a comparable employment relationship in accordance with applicable obligations.²⁴ There have also been important efforts of labour inspectorates in Belgium, working with civil society and trade unions, to implement an effective complaints mechanism for undocumented workers.

At the same time, additional protective measures that go beyond the provisions in ESD are needed to protect the rights of undocumented migrants. Below are some recommended measures that would be complementary to the protective measures in the ESD in related to back pay, facilitation of complaints and residence permits, which could be regulated and/or encouraged at European Union level, in connection with the mandate of DG Home. Other recommendations to labour and justice authorities can be found in PICUM's 2020 report.²⁵

- ❖ Irregular entry, residence and work should be fully decriminalised. In this regard, the definition of 'illegal employment' should also be changed, as it is discriminatory, contributes to rights violations and misplaced penalties and sanctions against undocumented workers.
- ❖ Encourage member states to implement accessible procedures for undocumented workers to regularise their residence and employment situation, to lift them out of irregular and undeclared work.

²³ Information provided by UNDOK, 26 April 2021.

²⁴ Loi prévoyant des sanctions et des mesures à l'encontre des employeurs de ressortissants de pays tiers en séjour illégal, 11 février 2013, Article 4.

²⁵ PICUM (2020) [A Worker is a Worker: How to ensure that undocumented migrant workers can access justice](#), PICUM: Brussels.

- ❖ Encourage member states to improve their labour migration and work permit policies to ensure decent work for third country nationals in all jobs and sectors and address specific vulnerabilities to exploitation. The fact that it is not possible for a non-resident or undocumented third-country national to be issued a work permit to work in many jobs, despite demand, is a major driver for the employment of undocumented workers.²⁶
- ❖ Explore with DG Employment possible improved regulation of recruitment agencies and on multiple liability.
- ❖ Support ratification and implementation of relevant ILO instruments, in particular C189 on domestic workers and C190 on violence and harassment in the world of work.

²⁶ For more information and recommendations related to labour migration and work permit policies, see PICUM (2021) [Designing labour migration policies to promote decent work](#), PICUM: Brussels.

How can the Commission help strengthen the effectiveness of the Directive?

In the scope of ensuring proper implementation of the ESD, the European Commission should, through dialogue with member states and other relevant stakeholders, guidelines or other soft law measures:

- ❖ Clarify to member state authorities that the ESD requires complaints mechanisms and procedures to be effective, and therefore due safeguards must be put in place to enable engagement and access to remedy for workers without them facing immigration enforcement as a result.

Information gathered or otherwise obtained by labour inspection authorities should be used to initiate procedures against employers for due social security, taxes, wages and sanctions, and where applicable to support workers to access relevant residence permit procedures, but not used to initiate immigration enforcement against workers.

The European Commission should also promote discussion and exchange of concrete examples of good practice in this regard.

- ❖ Improve the impact of the provisions presuming at least 3-months employment and applicable minimum wage levels. For example, it would be important to clarify that:
 - The 3-month presumption should be interpreted as a presumption of 3 months of full-time employment, unless the employer can prove otherwise.
 - Multiple forms of evidence of the employment relationship and labour rights violations should be accepted, including witness testimonies and declarations from trade unions or other designated third parties.
 - The burden of proof should be on the employer to prove that applicable minimum wage levels have been paid.
- ❖ Require member states to establish specific lines of responsibility and processes within immigration procedures to ensure that people identified by immigration authorities are systematically informed of their rights under the ESD, are referred to appropriate support, are able to file complaints and apply for relevant residence permissions, and actually receive salary payments due.
- ❖ Require member states to establish mechanisms to ensure that undocumented workers actually receive due payments, for situations both when the worker is in the country and when in another country. Provide guidance and support around the nature and form of such mechanisms. For example, they could include:
 - providing powers to labour inspectors to request on-the-spot payments for unpaid wages from employers during inspections;²⁷
 - establishing pre-payment mechanisms to automatically provide financial support to people awarded compensation, after a short period of time of non-payment, while the state continues to pursue payment from the employer;

²⁷ For more information see for example I. Wintermayr and A. Weatherburn (2021), [Access to protection and remedy for victims of human trafficking for the purpose of labour exploitation in Belgium and the Netherlands](#), International Labour Organization: Geneva.

- making greater use of possibilities to freeze and seize assets of exploitative employers, early in proceedings, and then using these assets to provide due payments to workers;
 - requiring banks not to discriminate in access to basic bank accounts on the basis of residence status and ensure administrative and documentary requirements do not block access in practice; and
 - cooperation agreements with NGOs to support the transfer of funds to workers.
- ❖ In the reporting and evaluation processes for the ESD, ensure member states provide detailed inputs on how they are meeting their obligations regarding the protective elements of the ESD, and initiate infringement proceedings as needed. Particular attention should be paid to provisions related to informing workers, back wages, complaints mechanisms including mechanisms to ensure actual receipt of funds, residence permits and liability of main and sub-contractors.
 - ❖ Collect and publish statistical data from the member states, with clear data protection safeguards (on collection, use, transfer, retention):
 - the number of complaints lodged by workers, disaggregated by gender, and residence status where known;
 - the number of cases in which competent authorities have approved an undocumented worker's claim for unpaid wages, the amount awarded and whether the worker actually received it, disaggregated by gender, and residence status where known;
 - the number and types of residence permits issued linked to following a complaint for labour violations being filed;
 - the location of apprehensions of undocumented migrants.

The European Commission should enhance coherence with and full implementation of undocumented workers' rights under the ESD, Anti-Trafficking Directive, Victims' Directive and Victims' Strategy, by promoting:

- ❖ Safe reporting policies and practical protocols to ensure that undocumented victims and witnesses can safely report to, and engage with, law enforcement regarding incidents of labour exploitation, forced labour, human trafficking and violence and harassment in the workplace, without facing any risk of immigration enforcement as a result.²⁸
- ❖ Better use of residence and work permits to enable people to seek justice through civil or criminal procedures, as well as for the benefit of the prosecution and justice system, in particular:
 - Special permits²⁹ for all victims of criminal labour exploitation, severe labour accidents, human trafficking and other violent crimes who would like to remain in the country, independent of their cooperation with authorities and participation in legal proceedings.

²⁸ See also PICUM (2021), [Preventing Harm, Promoting Rights: Achieving Safety, Protection and Justice for People with Insecure Residence Status in the EU](#).

²⁹ See also PICUM (2020) [Insecure Justice? Residence Permits for Victims of Crime in Europe](#).

- That, if issued on a temporary basis, special permits for victims of crime can be maintained at least until resolution of the case, provide access to services and the labour market, may be counted as regular residence towards statuses based on accrued residence and be convertible to a more stable status based on clear criteria, as a remedial measure and to prevent repeat victimisation, if a long-term status has not already been provided.
- ❖ In the ongoing reform of the Return Directive, and through soft law or other measures, encourage and exchange good practice, oblige member states to suspend the enforcement of any existing return decision or removal order during ongoing criminal, civil or administrative procedures, and not issue a return decision to any person who files a complaint, during the ongoing procedure, or on resolution of civil and criminal proceedings. This is essential to enable accountability and access to justice and to disempower employers who would threaten their workers with deportation.

The European Commission should provide funding to support effective complaints mechanisms:

- ❖ Channel resources from the structural funds (the AMIF and ESF+), operational grants to EU civil society networks, and action grants to support:
 - Civil society and trade union organisations to provide independent information and advice, legal assistance, and support services to workers with precarious or irregular status, to facilitate effective access to complaints mechanisms and cooperation with labour inspection, in line with Article 6.2, 13.1 and 13.2 of the ‘Employers’ Sanctions Directive’ (in particular in relation to complaints via third parties).
 - Training for inspectors of labour, social and financial standards on the rights of undocumented workers under EU law, including the Employers Sanctions Directive, the Victims’ Directive and the Anti-Trafficking Directive, and the obligation to provide information and refer to relevant supports and procedures.
 - Mechanisms with clear lines of responsibility within migration and labour authorities to ensure that persons who are in immigration enforcement proceedings receive back wages whether they are in the country, or elsewhere, including through cooperation with NGOs.
 - Establishment of special funds to pre-pay compensation to workers in cases where employers evade paying due financial settlements (similar to those in place in cases of employer insolvency or for victims of violent crime).
- Ensure that EU funds allocated for complaints mechanisms for undocumented workers do not establish separate complaints mechanisms or support any aspect of labour complaints mechanisms that may lead to immigration enforcement, but instead facilitate access of undocumented workers to existing complaints mechanisms for all workers.
- Promote quality jobs through the Common Agricultural Policy (CAP) by making receipt of payments conditional on respect for labour rights and standards.
- Support additional research on the situation of workers in situations of particular vulnerability and the functioning of complaints mechanisms in cases of undocumented workers.