

ETUC Position on the Implementation of the Employers Sanctions' Directive

Adopted at the Executive Committee meeting of 5-6 October 2021

Background

On 23 September 2020, the European Commission presented its new Pact on Migration and Asylum (COM(2020)609), whereby announcing that it will assess how to strengthen the effectiveness of the Employers Sanctions' Directive (2009/52/EC)¹ and evaluate the need for further actions. This Directive prohibits the employment of undocumented migrants in order to fight irregular migration. ETUC remains critical on the purpose of this Directive as a tool for immigration control and not to improve the conditions of irregular migrant workers, as well as the lack of regular labour migration pathways to Europe. It also lays down minimum standards on sanctions and measures to be applied against employers as well as measures to strengthen the protection of migrants' rights.

On 29 September 2021, the Commission released its long overdue report² on the implementation of the Employers Sanctions' Directive (ESD). ETUC has provided its views³ on the practical implementation of the Directive. ETUC has found very limited implementation of the provisions aimed at ensuring back payments, facilitation of complaints and residence permits for undocumented workers. Concurrently, on 24 June 2021, the European Union Agency for Fundamental Rights released a report⁴ on the Directive's implementation and has found major gaps in both the full and meaningful transposition and implementation into national law and practice.

The challenges in the implementation of the Directive

The main challenge is the practical implementation of the regulatory measures, together with the protection of the rights of undocumented migrant workers. Another challenge is the effective sanctioning of exploitative employers – sanctions are too easy to avoid and not dissuasive at all compared to the fiscal benefits of undeclared work and exploitation. ETUC member organisations have pointed out the very limited implementation of the provisions aimed at ensuring back payments (Art. 6), facilitation of complaints (Art. 13) and access to residence permits. The issue of proper access to information on the rights and proceedings and the role of trade unions in this respect has also been highlighted.

- **Ineffective complaints mechanisms**

As stipulated in Articles 6.2 and 13.1, Member States shall ensure there are *effective mechanisms and procedures* through which irregular migrant workers may lodge

¹Directive 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 irregular staying third-country nationals <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0052>

²https://ec.europa.eu/home-affairs/minimum-standards-sanctions-and-measures-against-employers-illegally-staying-third-country_en

³ ETUC has provided written inputs to the informal consultation put forward by DG Home Affairs and attended the Social Partners' Hearing organised on 13 July 2021 by DG Employment and DG Home Affairs to the request of the ETUC.

⁴ [Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive | European Union Agency for Fundamental Rights \(europa.eu\)](https://www.fundamentalrights.europa.eu/protecting-migrants-in-an-irregular-situation-from-labour-exploitation-role-of-the-employers-sanctions-directive)

complaints against their employers; introduce a claim; and eventually enforce a judgement for any outstanding remuneration, including when they are no longer in the country. It also provides for the possibility for competent authorities to initiate procedures for recuperation of unpaid wages without a claim being introduced.

ETUC calls for effective complaint mechanisms to be made available for all workers regardless of status⁵. Firewalls between labour inspectorates and immigration authorities must ensure undocumented migrant workers do not run the risk of detention or deportation due to interactions with labour inspectors, during labour inspections or when pursuing judicial remedy⁶.

However, in practice, the implementation of the Directive has not created meaningful possibilities for undocumented migrants to claim outstanding wages or lodge complaints against employers. Without firewalls or access to residence permits to conclude legal proceedings, undocumented workers risk retaliation from employers, loss of income, as well as detention and deportation.

In some cases, the undocumented worker may file a complaint to the labour inspectorate and submit a case to the labour court but must cover all the costs for claiming their rights through the court. In addition, the process is lengthy, and migrants may have left the country, been deported, or may decide not to continue claiming their rights due to the high costs of the procedure.

Moreover, undocumented workers face significant challenges to gather the evidence required to prove the existence of the employment relationship, the actual hours worked, etc. In general, the burden of proof is too high and is particularly difficult in cases of multiple contractors and sub-contractors.

The enforcement of labour rights cannot be tied to the existence of a physical employment contract.

The provision on presumption for the employment relationship of at least 3 months in the absence of proof is very important. However, this presumption is not interpreted in all countries as 3 months in 'full-time employment' (e.g. in Germany) – the working time still needs to be proved, which can undermine the effect of this provision.

Article 13.2 stipulates that third parties, which have legitimate interest in ensuring compliance with this Directive, may engage on behalf of or in support of an undocumented worker, in any administrative or civil proceedings. However, associations and trade unions have been prevented from accompanying the victim in court (e.g. in Italy), resulting in the undocumented worker being much more reluctant to denounce the employer for fear of reprisals.

- **Lack of information and access to rights**

In some cases (e.g. in Germany), the obligation to inform undocumented migrant workers about their rights has not been properly implemented. This task has been delegated to the immigration authorities. However, they can also decide on the deportation and thus do not have an independent position. In practice, information and support in such cases is provided by trade union counselling centres, which operate on a project basis (no separate funding is provided for them for this purpose).

⁵ See ETUC Resolution on Fair Mobility and Migration <https://www.etuc.org/en/document/etuc-resolution-fair-labour-mobility-and-migration>

⁶ See PICUM 'A Worker is a Worker: How to Ensure that Undocumented Migrant Workers Can Access Justice'. [Link](#). PICUM Guidelines for developing an effective complaints mechanism in cases of labour exploitation or abuse. [Link](#).

Early consultation on labour rights is necessary to prepare the legal proceedings, especially in the cases of irregular employment, as the quick collection of evidence or identification of subcontractors is crucial for the successful of the case.

- **Lack of access to residence permits**

According to the experience of the trade unions, a residence permit for the purpose of claiming wages in the labour court is hardly ever granted. Permits are generally issued when linked to criminal proceedings, and would depend on the certification of the prosecution authority and on the willingness of the undocumented worker to participate in the criminal proceedings. The link between participation in the criminal proceedings and the right to stay has a counterproductive effect on the goal of enforcing wage claims.

In Germany, the immigration authority also requires a residence permit, this causes particular hardship for the foreigner pursuing his or her claim to unpaid wages from abroad. The experience of the counselling centres shows that legal action from non-EU countries is always associated with extreme difficulties for workers. For this reason, very rarely do undocumented workers decide to pursue claims from abroad and only if the case is accompanied by counsellors. The handling of such cases is extremely time-consuming (translations, transfer of detailed information) and therefore cannot all be handled by the counselling centres. Thus, undocumented workers need easier access to residence permits to claim unpaid wages.

The challenges in conducting inspections

- **Lack of resources of labour inspectorates**

Inspection authorities in the EU are understaffed and lack financial resources, this makes inspections less frequent and less effective. They have been weakened through constant reforms and changes to their fundamental missions, i.e., to protect workers. There is also a lack of coordination between the different authorities involved in order to enforce the labour and social rights of undocumented migrant workers.

Moreover, exploitation occurs in big companies as in small and micro enterprises, which make up the reality of many sectors such as agriculture, international road transport, construction, meat processing and hospitality. Furthermore, the frequency of labour inspections has decreased even more during the pandemic. This has caused more violations of the precautionary health and safety measures implemented to protect workers during this crisis.

The EU should encourage Member States to meet the ILO recommendation of 1 labour inspector per 10,000 persons employed. Additional resources should be made available for the European Labour Authority to boost the capacity of national inspectorates through assistance in cross-border situations.

In the case of domestic work, inspections are particularly difficult or non-existent due to the privacy of the households, and therefore employers do not receive any sanctions. Dedicated strategies are needed to address the concerns of domestic and in-care workers, who live and work in the home of the employer.

Concurrently with strengthening the capacity and powers of labour inspection bodies, it is important to strengthen the complaints mechanisms and routes for trade unions to act on behalf of workers. The latter enables workers to flag problems and provide

evidence to inspection authorities. Information from workers helps inspectors to target their activities and build strong cases against employers.

- **Data collection**

The inspectorates usually keep track of the number of inspections and sanctions. Data on complaints lodged is not centralised and is disaggregated. It is only the numbers of complaints that are recorded, without follow up. Therefore, there is no data on what the outcome is for workers (equal wages, compensations, social rights, etc.). In practice, the labour inspectorates are only monitoring and recording the number of complaints and fines, but they are not actively involved as regards to the rights of migrants.

- **How inspections are being carried out**

The efficiency of the inspections depends, among other things, on the trust and willingness of the workers to cooperate with the enforcement authorities. This is negatively influenced by the following factors:

- The enforcement authorities, which control violations of minimum wage where such exists, are at the same time usually responsible to check the validity of work permits, or carry out inspections together with the police.
- Workers report that employers know about the inspections in advance. The interview with the authorities took place in the presence of the employer. Sometimes the employer was involved as an interpreter for the control authorities.
- During the inspections, undocumented workers are usually not informed of their rights and not asked for their working conditions. They are rarely informed about the further course of the procedure and/or addressed to specialised organisations.

ILO Convention 81 on Labour Inspection is clear on the fact that the primary role of labour inspectors is to enforce legal provisions relating to conditions of work and the protection of workers. They should not be tasked with other duties that interfere with this and break the relationship of trust with workers. The ILO Committee of Experts on the Application of Conventions has in its case law repeatedly recognised that duties to enforce immigration law and that joint inspections with immigration enforcement actors undermine this trust.

Hereunder are the possible measures to overcome these challenges:

- The system of inspections should be strengthened, providing more human and financial resources, particularly in the sectors of higher risk of exploitation of undocumented workers.
- Duties on labour authorities to report immigration enforcement should be lifted. Clear rules should be in place for how, to what extent, and for what purposes labour inspectorates may use immigration data. This would ensure information sharing is well-defined and does not undermine their primary role to ensure protect the rights of all workers regardless of status and have their trust.

- The guarantees provided to the workers should be improved: the specialised trade union counselling centres should be involved to ensure the trust and professional support of undocumented workers.
- If inspections are carried out together with the police, all participating authorities should uphold labour standards and protect workers - no immigration enforcement actions should be carried out.
- Inspectors should be (culturally) trained to work with undocumented migrant workers as workers feel misunderstood and are even considered as the offenders.
- The inclusion of a possible role for the European Labour Authority (ELA) in the efficient implementation of the Directive, as set out by the Migration and Asylum Pact, must in no way entrench the role of national labour authorities in sanctioning employers and additionally reporting undocumented workers to migration authorities, rather than upholding their labour rights. If ELA is to play a role it must be from the perspective of ensuring the independence and efficiency of labour inspectors in the role of enforcing labour rights for all workers, including mobile and migrant workers regardless of status.
- Third parties should be able to represent workers in legal proceedings with their consent. All Member States should be required to ensure that designated third parties including trade unions can file complaints on behalf of migrant workers (Art 13.1).

The role and duties of labour inspectorates

It is crucial that the inspection authorities are obliged to inform undocumented workers on their rights and the available complaint mechanisms. However, even if during the inspections the authorities provide information on rights, this is not so comprehensive and understandable that it enables workers to enforce their labour rights independently. It is therefore necessary to provide migrant workers with relevant information before the labour inspectorates act, by involving trade unions as well as civil society organisations. Trade unions have the skills and expertise to assist migrant workers in an effective way.

Trade unions support migrant workers through awareness raising campaigns in the workplace, as well as by reaching them in public spaces (dialogue with workers/leaflets disseminated in different languages) and before departure from their countries of origin. Public authorities as well as the EU should support trade union counselling services.

Complaint mechanisms do not work for a very simple reason: 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. This means there is no real choice for undocumented workers, and the repercussions for employers are very limited.

- All migrant workers including undocumented ones should be able to receive support and enforce their labour rights without risking immigration enforcement and deportation. Given the exploitative conditions to which these workers are often subjected, Member States must ensure that they – regardless of their employment or residence status – can effectively access

justice and exercise their employment rights before civil courts, employment tribunals, inspection and other relevant complaints mechanisms.

- This also means banning the transfer of personal data on undocumented workers to immigration services through labour inspection without their explicit consent (e.g. they might consent to be referred to residence permit procedures) and establishing policies and protocols in immigration services to protect workers against employer retaliation and negative repercussions regarding their status as a result of exercising labour rights.
- It would be possible, for example, to grant the specialised counselling centres rights of assistance or representation of undocumented workers in the legal proceedings.
- Undocumented migrant workers should be systematically informed - in their respective languages - about their rights and the legal procedures and have access to free legal support in order to claim for compensations.

The challenges in relation to sanctions applied to employers

Experience has shown that sanctions against employers primarily penalise workers. Such sanctions must therefore be applied with restraint and with the primary objective of protecting workers. Particular attention should be paid to women who are more exposed to exploitation and trafficking.

There are too few controls consequently the risk to be controlled and punished is low. With very limited complaints (see reasons above) also sanctions are applied too scarcely.

Financial/criminal consequences for exploitative employers are not visible and lower than the benefits to be gained through undeclared work and social dumping. They also do not tackle the downward pressure on wages in many sectors. For example, in Italy, with the law 199/2016 against the so-called 'caporalato' (illegal brokering of labour) sanctions against employers who exploit irregular foreigners have been made more severe, but the difficulty of inspections and the length of judicial processes remain. There are penalties (administrative and criminal) that are in some cases applied to employers who use and exploit irregular migrant workers: substantial fines, the impossibility of participating in calls for tenders for publicly financed works, and even criminal convictions in cases of serious forms of exploitation. Penalties are increased proportionately to the number of exploited migrants. The problem is that the public instruments of control and inspection of workplaces (as well as the action of protection of trade unions) are not sufficient as preventive measures. It is no coincidence that the phenomenon of 'caporalato' or the use of undeclared work has not decreased in Italy, especially in sectors such as agriculture, construction, domestic and care work, etc.

Moreover, Article 7 that provides for additional sanctions such as the exclusion from public procurement and national and EU funding (including CAP subsidies) has not been transposed by all Member States. This article should become mandatory for all MS. Our member, EFFAT, is pushing for the inclusion of this directive in the personal scope of the CAP social conditionality currently discussed at EU level.

Possible measures to overcome these challenges are:

- Strengthen the control system, make better use of sanctions set out in Article 7, and ensure that employers are made to pay full salaries that are due, including taxes and social security contributions.
- Gather data on the number and types of sanctions imposed on employers in order to assess the real impacts of these sanctions and the possible measures to be considered.

Protective measures for the rights of undocumented workers

As described above, ETUC underlines the importance of the protective measures provided for in the Directive and the need for their effective and full application in practice. In order to effectively fight irregular employment, there is a need for stronger protective measures for undocumented workers, for example exemption from punishment, entitlement to regularisation of the employment relationship, access to a regular residence permits. The contact of undocumented workers with different authorities (enforcement authority, labour court, prosecution authority) should not be notified automatically to another public institutions.

The scope of the application of the directive is limited to undocumented migrant workers. Third-country nationals with regular residence without a work permit or with a quasi-regular residence, which is not intended for the purpose of work, are not covered by the Directive (e.g., third-country nationals who are posted within the framework of the freedom to provide services), although they are confronted with the similar problems in enforcing their rights. To verify the authenticity of third-country national postings and to counter the use of artificial posting arrangements, due regard should be given to the legal definition of posting as meaning 'a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works' (Article 2(1) of the Posting of Workers Directive 96/71/EC). A posting of a third-country national that does not fulfil this definition should be considered as bogus and therefore without a valid work permit in the Member State of destination. Consequently, it should be possible, under the ESD, to hold liable a contractor who uses bogus posted third-country national workers, in addition to the posting employer in the sending Member State.

In addition to the subcontracting liability and the need for joint and several liability throughout the whole subcontracting chain, the ESD does not sufficiently address the key role of intermediaries in the entry into irregular employment. Their role is similar to that of employers, the sanctions or measures should therefore also be directed against intermediaries. Similarly, it must be ensured that due diligence obligations are complementary and do not remove responsibility under joint and several liability. Also, it must be possible to hold the main contractor liable for violations in the subcontracting chain, even if he or she has broken the service contract, since this has in some Member States been used by subcontractors as a way to escape liability when contractors start suspecting abuse.

Possible actions to overcome the insufficient measures:

- As soon as the proof of an employment relationship is established, the procedure for regularisation through work should be started and a residence permit that includes the right to work should be granted.

- Introduction of stricter rules on joint and several liability rules in the subcontracting chain, including also intermediaries.
- Addressing the misuse of bogus posted third-country nationals, making sure they have access to a work permit in the Member State of destination, rather than in a sending Member State, to which they have no connection.
- Undocumented workers to be informed – in their own languages - on their labour and social rights. Trade union counselling services should be supported. 24 hours phone help lines (free of charge) to be provided for reporting respective violations (with multilingual interpreters).
- Awareness-raising initiatives to be implemented in cooperation with civil society organisations and trade unions, other relevant actors and local communities in order to prevent and/or report labour exploitation of migrant workers.

ETUC recommendations for an effective implementation of the Directive

The Commission should:

- Clarify to Member State authorities that the Directive requires effective complaints mechanisms and procedures, and therefore safeguards must be put in place to protect workers from facing immigration enforcement. Inspection authorities should initiate procedures against employers to pay due wages, taxes and social security, impose sanctions, and to support workers accessing relevant residence permit procedures.
- Promote discussion and exchange of good practices in this regard. The Working Group of the European Platform on Undeclared Work and the Working Group on Inspections within the European Labour Authority could serve as a space for this purpose, so as to promote and ensure human right compliant approaches to labour inspection, in line with ILO standards. Social partners and civil society organisations should be part of these discussions.
- Collect and publish statistical data from Member States on the
 - number of inspections carried out
 - number of complaints lodged by workers
 - number of undocumented workers who have successfully enforced their wage claims, received compensation, social contributions
 - number and types of sanctions imposed on employers
 - number and types of resident permits issued
- Provide funding to support trade unions and civil society organisations to offer information and advice, legal assistance, and support services to undocumented workers, in line with Article 6.2, 13.1 and 13.2.
- Enhance coherence with and full implementation of undocumented workers' rights under the ESD, Anti-Trafficking Directive, Victims Directive and Victims' Strategy. This can be done by promoting safe reporting policies and practical protocols to ensure that undocumented victims 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. Particular attention should be paid to women and girls.

The Directive should:

- Set minimum standards on labour inspections and complaints mechanisms for undocumented migrant workers; require Member States to separate enforcement of employment standards and immigration regulations and acknowledge the right and necessity of undocumented workers to lodge formal complaints mechanisms without risking deportation.
- Ban the reporting of undocumented workers to immigration enforcement actors through labour inspection.
- Require Member States to introduce safeguards within immigration services to protect workers against employer retaliation and negative repercussions regarding their status as a result of exercising labour rights.
- Require labour intermediaries, placement agencies, as well as enforcement authorities (including labour inspectorates), to provide accessible information to migrant workers – including undocumented ones – on their rights and where to go for support and redress.
- The 3 months presumption period of an employment relationship should be extended and the burden of proof on the employer should be strengthened.
- Article 8 should be strengthened and a full chain joint and several liability must apply in all countries. Subcontracting full chain liability should factor in a range of different subject matters including wage floors or statutory minimum wages where such exists, (circumvention and evasions of) social security contributions and taxes, undeclared work, health and safety, and (violation of) the rights to organise and bargain collectively.
- The exclusion from public procurement, and public funding (including EU funding) should become mandatory and applicable to all Member States.
- All workers lodging a complaint should be granted a residence permit under the Directive.