

Brussels, 15 April 2008



Employers' Sanctions Directive:

Will migrant workers pay the price of their exploitation?

With this document, ENAR (European Network Against Racism), PICUM (Platform for International Cooperation on Undocumented Migrants) and SOLIDAR would like to stress that EU action on migration must be in accordance with the principles of fundamental rights, with core values that ensure effectiveness of action and respect for human dignity and in line with the employment and social policies of the E.U.

A number of other organisations have expressed their wish to be mentioned as supporting the key messages in this document. These organisations are: the European Women's Lobby (EWL), the International Catholic Migration Commission Europe (ICMC), European Migrant Women's Network, RESPECT, The People for Change Foundation, Monika-Naiset Litto Ry, the Immigrant Council of Ireland, Tiye International, Fatima Women's Network, Maisha eV Africa Women, AFRA (International Center for Black Women's Perspectives) and MRCI (Migrant Rights Centre Ireland).

Introduction

The draft Directive providing for sanctions against employers of illegally staying third-country nationals is currently under consideration within both the Council and the European Parliament. Our organizations urge all decision makers in this process to address the concerns outlined in this common position as they move forward with this process.

This paper is based on the joint comments on the fight against 'illegal' employment and exploitative working conditions, issued in May 2007,¹ which highlighted the key points that the forthcoming European Commission

¹ See ETUC, PICUM and Solidar, "Joint Comments on Expected Commission Proposals to Fight 'Illegal' Employment and Exploitative Working Conditions," Brussels, 26 April 2007, available online at: www.picum.org.

initiatives on irregular migration, especially regarding the proposal for legislation on sanctions for employers of 'illegally staying third-country nationals', cannot neglect.

It is recognised and welcomed that the Commission proposal for a Directive providing for sanctions against employers of 'illegally' staying third-country nationals has responded to these comments and that the danger for violations of fundamental rights of migrants has been recognised. The proposal identifies as one of its specific objectives "To contribute to reduced exploitation of illegally staying third-country nationals". Nevertheless, serious concerns remain that the primary goal of immigration control renders many of these welcome initiatives ineffective and undermines the ability of the proposed Directive to achieve this specific objective.

Towards a Rights Based Approach: Ten Core Principles²

- 1) *All human beings have human rights.*
- 2) *"Illegal" people do not exist.*
- 3) *No end to irregular migration without beginning to accept legal migration.*
- 4) *Good governance first.*
- 5) *Combating irregular migration = combating labour exploitation.*
- 6) *Combating labour exploitation = combating human trafficking*
- 7) *Design of sanctions crucial to prevent penalizing workers*
- 8) *Ensuring accountability of all actors in the labour market is a pre-condition.*
- 9) *Enhancing the role of trade unions, NGOs and civil society at large is key.*
- 10) *A stronger framework of international standards is needed.*

A Rights Based Approach

The signing of the Lisbon Treaty brings into focus the fundamental rights values of the EU. It will bring the European Convention on Human Rights into the EU legal order and enable the enforcement of the Charter of Fundamental Rights. Not only this, but the 27 Member States have made a clear statement of the values on which the Union is founded:

"...respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." (Article 2 of the Reform Treaty)

It is a basic principle of Human Rights that they apply to all persons, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."³ An

² Ibid.

³ See The Universal Declaration of Human Rights, Article 2, available online at: <http://www.un.org/Overview/rights.html>.

effective approach to issues that arise from migration must be in line with these fundamental values.

A Coherent Approach to a Complex Reality?

The identification of “illegal” employment as a ‘pull factor’ for ‘illegal’ migration is an overly simplistic view of the issue at stake. It lacks coherence with the analysis presented in other areas of the Commission’s policy, notably in Employment, Social Inclusion, Integration and Anti-discrimination. The availability of employment opportunities is a reason to migrate for both regular and irregular migrants. However, the analysis presented pays insufficient attention to the reality that the overwhelming majority of migrants, like all human beings, would rather have regular employment contracts, pay taxes and contribute to the social security system, than live outside the legal system, under a constant threat of deportation.

On the other hand, undeclared work is a major factor in enabling exploitation and, as the European Commission states in its Communication *‘Stepping up the fight against undeclared work’*, “tends to be associated with poor working conditions for individuals and subsequent risks to workers health, low prospects for career progress and insufficient social protection coverage.”⁴ Where such a tendency is coupled with an irregular situation, with the attendant risk of deportation for those that denounce such situations, undeclared work can create the conditions for extreme forms of exploitation.

Many undocumented workers who suffer abuse refrain from complaining to the authorities because of the possibility that they (or their colleagues) will be arrested and deported. In many cases this fear is justified. For example, the explanatory memorandum of the draft directive states that when workers are apprehended without a residence permit, a return decision will be issued. The practical impact of this reality is that measures based on immigration control will hinder, not promote, the eradication of exploitative or undeclared work.

In this context it needs to be recognised that removal of irregular workers does not remove irregular work. On the contrary, those who are willing to exploit the vulnerable position of undocumented workers simply move deeper into the shadows and onto the next vulnerable group and undeclared and exploitative employment is only increased and entrenched in the longer term.

The impact assessment accompanying the draft directive focuses almost entirely on enforcement strategies, and does not analyse the role that the lack of fundamental social rights of third country nationals in EU Member States and the lack of reality-based legal channels for migration, residence and employment in pushing vulnerable women and men into irregular work. This is in contrast to the approach taken by the Commission Communication

⁴ See European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, “Stepping up the fight against undeclared work,” COM(2007) 628 final, 24.10.2007, p. 3. Available online at: http://ec.europa.eu/employment_social/news/2007/oct/undeclared_work_en.pdf

'Stepping up the fight against undeclared work' which recognises "that the transitional arrangements in place limiting the mobility of workers from the new Member States is a factor hampering recourse to declared work and as such exacerbates the practice of undeclared work at a time when the labour market developments create enhanced opportunities for regular work."

Moreover, several Member States have already pointed out that the proposed targets of 10% of employers to be monitored every year will amount to too costly an operation. Before putting in place such an expensive measure, we believe that at a minimum the effectiveness of the measures proposed should be further investigated. The Impact Assessment does not provide hard evidence that the measures proposed have had the intended effects in situations where they have been introduced in the past.

Positive Aspects

The proposal recognises that there is a real potential for negative effects on the rights and protection of undocumented migrants and takes welcome, rights based, steps to mitigate this impact:

- Article 7 of the Commission proposal would introduce measures to enforce payment of any outstanding remuneration undocumented workers might be entitled to (as well as outstanding taxes and social security contributions). It proposes postponement of deportation in certain cases until the worker is paid and/or measures to guarantee the payment even if the worker is returned to his/her country of origin. *Such protection is crucial. Without it there is a real danger that workers will not be able to effectively access the relevant procedures, including those to enforce a court decision should an employer not comply immediately.*
- Article 7(2) introduces a presumption of 6 months employment whenever an employer is found to hire undocumented workers. The informal character of the employment relationship often makes it very difficult for these workers to prove their story, and this clause addresses this crucial difficulty of the burden of proof.
- The proposed facilitation of complaints in Article 14. The possibility to file a complaint through or with the support of a third party, without the risk of being arrested, gives workers the opportunity to be an ally in the struggle against unscrupulous employers and reduce the existence of undeclared work. *However, the proposal does not explicitly protect those who complain and does not make provision for anonymous or collective complaints. Nor do the proposals make it clear that 'complaints' goes beyond the collection of payment to include, for example, discrimination claims or other complaints related to working practices, violence, exploitation etc. On the contrary, the current approach is based on the presumption of detection and return. In addition, the concept of 'designated third parties' is restrictive and would undermine the Commission's intention of ensuring safe channels for employees to report illegal practices. This contrasts with the approach taken in anti-discrimination legislation that requires 'a legitimate interest', thus enabling*

access by those who have a legitimate role but excluding those who may wish to misuse the protections. It is vital that vulnerable migrants are able to access support through organisations that they trust and that have a mandate to provide such support. Thus there needs to be a clear recognition of the role of migrants rights NGOs and Trade Unions as well as Ombudsmen in the enforcement of undocumented workers' rights.

- The joint liability in the chain of subcontracting will tackle one of the major escape routes for employers of undocumented workers.

Unintended Effects of the Current Proposal

Despite the positive elements outlined above, gaps in which could be remedied by addressing the concerns identified, our organizations believe that the current proposal will have a number of unintended effects that run counter to both the values of the European Union and specific policies in the migration, integration and employment fields.

Firstly, migration control as the primary goal in the proposal will have the effect of increasing and entrenching undeclared work and will make it harder, not easier, to effectively address the problems associated with irregular migration, including the denial of rights of irregular migrants. The potential for this to happen is recognised in the proposal. However, the assertion that this will be "counterbalanced by the deterrent effect of especially the proposed criminal sanctions in cases of particularly exploitative working conditions"⁵ is not explored or substantiated by evidence. Moreover in the majority of the cases financial penalties will be imposed, reducing the deterrent effect.

Secondly, the European Union has promoted the employment of third-country nationals within the EU as a priority of every Member State, both as a response to unprecedented demographic and economic need for migrant labor and because employment is one of the main routes to integration and thus crucial for social cohesion within EU member states. The current proposal endangers such integration measures through the stigmatisation of employment of third country nationals and migrants, whereby third-country national are subject to procedures that question their right to reside in the country on a regular basis. At the most extreme end, the requirements may result in employers deciding it is 'too much trouble' to employ third-country nationals, resulting in nationality discrimination against which there is currently a lack of protection at European Union level for third country nationals.⁶

Thirdly, the current directive risks undercutting efforts to fight against discrimination on grounds of race or ethnic origin in the labour market more

⁵ See GHK, "Impact Assessment on a Community instrument laying down sanctions for employers of third-country nationals with no or limited rights to work that are exceeded," 29 April 2007, p. 24, available online at: http://ec.europa.eu/dgs/justice_home/doc/final_report_impact_assessment_employer_sanctions_29_04_07.pdf

⁶ See European Network Against Racism (ENAR), "General Policy Paper Number 3: Equal Treatment of Third Country Nationals," available online at: www.enar-eu.org

broadly. Placing the duty on employers to exercise immigration control functions will not only deter employers from hiring unauthorised workers, but is likely to create both intentional and unintentional racial discrimination whereby not only every third country national but also every 'foreign' looking worker is placed under suspicion and subjected to potentially repeated checks and scrutiny solely on the grounds of their actual or apparent race or ethnic origin. This could mean that implementation of the requirements placed on employers could create discrimination prohibited under the Race Equality Directive. Studies in the USA have repeatedly shown that widespread discrimination was one of the results of the introduction of employer sanctions. This has not been explored in the current proposal and the impact on equality for racial and ethnic minorities has not been assessed.

Our organisations believe that these effects will undermine the positive aspects that have been proposed and entail a high risk of rendering them ineffective.

An Effective Approach to a Complex Reality: Rights as the Foundation for Action

As stated above, the proposal introduces some welcome measures to protect the rights of undocumented and irregular migrants, many of which correlate to those put forward in the joint statement issued in May 2007. Nevertheless, a number of core principles and recommendations remain to be addressed, not least that labour inspectors should never be immigration law enforcers.

Our organisations call for the:

- Reaffirmation of the principle of the uniqueness of labour law to uphold rights and forms of protection in the workplace. Labour law exists to protect the worker in an unequal position of power, which is especially the case for undocumented workers.
- Safeguarding of the right to organize of all workers regardless of their immigration status, by ensuring that legislation is unbiased and does not exclude undocumented workers from exercising the right to join a trade union.
- Ensuring safe channels for the enforcement of rights by recognising and supporting the fundamental role played by trade unions and NGOs in supporting victims of exploitation and rights violations, and further ensuring that these organisations can carry out this vital role without fear of prosecution.
- Enabling workers to make anonymous complaints through third parties, including migrant support NGOs, trade unions, labour inspectorates and other appropriate bodies, regarding exploitative, abusive or otherwise illegal employment practices.
- Strengthening of the role of labour inspection in its primary duty of protecting workers and not enforcing immigration law, by:

- De-linking immigration status with workplace inspection, to ensure that undocumented workers can safely pursue a complaint against an abusive employer without being threatened with expulsion. Workplace controls play a crucial role in the detection of exploitation – especially of the most vulnerable workers who are not in a position or do not dare to file a complaint – and in the investigation of complaints. It is imperative that complaint procedures be safe, and that workplace controls by labour inspection services not put workers at risk of arrest or deportation, in order for workers to be able to approach the inspectors freely and cooperate with them.
 - Investing in training and awareness-raising measures to inform labour inspectors, undocumented workers, and those offering them assistance (e.g. NGOs, trade unions, local authorities) about the possibilities for filing an official complaint.
 - Providing labour inspections with sufficient human and financial resources to work effectively. Placing the role of migration control on labour inspectors will direct already inadequate resources for inspection services away from the core role of the protection of labour rights.
- In addition to strengthening the role of the labour inspectorates, undocumented migrant workers who want to escape from situations of irregularity, violence and exploitation should also be enabled to exercise their rights to complain about their situation, to access effective court proceedings in order to sue their employer for unpaid wages, and to receive damages and payments due to them, without being expelled.
 - In cases of exploitation (whether trafficking or not), victims should be offered special protection and a residence status if needed for their safety, recovery of health, or where this would be required in order to preserve other fundamental rights. These protective measures should be accorded based on the needs of the victim, especially gender-specific needs given the high proportion of women victims, and not based on the needs of prosecuting authorities. Therefore they should not be made conditional on cooperation with authorities.
 - Recognition of the particularly vulnerable position of undocumented migrant women especially those who are, or are at risk of becoming, victims of forced labor, trafficking or exploitation in the sex industry and who are particularly likely to be in sectors which are not conventionally recognized as “work” such as domestic and care work. Complaint procedures and measures to tackle irregular employment in highly feminized sectors should therefore be designed in such a way as to provide women with proper protection.
 - Insertion of labour standards and rights into EU financial agreements: intentional or grossly negligent violation of labour standards should be used to halt payments to producers who violate labour law or exploit workers.

An Overarching Concern: Migration Control or Challenging Exploitation?

Our organisations are concerned that effective measures are taken to address these concerns and to respect, protect and fulfil the rights of all - including irregular migrants - using a rights-based approach. An effective approach to tackling the existence of the irregular labour market needs to start from the perspective of tackling the violation of rights of those affected and needs to ensure coherence and consistency with EU policy, including in the employment, social, anti-discrimination, gender equality, migration and integration fields.

The European Commission has recognised that there needs to be a multi-faceted approach to dealing with the employment relationship in the case of undocumented workers. Indeed, the current proposal results from a positive and welcome initiative taken by the DG Employment and Social Affairs and the DG Justice, Freedom and Security to jointly address such concerns. It is therefore disappointing that the proposed directive seems to have lost the recognition of the multifaceted nature of the issue. The current use of Articles related to immigration control⁷ as the sole legal basis for the proposals undermines the ability of the EU institutions to fully take into account the employment, social, anti-discrimination, gender equality, legal migration, integration and social inclusion aspects.

We therefore strongly recommend that the focus of the proposal and the legal basis on which it is brought forward is revisited in order to bring back the welcome recognition of the inter-relationship between migration policy and employment and social affairs policy, to rebalance the priority given to the EU competencies and role in the different areas and to enable a rights-based approach to be taken that is in line with the fundamental values of the European Union as set out in the EU Charter of Fundamental Rights. The Commission Communication '*Stepping up the fight against undeclared work*' presents an opportunity to do this.

⁷ See Article 63 (3) (b) of the Treaty Establishing the European Community (TEC), available online at: http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html.

The following organisations have expressed their wish to be mentioned as supporting the key messages in this document.



For further information contact:

ENAR – European Network Against Racism
 43 Rue de la Charité
 B-1210 Brussels
 Belgium
 Tel: +32 2 229 35 70
 Fax: +32 2 229 37 75
 Contact person: Tansy Hutchinson, Policy Officer
 Email: info@enar-eu.org
www.enar-eu.org

SOLIDAR
 22 Rue du Commerce
 B-1000 Brussels
 Tel.: + 32 2 5001021
 Fax: + 32 2 5001030
 Contact person : Mathias Maucher, Social Policy Coordinator
 Email: mathias.maucher@solidar.org
www.solidar.org

PICUM - Platform for International Cooperation on Undocumented Migrants
 Gaucheretstraat 164
 1030 Brussels
 Belgium
 tel. +32/2/274.14.39
 fax +32/2/274.14.48
 Contact person: Michele LeVoy, Director
 Email: michele.levoy@picum.org
www.picum.org