



PLATFORM FOR INTERNATIONAL COOPERATION ON UNDOCUMENTED MIGRANTS

**PICUM's Comments on the
Proposal for a Directive of the European Parliament and of
the Council providing for sanctions against employers of
illegally staying third-country nationals
(presented by the Commission)
COM (2007) 249 final**

Summary of the Directive

The directive is the first in EU legislation targeting employers of undocumented workers¹. It builds on legislation already in force in several Member States and on generally accepted concepts such as human trafficking (although it states that cases of trafficking fall out of the scope of this directive).

The objective of this directive is to fight irregular migration by reducing what is viewed as a major pull-factor: the possibility of finding work.

It hopes to achieve this objective by introducing a general prohibition on the employment of undocumented workers. It imposes on employers the responsibility to check residence permits of their workers. Different kinds of penalties are proposed in case of infringements (among them fines, exclusion from public subsidies and criminal penalties in serious cases). The effectiveness of this directive is expected to be guaranteed by imposing fixed targets for controls in the Member States.

Further to this prohibition the directive introduces measures to reinforce the rights of the workers in question, as the directive explicitly states that the employer, not the worker should be punished for the irregular employment. Member States are asked to introduce procedures that facilitate complaints by undocumented workers in cases of abuse, and procedures for automatic enforcement of certain rights, for instance outstanding wages, when workers are apprehended without a residence permit.

The directive states that stronger sanctions and higher enforcement obligations applied in relation to undocumented workers are justified in the light of the objective of this Directive and non-discriminatory in view of the different status of these workers.

It is stressed that the proposal is concerned with immigration policy, not with labour or social policy.

¹ The directive talks about 'illegally resident third-country nationals'. However, PICUM chooses not to use 'illegal' as far as the labour and residence status of the workers in question are concerned. We will use the terms 'undocumented workers/migrants' related to the permits they do not possess, and 'non-declared' related to the non-payment of taxes and social security. The term 'irregular' refers to all situations not complying with the regulations concerning employment relationships, as in 'irregular labour' or 'irregular labour market'.

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I. PICUM and Fair Working Conditions of Undocumented Workers

PICUM, the Platform for International Cooperation on Undocumented Migrants, aims at promoting respect for the human rights of undocumented migrants within Europe, including the rights to health care, adequate housing, education and training, minimum subsistence, family life, moral and physical integrity, legal aid, and fair labour conditions. PICUM’s network has among its members many organisations that have firsthand views on the reality of undocumented workers and experience with the enforcement of their rights. It is therefore in a privileged position to comment on this proposal for a directive.

PICUM agrees with the explanatory memorandum where it states that undocumented workers are in a vulnerable position because of their irregular residence status. It also agrees that the majority of these workers are not only employed without the proper permits, but also working on an undeclared basis, which leads to losses to public finances, can depress general wages and working conditions, may distort competition between businesses and deprives undocumented workers from basic social security benefits. Therefore attention to the employment of undocumented workers is justified.

It is indeed the irregular residence status of undocumented workers that makes them vulnerable to exploitation and therefore attractive to unscrupulous employers. In many European countries, undocumented migrants risk being arrested and deported if they contact authorities about a situation of abuse. Non-respect of labour rights goes unreported and therefore unpunished because victims are in no position to seek redress. Financial gain for the employers of these workers is substantial.

However, we do have some fundamental concerns about the rationale upon which this directive is based, and will make clear, through a detailed comment, why our final conclusion is negative and why we ask the Commission not to pursue the current proposal.

II. The “Penal Approach” to Combating the Employment of Undocumented Workers

Although PICUM welcomes the fact that attention is paid to undocumented workers’ rights, we fear that the effects of the protective measures proposed will be as good as non-existent. The reason for this is that the directive does not address the main cause of undocumented workers’ vulnerability. Quite on the contrary, by imposing sanctions based on their residence status and enhanced controls of this status, this directive is likely to increase undocumented workers’ vulnerability to abuse rather than diminish it.

The directive’s explanatory memorandum leaves no doubt about the proposal’s true aim, which is migration control. However, it does use arguments about the negative consequences of irregular employment, for instance the employment of undocumented workers and its effect on the labour market. We want to challenge the presumption that this directive will have beneficial effects on general labour conditions on the one hand and the shadow economy on the other hand.

The sanctions proposed in the directive can be described as a ‘penal approach’ to the employment of undocumented workers. In relation to this approach, PICUM asks the following fundamental questions:

1. Will the measures proposed in the directive be effective?
2. What are some potential negative effects of the measures proposed in the directive?
3. Is it justified at all to deal with employment relationships from the angle of migration control?
4. What links are proposed with anti-trafficking measures?
5. What provisions are foreseen concerning workers who become undocumented because of administrative oversights?

Several countries, also within the EU, have been trying to fight the employment of undocumented workers through specific sanctions. Employers are sanctioned based on the absence of correct work/residence permits for their workers, and in some countries high fines are imposed. The directive proposes to extend and reinforce these sanctions and sanctions will be based on the absence of a residence permit. Whether the worker possesses the right work permit or not, is irrelevant. This differs from the situation in many countries.

1. Effectiveness of the Measures Proposed in the Directive

Do Employer Sanctions Work?

There is no clear evidence that employer sanctions work, despite the many experiences that exist. The Commission does not provide hard evidence for the effectiveness of these kind of sanctions - not in the explanatory memorandum of the proposal nor in the summary of the Impact Assessment that we have seen. Rather, in the explanatory memorandum it is admitted that sanctions do not always have the intended effect. The memorandum suggests that this might be because the sanctions are not high enough and control efforts not big enough.

PICUM rather believes that sanctions based on the workers’ status do not work because they are not the right way of tackling the problem. The following examples support this idea:

- In **Germany**, employer sanctions have been accompanied by massive control efforts. However, there is no evaluation of the efficacy of the proposed raids. Taking into account

the efforts, the results are rather poor and critics state that the worksite inspection is not effective. A main reproach is that under the current enforcement system tighter control causes employers to create legal facades by outsourcing responsibility to sub-contractors.²

- In the **Netherlands**, research in the horticulture industry has shown that the introduction of a repressive policy has not resulted in the disappearance of undocumented workers. If there is a possible (however not certain) slight decrease in the number of undocumented workers in the area where the research took place, it is not clear whether this is due to the repressive measures or to the arrival of legal, cheap foreign workers. What is clear, is that due to the repressive measures working conditions of undocumented workers have seriously deteriorated. They are now hired by subcontractors and not directly by their employers, which makes their situation even more precarious.³
- If we look at the situation in the **United States**, where employer sanctions have existed since 1986, it is clear that they have not prevented the number of undocumented workers rising there. Trade unions, who at first called for the introduction of the sanctions, now call for their abolition. They claim that 'although employer sanctions did not create the problems of exploitation and discrimination, they have contributed significantly to the inability of immigrant workers to enjoy and enforce the most basic labour and workplace rights.'⁴

What About the Sanctions Against Employers Foreseen in the Directive?

Even if one accepts the idea of employer sanctions, the minimum that must be ensured is that the sanctions will truly affect the employers, and first of all those employers that make the highest profit out of the exploitation of undocumented workers. PICUM stresses that employers have numerous strategies to escape their responsibilities, which they will with no doubt also use to escape employer sanctions. The following are some examples of how employers try to circumvent labour laws concerning undocumented workers:

- Subcontracting is one of the most common escape strategies for employers.
- Salaried workers are presented as independent contractors.
- Workers are forced to buy (for big money) forged documents and work permits.
- Companies go bankrupt whenever complaints are filed and/or sanctions are imposed.

² see Cyrus, Norbert: 2005, *Trafficking for Labour and Sexual Exploitation in Germany*, Geneva: ILO; also: Enste, Dominik H.; Schneider, Friedrich: 2006, *Schattenwirtschaft und irreguläre Beschäftigung: Irrtümer, Zusammenhänge und Lösungen*, in: Alt, Jörg; Bommes, Michael (eds.): *Illegalität. Grenzen und Möglichkeiten der Migrationspolitik*, Wiesbaden: VS Verlag, 35-59. The Federal Ministry for Finances commissioned a feasibility study for an evaluation of labour inspection but did not pursue the matter. (see Broockmann, Bernhard; Rincke, Johannes: 2005, *Wirksamkeit der Bekämpfung der Schwarzarbeit durch die "Finanzkontrolle Schwarzarbeit": Empirische Untersuchung der Entwicklung der Schwarzarbeit und des hierauf bezogenen Bewusstseins- und Wertewandels – Machbarkeitsstudie – Abschlussbericht an das Bundesministerium der Finanzen*, Mannheim: Zentrum für Wirtschaftsforschung (ZEW)). It seems as if the Ministry is not interested or fears transparency.

³ Benseddik/Bijl, 'Onzichtbaar achter glas', 2004

⁴ Quote drawn from the TUC comment on the UK proposal for a law introducing employer sanctions.

This text was issued in July 2007 and can be found on the TUC website

<http://www.tuc.org.uk/international/tuc-13568-f0.cfm>. PICUM's 10 Ways (see footnote 6) also mentions the AFL-CIO's change of thoughts. More references from the USA: Mehta, Theodore, Hincapié: Social Security's No-Match Letter program: *Implications for Immigration Enforcement and Workers' Rights*, 2003, http://www.nilc.org/immsemplymnt/SSA_no-match_survey_final_report_11-20-03.pdf * National Immigration Law Center: *State and Local Proposals that Punish Employers for Hiring Undocumented Workers Are Unenforceable, Unnecessary, and Bad Public Policy*, 2007, www.nilc.org

Some of these escape routes are addressed in the directive, but many are not. One serious loophole, difficult to come by with as long as the employer sanctions approach is maintained, is the clause that frees employers from persecution if documents appear to be forged. This gives a too easy way out for employers that already know the ways to get these forged documents and impose them on their workers.

PICUM fears that the sanctions proposed offer too many loopholes for rogue employers to be affected.

Root Causes of the Irregular Labour Market

Employment of undocumented workers is part of the irregular labour market in general, and is caused by the same dynamics. It is a matter of supply and demand, where the search for easy profit is one element, but other dynamics play a more structural role: market forces pressing down wages and working conditions on the one hand and the existence of a vulnerable and exploitable workforce on the other hand.

A correct understanding of these dynamics is necessary in order to design effective measures against the employment of undeclared and/or undocumented workers. This element is not addressed in the current directive.

2. Potential Negative Effects of the Measures Proposed in the Directive

The above-mentioned examples already indicate that not only the effectiveness of employer sanctions is, to say the least, unclear, but also employer sanctions have perverse side-effects on the vulnerability of the workers in question. More vulnerability means more unfair competition, also for regular workers.

Workers are Likely to Be Punished, Not Employers

In cases of abuse of undocumented workers, the latter more often than not 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. The explanatory memorandum of the directive also states that when workers are apprehended without a residence permit, a return decision will be issued. Thus in many cases, even when the law states it otherwise, undocumented workers are punished in practice. As we indicated above, their employers have ways to escape prosecution.

Sanctions Have a Deterrent Effect, but not the One Intended

All of the strategies employers use to reduce the risk of being caught result in more vulnerability and abuse for the worker. In other words, if there is a deterrent effect of employer sanctions, it is often the workers who pay for it instead of the employers.

Employers who refrain from using these escape strategies, are likely to be most affected by employer sanctions. Fixed targets for controls might even reinforce this tendency: the difficulty of taking enforcement actions against true rogue employers might lead to a perverse incentive to target legal firms who employ legitimate migrants and may make the occasional mistake.

Increased Risk of Discrimination of All Workers

The European Union has promoted the employment of third-country nationals within the EU as a priority of every Member State, as employment is one of the main routes to integration and thus crucial for social cohesion within EU member states.

PICUM stresses that the current directive risks undercutting efforts to fight against ethnic

discrimination on the labour market. Publicizing employer sanctions will not only deter employers from hiring unauthorized workers, but might deter them from hiring any 'foreign' looking worker at all.

On the other hand, the requirement for employers to carry out repeated checks on those who do not have an unqualified right to work and reside in the EU - a process which does not seem to be limited in any way by the proposed directive - will provide the unscrupulous with another means by which to harass the vulnerable and undermine union organisation. Even in workplaces where employers still seek to employ migrant workers and comply with the law such checks will create fear (even if not justified), feelings of humiliation and divisions within the workforce.

Studies in the USA have repeatedly shown that widespread discrimination was one of the results of the introduction of employer sanctions. We strongly recommend that similar studies be conducted within the EU.

Criminalisation of Undocumented Migrants and Undocumented Workers

PICUM stresses that the work done by undocumented workers is not 'illegal' in itself, but is work done without proper working permits. PICUM has consistently opposed the criminalisation of undocumented migrants, and considers that this measure is one step further in this criminalisation. Moreover, it risks to be a 'self-fulfilling prophecy' since measures that directly sanction the workers' status will discourage the least dishonest employers and drive the workers into the arms of more exploitative employers and even criminal networks.

3. Is It Justified to Deal with Employment Relationships From the Angle of Migration Control?

This directive interferes with the complex dynamics of the (irregular) labour market with a one-dimensional instrument focusing on the migration status of the worker. When labour inspectors are obliged to perform migration control tasks, this seriously reduces the possibility of migrant workers collaborating with them in the fight against unscrupulous employers. As we have pointed out above, it is most uncertain that employer sanctions can reduce the employment of undocumented workers, so one has to conclude whether this instrumentalisation of workplace controls is justified.

Need for a Holistic and Comprehensive Approach

PICUM thinks that the issue of the employment of undocumented migrants needs a more holistic and comprehensive approach. While the memorandum to the draft directive states that social partners (employers' associations and trade unions) were consulted, PICUM has strong concerns about the thoroughness and formality of such consultations. PICUM finds this a grave oversight, since the directive introduces heavy responsibilities on employers and is taking measures that have serious effects on the complex dynamics of the labour market.

We are aware that the powers of the Commission in matters of employment and social affairs are more limited than those it has in matters of migration control. However, we wonder whether this justifies the introduction of far-reaching measures for one very specific group without regard to the coherence with the general labour market policy. Taking into account that undocumented workers are the most vulnerable of all workers in the EU, it would be preferable that their situation is dealt with from a perspective of management of the labour market and protection of wages and working conditions. This means that if the situation of this group of workers is to be addressed, it should be done by the DG Employment and in consultation with the social partners.

We must bear in mind that recent social policies in many Member States tend to deregulate labour relationships, answering the call for more flexibility and enhanced competitiveness. This makes not only the regular workers vulnerable, but will have an even stronger effect on those who fall out of the protection of our welfare state, among them undocumented workers.

EU Commissioner Spidla of Employment and Social Affairs has announced new measures to fight the irregular labour market. We hope to find constructive measures reinforcing a rights-based approach, as outlined below, in these new plans.

4. What Links Are Proposed With Anti-Trafficking Measures?

The directive proposes special protection for victims of 'serious exploitation'. The protection offered has been inspired by trafficking procedures as the proposal refers in its preamble (19) to the Directive 2004/81/EC of 29 April 2004. This protection is conditioned by the workers' cooperation with the authorities and may include a (temporary) residence permit. Nonetheless, the human trafficking cases are explicitly left out of the directive's scope, so the proposal is planning a new special status here.

It is difficult to appreciate what the difference will be among these victims and the victims that truly fall under the protection for victims of human trafficking. Moreover, the proposal seems to adopt from trafficking procedures some of the points that are most criticised by human rights organisations: the most serious point being the conditioning of the protection for the victim on cooperation with the authorities. We also wonder why resident permits for these victims are indicated as being 'temporary'.

PICUM asks clarification about this special status and suggests that the criticism of human rights organisations on the existing trafficking procedures be taken into account.

5. What Provisions Are Foreseen Concerning Workers Who Become Undocumented Because of Administrative Oversights?

It must be stressed that workers can become undocumented as a result of slow administration or disfunctioning bureaucracy. The directive nowhere assesses this and leaves no room for exceptions in cases where workers became undocumented because of reasons beyond their control such as maladministration.

III. Alternative to the "Penal Approach": A "Rights-Based Approach"

Undocumented workers are very often hired because they are cheap and exploitable. PICUM therefore proposes to address this aspect in the first place. The rights-based approach is an alternative to the penal approach, and will not have the same negative side-effects. It can perfectly be designed by authorities responsible for Employment and Social Affairs, on the national or the European level, since the main criteria for enforcement are not the residence permits or even the work permits, but the compliance of employers with labour rights and regulations for taxes and social security. Contrary to the penal approach, the rights-based approach will target the most exploiting employers in the first place.⁵

⁵ A far-reaching example to illustrate the beneficial effects of a rights-based approach is the (past) experience in the Netherlands. Employers of undocumented workers used to be obliged, and could, pay taxes and benefits for these workers. This possibility does not exist anymore. Compared with the current situation, it appears that the possibility of 'declared undocumented work' had many advantages:

Because employer sanctions have the effect of exposing undocumented workers to vulnerable situations, it is impossible to combine a rights-based approach with an approach that aims to target employers because of their workers' residence status.

1. Elements of a Rights-Based Approach

A rights-based approach necessarily consists of the following:

- Undocumented workers will, as much as possible, possess the same workplace rights as documented workers. This includes minimum wages, maximum working hours and overtime pay, workers' compensation in case of work-related accidents, compensation in case of dismissal and the right to organise. Equal rights reduce the incentives for unscrupulous employers to hire undocumented workers. If they are hired anyway, the damage done to the general labour market will be minimised because the unfair competition with regularly employed workers will be reduced.
- However, experience in many countries where these basic workplace rights for undocumented workers do exist, has clearly shown that this is not enough. In order for undocumented workers' rights to be effective, there must be:
 - Effective and safe complaint mechanisms. 'Safe' means that the worker can complain without fear of deportation.
 - Enforcement of respect for labour rights which is not linked to migration control: however, this is exactly the opposite of what the current directive proposes.
 - The Commission itself has understood that the purely repressive approach is not sufficient to fight irregular migration, and has been reflecting on legal possibilities for migrant workers to enter the EU. These legal alternatives should be considered an integral part of every strategy to cope with the presence of undocumented workers.

2. Measures in the Draft Directive that Could Be Incorporated in a Rights-Based Approach

PICUM welcomes that the directive proposes measures to strengthen the position of undocumented workers and to facilitate the enforcement of undocumented workers' rights. The following measures, already present in the draft directive, should be part of a rights-based approach:

- Article 7 proposes 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. PICUM recommends to apply as definition for remuneration 'wages and any (outstanding) remuneration resulting from (the infringement of) labour law, namely worktime regulation, compensation for work-related accidents, and paid leaves obligation, with regard to the length of service'.
- Article 7(2) introduces a very interesting notion about 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

more declared work, less losses of public finances, more proof of labour-relations, so more possibilities for workers to go to court, so more control on labour conditions, and furthermore less fraud with names and social-fiscal numbers. See Benseddik/Bijl, 'Onzichtbaar achter glas', 2004

to prove their story, and this clause addresses this crucial difficulty of the burden of proof.

- PICUM approves the proposed facilitation of complaints in article 14. The possibility to file a complaint without the risk of being arrested gives workers the opportunity to be an ally in the struggle against unscrupulous employers.
- PICUM supports particularly the role proposed for “designated third parties” in the enforcement of undocumented workers’ rights. We do recommend that these third parties would be defined more precisely, indicating for instance trade unions and NGO’s working in the field of workers’ rights or migration.
- PICUM considers the joint liability in the chain of subcontracting to be essential. This will tackle one of the major escape routes for employers of undocumented workers.

PICUM has proposed concrete measures to design a rights-based approach in its 2005 publication *Ten Ways to Protect Undocumented Migrant Workers*.⁶ This publication listed the following ten policy recommendations:

1. Acknowledge the presence of social and economic presence of undocumented migrants.
2. Prioritize data collection.
3. Involve (local) NGOs in conducting research and making policies.
4. Mainstream undocumented migrants in integration policies and the Social Inclusion Strategy.
5. Invest in workplace inspection (but not for purposes of migration control).
6. Safeguard the right to equality before the law.
7. Safeguard the right to organize.
8. Regularize undocumented migrants.
9. Open up the debate on the future of the low wage sector.
10. Ratify the UN Convention on the Rights of All Migrant Workers and Their Families.

⁶ See Michele LeVoy and Nele Verbruggen, *Ten Ways to Protect Undocumented Migrant Workers*. PICUM, Brussels, 2005.

IV. Conclusions

PICUM welcomes that this directive explicitly guarantees workplace rights to undocumented workers, and imposes an obligation to Member States to guarantee these rights. This is a welcome new development in EU legislation.

However, we state that the rights accorded to the workers will in reality not be enforced because the directive fails to address the root cause of their vulnerability, which is their fear of deportation because of their irregular status. Quite on the contrary, the directive reinforces this vulnerability by sanctioning the employers based on the absence of a residence permit of their workers, and by imposing workplace controls targeting the workers' residence status in the first range.

Moreover, the directive fails to assess the root causes of the irregular labour market and the presence of undocumented workers in that labour market: namely, market forces pressing down wages and working conditions and global inequalities causing people to look for their fortune outside their countries of origin.

V. Recommendations

- 1. PICUM finds that in the current draft directive, the positive points will be undone by the rationale the directive is based on, and the directive should be revised.**

It has never been convincingly shown that employer sanctions can really reduce the number of undocumented workers in the labour market. We do have evidence however of the negative consequences of such sanctions:

- enhanced vulnerability of the workers
- employers using more escape strategies and/or going underground
- a greater risk for discrimination of all 'foreign' looking workers
- workers being more often punished (by deportation) instead of the employers, contrary to the directive's aim.

PICUM points out that even in their own right, the measures proposed still contain many loopholes and there is no guarantee that they will have even the most concrete results put forward, namely the sanctioning of the employers of undocumented workers.

- 2. The directive instrumentalises workplace inspection for the purpose of migration control.** Moreover, the directive proposes far-reaching measures having their impact on the complex dynamic of the labour market.

PICUM suggests that the situation of undocumented workers be addressed by the DG Employment and Social Affairs in full consultation with the social partners, and in coherence with the general fight against the irregular labour market. We believe that this is the best way to introduce a rights-based approach successfully.

- 3. As opposed to the "penal approach" outlined in the directive, PICUM proposes a "rights-based approach." It aims at minimising the workers' vulnerability** and thus targets the most exploitative and dishonest employers first. A rights-based approach necessarily includes:

- Equal workplace rights for documented and undocumented workers
- Safe complaint mechanisms
- De-linking enforcement of labour rights and workplace control from migration control
- Legal migration possibilities that do not place the foreign worker in a vulnerable position.