



OPINION

European Economic and Social Committee

Sanctions against employers of illegally staying third-country nationals

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals
[COM(2021)592 final]

SOC/705

Rapporteur: **Carlos Manuel Trindade**

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Referral	European Commission, 01/12/2021
Legal basis	Article 304 of the Treaty on the Functioning of the European Union
Section responsible	Employment, Social Affairs and Citizenship
Adopted in section	07/03/2022
Adopted at plenary	23/03/2022
Plenary session No	568
Outcome of vote (for/against/abstentions)	129/1/3

1. Conclusions and recommendations

- 1.1 The EESC shares the Commission's assessment of the situation when it states: "illegal employment of people not authorised to stay in the EU (...) is damaging from an economic perspective, as it leads to losses in public finances, tax and social contributions, depresses wages and working conditions, and creates unfair competition between businesses", which is damaging to the vast majority of businesses that do respect the law. "Illegal employment also exposes migrants to risks of violation of individual and social rights, notably labour exploitation, precarious living and working conditions and limited or no access to social protection"¹.
- 1.2 The EESC notes the Commission's stance when it states that the Directive grants Member States the flexibility to design different approaches to achieve its objectives, which allow them to take into account national specificities relating to the labour market, the role of illegal employment and migration and the severity of violation. However, all Member States need to ensure that the rules are successful in deterring "irregular" migration and tackling illegal employment².
- 1.3 The EESC underlines that the shortcomings of this Directive relate to its actual transposition and implementation by the Member States, in particular the considerable variability in sanctions, which in most cases means they do not do much to dissuade employers from hiring illegally staying third-country nationals. They also relate to the Directive's inability to encourage migrants to, as a rule, engage with the authorities due to their legitimate and justified fear of being returned to their country of origin. In fact, the mechanisms for migrants to file complaints are generally ineffective, because there is a lack of permanently available, detailed, effective and meaningful information in the languages of the target group, because inspections are few and far between (due to a lack of staff) or are inefficient, and because Member States do not provide timely, adequate reports or information permitting regular evaluation of the Directive's application.
- 1.4 The EESC calls on Member States to step up their efforts to implement the Directive and to work actively with the Commission to ensure it is effective. It firmly supports the Commission's willingness to launch infringement proceedings against Member States should they persist in not providing all relevant information on implementation of the key obligations on sanctions, inspections and protection of migrants' rights stemming from the Directive. However, the EESC would propose that the Commission, as part of the evaluation of the implementation of the Directive that is to be carried out by 2024, examine what sanctions can be established or adopted against companies that knowingly benefit from the outcome of illegal and criminal activities.
- 1.5 As regards sanctions, the EESC fully supports the Commission's commitments and recommendations to the Member States, also making the following proposals:
- i. the EESC recommends that Member States make appropriate use of the potential of all the sanctions provided for in the Directive, in particular the application of all additional

¹ Communication [COM\(2021\) 592 final](#), p.1.

² See COM(2021) 592 final, point 1.

administrative measures (loss of public benefits, exclusion from public contracts, recovery of public subsidies, temporary or permanent closure of establishments and withdrawal of licences to operate). It likewise recommends that the Commission support Member States in this process;

- ii. the EESC recommends that sanctions in Member States be devised in such a way as to be effective, dissuasive (more than offsetting the benefits) and proportionate, based on a comprehensive approach and incorporated into the legal framework of each Member State. It also recommends that a minimum framework of sanctions and administrative measures be adopted, to be defined for the whole of the EU, which each Member State could strengthen by means of its own legislation, adapting the sanctions to its own specific economic and social situation in this context, these financial penalties must be at least greater than the profits derived from the illegal activity.

1.6 As regards measures to protect the rights of irregular migrants, the EESC supports the Commission's undertakings and recommendations to the Member States and proposes the following:

- i. On Commission cooperation with Member States:
 - the EESC recommends that the Commission step up its dialogue with Member States to ensure that the administrative procedures developed by public authorities in the Member States are as effective as possible;
- ii. On migrants' cooperation with the authorities in efforts to tackle irregular work:
 - the EESC recommends to the Commission and Member States that migrants who work with the authorities to combat employers of illegally staying third-country workers be granted access to regular residence and work permits as a means of motivating them to engage actively with the authorities of the host country;
- iii. On the role of trade unions, business associations and civil society organisations:
 - the EESC recommends to the Commission that these organisations be granted access to specific EU programmes in support of activities for providing information, advice, legal and financial assistance, and training, amongst other things, as a concrete way for them to pursue and improve their action in this area;
 - the EESC calls for the co-financing requirement in specific EU programmes to be exceptionally reconsidered in the light of the pandemic and capital difficulties.
- iv. The EESC recommends to the Member States that they:
 - allocate the necessary resources to the labour inspectorates so that they are able to carry out their tasks properly, particularly by stepping up inspections in the sectors where there is the greatest risk,
 - use all available means, especially social and audiovisual media, to carry out information and awareness-raising campaigns, both for businesspeople who employ irregular migrants from third countries, informing them of the risks involved in hiring people under such conditions, and for the workers themselves, informing them, in several languages, of their rights and the way they can exercise them. In these campaigns, trade unions, business associations and civil society organisations must have a dedicated medium for conveying their messages,

- set up a telephone line where immigrants can anonymously report exploitative practices and other malpractices by their employers.

1.7 On inspections, the EESC supports the Commission's undertakings and recommendations to the Member States and proposes:

i. that Member States:

- establish monitoring strategies targeting risk sectors as a matter of priority, increase the number of labour inspectors and improve the effectiveness of inspections,
- implement International Labour Organization (ILO) recommendations or standards on the ratio of labour inspectors to workers, namely one inspector for every 10 000 workers, as a way of allocating sufficient human resources to labour inspectorates for them to carry out their tasks,
- stipulate in inspection strategies that inspections will not be carried out in conjunction with migration authorities and that it is not the duty of labour inspectors to report irregular migrants to the authorities if they are encountered in the workplaces inspected,
- ensure that, in those Member States where the social partners already play a role in inspections, this role continues to be respected,
- give trade unions and employers' organisations the opportunity to participate in inspection activities, in line with existing national practices, but respecting ILO standards particularly in collecting and sharing information;

ii. that the Commission:

- encourage Member States to have a sufficient number of labour inspectors relative to the number of workers in each Member State by 2024 (expected date for the next evaluation report)³ in line with convention No 81, in the event that they not do so, consider legislation to implement this international standard in the EU;

iii. regarding the involvement of the European Labour Authority (ELA) in inspections, that the Commission and the Member States:

- involve the ELA more in European inspections, in keeping with its rules of operation, since many chains for the hiring and subcontracting of irregular migrant workers have already been identified as operating at European level, which requires the same level of inspection.

1.8 Regarding the significant gaps in information, the EESC welcomes the initiative the Commission has taken, with the support of the European Migration Network (EMN), to set up an IT reporting system and database to provide timely, regular and comparable information, with a view to overcoming the current enormous difficulties. The EESC does, however, propose that the Commission stipulate in the relevant legislation that this database may not be used by Member States' immigration services for the purpose of identifying irregular workers and returning them to their countries of origin as a consequence.

³ See COM(2021) 592 final, point 6.

2. Objectives of the Communication

- 2.1 The Communication adopted by the Commission, which is the subject of this EESC opinion, aims to strengthen implementation of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals and is part of the more general approach of the New Deal on Migration and Asylum. The Commission will assess ways to enhance the effectiveness of the Directive and the need for additional measures.
- 2.2 This Communication also fulfils the obligation to report regularly to the European Parliament and the Council, laid down in Article 16 of the Directive. It identifies the measures needed to boost implementation of the Directive, focusing on the following strands of action:
- sanctions against employers (section 2);
 - measures for protecting the rights of irregular migrants (section 3);
 - inspections (section 4);
 - significant gaps in information (section 5);
 - stepping up EU action against illegal employment (section 6).
- 2.3 This opinion addresses the key aspects relating to each of these sections.

3. General comments

- 3.1 The EESC notes that "it is difficult to estimate the size of illegal employment in the EU because it is a 'hidden' phenomenon [...]. There are indications that illegal employment of irregular migrants is higher where the share of informal economic activity is high. Although informal employment is estimated to stand at 16.8% of all employment in the EU on average, the extent of illegal employment of irregular migrants is ever harder to quantify, in particular as regards the gender specific and child sensitive aspects, since irregular migration remains difficult to estimate"⁴. The nature and extent of irregular employment varies between Member States. Improving the availability of up-to-date and precise data is one of the main challenges for better understanding and tackling this issue.
- 3.2 The EESC shares the Commission's view that "undocumented workers may often be employed through complex employment relationships involving sub-contracting arrangements, recruiters and temporary work agencies, as well as through online platforms providing short-term work (e.g. food and meal delivery, transport services), which increases the difficulty in identifying employers who hire irregular migrants. In this regard, the liability of the entire chain of employers is intended to protect migrants especially in those economic sectors where subcontracting is widespread, such as construction, as well as in the newly emerged economic area of online platform work"⁵.

⁴ Communication COM(2021) 592 final, Introduction.

⁵ See COM(2021) 592 final, point 2.3.

- 3.3 The EESC points out that in some cases extreme and protracted violation of human rights and the rule of law may be linked to other criminal activities and state negligence, as indicated by the European Court of Human Rights (ECHR) landmark judgment of 2017[1], which recognised the severe labour exploitation of migrant workers in strawberry fields in Nea Manolada, Greece, as being forced labour, specifying that exploitation through labour is an aspect of human trafficking⁶.
- 3.4 In its opinions to date, the EESC has highlighted the need for simultaneous action to be taken to create opportunities for legal immigration and to deal with the causes of irregular immigration. In particular, in its earlier own-initiative opinion on the proposal for a Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, the EESC expressed "some doubts about the proposed directive's content, the time frame in which the proposal [was] made, and the order in which the legislative proposals [were] put forward". It also stressed "the importance of effective implementation of the directive in Member States, whose task will not be an easy one because the monitoring bodies do not have enough qualified staff, there are difficulties in dividing up responsibilities between the bodies concerned and there are a large number of companies for which monitoring is envisaged". "The strength of the directive should be in its actual implementation", it concluded.
- 3.5 Despite the positive elements contained in the Communication, after 12 years of the Directive being in force, the EESC has serious doubts as to whether this is the right means for combating the exploitation of irregular migrant workers and of legalising their status in host countries.
- 3.6 The EESC also considers that the Employers' Sanctions Directive on its own is not sufficient to promote legal migration pathways or overcome irregular immigration. A more comprehensive approach is needed, aimed at linking the various EU policy provisions on legal migration with national efforts to tackle undeclared work. It must be made easier for businesses to employ properly regularised migrants, and the rules should be simpler, clearer and not overly bureaucratic.

4. **Specific comments on sanctions against employers**

- 4.1 The EESC considers it extremely important that the Directive stipulate that financial and criminal sanctions be effective, proportionate and dissuasive in order to reduce employers' incentives to hire irregular migrants. Sanctions should considerably offset the economic gains of hiring irregular migrants⁷.
- 4.2 Likewise, the EESC highlights the additional administrative measures against employers provided for in the Directive, such as loss of public benefits, exclusion from public contracts, recovery of public subsidies, temporary or permanent closure of establishments and withdrawal

⁶ [Chowdury and Others v. Greece](#). The terrible conditions in Manolada attracted attention in 2013, when the supervisors of the farm opened fire on workers who were protesting about wage arrears, seriously injuring 30 Bangladeshi workers.

⁷ See COM(2021) 592 final, point 2.

of licences to operate. It condemns the fact that these measures remain very much under-used, despite their potential to dissuade employers from hiring irregular migrants⁸.

- 4.3 There are substantial differences between Member States in the size of the financial penalties and criminal sanctions imposed (e.g. financial penalties vary from EUR 3 000 to EUR 43 000 and prison sentences vary from 8 days to 12 years)⁹. However, it would be important to have an overview of the combination of different sanctions applied in Member States.
- 4.4 The EESC highlights the fact that Member States with a more stringent sanctioning system consider that higher financial sanctions are a good deterrent to illegal employment, whereas Member States applying lower sanctions or where the risk of sanctions is considered low in comparison to the potential profits from illegal employment have found that the sanctions are not a sufficient deterrent. It is significant that eleven Member States have changed their legislation since 2014 to increase the fine imposed¹⁰.
- 4.5 While the EESC understands that the "difference in the level of fines applied in the Member States depends on a variety of elements, such as the economic situation and the level of minimum wage in a Member State", as referred to in the Communication, it does not consider that this warrants sanctions not constituting a deterrent.
- 4.6 The EESC deems it unacceptable that there should be a significant gap in the information that Member States provide concerning the application of criminal sanctions against employers and the number of proceedings launched. Nevertheless, the available data point to the fact that the Directive has had limited impact in deterring illegal employment through sanctions; this leads the EESC to condemn the fact that it has not yet been possible to establish an efficient framework for effective, proportionate and dissuasive sanctions across the EU¹¹.
- 4.7 The EESC notes and emphasises the feedback provided by stakeholders representing trade unions and non-governmental organisations (NGOs), collected during dedicated targeted consultations on the topic, shows that sanctions for exploitative employers appear to be lower than the benefits gained through undeclared work and social *dumping*¹². However, the employers' assessment of the situation is that the sanctions are sufficiently robust and it is important to make enforcement of sanctions more effective and proportionate in the implementation of the Directive by each Member State.

5. Specific comments on measures for protecting the rights of irregular migrants

- 5.1 Articles 6 (2) and 13 of the Directive grant irregular migrants a set of rights to ensure that they are adequately informed and can lodge complaints against labour violations and claim back

⁸ See COM(2021) 592 final, point 2.3.

⁹ COM(2021) 592 final, points 2.1 and 2.2.

¹⁰ COM(2021) 592 final, point 2.1.

¹¹ COM(2021) 592 final, point 2.2.

¹² COM(2021) 592 final, point 2.2.

unpaid wages. These are key provisions to protect migrants from the risk of exploitation and abuse¹³.

5.2 The EESC takes note of and shares the Commission's views and analyses in this domain, particularly the following:

- i. further efforts are still needed as regards implementation of protective elements, particularly in relation to access to information, access to justice and recovery of back payments, and the granting of temporary residence¹⁴;
- ii. a majority of Member States only provide general information on employees' rights, not targeted information that is relevant for the specific situation of irregular migrant workers;
- iii. the cooperation of public authorities with social partners and non-governmental organisations is key to facilitating complaints, as they often have direct contact with the workers and can raise awareness, inform migrants of their rights, build mutual trust and help the workers identify situations of undeclared work and labour exploitation in order to file a complaint. The role of social partners and non-governmental organisations (NGOs) is also very important to facilitate complaints, expose situations of exploitation and reduce migrants' fear of being subject to return procedures if detected by migration authorities. In a large majority of Member States the law grants an important role to these stakeholders, notably trade unions, within the national mechanism for facilitating lodging of complaints¹⁵;
- iv. irregular migrants who have experienced labour exploitation face challenges in accessing residence permit procedures or in the conditions on granting the permits. Stakeholders report that victims face a lack of access to information and legal advice on the availability of permits and on how to apply or request consideration, on the granting of permits often being linked to criminal charges against particular employers, and on the permit being conditional on victims' participation in criminal proceedings, although this is not required by the Directive¹⁶;
- v. the Fundamental Rights Agency (FRA) has indicated that, in some Member States, migrants in an irregular situation are not using existing complaint systems. This may be for a number of reasons: a lack of incentives for workers to lodge complaints; limited information on their rights and the available complaint mechanism; economic barriers such as membership fees to trade unions that assist members only; and, mostly, fear of being detected, detained and returned¹⁷;
- vi. social partners and NGOs also play a central role in promoting and implementing the protective measures of the Directive and increasing their outreach to irregular migrants. The Commission will strengthen dialogue with the social partners and non-governmental organisations representing undocumented workers and engage with the European Platform tackling undeclared work when developing these activities.

13 COM(2021) 592 final, point 3.

14 COM(2021) 592 final, point 3.

15 COM(2021) 592 final, point 3.2.

16 COM(2021) 592 final, point 3.2.

17 COM(2021) 592 final, point 3.2.

5.3 The EESC warns that irregular migrant workers – even when informed of their rights by trade unions, civil society organisations or public service bodies – may not file complaints against employers with a view to recovering unpaid wages or may not denounce possible situations of exploitation, for fear of being ordered to return, of losing their income or, in some cases, of being subject to retaliation from their employers.

6. **Specific comments on inspections**

6.1 The EESC shares the Commission's viewpoint that inspections are the most important tools for detecting employers hiring irregular migrants and situations of exploitation. It is on the basis of the results of inspections that employers can be held accountable and sanctioned, and the necessary measures put in place to protect irregular migrant workers subject to exploitation. Article 13(1) of the Directive requires Member States to ensure effective and adequate inspections based on risk assessments identifying the sectors of activity at most risk, without which it is impossible to achieve the objectives of the Directive¹⁸. The EESC also stresses that, in addition to ensuring effective inspections, other problems associated with the employment of irregular staying third-country nationals must also be addressed.

6.2 It is surprised to note that nowhere in the Communication is there reference to the European Labour Authority (ELA) as regards its involvement in European inspections, given that, as we know, many chains for the hiring and subcontracting of irregular migrant workers have already been identified as operating at European level, which requires the same level of inspection. The EESC believes that this should change.

6.3 The EESC fully supports the Commission's conclusions on inspections, in particular the following:

- i. the number of inspections carried out under the current system is unlikely to dissuade employers from hiring irregular migrants. The share of employers subject to inspections tends to be very low; consequently employers may consider the economic advantage gained from illegal employment to be higher than the likelihood of being detected through inspections¹⁹;
- ii. Member States and other stakeholders report that labour inspection authorities are often understaffed and lack resources, affecting the number and frequency of inspections carried out²⁰;
- iii. stakeholders promote the idea of separating labour inspections and law enforcement/immigration activities by means of a 'firewall', which would guarantee that irregular migrants detected during inspections would not be referred to immigration authorities for return procedures²¹.

18 COM(2021) 592 final, point 4.1.

19 COM(2021) 592 final, point 4.1.

20 COM(2021) 592 final, point 4.1.

21 COM(2021) 592 final, point 4.1.

- 6.4 In this connection, the EESC deems it to be unacceptable that in several Member States inspections are not focused on risk sectors, a situation that does not respond to the requirement of the Directive²². In the majority of Member States, the most common risk sectors are agriculture, construction, manufacturing, domestic care and social assistance, hospitality and food services.
- 6.5 The EESC highlights the FRA's observation that inspections conducted jointly by labour authorities and anti-trafficking units or other specialised units trained to deal with labour exploitation might help identify migrants who are victims of labour exploitation or human trafficking²³.
- 6.6 Regarding the FRA's opinion on this, the EESC emphasises, however, that stakeholders working in the field highlight the fact that exploited workers are discouraged from reporting their situation during inspections due to the risk of apprehension and return, in particular when inspections are carried out jointly by labour inspection and police/immigration authorities.

7. **Specific comments on the significant gaps in information**

- 7.1 The Directive requires that Member States communicate annually to the Commission on the number of inspections and their results, on the back payments made by employers, on the other measures applied and on the facilitation of complaints. This information is key to assessing how the measures of the Directive are implemented and their consequences. Member States provide very limited and uneven information, leading to significant data gaps on inspections and their results²⁴.
- 7.2 The lack of reliable and complete information makes it difficult to assess in a conclusive manner whether the Directive has had an impact in deterring and reducing illegal employment and whether criminal sanctions in the Member States are effective, proportionate and dissuasive. Improved collection of information would contribute to a more effective enforcement strategy at both national and EU level²⁵.
- 7.3 The EESC welcomes the initiative the Commission has taken, with the support of the European Migration Network (EMN), to set up an IT reporting system and database to provide timely, regular and comparable information²⁶. The EMN can also be a useful vehicle for organising opportunities for mutual learning and exchanges of practices between Member States and relevant stakeholders.

²² COM(2021) 592 final, point 4.1.

²³ COM(2021) 592 final, point 4.1.

²⁴ COM(2021) 592 final, point 5.

²⁵ COM(2021) 592 final, point 5.

²⁶ COM(2021) 592 final, point 5.

7.4 The EESC believes that this database ought to comply with the rules of the General Data Protection Regulation and that it should not be allowed to be used by Member States' immigration services for the purpose of identifying irregular workers and returning them to their countries of origin as a consequence.

8. **Specific comments on moves to step up action against illegal employment**

8.1 The EESC fully supports the following stances and intentions of the Commission as set out in this Communication:

8.1.1 to counter irregular migration, the EU needs to address all the facets of this phenomenon through a comprehensive approach, as indicated by the New Pact. In addition to addressing the root causes of migration, relaunching the fight against migrant smugglers in partnership with third countries and stepping up the opening of legal pathways to the EU, the EU also needs to enhance its response to illegal employment, as a driver of irregular migration and a source of exploitation and abuse. To this end, it is necessary to ensure more effective implementation and enforcement of the Directive, the most important tool at our disposal whose potential is still to be fully exploited²⁷;

8.1.2 while supporting Member States in their implementation efforts, the Commission will also continuously monitor implementation of the Directive and focus on its effective enforcement. Upon adoption of this Communication, the Commission will engage with the relevant authorities of the Member States to obtain additional information on implementation of the key obligations on sanctions, inspections and protection of migrants' rights stemming from the Directive with the aim of identifying possible solutions. Where appropriate, the Commission will launch infringement procedures²⁸;

8.1.3 by the end of 2022, the Commission will implement the measures presented in this Communication and report on the results achieved in the next implementation report due in 2024 at the latest. In light of the progress achieved through the recommendations presented in the Communication and renewed implementation and enforcement efforts, and taking into account possible developments in the area of illegal employment and whether the Directive is still fit to respond to them, the Commission will then consider whether it is necessary to amend the existing legal framework²⁹.

Brussels, 23 March 2022

Christa Schweng

The president of the European Economic and Social Committee

²⁷ COM(2021) 592 final, point 6.

²⁸ COM(2021) 592 final, point 6.

²⁹ COM(2021) 592 final, point 6.

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N.B.: Appendix overleaf.

APPENDIX to the OPINION
of the
European Economic and Social Committee

The following amendment, which received at least a quarter of the votes cast, was rejected during the discussions (Rule 59(3) of the Rules of Procedure):

AMENDMENT 5

SOC/705

Sanctions against employers of illegally staying third-country nationals

Point 1.7 (i), third bullet point

Amend as follows:

<i>Section opinion</i>	<i>Amendment</i>
<p>– <i>stipulate in inspection strategies that inspections will not be carried out in conjunction with migration authorities and that it is not the duty of labour inspectors to report irregular migrants to the authorities if they are encountered in the workplaces inspected,</i></p>	<p>– <i>call for clarification of the inspection strategy of labour inspectors and their professional responsibility to report irregular migrants. The EESC notes that joint inspections carried out by labour inspectors and migration authorities are often intended to enforce immigration rules. It must be acknowledged that these inspections may discourage workers being exploited from speaking up about their circumstances during an inspection. The EESC therefore calls for a clear definition of the strategy followed by labour inspectors and their legal obligations,</i></p>

Reason
<p>The amendment aims to clarify the role of inspectors and to emphasise that as part of their professional obligations, they are required to report irregular migrants to the authorities if they are encountered in the workplaces inspected, while acknowledging that joint inspections may dissuade workers being exploited from speaking up about their circumstances at that time. The strategy followed by labour inspectors needs to be clarified.</p>

Outcome of the vote	
In favour:	48
Against:	70
Abstention:	16