



A Worker is a Worker:
How to Ensure that Undocumented
Migrant Workers Can Access Justice

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Executive Summary

The vast majority of undocumented migrants work, across a range of different sectors. The workforce in some of these sectors is highly gendered. Migrant workers with precarious, dependent or irregular status frequently experience conditions below those required by minimum labour standards and collective bargaining agreements, in terms of pay, working time, rest periods, sick leave, holiday, and health and safety.

Many undocumented workers endure such conditions, as they see little alternative. If they try to negotiate due payment and respect of basic working conditions, their employers threaten to report them to immigration and wield over them their inability to access formal complaints mechanisms without risking deportation.

This report therefore explores judicial and state-based¹ non-judicial labour complaints and redress mechanisms that are in place in 15 EU member states, and what happens or would happen when undocumented workers try to use them. The report covers Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom (UK). It also draws on a few examples from non-EU countries and cities with

large migrant worker populations; Brazil, Geneva, Israel, New York City and South Korea.

It finds that:

- Undocumented migrants' rights at work are protected by the law,² although there remain problematic exclusions of domestic workers and sex workers, in particular, from labour law protections, and a lack of implementation.
- Civil courts and labour tribunals in 13 out of 15 EU member states in the study³ do or would consider undocumented workers' claims equally to other workers. They usually check identity, but do not check work permits, and in practice do not report undocumented workers for immigration enforcement purposes if the irregular status of the worker is known. There remain very significant barriers for undocumented workers to take complaints, participate in proceedings and receive due wages and compensation through the courts.
- There are significant barriers to undocumented workers gaining access to justice through the criminal justice system. Undocumented victims of crime, including violence and human trafficking,⁴ are often required to leave the country or are deported as a result of interaction with law enforcement.

1 Neither international and regional mechanisms nor non-state based non-judicial grievance mechanisms are addressed in this report, though they may be useful mechanisms for undocumented workers and those supporting them to explore. For example, mechanisms on international level that may be relevant include: the [UN Human Rights Council Complaint Procedure](#) to address consistent patterns of gross and reliably attested violations of human rights, the [OECD Guidelines for Multinational Enterprises Complaint Procedure](#), the [Ethical Trading Initiative Code Violation Procedure](#) and the [Fair Labor Association Complaint Procedure](#). At national level, there may be national ombudspersons who can take complaints, as well as corporate specific mechanisms (which may also have international reach for international companies).

2 This includes international, regional and national human rights laws, including ILO Conventions, the European Convention on Human Rights (ECHR) and related jurisprudence from the European Court of Human Rights ("ECtHR"), and the EU Charter on Fundamental Rights, among others. They are also covered by a range of other EU law on migration, anti-trafficking, employment, health and safety and anti-discrimination and related jurisprudence from the Court of Justice of the European Union ("CJEU").

3 The 13 EU member states are: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain. Ireland and the United Kingdom (UK) are the two countries in the study where there are some limitations in coverage and/or additional considerations when the civil courts and labour tribunals handle undocumented workers' cases, so the consideration is not equal to workers with authorisation to work.

4 As described in the relevant section, this relates to immigration enforcement before identification and if not found to be a victim of human trafficking, as well as the provision of only short-term permits for the duration of the reflection period or criminal proceedings, including for recognised victims. Only a few EU member states regularly provide long-term permits to recognised victims of human trafficking.

- In 13 out of the 15 EU member states,⁵ there is an inspection body with the competence to take individual complaints from workers regarding issues related to underpayment of wages and working conditions, although not all have the competence to investigate and take decisions on complaints of workers without an authorised employment relationship.
- Practices of labour inspections reporting personal information on undocumented workers to immigration authorities vary greatly, as does whether they are based on law, a formal cooperation agreement/ policy or common practice. There are a number of important examples, where labour inspectors maintain professional confidentiality and do not report undocumented workers with labour complaints for immigration enforcement.
- In all 15 of the EU member states⁶ examined in this report, there is an inspection authority whose remit relates to working conditions, salaries or financial matters, who is tasked with checking work permits of workers, in order to impose sanctions on employers in the case of irregular employment. Sometimes these authorities carry out inspections together with the police.
- Health and safety inspectorates are largely independent, when a separate authority, though there are some cases of reporting and/or joint inspections. Undocumented workers are normally able to claim for compensation for occupational illness and injury, but face barriers to doing so, and are usually excluded from incapacity allowance and essential health services, while being particularly at risk.
- Certain sectors where undocumented workers work face particular challenges in the monitoring and enforcement of employment standards include agriculture, domestic work and sex work, as well the gig economy.⁷
- Aside from the risk of immigration enforcement as a result of engaging in complaints mechanisms, key issues include lack of information, advice and legal assistance; the length of procedures and associated costs; additional sanctions related to irregular status or irregular work; challenges to prove the employment relationship and the extent of the rights violations; and difficulties to actually receive funds when employers evade payment.

The report also highlights several noteworthy practices to provide insights on how the different national systems work in practice, and inspiration on avenues for change. It concludes that it is essential to ensure undocumented migrant workers can effectively exercise their labour rights without risking immigration enforcement, to promote decent working conditions for all workers, prevent and provide remedy for exploitation, and reform sectors that rely on exploitation and undeclared work. Finally, it suggests recommendations to improve enforcement of labour standards and access to justice.

5 The 13 EU member states are: Belgium, Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom (UK). Austria and Germany are the two countries in the study where there is no inspection body which handles workers' complaints regarding wage issues, though there are inspection bodies with competence to take complaints on other issues.

6 Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom (UK).

7 The "gig economy" is a way of working that is based on people having temporary jobs or doing separate pieces of work, each paid separately, rather than working for an employer. It is increasingly common way of organising labour across several sectors, such as delivery.

Introduction

The vast majority of migrants, regardless of their status and whether they migrate for work, study, family or protection reasons, enter the labour market. As with the general population, those of working age are normally in work. In addition, as undocumented migrants are excluded from social protection systems which would provide some income support when unemployed, unable to work due to long-term health issues or disability, or of retirement age (pensions), undocumented migrants have to work to survive and provide for their families. Migrant workers with precarious, dependent or irregular status frequently experience conditions below those required by minimum labour standards and collective bargaining agreements, in terms of pay, working time, rest periods, sick leave, holiday, and health and safety.

Yet there is inadequate attention to the impacts of migration policies which dictate access to the labour market, criminalise the employment of undocumented migrants, and disempower workers, on labour market regulation and conditions of work. Although an issue of employment and

social affairs, which should be addressed through the corresponding authorities and social dialogue structures, these policies have been progressively moved from ministries of labour to ministries of the interior or home affairs, with clear impacts on responses, priorities and processes.⁸

PICUM has found that a crucial aspect is the disempowerment of migrant workers from enforcing their labour rights due to the risk of arrest and deportation as a result of doing so. Many undocumented workers endure prolonged under or non-payment and unsafe and unhealthy working conditions, as they see little alternative. If they try to negotiate due payment and respect of basic working conditions, their employers are able to threaten to report them to immigration and wield over them their inability to access formal complaints mechanisms without risking deportation.

The risk that filing a complaint will lead to immigration enforcement, combined with the low likelihood that it will result in remedy and exclusion from support for people in unemployment, means that for

⁸ P. Taran, 'Globalization, migration and exploitation: Irregular migrants and fundamental rights at work', *Undocumented migrant workers in Europe*, PICUM: Brussels, 2004, p. 21.

“I have worked as hard and as good as any other worker so I demand that my labour rights will be respected. That is why I filed a complaint against my boss.”

– undocumented worker

most, continuing to work for low wages, or accepting their losses and finding alternative employment with slightly better conditions, are the only viable options.

It is essential to ensure undocumented migrant workers can effectively exercise their labour rights without risking immigration enforcement, to promote decent working conditions for all workers, prevent and provide remedy for exploitation, and reform sectors that rely on exploitation and undeclared work.

This report explores judicial and state-based⁹ non-judicial labour complaints and redress mechanisms that are in place in 15 EU member states,¹⁰ and what happens or would happen when undocumented workers try to use them. While noting some challenges related to the criminal justice system, the report is focused on the mechanisms managed by labour authorities and civil courts. It is based on the

experiences of organisations working on the front-line assisting workers in those countries. It points to some practices that are noteworthy for being particularly problematic or promising, including some interesting examples from outside of the EU. Finally, it suggests recommendations to improve enforcement of labour standards and access to justice.

9 Neither international and regional mechanisms nor non-state based non-judicial grievance mechanisms are addressed in this report, though they may be useful mechanisms for undocumented workers and those supporting them to explore. For example, mechanisms on international level that may be relevant include: the [UN Human Rights Council Complaint Procedure](#) to address consistent patterns of gross and reliably attested violations of human rights, the [OECD Guidelines for Multinational Enterprises Complaint Procedure](#), the [Ethical Trading Initiative Code Violation Procedure](#) and the [Fair Labor Association Complaint Procedure](#). At national level, there may be national ombudspersons who can take complaints, as well as corporate specific mechanisms (which may also have international reach for international companies).

10 Due to limited resources, it was not possible to include information on all 28 EU member states. The member states include a range of countries for western, northern, eastern and southern Europe where PICUM members or partners active in supporting migrant workers to exercise their labour rights and access justice.

1: Setting the Scene

Who are undocumented workers?

There are no reliable and current estimates for the number of non-EU nationals who are working irregularly in the European Union (EU). Irregular employment of nationals from outside of the EU involves people with different residence statuses, including not only those without a residence permit, but also people who have a residence status with no or restricted access to the labour market, when their employment goes beyond those conditions (this can be the case, for example, for students, people on spouse-dependent visas, people in the process of applying for international protection).

Workers with a permit linked to a specific job also face similar challenges to access justice, as they are usually fired and made undocumented, if they denounce their employer. This also means that job loss and exploitation are key reasons for people becoming undocumented in Europe.

Data on undocumented migrants in Europe

In 2009, the Clandestino project produced minimum and maximum estimates of the size of the irregular migrant population for 2008, while noting the lack of reliable data and estimates, and significant methodological challenges. The aggregate estimate for the 27 EU member states in 2008 ranged from 1.9 million to 3.8 million undocumented migrants.¹¹

Some research entities and civil society organisations have attempted to provide estimates on the national level. For example, in the Netherlands, the University of Utrecht estimated that there were 35,000 undocumented migrants in 2012-2013 (latest estimate [published](#) 2015),¹² of which

11 Data, reports and available updates can be found at <http://irregular-migration.net/>. A recent [attempt](#) in 2019 by the Pew Research Center to update these figures found no increase in the irregular migrant population, when discounting asylum seekers, who were inappropriately included in their headline figures. However, the estimates are based on flawed data and methodology, and the estimates excluding asylum seekers still include people with various different statuses, who are regularly residing.

12 P.G.M. van der Heijden, M. Cruyff, G.H.C. van Gils, [Schattingen illegaal in Nederland verblijvende vreemdelingen 2012-2013](#), University of Utrecht, 2015.

approximately 70% were men and 30% were women.¹³ In Ireland, the Migrant Rights Centre Ireland [estimates](#) that there were between 20,000 and 26,000 undocumented migrants in 2014.¹⁴

These estimates refer to the number of undocumented migrants overall, rather than non-EU nationals working irregularly. Data such as applications for regularisation based on work and identifications of undocumented workers during labour inspections also provide some information about undocumented workers, but not a full picture.

In 2018 in Spain, 36,735 people were documented through the various “arraigo” regularisation mechanisms.¹⁵ Most people regularised through these mechanisms are in employment.

A report from the Open Society European Policy Institute on the agricultural sector in Italy¹⁶ cites 2015 data indicating that approximately 430,000 workers in this sector were employed without an official contract (more than 50% of workers in the sector). Of these workers without a contract, an estimated 344,000 were foreign nationals (80%). This figure includes EU nationals, migrants with authorisation to work, and those without authorisation. 42% of irregular farm workers were estimated to be women.

The Fundamental Rights Agency has also carried out significant research into severe labour exploitation of migrant workers. The research does not attempt to estimate numbers of victims of severe labour exploitation, but analyses various risk factors for severe labour exploitation of migrant workers and measures to address them.¹⁷

13 In addition, data regarding health care reimbursement indicates that there were at least 13,000 undocumented migrants in the Netherlands in 2017, approximately 50% men and 50% women (J. Snippe & R.Mennes, [Vooronderzoek data en methoden illegalenschattting](#), Breuer & IntraVal, September 2018). Estimates of the number of undocumented workers in the Netherlands between 2003 and 2006, based on data, from various researchers indicated roughly 80,000 undocumented workers in the country during this time. Data presented in J. van der Leun and M. Ilies, [“The Netherlands: Assessing the Irregular Population in a Restrictive Setting”](#), in Anna Triandafyllidou (ed.), *Irregular Migration in Europe: Myths and Realities*, Farnham: Ashgate, 2010. See Table 10.2 Estimates of undocumented workers, p91. In 2003: 80,000 (60,000 to 100,000) based on Zuidam and Grijpstra (2004); in 2004: 66,750 to 89,000 based on Mosselman and Van Rij (2005); in 2006: 86,250 to 115,000 based on Groenewoud and Van Rij (2007) or 80,000 (60,000 to 97,000) based on Dijkema et al. (2006). The Netherlands case study conducted in the framework of the CLANDESTINO research project estimated that in 2005, there were 88,116 irregular migrants present in the country, and that this figure had been roughly constant since 2000 (in J. van der Leun and M. Ilies, [“Irregular migration in the Netherlands”](#), CLANDESTINO Research Project).

14 MRCI, [Ireland in Home: An analysis of the current situation of undocumented migrants in Ireland](#), November 2014.

15 Observatorio Permanente de la Inmigración, [Flujo de autorizaciones de residencia concedidas a extranjeros. Resultados detallados 2018](#), 26 November 2019.

16 Open Society Foundations, [Is Italian agriculture a ‘pull factor’ for irregular migration – and if so, why?](#), December 2018, p. 3 citing CREA, *Annuario dell’Agricoltura Italiana 2015*, Consiglio per la Ricerca in agricoltura e l’analisi dell’Economia Agraria, Rome, 2017 and OPR-Osservatorio Placido Rizzotto, *Agromafie e Caporalato. Quarto Rapporto*, Ediesse, Rome, 2018.

17 See: FRA, [Severe labour exploitation: workers moving within or into the European Union - States’ obligations and victims’ rights](#), 2015 and FRA, [Protecting migrant workers from exploitation in the EU: workers’ perspectives](#), 2019, as well as country reports and additional resources.

Undocumented migrants make up a significant proportion of the workforce in several sectors of economies across Europe.¹⁸

The sectors where undocumented workers most frequently work include:

- Building and construction (including renovation)
- Car washes
- Care work (including as au pairs)
- Cleaning and maintenance
- Delivery
- Domestic work
- Fishing, agriculture, meat processing
- Hospitality (hotels, restaurants, cafes, catering)
- Logistics and security
- Nail studios
- Sex work.

In some of these sectors, there are high levels of undeclared work in general, and workers are largely from lower income EU member states and non-EU countries. **It is also important to note that in some of these sectors, the workforce is highly gendered**, with mostly men working, for example, in building and construction and mostly women working, for example, in domestic and care work, reinforcing stereotypical gender roles and inequalities, and bringing specific risks.¹⁹

For example, women providing care services in the home and working as domestic workers may be at greater risk to face sexual harassment and abuse due to their isolation and solitary work environment.²⁰ Those that live in as care or domestic workers also risk homelessness if they lose their job. Women who are sex workers face additional layers of criminalisation, discrimination, and violence.²¹

In addition, gender discrimination makes it more likely for women to be on dependent visas, whether as spouses/ partners or in low-wage work, or to be working irregularly. This can trap them in situations of domestic violence or violence, harassment and exploitation in the workplace,²² because they face losing their status if they leave the relationship and cannot safely report to police

18 See for example: Undocumented Worker Transitions [‘The relationship between migration status and employment outcomes: Final Report’](#) 2009, p. 22; ILO, *Migrant Work and Employment in the Construction Centre*, 2016.

19 On the domestic and care sectors, see for example: A. Triandafyllidou, [‘Irregular migrant domestic workers in Europe : who cares?’](#), 2013, p. 2; ILO, [Promoting integration for migrant domestic workers in Europe: A synthesis of Belgium, France, Italy and Spain](#), 2013, p.13.

20 See for example: Alexandra Ricard-Guay, [‘Addressing demand in the context of trafficking in the domestic work sector : perspectives from seven European countries’](#), DemandAT working paper, December 2016; Fundamental Rights Agency, [Irregular migrants employed in domestic work](#), 2011; Working paper: [‘Shared concerns and joint recommendations on migrant domestic and care work’](#), February 2018.

21 See for example: PICUM, [Safeguarding the human rights and dignity of undocumented migrant sex workers](#), 2019.

22 See for example: [FLEX/LEAG submission](#) to the UN Special Rapporteur on Contemporary Forms of Slavery on the gendered dimensions of contemporary forms of slavery, its causes and consequences, May 2018.

without facing immigration enforcement. Access to housing can be extremely difficult when unable to show declared income and due to restrictions on social benefits as well as renting.

Women also often carry most of the family care responsibility, taking care of both children and elderly relatives. Undocumented children are usually excluded from publicly-funded early childhood education and care services.²³ This situation often makes it more difficult for undocumented women to work full time or even maintain part-time jobs and make ends meet. In addition, it is virtually impossible for undocumented migrant women to exercise maternity rights, such as maternity leave and breastfeeding breaks, at work.²⁴ They are particularly likely to face discriminatory treatment such as reductions in pay and working hours, and termination of employment, due to pregnancy and childcare obligations.²⁵

Racial and ethnic discrimination also run through exploitative employment practices. In addition to discrimination based on not having a work permit – and in who has access to a work permit in the first place²⁶ – workers are sometimes assigned different jobs in a workplace, and paid different wages for the same work, along lines of national or ethnic origin.

23 PICUM, '[Access to early childhood education and care for undocumented children in Europe](#)', October 2013.

24 See for example: A. Triandafyllidou, 'Irregular migrant domestic workers in Europe: who cares?', 2013 p.109.

25 See for example: [FLEX/LEAG submission](#) to the UN Special Rapporteur on Contemporary Forms of Slavery, its causes and consequences, May 2018; FRA, '[Second European Union Minorities and Discrimination Survey. Migrant women – selected findings](#)', EU- MIDIS II, 2019.

26 For example, data on first time permits issued for remunerated activities reasons (highly-skilled, seasonal, researchers and others) in the EU 28 member states in 2018, disaggregated by country of citizenship, shows that citizens of the 55 countries coded as Africa account for 5% (38,099), citizens of the 35 countries coded as America account for 13% (93.018 with 38.598 of those permits granted to citizens of the United States of America, more than the citizens of all the African countries put together), citizens of the 47 Asian and Middle Eastern countries coded as Asia account for 22% (156,668), citizens of the 15 countries coded as Oceania account for 2% (16.234) and citizens of the 10 countries coded as Central and Eastern Europe account for 51% (368.032) of the total of 726.039 first time permits issued for remunerated activities reasons in the EU in 2018 (analysis based on Eurostat data on [First permits issued for remunerated activities by reason, length of validity and citizenship](#), last updated 22 October 2019).

Do undocumented workers have rights?

While undocumented workers face significant challenges in accessing their rights in the workplace, they do have rights and protections under a variety of legal frameworks. This includes international,²⁷ regional and national human rights laws, including ILO Conventions, the European Convention on Human Rights (ECHR) and related jurisprudence from the European Court of Human Rights (“EctHR”), and the EU Charter on Fundamental Rights, among others. They are also covered by a range of other EU law and related jurisprudence from the Court of Justice of the European Union (“CJEU”). This also means that, if domestic remedies have been exhausted, cases can be taken to the regional human rights courts.

European Union law

The **EU Charter of Fundamental Rights**²⁸ ensures that every worker has the right to:

- working conditions which respect his or her health, safety and dignity and has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave (Article 31),
- freedom of assembly and of association (Article 12),
- non-discrimination (Article 21), and
- protection in the event of unjustified dismissal (Article 30), among others.²⁹

The EU **“Employers’ Sanctions Directive”** ([2009/52/EC](#)) explicitly includes labour rights protections for undocumented workers, with provisions requiring effective complaint mechanisms and access to permits (Article 13) and payment of outstanding wages (Article 6).

27 See for example: ILO Declaration on Fundamental Principles and Rights at Work, ILO Conventions no. 29 and no. 105 on forced labour; no. 87 on freedom of association; no. 111 on equality of opportunity and treatment in employment and occupation, no. 97 and 143 on migrant workers; and Article 7 of the ICESCR.

28 The EU Charter on Fundamental Rights applies to all EU institutions and Member States when legislating, and whenever a Member State applies EU law (Article 51). The Charter applies to undocumented migrants unless stated otherwise (see for example Article 34(2)). When a right in the Charter has a counterpart in the ECHR, the scope of the provision of the Charter should have at least the same meaning and scope as the corresponding right of the ECHR (Article 52(3)).

29 See also in particular, workers’ right to information and consultation within the undertaking (Article 27), the right of collective bargaining and action (Article 28) and the right to effective remedy and to a fair trial (Article 47).

Other EU Directives which include relevant rights provisions for undocumented workers include:

- the **Directive on residence permits for victims of trafficking and smuggling** ([2004/81/EC](#)), which defines the conditions for granting short-term (minimum 6-month) residence permits to adult victims of human trafficking³⁰ who cooperate with proceedings against human trafficking and human smuggling. Rights include e.g. information (Article 5); a reflection period (Article 6), renewal of residence permits (Article 8) and access to services during the reflection period and when holding a residence permit.³¹
- the **“Victims’ Directive”** ([2012/29/EU](#)), which provides rights to victims of crime³² including access to services, protection measures, and courts. There are provisions on e.g. information (Article 4 and 6); complaints mechanisms (Article 5); free interpretation and confidential victim support services (Article 7, 8 and 9); legal aid (Article 13); compensation (Article 16); protection from repeat and secondary victimization (several articles); and privacy (Article 21).
- the **“Anti-Trafficking Directive”** ([2011/36/EU](#)), which grants rights to trafficked persons, including e.g. non-punishment for any crimes committed as a consequence of the trafficking (Article 8), assistance and support³³ independent of whether or not the victim agrees to testify (Article 11); legal representation (Article 12) and access to existing compensation schemes for victims of violent crime of intent (Article 17).
- **“Employers’ Insolvency Directive”** ([2008/94/EC](#)), which grants rights to workers in the case of their employer’s insolvency and obliges member states to ensure institutions take over outstanding remuneration claims resulting from insolvency (Article 3). The liability of guarantee institutions can be limited but minimum standards are established (Article 4).³⁴
- the **“Framework Directive on Health and Safety at Work”** ([89/391/EEC](#)), which places requirements on employers³⁵ to ensure the health and safety of workers (Article 5), including through measures to prevent risks (Article 6), ensuring worker receive information on risks and measures to meet them (Article 9), proper training (Article 12), and special provisions for sensitive groups (Article 15).³⁶

30 Member States can also choose to apply the Directive to victims of smuggling and to children.

31 Access to legal aid, interpretation and translation services, emergency medical treatment, including psychological treatment, and subsistence is to be provided for both the reflection period and when holding a residence permit (Articles 7 and 9). Permit holders should also have access to education, vocational training and the labour market (Article 11) as well as programmes aimed at recovering a normal social life (Article 12).

32 It specifically mentions in the preamble and in Article 1 that the rights should be ensured in a non-discriminatory manner, including on grounds of residence status, citizenship, or nationality.

33 This should include at least safe accommodation, medical treatment, psychological assistance, counselling, information and interpretation.

34 While liability of guarantee institutions can be limited in time and the total amount to be paid, they must cover at least remuneration for the last three months (within a reference period of at least six months) or eight weeks (within a reference period of at least eighteen months) (Article 4).

35 The Directive applies to all sectors, except certain specific public service and civil protection services, such as the armed forces or the police. Under this Directive, a “worker” is defined as “any person employed by an employer, including trainees and apprentices but excluding domestic servants.” (Article 3).

36 According to EU-OSHA, evidence suggests that migrant workers are a group of workers at increased risk, and that their working conditions require special attention. Undocumented workers are also mentioned in the section on migrant workers (European Agency for Safety and Health at Work, [Workforce diversity and risk assessment: Ensuring everyone is covered](#), 2009, p.16)

While not protecting people from discrimination or differential treatment based on nationality or immigration status, the **“Employment Equality Directive”** ([2000/78/EC](#)) and **“Race Equality Directive”** ([2000/43/EC](#)) equally protect third-country nationals from discrimination based on religion or belief, disability, age or sexual orientation, and on race or ethnicity respectively. Discriminatory treatment based on these grounds compared to other workers performing the same job – for example regarding working conditions, pay and dismissal – are all prohibited.

There are also a number of EU directives that might apply to undocumented migrants based on jurisprudence, but this is not yet confirmed in any case related to the specific directive. In particular, the **“Working Time Directive”** ([2003/88/EC](#)), **“Written Statement Directive”** ([91/533/EEC](#)) and **“Transparent and Predictable Working Conditions Directive”** ([2019/1154](#), which comes into force 1 August 2022) all refer to “any worker”, “any person employed” or “every worker” without providing a definition.

The wording tends to defer to national law, pointing to workers who have an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State. However, the rights of all workers under the EU Charter of Fundamental Rights, settled case law on recognition of an employment relationship,³⁷ and the ruling of the CJEU in *Tümer*³⁸ all point towards the inclusion of undocumented workers. The *Tümer* judgement related to protections for workers in case of employer insolvency. The European Court of Justice found that undocumented workers cannot be excluded from the definition of employee such that it would undermine the purpose of setting minimum standards across the EU.

In addition, the **“Health and Safety in Fixed-term and Temporary Employment Directive”** ([91/383/EEC](#)) supplements the “Framework Directive on Health and Safety at Work” so should also apply in situations where undocumented workers have a fixed-term contract or are employed by temporary employment agencies. Undocumented workers employed by temporary employment agencies should also be covered by the “Temporary Agency Work” Directive” ([2008/104/EC](#)), which applies the principle of equal treatment to temporary agency workers and recognises temporary-work agencies as employers.

Undocumented victims of a violent intentional crime – for example human trafficking – may also have the right to claim state compensation³⁹ under the 2004 **“Compensation Directive”** ([2004/80/EC](#)). There is no reference to third-country nationals or residence status, so the Directive might

³⁷ According to the case law of the CJEU, the essential feature of the employment relationship is that, for a certain period of time, one person performs services for and under the direction of another person in return for which they receive remuneration. It is of major importance that the person act under the direction of their employer as regards, in particular, their freedom to choose the time, place and content of their work. For more information see: M. Risak and T. Dullinger, *The concept of ‘worker’ in EU law. Status quo and potential for change*, Report 140, ETUI: Brussels, 2018.

³⁸ *Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* (C-311/13, 2014). See also, Steve Peers, [“Irregular migrants and EU employment law”](#), EU Law Analysis blog, 5 November 2014.

³⁹ The Directive enables victims of violent intentional crime in a country different to where they are habitually resident, to claim compensation from the Member State where the crime was committed, in the Member State where they reside. It also requires that all EU countries have a state compensation scheme which provides fair and appropriate compensation to victims of violent intentional crime.

apply to undocumented victims, in particular when read together with the “Victims’ Directive” and “Anti-Trafficking Directive”.⁴⁰

Council of Europe: the prohibition of forced labour under the European Convention on Human Rights

The obligations on states deriving from the prohibition of slavery, servitude, forced or compulsory labour in the European Convention on Human Rights (Article 4) are also very relevant for undocumented workers.

The European Court of Human Rights (EctHR) has found, for example, that Member States must take a specific set of measures (“operational measures”) to protect potential victims if the authorities are aware of circumstances where an individual is at risk of being trafficked or exploited.⁴¹

In addition, several judgements indicate that undocumented status is considered a major factor in determining coercion and potential forced labour and human trafficking, with the risk of denunciation and deportation playing a role including in situations where the person can move freely⁴² and initially consents to the employment arrangement.⁴³

“Forced or compulsory labour” is defined as: “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.⁴⁴

The European Court of Human Rights has found that “penalty” need not go as far as physical violence – it can take on subtler forms of a psychological nature, such as threatening to report the victims to the immigration authorities when their employment status is irregular (C.N. and V. v. France⁴⁵).

In *Chowdury and Others v. Greece*, the Court emphasized the fact that the workers were undocumented when finding both forced labour and trafficking, noting that they “were aware that their irregular situation put them at risk of being arrested and detained with a view to their removal from

40 In the 2019 report of the Special Adviser to President Juncker on compensation for victims of crime “[Strengthening victims’ rights: from compensation to reparation](#)” she recommends that there is legislative change to extend the definition of “victims eligible for compensation” to victims of intentional violent acts committed in the EU, irrespective of their nationality or residence status (Recommendation 19, page 50).

41 *Chowdury and Others v. Greece* (Appl. No. 21884/15, 2017), paras. 67 and 88; *Rantsev v. Cyprus and Russia* (Appl. No. 25965/04, 2010), paras. 282 and 287.

42 In *Chowdury*, the Court rejected Greece’s argument that the situation did not constitute forced labour or human trafficking because the workers could move freely, leave, go shopping, and seek other work (*Chowdury and Others v. Greece* (Appl. No. 21884/15, 2017, paras. 73, 123).

43 *Chowdury and Others v. Greece* (Appl. No. 21884/15, 2017, para. 96).

44 *Van der Mussele v. Belgium*, Application no. [8919/80](#), 1983, para. 32.

45 Appl. no. 67724/09, 2012, para. 77.

Greece. An attempt to leave their work would no doubt have made this more likely and would have meant the loss of any hope of receiving the wages due to them, even in part”.⁴⁶

In contrast to *Chowdury*, a subsequent case, *Tibet Mentés and others v. Turkey*, found that the workers, who were not undocumented, were not subject to any “menace of penalty”; the mere possibility that they could be dismissed did not amount to coercion.⁴⁷ The Court found no violation of Article 4.

National law

Similar to the EU legal framework, on national level, the labour rights of undocumented workers are often not explicit, but understood implicitly in references to workers, though the specific rights of undocumented workers to unpaid wages in the EU “Employers’ Sanctions Directive” have also resulted in this right being explicit in some countries.

For example:

- In **Italy**, the constitution guarantees workers the right to remuneration that is proportionate and sufficient to ensure a free and dignified existence for themselves and their family, and weekly rest and paid annual leave.⁴⁸
- In **Austria**, the Law on Wages and Social Dumping specifies that an employee whose normal place of work is in Austria is necessarily entitled to the remuneration due under law, regulation or collective agreement, and does not exclude undocumented workers from its scope.⁴⁹
- In **Belgium**, the Law providing for sanctions and measures against employers of irregularly staying third-country nationals states that employers shall pay undocumented workers a remuneration equivalent to what they would pay a regular worker in a comparable employment relationship in accordance with applicable obligations.⁵⁰

⁴⁶ Appl. no. 21884/15, 2017, paras. 95, 101.

⁴⁷ Appl. no.’s 57818/10, 57822/10, 57825/10, 57827/10 and 57829/10, 2017, paras. 68–69.

⁴⁸ Costituzione della Repubblica Italiana, Article 36.

⁴⁹ Gesamte Rechtsvorschrift für Lohn- und Sozialdumping-Bekämpfungsgesetz, Fassung vom 26.11.2019, Articles 1 and 3.

⁵⁰ Loi prévoyant des sanctions et des mesures à l’encontre des employeurs de ressortissants de pays tiers en séjour illégal, 11 février 2013, Article 4.

France: Labour law explicit about undocumented workers' rights

In France, the Labour Code⁵¹ is explicit about the rights of migrant workers employed irregularly. In particular, it specifies that they should be treated equally to regular workers with regards to:

- Provisions relating to prohibition of employment during prenatal and postnatal periods, and to breastfeeding;
- Provisions relating to hours of work, rest and paid holidays;
- Provisions relating to health and safety at work;
- Calculation of seniority in the company.

It also guarantees the rights of workers, for the period of irregular employment to:

- payment of wages and supplementary payments (e.g. overtime), in accordance with the applicable legal provisions and contracts, less amounts previously received for the period in question, with a presumption of 3 months of work in the absence of proof to the contrary;
- compensation and certain procedural rights in the event of termination of the employment relationship, dependent on the specific situation, but equal to at least one month's salary.

This section has given a brief overview of the array of rights undocumented workers have – at least on paper. While it would be beneficial for employment legislation to be more explicit and there remain some important gaps in protection, for example, regarding the application of working time regulations to domestic workers, the core issue is how these rights can be meaningful to undocumented workers in practice. The next section looks at the various complaints mechanisms to access justice for labour rights violations.

⁵¹ Code du travail, Article L. 8252-1-2. For more information see also: Gisti, *Les travailleurs sans papiers et les prud'hommes*, Gisti : Paris, 2014.

2: Labour complaints mechanisms in different EU member states

Legal framework

In addition to rights to effective remedy, non-discrimination and equality before the law, there are specific regulations regarding labour monitoring and complaints mechanisms. In particular, the **International Labour Organisation (ILO) Labour Inspection Convention (C81)** stipulates that the functions of the system of labour inspection shall be to:

- secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors;
- supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions;
- bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions.

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

The ILO Committee of Experts has underlined that giving labour inspectors duties to enforce immigration law interferes with their primary duties.⁵² The Organisation for Security and Co-operation in Europe (OSCE) Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings has also underlined⁵³ that the increasingly widespread imposition of

52 Article 3 [ILO C081 - Labour Inspection Convention, 1947 \(No. 81\)](#). See also Article 15. See for example: ILO Committee of Experts, [Report on the Application of International Labour Standards \(Conventions and Recommendations\): General Report and observations concerning particular countries](#), February 2017; [Resolution concerning fair and effective labour migration governance – ILC 2017](#); International Labour Conference 2017 – report [Addressing governance challenges in a changing labour migration landscape](#), April 2017; International Labour Organisation non-binding [General principles and operational guidelines for fair recruitment](#), 2016; International Labour Office – Labour Inspection, [General Survey](#) 2006. A separation between labour authorities and immigration enforcement has also been strongly recommended by several UN and Council of Europe bodies including, inter alia, the UN Special Rapporteur on Migrants (in his [recent report](#) a 2035 agenda among others), [ECRI General Policy Recommendation 16](#), as well as at EU level by the European Parliament [resolution](#) of 14 January 2014 on effective labour inspection as a strategy to improve working conditions in Europe (2013/2112(INI)) and FRA [Apprehension of migrants in an irregular situation – fundamental rights](#), 2014.

53 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings at the OSCE, *An Agenda for Prevention: Trafficking for Labour Exploitation*, 2011, p.12.

measures that compel labour inspectors to conduct immigration enforcement activity as part of their workplace inspection agenda is a challenge to effective enforcement of labour standards.

In addition, an available, accessible and effective complaints mechanism is required by EU law, for irregular workers by the “Employers’ Sanctions Directive”,⁵⁴ and for regular seasonal workers by the “Seasonal Workers’ Directive”.⁵⁵ It would also be a necessary measure to implement and make accessible the rights enshrined in other EU laws (as outlined above), in particular the “Victims’ Directive”, “Anti-Trafficking Directive” and EU employment regulations.

For a complaints mechanism to be effective and meaningfully accessible when people are in an irregular situation, it must not have direct negative results and sanctions for the person who is seeking to exercise their fundamental rights and access justice, such as arrest, detention and/or deportation. The next section explores this aspect of complaints mechanisms in different EU countries.

A note on methodology

Information on labour complaints mechanisms and how they treat or would treat complaints by undocumented workers was collected from frontline organisations assisting migrant workers experiencing labour rights violations in **15 EU member states: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom (UK).**⁵⁶

To enlarge the perspective, some examples from cities and countries with significant migrant worker populations from different world regions are also included: **Brazil, Geneva, Israel, New York City and South Korea.**⁵⁷

It is important to underline that due to the lack of cases of undocumented workers using complaints mechanisms in some countries, the information represents that best currently available on how the different labour courts, inspection authorities or other complaints bodies would handle complaints filed by undocumented workers and their data. In addition, cooperation agreements between labour authorities and immigration authorities are generally not publicly available, if they are formal. Efforts are ongoing to clarify where practice results from legal obligations, formal or informal policy,

54 Article 13 of the [Employers Sanctions Directive](#) (2009/52/EC).

55 Article 25 of the [Seasonal Workers Directive](#) (2014/36/EU).

56 The contributing organisations are listed and thanked in the acknowledgements. Detailed questionnaires were completed for Belgium, Czech Republic, Germany, Greece, Ireland, the Netherlands, Spain and the United Kingdom, as well as South Korea. Information related to the key questions for the report was collected for Austria, Bulgaria, Cyprus, France, Italy, Luxembourg, and Portugal, as well as Geneva, Israel and New York.

57 For example, according to [Statistics Korea](#), the total number of undocumented migrants in South Korea in 2018 was 355,126. Migrants who have never had status are not reflected in the official records (migrants born in Korea without status, for example).

or localised/ individual behaviour. In addition, it is an area that is evolving, with strategic litigation, as well as changes in inspection authorities' competences and practices.

At the same time, ways in which these mechanisms were being used by civil society and migrant workers to exercise their rights were addressed in two chapters in PICUM's 2005 report "[Ten Ways to Protect Undocumented Migrant Workers](#)". Overall the situation is strikingly similar 15 years later. That report remains a useful reference for examples of civil society practice. This reports updates and develops the systematic analysis of the functioning of state-led grievance mechanisms, with a focus on when they protect or share undocumented workers' data, and highlights noteworthy practices from the legal institutions and state authorities and agencies.

Civil courts and labour tribunals

This section examines access to civil courts, or where they exist, labour courts or industrial tribunals that are specialised in labour rights violations. While their competences and powers vary in different countries, they can normally handle cases related to individual employment relationships, and require the employer to pay financial compensation to the worker in relation to unpaid wages, social security, allowances in the event of industrial accidents or occupational illnesses, unfair dismissal, and administrative fines and sanctions.

It is also important to underline the relevance of civil and labour courts as a complaints mechanism for victims of criminal labour exploitation, in order to claim payment of unpaid wages, etc. In some cases, a worker may prefer to take a civil case, take a civil and criminal case simultaneously, or first take a criminal case and use the evidence gathered for the civil claim.

The Netherlands: Settlement for worker in souvenir shop in Amsterdam

In one case,⁵⁸ a man was exploited by his employer in a souvenir shop. He had to work 10-12 hours a day, he could not sit during that time and was paid around €10 per day. He lived above the shop in poor conditions with no mattress or hot water. He was undocumented and had no contract,

58 Case supported by FairWork, more information on [FairWork's website](#).

and he had nowhere to go. If he complained about his work situation, he was told to hand in the key to the shop and sleep on the streets.

At some point he managed to exit this situation and file a complaint. He was recognised as a potential victim of trafficking and referred for support. However, the case was prosecuted as one of irregular employment, not human trafficking.

With the assistance of a lawyer, he filed a civil claim for compensation under labour law, he was awarded and paid compensation amounting to about €10,000. Among the factors contributing to the successful claim, was the good cooperation established between the lawyer, the prosecutor, the police and the victim support organisation which helped in collecting evidence from the criminal proceedings for use in the civil action, for example with regard to establishing the employment relationship.

Equal consideration

The civil courts and labour tribunals do or would equally consider complaints made by undocumented workers in 13 out of the 15 EU member states in the study (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain). While courts usually check the identity of the person, they are not implicated in checking validity of work permits and address the labour rights violations presented.

However, in the **UK**, although undocumented workers can take a case to the employment tribunal, their contract may be considered void and unenforceable (see box on page 26).

In **Ireland**, the law specifically states undocumented workers' right to seek redress through the civil proceedings if they "took steps as were reasonably open" to them to comply with immigration rules around their permission to work in Ireland. This provision limits an undocumented worker to seek redress solely for unpaid wages.⁵⁹ It does not include compensation for other breaches of rights under Irish employment legislation. Some judgements and decisions in the High Court⁶⁰ and Labour Court⁶¹ have interpreted that the Workplace Relations Commission (WRC) Adjudication Service and the Labour Court (as an industrial relations tribunal and not a court of law) do not have jurisdiction

59 Employment Permits (Amendment) Act 2014. As far as MRCI is aware no undocumented worker has issued civil proceedings under this provision.

60 Hussein v. The Labour Court [2012] IEHC 364; [2012] 2 I.R. 704; [2012] 2 I.L.R.M. 508 (Hogan J on 31st August 2012). The law was changed as a result of this judgement - with the aforementioned Employment Permits (Amendment) Act 2014 - but the reference in this provision to 'civil proceedings' may limit undocumented workers' avenues of redress to civil courts.

61 This was the finding of the Labour Court in a recent decision related to a complaint taken to the WRC under the Redundancy Payments Act. Labour Court [Determination no. RPD1917](#) Appeal Of Adjudication Officer Decision No. ADJ-00006896CA-00009334-005 following hearing on 24 May 2019.

if a worker is undocumented, due to illegality of contract, leaving undocumented workers access only to ordinary civil courts, and only in cases of non-payment or underpayment of wages.

Independence of the courts

Where the court nonetheless becomes aware of an undocumented worker's status, they are usually not obliged to report the worker to the immigration authorities. However, in **Germany**, public bodies are obliged to report crime, including persons with irregular status, and courts are not excluded,⁶² though they do not systematically do so in practice (see more below).

In **Spain**, judicial bodies are supposed to communicate final decisions of cases where infringements of immigration rules occur to immigration authorities, so they can see what follow up, if any, is appropriate.⁶³ In practice courts do not transfer information about cases when the undocumented migrant is the victim, and only when they are convicted.⁶⁴ In the experience of some organisations supporting migrant workers, the Ministry of Interior does not usually initiate expulsion proceedings against undocumented workers when they become aware of their situation through their participation in a labour complaint proceeding, regardless of the outcome.⁶⁵

In none of the 15 EU member states is it standard practice for judges or court employees in civil courts and employment tribunals to report undocumented workers who file a complaint against their employer for immigration enforcement purposes,⁶⁶ though it may happen in individual cases.

Germany: Navigating a duty to report to safeguard access to justice and independence of the labour courts⁶⁷

According to German law, labour courts, like most public bodies, have the obligation to report persons with irregular residence status to immigration authorities.⁶⁸ However, this only applies if the labour court has positive knowledge of the individual's irregular status; suspicion or assumptions

62 Except schools and other educational institutions, § 87 Abs. 2 Aufenthaltsgesetz.

63 Artículo 257 Comunicaciones de los órganos judiciales a la Delegación o Subdelegación del Gobierno en relación con extranjeros (RD557/2011); see also Disposición adicional quinta Acceso a la información, colaboración entre Administraciones públicas y gestión informática de los procedimientos (L.O 4/200).

64 Information provided by Federación Andalucía Acoge.

65 Information provided by CEPAIM.

66 In France, labour court registries are also required to send a copy of any final decisions requiring employers to pay due sums to undocumented workers, to the Director General of the French Office for Immigration and Integration. On receipt of such a decision, the immigration authorities are to pursue payment from the employer. There is no risk of immigration enforcement from taking a labour complaint to the tribunal. Articles R8252-10 and R8252-12 of the [Labour Code](#), created by [Decree No. 2011-1693 of 30 November 2011](#).

67 Information provided by Arbeit und Leben Service center against labour exploitation, forced labour and human trafficking.

68 Except schools and other educational institutions, § 87 Abs. 2 [Aufenthaltsgesetz](#).

are not enough and labour courts have no obligation to check status.⁶⁹ While a major challenge for all involved, interviews with lawyers and a judge in labour court suggest that in practice, labour courts do not report undocumented workers in most cases,⁷⁰ and judges are not liable to prosecution if they do not report the undocumented person. Nonetheless, it is difficult for counselling services to give reliable advice to undocumented workers whether or not to file a lawsuit.

Trade unions, or any person able to answer questions regarding the circumstances in its entirety, may also file a complaint to the court on behalf of a worker. Lawyers can, under certain circumstances, represent a worker in front of court in a way that she/he will not have to appear or give any personal information during the trial. If the worker is called into court, they are not necessarily required to show their passport or identity document.

There is a similar situation in South Korea. The courts do not generally require information on the immigration status of the parties, and do not report undocumented migrants should they become aware of their status, although judges may be technically obliged to do so under the duty on public officials to report crime.⁷¹ In practice, labour inspectors also usually do not report undocumented workers, although there have been some cases, or threats, of denunciation, reported, especially in inspections of fisheries.

In sum, as a complaints mechanism, labour courts are theoretically accessible for all workers regardless of their status in most countries, and in several EU member states, there have been cases of undocumented workers being awarded unpaid wages and compensation by civil courts or employment tribunals without facing immigration enforcement as a result.⁷²

However, in many countries there are still very few (or no known) cases of undocumented workers taking cases to the courts. There remain a number of significant barriers.⁷³

69 J. Barkholdt & T. Tschenker, [Zugang zum recht für irreguläre migrant_innen: Die Übermittlungspflicht von Arbeitsgerichten gemäß § 87 Abs. 2 Aufenthaltsgesetz auf dem Prüfstand](#), Working Paper No. 8, Humboldt Law Clinic Grund- und Menschenrechte in cooperation with Ban Ying, 2015.

70 Information provided by Arbeit und Leben Service center against labour exploitation, forced labour and human trafficking.

71 Article 84 (Obligation to Notify), [Immigration Act](#). Note: The exemption for reporting obligations is given to: 1) school officials; 2) health institution officials; 3) police officers for victims of specific crimes (Art 92-2, Enforcement Decree of the Immigration Act, and MOJ regulations).

72 See for example: the case of [Muhammad Younis](#) in Ireland: ["Court upholds chef's award of €91,000"](#), The Irish Times, 2015; the case of Ana S. in Hamburg, Germany: E Mitrović, ["Without papers but not without rights: The case of Ana S. MigrAr: Trade Union Drop-In Center for Undocumented Workers in Hamburg"](#), 2010; the case of Cheikh Abdelhamid in France: [Cour de cassation, criminelle, Chambre criminelle, 11-85.224](#), 11 April 2012; the case of Zita Cabais-Obra in France: International Trade Union Confederation, ["Spotlight interview with Zita Cabais-Obra"](#), 2012.

73 See also Fundamental Rights Agency ["Severe labour exploitation: workers moving within or into the European Union"](#), 2015, and the [country reports](#), and Fundamental Rights Agency, ["Protecting migrant workers from exploitation in the EU: workers' perspectives"](#), 2019 and the [country reports](#).

Information and advice, time and cost

It is worth noting that even national workers do not always have the time, resources and incentive to take a lawsuit or complaint against their employer. Court cases can take several years, can be costly especially if there is no legal aid available and/or the worker is not a member of a trade union that would provide legal support, and the worker risks having to pay the legal costs of their employer should they lose the case. These challenges are often felt more acutely by migrant workers with dependent or irregular status due to the precarity of their situation, limited employment opportunities and low income, and exclusion from social welfare support.

Though some trade unions in some countries have been defending the rights of undocumented workers for many years,⁷⁴ in most countries few precarious migrant workers are formal members of trade unions, and few trade unions provide legal services to workers that are not formal members. Where undocumented workers are eligible for legal aid for people with low income, it can be difficult for them to prove this is the case.

It can also be difficult to find legal advice and representation that is specialised. There is a general lack of awareness of undocumented migrant workers' rights both among legal professionals and support organisations, and migrant workers themselves. In this context, time limits on examination of labour rights violations are also relevant, as it may be a number of years before an undocumented worker comes into contact with someone who advises them on how to file a complaint. In **Cyprus**, for example, the application to the court has to be submitted within maximum a year.⁷⁵ Issues such as language can also be challenging for filing complaints and participating in legal proceedings.

Austria: Specialised legal representation for undocumented workers

In Austria, there is a Chamber of Labour⁷⁶ (mainly operating under the abbreviation AK), which represents the interests of all employees (including apprentices, workers on parental leave and unemployed people, with the exception of executive staff and public sector employees). Membership is mandatory, and every worker pays a contribution as part of their social insurance. In case of individual labour or employment disputes, employees can contact the AK for obtaining information, advice or assistance in legal procedures. Through the work, information provision and referral by UNDOK contact point, which is an initiative of several trade unions and NGOs that works specifically for undocumented workers, the Chamber of Labour is increasingly supporting undocumented workers' cases.⁷⁷

⁷⁴ For more information see e.g. PICUM, [Ten Ways to Protect Undocumented Migrant Workers](#), 2005; European Trade Union Confederation, ['Defending undocumented workers - means defending all workers'](#), 18 December 2017; and links to the websites of the trade unions that are members of PICUM on [PICUM website](#).

⁷⁵ Article 12(10A), [Annual Paid Leave Act of 1967 \(8/1967\)](#).

⁷⁶ There is one Chamber of Labour (Länderkammer) in all the nine states (Bundesländer); together they form the Federal Chamber of Labour (Bundesarbeitskammer, BAK). For more information see: ETUI, ["Austria: The Chambers of Labour - role and functioning"](#), 2 May 2017.

⁷⁷ Information provided by Lefo and UNDOK.

Risk of employer retaliation and immigration enforcement

The length of procedures also has more significance for undocumented workers, who remain at risk of facing immigration enforcement during the procedure, and fear that taking a complaint might lead to exposure. Undocumented workers still have to weigh up the risks of being denounced by their employer, for example. Sometimes employers find ways to denounce their employees anonymously and without mentioning their workplace. Either way, the most exploitative employers still have more to gain from retaliating by denouncing the worker, with the risks and costs of sanctions lower than the benefits to be gained from not paying their employees properly. In **the UK**, there is even the additional incentive of reduced sanctions for employers that cooperate with immigration enforcement (see box below).

Being reported to immigration authorities for enforcement purposes can result in an order to leave the territory, administrative detention, and deportation from the country, as well as an entry ban.

Additional sanctions on workers

In some countries, there are specific sanctions on workers for working undeclared, which are applicable to all undeclared workers. These vary widely. For example, in the **Czech Republic**, a fine of CZK 1000 (approximately 40 euros) is usually imposed on the worker.⁷⁸ In **Germany**, in serious cases being an accessory to social fraud is a criminal offence.⁷⁹

While these penalties are not discriminatory per se, undocumented workers often have no alternative but to work undeclared, as, in most countries, it is not possible to get a work permit from within the country when undocumented.⁸⁰ Undocumented workers also face the risk of immigration enforcement. In addition, regardless of status, a sanction can be a major barrier for someone on a low income, particularly if in a situation of exploitation, to come forward to file a complaint. Recognising this, in **Belgium**, there is a fine for undeclared work, but it is waived if the worker files a complaint or is a potential victim of human trafficking or victim of exploitation.⁸¹

In addition, undocumented workers may face specific fines due to their irregular status.⁸² The UK is one country where working without a permit is specifically criminalised.

78 Information provided by SIMI (Sdružení pro integraci a migraci).

79 Information provided by Arbeit und Leben Service center against labour exploitation, forced labour and human trafficking.

80 There are some important mechanisms where undocumented workers can regularise their employment, for example, in France, Spain and Geneva. For more information about regularisation see for example: A. Kraler & M. Baldwin-Edwards, [Regularisations in Europe: Study on practices in the area of regularisation of illegally-staying third-country nationals in the Member States of the EU](#), ICMPD, 2009; A. Kraler, "Regularization of Irregular Migrants and Social Policies: Comparative Perspectives", *Journal of Immigrant & Refugee Studies*, Volume 17, 2019 - Issue 1: Social Policies as a Tool of Migration Control, 28 Dec 2018.

81 For more information, see FAIRWORK Belgium (formally OR.C.A) [Le travail au noir rendu punissable pour le travailleur. Quelles conséquences pour les travailleurs sans papiers ?](#), 2016.

82 See for example, Fundamental Rights Agency, [Criminalisation of migrants in an irregular situation and of persons engaging with them](#), 2014.

UK: When workers' wages can be stolen by employers and potentially confiscated by the state⁸³

Although undocumented workers are not explicitly excluded from the definitions of “worker” or “employee” under UK law and can take a claim to the Employment Tribunal, there are significant legal and procedural barriers to do so, even if the worker has a written contract.

“Early conciliation”, to try to resolve the case through arbitration, is mandatory to take a case to the Employment Tribunal. Acas, the responsible public body, is an impartial organisation, that only requires the claimant’s name and address and the respondent’s name and address. Acas is specifically prohibited by law from disclosing information to third parties under the 1992 Trade Union and Labour Relations Act.⁸⁴ However, if they find out that the person does not have authorisation to work, the case will be closed.

Further, their contract may be considered void and unenforceable, because their employment relationship is considered unlawful.⁸⁵ This means that an employer can ask the tribunal to strike out the claim. The court will consider various different relevant factors, and it will also depend on the nature of the claim (for example if it relates to unfair dismissal, which is a claim arising directly from a contract, or discrimination⁸⁶). For example, a court case in 2019⁸⁷ decided that at least when a migrant worker is unaware of the fact⁸⁸ that they are undocumented, the worker can enforce their rights before the Employment Tribunal. This would include cases where, for instance, the employer is responsible for applying for the visa, or if the worker does not have access to their documents to check whether they have a valid visa.

However, the tribunal does not treat labour rights violations against undocumented workers equally to documented workers; the claim risks being dismissed because they did not have authorisation to work.

In addition, **working without authorisation has been made a criminal offence; workers can be prosecuted and imprisoned, and their wages can be confiscated as the proceeds of crime if convicted.**⁸⁹ This runs contrary to fundamental rights, undermines labour standards, and represents a new level of state facilitation of the exploitation of migrant workers, including in the context of efforts to reduce modern slavery. This is even more the case when considering that

⁸³ Information provided by FLEX with support from Ashurst LLP.

⁸⁴ FOI Request 201920, submitted 18 October 2019.

⁸⁵ The contract may be considered ‘illegal’ in terms of ‘statutory illegality’, when the law prohibits the making of the contract or a particular terms of the contract, or in terms of ‘common law illegality’, if the formation, purpose or performance of a contract involves conduct that is illegal or contrary to public policy.

⁸⁶ See for example *Hounga v Allen* [2014] UKSC 47 (30 July 2014).

⁸⁷ *Okedina v Chikale* [2019] EWCA Civ 1393 (31 July 2019).

⁸⁸ The Court/Tribunal will weigh up public policy considerations as to whether a party without permission to work and have a contract should be compensated, so they might also consider whether the worker was complicit in the situation as well as just having knowledge of it. In cases where the claimant is a victim of human trafficking seeking to enforce their right to compensation, additional arguments can be raised that EU trafficking legislation requires that victims should be compensated for their treatment.

⁸⁹ Immigration Act 2016, Chapter 2, 34, 24B. Wages can be confiscated under the Proceeds of Crime Act 2002.

employers who cooperate with immigration authorities may enjoy reduced sanctions,⁹⁰ enabling even greater levels of impunity.

Proof

In civil cases, the burden of proof is on the worker, and when working undeclared and without a written contract, the best way to prove a working relationship is through a labour inspection. However, this option is not open to undocumented workers in most countries, as they would risk immigration enforcement if identified during an inspection (see more in the section on inspection authorities). Many also want to avoid an inspection being carried out due to the risks that co-workers would be identified and face immigration enforcement.

The “Employers’ Sanctions Directive” does require a 3-month presumption of employment, with the burden of proof on the employer to prove the employment relationship was less than 3 months and the burden of proof on the worker to prove it was more than 3 months. This should provide a minimum safeguard for undocumented workers, and in some countries, such as **the Netherlands**, this has been increased to a presumption of 6 months of employment.⁹¹ However, frontline organisations in all member states in the study find that this safeguard is rarely implemented in practice, and that it remains a challenge to prove the existence of the working relationship and the level of underpayment. Also, many undocumented workers have worked for significantly longer periods of time. In addition, it can be difficult in some cases for undocumented workers to identify their employer, particularly when hired through intermediaries such as gangmasters or recruitment agencies.

Nonetheless, emails, messages, voicemails, wage slips, any kind of attendance list or log, photos, uniforms, company ID badges or security passes, and witness statements, can be used as evidence. In **Portugal**, for example, a declaration from a trade union stating the existence of a labour relationship can also be used as proof.⁹² Contracts of co-workers working in the same position could also be used in some cases, as there should be no unjustified differences in the salary or working

90 While employing undocumented workers is punishable with imprisonment of up to five years and a fine of up to £20,000 per worker, the employer may enjoy reductions in the sentence if they cooperate with immigration authorities. This [flow chart](#) explains how the reduction in penalty is applied, p.9. For example, in one case in 2016, a total of 35 migrant workers from Brazil, Nepal, Egypt and Albania were detained as part of a raid on several branches of the Byron Burgers chain of restaurants on 4 July 2016 in London. Reports indicate that staff had been told to attend a health and safety training (about cooking medium rare and rare hamburgers) in the morning of that day, but immigration officials quickly arrived and started to interview and arrest people. Some were deported on the same day. Some workers had worked for the company for several years. Byron Burgers published a statement arguing that they were unaware that employees were in possession of ‘counterfeit documentation’ until the Home Office brought it to their attention. They faced criticism for lying and betraying their employees rather than trying to support them to access appropriate documentation, and may have done so in order to benefit from reduced sanctions ([The Guardian](#), 27 July 2016; [Migrant’s Rights Network](#), 11 July 2016; [The Guardian](#), 31 July 2016 c.f. [PICUM newsletter 26 August 2016](#)).

91 Article 23, [Wet arbeid vreemdelingen](#) (WAV).

92 Information provided by CGTP.

conditions. If undocumented workers are able to gather such evidence, they can be awarded at least some of their due pay by labour courts.

While courts do not check work permits, some kind of identity document to prove identity is also usually required, excluding those who have no passport or any other valid form of ID.

Receipt of funds

Another major issue in all countries examined is whether or not the worker can actually receive the unpaid wages or compensation awarded to them by the court. Despite provisions on accountability of general/ main contractors and sub-contractors (e.g. “Employers’ Sanctions Directive”) and rights of undocumented workers to state compensation in cases of employer insolvency (“Employers’ Insolvency Directive”), it can be difficult to hold exploitative employers accountable in practice.

Mechanisms to enforce payments may not be effective. For example, in **Ireland**, the Workplace Relations Commission (WRC) adjudication service issued 2,964 decisions in 2018⁹³ but only 66 cases to enforce decisions and awards were pursued by the Workplace Relations Committee Enforcement Unit in the same year.⁹⁴ The WRC do not provide data on how many of the 2018 decisions included awards or if the awards were paid.

Where enforcement requires an additional legal proceeding, the same barriers arise. Again, it is the most unscrupulous employers that find ways to evade paying their workers through various strategies such as changing company structures or closing the business and moving their assets without officially filing for bankruptcy, or simply refusing to pay.

There is also still a widespread lack of awareness that undocumented workers are equally eligible to access state financing of claims in case of employer insolvency, and challenges for undocumented workers to provide adequate evidence on the length of employment and the amount of unpaid salary.

In addition, it is very difficult for undocumented migrants to open bank accounts, and it is normally required for the money to be paid into a bank account. It can be possible to have the money paid into the bank account of a friend or support organisation, but this remains a major challenge, especially for significant sums of money. Mechanisms for following up when the money has been recuperated by the state and the worker is no longer in the country are also lacking. In individual cases, it might be possible for a worker to still get their money through the efforts of individual labour inspectors, NGOs or friends,⁹⁵ but this is rare and not a systemic solution.

93 Workplace Relations Commission, [Annual Report 2018](#), 2019, p. 6.

94 Workplace Relations Commission, [Annual Report 2018](#), 2019, p. 34. Since the Workplace Relations Act 2015, workers who are made an award by a WRC adjudicator can apply to the WRC Enforcement unit if respondent has not paid. If necessary, this unit can also refer people to receive legal representation, to ask the district court to issue an enforcement order.

95 For example, in Belgium, if the Control of Social Law inspectors determine that wages, or a part of them, have not been paid correctly and the workers are not immediately available, the employer must pay the salary into the Federal Deposit and Consignment Fund. There is no department or administration that has the obligation to inform the workers involved. In one case in 2017, salary arrears for 31 Polish workers totalling €61,739.08 were collected and available in the Federal Deposit and Consignment Fund. Through the efforts of an individual labour inspector, Fairwork Belgium and the Association for Legal Intervention (SIP) in Poland, 25 workers were located, and €57,527.27 in due wages returned, representing 93.18% of the total amount (Information provided by FAIRWORK Belgium).

Criminal courts

Undocumented workers may also have recourse to criminal courts when their labour rights violations amount to a crime. In all EU member states, human trafficking is a criminal offence, with several also criminalising particularly exploitative conditions of work.⁹⁶ In some countries, such as Greece and South Korea for example, non-payment of wages is also a criminal offence.⁹⁷ Undocumented workers may also be subjected to criminal acts such as violence in the workplace.

This report does not focus on the criminal justice system, and the Fundamental Rights Agency (FRA) has done extensive research⁹⁸ into the situation of migrant workers subject to criminal forms of labour exploitation across the European Union. However, the frontline organisations participating in this study underline the fundamental barriers for undocumented workers who are victims of crime, both to actually report, and to access justice when in the system.

Return or deportation

Even when undocumented workers are victims of trafficking, they are primarily treated as offenders and required to leave the country or are deported as a result of interaction with law enforcement. This is the case even if a person goes voluntarily to the police to file a report as a victim of crime and seek protection.

When identified by police or labour inspectors, people with irregular status are frequently not informed of their rights as a trafficked or exploited person, or otherwise as a victim of crime, and are required to return or deported without being given a reflection period or access to services and justice.

Germany: Over 120 construction workers required to leave country with no access to justice for labour abuse

In August 2019, the German Customs Authority's Financial Control of Undeclared Work Unit (FKS) carried out checks in a Berlin-based company which was allegedly employing over 120 people from Albania, Kosovo and Serbia irregularly. The employer was suspected of human trafficking for labour exploitation, of having forged student enrolment documents to obtain for the workers short-term working visas for students, and of paying less than one third of the minimum wage in the construction sector and requiring the workers to work extreme over-time. Despite the investigation into trafficking in human beings, the people identified during the workplace inspection were not provided any of their rights as potential or presumed victims. They were made homeless by the

96 See Fundamental Rights Agency, [Annex III: Criminal law provisions relating to labour exploitation](#), Severe labour exploitation: workers moving within or into the European Union Annexes on criminal law provisions and inspection authorities, 2015.

97 Greece: Article 3.2 of Law 3385/2005; South Korea: Art 43, 109 of the Labor Standards Act.

98 Fundamental Rights Agency '[Severe labour exploitation: workers moving within or into the European Union](#)', 2015, and the [country reports](#), and Fundamental Rights Agency, '[Protecting migrant workers from exploitation in the EU: workers' perspectives](#)', 2019 and the [country reports](#).

control, and only provided accommodation for a few days. Their passports were confiscated, and they were prevented from leaving the country for weeks, forcing them to miss doctor appointments and university exams in their country of origin. They were issued 2-year entry bans, and no action has been taken to remedy the labour abuses they experienced.⁹⁹

If exploited undocumented workers do participate in criminal justice proceedings, they risk deportation if they are not found to be a victim of trafficking.

For example, it is striking to note that in **Bulgaria**, despite several cases¹⁰⁰ of foreign nationals that are identified and supported as presumed victims of trafficking by NGOs and the National Commission for Combating Trafficking in Human Beings, no foreign national has yet been found to fit the criteria to be granted a residence permit specifically as a victim of human trafficking.¹⁰¹ Even if they are recognised as a victim, the length of the residence permit granted is, in many countries,¹⁰² only for the reflection period or for the duration of the proceedings or as long as they are considered useful for the prosecution. They face an order to leave the territory or deportation when this period ends, with limited possibilities to access residence and work permits on other grounds.

This denies and impedes the migration projects of the majority of trafficked and exploited persons, who have migrated to work. This approach results in repeat victimisation, and in essence, violates the non-punishment principle. As such, the implementation of protection framework against human trafficking and exploitation in most countries does not really offer meaningful protection to most undocumented trafficked persons.¹⁰³

99 For more information see for example [Berliner Morgenpost](#), 22 August 2019, c.f. PICUM Newsletter November 2019. Information provided by Arbeit und Leben Service centre against labour exploitation, forced labour and human trafficking, 7 October 2019.

100 For example, in one case, a woman working as a domestic worker, looking after the children of a diplomatic family, was being made to work 18 hours a day, be available 24 hours a day and to look after the smallest child seven days a week. When she fell ill due to the bad working conditions, the family refused to provide her with medical help. The family promised to arrange work and permanent residency documents for her in Bulgaria and forced her to sign papers and contracts in Bulgarian that she could not understand. She was identified and provided support as a victim of trafficking. However, she was not eventually recognised as a victim of trafficking (S. Hoff for La Strada International, "[Rights at Work - Tackling labour exploitation in Poland, Bulgaria and Romania](#)", March 2019).

101 No third-country national has been granted a permit under Article 25 of the Combating Trafficking in Human Beings Act, which stipulates the grant of temporary residence permit to foreign nationals who are victims of trafficking if they cooperate in the criminal proceedings, where the permit would be for the duration of the proceedings. Information provided by the Center for Legal Aid – Voice in Bulgaria.

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

103 EU data indicates that 56% of registered victims (identified and presumed) of trafficking were non-EU nationals (European Commission, 'Data collection on trafficking 2018 in human beings in the EU', 2018. While such data has to be treated with a certain degree of caution because it reflects enforcement and identification practices as well as the reality, it is clear that a significant proportion of victims are non-EU nationals, some of which are undocumented.

Additional barriers to justice

Other reported factors preventing undocumented victims of criminal labour exploitation from reporting, include:

- Threats, being in isolated and controlled environments, and violence.
- Debts and inability to lose even minimal income.
- Lack of information and legal advice.
- Risks of charges and penalties for irregular residence status or work.

When in the criminal justice system, key issues include:

- Difficulties to prove the employment relationship and severity of the exploitation.
- Lack of support services for men.
- Lack of identification of exploitation in non-traditional sectors, such as the food service industry and cleaning. People in these sectors are less likely to be referred to support as potential victims, and less likely to be recognised through the procedure.
- Actual receipt of compensation if awarded, with limited use of mechanisms to freeze and confiscate assets and undocumented victims or labour exploitation excluded in some countries from state compensation schemes for victims of violent crime.

The Netherlands: State payments or pre-payments of compensation

In the Netherlands, if the person joins proceedings in the criminal case, and the claim is awarded, the state will make a pre-payment 8 months after the verdict being definite if the perpetrator does not pay, and will try to collect the money from the perpetrator.¹⁰⁴

There is also Violent Offences Compensation Fund¹⁰⁵ to which victims of violent crime resulting in serious psychological or physical injuries can apply for compensation related to injuries (pain and suffering) and any financial damages suffered, such as medical expenses or a loss of income due to incapacity for work. Human trafficking, including for labour exploitation, is considered a violent crime.

Undocumented workers are also entitled to access insolvency benefits from the Employee Insurance Schemes Implementing Body, if they have a claim relating to pay, holiday pay or holiday allowances against an employer who has been declared insolvent or if the worker is liable to suffer financial loss because that employer has failed to pay to third parties amounts owed in respect of the employment relationship with the employee.¹⁰⁶

¹⁰⁴ For more information see: [Policy rule for extending the advance payment scheme for old compensation measures still outstanding at CJIB](#), valid from 2 December 2011 until present and summary on the [website](#) of the Dutch Public Prosecution Service, 23 December 2015.

¹⁰⁵ For more information see: <https://www.schadefonds.nl/>.

¹⁰⁶ Article 61, Dutch Law on Unemployment* (WW). For more information see *Tümer v. Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen* (C-311/13, 2014).

Inspection authorities

Across the different 15 EU member states examined, there are significant differences in the number of different inspection authorities, their mandates and resources.

Individual complaints

In 13 of the 15 EU member states there is an inspection body with the competence to take individual complaints from workers regarding issues related to underpayment of wages, including overtime (Belgium, Bulgaria, Cyprus, Czech Republic, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom (UK)).¹⁰⁷

In Germany and Austria, there are inspection authorities that can handle individual complaints related to health and safety or social security and related issues, but disputes related to unpaid wages need to be addressed through the labour courts.¹⁰⁸

Most of the inspectorate bodies can initiate administrative proceedings leading to fines,¹⁰⁹ and have the possibility to mediate with the employer and reach a settlement out of court. While some can also directly impose fines, the case may otherwise need to go to court for the employer to be ordered to pay due wages.¹¹⁰ Evidence from the procedure with the inspection can also be used if the worker takes the case directly to the labour court.

These are, therefore, important complaints mechanisms for workers, with fewer barriers than taking the case to court. For example, the procedure would normally be quicker, not need legal representation, and not include risks of liability for court costs (for more see previous section).

However, a few of these authorities are only able to investigate and take decisions on complaints from workers with an authorised employment relationship.

For example, in **Ireland**, as mentioned above, some court decisions have interpreted that the Workplace Relations Commission (WRC) Adjudication Service do not have jurisdiction if a worker is undocumented.¹¹¹ Nonetheless, the law specifies that the Minister for Business, Enterprise and Innovation (the government department with responsibility for employment permits and the

107 Presentation of M. Velázquez, Spanish Labour Inspector and Chairman of the SLIC - Working Group on Cross-border Enforcement "[Setting the scene III: Labour Inspectorates in the European Union](#)" at the EU-Georgia Dialogue - September 2018; EPSU, "[A mapping report on Labour Inspection Services in 15 European countries](#)", A SYNDEX report for the European Federation of Public Service Unions (EPSU), 2012, Update March 2013.

108 Presentation of M. Velázquez, Spanish Labour Inspector and Chairman of the SLIC - Working Group on Cross-border Enforcement "[Setting the scene III: Labour Inspectorates in the European Union](#)" at the EU-Georgia Dialogue - September 2018; EPSU, "[A mapping report on Labour Inspection Services in 15 European countries](#)", A SYNDEX report for the European Federation of Public Service Unions (EPSU), 2012, Update March 2013.

109 EPSU, "[A mapping report on Labour Inspection Services in 15 European countries](#)", A SYNDEX report for the European Federation of Public Service Unions (EPSU), 2012, Update March 2013.

110 For example, in Italy, workers that are not being paid for their work can report this to the labour inspectorate, but the labour court are the competent authority to order employers to pay their debts towards employees (Article 413 of the Code of Civil Procedure). Workers can also file complaints to INAIL (Istituto nazionale Assicurazione Infortuni sul Lavoro, National Institute for Occupational Accident Insurance) in case of accidents at work ([Decree of the President of the Republic no. 1124 of 1965](#); Legislative Decree no. 626 of 1994, amended and supplemented by Legislative Decree no. 242 of 1996) and to INPS (Istituto Nazionale Previdenza Sociale, National Social Security Institute) for complaints related to social security issues, including contributions (Law no. 88 of 1989).

111 See footnotes 60 and 61.

Workplace Relations Commission) can at their discretion, institute civil proceedings on behalf of the foreign national, with their consent.¹¹²

Responsibilities to check work permits

In all 15 of the EU member states, there is an inspection authority whose remit relates to working conditions, salaries, social security or financial matters, who is also tasked with checking work permits of workers, in order to impose sanctions on employers in the case of irregular employment. It may be possible for labour inspectors to check the validity of work permits within their role of protecting workers, to facilitate their access to their rights and refer them to appropriate procedures to regularise their status.

However, in some cases, checking validity of work permits to enforce the sanctions against employers seems to have become a primary function, superseding the checking and enforcement of labour standards. Certainly, even if intending to also look into working conditions, if the first action of the inspector is to check the validity of work permits, immigration control is at the forefront of the interaction and outcome for migrant workers.

Professional confidentiality

The question as to whether labour inspectors report undocumented workers to immigration authorities, and the legal basis for doing so, is less clear. **In many of the 15 EU member states, data sharing for immigration enforcement purposes appears to be common practice.** Whether this reporting is a legal obligation, the result of a formal cooperation agreement, or common practice varies.

There remains a certain degree of discretion and this is a crucial site for change, to make the complaints mechanism actually accessible and ensure that undocumented workers can trust and cooperate with labour inspection authorities when employment standards are not being met.

There are some important exceptions. In some cases, labour inspectorates report undocumented workers that they identify during routine inspections, but maintain professional confidentiality of workers that file a complaint.

For example, in **Ireland**, the Workplace Relations Commission (WRC) Adjudication Service has no obligation to report undocumented workers, and in the experience of the Migrant Rights Centre Ireland (MRCI), does not report claimants to immigration authorities.¹¹³

In **Austria**, UNDOK supports undocumented workers to file complaints to the social insurance authority to get documentation that the employer has not paid their social insurance. This is used

¹¹² Employment Permits (Amendment) Act 2014.

¹¹³ Information provided by the Migrants Rights Centre Ireland.

as evidence before going to the Chamber of Labour and labour court. The social insurance authority is independent and does not share information with immigration authorities.¹¹⁴

Belgium: Labour inspectorate respects professional secrecy in complaints from undocumented workers¹¹⁵

In Belgium, if an undocumented worker files a complaint to the labour inspection, the labour inspection maintains their professional secrecy, and does not share personal data with immigration authorities for enforcement purposes.

This policy does not apply if the worker is identified during an inspection. Therefore, the worker has to gather enough evidence, so that no inspection is needed to prove the employment relationship. In these cases, the labour inspectorate will handle the worker's case equally and the worker will not risk immigration enforcement as a result of filing a complaint.

For example, in one case an undocumented worker was paid € 24,680.25 in unpaid wages and the state received an amount of € 63,881.91. Saïd¹¹⁶ started working for a landscaping company in 2008. During the 2009 regularisation campaign in Belgium, his employer had promised to do what was necessary to regularise him through work, but he did not keep his word and Saïd remained in an irregular situation. In the first few years, his employer paid him 5 € / hour, then he increased his salary to 6.50 € / hour.

In 2012, Saïd suffered an accident at work and broke his hand. The employer did not declare the accident at work and gave Saïd only 500 € as compensation, which was not enough to cover medical expenses or the period of incapacity for work. From then on, Saïd's salary increased to 8 € / hour. When the accident at work was reported to FAIRWORK Belgium, in 2017, the three-year time-limit for claiming compensation for a labour accident had already passed, so he was not able to claim compensation for the accident.

Saïd was still working for his employer when he contacted FAIRWORK Belgium in 2017. He had pictures and videos. One of the videos showed the employer assigning tasks. FAIRWORK Belgium contacted the labour inspection for Control of Social Laws. The inspection immediately took the

114 Information provided by Lefo and UNDOK.

115 Information provided by FAIRWORK Belgium.

116 His name has been changed to protect his privacy.

case seriously and opened an investigation. The team confronted the employer with the facts and evidence produced by Saïd.

After consultation with his lawyer, the employer agreed to regularise five years of wages. Saïd had worked for ten years, and due to difficulties posed by the burden of proof, obtaining the payment of the remaining period of work before the Labour Court did not seem possible.

Nonetheless, through the intervention of the labour inspection, in 2018, Saïd received the difference between the minimum wage and the salary already paid, i.e. net salary arrears of € 16,939.33, year-end bonus included. Holiday arrears amounted to € 7,543.75. In total, € 24,680.25 in salary.

The employer also had to pay unpaid social security contributions in the amount of € 46,097.97 as well as tax of € 17,783.94. The public funds received a total amount of € 63,881.91 corresponding to their shortfall. The whole procedure was completed in less than a year.

FAIRWORK Belgium also assists undocumented workers to receive pro deo legal representation to take the case to court if needed.

If there is an inspection of a workplace and an undocumented worker is identified, most inspectors will contact the police, who will contact the immigration authorities, resulting in the person being issued an order to leave the territory. There is an informal agreement between the labour inspection service for Control of Social Laws, the migration office, Myria and FAIRWORK Belgium that if a worker files a complaint with the assistance of Myria or FAIRWORK Belgium, and as a result of this complaint, there is an inspection on the work floor, the worker will receive an order to leave the territory, but will not be placed in detention.

Identification of undocumented workers through inspections

While maintaining professional confidentiality for complainants is an important step, it is crucial for labour authorities to be fully independent and focused on labour rights issues. If they report workers identified during inspections to immigration authorities, it undermines their relationship and trust among workers, and their ability to actually enforce employment standards and sanction employers in case of violations. Undocumented workers also fear that filing a complaint will lead to an inspection, and immigration enforcement against other undocumented colleagues, even if they are no longer in the workplace themselves.

Co-optation of labour inspections for immigration enforcement purposes is also carried out through joint inspections. **In all 15 EU member states in the study, there are sometimes joint inspections between inspection authorities tasked with monitoring working conditions or financial matters, and the police.**

Even when police accompany inspectors for safety purposes rather than expressly for immigration enforcement purposes, as is often the reasoning stated in the **Czech Republic**¹¹⁷ for example, undocumented workers identified in the workplace face immigration enforcement as a result.

This is also the case when specialist anti-trafficking units are involved, when there are suspicions of criminal labour exploitation or human trafficking, as described in the section on criminal courts.

In several cities and countries, labour inspectors and inspectorate bodies are pushing back against the pressure to enforce immigration control through inspections, and prioritising their primary role of enforcing labour regulations and protecting workers.

Geneva: Inspections in certain sectors focus on working conditions¹¹⁸

In Switzerland, in sectors where there are collective agreements/ contracts, there is a joint control mechanism in the agreement, which stipulates that both parties to the contract (i.e. employers and employees) are in charge of making sure the terms of the agreement are being respected. Typically, in a collective agreement, there will be provisions on wages, breaks during the day, working equipment to be provided, paid leave, etc. Official labour inspection services, such as the *Office cantonal de l'inspection et des relations du travail* (OCIRT) in Geneva, are responsible for ensuring that the law is being respected in workplaces (e.g. the labour law, the law on foreigners, the law on undeclared work).

In Geneva, in certain sectors, such as construction, the labour inspection (OCIRT) has delegated its controls to the joint force made up of union and employer representatives. When the deal was signed between OCIRT and this joint force, it was agreed that they would not check work permits or denounce workers for immigration enforcement.

In other sectors however, where the OCIRT inspects workplaces, work permits are checked.

¹¹⁷ Information provided by SIMI (Sdružení pro integraci a migraci).

¹¹⁸ Information provided by [Centre de Contact Suisse-immigrés \(CCSI\)](#) and [Collectif de soutien aux sans-papiers de Genève](#).

France: Labour inspectors push back against being implicated in immigration control¹¹⁹

Labour inspectors in France are tasked with checking work permits during inspections, but they have a strong organisational culture to not share information for immigration enforcement purposes. Labour inspectors usually try to plan interventions in a way that enables workers to begin regularisation procedures before undertaking a control. If there is a random inspection, there is a risk that undocumented workers lose their jobs, but in general, labour inspections do not lead to undocumented workers being issued with an order to leave the territory.

The issue of labour inspectors' competence and cooperation with immigration control has been the subject of considerable push back on the part of labour inspectors and criticism from the International Labour Organisation Committee of Experts. Following a circular in 2006¹²⁰ which encouraged joint operations - a policy reiterated in subsequent circulars¹²¹- the ILO Committee of Experts issued several recommendations underlining joint operations are incompatible with the Labour Inspection Convention, violating the independence, confidence and trust of labour inspection.¹²² Facing criticism and push back from labour inspectors and their trade unions, specialised sections of the inspection were established to focus on all infringements related to what the government deem as "illegal" work.¹²³ These inspectors are involved in joint inspections and initiatives, while other parts of the inspection endeavour to maintain their professional independence and focus on workers' rights and conditions.

Israel: Inspection and enforcement of labour regulations generally kept separate from immigration enforcement¹²⁴

In Israel, the authority responsible for investigating adherence to labour laws is called the Director of Regulation and Enforcement of Labor Laws, and operates under the direction of the Ministry of Labour. While there is limited enforcement of labour laws for migrant workers, and workers have to file complaints and exercise their labour rights to have them respected, this authority and its

119 Information provided by Clinique de Droit at Sciences Po, CGT and the Inspection du Travail.

120 [Circular DGT / DACGT / IGTT / DGFAR / MISITEPSA n° 21 of 20 December 20 2006](#) on the positioning of the labour inspectorate in the fight against the employment of foreigners without a work permit and hidden work.

121 In particular [Interministerial Circular No. NOR IMIM1000102NC](#) of 2 June 2010 relating to the fight against illegal work involving foreign nationals / implementation of joint operations in 2010.

122 ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), [General report and observations concerning certain countries](#), International Labour Conference 98th session, 2009; ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), [General report and observations concerning certain countries](#), International Labour Conference 100th session, 2011.

123 For more information see: É. Briantais for Gisti, « [L'inspecteur n'est pas un flic](#) », Plein droit n° 92 Les bureaux de l'immigration (2), March 2012.

124 Information provided by Kav LaOved.

inspectors, in general, allow undocumented workers to exercise their rights without reporting them for immigration enforcement.

There is no clear or systemised procedure for reporting undocumented workers to the Ministry of Interior's Population and Immigration Authority, which is responsible for immigration enforcement, if the worker files a complaint or is identified during an inspection. In practice, there are cases where the Ministry of Labour has reported cases. However, in many cases, the report is not made or at least delayed, so it does not necessarily harm the worker. The same is true of the police; they may sometimes report workers without a permit to the Population and Immigration Authority, but there is no definite obligation nor coherent procedure to do so.

In addition, the Ministry of Interior has an office, the Population and Immigration Authority Bureau, which holds enforcement powers related to the Foreign Workers Law, such as the provision of adequate housing, medical insurance, money transfers to bank accounts and so on. In general, safeguarding workers' rights is part of the work permit conditions they are supposed to monitor. This office has distinct departments and inspectors: one (small) unit enforces labour regulations regarding employers who commit offenses against workers and the other (larger) enforces regulations regarding work authorization permits for workers. If the department responsible for labour regulations carries out an inspection independent of the inspectors responsible for identifying irregular work, they do not always check work permits, in general focusing their investigation of working conditions. However, they can perform joint inspections, in which case, work permits are checked, and undocumented workers are likely to face immigration enforcement.

New York City: Immigration control does not interfere with protection of workers' rights

Undocumented workers' rights are protected by some local labour authorities in the United States of America. In **New York City** (NYC) for example, the Department of Consumer and Worker Protection (DCWP)¹²⁵ enforces, among other things, NYC's paid safe and sick leave and fair scheduling laws, including for undocumented workers. The [webpage for immigrant workers](#) clearly states that it supports all residents, including undocumented migrants. They do not ask workers about their immigration status during the enforcement process, and in the event they learn about status, they do not voluntarily share that information with other agencies.

The NYC Commission on Human Rights is the agency charged with enforcing NYC's broad anti-discrimination and anti-harassment protections in the workplace (as well as housing and public spaces) across 26 different categories of protection, including race, gender, sexual orientation, disability, age, national origin, religion, immigration, and many others. Discrimination on the basis

¹²⁵ For more information see the [DCWP website](#).

of immigration status is explicitly prohibited, and in September 2019, the Commission issued [Legal Enforcement Guidance on Discrimination on the Basis of Immigration Status and National Origin](#), clarifying exactly how the Commission interprets these protections. It is unlawful to discriminate in the terms and conditions of employment because of a job applicant's or employee's actual or perceived immigration status or national origin. For example, differential treatment in terms of pay, breaks or leave between a document and undocumented worker doing the same job is prohibited. Similar to DCWP, the Commission does not retain information about immigration status, nor does it share it with any other entity, and pursuant to new [Rules of Practice](#) earlier this year, created a mechanism to protect such sensitive information from being disclosed through litigation.

Also, at national level, there has been a Memorandum of Understanding (MoU)¹²⁶ between the Department of Labor and the Department of Homeland Security (DHS), which aims to prevent immigration control from interfering with workers' rights and prevent intimidation and retaliation by employers who threaten their undocumented employees with deportation.

According to the MoU, when there is an investigation by one of the labour agencies into an ongoing labour dispute, for example, in relation to the right to be paid the correct wages and overtime pay, DHS's Immigration and Customs Enforcement agency (ICE) will not conduct worksite enforcement activities, subject to some exceptions. ICE also agrees to allow the labour agencies to interview any person detained because of ICE worksite enforcement activities. However, there is significant uncertainty about the continuing validity of the MoU under the current government administration.

Brazil: Labour inspections prioritise tackling labour exploitation over immigration enforcement

In Brazil, the labour inspectorate has been held up as an example of good practice in tackling labour exploitation.¹²⁷ The labour inspectorate sought to respond,¹²⁸ in particular, to the situation of widespread exploitation of a large number of undocumented migrant workers in the clothing production chain in São Paulo, and the treatment of the Federal Police of the situation solely as a violation of immigration policies. Seeing the need for a separation between labour inspection and immigration enforcement to counter precarity at the workplace and promote better working

126 National Employment Law Project, [Factsheet: Immigration and Labor Enforcement in The Workplace: The Revised DOL-DHS Memorandum of Understanding](#), 23 May 2016.

127 Note that the labour inspection is currently under attack by the current government, through measures such as the abolition of the Ministry of Labour in early 2019.

128 For more information see Renato Bignami, Brazilian Labour Inspectorate, '[Labour rights or immigration enforcement? The case of labour inspections in Brazil](#)', Labour Exploitation Accountability Hub blog, 26 October 2017.

conditions, labour inspectors began negotiations with the Secretariat for Labour Inspection to allow all migrant workers to benefit from the same legal mechanisms and instruments as other workers.

The labour authorities convened different actors and developed a 'Pact Against Precarisation and for Decent Employment and Work in São Paulo – Clothing Supply Chain'¹²⁹ in 2009. It later supported the development of guidelines¹³⁰ for inter-institutional use, prepared by the National Commission for the Eradication of Slave Labour (CONATRAE), which indicate best practices to be implemented by all authorities.

The details guidelines outline, for example:

- The application of all the relevant labour and social security legislation for both regular and irregular migrant workers.
- That confidentiality regarding the identity of complainants should be fully guaranteed.
- That steps should be taken to regularise the situation and ensure severance pay and unemployment allowance for all affected workers.
- That the relevant authorities should cooperate to ensure that workers are provided with a permit when possible, including permanent residence status for victims of human trafficking regardless of the outcome of criminal proceeding; permits for nationals of MERCOSUR countries, Bolivia, Chile, Peru and Ecuador who have not committed a crime, under the regional residence agreement; and permits on grounds of family reunion, work, temporary amnesty for undocumented migrants, or humanitarian reasons, as per the corresponding regulations.

The role of immigration authorities

There is also a role for immigration authorities to ensure complaints mechanisms are effective and undocumented workers' rights are upheld.

In many countries, there are permits that undocumented workers can be granted, whether due to their employment, their social integration, their length of residence, or as a victim of crime, gender-based violence or human trafficking. For example, undocumented workers may be able to regularise their status based on their employment in **France** and **Spain**.¹³¹

Immigration authorities also have discretion about how to treat the information they receive. Even if there is no specific permit available, governments have the possibility to issue an autonomous residence permit or other authorisation offering a right to stay, to refrain from issuing a return

129 [Pacto Contra a Precarização e pelo Emprego e Trabalho Decentes em São Paulo – Cadeia Produtiva das Confeccões](#), 24 July 2009.

130 [Manual de recomendações de rotinas de prevenção e combate ao trabalho escravo de imigrantes](#), 2013.

131 For more information on regularisation through work in Spain and France, see for example S. Chauvin, B. Garcés-Mascareñas and A. Kraller, "Working for Legality: Employment and Migrant Regularization in Europe", *International Migration*, IOM: 2013; M. Baldwin-Edwards, '[Regularisations and employment in Spain](#)', REGANE Assessment Report, ICMPD, February 2014 (MPRA Paper No. 59812, posted 12 Nov 2014).

decision to someone with an ongoing procedure related to their status, and, at least, to postpone the removal of someone with an ongoing civil or criminal proceedings.¹³²

As per the “Employers’ Sanctions Directive”, immigration authorities are also legally obliged to ensure undocumented workers have effective access to complaints mechanisms, including through information and third-party complaints, to claim back wages from their employers. **The rights provisions in the Employers’ Sanctions Directive are very rarely implemented even for undocumented workers who are in return procedures.** Most undocumented workers are not aware of their rights to claim wages, and they are not provided with any information about their rights or how to file a complaint by labour inspection, police or immigration authorities once identified as undocumented. Even if they file a complaint, there are no mechanisms in place to ensure that workers are able to receive any money awarded to them, especially if they are no longer in the country. It is important for immigration authorities to ensure that people who are in immigration proceedings and who have outstanding claims against their employers are provided information and effective access to mechanisms to exercise their rights, in particular if they may be subject to a return decision.

In **France**, for example, there is an obligation for all relevant authorities who identify someone working without the necessary work permit to provide them with a document informing them of their rights, employers’ obligations and complaints mechanisms, and there is a procedure set out to follow up on payment of wages and allowances owed, including when the worker is no longer in the country.¹³³

At the same time, migrant workers’ complaints must be addressed through the same labour justice system as other workers, with operational measures to ensure that they are accessible and effective regardless of status, and not through a separate mechanism.

Cyprus: Specific complaints mechanism for non-EU migrant workers provides limited security for workers with permits, and is inaccessible for undocumented workers who are not in return procedures¹³⁴

In Cyprus, the Department of Labour Relations is the public service responsible for mediation in the employment field. Staffed with professional mediators and labour relations experts, it deals

¹³² Articles 6 and 9, “Return Directive” ([Directive 2008/115/EC](#)).

¹³³ Article R8252-1-2-6-7-8-9 of the [Labour Code](#), created by [Decree No. 2011-1693 of 30 November 2011](#). There are also provisions on reporting of specific information by the different inspection authorities, and of final decisions by labour courts, to the French Office for Immigration and Integration. This is also covered by a detailed policy document “[Mode d’emploi pour le contrôle de l’emploi illégal du salaire étranger sans titre de travail](#)”, October 2017. In both the law and policy document, with distinctions according to each specific authority, the purpose of sharing information is for follow up of sanctions on and payments owed by employers. There is a need for greater clarity around non-punishment of workers.

¹³⁴ Information provided by KISA - Action for Equality, Support, Antiracism.

with labour disputes between trade unions and employers, on the basis of the Industrial Relations Code. Individuals who want to file complaints can do so either in person or online.

However, the authorities have opted to exclude non-EU migrant workers from this professional and effective dispute mediation mechanism. Instead, they set up a specific complaints mechanism for migrant workers; a specific unit was created under the Labour Relations department to carry out mediation in labour disputes involving migrant workers from third countries. This procedure is not provided or regulated by law. As a result, there are no procedural safeguards. It also has fewer powers than the Labour Relations Committee (the normal complaints mechanism for workers); for example, it does not have labour inspectors or do investigations, its staff are usually temporary, and it can only issue non-binding recommendations, to the immigration authorities.¹³⁵

In cases of labour disputes, workers with a residence and work permit can go to the mediation mechanism. If they leave their employer, they have 15 days to file a complaint. If they do not do this, their residence and employment permit is cancelled, and they are considered to have committed a criminal offence and put on a wanted list. If they file a complaint within 15 days, their residence and work permit is suspended. If the complaint is found to be justified, the unit may suggest to the immigration authorities to issue permission to find a new employer and reactivate the permit. But if they find the complaint is not justified or adequately proven, they suggest the termination of the workers' permit.

Also, it is impossible for undocumented workers to access the mechanism without facing immigration enforcement or unless they are already in immigration proceedings, because complaints have to be registered with the immigration police before they can be submitted to the labour dispute mechanism. This would always result in a deportation order, routinely accompanied by a detention order.

As a positive step, in some cases where a worker is in detention¹³⁶ and has a pending or ongoing procedure to recuperate unpaid wages, the authorities do not proceed with deportation while the case is pending.

¹³⁵ In addition, the staff are not permanent or qualified, so the quality of the evaluation suffers compared to professional labour inspectors. They also sometimes limit the scope of violations they will examine in relation to the contract of employment e.g. they say that they will not examine an overtime violation if overtime was not allowed according to the contract.

¹³⁶ However, police also sometimes ignore the complaint if made by a person in detention, rather than referring the complaint to the appropriate authorities.

Health and safety inspections

A marked difference can be seen regarding the independence of health and safety inspection authorities, where there is a different inspection authority.¹³⁷ **Health and safety inspectorates do not systematically share data with immigration authorities for immigration enforcement purposes.** There seems to be greater recognition that health and safety standards have to be enforced equally for all in order to maintain healthy and safe work environments.

However, when health and safety inspectors do go with police for safety reasons, it can lead to immigration enforcement against undocumented workers. There are also some cases of reporting - usually ad hoc actions by individual inspectors - and in a few of the countries in the study, such actions can be quite common.

In addition, not all health and safety inspection authorities can handle individual complaints from workers; some focus on rectification of standards for a workplace as a whole and cannot intervene on behalf of individual workers.

Migrant workers are also largely at greater risk of developing occupational illnesses and experiencing injuries and accidents, including fatal accidents.¹³⁸ This is due, in particular, to their sectors and conditions of work and limited access to training and safety equipment, as well as language barriers.

In addition, undocumented workers experiencing respiratory and skin conditions, musculoskeletal disorders, mental health or other health issues resulting from their work are sometimes unable to access health care, with strict limitations on non-emergency health care services for undocumented migrants in many European countries, and exclusion from work-related health insurance schemes.¹³⁹ Undocumented workers are also excluded from received social protection assistance, including allowances for people with incapacity to work.

Access to compensation in case of occupational illness or accidents is nonetheless provided for undocumented workers in several EU countries. For example, in **Germany**,¹⁴⁰ labour accidents which cause inability to work for more than 3 days and fatal accidents should be reported by the employer to the Social Accident Insurance Institution (Berufsgenossenschaft). The Social Accident Insurance Institution covers medical and rehabilitation costs, and undocumented workers have the same rights for medical care and payments as other workers, on the condition that they can prove that they have had a factual employment relationship.

137 For example, in Portugal, the labour authority with the competence to check working conditions also checks health and safety conditions at work; there is no separate authority for monitoring occupational health and safety.

138 European Agency on Safety and Health at Work (EU-OSHA), 'Literature study on migrant workers', 2007; S. Moyce & M. Schenker 'Migrant Workers and Their Occupational Health and Safety', 2018 Annual Review of Public Health, Volume 39, p. 351-365.

139 For more information see: Médecins du Monde, [Falling through the cracks: The failure of universal healthcare coverage in Europe](#), 2017 Observatory report.

140 Information provided by Arbeit und Leben Service center against labour exploitation, forced labour and human trafficking.

However, employers tend to avoid reporting accidents involving undocumented workers, due to risks of sanctions and other implications, and dismiss them without any support. In the **Czech Republic**, the accident has to be reported to the Inspectorate¹⁴¹ and the police is usually involved to investigate whether the accident might be qualified as a crime. While the main focus should be on the accident, the worker risks facing immigration enforcement, if found to have been working without a regular permit.¹⁴² Issues can also arise around procedural and administrative requirements of insurance companies.

In cases where the employer does not declare the accident to their insurance, or has no insurance, workers have to claim compensation through civil lawsuit, or where there is one, the specific inspectorate authority.

This raises the same challenges as described for claims to the civil courts and employment tribunals related to unpaid wages. In addition, the worker has to prove that the labour accident happened with the particular employer. It would also be extremely difficult for a family who is not in the country to claim compensation in the case of a fatal accident.

Nonetheless, labour courts may award compensation for accidents to undocumented workers, and to their families in cases of fatal accidents. To this end, in **Belgium**, for example, there is a specific fund that intervenes for victims of a labour accident with an employer without labour accident insurance.¹⁴³

SOUTH KOREA: Equal application of laws and procedures to undocumented workers in cases where employers do not meet their obligations in case of occupational injury or illness

According to South Korean law¹⁴⁴, employers shall provide or bear the costs of necessary medical treatment for an employee, including an undocumented worker, who suffers from an occupational injury or disease, and register for Industrial Accident Compensation Insurance. If an employee is injured during work, and more than 4 days of care is needed, they are covered by Industrial Accident Compensation Insurance.

141 Article 105 of the Labour Code (262/2006).

142 Information provided by SIMI (Sdružení pro integraci a migraci).

143 Information provided by FAIRWORK Belgium.

144 Chapter VIII [Labor Standards Act](#); Article 10-2 [Employment Insurance Act](#) and [the Enforcement Rules](#) of the Act on the Collection etc. of Premiums for Employment Insurance and Industrial Accident Compensation Insurance; Article 2 and 28 of the [Act on the Employment, etc. of Foreign Workers](#).

On 15 September 1995, the Supreme Court affirmed that undocumented workers can have their medication funded by the Industrial Accident Compensation Insurance,¹⁴⁵ and this is reflected in the law.¹⁴⁶

Even if the employer neglects to register for the Insurance, employees can still apply for industrial accident compensation to Korea Workers Compensation and Welfare Service (KCOMWEL). In this case, the employer funds half the compensation and can be subject to additional fines. The law and procedure are equally implemented for undocumented workers, while there are some limitations in practice.

Challenges in certain sectors

There are particular challenges in the monitoring and enforcement of employment standards in various different sectors where undocumented workers frequently work, that are also important to briefly highlight and address. The role of labour inspection in the agricultural, domestic work and sex work sectors is especially limited.

For example, labour inspection of agriculture may be limited due to lack of competence or resources to visit agricultural areas, and widespread acceptance of exploitation in the sector.

GREECE: Challenging exploitative working and living conditions in Nea Manolada¹⁴⁷

Within 20 kilometres of the village of Nea Manolada in Iliia, Greece, over 90% of Greek strawberries are produced. The situation of migrant workers in the area gained attention following a shooting in 2013 and ECHR judgement on the case in 2017 (Chowdury and Others v. Greece). The same working and living conditions persist.

The living conditions in Manolada and the surrounding areas further deteriorated in 2018 and 2019. For example, one of the already insalubrious makeshift camps where workers live was destroyed

145 Supreme Court Decision rendered on Sep 15, 1995, 94 Nu 12067.

146 Article 10-2 [Employment Insurance Act](#) and Article 2 of the [Act on the Employment, etc. of Foreign Workers](#).

147 Information provided by Generation 2.0 for Rights, Equality and Diversity and HIAS Greece. For more information see for example: Generation 2.0, "[Regarding the Labor Inspection's response to the farm workers of Manolada](#)", 18 December 2018, and [Manolada Watch](#), updated approximately once a month following field visits; The Greek Ombudsman, "[Equal Treatment: Special Report 2018](#)", 2019; "[Manolada: The Minister of Labor's promises, which turned into ... expulsion](#)", Inside Story, 18 January 2019.

by a fire on 7 June 2018. It had to be reconstructed on the debris, garbage and mud that was not removed from the site.

The workers filed a complaint to the Labour Inspectorate requesting they conduct field inspections to identify violations of labour and insurance laws in agriculture in the region. The equivalent regional services of the Labour Inspection report having carried out an inspection on 11 October 2018, in which they found no violations, as it was off season, with very little work and few migrant workers. The relevant inspection bodies raised questions about their competence to intervene further.

With the support of pro bono lawyers, a criminal complaint was also filed with the public prosecutor of Amaliada in September 2018, and then to the Supreme Court in December 2018, under the Greek law transposing the Employers Sanctions Directive,¹⁴⁸ and requesting permits for the workers as victims of particularly exploitative working conditions. On the order of the Supreme Court prosecutor, after the victims were issued deportation orders by the police in December 2018, the labour inspectorate came back to the area in January 2019. The case is still under preliminary investigation, but the workers were recognised as presumed victims of particularly exploitative working conditions in February 2019. Pending the criminal proceedings, 220 workers have been granted temporary residence permits, though without the right to work.

Access by labour inspection authorities to private homes as places of employment is also very limited, and domestic workers are excluded from some labour laws, in particular regarding health and safety and working time, at both EU and national level.¹⁴⁹ While there is increasing recognition of domestic work as work, including through the work around the ILO Convention on domestic workers,¹⁵⁰ reforms of labour, immigration and social security law, as well as state investment in service provision and societal changes in attitudes are still needed for the rights of domestic workers to be established and meaningfully upheld.

Only in a few EU countries are sex workers protected by any labour regulations, and the widespread criminalisation of sex workers, their clients, and work environment add additional layers of discrimination and insurmountable barriers to claiming their rights as workers.¹⁵¹

148 Articles 88 and 89 of Law No. 4052/2012 transposing Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

149 For more information see for example: EESC, [‘The rights of live-in care workers’](#), SOC/535-EESC-2016-00941-00-00-ac, 2016; Alexandra Ricard-Guay, [‘Addressing demand in the context of trafficking in the domestic work sector : perspectives from seven European countries’](#), DemandAT working paper, December 2016; Fundamental Rights Agency, [Irregular migrants employed in domestic work](#), 2011; Working paper: [‘Shared concerns and joint recommendations on migrant domestic and care work’](#), February 2018.

150 As of the date of publication, the convention has been ratified by 29 ILO member states, including the following countries in Europe: Belgium, Finland, Germany, Ireland, Italy, Portugal, Sweden (entry into force 4 April 2020) and Switzerland.

151 See for example: PICUM, [Safeguarding the human rights and dignity of undocumented migrant sex workers](#), 2019.

HAMBURG: Social Court case recognises eligibility for statutory accident insurance for undocumented migrant sex worker

A judgement by the Hamburg Social Court in 2016¹⁵² awarded benefits from the statutory accident insurance to an undocumented migrant sex worker. Although the woman had no written contract, the court recognised that she was in a dependent employment relationship and not self-employed.¹⁵³ In addition, the court found she was not excluded from accident insurance coverage due to her irregular status. In this case, Ms. D. was locked in an apartment by her employer for two days, under the indications he was going to organise her residence and work documents. She came across warnings about the recruiter on the internet and decided to flee. When she jumped from the balcony on the second floor, she suffered complicated fractures. Given that she was at work at the time of the accident, and subject to her employer's influence and instructions, the court recognised the injuries as work-related and therefore eligible for the statutory accident insurance.

The continued prevalence of migrant workers being required to work as self-employed rather than employees in numerous sectors, also poses specific challenges regarding the role and competence of labour inspection authorities and courts in enforcing employment standards. This work model has become increasingly entrenched for all workers in jobs, such as delivery, in particular in the context of the growth in the gig economy, where workers are paid per piece of work or gig (e.g. a delivery), with minimal labour rights.

¹⁵² Hamburg Social Court, judgment of 23 June 2016, file number S 36 U 118/14.

¹⁵³ In Germany, sex work is recognised as work, but all sex workers are required personally register with authorities designated by each federal state. Foreign nationals have to prove that they are permitted to be self-employed in Germany. For more information see for example: PICUM, [Safeguarding the human rights and dignity of undocumented migrant sex workers](#), 2019; ICRSE, [Professed Protection, Pointless Provisions – overview of the German Prostitutes Protection Act](#), 2017.

Conclusion

Despite a political discourse which frames the presence of irregular workers as undesirable, their participation in the labour market is integral,¹⁵⁴ while not being met by appropriate work permit schemes.¹⁵⁵ There is some recognition of their rights as workers under labour law, and complaints mechanisms that are theoretically accessible. However, these rights are little known and undermined by the creep of immigration enforcement into the labour justice system. It is meaningless for most workers to state that they have labour rights if they are likely to receive a removal order if they file a complaint. This reality enables exploitation and retaliation of employers against whistle-blowers.

In the case of the courts, there is a lack of clear protocols to ensure that seeking protection and due wages will not lead to deportation, as well as other critical barriers. In the case of labour inspection authorities, cooperation with immigration enforcement has become increasingly normalised. There are clear and essential lines of action to make these complaints mechanisms accessible and effective for undocumented workers.

At the same time, there may be an implicit understanding that, in some sectors, the reliance on undocumented workers is partially driven by the fact that it is easier to underpay, require long working hours, and exploit those in an irregular situation. There are therefore economic interests in maintaining their precarity. Migration policies which prevent workers from exercising their rights are de facto employment policies, creating the conditions for a flexible workforce which can be easily hired and fired, and even removed from the country according to labour market needs.

Whether in agriculture, domestic work, or the gig economy, we can see that changes in the organisation of production, work and consumption are resulting in a downward pressure on labour costs and conditions, in which undocumented workers often pay the most. In a sense, they have also been used as testing grounds for deregulation and dismantling of labour protections which are then also applied to other workers on a much larger scale (for example, temporary work, zero-hour contracts, and arrangements where workers are registered as self-employed while in fact employed, without any of the rights and security derived from that employment).

In order to halt the downgrading of standards, labour law has to keep pace with the changes in the world of work, and ensure that all workers can demand fair wages, social security, and conditions

154 For example, in concluding remarks to a report on undeclared work in the agrifood industry in Italy, which relies significantly on irregular workers (undocumented workers and asylum seekers working without authorisation), the Open Society European Policy Institute (OSEPI) notes that 'evidence shows that migrants have represented an important element for the EU agricultural sector's resilience and for the rural world to cope with the recent economic crises. Migrant inflows have contributed significantly to tackling the social and economic gaps left by the local population, thereby enabling many farms, rural villages and agricultural companies to remain productive and in business in difficult times. Migrants' contribution to rural areas is thought relevant not only in terms of agricultural work, but as well through as number of social and environmental services and domains – such as forestry, pastoralism, and care work.' (Open Society Foundations, [Is Italian agriculture a 'pull factor' for irregular migration – and if so, why?](#), December 2018, p. 30).

155 It is often not possible for non-EU nationals to work in the sectors where they are most commonly employed, except in very specific jobs (e.g. qualified (level 4-6) Asian cooks for Asian restaurants in the Netherlands).

of work. It is not possible to enforce standards in a workplace, only for some of the workers on site. This means ensuring that labour complaints mechanisms are effective and accessible for all workers, without any risk of immigration enforcement as a result.

Paying all workers a fair wage will have economic implications for key sectors, but this is necessary to meet several economic, social and rule of law objectives. Effectively implementing undocumented workers' labour rights would contribute to reducing undeclared work, irregular work, exploitation, forced labour, human trafficking and modern slavery, and support the maintenance and advancement of employment and safety standards for all workers. It would also advance racial and gender justice, considering the gendered and racial dimensions of marginalisation, exclusion and exploitation of migrant workers in Europe. It is time that these sectors, which are socially and environmentally unsustainable, are reformed.

Recommendations

To national authorities

Labour and justice authorities

- **Address gaps in labour law coverage and make explicit the inclusion of all workers.**
 - » Explicitly include all workers - in any employment relationship and regardless of their authorization to work - in relevant laws and collective agreements regulating wages, working time, rest and paid leave, conditions of work, parental rights, termination of employment, health and safety, insurance and state compensation funds or mechanisms (in case of employer insolvency and work-related illness or injury).

- **Re-establish the independence and primary role of labour authorities as the protection of workers and enforcement of laws related to conditions of work and ensure this role is not undermined by immigration enforcement responsibilities or cooperation.**
 - » Take measures to ensure there is no risk of immigration enforcement as a result of filing a complaint to labour inspection authorities, civil courts or labour tribunals, or engaging with labour authorities during inspections.
 - Establish clear policy and training around professional secrecy of labour inspection authorities and labour courts, to protect the confidentiality of workers submitting complaints or identified during inspections, as essential to enforce labour rights for all workers and to prevent employer retaliation, exploitation, and repeat victimization.
 - Overhaul practical cooperation agreements to ensure personal data gathered and actions carried out for enforcement of labour, social and financial laws are not used for immigration enforcement purposes, including by ending automatic transmission of data through access to or joint databases, as well as reporting obligations and joint inspections.
 - » Critically re-assess the role of labour inspectors in the enforcement of sanctions against employers of irregular migrants as well as the real impacts of such regimes overall. This review should be based on an independent and transparent evaluation, with consultation of all stakeholders including representatives of labour inspectors and migrant workers, and anonymized data on complaints lodged, inspections, labour violations registered, compensation, residence permits and sanctions.

- **Address practical aspects which make complaints mechanisms inaccessible and ineffective, in particular for migrant workers.**
 - » Provide labour inspection authorities with sufficient powers to investigate and award due wages and compensation, including enabling access to all places of employment as well as adequate resourcing to protect all workers.

- » Provide legal aid to people with low income, including undocumented workers, as needed to file complaints and access compensation through civil and criminal courts and tribunals. Promote quality and independent legal advice and representation in the area of employment law through funding.
- » Ensure that designated third parties can file complaints on behalf of undocumented workers. These third parties should include ombudspersons and relevant statutory agencies, trade unions and specialised NGOs.
- » Share the burden of proof between the worker and employer in civil labour cases; the burden should not weigh only on the worker. Ensure multiple forms of evidence of the working relationship and labour rights violations are accepted, including witness testimonies and declarations from trade unions or other designated third parties, implementing, at a minimum, the 3-month presumption of the employment relationship required by the Employers Sanctions' Directive.
- » Support training for different professionals (including in the health sector) on the rights of undocumented workers and undocumented victims of crime, to increase awareness, provision of information and referrals to local support organisations.
- » Establish mechanisms to ensure that when awarded, workers receive their due compensation in practice.
 - Make better use of powers to freeze the assets of exploitative employers early on in proceedings.
 - Establish pre-payment mechanisms to automatically provide financial support to people awarded compensation after a short period of time of non-payment and pursue payment from the perpetrator.
 - Require banks to not discriminate in access to basic bank accounts on the basis of residence status and ensure administrative and documentary requirements do not block access in practice.
 - Cooperate with NGOs to support the transfer of funds, both when the worker is within the country and in another country.

Immigration and police authorities

- **Promote reporting, participation and remedy within the criminal and labour justice systems.**
 - » Establish safe reporting policies and practical protocols to ensure that undocumented victims and witnesses can safely report to, and engage with, law enforcement regarding incidents of labour exploitation, forced labour, human trafficking and violence and harassment in the workplace, without facing any risk of immigration enforcement as a result.
 - » Suspend enforcement of any existing return decision or removal order during ongoing procedures, and do not issue a return decision to any person who files a complaint, during the ongoing procedure, or on resolution of civil and criminal proceedings. This is essential

to enable accountability and access to justice and to disempower employers who would threaten their workers with deportation.

- » Grant residence and work permits to enable people to seek justice through civil or criminal procedures, as well as for the benefit of the prosecution and justice system by:
 - Facilitating access to special permits for all victims of criminal labour exploitation, human trafficking and other violent crimes who would like to remain in the country, independent of their cooperation with authorities and participation in legal proceedings.
 - Ensuring that, if issued on a temporary basis, special permits for victims of crime can be maintained at least until resolution of the case, provide access to services and the labour market, may be counted as regular residence towards statuses based on accrued residence and be convertible to a more stable status based on clear criteria, as a remedial measure and to prevent repeat victimisation, if a long-term status has not already been provided.
 - Developing clear criteria - in consultation with stakeholders - upon which equivalent permits to special permits for victims of crime would be accessible for claimants involved in civil labour proceedings.
 - Ensuring that undocumented workers involved in either criminal or civil labour proceedings, are supported to apply for residence and work permits provided for by national law that they may be eligible for (e.g. on grounds of work, family, study, protection or humanitarian reasons) and accepting applications from within the country.
 - » Establish protocols that prohibit pursuing immigration enforcement as a result of someone having had a permit linked to legal proceedings, when it ends, regardless of the outcome, as this would in effect sanction the person for having sought protection and justice.
- **Facilitate labour rights through work permit schemes, and in the context of immigration enforcement.**
 - » Enable migrant workers to change their employer on the same residence and work permit, and change to a different type of permit, as well as apply for residence and work permits that are available from within the country.
 - » Ensure that all undocumented migrants who are in return or removal proceedings are provided with information about their rights to unpaid wages.
 - » Facilitate undocumented workers' access to complaints mechanisms, legal advice and assistance.
 - » Establish and utilize mechanisms to ensure undocumented workers in immigration proceedings actually receive their due wages and compensation.

To the EU institutions

- **Address the rights and situation of workers with precarious or irregular status facing labour rights violations, exploitation, violence or other crimes, in every relevant policy area and entity of the EU institutions.**
 - » Consider and address the political and institutional measures that need to be taken to enable access to justice for undocumented workers in every relevant area of work of the European Council, European Commission, European Parliament, including: migration, employment and social affairs, equality, justice, agriculture, regional development, trade, foreign affairs and health.
 - » Include a focus on the rights of workers with precarious or irregular status in the following EU entities and policies in the 2019-2024 legislature:
 - Strategy on victims' rights,
 - Gender equality strategy,
 - Farm to Fork strategy,
 - Minimum wage legislation,
 - Efforts to promote mandatory due diligence in supply chains,
 - EU Platform on Undeclared Work and
 - European Labour Authority.
 - » Develop meaningful engagement and consultation with NGOs, including direct service providers and migrant worker organisations.
 - » Within the European Labour Authority, include regular consultation of relevant NGOs.
 - » Extend the participation of NGOs in the European network on victims' rights.
- **Channel EU funds in the current and next multi-annual financial framework to support effective labour complaints mechanisms for all workers, regardless of status.**
 - » Channel resources from the structural funds (the AM(I)F and ESF(+)), operational grants to EU civil society networks, and action grants to support:
 - Civil society and trade union organisations to provide independent information and advice, legal assistance, and support services to workers with precarious or irregular status, to facilitate effective access to complaints mechanisms and cooperation with labour inspection, in line with Article 6.2 and 13.1 and 13.2 of the 'Employers' Sanctions Directive' (in particular in relation to complaints via third parties).
 - Training for labour inspectors on the rights of undocumented workers under the Employers Sanctions Directive and the obligation to provide information.
 - Mechanisms with clear lines of responsibility within migration and labour authorities to ensure that persons who are in immigration enforcement proceedings receive back wages whether they are in the country, or elsewhere, including through cooperation with NGOs.
 - Establishment of special funds to pre-pay compensation to workers in cases where employers evade paying due financial settlements (similar to those in place in cases of employer insolvency or for victims of violent crime).

- » Ensure that EU funds allocated for complaints mechanisms for undocumented workers do not establish separate complaints mechanisms or support any aspect of labour complaints mechanisms that may lead to immigration enforcement, but facilitate access of undocumented workers to existing complaints mechanisms for all workers.
 - » Promote quality jobs through the Common Agricultural Policy (CAP) by making receipt of payments conditional on respect for labour rights and standards.
 - » Support additional research on the situation of particularly vulnerable groups of workers and the functioning of complaints mechanisms in cases of undocumented workers.
- **Evaluate and improve the EU legal framework.**
 - » Employers Sanctions Directive:
 - The ongoing evaluation by the European Commission should assess the implementation of the provisions on rights for undocumented workers, and support member states to implement effective complaints mechanisms which do not lead to immigration enforcement, as part of a comprehensive and coherent migration policy.
 - The European Parliament should commission an independent evaluation of the impacts of employers' sanctions on irregular migration, undeclared work, employment standards and exploitation, and human rights.
 - » Ensure that the evaluations of the Anti-Trafficking Directive, Compensation Directive and Victims' Directive pay particular attention to undocumented victims.
 - » Encourage member states to use the various possibilities in EU law (e.g. from the Employers Sanctions Directive, the Directive on residence permits for victims of trafficking and smuggling, the Return Directive) to provide people in civil and criminal proceedings with residence permits both to participate in proceedings and access protection and justice in the longer term.
 - » Support ratification and implementation of relevant ILO instruments, in particular C189 on domestic workers and C190 on violence and harassment in the world of work.



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PLATFORM FOR INTERNATIONAL COOPERATION ON
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