



# Subgroup on tackling undeclared work among third- country nationals: regularisation initiatives

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# 1.0 Introduction

The European Platform tackling undeclared work (hereafter the Platform) Work Programme for 2021-2022 focusses on, among other topics, cross-border undeclared work, including undeclared work performed by third-country nationals. This covers also a subgroup to address the topic 'Tackling undeclared work related to mobility of third-country nationals' as part of the 'Strategic Priority 1: cooperation and joint activities'. At the extraordinary Plenary meeting on 15 July 2021, the Platform showed a clear interest to further look into regularisation initiatives to bring undeclared third-country national workers into the declared economy.

The specific tasks of the subgroup are to:

- ▶ Assess different ways to transform undeclared work into declared work for third-country nationals;
- ▶ Review recent regularisation approaches, recent outcomes and the careful design in terms of their frequency, universality and eligibility rules;
- ▶ Review arrangements for cooperation with NGOs and social partners in voluntary disclosure and regularisation initiatives;
- ▶ Identify good practices.

The subgroup is expected to produce the following outputs:

- ▶ A short report documenting Platform members' experience and challenges faced in developing and improving voluntary disclosure and regularisation initiatives to bring undeclared third-country national workers into the declared economy;
- ▶ Recommendations on the design of regularisation schemes to address undeclared work of third-country nationals.

Mr Bart Stalpaert (Belgium) was appointed chair of the subgroup, with participants from Belgium, Czech Republic, Finland, Greece, Iceland, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Spain and Sweden, plus representatives from the European Federation of Building and Woodworkers (EFBWW), the European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT), the European Trade Union Confederation (ETUC), the European Construction Industry Federation (FIEC), the European Agency for Safety and Health at Work and an independent observer of the Platform. In addition, a representative of the Platform for International Cooperation on Undocumented Migrants (PICUM) participated as an external expert.

During its meeting on 2 December 2021, the group focussed on assessing different regularisation initiatives to bring undeclared third-country national workers into the declared economy and discussing examples of the different approaches across countries. Subsequently, the members of the subgroup discussed the design of regularisation schemes to address undeclared work among third-country nationals, as well as the role of enforcement authorities.

The subgroup builds on previous activities of the Platform in relation to the topic. In the beginning of 2021, the Platform published a report<sup>1</sup> on tackling undeclared work and labour exploitation among third-country national workers which focusses on the different ways of engaging in undeclared work by non-EU nationals and appropriate policy measures, ranging from prevention to detection and deterrence. The Platform's plenary discussion in March 2021 on 'Third country migration and undeclared work' covered, amongst other aspects, routes out of undeclared

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<sup>1</sup> European Platform undeclared work, (2021). Counteracting undeclared work and labour exploitation of third-country national workers.

work and exploitation, outlining that regularisation initiatives offer a possibility for irregularly staying third-country national workers to obtain residency and to move from undeclared work into declared work.

## 2.0 Ways to transform undeclared work into declared work for irregularly staying third-country national workers

*What are ways to transform undeclared work into declared work for third-country nationals in different countries?*

Research broadly refers to regularisation as a state procedure to grant legal status to irregularly staying migrants.<sup>2</sup> This group is not entitled to stay in the territory of the Member State for various reasons: for instance, because they entered the country irregularly, continued to reside following the expiration of their visa or residence permit, or had their asylum application rejected.

During the subgroup discussion, some members also stressed that regularisation alone would not address irregular status of migrant workers. It is also needed to protect the external borders of the EU, ensure legal migration pathways, in particular in sectors with a high demand for flexible and low-skilled workforce, and also ensure protection of all migrants' labour rights, including when undocumented. The lack of regular migration paths is therefore linked to a push of third-country nationals towards irregular border crossing and illegal employment. In that context, examples of relevant legal migration pathways included the 'Spanish Collective Management of Recruitment in Countries of Origin' that yearly recruits more than 15 000 workers in their home country, and the Polish 'Declarations on entrusting work to a foreigner'<sup>3</sup>. Another example from Ireland is presented below:

### Atypical Work Scheme, Ireland

The Atypical Work Scheme was introduced in 2016 in Ireland, originally aimed at addressing exploitation of irregular staying workers in the fishing sector and is now a legal migration pathway. This scheme allows non-EEA nationals to perform specific short-term jobs that are otherwise not eligible for an employment permit. It allows applicants to work in Ireland for 90 days if they are already offered a job in a sector with an employment shortage, or are specialised, high-skilled workers, health care professionals, researchers or fishing fleet members. Those workers can apply for the scheme online before travelling to Ireland.

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<sup>2</sup> See for example, European Union Agency for Fundamental Rights (FRA), (2012). Regularisations – an instrument to reduce vulnerability, social exclusion and exploitation of migrants in an irregular situation in employment?; Organisation for Economic Co-operation and Development (OECD) (2020). What are the Possible Policy Responses to Future Irregular Migration?; International Centre for Migration Policy Development, REGINE project (2009). Regularisations in Europe.

<sup>3</sup> On the basis of such a declaration, non-seasonal work may be performed in Poland by citizens of 6 countries (Armenia, Belarus, Georgia, Moldova, Russia and Ukraine) for a maximum period of 24 months (until 29 January 2022 it was limited to 6 months within subsequent 12 months). The declaration legalises work performed by foreigners but not their residence in Poland - to perform work lawfully, third-country nationals require also a residence permit (e.g. visa) which does not exclude the right to perform work. Only fulfilling these two requirements allows a foreigner to perform work lawfully, however, based on a 'Declaration on entrusting work to a foreigner', receiving a visa is fairly easy. In addition, some third-country nationals do not require a visa to perform work of a shorter duration. There have been some reports that third-country workers with Polish visas work also under fraudulent posting arrangements, see European Platform tackling undeclared work (2021). Counteracting Undeclared Work and Labour Exploitation of Third-Country National Workers.

The European Union Agency for Fundamental Rights sees regularisation as ‘the awarding of legal status to irregularly staying migrants –typically followed by two distinct approaches: one driven by a humanitarian and human rights driven logic; and the other by a regulatory, labour market policy driven logic.’<sup>4</sup>

## 2.1 Regularisation based on labour market reasons

Regularisation based on labour market reasons aims to tackle undeclared work and to bring undeclared workers into the declared economy, ensuring compliance with tax and social security obligations and workers’ rights. Besides transferring to declared employment, regularisation provides access to basic rights, and related welfare services. It further promotes the labour market integration of irregular-staying third-country national workers and has a positive effect on public revenues. In this sense, ‘regularisation is a tool for reducing stocks of unauthorised immigrants and can deliver economic and social benefits by moving migrants from informal to formal employment.’<sup>5</sup> On the other hand, regularisation has been also criticised by some as ‘encouraging illegal migration and undermining migration control’, although evidence on that aspect is indeterminate<sup>6</sup>.

Examples of regularisation based on labour market reasons discussed during the meeting on 2 December are presented below. They are differentiated between regularisation mechanisms and programmes. Both approaches have eligibility criteria, such as specific sectors or population groups, to assess whether a person can be regularised or not. Mechanisms are part of regular migration law and applied on an ongoing, case-by-case basis. They can be available for a small or big group of applicants, and can also address a large number of applicants over time. Programmes are time-bound, and the size of the group of applicants can vary, but they are often large-scale (as applications are all received within a specific limited time period) and ‘one-off’; though several countries have programmes at different times, the criteria and set-up often differ. The most comprehensive study on regularisations to date<sup>6</sup> shows that 24 of the 27 EU Member States implemented regularisation programmes or mechanisms between 1996 and 2008.

### 2.1.1 Regularisation mechanisms

Up to 2005, Spain conducted several ‘one-off’ regularisation programmes, mostly based on humanitarian and labour market grounds. Today, Spain implements the permanent ‘arraigo’ regularisation (also called roots procedure) that is part of migration law and allows third-country nationals who have been living in Spain irregularly for a certain period of time to obtain a residence permit due to exceptional circumstances. The residence authorisation is granted on a case-by-case basis and the individual needs to show proof of social integration through employment, social or family ties:

- ▶ Applicants on the ground of employment need to prove residence in Spain for at least two years and should have been involved in an employment relationship for at least six months;
- ▶ Applicants on the ground of social ties have to prove residency in Spain for at least three years, present an employment contract covering the year after or prove family ties with another foreigner residing in Spain or present a social inclusion report;
- ▶ Regularisation via family ‘arraigo’ is available to parents of a child with Spanish nationality, or to children of parents with Spanish nationality.

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<sup>4</sup> European Union Agency for Fundamental Rights (FRA), (2012). Regularisations – an instrument to reduce vulnerability, social exclusion and exploitation of migrants in an irregular situation in employment?

<sup>5</sup> Organisation for Economic Co-operation and Development (OECD) (2020). What are the Possible Policy Responses to Future Irregular Migration?

<sup>6</sup> Kraker, A. and Baldwin-Edwards, M. (2009). Regularisations in Europe: Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU.

When the application is approved, a temporary residence permit is issued together with a work permit, both valid for one year and with the possibility of renewal. Applicants need to submit several legally translated documents into Spanish and pay fees to the Spanish Foreigners' Offices.

## 2.1.2 Regularisation programmes

During the subgroup meeting, the discussions focussed on three examples of previous regularisation programmes in Greece, Poland and Switzerland, recent approaches in Italy and Portugal related to the pandemic, and a future initiative in Ireland.

Similar to other Southern Member States, Greece applied two large-scale regularisation programmes in 1998 and 2001, which led to 580 000 third-country nationals obtaining a legal residence permit. The authorities incentivised irregular migrants to participate in the schemes by promoting the benefits of regularisation, such as access to social protection, to public health care or any other type of free public services.<sup>7</sup>

Poland implemented three regularisation programmes in 2003, 2007 and in 2012 that allowed third-country nationals to apply for a temporary work permit. Poland implemented its first regularisation programme from 1 September to 31 December 2003, with the aim to regularise irregularly staying migrants who had 'de facto' ties with the country. No nationality requirements were applied, yet the focus was on Armenian, Vietnamese and Ukrainian citizens. Applicants had to prove that they lived in Poland for at least five years. A second phase of the regularisation programme was launched from 2007 to 2008, with the intention of regularising individuals who were excluded or were unaware of the regularisation programme implemented in 2003. As part of a third phase in 2012, within six months, approximately 4 650 persons (out of 9 559 applications), mainly citizens of Ukraine, Vietnam and Armenia, were granted a two-year temporary residency permit with the possibility to work. While the 2012 programme was not restricted to specific sectors or nationalities, applicants needed to have stayed in the country for at least five years. Some applicants had difficulties to prove their identity, as they were not in possession of a passport or documentation of their stay.<sup>8</sup> During the procedure, they often received legal counselling by NGOs.

During the meeting, PICUM explained the 'Operation Papyrus' temporary regularisation scheme piloted in the city canton of Geneva, Switzerland, based on existing Swiss law. The programme ran from February 2017 to December 2018, granting one- or two-year residence permits to 2 390 undocumented people who were residing and working in the city, and their children. Overall, the scheme had a very high acceptance rate, with 99% of the requests being successful. Objective and transparent criteria (e.g., five years of consecutive residence for families with children in school, absence of a criminal record, integration/language skills), as well as information which documents would be accepted as proof of the criteria and the possibility to apply for regularisation without an employer were seen as success factors of the programme. At the same time, 'Operation Papyrus' was not limited to the regularisation process, but it was combined with measures to tackle undeclared work and support regularised individuals and families. Measures included public awareness raising campaigns on undeclared and precarious work, targeted labour inspection *after* workers had been regularised to check their employers were complying with all labour standards, etc, and labour market integration initiatives to ensure that persons regularised could easily find employment if they lost their job during the regularisation process. A key element was the involvement of social partners and NGO's at all stages in the development and implementation of the programme. Employers' organisations increased awareness among employers on their obligations and the benefits of

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<sup>7</sup> R. Fakiolas, (2006), Regularising undocumented migrants in Greece: procedures and effects.

<sup>8</sup> Fagasiński, M. ; Górczyńska, M ; Szczepanik, M. (2012) Wychodząc z cienia: Badanie prawnych, politycznych i społecznych konsekwencji programu regularizacyjnego, (Warsaw: Polish Helsinki Foundation, 2012).

employing declared workers (i.e., to avoid sanctions and fines), while trade unions and NGO's supported applicants throughout the process.<sup>9</sup>

## Recent approaches in Italy and Portugal

During the COVID-19 pandemic, many countries extended expiring visas and permits in order to prevent situations of irregularity. In addition, regularisation schemes for those already staying irregularly featured high on the political agenda of some countries to provide access to health, social and income support to migrants, whilst lifting them out of undeclared work.

Portugal was one of the first countries to implement a limited regularisation scheme responding to the COVID-19 pandemic, by regularising all migrants and asylum seekers with pending immigration requests until 1 July 2020 (extended until 31 December 2021) and guaranteeing them access to healthcare and social services as well as to the labour market. Applicants needed to proof that they have made the immigration request via an appointment or the receipt of the request. Around 356 000 third-country nationals were granted a temporary residency status, which resulted in a shift from undeclared to declared work, mainly in the HORECA and agriculture sectors. On the other hand, third-country nationals with no pending immigration requests or documents (i.e., residence documents, visas and documents relating to the stay) were not granted access to this regularisation scheme and remained irregularly staying migrants.

The Italian 'Relaunch' decree, which aimed to reform the sectors agriculture and domestic work more widely, allowed regularisation for agricultural workers and domestic workers. The decree from May 2020 set out urgent measures concerning health, support for work, economy and social policies connected to the COVID-19 pandemic. As part of the scheme, it was agreed to allow regularisation of agricultural workers and domestic workers whose residency permit had expired by 31 October 2019. They were able to apply for a temporary six-months permit to be able to look for work and, if they were hired during that time, they could convert it to a regular work permit. If they were already working undeclared, their employer could apply to regularise their contract. An employment contract mentioning the duration and remuneration of the employed workers, along with the relevant national collective labour agreement, was required. Workers were able to apply until 15 July 2020 with a passport or similar ID document. However, by the end of 2021, there were reports about the slow processing of the applications.<sup>10</sup> Moreover, 91% of the examined requests were filed by domestic workers (hence only 9% of the applications were filed by agricultural workers).<sup>11</sup>

Ireland has recently announced (3 December 2021) that in January 2022 a new 'once-in-a-generation' scheme will be implemented for undocumented migrants and asylum seekers. Applications will be accepted for six months, and will cost EUR 700 for family applications (including children up to the age of 23) and 500 EUR per individual application. The scheme intends to create pathways for regularising the status of long-term undocumented people and their dependents. It will allow applicants to reside, access the labour market, and to start an application for citizenship. The scheme will be open to those who have spent at least four years living in Ireland, or three years for those with children. Other criteria include having a clean criminal record and not posing a threat to the country. Individuals with an existing deportation order can also apply on the basis that they fulfil the criteria. Furthermore, asylum seekers who have been waiting for their decision for at least two years can apply and they will be exempt from paying an application and registration fee. It is expected that approximately 17 000 third-country nationals may qualify for the scheme.

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<sup>9</sup> See also: <http://picum.org/geneva-operation-papyrus-regularised-thousands-of-undocumented-workers/>

<sup>10</sup> See for instance [La sanatoria per i lavoratori stranieri non ha funzionato - Il Post](#) and [Nessuna tutela per i migranti - La Stampa](#)

<sup>11</sup> European Commission (2020). On migrant regularisation in Italy: a contested measure.

### 2.1.3 Mechanisms based on humanitarian grounds

Next to labour market reasons to move third-country national workers out of irregularity, residency is also granted for reasons of protection.

More than half of the Member States have national legislation to grant temporary resident permits to victims of particularly exploitative working conditions, in accordance with the Employers' Sanction Directive.<sup>12</sup> The remainder of the countries only provide residency in cases of trafficking in human beings, in line with Directive 2004/81/EC<sup>13</sup> or national legislation. In addition, in most countries third-country nationals need to cooperate in criminal proceedings against the employer to be granted the permit.<sup>14</sup>

As mentioned in previous Platform documents,<sup>15</sup> labour exploitation can range from mild inconsistencies with the principles of decent work to severe exploitation, with both concepts being defined differently in national labour and criminal laws. In criminal cases, there are often major challenges when workers are required to prove severe or criminal exploitation, as this is often not possible in practice. On the other side, labour exploitation that falls within the framework of an employment relationship subject to labour law is the realm of labour inspectorates. These authorities however often face challenges to recognise those forms of exploitation at the workplace or have limited measures to assess this risk. Moreover, migrants are afraid to report exploitative employers because they fear the consequences of being found in illegal employment, such as deportation.

Especially participants from Nordic countries indicated to grant residency based on cases of less severe labour exploitation, providing the possibility to change the employer and to work declared. In Finland, proposed amendments to the Aliens' Act which came into force in October 2021, will entitle exploited workers to a new fixed-term (one-year) residence permit, so that the applicant can search for a new job in that time. This will allow third-country national workers who experience abuse by their employer to end the working relationship without losing their right to stay in the country. Additionally, in a similar exploitative situation, a migrant worker can change employer without the need to apply for a new residence permit (this applies for family members too). The authorities hope this will encourage migrant workers to report unlawful situations without fear of being deported from the country. An almost similar approach is taken in Iceland, where the Directorate of Labour provides the possibility for exploited workers to obtain a work permit on an individual case-by case basis, if the person wants to stay in the country.

Another example is the Irish 'Reactivation Employment Permit Scheme' which allows third-country national workers, whose valid employment permit expired through no fault of their own (e.g. redundancy) or who were badly treated or exploited by the employer, to apply for a new residence and work authorisation. This is available for most occupations, excluding however all jobs in a domestic setting. Either the foreign national or the new employer can apply for a Reactivation Employment Permit at the migration services, at least 12 weeks before the proposed employment start date. A permit may be granted for a maximum period of up to 24 months in the first instance and can be extended by a further three years. Non-EEA nationals who have held a valid Reactivation Employment

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<sup>12</sup> European Union Agency for Fundamental Rights (FRA), 2021, Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive.

<sup>13</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

<sup>14</sup> European Union Agency for Fundamental Rights (FRA), 2021, Protecting migrants in an irregular situation from labour exploitation – Role of the Employers Sanctions Directive.

<sup>15</sup> European Platform tackling undeclared work (2021). Counteracting Undeclared Work and Labour Exploitation of Third-Country National Workers.

Permit for five years or more consecutively, and who have been working lawfully during that time, can apply for residency and no longer require an employment permit to work in the country.

In addition, Member States have several national protection statuses covering a wide range of grounds, such as humanitarian protection for health reasons, natural disasters, climate change or to protect (unaccompanied) children. A recent EMN study identified a total of 60 national protection statuses in the 22 countries covered (select European Union Member States and Norway).<sup>16</sup> While many of these statuses are not viewed as regularisation as they primarily aim to grant appropriate protection, they have however an important impact on the prevention of undeclared work of third-country national workers.

Subgroup members from Belgium, the Czech Republic, Lithuania, Luxembourg and the Netherlands reported that their countries have specific national protection statuses in place (or they existed in the past) based on humanitarian or other reasons. For instance, in Lithuania, citizens from Belarus receive a national protection status.

## 3.0 Challenges and lessons learnt of regularisation for the transfer to declared work

Regularisation initiatives based on labour market reasons can take various forms, such as different target groups, the sectors covered and the conditions that need to be met. As described by the group members, most regularisation programmes have been applied as political ad-hoc measures to address the precarious situation of irregularly staying third-country national workers, while some countries (such as Spain) have moved away from programmes over the years and adopted a legal mechanism instead. PICUM stressed that while most Member State (i.e. 24 out of 27) had implemented in some point measures to regularise third-country nationals, only few countries currently have possibilities for people to regularise their status based primarily on an employment relationship.

*How should regularisation schemes be designed to allow irregularly staying third-country national workers to move from undeclared work into declared work? What is the impact of certain eligibility criteria for regularisation schemes (a focus on specific sectors or target groups) and how do these criteria relate to declared work?*

In the regularisation mechanisms or programmes discussed by subgroup members, the most frequently mentioned eligibility criteria for regularisations related to the length of their stay in the country, the time of their application for residence, or proof of an existing employment relationship.

When regularisation is linked to employment, applicants nearly always have to provide proof of the employment relationship. For instance, in one of the Spanish 'arriago' mechanisms based on employment described above, a proven work relation is needed for six months. This is similar in past Italian and Portuguese schemes. Some group members mentioned that it was often a paradox that applicants for regularising their status were requested to prove they had been working illegally and undeclared for a certain period of time. Here, it was noted by PICUM that next to the Spanish 'arriago' scheme based on employment (which is based on a past employment relationship), the 'arriago' scheme based on social ties (family ties with another foreigner residing in Spain or a social inclusion

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<sup>16</sup> European Migration Network (2020), Comparative overview of national protection statuses in the European Union (EU) and Norway'.

report) was more focussed on wider integration into society, also enabling a future declared employment relationship.

The group also discussed the risk of increased dependency on the employer, in case a possible residence permit and work authorisation were linked to a certain amount of time in a single employment relationship, or where it was conditional on the employer signing a contract.<sup>17</sup> An existing employment relation (e.g. the performance of services for and under the direction of another person) could also be proven by social partners or the labour inspectorate. For instance, in Spain, in the past, very few applicants managed to meet the condition to prove their employment relationship via a judicial procedure. Required are documents that prove the existence of labour relations, such as a judicial resolution or an administrative resolution confirming the infringement report of the Labour and Social Security Inspectorate. In addition, these documents can be used as per Supreme Court Decision 25 of March 2021.

Moreover, the recent experiences with the pandemic such as in Portugal or Italy show that mechanisms and programmes need to be flexible to address exceptional situations and challenges. The pandemic has shown that sectors like agriculture, cleaning or transport, with a typically high share of third-country workers, face labour shortages, while at the same time, workers have been at higher risk of precarious working conditions without relevant hygiene standards. It was also noted that especially 'large-scale' regularisation programmes can create bottlenecks for authorities as they are unable to process applications for residence or work authorisations in time, which leaves a high degree of uncertainty for the applicants.

In addition, the prospect of a short-term status may not incentivise irregularly staying migrants to come forward and reveal their status, especially when they are required to denounce their existing employment relationship.<sup>18</sup> In these cases, providing the possibility of renewal and ultimately permanent residency or citizenship, such as in the Irish or Spanish schemes, are important. Moreover, administration fees can disincentivise employers and workers to come forward.

#### *How should third-country national workers be able to apply for regularisation schemes?*

Spain or Poland reported that eligibility criteria could be burdensome and hard to meet for applicants, for example when several documents in the language of the host country were required. Frequently applicants cannot obtain the original documents (i.e., passport) from their country of origin, or they might not be aware of all the required steps of the application procedure for their residency status. Such challenges may discourage individuals from applying and might force them to remain in undeclared work.

As already noted in previous Platform events, third-country national workers often face language barriers and miss out on information on how they could move into declared work. Public authorities and other relevant organisations need to provide clear and easy-to-understand information about the eligibility criteria for regularisation, how to meet these criteria and possible (legal) support available. During inspections, migrant workers could be provided with relevant multilingual information materials about regularisation pathways and be assisted by multi-lingual inspectors.

It was noted by PICUM that, in order to reduce dependency on employers, third-country national workers should be able to apply for regularisation independently (without the employer), so they are not (longer) exposed to a potentially exploitative employer or/and are free to change employer if they get offered or are pressured to work undeclared.

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<sup>17</sup> European Union Agency for Fundamental Rights (FRA) (2019). Protecting migrant workers from exploitation in the EU: workers' perspectives.

<sup>18</sup> Bansak, C., Pearlman, S. (2021). The impact of legalizing unauthorized immigrants. IZA World of Labor.

## 4.0 The role of enforcement authorities

The subgroup members emphasised that their authorities had little to no influence on regularisation initiatives and wider aspects of migration policies. However, labour inspectorates are often specifically mandated to monitor the employment of migrant workers or aspects of migration law, such as checking work authorisation during inspections.

Labour inspectorates and other enforcement authorities are often the public bodies who first detect illegal employment and undeclared work of third-country nationals, although it was added that a large number of cases remained undetected. Furthermore, the number of irregularly residing third-country nationals is unknown. Moreover, data on regularisation programmes, mechanisms and initiatives and hence evidence on the outcomes of regularisation are scarce.<sup>19</sup> These aspects pose a challenge for enforcement authorities to firstly detect undeclared work of third-country nationals, and secondly to measure the effectiveness of ways to transfer undeclared work to declared work amongst third-country nationals.

*How can enforcement authorities cooperate with those employers employing irregularly staying third-country nationals? How to balance deterrence with prevention?*

Enforcement authorities have, to some extent, adapted their deterrence and preventative approaches to identify and address undeclared work of third-country nationals. There are still concerns that employers are not interested in regularising, given the profits they make from non-compliance.<sup>20</sup> Most subgroup members mentioned deterrence approaches when working with employers, while with third-country workers they would focus on awareness-raising and education, as part of their work.

Inspections are the main instrument to detect employers hiring irregularly staying third-country nationals and to monitor their future compliance. The Employers' Sanction Directive requires Member States to 'ensure effective and adequate inspections based on risk assessments identifying the sectors of activity at most risk'.<sup>21</sup> Nevertheless, concerns remain about the insufficient number of inspections and resource issues in inspectorates.

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Labour inspectorates also enforce sanctions towards the employer for employing third-country nationals without work permit, such as in Spain where sanctions range from 10 001 to 100 000 EUR (this depends on the assessment of the severity of the case by the labour inspectorate). However, evidence about the effects of increasing sanctions on the scale of undeclared work remains unclear, and it is overall considered that a combination of fines with criminal sanctions, such as imprisonment,<sup>23</sup> withdrawal from public procurement or orders to stop their business or hiring may deter more effectively. For instance, in Finland, an abusive employer can be banned from recruiting from abroad for a maximum of 6 months per case, based on the Aliens Act. At the moment, the ban applies to the recruitment of blue-collar workers, but a Government Bill is being prepared with the aim to extend the recruitment ban to all recruitment from abroad.

In terms of preventative measures, temporary financial support can be one way to incentivise employers. For example, the Kosovo tax authority offered employers a financial assistance of EUR 130 per month per employee

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<sup>19</sup> Ibid and Bansak, C., Pearlman, S. (2021). The impact of legalizing unauthorized immigrants. IZA World of Labor.

<sup>20</sup> European Platform tackling undeclared work (2021). Counteracting Undeclared Work and Labour Exploitation of Third-Country National Workers.

<sup>21</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

<sup>22</sup> European Commission (2021). On the on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

<sup>23</sup> European Platform tackling undeclared work (2021). Counteracting Undeclared Work and Labour Exploitation of Third-Country National Workers.

for two consecutive months during the COVID-19 pandemic, conditional upon the employer putting the worker on a declared contract for at least one year.<sup>24</sup>

*What can enforcement authorities do to promote declared work amongst irregularly staying third-country nationals?*

It was noted during the subgroup discussions that third-country national workers usually want to regularise their status and hence work declared. However, as raised in previous Platform discussions on the topic, migrant workers are often afraid to come forward to report undeclared work because of the possible consequences, such as losing their income or facing deportation. Here, information about regularisation schemes needs to always be made available as part of the different preventative and deterrence approaches by enforcement authorities, for instance through the provision of multi-lingual material and advice on regularisation, informing workers of their rights and the available complaint mechanisms, and communicating regularisation possibilities during inspections.<sup>25</sup> As mentioned above, enforcement authorities can also support workers by collecting evidence of their employment relationship required to qualify for a regularisation scheme.

As mentioned in previous Platform outputs in 2021,<sup>26</sup> irregularly staying third-country national workers face a high risk of labour exploitation and labour inspectors are often challenged to recognise or acknowledge cases of labour exploitation, either because they have no legal definition of exploitive conditions or have little capacity to work and address cases of labour exploitation. In that context, the Netherlands mentioned that they are also looking into ways to offer support for milder to severe instances of labour exploitation. Another example of working with third-country national workers exposed to exploitive conditions was provided by Iceland:

### **Inspectors to identify cases of labour exploitation**

In Iceland, labour inspectors seek to reach out to workers to help them enforce their rights. Labour inspectors are tasked to identify cases of labour exploitation, and to make it easier for the workers to prove exploitation. In cases of severe to less severe forms of labour exploitation which are not covered by criminal law, inspectors have the power to stop any business activities by the employer.

For the worker, there is also a case-by-case possibility of regularisation, in cases of labour exploitation that fall under labour law intervention. When this happens, inspectors explore the wishes of the exploited workers, such as the re-payment of salaries, if they prefer to go home or whether they want to regularise their status.

Even when regularisation schemes based on employment are not available in a country, enforcement authorities still play a role in the acknowledgement of the existing employment relation, for instance in facilitating the repayment of unpaid wages. For example, subgroup members in Luxembourg and Belgium stressed that they systematically and objectively inform irregularly staying third-country workers of their rights with regards to their remuneration, including the possibility of free legal aid. It is especially hard for subcontracted employees to claim rights, or those employed via a letterbox company, and inspectorates can help to prove the employment relation and to identify the employer.

*Are there interesting examples of collaboration at a national level between the various competent enforcement authorities in your Member State?*

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<sup>24</sup> European Platform tackling undeclared work (2021). Report from the Platform webinar on COVID-19: combating fraud in short-term financial support schemes.

<sup>25</sup> See also European Platform tackling undeclared work (2021). Thematic report on third country migration and undeclared work.

<sup>26</sup> Ibid.

As mentioned during the plenary meeting in March 2021, Platform members and observers expressed the difficulty of safeguarding workers' rights while at the same time having to report the migration status to immigration enforcement authorities. In the subgroup Spain constituted an exception, as Spanish inspectors are not obliged to immediately report the status of migrant workers to the migration authority, but to the competent authorities once the investigation is finished. There are moreover joint inspections with police and tax authorities, and dedicated police staff informs migrant workers about regularising their status and supports them in filing complaints towards employers.<sup>27</sup>

In this respect, the International Labour Organization underlines the need for a clear division of tasks between enforcement authorities, ideally migration authorities focus on illegal employment and inspectorates on working conditions during inspections. In that sense, labour inspectors should prioritise procedures allowing irregularly staying third-country national workers to regularise their status, before reporting their migration status. PICUM and ETUC reminded the group of the 'firewall' approach between labour inspectorates and social security authorities on the one side, and immigration authorities on the other, so that irregularly staying migrants do not face deportation when they wish to access essential services, report exploitation and undeclared work, or regularise their status. This approach can make regularisation programmes more effective, and enhance collaboration with NGOs, so that migrant workers can access their support services such as legal aid.

Iceland mentioned an example of such clear division of tasks: while their Directorate of Labour is responsible for work authorisations and concentrates on declared and legal employment, the migration authority is responsible for authorisations to stay, and the police mainly deals with sanctions for employers. Furthermore, the Occupational Health and Safety (OSH) authorities do not check work permits, and focus on enforcing OSH regulations for all workers instead. In that regard, the Finnish 'Action Plan for Tackling the Grey Economy and Economic Crime for 2020–2023' includes several projects to develop cooperation between the relevant authorities tackling undeclared work at national and international level. This will include a joint resource-monitoring system of the authorities involved. The Action Plan also envisages a study about the legal provisions on the exchange of information and competence issues connected with this, currently carried out by the Ministry of Interior.

*How to best cooperate with social partners and NGOs to allow irregularly staying third-country national workers to move from undeclared work into declared work?*

Labour inspectorates mainly cooperate with social partners and NGOs to outreach and facilitate access to regularisation schemes. NGOs and trade unions are familiar with the situation of third-country national workers and can inform them of their rights and obligations. They can help increase awareness about regularisation by, for example, communicating the conditions and application criteria via their own channels.

Additionally, NGOs often have direct contact with non-EU workers and can build trust. As a result, complaints about undeclared work and labour exploitation are often channelled via NGOs to labour inspectorates. This is most effective when exploited workers have trust that they will not face detention, and a good chance of getting compensation for unpaid wages or to regularise their status.

Some enforcement authorities cooperate with NGOs or social partners who can counsel workers during workplace inspections and point them towards further legal advice. Moreover, these NGO support networks can refer applicants to further services that can help with their integration into the labour market. For instance, the Swiss Operation Papyrus promoted access to support, and encouraged migrant workers to access support services where they could discuss their situation.

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<sup>27</sup>European Commission (2020). Communication on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

Trade unions, on the other hand, know workplace-related issues very well and can point labour inspectors towards issues in a specific sector. In addition, they facilitate complaints by third-country national workers and provide support with their regularisation procedure. Employer organisations can help public authorities to work with employers, by communicating their role and responsibilities to promote fair competition, so that they and their workers benefit from declared work.

## 5.0 Conclusions and recommendations

During the subgroup meeting, Platform members and observers discussed the different regularisation mechanisms and programmes, and noted that these varied greatly in terms of scope (labour market-oriented or not), period covered (mostly one-off), eligibility criteria and implementation. In general, the participants were in favour of regularisation to bring undeclared workers into declared and less precarious work, as this would also give them access to other services (e.g. social benefits, healthcare). They stressed that irregularly staying third-country national workers were often more vulnerable and at risk of labour exploitation. Finally, regularisation would, to some extent, also help to tackle unfair competition.

However, migrant workers also face challenges in relation to accessing existing regularisation initiatives, such as a lack of knowledge about procedures, difficulties to provide proof that they meet the conditions, such as the length of stay in the country or the relationship with the employer. Whilst enforcement authorities have no influence on regularisation policies, they can promote and facilitate ways to transition workers from undeclared to declared work, together with other authorities, NGOs and social partners.

During the subgroup meeting, the following recommendations were formulated in relation to national regularisation policies to enable a shift from undeclared work to declared work:

- ▶ As the number of regularisation initiatives based on labour market reasons is limited, Member States could explore the possibility to offer this in a more structural way, while learning from the past and carefully designing and implementing measures to avoid labour exploitation. The pandemic has shown that recent approaches could be transformed into more permanent structures. However, large-scale regularisation programmes especially often cause a backlog in application procedures, which can lead to long waiting periods and uncertainty for the applicants.
- ▶ Regularisation schemes should set out the eligibility criteria in a clear and transparent way, and these should ideally be communicated via different channels by public authorities, social partners and NGOs. It also needs to be clear how migrant workers can apply to regularise their status and what type of support is available for them to do so, what type of documents are required (how can they prove how long they have been living in the country?) and the fees that will be charged (which should be reasonable so as not to disincentivise potential applicants).
- ▶ Third-country national workers may be more incentivised to apply for regularisation when there is a prospect of a longer stay and ultimately permanent residence. Even when the initial work or residence authorisation is temporary, there should be a possibility for renewal.
- ▶ Approaches to regularise employment should involve multiple partners, such as national authorities, NGOs and social partners. Especially NGOs representing migrants can input in the design of regularisation initiatives and support outreach amongst third-country national workers.
- ▶ Third-country national workers should be able to apply independently, so that their application is not dependent on an employer. In case an employment relation needs to be proven, this could be done via labour inspectors (such as using their inspection report as evidence) or social partners.

Although enforcement authorities are not directly involved in the design of regularisation, they play a role in facilitating access to regularisation:

- ▶ Preventative measures by enforcement authorities need to make third-country national workers aware of the opportunity to regularise their status via multi-lingual, easily accessible information material communicated via different channels (for instance information sessions, flyers in different languages, information on websites, advisory centres) together with public authorities, NGOs and social partners.
- ▶ Especially during inspections and afterwards, labour inspectors should inform workers about their rights and help them to exercise these rights (for instance in supporting the re-payment of unpaid wages) and possible ways to transfer their undeclared working relationship into declared work. If regularisation based on labour market reasons does not exist in the country, it would be important that irregularly staying third-country national workers are referred to non-labour marked related options to remain in the country (e.g. for exploited workers, for humanitarian reasons, etc.) if these may apply.
- ▶ During inspections, labour inspectors, NGOs and social partners need to build trust with workers, including potential victims of labour exploitation and inform them about their rights and obligations (in multi-lingual information material or ideally via multi-lingual staff) and ways to file a complaint against their employer. Furthermore, this cooperation can help migrants with their regularisation procedures, but also point them towards other support services, such as social, health or housing support.
- ▶ Labour inspectorates, law enforcement and migration authorities should set up clear and well-defined cooperation procedures, so that migrant workers feel encouraged to come forward without risking sanctions or deportation. Here, a clear task division and joint risk management may help to support victims of labour exploitation. In addition, it is important that complaints' mechanisms safeguard confidentiality and equal treatment of migrant workers.
- ▶ The Platform tackling undeclared work provides the opportunity to share good practices, specifically on cooperation between different authorities to safeguard workers' rights, with a focus on setting up effective complaints' mechanisms and ways to recognise different types of labour exploitation. The latter could also cover different ways and indicators to recognise exploitation (from severe instances covered by criminal law to less severe cases covered often by labour law), assess risks and ways to support workers.

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