

## EMN INFORM

# Illegal employment of third-country nationals in the European Union

### Introduction

This Inform presents a brief overview of the EMN Study on 'Illegal employment of third-country nationals in the European Union. The Synthesis Report is available on the EMN website<sup>1</sup> and is based on National Reports from 23 Member States<sup>2</sup>. The aim of this Focussed Study is to comparatively map and analyse the measures in place at Member States level to fight the illegal employment of TCNs, possible problematic areas and obstacles in this field and strategies and good practices to overcome them.

### Key points to note

- ★ Illegal employment of third-country nationals (TCNs) - defined as employment contravening migration and/or labour law - is **a source of concern in the EU for economic, migration-related and social and fundamental rights** reasons. It is also linked to trafficking in human beings for labour exploitation.
- ★ Due to its covert nature, illegal employment is a **'hidden' phenomenon** linked to the 'grey' or informal economy of the Member States. Although there is no shared and clear definition of the term 'grey' economy, definitions commonly include both legal and illegal activities. Schneider and Boockmann define it as "economic activities to obtain income whilst avoiding state regulation, taxation, or detection".<sup>3</sup>

- ★ Statistics provided by a limited number of Member States in the context of this Study shows that the number of identified illegally employed TCNs and the number of convictions and sanctions for employers **differ significantly** across Member States. It should be noted that available statistics on identification of illegally employed TCNs and convictions of employers reflect law enforcement practices and thus does not provide a complete picture.
- ★ In the period 2014-2016, the highest number of cases of identified irregularly staying and illegally employed TCNs, in Member States that record data on this phenomenon, was in **France** (2,311 identified TCNs in 2014 and 1,774 in 2015), followed by **the Netherlands** and **Belgium**, while the lowest number of cases were recorded in **Latvia** (2 identified in 2014 and 1 in 2015) and **Bulgaria** (2 in 2014; 0 in 2015 and 1 in 2016 respectively), based on statistics provided by 15 Member States. As for regularly staying TCNs, from the 8 Member States which provided data, the highest numbers of illegal employment were recorded in the **Czech Republic** (1,128 in 2016) and **Greece** (832 in 2016), while the lowest number of cases were again recorded in **Bulgaria** (32 in 2016).
- ★ Agriculture, construction, manufacturing, hospitality and food services are the sectors in which the illegal employment of TCNs is most prevalent. The types of businesses considered at high risk of illegal employment are in the labour-intensive and low-skilled sectors, particularly those with a high turnover of staff and low wages.

<sup>1</sup> [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00\\_eu\\_illegal\\_employment\\_synthesis\\_report\\_final\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_illegal_employment_synthesis_report_final_en.pdf)

<sup>2</sup> AT, BE, BG, CY, CZ, DE, EE, ES, FI, FR, EL, HR, HU, IE, LT, MT, LU, LV, NL, SI, SK, SE and UK

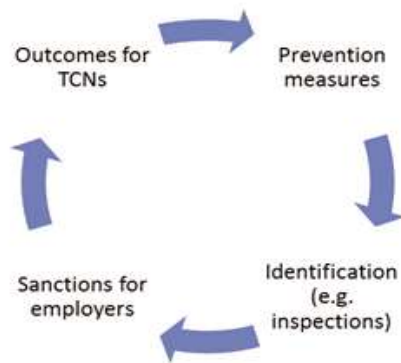
<sup>3</sup> Schneider, Friedrich/Boockmann, Bernhard (2016): Die Größe der Schattenwirtschaft. Methodik und Berechnungen für das Jahr 2016

- ★ Fighting illegal employment is a policy objective and priority for the EU as a whole and in the Member States participating in this Study. The EU has been mandated to adopt measures to prevent and tackle illegal employment of TCNs, most notably through the **Employers’ Sanctions Directive 2009/52/EC**, which tackles irregularly staying TCNs.
- ★ At Member State level, the majority of Member States have recently adopted or are in the process of implementing new measures. These include introduction or increase of sanctions for illegally employed TCNs and employers; establishing lists of trusted or unreliable employers; addressing malpractice of employment intermediaries (e.g. employment agencies); setting up specific offices; running communication campaigns and stepping up and improving inspections.

#### *What does the Study aim to do?*

The Study examines each stage of the illegal employment policy ‘cycle’ for TCNs: (i) preventive measures and incentives for employers and employees; (ii) identification of illegal employment of TCNs; (iii) sanctions for employers and (iv) outcomes for employees.

Figure 1: Illegal employment policy cycle



#### *What is the scope of the study?*

The scope of this Focused Study is illegal employment of TCNs. This study focuses on the illegal (either totally or partially undeclared) employment of the following categories or workers: TCNs regularly residing on the territory of the Member State working illegally – for example, without the right to access the labour market (for instance, some asylum seekers) or who contravene restrictions on their access to labour market, (e.g. students working beyond permitted hours);

Irregularly residing TCNs, i.e. persons who do not, or no longer, meet the conditions to stay in the country. These include TCNs who arrived outside the legal channels of migration and TCNs who continue to reside and work after their permit or visa expired or the conditions for which it was granted are no longer valid.

Illegal employment of TCNs working as self-employed or as posted workers is not covered by the Study.

#### *What preventive measures and incentives are in place in the Member States and what success factors contribute to their effectiveness?*

With regard to preventive measures for employers, **information campaigns** targeted at employers on the risks and liabilities of illegal employment have been implemented in 19 Member States. In 7 of these Member States, these campaigns focus on illegal employment in general (and not specifically on TCNs). **Information support** for employers is another preventive mechanism provided by all Member States participating in the Study, typically through online platforms. Furthermore, all Member States require employers to notify national authorities when employing TCNs.

Similar preventive measures for employees include information campaigns (implemented by 13 Member States); information support (available in different forms in all Member States) and notification obligations for commencing employment and changing employer. Protective measures as established by Directive 2009/52/EC also include establishing a **complaints mechanism**, which is available in most Member States participating in this Study.

#### *How do Member States use risk assessments to establish the sectors and industries at risk?*

As stipulated by the Employer Sanctions’ Directive (Art. 14 (2)), Member States should identify the sectors of activity which are at greater risk of illegal employment of TCNs. Risk assessments are carried out in all Member States participating in this Study. Depending on the Member State, the authorities most commonly involved in risk assessment are labour inspectorates; immigration authorities; police, border guard and customs authorities and Ministries of Finance and tax authorities. Risk assessments are used by Member States to better target inspections.

*How is identification of illegal employment of TCNs organised and carried out in Member States and what are the success factors?*

In the majority of Member States, **labour inspectorates** are responsible for identifying illegal employment and carrying out inspections. Depending on the Member State (see details in the Synthesis report) other competent authorities may include police, border guard and customs authorities, financial police and immigration authorities.

In all Member States, the competent authorities do not have separate functions to specifically target illegal employment of TCNs but carry out inspections for all the population (including nationals of the Member State and EU nationals).

In all Member States, inspections are carried out based on the results of the **risk assessments** of sectors at risk and other methods of inspection planning. Inspections can also be triggered from **signals of irregularities** from the public, including signals from the illegally employed TCNs.

The majority of Member States have a dedicated **hotline where** any individual can call to signal a case of illegal employment but in most cases this hotline is not specifically dedicated to signal a case of illegal employment of TCNs, but for signals in general (including nationals and TCNs).

In all Member States, inspections are carried out **on-site of the workplace**, but can also take place in some Member States at private premises (typically with an authorisation from a judge); company premises and/or offices of intermediaries. While in most Member States, **technical tools and methods** (such as planning maps, manuals, operational guidelines, interview scripts, etc.)

are systematically applied, a few Member States (e.g. LT, LV, SE) reported that such formal tools are not applied and inspections are carried on a case-by-case manner without using common methods and tools.

The effective **cooperation and exchange of information** between different authorities involved in identification, including using common databases is a common success factor. An effective **complaints mechanism** as a protective measure also contributes to successful identification, in especially where the TCN has been subject to particularly exploitative conditions.

**Challenges** identified by Member States include **language barrier** for TCNs to obtain and share information on their rights and communicate effectively during inspections and **insufficient number of staff** to carry out inspections.

*What sanctions for employers are in place in Member States and what are the factors affecting their implementation?*

The most common **sanction** – applied by all Member States participating in this Study – is **finances**.

Although applied for both regularly and irregularly staying illegally employed TCNs, the severity of the sanction for employing irregularly staying TCNs is much higher in most Member States. **Imprisonment** is applied as a possible sanction with regard to irregularly staying TCNs in 17 Member States and regularly staying TCNs in 13 Member States.

Other less commonly applied sanctions include **confiscation of financial gains and equipment** (applied in 9 Member States for irregularly staying and 7 Member States for regularly staying TCNs); **ineligibility for public contracts** (applied in 14 Member States for irregularly staying and 14 Member States for regularly staying TCNs); **temporary/definitive closure** (applied in 13 Member States for irregularly staying and 12 Member States for regularly staying TCNs); **withdrawal of trading license** (applied in 10 Member States for irregularly staying and 8 Member States for regularly staying TCNs) and **revocation of residence permit** if the employer is a TCN (applied in 12 Member States for irregularly staying and 11 Member States for regularly staying TCNs).

In general, **procedures do not differ** if the employer did not **intentionally hire irregular workers**. This is mainly due to employers having a responsibility to conduct thorough checks and fulfil the necessary conditions to verify an employee's legal status.

Art. 9(1) of the Employer Sanctions' Directive stipulates that criminal sanctions should be applied in severe cases of illegal employment. The Study found that 17 Member States of the participating 23 Member States comply with the provision, while four Member States (CY, HR, LV and NL) do not apply criminal sanctions in all of the severe circumstances (*IE and UK have opted out of the Directive*).

Sanctions for employers are found to have **deterrent effect** in some Member States but limited effect in others.

Not only the strictness of legislation and levels of sanctions but also the actual application of sanctions is a key factor in deterring employers from illegally employing TCNs. Furthermore, practices of making publicly available the names of employers ('naming and shaming') has been identified as successful in some Member States (e.g. FR, SK).

*What are the possible outcomes and/or sanctions for identified illegally employed TCNs?*

Following identification of an illegally employed TCN, there are several **possible outcomes**, including **return**, possibly preceded by **detention** (which is an 'intermediary outcome' and in itself may lead to release, return or regularisation), **fining**, **identification as victims of trafficking in human beings** and **regularisation of residence/work status**. 'Possible outcomes' means that these outcomes are not 'definite' (meaning that Member States will act in one way or another) but they are possibilities depending on the particular case (in some cases subject to discretion of Member States' authorities).

In some cases, outcomes are cumulative (e.g. a return decision may be accompanied by a detention order and an entry ban), while in other cases these outcomes are exclusive (meaning that only one of the outcome is possible – e.g. return decision or regularisation).

The most common outcome for illegally employed and irregularly staying TCNs is the issuance of a **return decision**, which in most cases includes a period for voluntary departure. Member States may also issue an entry ban to irregularly staying and illegally employed TCNs.

In the case of regularly staying TCNs found to be working illegally, the main outcome would be the possibility of **losing residence rights**. A consequence would be the issuance of a return decision.

Nineteen Member States reported that **detention in conjunction with a return procedure** of irregularly staying TCNs found to be working illegally can be applied in some cases. In eleven Member States regularly residing and illegally employed TCNs – who lost their residence rights – can be detained in certain cases. In **Germany**, **imprisonment** (besides the possibility for detention pending deportation) is a possible sanction for the TCNs in the case of persistent repetition of irregular employment or if illegally employed TCNs commit fraud against the social security system.

As provided by Directive 2004/81/EC<sup>4</sup>, residence permits of temporary duration may be issued to non-EU nationals who are victims of trafficking in human beings. If the irregularly staying TCN is identified as a victim of trafficking of human beings subject to labour exploitation, 21 Member States reported that they may issue (temporary) residence and work permits.

**Regularisation** of TCNs (meaning regularising their status by issuing a residence and/or work permit) found to be working illegally is only possible in 9 Member States for irregularly staying illegally employed TCNs and in 7 Member States for regularly staying illegally employed TCNs (i.e. regularising their work permit). This is usually done on the basis of a **humanitarian residence permit in exceptional circumstances**. Financial fines are applicable in 12 Member States for irregularly staying illegally employed TCNs. The fines range significantly across Member States – e.g. from €140-700 in **Latvia** and € 330 in **Slovakia** to up to €5,000 in **Germany** and **Slovenia** and up to £20,000 in **the UK**.

*What are the possibilities for illegally employed TCNs to receive back payments and compensation of unpaid wages?*

In 20 Member States, TCNs who are found to be illegally employed (regardless of whether they are residing regularly or irregularly) can make claims against their employer for compensation of unpaid wages for the duration of their employment as under a valid employment contract (including in cases when they have been returned).

In most Member States, third parties with legitimate interest (such as trade unions, organisations of migrant workers), may act on behalf or in support of TCNs.

In addition to employers, direct contractors and other immediate subcontractors can be liable and obliged to pay any outstanding taxes to the state and remuneration due to the TCN.

However, some Member States reported that **in practice TCNs seldom file a complaint** about their working conditions. In addition to the language barrier, TCNs can be reluctant to cooperate with police forces or inspectorates, because they face direct risks of the outcomes described above (a return decision, with possible detention and forced removal and entry bans), and due to challenges participating in proceedings (including with legal assistance) and proving their employment.

<sup>4</sup> Council Directive [2004/81/EC](#) of 29 April 2004

Although statistics are not available, some Member States reported that in practice, there is a very limited number of cases where the worker actually receives due compensation.

*What are the channels which provide information to illegally employed TCNs?*

While the majority of Member States provide general information on employment without specifically targeting illegally employed TCNs, only a limited number of the Member States (11 Member States) reported that they provide for information **specifically to illegally employed TCNs** on their rights. There is variation in terms of when any information on rights is provided to the TCN, by whom and in what way; all of which can impact on understanding and ability to act on the information.

Initiatives by civil society and social partners have been implemented in a number of Member States, including offering counselling and legal support for TCNs working illegally, in particular those TCNs who are subject to exploitation.

As outlined in the **2015 EU Agenda on Migration** and as demonstrated by the findings of this Study, although Member States have adopted a number of safeguards and measures in this field, action against illegal employment of TCNs needs to be stepped up, notably in introducing and implementing protective measures and risk assessments to improve identification. Such measures (if effectively implemented) are expected to ultimately increase the number of identified cases and convictions for employers, which is still very low in some Member States (as demonstrated by the partial data provided in this Study).



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