Unprotected

Migrant workers in an irregular situation in Central Europe

Stowarzyszenie Interwencji Prawnej
Association For Legal Intervention

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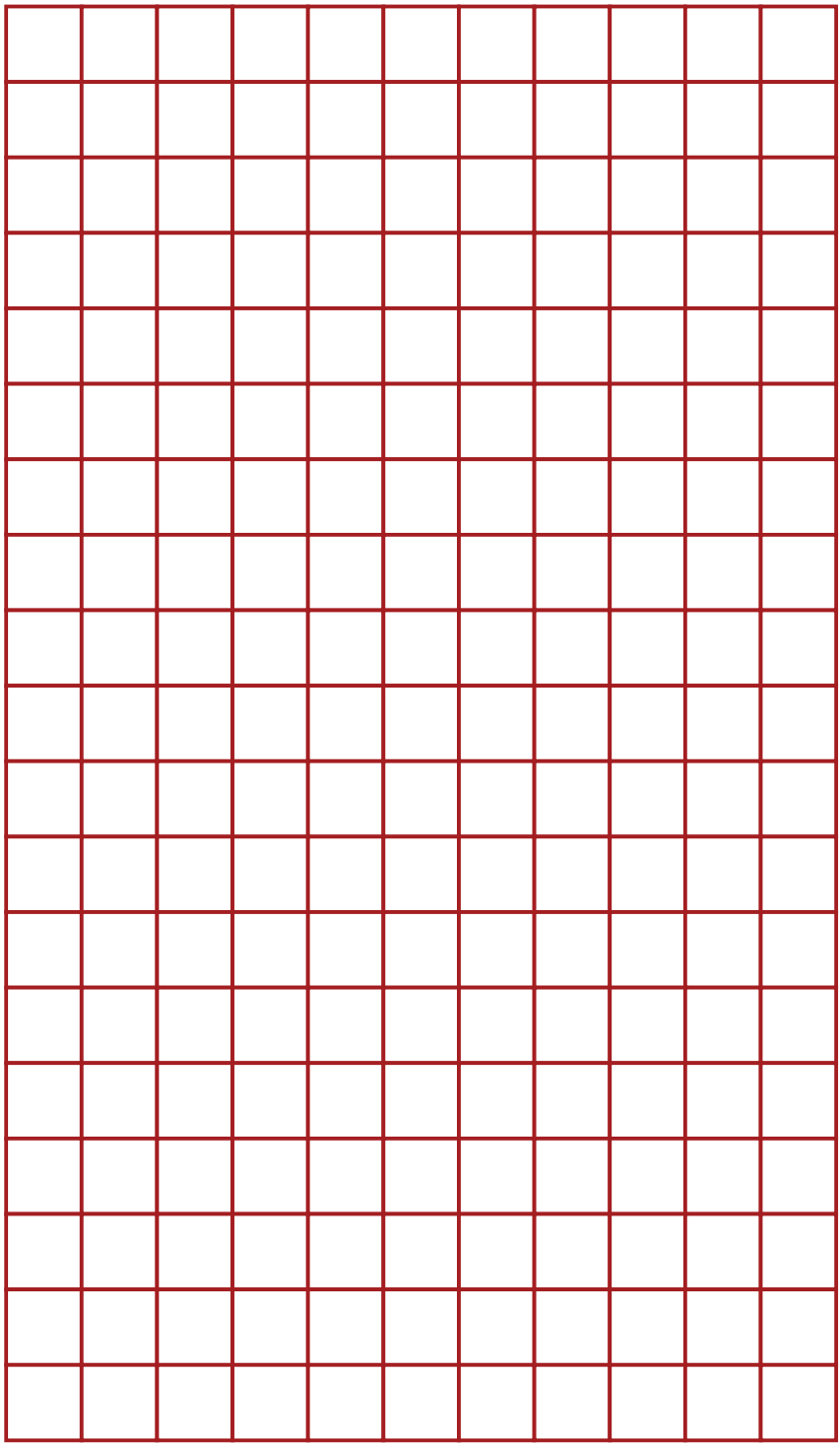
European Programme for Integration and Migration



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Migrant workers in an irregular situation in Central Europe

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Warsaw 2014

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„The difference between being undocumented and documented is a sense of freedom. Those of us who do not have a legal status are never able to feel free".

Undocumented woman in Poland

Chapter 1
Executive summary

This paper is an outcome of the multi-component project "For Undocumented Migrants' Rights in Central Europe," which has been made possible by the support of the European Programme on Integration and Migration (EPIM). It aims to summarize the findings of the project implemented from September 2012 to December 2014, but also to spark debate among policy--makers and civil societies on the protection of undocumented migrant workers in Member States.

It is the result of a collaboration of 6 non-governmental organisations based in Central Europe: SIP- Association For Legal intervention (Poland), Menedék – Hungarian Association for Migrants (Hungary), Association for Integration and Migration (Czech Republic), Society of Goodwill, Human Rights League (Slovakia) and ARCA - Romanian Forum for Refugees and Migrants (Romania).

In the report, the authors focus on identifying the main problems and obstacles towards the full implementation of the protective measures introduced by the Employers Sanctions Directive.[1] In doing so, they aim to steer attention towards employment conditions of third-country nationals in Central Europe. Apart from its informative value, the report is intended to encourage policy-makers at the national and EU levels to find solutions strengthening the protection of migrant workers against labour exploitation, with a special focus on undocumented migrants.

The "For Undocumented Migrants' Rights in Central Europe" project

The main aim of the project was to observe the implementation and application of Directive 2009/52/EC in Central Europe. In addition to studying undocumented migrants, the project scope also included documented

1 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, available at: http://eurlex.europa.eu/LexUri Serv/LexUriServ.do?uri=CELEX:32009L0052:EN:NOT

migrants performing work deemed "irregular" by national regulations, and potentially leading to the withdrawal of legal status. Activities undertaken within the framework of the project have been aimed at enhancing the protection of migrant workers from labour exploitation and raising awareness about their rights. The core of the project was a free legal assistance programme for undocumented migrant workers and for third-country nationals who were at risk of losing their legal status due to employment complications. Furthermore, the participating NGOs have been researching the situation of migrant workers and advocating at national levels.

The Employers Sanctions Directive

The aim of the Directive is to combat irregular immigration to the European Union through reducing what is defined as a major "pull factor": the possibility of obtaining work without the required legal status. At the same time, the Employers Sanctions Directive is one of the very few EU documents that actually acknowledges, to a limited extent, the rights of undocumented third-country nationals staying on EU territory, at least in respect to their labour rights. It explicitly states that the employer must pay any outstanding remuneration for work which the employee has performed, along with any outstanding taxes and social security contributions. In addition, the employer should cover the costs of transferring money to the country where the employee returned or was forcibly returned to. To facilitate the recovery of this remuneration, the Directive establishes a presumption of existence of at least the minimum wage and a working relationship of at least three months, if not proven otherwise. The Directive also emphasizes the necessity of securing the recovery of any back-payments even after the employee has left the territory of the Member State.

Who are undocumented migrants?[2]

The project focused on undocumented third-country nationals[3] and migrant workers in danger of losing their legal status due to employment complications.

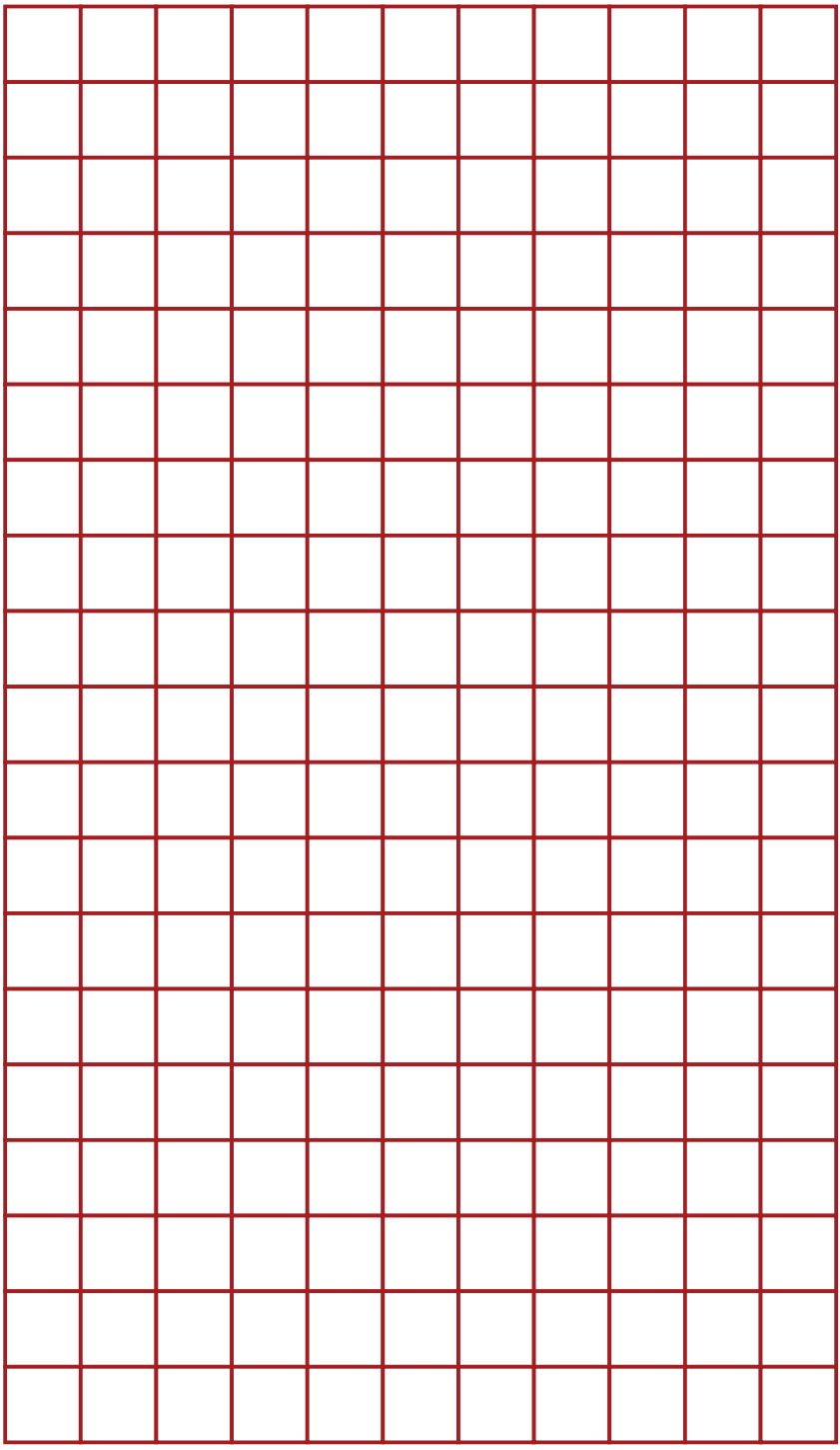
2 It needs to be highlighted that the appropriate term that should be used while describing a person without legal status is "undocumented" or "irregular", not "illegal", because no human being is illegal. (See: "Word matters" – PICUM's campaign for accurate terminology when referring to undocumented migrants: http://picum.org/en/news/picum-news/44372/)

3 Non – EU citizens

Undocumented migrants do not have a residence permit authorising them to regularly stay in their country of destination. Some may have entered the country legally, but overstayed their visa or had their residency status later withdrawn. Others were not granted asylum, or may have entered the country irregularly (without a valid visa, resident permit and/or travel document). There are many ways a migrant may become undocumented. Frequently, migrants have little or no control over processes which lead them to become undocumented: fraud, administrative delays or misinformation are only some of the obstacles faced by migrants in receiving countries.

What is irregular employment?

Irregular employment is work performed without meeting laws governing the employment of third–country nationals. In the majority of CEE countries, it is defined as dependent work performed for a legal or a natural person without an employment relationship established by existing legal context. It can be employment under an invalid contract or work performed by a person who does not meet the conditions for employment – including not holding a valid visa or temporary residence for the purpose of employment or not holding a work permit if required by law. The employment might also be considered irregular if the employer has not fulfilled the notification obligation towards the social insurance institution or paid the required social insurance contributions. Irregular employment occurs most commonly on a seasonal basis, especially in the construction, agricultural and trade sectors. Of course, all undocumented migrants performing work are considered illegally employed as no laws allow for undocumented migrants to engage in gainful employment. It is rarely a foreigner's initiative or conscious decision to work illegally. According to the laws of the Central European countries, it is an employer's obligation to register employed workers, provide health insurance and apply for their work permits. However, the foreigner bears heavier consequences as a result of any mistakes. Any violation of labour law or rules governing the employment of migrants may result in their deportation, regardless of the circumstances (e.g. whose fault it was that the migrant worked without valid documents or regardless of the migrant's length of stay in a host country). There is already unbalanced dependency in the employer-employee relationship, so in the case of the employer and the undocumented worker, the employer's advantage is further magnified. Therefore, mechanisms protecting migrant workers from exploitation are crucial.



Chapter 2.
Irregularity addressed at the EU level[4]

In every country of the European Union, including the CEE countries referenced in this report, there are unspecified numbers of irregular migrants living or rather surviving. It involves individuals who cannot return for various reasons to their country of origin or other country willing to accept them, as well as those who are heading here for clearly economic reasons. As a whole, they create one extremely vulnerable group threatened by social exclusion. Although the exact statistical numbers are missing, it is necessary to state that the estimated numbers of irregular migrants living in the European Union are constantly very high. The fact that so many foreigners remain in irregular status has led to increasing importance of the phenomenon of irregular migration with respect to the political topics in the European context in the past few decades. This can be proven by a number of binding European documents.

This chapter aims to bring a brief reflection on estimates of numbers of undocumented migrants living in the EU and, in particular, an overview of the EU approach towards questions related to the irregular migration in the context of the common migration policy. More specifically, the focus will be set on the EU approach towards the highly discussed and controversial tool used by number of Member States in the fight against irregular migration – regularisation, which, although so far excluded from the common EU legal framework, needs to be assessed at the EU level due to its cross-border impacts.

Rationale behind the common migration policy

The increasing flow of international migration in the past few decades has made it necessary to develop a common migration policy at the EU level. There are two reasons for this imperative: first, the peculiarities of the socio-political situation in the past two decades have made migration a leading topic in the political agenda of many Member States, and second, although the industrialised states benefit from migration, there is still a significant

4 Parts of this chapter were retrieved from Hradečná, P., Jelínková, M. (eds.) (2011) *Regularisation as one of the tools in the fight against irregular migration, Association for Integration and Migration*, Prague 2011, available at: www.migrace.com.

public and political resistance to any liberalisation of the existing policies and regimes in this area.[5]

The way states should cope with the indispensable number of irregular migrants in their countries is subject to many discussions as its importance is ever-increasing. The question posed in regards to this topic is **whether to choose the more repressive approach, and leave those who fail to meet usual requirements for granting a residence permit on the verge of the society with all negative consequences, or the liberal approach, which enables them to integrate into the legal structure of the state**. It is observed thorough the European Union, that national migration policies of the Member States have generally followed similar patterns over the last 20 years. Given the prerogative of states to decide who can enter a country and who cannot (except for specific categories of persons such as asylum seekers), these policies include a limitation of third country migration, essentially to cases of family reunion, a special permit system for high skilled workers and legislation to tighten control on irregular migration. Tightening migration policies towards the third country nationals is one of the measures often perceived as appropriate by many states. In particular, **the linkage of migration with security issues leads states to consider irregular migration as a "problem" that needs to be solved instead of seeing it as consequence of inadequate or failing policies**. It is therefore rather significant that the European Union has preferred targeting irregular migration for the past decade in the broader context of the important agenda of legal migration, which is being logically reflected in the final deficit structure of the common migration policy.[6]

Accordingly, it is quite important to observe that no complex solutions for negative impact caused by irregular migration have been identified so far, despite the fact that this phenomenon harnesses deprivation of fundamental human rights, human trafficking, damage to society as a whole, state budget losses caused by residence or work illegality or displays of institutional racism and xenophobia. The experts talk about a whole range of other issues connected to uncontrolled and illegal influx of foreigners into European – be it international strategy against poverty, fight against international organised crime, war conflict prevention or world economy globalisation, which make it

5 See: Undocumented Worker Transitions (2007) *Undocumented Migration Overview, State-of-the-art country reports*, Work Package 2, International Centre for Minority Studies and Intercultural Relations, Working Lives Research Institute and Université Libre De Bruxelles, July 2007, p. 5, available at: http://www.undocumentedmigrants.eu/.

6 Scheu, H., CH. (2010) *Evropská vízová politika a opatření proti nelegální migraci*. In: Jílek, D.- Pořízek, P. (eds.).Vízová politika a praxe v ČR v kontextu Evropské unie. Quo vadis visum? Sborník ze semináře. Brno: Kancelář veřejného ochránce práv. 2010, p. 159–172.

necessary to consider the phenomenon of legal and illegal migration and its legal definitions in this complex interconnection of various legal and political aspects.[7]

The issue of millions of people in irregular situation makes it a controversial topic, and in the same time an urgent call for action. However, knowing that factual non-existence of common migration policy is caused, above all, by distinct national interests of individual states, which impedes the mutual agreement up to this day, and simultaneously accepting that national policies of Member States and their specifics play still an important role in granting residence permissions, it is difficult to even imagine any common liberal approach of the European Union towards irregular migration.

Estimates of numbers of undocumented migrants in the EU

When it comes to the statistical data, often there are varied and conflicting estimates, even of documented migrants, but particularly in relation to undocumented migration in the individual Member States, thus, within the EU. According to the European Commission, "*the nature of irregular immigration into the EU makes it a phenomenon that is difficult to quantify.*"[8]

Logically, due to their legal status, irregular migrants avoid contact with government agencies as they are threatened with deportation, imprisonment and often also fines or criminal penalties. For this reason, it is only possible to estimate the extent of irregular migration. These estimates, however, had been neither plausible nor reliable. The European organisation defending rights of undocumented migrants (PICUM), assessed in one of its position papers that "*current estimates on irregular migration in the European Union are characterised by a generalised inaccuracy and reliable and systematic data collection mechanisms still have to be developed and implemented. […] Analyses of irregular migration are often confronted by inconsistent terminology and incomplete and incomparable data between states. EU Member States often rely on different standards to identify undocumented migrants and recorded irregular migration mostly covers apprehensions at borders or irregular entries.*" [9]

7 *Ibid*., p. 160.

8 European Commission, DG Home Affairs, Policies. Immigration. Irregular migration. http://ec.europa.eu/dgs /homeaffairs/what-we-do /policies/immigration/irregular-immigration/index_en.htm (last update 21 August 2014).

9 PICUM (2013) PICUM *Submission to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families*. Day of General Discussion on the role of migration statistics for treaty reporting and migration policies, 22 April 2013, Geneva, p. 2, available at:http://www.ohchr.org/Documents/HRBodies/CMW/Discussions/2013/D GDMigrationData_PICUM_2013.pdf.

Based on statistics of varying quality, it was estimated by 2008 that there were between four and seven million irregular migrants in the EU; the states with the highest absolute numbers of irregular residents including Germany, France, Italy, Spain, Greece, Poland and the United Kingdom. For Germany, the stated figures ranged from 100 000 to a million people.[10] For more precised data, PICUM, for example, referred to the research provided by the Organization for Economic Cooperation and Development (OECD), which estimates that each year around half a million undocumented migrants enter the European Union. In its most recent figures from 2007, the OECD estimated that between 10% and 15% of Europe's 56 million migrants were undocumented (i.e. approximately 5 million persons).

To date, the most relevant data result from the European Commission-funded "Clandestino" project, which calculated between 1.9 to 3.8 million undocumented migrants in Europe while previously used estimates ranged from 4.5 million to 8 million undocumented migrants in Europe and were quoted in policy documents of the European Union although their sources was not reliable. The Clandestino Project was developed from 2007 to 2009 with the aim of collecting reliable data on trends in irregular movement across Europe. As an outcome of the project, the database on irregular migration in Europe was created, which provides an inventory and a critical appraisal of data and estimates related to undocumented migration in the European Union and selected Member States.[11]

European migration policy on irregular migration

In the European context, migration became an issue of common interest of European Communities with the Maastricht Treaty (1992)[12] establishing the European Union, which ranked this issue among the areas managed on the basis of international cooperation between the Member States. Fighting against irregular migration has then been a main focus of European Union policy ever since the communitarisation of migration policies in the Treaty of Amsterdam (1997),[13] which granted to the EU full responsibility with respect to immigration. Article 63 (3) of the Amsterdam Treat stated, among others,

10 HWWI (2008). *Irregular Migration in Europe – Doubts about the Effectiveness of Control Strategies*, Policy brief no. 9, Focus migration, Hamburg Institute of International Economics (HWWI), March 2008, Hamburg, available at: www.focus-migration.de.

11 See: Clandestino - Undocumented Migration: Counting the Uncountable Data and Trends Across Europe, Eliamep, 2009, http://clandestino.eliamep.gr/about/.

12 Treaty on European Union, OJ C 191 of 29.7.1992.

13 Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts, signed on 2 October 1997, OJ C 340 of 10.11.1997.

that the Council on European Union may take measures against unauthorised immigration and residence, including returning individuals who reside illegally in a Member State.[14]

It was the Tampere European Council in Finland (October 1999),[15] however, which was the first to determine the elements for a common EU migration policy as a part of the area of freedom, security and justice in the European Union. One of the four priorities in this new common policy was to "tackle illegal immigration" through policies framed around the prevention of irregular migration and the facilitation of return, with a strong focus on border control, the fight against trafficking of human beings and repatriation of migrants. Even though the Tampere conclusions called for guarantee of human rights, this dimension was further overshadowed by emphasis on border control and other restrictive measures focused on repelling, limiting and controlling immigration. At the beginning of 2002, an action plan adopted by the cabinet of ministers encouraged the development of a joint visa and return policy, improved exchange of information and the coordination of control authorities, the setting up of a European border police, and a tightening of sanctions.[16] Similarly for the Commission, policies on irregular migration were considered as a prerequisite for the development of more open policies on legal migration and, thus, needed to be addressed by a comprehensive approach, at all different stages of the migration process by means of variety of repressive measures (COM(2000)757).[17]

The next five-year Hague programme (2004-2009)[18] was driven by fear of the EU of the growing threat of terrorism in Europe after incidents in New York and Madrid, and, hence, reflected the strengthening securitization trends in the migration discourse and draw considerable attention to the actions aimed to control irregular migration within three priority areas: i) strengthening border control (to limit admission of third country nationals), ii) recognition of removal decisions and return measures, and iii) criminalization of trafficking

14 See for example, Scheu, H., CH. (2008) *Problematika regularizace z pohledu práva EU. In: Neregulérní pobyt cizinců v ČR: Problémy a jejich řešení.* Collection of articles. Kadlecová, M, Polanská, J. (eds.). Praha: Člověk v tísni. 2008, p. 100–108, available at: www.migrace.com.

15 Presidency Conclusions, Tampere European Council 15-16 October 1999, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/en/EJN360.pdf

16 HWWI (2008). *Irregular Migration in Europe – Doubts about the Effectiveness of Control Strategies*, Policy brief no. 9, Focus migration, Hamburg Institute of International Economics (HWWI), March 2008, Hamburg, available at: www.focus-migration.de.

17 Communication from the Commission to the Council and the European Parliament on a Community immigration policy (COM(2000) 757 final). Available at: http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/immigration/general/index_en.htm.

18 Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice [COM(2005) 184 final – Official Journal C 236 of 24.9.2005].

in human beings and smuggling.[19] Since then, the political line of intensifying migration control has run throughout all relevant documents while the adoption of directives on legal migration slowed down. As a consequence, the European border police FRONTEX commenced operations in 2005, the Commission´s Communication on policy priorities in the fight against illegal immigration of third-country nationals (2006)[20] proposed the establishment of so-called e-borders whereby immigrants and emigrants would be registered automatically by means of electronic, biometrically supported systems.[21]

The securitisation direction was further replicated by the European Pact on Immigration and Asylum, adopted during the French Council presidency in 2008.[22] Although not legally binding, this political document, driven by nationalism and intergovernmentalism, was created to pave the way for the adoption of the next multi-annual programme in the area of freedom, security and justice. Thus, the Pact defined five common principles for future policy agenda on migration and asylum, among which it stressed control of irregular immigration by ensuring the return of irregular migrants to their country of origin or transit as well as envisaged more effective border controls while it suggested selective legal migration taking into consideration the national labour markets needs with preference for circular migration or admission of highly qualified workers and researchers.[23]

The Stockholm programme, adopted a year later in 2009, came in an uncertain time of economic crisis overwhelming the European space and a long-awaited institutional reform, which would transform the policy-making in the field of migration. Consequently, it contained far fewer legislative initiatives than in previous programmes, focusing more on improving evaluation and on strengthening cooperation (both within the EU and with third countries, incl. readmission agreements) with regard to the expansion of the migration policy area, and the need to consolidate the work done over the past decade. Similarly to the Pact, the Stockholm Programme remained very

19 Scheu, H., CH. (2010) *Evropská vízová politika a opatření proti nelegální migraci*. In: Jílek, D.- Pořízek, P. (eds.).Vízová politika a praxe v ČR v kontextu Evropské unie. Quo vadis visum? Sborník ze semináře. Brno: Kancelář veřejného ochránce práv. 2010, p. 159–172.

20 Communication from the Commission of 19 July 2006 on policy priorities in the fight against illegal immigration of third-country nationals [COM(2006) 402 final - Not published in the Official Journal].

21 HWWI (2008). *Irregular Migration in Europe – Doubts about the Effectiveness of Control Strategies*, Policy brief no. 9, Focus migration, Hamburg Institute of International Economics (HWWI), March 2008, Hamburg, available at: www.focus-migration.de.

22 Council of the European Union, *European Pact on Immigration and Asylum*, 24 September 2008, available at: http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2013440%202008%20INIT.

23 Carrera, S., Guild, E. *The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanisation? Security vs. Rights?* Policy brief no. 170, Centre for European Policy Studies, September 2008, available at: http://www.libertysecurity.org/IMG/pdf_The_French_Presidency_s_European_Pact_on_Immigration_and_Asylum.pdf.

vague about legal migration and integration, while it is far more specific about the development of border control and asylum policies and focus is brought to the external dimensions of migration, reflecting the principles of the Global Approach to Migration.[24]

In 2009, the Lisbon Treaty[25] abolished the former EU architecture and made a new allocation of competencies between the EU and the Member States. The treaty also reformed several of the EU's internal and external policies, among others, it introduced several changes to the formulation of common migration policy. The relevant provisions for this area are now incorporated in Article 79 of the Treaty on the Functioning of the European Union. According to these, the EU is required to prevent and reduce irregular immigration, in particular by means of an effective return policy, with due respect for fundamental rights. In general, the EU aims to set up a balanced approach to dealing with legal migration and fighting illegal immigration. Proper management of migration flows entails ensuring fair treatment of third-country nationals residing legally in Member States, enhancing measures to combat illegal immigration and promoting closer cooperation with non-member countries in all fields. It is the EU's aim to develop a uniform level of rights and obligations for legal immigrants, comparable with that of EU citizens.[26]

In conformity with previous policy-making in the area of freedom, justice and security, a new multiannual programme should have been adopted in 2014 for the period of next five years. In March 2014, the Commission adopted a new communication presenting its vision on the future agenda for Home Affairs,[27] which contributed to the strategic guidelines discussed by the European Council and Parliament in June 2014. In its communication, the Commission identified three key future challenges in the area of home affairs policy : strengthening trust, mobility and growth. To address these challenges, the Commission proposed to base future EU justice and home affairs policy in consolidating what has been achieved within last 15 years, codifying EU law and practice where necessary and complementing the existing framework with new initiatives. However, the Commission did not propose another five-year programme based on arguments that the policies in question became

24 Collett, E. *Beyond Stockholm: overcoming the inconsistencies of immigration policy*. European Policy Centre, Working Paper 32, december 2009, available at: http://www.epc.eu/documents/uploads/pub_4863_epc_working_paper_32_beyond_stockholm.pdf.

25 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306 of 17.12.2007.

26 European Parliament. Immigration Policy. Fact Sheets on the European Union, April 2014, available at: http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.12.3.html.

27 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, An open and secure Europe: making it happen, 11 March 2014, COM(2014) 154 final.

well developed following successive changes to the EU Treaties, specifically the Lisbon Treaty as well as the European Parliament and the Council have become co-legislators in virtually all areas of home affairs. Therefore, a more political and strategic approach is now needed, which has to be discussed in between all EU institutions.[28]

Areas of EU irregular migration related policies

The regulation of EU measures against irregular migration is quite complex and entails a large number of policy or legislative documents that has been adopted since the adoption of the Tampere programme. Considering the extent of these regulations, several policy areas are distinguished with the common migration policy on irregular migration such as:

- Visa policy and efficient control of external borders
- Fight against smuggling and human trafficking combined with assistance for victims
- Return and readmission, incl. recognition of removal decisions
- Sanctioning of irregular employment

In general sense, it is the Commission, which takes the initiatives to determine directions of the policy-making in the field and to propose for concrete measures to be taken therein. The Commission´s major documents in this area are as follows:

- *Communication from the Commission to the Council and the European Parliament on a Community immigration policy* (COM (2000) 757)
- *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration* (COM (2001) 672)
- *Communication from the Commission to the Council and the European Parliament in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external border and the return of illegal residents* (COM(2003) 323)
- *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on immigration, integration and employment* (COM(2003) 336 final)

28 European Commission (2014), *The Future EU Justice and Home Affairs Agendas*: *Questions and Answers*, memo, Strasbourg, 11 March 2014, available at: http://europa.eu/rapid/press-release_MEMO-14-174_en.htm

- *Communication from the Commission on policy priorities in the fights against illegal immigration of third country nationals* (COM (2006) 402)
- *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common Immigration Policy for Europe: Principles, actions and tools* (COM(2008) 359 final)
- *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Strengthening the global approach to migration: increasing coordination, coherence and synergies* (COM(2008) 611 final)
- *Communication from the Commission to the European Parliament and the Council - Evaluation of EU Readmission Agreements* (COM(2011) 176 final)
- *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Communication on migration* (COM(2011) 248 final)
- *Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The Global approach to migration and mobility* (COM(2011) 743 final)
- *Communication from the Commission to the Council and the European Parliamnet on EU Return Policy* (COM (2014) 199 final)
- *Communication from the Commission to the European Parliament and the Council on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals* (COM(2014) 286)

Based on the Commission recommendations, the Council and the European Parliament proceed to the adoption of respective EU legislation, mostly in the form of directly applicable regulations or directives, which, generally have to be implemented into national legislations of the Member States within a two-year time period. Some of the most important legal documents of the EU on irregular migration are demonstrated in the table below.[29]

29 Merlino, M., Parkin, J. (2012) *Irregular Migration in Europe: EU policies and the Fundamental Rights Gap*, report, Centre for European Policy Studies, available at: http://migration.etuc.org/en/docs_en/1%20Irregular%20Migration%20in%20Europe_%20EU%20policies%20and%20the%20Fundamental%20Rights%20Gap.pdf.

Table. 1 EU legally binding measures on irregular migration

Subject	Measure
Carrier Sanctions	Directive 2001/51 on carrier sanctions (OJ 2001 L 187/45)
Employers sanctions	Directive 2009/52 on sanctions for employers of irregular migrants (OJ 2009 L 168/24)
Expulsion/removal	Directive 2008/115 (Returns Directive) (OJ 2008 L 348/98)
	Decision on European return programme (OJ 2007 L 144)
	Decision on costs of expulsion (OJ 2004 L 60/55)
	Decision 2004/573 on joint flights for expulsion (OJ 2004 L 261/28)
	Directive 2003/110 on assistance with transit for expulsion by air (OJ 2003 L 321/26)
	Conclusions on transit via land for expulsion—adopted 22 Dec. 2003 by Council
	Directive 2001/40 on mutual recognition of expulsion decisions (OJ 2001 L 149/34)
External Borders	Regulation 1988/2006 on SIS II, amending Reg. 2424/2001 (OJ 2006 L 411/1)
	Regulation 1987/2006 establishing SIS II (OJ 2006 L 381/4)
	Regulation 2424/2001 on funding SIS II (OJ 2001 L 328/4)
	Regulation 871/2004 on new functionalities for SIS (OJ 2004 L 162/29)
	Decision 2001/886/JHA on funding SIS II (OJ 2001 L 328/1)
Exchange of Information / Data	Decision 2005/267 on early warning system (OJ 2005 L 83/48)
	Directive 2004/82 on transmission of passenger data (OJ 2004 L 261/64)
	Regulation 378/2004 on procedure for amendments to Sirene manual: (OJ 2004 L 64)
Human Smuggling	Directive 2002/90 on the facilitation of unauthorized entry, transit, and residence (OJ 2002 L328/17)
	Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit, and residence (OJ 2002 L 328)
Readmission	Readmission Agreements: concluded with Hong Kong (entered into force in 2004), Macao (2004), Sri Lanka (2005), Albania (2006), Russia (2007), Ukraine, Moldova, Bosnia and Herzegovina, Montenegro, Serbia and FYROM (on 1 January 2008), Georgia (2010), and Pakistan. 5 Current mandates are at various stages of negotiation: Morocco, Algeria, China, Turkey, Cape Verde and Belarus.
Trafficking in persons	Directive 2004/81 on res. permits for trafficking victims (OJ 2004 L 261/19)
	Framework Decision on trafficking in persons (OJ 2002 L 203/1)
Visa policy	Regulation 453/03 amending Reg. 539/01 listing TCNs who must be in possession of visas when crossing external borders and those who are exempt (OJ 2003 L69/10)

Regularisation as a tool in the fight against irregular migration

As said previously, the EU measures implemented in the fight against irregular migration are dominated by a security rationale. Therefore, by its nature to grant the legal status to people who lack of it, the regularization has not appeared yet among the tools with potential to tackle this negative phenomenon in EU legal documents. However, since their emergence in the 70s in France, Belgium, the Netherlands and the UK, regularisations have been used repeatedly at the national level to address the dramatically raising numbers of undocumented migrants in the individual Member States.

Moreover, despite their rather controversial or exceptional status, the frequency of regularization schemes and amount of regularised people within the EU does prove that this policy tool has become a renowned practice in many European countries. According to the study REGINE,[30] 43 official non-recurring regularisations and normalisations were enforced in 17 EU Member States between 1996 and 2008. In total, 4.7 million foreigners in irregular situation registered, out of which approximately 3.2 million persons were granted residence permit within this period. Since then, few other schemes have been adopted thorough Europe, incl. Poland, one of the reference countries in this report.

The goals and rationales underpinning regularisations may vary significantly across the EU. Basically, it is impossible to find identical regularisation measures in practice, or at least such measures that could be generally transferred and implemented without further pro futuro in the same country, let alone a different one. The heterogeneity of regularisations is related to the non-existing common European position, both towards the Council of Europe and the European Union. The current legal status does not have much to do with implementing regularisation measures into exclusive competence of individual states. The states therefore create their own definitions of regularisation and determine its implementation scale according to their own needs and conditions. Different programmes have different eligibility criteria, target population or political objectives. Also the methods used to regularize undocumented migrants in each country vary from mechanism built into policy frameworks, to large-scale or "one-off" regularization programmes targeting migrants who meet certain criteria or launched for a limit time period, to the granting the legal status on an individual, "case-by-case" basis.

A state's decision to implement regularisation depends on combination of inner factors such as the state's economic situation, dynamics of migration flows, attitude of governing political parties or the activation level of migrant groups. In most cases, the EU Member States use regularisation policies to manage informal economy and illegal employment of migrant workers or to achieve humanitarian goals by granting legal status to migrants in an irregular situation, asylum seekers in particular, as an alternative to removal.[31] On the other hand, there are also Member States, which reject the regularisation

30 Baldwin-Edwards, M. – Kraler, A. (eds.) REGINE Regularisations in Europe: Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the EU. Final Report. Vienna: ICMPD. 2009. Ref. JLS/B4/2007/05. Available at: http://research.icmpd.org/1184.html.

31 Brick, K. (2011): *Regularizations in the European Union: The Contentious Policy Tool*, Migration Policy Institute, December 2011.

approach entirely such as the Czech Republic among the reference countries, or are reluctant to admit that undocumented migrants exist in their countries, e.g. Bulgaria.[32]

The extent of this report does not provide enough space to assess the pros and cons of regularization measures. However, based on assumption that regularisation clearly falls within the scope of the powers granted to the European Union, as defined by Treaty of Amsterdam, and, lately by the Lisbon Treaty, it is appropriate to review the evolution of European Commission thinking on the role of regularisation as a policy tool in common migration policy framework.

Following the Tampere council conclusions, the Commission has for some time taken an interest in regularisation policy. Although regularisation was considered at that time as an issue of concern in the context of the development of common migration policy, to date, the European Union has not explicitly dealt with regularisation as a policy option. The absence of an explicit policy on regularisation is justified by the fact that this type of measure as such "*touches the core of immigration policy – namely, defining the conditions and procedures for admission of third country nationals …*", which still pertains to the exclusive competence of the Member States (without prejudice to the harmonisation of the respective rules within the Single Permit Directive).

Thus, in its early communications adopted yet, the Commission i) either refrained from an evaluation of whether regularisation could be an effective policy tool to address the complex phenomenon of illegal migration,[33] or ii) suggested even that, generally, regularisations were not an appropriate policy instrument, based on a principled argument that *"[i]llegal entry or residence should not lead to the desired stable form of residence."*[34] As a corollary, the Commission proposed policies emphasized on strengthening border management, the common visa policy, information exchange mechanisms and development of common policies on readmission and return. Paradoxally, the Commission later admitted that regularization schemes might be considered as a factor enhancing the integration process as for the situation of those already in an irregular status on the territory of Member States (COM (2003)336). However, it is still emphasised that such programmes demonstrate "*the*

32 Undocumented Worker Transitions (2007) *Undocumented Migration Overview, State-of-the-art country reports*, Work Package 2, International Centre for Minority Studies and Intercultural Relations, Working Lives Research Institute and Université Libre De Bruxelles, July 2007, p. 5, available at: http://www.undocumentedmigrants.eu/.

33 Communication from the Commission to the Council and the European Parliament on a Community immigration policy. COM (2000) 757 final.

34 Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration COM (2001) 672 final, p.6.

current limits of the measures in place to manage the existing channels for legal immigration" (COM (2004)412).

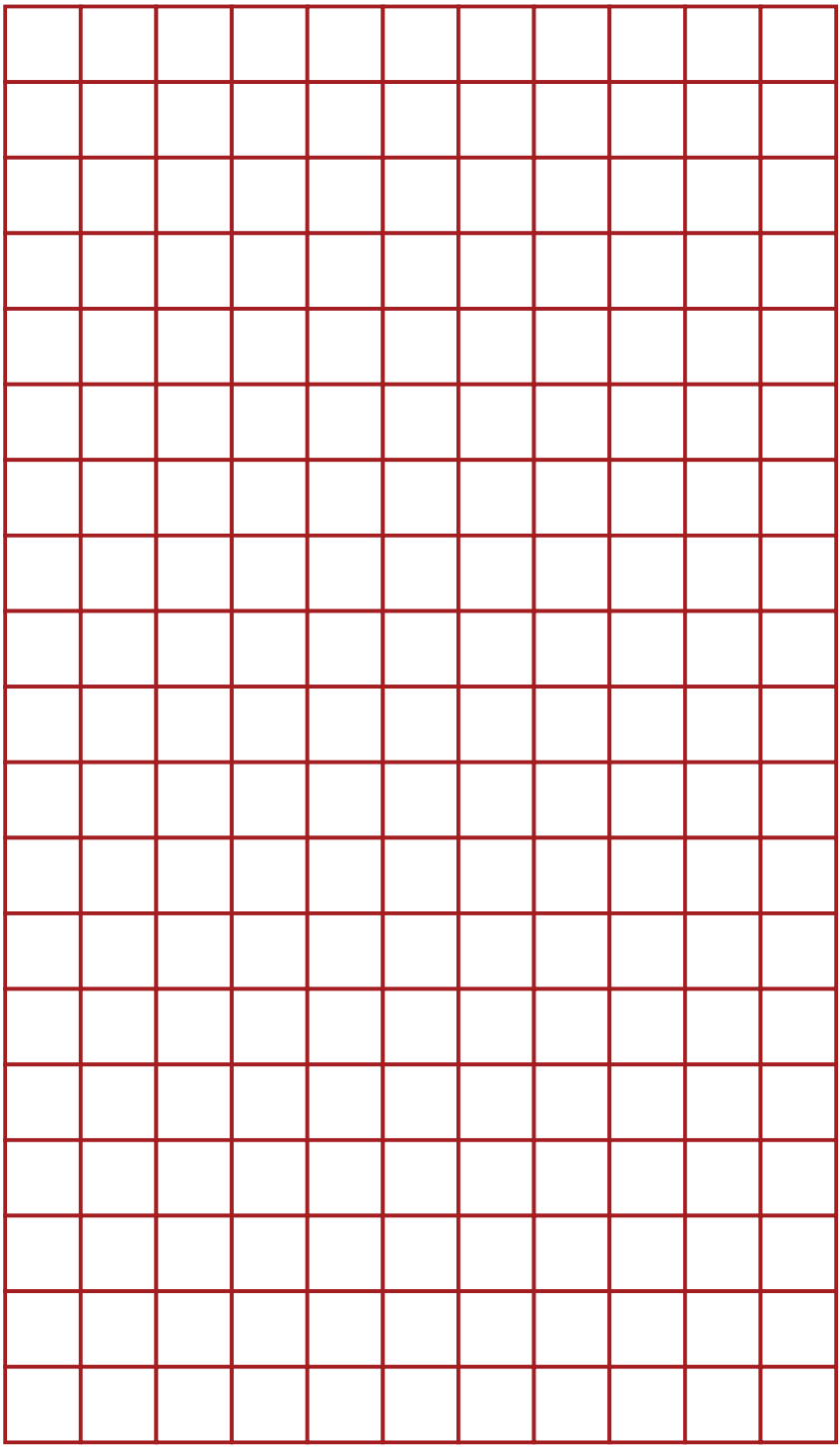
Since the adoption of the Hague programme and its focus on securitization of common migration policies, an increasingly conservative stance of the European Union on regularization may be observed in repeated proposals for limiting the freedom of Member States to implement the regularisations at their territories. These were driven by the belief that regularization policies of one Member State could impact on neighbour countries because of the free movement of regularized persons within the Schengen area. Consequently, the Council first required the implementing Member States to inform the Commission of planned regularization measures,[35] whereas the Pact on Immigration and Asylum explicitly limited regularizations only to the case-by-case schemes. Despite these anti-regularisation efforts, the large scale programmes implemented in Belgium and Italy in 2009 proved that the Member States would always act on their best interests no matter the EU rhetoric.[36]

At the same time, lately both the Member States and the EU, have admitted the importance of recognition of the humanitarian cases. For example, the Returns Directive foresees the cases when Member States may grant migrants, in exceptional cases, a residence permit for humanitarian reasons should their return be harmful or unfeasible. Similarly, the Employers Sanctions Directive obliged the Member States to create mechanisms, under which undocumented migrant workers, minor or extremely exploited by their employers, could be granted a residence permit in the host country. Notwithstanding these trends, there is no consensus within the EU concerning the need for regularisation policies. Given the diversity of positions, Member States on the whole are not in favour of regulation at the European level. However, there is considerable support among governments for increased exchange of information, including the exchange of good practices.[37]

35 Council decision 2006/688.

36 Brick, K. (2011): *Regularizations in the European Union: The Contentious Policy Tool*, Migration Policy Institute, December 2011.

37 ICMPD (2009) REGINE Regularisations in Europe: Study on practices in the area of regularisation of illegally staying third-country nationals in the Member States of the European Union. Policy Brief. Vienna: ICMPD. 2009. Available at: http://research.icmpd.org/1184.html.



Chapter 3.
Country migration profiles

This project covers five countries: the Czech Republic, Hungary, Poland, Slovakia and Romania. Located in Central Europe, they either border each other now or they did it in the past. Regardless of their differences, such as geographic size, population and homogeneity, they share many common historical, economic, political and social developments.

Looking back only to the 19th century, the analysed countries did not exist as independent states; they belonged (at least in large part) to the Habsburgs' empire, gained their independence in 1918, and only then built their statehood. They suffered extensively during the World War II, and became dependants of the Soviet Union, which imposed socialist regimes on them. Democracy and a pluralist political scene emerged only after 1989. In 1991, the four of the countries (the Czech Republic, Hungary, Poland and Slovakia) formed a political regional cooperative initiative called the Visegrad Group.[38] Aspirations to join the European Union and NATO were met in 2004 and 1999 respectively (for Slovakia 2004). Romania joined NATO in 2004, and the European Union in 2007.

For a better comparison of basic features, see the table below:

Table 2.
Background information on the situation in the researched countries.

	Czech Republic	Hungary	Poland	Slovakia	Romania
Population (in thousands in 2014)	10.512	9.879	38.495	5.415	19.942
Area in km²	78 866	93.030	312.679	49.035	237.500
GDP per capita in PPS Related to the EU-28 (Eurostat 2013)[40]	80%	67%,	68%	76%	54%
Unemployment rate (2014.06)	6 %	8,1%	9,1%	13,8%	7,1%
Estimated number of migrants (according to national reports)	441.000	110.000	121.200	71.600	58.500
Estimated share of migrants in the total population	4,2%	1,1%	0,3%	1,3%	0.3%

38 The Visegrad Group (also known as the "Visegrad Four" or "V4") reflects the efforts of the countries of the Central European region to work together on common interests within the all-European integration. It was formed in 1991, and played its most important role in the initial period of its existence (1991–1993), during talks with NATO and the EU http://www.visegradgroup.eu/about (30.06.2014).

39 Source of data: Eurostat http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language= en&pcode=tec00114 (30.06.2014).

During their modern history, the five project countries were a source of many migrants seeking a better life abroad. Thousands of people escaped poverty during between the 19th and 20th centuries. The World War II made other thousands more of people leave their homes as refugees. Despite closed borders, the socialist regimes existing in Czechoslovakia, Hungary, Poland and Romania also pushed people to migrate abroad.

The change came in 1989, when newly emerged democracies and free markets in these countries started to attract foreigners to come. However, they had very little experience in dealing with immigrants, which included political migrants seeking asylum and economic migrants. Migration laws at the time could be considered quite liberal, still allowing for movement of people from the West and the East. More recently introduced migration laws and policies became stricter, following the European Union examples and regulations.

Since the change of a political system in 1989, these five countries in Central Europe developed immensely in heading towards the welfare status existing in the older European Union countries; however, their GDP remains at the level between 54% - 80% below the average EU GDP. Their developing economies are attracting more and more migrants, coming mainly from the neighbouring regions outside the European Union. Since the state borders of Hungary, Poland, Slovakia and Romania are also partially external borders of the European Union, they allow for an easier arrival of migrants from the neighbouring non-EU countries. Poland borders Russia, Belarus and Ukraine; Slovakia borders Ukraine; Hungary borders Ukraine and Serbia; and Romania borders Ukraine, Moldova and Serbia. Nevertheless, for many, these Central European countries are considered as transit countries to the West. Generally speaking, **the total number of migrants in the five countries, despite continuous growth, remains relatively small**, both when compared to the other European Union countries and as a share of the general population.

For many migrants from the eastern neighbourhoods, Poland, Slovakia and the Czech Republic are closer in terms of distance as well as cultural and language background: it is easier for them to communicate, and find accommodation in these countries.; while Hungary has become a destination for many ethnic Hungarians living abroad. And Romania is a destination country for many Moldavians, who speak Moldovan language, which is very similar to Romanian.

The transition from being an sending country, which lacks local workers, to a destination country, which has a gradually growing influx of migrants, is still a new phenomenon for all five countries. Thus, they have had little experience

in formulating adequate migration policies. Even till now, new policies and laws are evolving, as the flow of migrants continues.

After the political changes, policies were oriented to welcome compatriots returning from exile and migrants seeking to develop business activity. The five countries tried to keep a relatively free entry for citizens of the former socialist block. However, aligning with the European Union's regulations changed this situation, making admission for those citizens more restricted. The global economic crisis and local market needs pushed authorities to offer better employment opportunities to certain groups – e.g. a simplified procedure for obtaining a work permit in Poland, for citizens of Armenia, Belarus, Georgia, Moldova, Russia and Ukraine.

According to the Czech Statistical Office, there are 441,000 foreigners with a residence permit **in the Czech Republic**, which amounts to 4.2% of the total population – that is the highest share among the five countries presented. In this group, 238,000 foreign nationals have a permanent residence permit, while 203,000 have other residence permits (especially long-term stays over 90 days).

Among all foreign nationals legally staying in the CR, 37% are EU citizens. This includes Slovakia (91,000 people), Poland (19,000), Germany (18,000), Bulgaria (9,000), and Romania (nearly 7,000). The high number of Slovak nationals is a consequence of common statehood before 1993.

Among third-country nationals, the biggest groups come from Ukraine (105,000 people), Vietnam (57,000), and the Russian Federation (33,000).

In Hungary, the number of foreigners has been growing continuously in the last ten years. According to the Central Statistical Office, in 2001 there were 110,000 foreign nationals (1.1% of the entire population), while the 2011 census estimates already 205,000 foreigners (equal to 2.1% of the population). Although the number in 2013 decreased to 141,000, the share of third-country nationals grew. It was 37% in 2012, a few percentage-points more than in 2011 (32%) and 2010 (34%).

In Hungary nearly 60% of foreigners are citizens of other EU Member States. Most of them come from neighbouring countries, primarily from Romania, which was the country of origin of 30% of the foreign nationals staying in Hungary in 2012.

A unique feature of the migrants in Hungary is that, according to the Office of Immigration and Nationality in 2013, most of them are ethnic Hungarians and are therefore culturally similar to the native population. As a consequence of new legislation simplifying the naturalisation procedure, the share of foreigners from Romania dropped after 2005. In this regard, an

important change came after Bulgaria and Romania joined the European Union, as citizens of these countries were no longer counted as third-country nationals . Similarly, since 1 January 2009, when Hungary abolished temporary work restrictions for Romanians, the number of work permits issued annually decreased substantially. Nevertheless, Romanian citizens remained a large portion of the foreigners in the Hungarian labour market. Out of third-country nationals, Ukraine, Serbia and China show the biggest numbers.

In Poland, according to the National Census in 2011, there were 55,400 foreigners registered. Other sources state that 121,219 foreigners were holders of different types of residence permits in 2013. Ukrainians represent the biggest number, accounting for about 30% of all foreigners; the other large groups are citizens of the Russian Federation, Belarus, Vietnam, and China.

Different estimates provided by researchers say that the number of undocumented migrants varies between 50,000 and 450,000 people, coming mainly from Ukraine, Vietnam, Moldova, China and Belarus, which correlates with statistics on regular migrants.

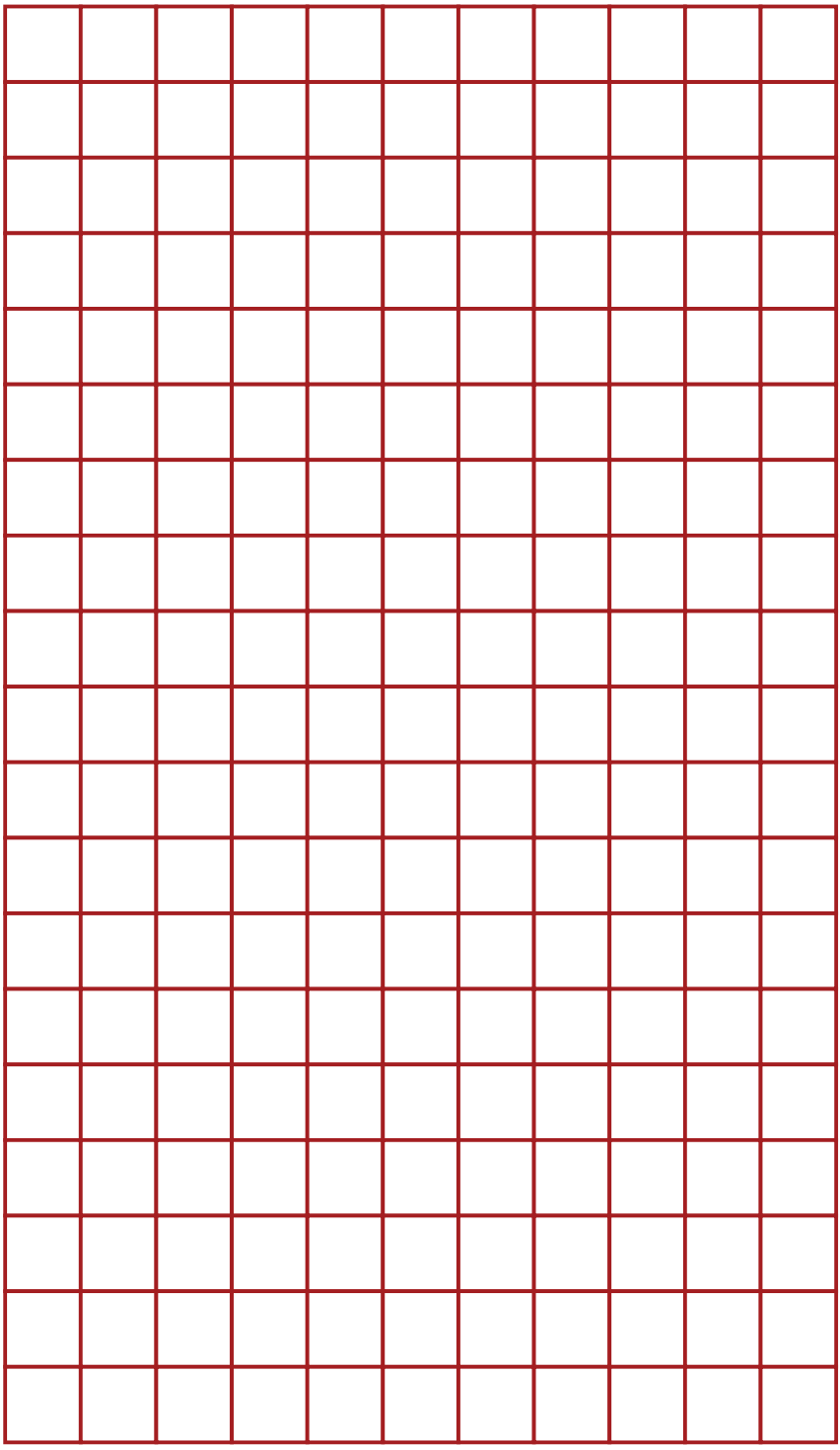
In Slovakia, there has been a gradual increase in the number of migrants entering the country since 1993. However, the interesting fact is that while legal migration has been increasing, even after accession to the European Union and to the Schengen area, irregular migration and the number of persons seeking international protection has been gradually decreasing.

In terms of the origin of foreigners holding a residence permit in the territory of Slovakia, the largest groups of immigrants are foreigners came from EU Member States. For better perspective, in 2013 the twelve countries with the largest numbers of migrants were: Czech Republic – 9,321, Hungary – 6,912, Romania – 5,949, Poland – 5,050, Germany – 4,093, Austria – 2,147, Italy – 2,140. Regarding third-country nationals, the largest groups come from Ukraine – 6,898, Serbia – 4,021, the Russian Federation – 2,633, Vietnam – 2,089 and China – 1,926.

In Romania, according to the annual activity report of the General Inspectorate for Immigration, there were 58,497 third country nationals legally residing in Romania at the end of 2013. The largest groups of foreigners residing in Romania originate from the Republic of Moldova – 11,699, Turkey – 9,400 and China – 7.938.

Every year the government establishes a number of work authorizations for foreigners. In 2014, 5,500 work authorizations can be issued. The most prevalent employment sectors among the migrant workers are low and middle skilled sectors, including wholesale and retail trade, the manufacturing industry,

construction, domestic activities, and the hotel and restaurant industry. In 2013, 2,093 work authorizations were issued by the General Inspectorate for Immigration to permanent workers (1,557), athletes (201), deployed workers (167) and highly skilled workers (144).



Chapter 4.

Transposition of the Directive 2009/52/EC to the national legal frameworks[40]

The Employers Sanctions Directive was adopted on 18 July 2009 with the deadline for transposition set for 20 July 2011. The aim of the Directive, as stipulated in Preamble (2), is to combat illegal immigration to the European Union through reducing what is defined as a major "pull factor": the possibility of obtaining work without the required legal status. Therefore, the measures introduced in the Directive focus mainly on prohibiting the employment of third-country nationals who do not hold residence permits and sanctioning employers who infringe the said prohibition with sanctions ranging from fines to criminal liability in the most serious cases. It also obliges Member States to carry out effective and adequate inspections on their territory to control the employment of illegally staying third-country nationals (Article 11).

The Directive's goals are to be achieved by obligations imposed on the employers of migrant workers, e.g. to verify the legal status of the worker before employing a third-country national and notify competent authorities of the initiation of the working relationship (Article 4(1)). Complying with these responsibilities may release the employer from criminal liability or financial sanctions. The Directive also strives to establish measures aimed at reinforcing undocumented migrants' rights. It explicitly states that the employer is obliged to pay any outstanding remuneration for work which the employee has performed, and any outstanding taxes and social security contributions. In addition, the employer should cover the costs of transferring money to the country where the employee returned or was returned to (Article 6). To facilitate the recovery of this remuneration, the Directive establishes a presumption of existence of at least the minimum wage and a working relationship of at least three months if this is not proved otherwise. The Directive emphasizes the necessity of securing the recovery of any back payments even after the employee has left the territory of the Member State. This is also a consequence of the fundamental limitation of the Directive that any of its provisions may not be implemented with the result of facilitating the irregular stay of third-country nationals on the territory of a Member State.

40 For details see country reports available at: http://interwencjaprawna.pl/en/projects/for-undocumented-migrants-rights-in-central-europe/.

This is the reason why the Directive emphasizes the employees' right to remuneration for their work on one hand, but on the other fails to provide for the possibility of granting residence permits to undocumented migrant workers with the aim of recovering their outstanding remuneration or filing a complaint against their employers. According to the Directive, residence permits may only be granted on a case-by case basis to the victims of the most serious offences committed by the employer. These offences include employment in particularly exploitative conditions and the employment of a minor (Article 13 (4)); and even then only under the condition of employee's involvement in the criminal proceedings initiated against the employer. Only third-country nationals holding the said residence permit may be granted an extension of legal residence for the sole aim of facilitating the recovery of any outstanding remuneration (Article 6(5)).

The following brief summary provides a comparison of the implementation of the Employer Sanctions Directive in national legislation of five Central European countries: the Czech Republic, Hungary, Poland, Romania and Slovakia. Emphasis is put on the main measures introduced by the Directive: criminal liability of employers, financial sanctions imposed on employers, recovery of outstanding remuneration, an effective complaint mechanism, information regarding employee's rights and the possibility of granting special residence permits to specified groups of undocumented migrant workers.

Financial sanctions against employers

As stipulated in Article 5 of the Directive, infringements regarding the prohibition of employment of illegally staying third-country nationals shall be subject to **effective, proportionate and dissuasive sanctions** against the employer.

Sanctions shall include:

- **financial sanctions** which shall increase in amount according to the number of illegally employed third-country nationals;

and

- **payments of the costs of return** of illegally employed third-country nationals in those cases where return procedures are carried out.

Member States may provide **reduced financial sanctions** where the employer is **a natural person** who employs an illegally staying third-country national **for his or her private purposes** and where **no particularly exploitative working conditions are involved.**

Member State	National law
Czech Republic	Delegating work to an illegally staying third-country national is punishable with: ▸ a fine of up to 186 500 EUR for natural persons delegating work to third-country nationals for private purposes; ▸ a fine from 9 300 EUR to 373 000 EUR for employers who are legal entities. ▸ payment of the costs of return of the illegally staying third-country national. No explicit increase of sanctions in relation to the number of the employees is established, general rules of proportional punishment shall be applicable.
Hungary	Delegating work to a third-country national without the required work permit is punishable with: ▸ a fine from 650 EUR to 1300 EUR for natural persons delegating work to third-country nationals for private purposes; ▸ a fine from 2500 EUR to 5000 EUR for employers who are legal entities No explicit increase of sanctions in relation to the number of the employees is established, general rules of proportional punishment shall be applicable. The law does not explicitly emphasize the prohibition of employing illegally staying third-country nationals nor does it impose an obligation on the employer of covering the return costs of third-country nationals.
Poland	Sanctions for delegating work to an illegally staying third-country national include: ▸ a fine from 720 EUR to 1200 EUR for employers delegating work to illegally staying third-country nationals; ▸ a fine from 5 EUR to 2500 EUR for natural persons employing persistently illegally staying third-country nationals for private purposes; ▸ payment of the costs of return of the illegally staying third-country national. No explicit increase of sanctions in relation to the number of the employees is established, general rules of proportional punishment shall be applicable.
Romania	Sanctions for delegating work to an illegally third-country national include: ▸ a fine from 340 to 1350 EUR for each illegally staying third-country national employed (dependent on the number of employees and the gravity of the violation); the total amount of the fine cannot exceed 22 500 EUR; ▸ a payment of the costs of return of the illegally staying third-country national. The amount of sanction is related to the particular situation of the illegally staying third –country national. The legal framework makes no distinction between an employer as a legal entity and a natural person.
Slovakia	Delegating work to an illegally staying third-country national is punishable with: ▸ a fine from 2 000 to 200 000 EUR; ▸ payment of the costs of return of the third-country national. The sanctions depend on the gravity of infringements, the gravity of their consequences, repetition of the same infringements and number of irregularly employed persons. In case of illegal employment of two and more people simultaneously a fine shall be minimum 5.000 EUR. Legislation does not differentiate between employers who are legal entities or natural persons.

Criminal liability of employers

Articles 9 and 10 of the Directive establish that the infringement of the prohibition of employment of illegally staying third-country nationals **constitutes a criminal offence** when committed **intentionally** and:

- the infringement **continues or is persistently repeated**;
- the infringement regards the simultaneous employment of **a significant number of illegally staying third-country nationals;**
- the infringement is accompanied by **particularly exploitative working conditions**;
- the infringement is committed by an employer who, while not having been charged with or convicted of human trafficking offences[41], uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a **victim of trafficking in human beings**;
- the infringement relates to the illegal employment of a **minor**.

Inciting, aiding and abetting the above-mentioned infringements should also be punishable as a criminal offence.

Member State	National law
Czech Republic	A person commits a criminal offence when he/she: ▸ repeatedly, consistently, to a large extent and under exploitative conditions employs third-country nationals or facilitates employment of third-country nationals who stay illegally in the Czech Republic or do not possess a work permit; ▸ employs or facilitates employment of a minor illegally staying third-country national. The crime is punishable with imprisonment up to 6 months. The crime is committed if the employment of undocumented migrants is committed "to a large extent". This notion is interpreted as a period longer than 6 months. The personal scope of the criminal liability is rather broad, not only referring to direct employers but also facilitators of employment, i.e. any person involved in the criminal action. Higher sanctions apply in case this crime was committed for profit, repeatedly or in an organized group (imprisonment up to one year) or when the profit is significant (imprisonment of six months up to three years).

41 Offences established pursuant to Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings

Hungary	A person commits a criminal offence when he/she: ▸ permanently or regularly employs a third-country national without official authorisation for income generating activity; ▸ simultaneously employs a significant number of third-country nationals without official authorisation for income generating activity at the same time The crime is punishable with imprisonment up to two years. A person also commits a criminal offence when he/she employs: ▸ a third-country national without an authorization for income generating activity under particularly exploitative working conditions, ▸ a minor being a third-country national without an authorization for income generating activity, ▸ a third-country national without an authorization for income generating activity, who has been a victim of human trafficking The criminal offence is punishable with imprisonment up to three years. The criminal provisions do not introduce a notion of an "illegally staying third-country national", but the abovementioned criminal offences cover also the employment of such persons.
Poland	A person commits a criminal offence when he/she : ▸ simultaneously employs a significant number of illegally staying third-country nationals ▸ employs a minor (illegally staying third-country national) ▸ persists in employing an illegally staying third-country national, with employment being related to business activity The criminal offence is punishable with a fine from 25 to 260 000 EUR or the custodial sentence of 1-12 months. A person also commits a criminal offence when he/she: ▸ employs an illegally staying third-country national in the conditions of particular exploitation ▸ employs an illegally staying third-country national being the victim of human trafficking. The criminal offence is punishable with imprisonment from 1 month to 3 years. Persistent employment of a illegally staying third-country national constitutes a misdemeanor, not a criminal offence.
Romania	The following acts constitute criminal offences: ▸ simultaneous employment of more than 5 illegally staying third-country nationals, punishable with imprisonment from one to two years ▸ employment of an illegally staying third-country national under particularly exploitative conditions, punishable with imprisonment from 1 to to 3 years ▸ employment of a minor, punishable with imprisonment from one to three years; ▸ employment of an illegally staying third-country national being the victim of human trafficking with the knowledge that he or she is a victim of trafficking in human beings, punishable with imprisonment from 6 months to 3 years (unless the act does not constitute a more serious offence) or a fine.

Slovakia	The following acts constitute criminal offences: ▸ persistent, repeated, and unlawful employment of a person illegally staying on the territory of the Slovak Republic; 'repeated' means that the employer had already been convicted of a similar offence during the previous 24 months in an administrative or judicial procedure – the offence is subject to imprisonment of up to 2 years; ▸ unlawful employment of a 'vulnerable person' - punishable with imprisonment from six months to three years. A 'vulnerable person' means a minor, pregnant woman, sick or elderly person, person enjoying protection according to international law, etc., provided that an offence has been committed in relation to specific status, state or age of this person; ▸ unlawful employment committed in a serious manner (i.e. persisting for longer time, in a cruel or torturous manner, by means of violence or its threat, committed by deception, by taking advantage of another person's helplessness, inexperience, dependency or subordination, committed by violation of an important obligation of a perpetrator based on law, his/her profession, status or function, committed by an organized group, or on more people), punishable with imprisonment from 6 months to 3 years; ▸ unlawful employment under particularly exploitative working conditions, including discriminatory working conditions which are considerably worse than those disproportionate compared to working conditions of legally employed persons, and which affect human health and security, and are in conflict with defiance of human dignity - punishable with imprisonment from 6 months to 3 years; ▸ unlawful employment of a victim of human trafficking - punishable with imprisonment from 6 months to 3 years.

Back payments

According to Article 6 of the ESD, the employer shall be liable to pay:

- **any outstanding remuneration to the illegally employed third-country national**. The agreed level of remuneration shall be presumed to have been **at least as high as the wage provided for by the applicable laws on minimum wages**, by collective agreements or in accordance with established practice in the relevant occupational branches, unless either the employer or the employee can prove otherwise, while respecting, where appropriate, the mandatory national provisions on wages;
- **any costs arising from sending back payments to the country to which the third-country national has returned or has been returned;**
- **an amount equal to any taxes and social security contributions** that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines.

Member States are obliged to enact mechanisms to ensure that illegally employed third-country nationals:

- may **introduce a claim**, subject to a limitation period defined in national law, **against their employer** and eventually **enforce a judgment against**

the employer for any outstanding remuneration, **including cases in which they have, or have been, returned;**

or

- when provided for by national legislation, may **call on the competent authority** of the Member State **to start procedures to recover outstanding remuneration** without the need for them to introduce a claim in that case.

Member States shall provide that an **employment relationship of at least three months duration be presumed** unless, among others, the employer or the employee can prove otherwise.

Member States shall ensure that the **necessary mechanisms** are in place to ensure that illegally employed third-country nationals are able to **receive any back payment of remuneration** which is recovered including cases in which they have, or have been, returned.

Member State	National law
Czech Republic	An employer is obliged to pay the outstanding remuneration in case it was established with the administrative decision of the labour inspectorate that the employer committed an offence of illegal employment and an enforceable decision imposing the penalty for the offence was issued. The sanctioned employer is liable to pay back a three months minimum wage. The requirement of enforceable decision goes beyond the scope of the Directive and limits access of employees to their wages. Similarly, upon the enforceable decision of the administrative authority, the employer is liable to pay the same payments including penalties into the tax system, system of public health insurance and social security insurance as required if an employee is employed legally. The employer has to bear costs of sending back payments to the employee to the country of origin. However, there are no practical mechanisms and tools implemented to facilitate the process of sending back payments. Undocumented migrants have access to justice as they may be represented by NGOs active in the field of the protection of foreigners' rights in labour disputes. However, there are no policy measures ensuring access of NGOs to finances for this legal representation. Thus, in practice, the protection of rights of migrants is not ensured and an effective mechanism is non-existent.
Hungary	The employee may pursue a claim before the court with the presumption of the employment relationship lasting for three months. The agreed level of remuneration shall be presumed to have been at least as high as the wage provided for by the applicable laws on minimum wages. The law also states that, where appropriate, the employer, jointly with the subcontractors, shall be liable to pay any cost arising from sending back payments to the country to which the third-country national has returned or has been returned. No effective mechanism exists for facilitating a claim neither in the case when the third-country national is in Hungary, nor after he or she has been returned. If a case of a third-country national's work relationship without the required work permit is reported to the labour inspectorate, they are obliged by law to report the case to the immigration police who may immediately order expulsion. In theory, with the written consent of the third-country national, an advocate may represent his or her case before the court.

Poland	Labour inspectors may order the employer to pay the outstanding remuneration and also any other benefits owed to the employee. The orders are subject to immediate enforcement. The employee may also pursue a claim before a court with the presumption of the employment relationship lasting for three months in case of labour law contracts. This is also true for civil law contracts with the presumption of agreed remuneration amounting to three times the minimum pay. No effective mechanism is in place to facilitate a claim when an employee returned or has been returned, unless written consent was obtained before the employee left the country. In the case of an employee who was returned to the country of origin, the case may be pursued in court by a non-governmental organisation, provided it has obtained the written consent of the employee. However, if the court does not decide to (or cannot) hear the employee with the help of the institutions in his/her country of origin, the case may be dismissed due to the lack of evidence.
Romania	Based on a written complaint of the illegally staying third-country national, the labour inspectorate may order the employer to pay: ▸ any outstanding remuneration to the illegally employed third-country national. The agreed level of remuneration is assumed to be equal to the national average wage unless either the employer or the employee can prove otherwise; ▸ the amount of all taxes and social security contributions that the employer would have paid if the alien was legally employed, including penalty payments and relevant administrative fines and any costs arising from transfer payments to the country to which the alien has returned or has been returned No presumption as to the length of the employment relation has been introduced. A claim may be filed in court directly by the third-country national prior to voluntary or forced return to the country of origin or by a third party (lawyer) based on his/her written consent obtained prior or after his/her departure from Romania.
Slovakia	There are two ways of recovering outstanding remuneration from the employer, through administrative and civil procedure: The employer who has been sanctioned for illegal employment is obliged to pay: ▸ the outstanding remuneration to an illegally employed person, ▸ the outstanding payments including penalties into the tax system, system of public health insurance and social security insurance as required if an employee was employed legally, ▸ the costs of sending back payments to the employee to the country of return or of administrative expulsion. This obligation shall be imposed by a decision of the labour inspectorate after the decision sanctioning an illegal employment had become final. Unless the employee or the employer can prove the actual duration of an employment relationship, it is presumed that illegally employed third-country nationals are entitled to three monthly wages which are calculated based on the amount agreed upon or the amount of minimum wage. The employee may also independently pursue protection of his/her right for outstanding remuneration in a civil court. Even in case if the employee returned or was returned to the country of origin, s/he may continue the pursuit of the claim from abroad. Provided that the plaintiff had issued a power of attorney to a lawyer or a legal entity established by law for purpose of protecting rights and interests of third-country-nationals, before his departure from Slovakia, the court shall continue in the civil proceeding. Without representative in Slovakia, an illegally employed third-country national is unable to pursue his claim in court. Also lack of his presence and possible unknown whereabouts may lead to suspension of the proceedings or an appointment of a trustee/custodian who shall defend the interests of the third-country national.

Obligation of notification

As stipulated in Article 6 (2) and Article 13 of the Directive - illegally employed third-country nationals shall be **systematically and objectively** informed about their rights to :

- **introduce a claim**, subject to a limitation period defined in national law, against their employer and eventually **enforce a judgment** against the employer for any outstanding remuneration, including in cases in which they have, or have been returned; or when provided for by national legislation,
- **call on the competent authority of the Member State to start procedures to recover outstanding remuneration** without the need for them to introduce a claim in that case,
- **lodge complaints against their employers, directly or through third parties** designated by Member States such as trade unions or other associations, or a competent authority of the Member State when provided for by national legislation.

Mamber State	National law
Czech Republic	The Immigration police are required to inform illegally staying third-country nationals about the procedure of administrative expulsion concerning the performing of illegal work. Police should inform a person subjected to expulsion of their right to obtain from the employer any unpaid wages including costs of sending it to the country of return and the possibility of filing a complaint against the employer to the labour inspectorate.
Hungary	In the law about labor inspection, the obligation of notification is not mentioned at all. According to the Act on Entry and stay of third-country nationals, third-country nationals need to be informed about their rights before the return decision. However, this is not happening, based on interviews carried out with authorities and the experience of practicing lawyers. In case of a written consent, an advocate may represent cases after the return of the third-country national to the country of origin.
Poland	Information constitutes a part of the return decision. Once a third-country national obtains a decision it might be too late for them to undertake legal actions or sign a consent form. This means they often have to authorize NGOs to act on their behalf after the return to the country of origin.
Romania	The illegally staying (and working) third-country nationals are not informed by the labour inspectors about their rights to receive outstanding remuneration. No information is provided in the expulsion decision. However, they may be informed by the immigration office at the moment of signing their return decision, if they show proof that a written complaint has been filed with the labour inspectorate beforehand. From the moment the illegally staying third-country national was informed about the return decision, he/she is bound to leave the country within 30 days, which is also the last moment to undertake legal action against the employer or sign a consent form for a third party to act on his/her behalf.

Slovakia	During the inspection the labour inspectorate is obliged to provide information o illegally employed third-country nationals about their right to file complaints (if their agreed wage has not been paid) to the labour inspectorate. Labour inspectorates should also advise on how to claim outstanding remuneration, they should inform about the right to demand that the outstanding remuneration is transferred to the country of return or of administrative expulsion.But in case the irregular work/employment was not detected by the labour inspectorate, the person will not be informed.

Complaint mechanism

According to Article 13 of the Directive, an **effective mechanism** should be put in place, through which third-country nationals in illegal employment may **file complaints against their employers. These complaints can be filed directly or through third parties** designated by Member States. These bodies can include trade unions, other associations or a competent authority of the Member State when provided for by national legislation.

Member State	National law
Czech Republic	An illegal third-country national may file a complaint against their employer to the labour inspectorate. No specific provisions enabling the complaint mechanism and no possibility for undocumented migrant workers to complain through third parties are set. The body receiving the complaint (labour inspectorate) cooperates with the immigration police in detecting and denouncing undocumented migrants.
Hungary	According to the law, a complaint to the labour inspectorate is possible. There are two different kinds of complaints: an individual complaint in case of personal infringement or violation and a public interest complaint in cases where obeying the law is in the interest of the society. Anyone can file a written/oral individual/public interest complaint. It is possible to file these complaints anonymously; the authorities may not disclose a third-country national's data unless the person consents to it. A decision on the matter shall be issued within 30 days. However, if after the decision, it turns out that the third-country national did not possess a work permit, the labor inspectorate is obliged to report the case to the immigration police, who may immediately order expulsion.
Poland	Complaints against the employer should be made to the labour inspectorate. However, the complainant is not a party to the initiated proceedings. The labour inspectorate collaborates closely with the alien police with the aim of detecting illegally staying third-country nationals. This makes the filing of complaints quite risky for employees. Anonymous complaints are not admissible. A third party may also report the infringement once informed about it by an employee, but will also not become a party to the procedure.

Romania	Complaints against employers should be made to the labour inspectorate. Once a complaint has been filed with the labour inspectorate by a third-country national, the former has the obligation to inform the Immigration department about the illegal status of the foreigner. This is based on a formal agreement between the two public agencies. However, if a foreigner has left the country and decided to make a complaint against his/her former employer, a claim can be filed to the labour inspectorate. This claim must be made within 3 years of the event which gave rise to the complaint. There are no provisions in place in terms of a third party involvement in a complaint mechanism.
Slovakia	Complaints should be made to the labour inspectorate. This should result in an inspection at a workplace within the next 30 days. The results are then communicated to the complainant. The labour inspectorates can impose penalties, order back payments and notify competent authorities (social security institutions, tax offices, and police departments) about the infringement of prohibition of illegal employment. If these bodies detect repeated infringements of illegal employment the labour inspectorate can file an initiative to start criminal proceedings against the employer.

Third party engagement

As further stipulated in Article 13, Member States shall ensure **that third parties may engage either on behalf of or in support of an illegally employed third-country national**, with his or her approval, in any **administrative or civil proceedings** provided for with the objective of implementing the Directive.

Member State	National law
Czech Republic	Administrative proceedings: no special regime for third parties to act on behalf of the employee, but any person having obtained employee`s authorization may represent him/her in administrative proceedings. Civil (court) proceedings: NGOs whose subject of activity is the protection of rights and interests of third-country nationals, can, on the basis of a power of attorney (mandate), represent the third-country nationals in labour law disputes on their behalf.
Hungary	Administrative, civil and criminal proceedings are similar in this respect: A third party may represent the employee on his or her behalf after having obtained their authorization. However, a third party may be only a natural person of some sort (an advocate or a spouse, etc.). Exceptions are the followings: ▸ Trade unions may represent an employee if he or she is a member of their organization. ▸ NGOs may represent a person in the court if the violation relates to the equal treatment law.

Poland	Administrative proceedings: no facilitation for third parties to act on behalf of the employee, but any adult person, having obtained the employee`s authorization may represent him/her in administrative proceedings. Civil proceedings: a trade union representative, a labour inspector and an NGO may initiate proceedings on behalf of the employee and represent him/her when labour code employment disputes are concerned, after having obtained the employee`s written consent. Criminal proceedings: the labour inspectorate may act as a prosecutor in proceedings initiated against the employer in case of misdemeanors.
Romania	NGOs or trade unions cannot represent the illegally staying third-country nationals or engage in any type of court proceedings, the right of representation in any type of proceedings is restricted only to legal professionals (advocates).
Slovakia	NGOs whose subject of activity is the protection of rights and interests of third-country nationals, can, on the basis of a power of attorney (mandate), represent the third-country national in any civil proceedings with the objective of protecting his/her interest. The trade unions may also file complaints and represent third-country nationals in civil proceedings, depending on membership of the employee in the particular trade union.

Residence permits

According to Article 13(4) in respect of criminal offences of **delegating work to illegally staying minors** or **under particularly exploitative conditions,** third-country national employees may be granted on a case-by-case basis of **permits of limited duration**, linked to the length of the **relevant national proceedings,** under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC[42].

In respect of cases where such residence permits have been granted, Member States shall define under national law the conditions, under which the **duration of these permits may be extended** until the third-country national has **received any back payment** of their remuneration (Article 6(5)).

42 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, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ .do?uri=CELEX :32004L0081:EN:HTML

Country	National law
Czech Republic	The long-term residence permit for protection purposes under the pre-existing national regime implemented in accordance with Directive 2004/81/EC applies to the cases listed under article 13(4) ESD as well. This type of residence permit may be granted to a foreigner involved in criminal proceedings as a victim of trafficking in human beings and who cooperates with criminal authorities. However, the relevant provision remains unclear towards the employment of minor undocumented migrants and the employment under particularly exploitative conditions. Should the criminal proceedings be closed, any holder of a residence permit for protection may apply for prolongation of their residence in the Czech Republic. They can do this in the form of a long-term permit for tolerated stay, provided the civil procedure against the employer for payment of the outstanding remuneration is still pending. Besides this, when applying for this residence permit, a foreigner has to prove s/he has sufficient financial resources to stay in the Czech Republic. This includes accommodation and health insurance. The residence permit will be issued only for the duration of civil proceedings.
Hungary	In the absence of residence permits described by law, a humanitarian residence permit shall be granted by a court petition to the third-country nationals. This permit will be granted if they have experienced particularly exploitative working conditions. It will also be granted to minor third-country nationals, who have been employed without possessing a valid residence permit or other authorization for stay. The duration of the humanitarian residence permit shall be 6 months, which can be occasionally extended by six months – for the duration of court proceedings initiated by third-country nationals against their employer for receiving back payments and remuneration.
Poland	Residence permit (for up to 3 years) shall be granted to third-country nationals possessing injured party status in criminal proceedings against the employer in cases of: ▸ employment of an illegally staying third – country national under particularly exploitative working conditions; ▸ employment of a minor. A person who would have obtained a residence permit in the above-mentioned cases, may apply for extension of the legal stay if they intend to continue staying in Poland until they recover the outstanding remuneration from the employer. This depends on whether it is supported by a particularly significant interest of the foreign national. The maximum period of the residence permit awarded is also 3 years. While applying for the residence permit, the applicant must prove, however, that they possess health insurance and financial resources sufficient to pay the costs of maintaining themselves and their dependent family members.
Romania	A residence permit of 6 months (with the possibility of extension) shall be granted to a third-country national possessing injured party status in the criminal proceedings against the employer at the request of the prosecutor or the court, in the following cases: ▸ employment of an illegally staying third –country national under particularly exploitative working conditions; ▸ employment of a minor.

Slovakia	A tolerated residence permit of 180 days is granted to a third-country national only upon the request of a prosecuting authority, if he/she was illegally employed under particularly exploitative working conditions or was an illegally employed minor. This permit is only granted if the presence of this third-country national in the Slovak Republic territory is necessary for the purpose of the criminal proceedings. A residence permit might be repeatedly extended to another 180 days maximum until the completion of criminal proceedings or until the outstanding remuneration is recovered. A person who was granted the abovementioned permit acquires a right to social housing.

Concluding remarks

The labour markets of the project countries are characterised by rather low levels of employment of undocumented migrant workers. At the same time, there is a quite widespread phenomenon of unregistered labour, which stands for performing work without complying to provisions of employment of foreign nationals or employment as such (e.g. failure to obtain work permits or pay social security contributions). The Directive's provisions were implemented into the pre-existing sanction regimes of the project countries, all of them comprising mainly of financial sanctions for violations of labour provisions such as the failure to sign a written job contract, non-observance of minimum wage provisions, failure to obtain necessary work permits or exploiting another person (the latter not necessarily limited to the context of employment relations). In all of the countries in the previous legal frameworks the employment of a third-country national staying illegally would be considered a violation against the provisions on the employment of aliens. The implementation of the Directive was the cause of the differentiation of the misdemeanors based on the type of the offender (a natural or legal person[43]), followed by the differentiation of the maximum amount of financial sanctions applicable. The new addition in the majority of countries is the obligation of payment of the costs of return of the illegally staying third-country national imposed on the employer.

Currently, after the implementation of the Directive, the maximum **financial sanctions** in the five countries vary significantly from 2 500 EUR in Poland to 373 000 EUR in the Czech Republic, which does not necessarily reflect the discrepancies in the states` minimum wages, but should rather be viewed as a result of a diverse understanding of what constitutes a "deterring sanction".

43 With the exception of Slovakia

The implementation of the Directive has led to the introduction of new **criminal offences** such as the simultaneous employment of a significant number of undocumented migrants or the delegation of work to undocumented minors. In some of the countries, Article 9 of the ESD was not implemented explicitly (Hungary, the Czech Republic), while in others the national lawmaker went even further in determining criminal liability. E.g. under the Slovak law it is punishable as a criminal offence to unlawfully employ a 'protected person', which implies not only a minor or a victim of human trafficking but also an elderly person or a pregnant woman. In contrast in Poland, the persistent employment of an undocumented migrant committed by a natural person constitutes only a misdemeanor (an administrative offence) and not a crime, contrary to the article 9 (1)a of the Directive.

The employer`s obligation to pay any outstanding remuneration and other contributions (tax, social security contribution) has been either explicitly introduced to the national legal systems or derives from pre-existing labour regulations (e.g. Poland). In the majority of countries (with the exception of Hungary), two paralel mechanisms of recovering the back payment exist: through an order of the labour inspectorate and through civil /labour court proceedings. The risks associated with the employee`s disclosure to the labour inspectorate remain the same as in the case of an undocumented migrant filing the complaint to this body (see below). Nevertheless, in the Czech Republic and Slovakia an employee faces even more obstacles to the recovery of their remunerations: the obligation may be imposed on the employer only provided that an administrative authority had earlier discovered in the course of an administrative procedure that the employer has committed an offence regarding illegal employment. Such a limitation goes beyond the scope of the Directive and limits the access of employees in irregular situation to their wages. Also contrary to the Directive, Romanian legislation makes no assumption on the presumed length of the employment relationship lasting at least three months, thus it is not clear how the amount of outstanding remuneration is established, if no clear evidence exists.

As regards the court procedures, civil judicial systems in the analyzed countries are quite inefficient – the length of procedures and the risk associated with disclosing one`s irregular status result in foreign workers perceiving the pursuit of civil claims as an unconvincing option of recovering their remunerations.

None of the countries has introduced a specific **mechanism facilitating the transfer of money to the country where the**

employee returned or has been returned, even though in each country such an obligation has been imposed on the employer. The practical application of these provisions depend on the practice of the national enforcement officers.

Third party engagement in the proceedings based on the Directive, as stipulated in Article 13(2), defined as *engaging either on behalf of or in support of an illegally employed third-country national, with his or her approval, in any administrative or civil proceedings with the objective of implementing the Directive,* means in majority of countries the involvement of NGOs or trade unions in civil court proceedings through the procedural representation of the employee. In the Czech Republic, Poland and Slovakia, NGOs whose subject of activity is the protection of rights and interests of third-country nationals may represent an employee in the court proceedings initiated with the aim of recovering the due remuneration. However, in Poland the participation of NGOs is limited to disputes stemming only from labour code contracts. The engagement of the NGOs in Hungary consists in their involvement in the equal treatment cases. In Romania neither NGOs nor trade unions may engage in civil proceedings on behalf of the employee.

The efficiency of the **complaint mechanism** in all of the analyzed countries is disputable. Contrary to the provisions of the Directive, **no specific provisions enabling the complaint mechanism** have been set in any of the countries. Notwithstanding that the workers lodge a claim to the inspectorate, they are not a party to the procedure and may not interfere with the decisions issued to the employer by the inspector, nor appeal against them. In each of the countries, the agency responsible for the examination of the complaint against the employer also closely collaborates, formally or informally, with the immigration police regarding the detection and denouncement of undocumented migrants. The cooperation may assume a form of joint inspections or the legal obligation of the labour inspectors to denounce each case of the detected undocumented migrant worker (Poland, Slovakia). The lack of distinctive separation of these agencies` competencies and duties poses a great risk for the employees when it comes to filing a complaint against the employer - thus making this mechanism not effective. Furthermore, labour inspectorates are granted limited powers, e.g they cannot protect employees abused by the employer who perform work on the basis of contracts other than employment contracts governed by the labour codes (the Czech Republic, Hungary, Poland) , they cannot investigate labour conditions of domestic

workers and basically can only investigate the documentation provided to them by the employer.

Labour inspections	Czech Republic	Hungary	Poland	Romania	Slovakia
Ordering the employer to pay outstanding remuneration	Exclusively upon sanctioning the employer for the offence of illegal employment Limited only to labour law employment	–	Limited only to labour law employment	+	+
Obligation to denounce UDM to the immigration police	+	+	+	+	+
Joint inspections: labour inspection + immigration police	+	+	+	+	+
Protecting employees working on the basis of civil law contracts	–	–	–	+	+
Entering private households	–	–	–	+	–
Employee is a party to the proceedings against the employer	–	–	–	+	–

Table 3.
Labour inspectorates in each country

The implementation of the Directive`s provisions on **residence permits** (Article 6(5) and 13(4)) has been conducted quite precisely and similarly in all of the countries (with the exception of the Czech Republic). However, a very narrow scope of the provisions will not allow for its practical application. A permit may be granted only to the victims of two of the criminal offences: employment under particularly exploitative conditions, and employment of a minor, provided they cooperate closely with the prosecution in the proceedings initiated against the employer.

The effectiveness of protection measures introduced by the Directive is largely dependent on employees' awareness of their existence. Even though Article 6(2) imposes on the Member States the **obligation of informing an employee** (at the latest before the enforcement of a return decision) of his or her rights deriving from the Directive, in Hungary and Romania the obligation is not implemented at all. In Poland and in the Czech Republic, the immigration police fulfils this obligation by handing a written document to irregular migrants in the procedure of administrative expulsion about his/her right to obtain any outstanding remuneration from the employer, including costs of

their return to the country of origin and the possibility of filing a complaint to the labour inspectorate or lodging a claim at the civil court. However, such information does not contain any reference to the NGOs nor to possibilities of free legal aid. Moreover, this information reaches the undocumented migrant at a very late stage, when she or he is under a real threat of return to the country of origin and has no effective means to enforce his or her rights arising from the Directive.

On the other hand, in Slovakia this information is provided while inspections are carried out by the labour inspectorates in the workplace. However, if the inspection does not take place, the employees may not be properly informed at all.

Chapter 5.
Provision of legal assistance to irregular migrant workers

Providing legal assistance has been at the heart of the project activities since its inception. Each organisation involved in the project had one legal counsellor provide free legal assistance to migrant workers in the 23-month period between September 2012 and September 2014. The assistance was offered to undocumented migrant workers, and to those at risk of losing their legal status due to employment complications. Documentation obtained during these consultations and questionnaires filled in by the legal consultants provided the basis of our research. The following chapter attempts to illustrate the situation of third-country nationals in the project countries' labour markets, including obstacles to employment and residence, and give insight into the support provided by organisations. In addition to this background information, the chapter will analyse the impact of the Employers Sanctions Directive in individual cases.

The following table presents the total number of persons who were provided with legal assistance:

	Czech Republic	Hungary	Poland	Romania	Slovakia	Total
Undocumented	55	4	30	24	46	159
Documented	50	20	49	37	5	161
Number of clients	105	24	79	61	51	320

Table 4.
Migrant workers provided with legal assistance in the course of the project

Struggling to remain documented

The majority of our undocumented clients lost their legal status only after having entered and resided in the project country legally. In many cases, the client's legal residence status was threatened by external circumstances. Migrant workers are most vulnerable in this respect since their status is very closely connected to their employers and dependent on their actions. Should an employer fail to complete all legal procedures for hiring a third-country worker, a migrant might have

A massage therapist came to the Czech Republic on a basis of long-term residence. While on vacation, her employer forgot to submit her application to extend her legal stay. Due to her employer's oversight she became undocumented. The authorities did not inform her of her status and she was unaware of it until she faced expulsion.

problems with receiving or prolonging legal status and eventually may risk becoming undocumented.

The most frequent reasons for losing legal status, recorded in the project, include :

- **lack of written employment contract,**
- **immediate termination of an employment relationship,**
- **remuneration below the threshold required by law,**
- **the employer's failure to apply for work authorization or to re-apply for a new work permit,**
- **change of the employer**.

The NGO advisers have also identified several barriers faced by the migrants in maintaining their legal status. A **long and complicated administrative procedure** to obtain residence permit was a common obstacle in all the project countries, as indicated by the counsellors and migrants themselves. For example in Romania, the application for the residence permit and for prolonging the permit must be submitted 30 days before a visa expires at the latest. This long waiting time shortens the period in which the foreigner is allowed to work without dealing with his/her legal issues. The residence permit is usually granted for 1 to 2 years. In some cases, the entire procedure needs to be initiated every few months.

The lawyers observed that the newly introduced national regulations (e.g. **implementation of the Single Permit Directive**[44]) do not simplify the procedures, but to the contrary, make them more complicated. In Hungary, it now takes 90 days to get a single residence and work permit for third-country nationals, whereas before the law's implementation the process took about 60 days. In Poland the application form for a residence permit is 19 pages long.

In the Czech Republic, when a third-country national wishes to extend the validity of a residence card, s/he is not allowed to work during processing and must wait, unemployed, for months for the decision.

Labour market tests potentially limit third-country nationals` entry into a national labour market. This procedure complicates and prolongs unnecessarily the work permit procedure. Moreover, the work authorisation procedure implies extra work for the employer: the company has to provide many additional documents to prove the business is running in conformity with laws.

44 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State

A residence permit with the purpose of work assumes stable employment with the same employer. Complications emerge, when a **migrant worker wants to change an employer** during the work permit's validity, even if the change is caused by the employer's failure to fulfil his/her obligations (e.g. non-payment of remuneration). In Romania an employee has only 60 days to find a new employer and sign a work contract, in the Czech Republic this period is 90 days. In Hungary, legislation is even stricter as there is no waiting period between the withdrawal of the work permit and withdrawal of the residence permit. If the work permit is cancelled, the residence permit expires automatically.

Having obtained a residence/work permit a migrant is allowed to work only at the initially declared job position with the initially declared employer. The **short period between cancelling a work permit and withdrawing a residence permit** makes the situation of a migrant unstable, and binds them to the first employer, regardless of work conditions.

Legal counsellors reported many cases in which migrants lost or were on the verge of losing legal status as a result of **poor or erroneous communication from public administration**. For example, in one case, the Ministry of the Interior in the Czech Republic provided misleading information to a migrant worker regarding her stay status. While she did receive confirmation that her case was still in progress, in reality, she no longer had a permission to stay.

Due to the complexity of procedures, one can easily make a mistake resulting in the withdrawal of the legal status. In the course of the procedure for obtaining a work permit, an employer is required to perform certain legal actions. This **makes an employee more vulnerable and dependent on the employer.**

Awareness of rights

When looking at specific rights of third-country nationals, it is noticeable, that some migrants while possessing very general knowledge about their labour rights (e.g. the right to file a complaint or a lawsuit against the employer), hardly ever knew about the rights granted by the Sanctions Directive. While over 1/3 of clients knew generally about the right to complain against the employer, only 1,7% had any knowledge about specific instruments introduced by the Directive, e.g. legal presumptions facilitating the pursuit of claims in courts (article 6. 3). The little knowledge about the rights granted by the Sanctions Directive comes either from friends or from informational leaflets (produced by public authorities or NGOs), internet or from hearsay.

Struggling for dignity: workplace violations

In Romania a woman from the Philippines became undocumented after both her work and residence permit expired. With no money to leave Romania, she continued her work, however her employer felt encouraged to go against the terms of her initial employment contract. She was forced to work excessive hours, lived in hazardous conditions, and was deprived of privacy and freedom of movement. For example, she was prohibited to use her mobile phone, could not leave the house and maintain contacts within the community. Moreover, she was verbally abused, deceived about her monthly wage and later on not paid at all. The employer took her passport and her expired residence card away.

Third-country nationals face various problems when performing work on the territory of State a EU Member State, ranging from limited access to the labour market to discrimination and heavy exploitation. Should an employee be undocumented, a fear of being reported to the immigration police increases his/her vulnerability in the relationship with an employer.

The following table presents information on the **most common workplace violations** reported by the migrants assisted throughout the project:

	Czech Republic		Hungary		Poland		Romania		Slovakia	
	UDM	DM	UDM	DM	UDM	DM	UDM	DM	UDM	DM
No employment contract	10	5	2	9	7	35	16	11	30	5
No payment of remuneration < 3 months	3	1	1	4	5	32	11	4	20	1
No payment of remuneration >3 months	1	4	-	-	-	4	-	1	12	3
No compliance with OSF procedure	-	-	-	-	3	4	1	2	-	-
Leave violation	6	8	-	-	3	10	2	1	-	-
Wrongful termination	9	9	1	1	5	21	-	-	-	-
Excessive working hours	9	6	-	4	3	19	8	6	-	-
Non-compliance with social security obligations	6	3	3	13	8	18	10	7	20	2
Excessively low remuneration	3	4	-	3	-	8	8	1	5	-
Discrimination	-	1	-	-	2	5	3	-	-	-
Deprivation of passport or ID	2	-	-	3	-	3	1	-	-	-
Deprivation of freedom	-	-	-	3	-	1	1	-	-	-
Bonded labour	-	1	-	-	-	-	-	-	-	-
n/a	2	1	-	2	-	-	-	-	-	-
Total number	14	17	3	17	8	49	16	14	35	5

Table 5. Types of workplace violations (in numbers).

Workplace violations were recorded in all project countries, the most widespread being: no employment contract, no payment of remuneration up to 3 months, and non-compliance with social security obligations. There were however, some typical abuses that can be attributed to specific countries. For example, in Slovakia all assisted migrants worked without job contracts

(documented and undocumented); in Hungary, the majority of migrants complained about non-compliance with social security obligations, and also over 50% of clients had no employment contract. In Romania, multiple violations have been recognised for most undocumented migrants.

Particularly exploitative conditions

Out of all cases reported by the five organisations, particularly exploitive conditions were indicated by 34 clients (10 cases in Czech Republic, 3 cases in Hungary, 12 in Poland, 9 in Romania). In determination of whether the work conditions were particularly exploitative, we relied on the legal counsellors` assessment, since they were aware of all the details of the case and the circumstances accompanying the abuse.

Why do migrant workers refuse to take legal steps?

The five organisations participating in the project engaged in legal aid for third-country nationals within the national legislative frameworks. The organisations took different legal actions suitable in individual cases. Initially, they assisted in **communication and mediations with employers.** Nonetheless, when no compromise was reached, most organisations assisted the clients in **lodging complaints** against employers with the relevant labour inspectorates. Where necessary **crimes were reported to the police**, however only upon the consent of the client. In several cases legal advisors assisted in filing a **claim for back-payments**, including **pre-trial calls for payments** and **representation in court**.

Non-governmental organisations seeking to represent migrants in legal disputes faced different legal frameworks in each country. In the Czech Republic, Slovakia and Hungary, non-governmental organisations can represent a claim on behalf of a migrant employee based on the power of attorney. In Poland, it is allowed for the NGO to initiate the proceedings and represent the employee, but solely in cases concerning employment relations (based on the labour code), not in cases involving civil law contracts. In Romania,

In Poland an employee had worked 16 hours a day every day for a month, in very difficult working conditions. He received no protective uniform, nor was a health check performed. Despite many requests, the employer did not provide a written work contract or any other documents related to employment. When the client attempted to quit and demanded due payment, the employer threatened to expose his irregular status and claimed the employee did not have any rights. He was threatened with violence should he "make any trouble".

the law does not allow for any engagement of NGOs in any proceedings, let alone representing migrant employees in court.

Migrants seeking assistance were provided with information about all legal instruments available in their individual cases and encouraged to make us of them, with the lawyer`s assistance, for their benefit.

However, few of them decided to actually proceed with their claims or engage in legal proceedings.

The reasons hereto were as follows:

- **fear of expulsion,**
- **fear of retaliation and/ or violence from the employer,**
- **fear of putting co-workers at risk,**
- **fear of being estranged from community,**
- **language barrier (the documents in the court are in the official language of the country),**
- **lack of sufficient evidence,**
- **risk of losing a job or destroying prospects on finding another job,**
- **court procedures being time-consuming and bureaucratic.**

Also in cases where migrants had initially agreed to seek justice, they would change their mind in the process and withdraw a claim or a testimony at a later stage of the proceedings.

As far as the **fear of deportation** is concerned, sadly the situation of documented and undocumented migrant workers might be fairly similar in this respect due to the strict national provisions which make it obligatory for the migration authorities to expulse documented workers performing work contrary to the binding provisions. These regulations make pursuing legal action against employers equally risky for documented and undocumented workers alike.

To illustrate the situation, in Romania, in three cases of outstanding remuneration due, employees refused to go to court and preferred to search for new employers. The reasons behind the refusal were mainly **economical** and **related to bureaucratic procedures**. Those who did not not receive a one month salary month salary considered the amount of money too small to justify lengthy court proceedings. In Poland, the long procedures and small chances at winning also discouraged the workers from initiating legal actions. In Slovakia, when there

In Slovakia an undocumented Vietnamese employee was not paid due remuneration for four months. The employer provided accommodation, food and pocket money, but failed to pay the salary agreed on earlier. Still the employee did not want to file a complaint against the employer, because he was afraid of the Vietnamese organised crime groups. He also feared the employer would report his irregular stay to the police, which would result in his expulsion to Vietnam. No legal action was undertaken in this case.

is no valid decision imposing a fine for irregular employment on the employer, the undocumented employee cannot make use of facilitations in pursuing a claim in court deriving from article 6 of the Directive. As it was indicated by lawyers from five organisations, even if an inspection takes place, it is often impossible to find valid proof of employer`s mistreatment. For these reasons migrant workers in Slovakia refused to engage in any proceedings.

There were also some **personal motives** that influenced the decision not to undertake any legal action, such as fear of the employer's immunity (e.g. an embassy) or fear of employer`s violent retaliation. Some raised the issue of lengthy procedures, as it takes ca. 6 months to finalise proceedings in court, which was too long for migrants who had been ordered to leave the country within 30 days. There was wide disbelief in the procedure's effectiveness without the participation of the plaintiff/complainant. Also, undocumented migrants have little awareness of their rights and the provisions stipulated in the Sanctions Directive. The procedure of recovering back-payments had not yet been practiced, so employees **did not trust its efficiency** and did not want to take risk.

It is surprising that in at least 10 cases, complaints were not lodged with the labour inspectorate because they **did not fall under its authority**, since the institution only protects the workers who have entered a labour code employment relationship.

Also in Slovakia, it was mentioned that some clients did not want to file a complaint against an employer because of fear of the Vietnamese organised crime group and deportation to Vietnam

Legal assistance provided to undocumented migrant workers

As mentioned above, with 159 undocumented clients registered during the project, **very rarely were the NGO lawyers able to apply protective measures introduced in the Employers Sanctions Directive.**

Legal measures in the cases of undocumented migrant workers	
Pre-trial letter or call for payment	20
Complaints	15
Lawsuits	4 (3 withdrawn)
Crime reports	4 (1 withdrawn)
Applications for a residence permit	1

Table 6.
Legal measures applied in the cases of undocumented clients

Mediations / Pre-trial call for payment

Among all legal actions taken by organisations, **pre-trial calls for payment and mediation** between employers and employees were **the most common and proved to be the most successful.** In 20 cases the clients agreed for the lawyer to contact their employer either personally or by phone or to send a formal pre-trial letter summoning the employer to comply with their obligations towards the employee. Obviously these were possible only in cases of employer`s known contact details, which was not always possible to establish due to an unclear chain of employers or in seasonal employment. The lawyer`s participation in the process proved to be a motivating factor for the employers, and at the same time the instrument itself was safe enough for employees to pursue it. It is not without relevance that even in cases where a pre-trial call for payment was sent to the employer, the procedure itself was significantly shorter than obtaining an initial response from the court in cases where a lawsuit was filed. In some cases (in the Czech Republic) labour inspectors were active participants of the mediation process. **In 50% of the cases the outstanding remuneration was recovered from the employers through the abovementioned pre-trial measures.**

Legal counsellor (CZ):

"The first contact with the contractor or subcontractor by phone proved to be an efficient tool for negotiations. We could speak directly to persons who usually owed salary to our clients. Employers became nervous that we would sue them as somebody who knew about the situation regarding back-payments and unlawful termination of employment. These calls had even better impact than the pre-trial letters. We received favourable results after calling employers and following up with a pre-trial letter with information about the possible lawsuit against the (sub)contractor."

In Slovakia the of outstanding remuneration requires several steps:
1. After an employee submits a complaint to the labour inspectorate, an inspection of the workplace may start, which is a long procedure, since all relevant details must be verified. Also cooperation with the employer is required.
2. In case that the inspection confirms that irregular employment took place, a new procedure starts to impose a fine on the employer
3. The employer has the right to appeal against the labour inspectorate's decision, so the procedure is extended.
Given that procedure concludes with a final decision, the undocumented migrant must now proceed with a lawsuit against the employer claiming outstanding remuneration. Only the court has the authority to decide upon this issue.

Complaints to the labour inspectorate

In each project country the employee`s right to lodge a complaint against the employer to the labour inspectorate in case his/her labour rights had been violated is enshrined in the law. However, none of the analysed mechanisms meets the requirements of a facilitated and effective complaint as stipulated in article 13 of the Directive (no separation between labour inspections and

immigration controls, *see: Chapter 4*). Therefore fear of expulsion, losing a job or endangering co-workers were the most common disincentives to pursue with complaints.

The highest number of complaints in undocumented migrants` cases was recorded in Slovakia (12 complaints) due to fact that many migrants approached counsellors while already awaiting their expulsion in detention centres ("nothing to lose" approach). The outcome of the inspections in the workplace was hardly ever reported back, since neither the employee nor the NGO are party to the proceedings initiated by the labour inspectorates. The counsellors recorded no case of the labour inspectors formally ordering the employers to make payments to the employees (at least not by way of a legally binding decision).

In several cases, labour inspectorates **did not detect any violations because they were not always equipped with effective instruments and powers** e.g. when an employee has not signed the contract based on the labour code, the inspectors are often unable to take any action.

Litigation

In situations where negotiations between employers and migrant employees were impossible or ineffective, and there were no prospects on recovering the back payments through the labour inspectorates, migrants were recommended to initiate court proceedings if they had a valid claim against the employer. These were without exceptions all claims for outstanding remuneration. According to article 6(2) of the directive, Member States shall enact mechanisms to ensure that irregular migrant workers may introduce a claim against their employer for any outstanding remuneration, including in cases they have, or have been returned or start procedures to recover outstanding remuneration without the need for them to introduce a claim." As explained in chapter 4, in none of the project countries has been established a specific mechanism to facilitate the recovery of the outstanding wages for the irregular migrants, let alone for the employees who have left the country. Therefore, the usual obstacles associated with the court proceedings

Legal counsellor (SK): "Undocumented migrants are hidden and trying to avoid any kind of contact with state authorities. Should they be disclosed, they are facing a risk of being deported to the country of origin. According to the Constitution of Slovak Republic everybody has the right to judicial protection – this means that also irregular migrants have the right to initiate any procedure when their rights were violated. The main obstacle in case of undocumented migrants is that they do not want to (and cannot) let go of their anonymity and are in most cases not able to prove their identity with documents which can be a problem in court".

In Poland an undocumented Pakistani citizen filed a lawsuit against his employer, with the counsellor`s assistance, for outstanding remuneration. However before the first hearing he obtained a residence permit based on his family life family life and demanded that the counsellor withdraws the lawsuit, because he didn't want to pursue a long and possibly stressful procedure.

(length, language barrier, costs) are accompanied with the lack of any protection for an undocumented employees, should they pursue w their claims. Even if in some countries the non-governmental organizations may represent an employee in the employee-employer disputes, this facilitation does not encourage the migrants to take legal steps, since:1/it applies solely to labour law disputes 2/ it does not really make an irregular migrant less vulnerable to employer`s retaliation or deportation. **The legal consultants stressed that only a possibility of obtaining a temporary residence permit could encourage the employees to step out of the shadow**. Also, during the project there was no case of an employee determined to recover the outstanding remuneration after he or she has been returned to their country of origin.

In Slovakia an undocumented Serbian citizen had been working for seven months in a food preparation and service company, but was not paid for two months. The employee decided not to submit any complaint to the labour inspectorate because of its limited authority and also because of fear that the employer would influence the investigation and its results. The NGO lawyer decided to lodge a claim to the court to pay the outstanding remuneration. After the claim was lodged, the client disappeared and cut off contact with the lawyer. Due to the lack of evidence and information the lawsuit has been withdrawn, since the undocumented migrant's testimony was the main evidence essential to the court hearing.

Most commonly when clients learned that **the procedure could last up to several months**, they gave up undertaking legal action. Also the necessity of collecting evidence, while simultaneously searching for another gainful employment proved to be a limitation for several migrants. In some cases the sole identification of an employer (name, address) proved to be an irremovable obstacle to the pursuit of the claim.

A very similar case occurred in Poland, where an undocumented Georgian citizen, while very motivated to recover his outstanding remuneration from the employer in the beginning, broke off contact to the NGO two weeks into the civil court proceedings. His disappearance also resulted in withdrawal of the lawsuit.

In the end, only in four cases the lawsuits were actually filed to the courts in the course of the project. And sadly three of them were later withdrawn due to the disappearance of the plaintiff or on his/her direct demand. In one case a part of the outstanding remuneration was due to the employee for the work he has performed while being documented. Therefore a joint lawsuit has been prepared, covering both the period of regular and irregular stay, the latter based on the presumption deriving from the article 6 of ESD. Since the employer was not actively participating in the proceedings, the due remuneration has been awarded to the full amount with

a default judgement. Therefore, even though the plaintiff`s claim has been satisfied, it was impossible to know the reasoning behind the judgement, and find out whether the court has actually acknowledged the existence of the Directive`s provisions.

Victims of criminal acts

Undocumented migrants due to their unwillingness to contact authorities are a specially vulnerable group of employees, likely to fall victim to a crime. The underreporting rate is very high. An irregular situation of an employee might embolden employers to diverse acts of abuse and exploitation in the work environment, not always constituting offences according to the national criminal codes. The Directive, acknowledging the extremely vulnerable position of the irregular migrants, makes it obligatory for the Member States to penalize certain acts as offences (articles 9-10) when they are targeting undocumented employees (*see Chapter 4*). Reporting the most harmful of these crimes and engaging in criminal proceedings against the perpetrators is supposed to be facilitated by the possibility of granting a temporary residence permit to the "cooperative" victim. This facilitation however proved to be not applicable in the cases registered by the legal counsellors in the course of the project. The disclosed crimes, even though committed by the employer, either failed to entitle employees with a right obtain protection (a residence permit) or completely fell outside the scope of the Directive`s provisions eg. violence or fraud.

A man from Sri Lanka arrived in Poland with a visa arranged by the Polish lawyer, who promised to help him find work and legalize his stay. In Poland, the client was forced to work as a servant for a couple of months, and his documents were taken away from him. When he decided to leave, he was seriously beaten up by the employer's staff. He reported this to the police who managed to retrieve his documents. However afterwards the legal proceedings were closed, as no criminal offence was recognised

In Poland a Tanzanian citizen did not want to take any legal action against his employer, despite the fact that his case had a criminal dimension, as he was afraid of the employer`s retaliation after being previously seriously beaten. He refused any assistance of the NGO and received a negative decision in response to his application for a residence permit. He left the country and his future attempts at return were unsuccessful.

In Romania in the abovementioned case of a Philippine woman who informed the project organisation about labour exploitation and deprivation of liberty, the police was alarmed and they freed the hostage quickly. Nevertheless the employer, being a public figure, denied all of accusations, but paid outstanding salary and covered other costs. The employee withdrew her testimony despite being advised by the lawyers not to do so.

In the end, only 4 offences have been reported to the relevant authorities with the assistance of the NGO lawyers, one of which has been subsequently withdrawn on the victim`s demand. The outcome of the

investigations has been known by the time of the preparation of this report only in one case, where the police found no evidence of a crime committed.

Applications for a residence permit (Article 13(4))

Out of all of the cases registered by lawyers in the five countries, there was just one situation in which the application for a residence permit provided by the Employers Sanctions Directive could be filed. Polish lawyers applied for the temporary right to stay on behalf of a third-country national involved in penal proceedings against an employer. He eventually obtained the residence permit, but on the basis of other, previously binding provisions on facilitating legal stay of persons indispensable to national court proceedings. While beneficial for the employee, the decision was incomprehensible for the project staff, since it proved that the authorities preferred to apply previously existing laws over the new, more adequate provisions introduced by the Directive.

Other legal advice

Undocumented migrants, who were expecting support also in non-work related issues often asked for advice on legalizing their stay (Romania, Poland, Hungary), entering a marriage procedure (Romania, Poland, Czech Republic) or regularization (Poland). Other consultations included questions about the return to the country of origin, health care, maternity, studying, and housing.

15 undocumented migrants successfully became documented thanks to the efforts of the project consultants (two cases in the Czech Republic, four cases in Hungary, five cases in Romania and one case in Poland and Slovakia).

Legal assistance provided to documented migrant workers

As mentioned above, documented migrant workers might very often find themselves in equally vulnerable position as if they were undocumented. The main reasons hereto are the following:

- dependence from the employer, as work and residence permits are tightly coupled and losing a job leads to losing a residence status;
- irregular work, i.e. work performed contrary to the binding regulations, is most commonly punishable with a fine and results in deportation of an employee disregard of his/her intent, therefore the latter is not interested in disclosing his/her employment situation to authorities.

With these dilemmas, only some of exploited workers make the decision to seek justice. Nevertheless, the numbers of legal remedies applied with the assistance of NGO lawyers in this group was significantly higher than in the similarly numerous group of undocumented migrant workers:

Table 7.
Legal measures applied in the cases of documented migrant workers

Legal measures applied in the cases of documented migrant workers	
Pre-trial letter/ call for payment	23
Lawsuits	12
Complaints	22
Other legal instruments	27

Below you will find examples of cases facilitated by the NGO legal counsellors in the course of the project.

A migrant was working in the retail industry for 11 months while going through the asylum procedure. In Romania asylum seekers are not allowed to work during the first 12 months of stay. He was paid less than the national minimum wage and at the moment of the consultation he had not been paid for the last 3 months. The employer provided him with 1 meal/day and beverages instead. Consequently, ARCA contacted the employer directly, acting as a mediator and explaining him the legal consequences of his actions. The employer eventually agreed to pay the client's salary for the remaining three months.

An Ukrainian woman had been working on a visa with a right to gainful employment. Her employer provided accommodation, food and salary, but took her documents away. When the woman realised that she was being paid less than the Poles and wanted to resign from the job, the employer kicked her out from her accommodations without her belongings and payment. After negotiations with the Police and the Ukrainian embassy, she received her belongings and documents. The organisation's lawyer formulated a pre-trial call for payment which apparently had its impact: the woman was paid and returned to Ukraine.

In the Czech Republic an Ukrainian citizen who was employed at a construction site and worked for 210 hours without payment, asked the project organisation to mediate with the employer. An agreement was made that the employer would compensate the employee for 170 work hours, but no complaint would be made to the labour inspectors. The Ukrainian worker accepted the arrangement.

The recovery of back-payments was crucial to more than 2/3 of the migrants requesting support from the organisations. Legal counsellors indicated that some instruments were more effective in certain situations than the others. In this group, improvements of migrants' situation were observed in cases of **mediation with an employer** but also in cases where a **lawyer assisted in communication with the state authorities** (labour inspection, labour office, financial office, social security agency, public healthcare insurance,

Legal counsellor (HU):
"The residence permit and the work permit are in strong relation, that is why employees are afraid to file a complaint against the employer because it would cause the termination of their employment, withdrawal of the work permit and the residence permit too".

etc.). In Poland, **complaining to the labour inspectorate (when applicable)** worked quite well and resulted in solutions satisfactory for the employee. In an ideal situation, even if the employer cannot be punished with a fine, the inspection provides additional information or evidence that can be used in court. Unfortunately the inspection could not be initiated if the employee was working irregularly or his/her colleagues still maintained a working relationship with the same employer, due to the risk of being fined or expulsed.

One of the issues raised by the lawyers was the ineffective enforcement of the awarded back payments. Even if the judgement was beneficial for the plaintiff it could not be enforced, because the employer pretended to have no financial means or assets.

Chapter 6.
Best practices in other EU Member States

During our ongoing efforts to improve the standard of protection of third-country nationals in the labour market we searched for examples of good practices from the countries of "old" Europe. We paid close attention to practices regarding irregular third-country nationals and to migrant workers engaged in irregular employment.

In our desk research, we compared legal frameworks and practices in Germany, Austria, Norway, Ireland, Sweden, Portugal, the UK, Belgium, Finland, Greece and France.

- **Practice of prior warning before a penalty application for irregular employment (Ireland, Finland)**

In **Ireland**, in most cases, if an inspection reveals that an employee does not have a valid work permit, both the employer and employee are first advised to correct the situation. They are also warned of potential prosecution if such action is not taken. In **Finland,** when a legally-staying third-country national is discovered working without a work permit, the consequence is a warning and a 'day fine'. In practice, the local police will notify the employee of the undeclared work and advise him/ her to apply for a residence permit that will entitle the employee to work. If the authorities do not grant a residence permit entitling that person to work, the third country-national has the right to appeal the decision. The ultimate consequence for failure to abide by the terms of the residence permit may be expulsion from the country.

Many times employees are kept in the false belief that the papers are being processed or that the work permit has already been issued. The employees do not have access to documents and are usually unable to verify if the employer has fulfilled all the requirements regarding their employment. They are not informed of the real state of affairs. Hence, the practice of giving a prior "warning" allows for the opportunity to remedy such a situation by the employer and commence legal work by an employee.

- **Equal labour rights irrespective of legal status (e.g. France, Finland)**

In almost all of the considered states[45], irregularly employed workers hold the same labour rights as regular employees in regards to claiming their remuneration and other employment benefits related to work. It is obvious that the undocumented employees' work contracts should be considered as valid, existing and enforceable regardless of their residence status.

- **Mechanisms to facilitate the remuneration transfer to the employee's country of origin (France)**

Legislation usually does not provide any special mechanisms to facilitate the transfer of money to the undocumented employees once they have returned to the country of origin, even though this is a requirement stated in the Employers Sanctions Directive. The exception is France, where an employer has 30 days from the moment he/she received a notification of offence from authorities to pay the employee directly and voluntarily. If, in the meantime, the foreigner has been arrested or expelled, the employer has to pay the salary and transfer fees to the French Office of Immigration and Integration (FOII), which will transfer the amount to the foreigner. If the employer does not pay, the FOII will recover the outstanding compensation from the employer on behalf of the employee.

- **Possibility of filing an anonymous complaint against an employer (Portugal, Sweden, Finland)**

Another tool to protect the rights of irregular third-country nationals is the possibility to file anonymous complaints against the employer should the latter violate workers' labour rights. This allows the employee to initiate a workplace inspection without the fear of retaliation by the employer or an expulsion order from the immigration police, since an agency overseeing labour infringements cooperates closely with the immigration police and denounces third country nationals should they be found working illegally or without a residence permit.

45 Up until 1 October 2014 in Ireland any contract between an undocumented worker and an employer could not be enforced by the courts, whether for the benefit of the employer or the employee (see: Hussein v the Labour Court and Younis). In April 2014, the Employment Permits (Amendments) Bill 2014 was passed. One of the aims of this Bill is to address the deficiencies in the current legislation which enable employers to benefit, at the cost of the employee, from the unenforceability of employment contracts where the employee requires but does not hold an employment permit. The Bill allows a foreign national who can satisfy a Court that he/she took all reasonable steps to comply with the requirement of having an employment permit to take civil action for compensation against the employer for work done or services rendered. It proposes that compensation for such work be calculated by reference to the national minimum hourly rate.

- **No automatic expulsion order after being detected performing work contrary to the binding provisions (Greece, Portugal)**

Often the performance of work contrary to the binding provisions on employment of third country nationals, e.g. without a written contract or a work permit, is a direct and sole basis for the expulsion order imposed on the employee. This happens even though the employee is often not the one to blame for failure to abide by the law, as it is the employer who is responsible for obtaining a work permit and registering the contract.

However, in Greece employment inconsistent with the residence permit granted meets is punishable with fines, but a residence permit may be revoked or not renewed only in the case of repeated infringement.

In Portugal, conditions justifying an expulsion order do not include situations in which the foreigner has a legal residence permit but is performing work illegally. Only in exceptional situations, such as risks to national security or to other interests of the country, may a person who has the right to reside in Portugal be subject to deportation.

- **Appealing the decision on the complaint against the employer (Greece, Portugal)**

Should migrants' labour rights be violated by the employer, they have the right to file a complaint to the relevant body. This should initiate a procedure which may result in the following outcomes: an employer might be found guilty of violating the migrants' labour rights, she/he can be fined or ordered to pay the outstanding remuneration. Unfortunately, in most countries a migrant worker filing a complaint is not a party to the proceedings, so he/she may not influence the outcome of the proceedings (e.g. provide evidence) and may not appeal a decision that s/he finds unjust.

In Greece and Portugal, however, employees (regardless of their residence status) are party to the proceedings and they are entitled to appeal.

- **Residence permit for an undocumented employee, other than the one introduced by the Directive (France)**

One of the Directive's most important mechanisms, which was supposed to facilitate the recovery of outstanding remuneration by undocumented migrants, is the ability to obtain a residence permit in certain cases strictly determined by law.

The ability to temporarily legalize one's stay, whether it is for the time of the recovery procedure against the employer or to enforce a claim, is the

only factor encouraging employees to initiate any proceedings against their employers, who otherwise would walk away unpunished. Disclosing their identities poses a great risk for undocumented employees, greater than the benefit from the (uncertain) outcome of a civil action. The Directive provides a rather narrow scope of possibilities to obtain a residence permit, e.g. when an employee was a victim of particularly exploitative working conditions or human trafficking. However, some states decided to enlarge in their own legislation the minimum requirements for other cases. Under French law, undocumented migrant workers may seek legalization of status and obtain a residence permit related to their status, should they have a signed employment contract or a promise of employment, have stayed in France for at least five years, been previously employed, and speak French.

- **Presumption of the employment relationship's duration applied also to documented migrant workers (Austria)**

In order to facilitate the recovery of outstanding remuneration for undocumented migrants, the Directive introduced the presumption that the duration of the employment relationship would be a minimum 3 months. However, the Directive applies only to undocumented migrant workers and leaves aside other migrant workers who are exploited by their employers but are unable to prove the employment relationship. In Austria, the three month employment relationship presumption applies to all migrant workers if they perform their work contrary to the binding provisions.

- **Third party involvement (Germany, Portugal)**

The right to appoint a third party as an employee's representative before the court secures his/her right to a fair trial and enhances the probability that a migrant worker will actually initiate a lawsuit against the employer. In both Germany and Portugal, an NGO may represent an employee in civil proceedings against the employer. In Portugal, however, only immigrant associations duly recognized by the relevant authorities may get involved in the process.

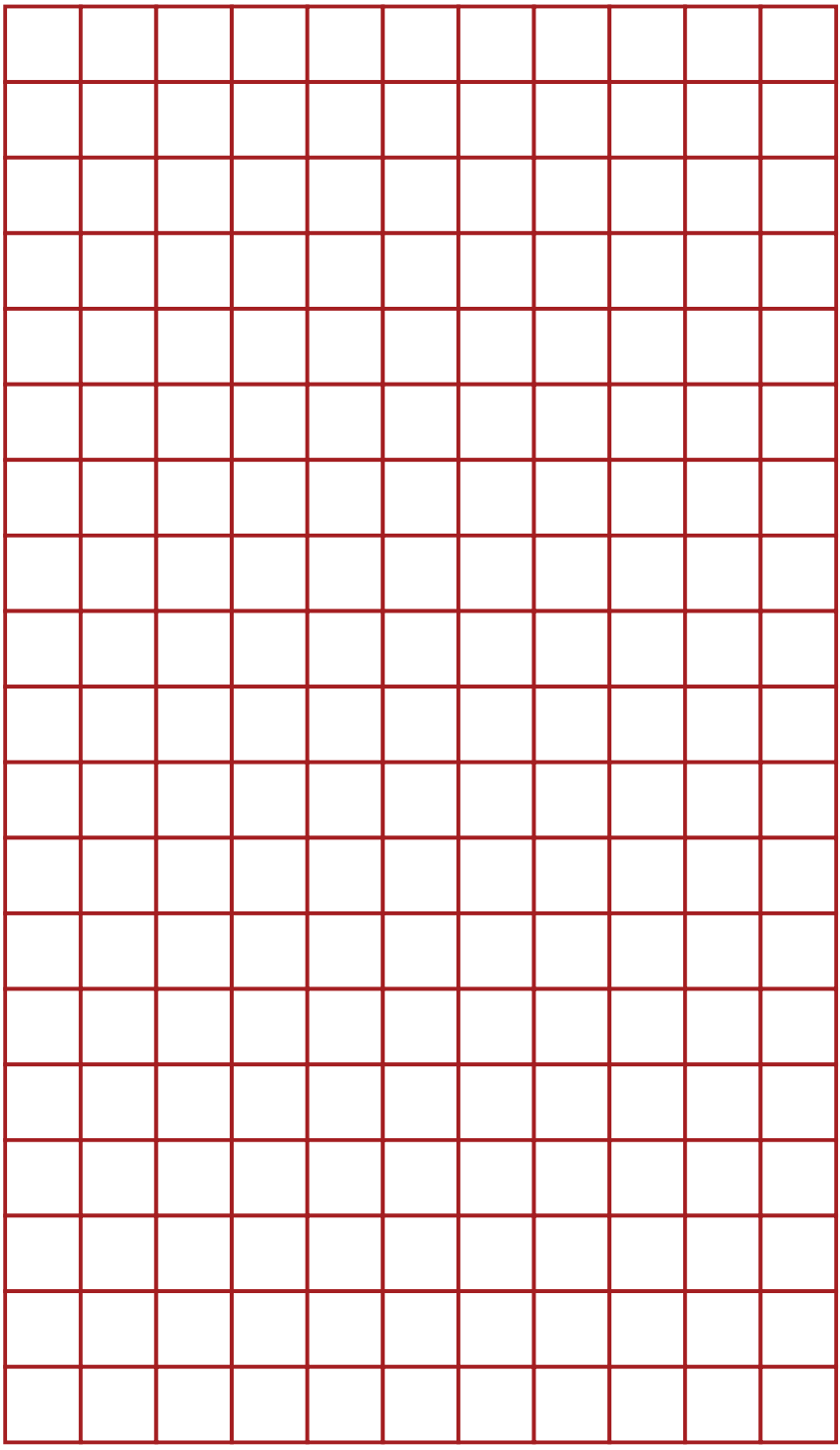
- **Support from the labour inspectorates (Ireland, Belgium)**

It is common practice for labour administration agencies to cooperate closely with immigration police either by conducting joint controls in the workplace or by denouncing the detected third-country nationals who infringe the provisions of residence or employment of aliens. This arrangement nullifies the protection of the migrant worker against exploitation in the

workplace.It cannot be effective if the inspection poses a greater threat for the employee (expulsion) than for the employer. We were not able to identify a system where a labour administration mechanism was totally separated from the immigration police, i.e. where there was no exchange of information or cooperation of some kind between the two parties.

Having underlined this, it bears mentioning that in both Ireland and Belgium filing a complaint to the labour inspectorate does not result in the notification of the immigration police about the employee's status. However, should an inspection be initiated, it might be carried out jointly with the immigration police and thus the protection disappears. Being able to safely initiate an inspection in a workplace is very important in terms of possible evidence for the future lawsuit against the employer. Often the employee is not able to prove in court that s/he was in fact employed by a defendant.

In Greece, Finland, Norway and Sweden, labor inspections are only occasionally carried out jointly with the immigration police.



Chapter 7.
Giving voice to employers, civil servants and experts

While the project core activity was the provision of legal assistance to the migrant workers, it seemed also interesting to hear from other actors involved in the employment process. Therefore an attempt was made to investigate employers' level of knowledge of foreign employees' labour rights, as well as to analyse the opinions of key actors in the labour market on the effectiveness of Directive 2009/52/EC and the national regulations concerning employment of third-country nationals.

The research questions were as follows:

- What is the level of knowledge that employers have regarding the employment of third-country nationals?
- What are the employers' opinions on the Directive and national regulations applicable in the employment of third-country nationals?
- What is the role of the Directive? Do those regulations have a real impact on the employment relationship?
- Is the implementation of such regulations effective? Does it achieve an outcome?
- What are other possible tools for protecting foreigners from illegal employment? What instruments could be provided for a foreigner to guarantee that his/her labour rights are respected?

In each country a similar research process was carried out, based on the common concept, adjusted aims, objectives, and tools. Researchers in the Czech Republic, Hungary, Poland Slovakia and Romania followed the same questionnaires and were encouraged to interview the same five groups of respondents[46]:

- civil servants,
- NGOs and trade unions,
- employers,
- recruitment agencies and employee unions,
- academics and experts.

46 Researchers in the four countries reached about 20 respondents and wrote country reports, which were used as the main source of information for the comparative report.

The research was carried out in four countries between November 2013 and July 2014. Altogether, 94 people were interviewed.

	Czech Republic (Praha / Ústecký kraj)	Hungary (Budapest / Nyíregyháza / Visegrád)	Poland (Warsaw / Poznań)	Slovakia (Bratislava / Košice)	Romania (Bucharest)
civil servants	6	5	8	4	3
NGOs and trade unions	6	3	4	3	3
employers	5	5	7	7	4
recruitment agencies and employee unions	0	2	4	5	0
scholars and experts	2	5	2	1	0
Total	19	20	25	20	10

Table 8. Number and groups of the respondents in researched countries.

The different groups of respondents gave a diversified picture of foreign workers' employment in the national labour markets. It is worth mentioning that the respondents' opinions were rather frank, but the experience and position they represent influenced their answers. Civil servants were rather distanced from the problems of migrants, in contrast to NGOs' representatives, who identified existing challenges but sometimes overemphasised them. Legal knowledge, especially details of the local regulations implementing the Directive, was shown to the greatest extent by experts and academics.

Respondents were chosen on the basis of their work experience, previous collaboration with the project partner organisation, or thanks to private networks. In some cases, the researchers encountered obstacles when arranging interviews with civil servants who showed very little interest and willingness to cooperate on this project and looked for excuses not to do so.

The most challenging task during the research was to reach out to the appropriate employers. There were different strategies for identifying and encouraging employers to participate in the research. However, lack of trust and a fear of inconvenient questions might have discouraged some of them. In some cases they did not allow for the interviews to be recorded or they completely refused to be interviewed. They feared being exposed to the authorities for illegal employment practices. Most employers were found by 'word of mouth'. Suspicious behaviour toward researchers and many refusals show that employing migrants is a sensitive issue in these countries. It was significant that a number of respondents agreed to talk only if their interviews were not recorded.

One of the interesting outcomes, already visible while identifying the best interlocutors, was the **lack of interest of trade unions in supporting migrant**

workers in the researched countries. The national trade unions tend to support citizens of the country they are based in. Lack of access to trade unions leads to a weaker position of migrants in the labour market. In case their workers' rights are violated, the migrants can individually turn for help only to NGOs working with migrants or on integration issues, but not to trade unions.

To some extent, the employers selected for the study reflect the policy of employing foreigners in these countries – e.g. in Slovakia due to administrative burdens, only big companies, with HR departments, are able to employ a third-country national. Therefore most of the employer interviews were conducted at multinational companies with hundreds of employees. In the Czech Republic, after the law was changed in 2009, many employers prefer to employ EU citizens (especially Romanians and Bulgarians) over third country nationals.

Overview of the procedure of the TCN`s employment

Migration laws and policies have been significantly changed over recent years in the CE countries. To a large extent these were dictated by accession to the European Union.

Once the Czech Republic, Hungary, Poland, Slovakia and Romania became members of the European Union, they automatically abolished employment restrictions for other EU citizens. Moreover, European Union Directives were also dedicated to them, and the countries have been obligated to implement these regulations into their national laws.

In the research, respondents clearly expressed that European law greatly influenced the procedure for employing foreign workers. The following three instruments of the EU law were mentioned most frequently:

- Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment;
- Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals;
- Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State.

Restrictions on access to the labour markets

We identified two categories of access to the labour markets of the researched countries which remain in accordance with the EU regulations. **Unrestricted access** is open to the EU nationals and their family members together with holders of permanent residence permits. However, the employer still has duties related to proper registration and keeping an employee's record. **Restricted access** to labour markets for all third-country nationals is usually exercised through the issuance of work permits. Based on the analysis of the five research projects, some common elements can be identified.

Labour market test. All five countries have institutions for labour market tests for employers willing to employ a foreign national. The objective of the test is to justify the employment of a foreign national in the position concerned. A foreign national can obtain a work permit only if the competent authority deems that their employment in the given position is justified. In other words, if a citizen of the country can be engaged for said position, a foreigner will not receive the work permit.

People with protection status. All five countries give preference to third-country nationals enjoying protection status, e.g. refugee status or beneficiaries of subsidiary protection in accessing the labour market. In the Czech Republic, they need work permits, but this can be obtained without the labour market test. In Hungary and Poland they do not need work permits. In the Czech Republic and Slovakia, there is a requirement of a stay in the country for a period longer than 12 months.

Foreign citizens with local descent. Both Hungary and Poland introduced legal preferences for migrants having origins in these countries. In Poland the holders of the Polish Card (Karta Polaka) do not need to obtain a work permit, whereas in Hungary, according to the Law on Citizenship, foreign nationals of Hungarian origin can immediately acquire Hungarian citizenship.

Seasonal work regulations. Poland, Hungary and Slovakia introduced a special procedure of employment of third-country nationals working on a seasonal basis. In Hungary, it allows a foreigner to stay for a period of 150 days a year for the purpose of employment, a period which may be divided, if the seasonal work so requires, into multiple periods. The introduction of these options, however, did not actually boost the employment of third-country nationals in Hungary. In Poland this regulation applies only to the nationals of listed countries (Armenia, Belarus, Georgia, Moldova, Russian Federation, Ukraine) for the period of 6 months within 12 consecutive months.

This procedure is commonly known as a "statement" procedure, where an employer only registers a declaration on the intention to employ a foreigner. Slovakia introduced a procedure in which no labour market test is required for seasonal employment which does not exceed 180 days during 12 consecutive months. This option is limited to the holders of temporary residence cards for the purpose of family reunification (within 12 months of the granting of the card), as well as to the long-term residents of any of the EU Member States.

Work permits. In the Czech Republic, Slovakia, and Hungary, work permits can be issued to a foreigner for a maximum of two years. In Poland, they are valid between one and three years. In Romania a foreign worker can receive a work permit for one year. The work permit allows for work in a specified position, for a specified employer, with a fixed remuneration. When changing the employer, type of work, or job position, an employee has to obtain a new work permit. A separate work permit has to be issued for all activities performed under one of the types of contracts specified in the Labour Code and service contracts, including short-term contracts, part-time contracts, and seasonal work.

There are some exceptions that countries provide for some categories of third country nationals who do not need work permits, such as spouses of holders of permanent residence and students, but these differ from country to country.

Annual quota of work permits. In Romania, to control the number of foreign workers, a system of quotas is implemented. Each year the number and types of work permits to be issued are approved by the government in the form proposed by the Ministry of Labour. The annual quota for 2011 and 2012[47] was 5,500 work authorizations, most of them permits for permanent workers (3,000-4,000), then highly-skilled (1,000) and seconded workers (600-700). The other types of work permits, for seasonal workers, trainees, athletes, nominal work permits and cross-border workers oscillated around 100-200 issued documents. If the number of applications exceeds the established quota, the Romanian government can extend it based on a justified proposal from the Ministry of Labour, so potential employers might be still included in the system.

47 Data collected by the Romanian researcher. In 2014 the annual quota for work permits is the same, 5,500.

Reasons for employing third-country nationals

The following part of the report is based on research undertaken in the five countries. The use of the same methodology – questionnaires and defined groups of respondents – created the chance to make comparisons between the countries. The majority of interviews were conducted either with employers who engage migrant workers legally or people involved in the issues of legal employment (civil servants, agencies, NGOs). There were two employers who openly admitted to illegally employing third-country nationals, and one who did not employ a foreign person.

Based on collected data, the research team tried to find out **why employers are willing to employ a foreigner and why some of them do not decide to do this**. Interestingly enough, in all five countries the answers regarding "the need to protect the domestic labour market" were given. This statement was frequently made in the name of protecting citizens' rights; some key people wanted to hide their biased opinions behind this statement, while others, like authorities, were expressing their obligation to take care of native workers first.

In Romania, the interviewed employer indicated the importance of language competence in engaging a non-native speaker for some positions, but his opinion also suggests a reluctant approach toward foreigners.

> *I don't think I would trust someone who is not fluent in Romanian to deal with customers and with this kind of responsibility. Of course all employees receive training when they get hired. But for this business to work here, there cannot be any language barrier between a customer and an employee. (...) As a customer service assistant you need to maintain communication with sales representatives, place orders and so on, so again speaking the language is critical* (employer, 9, RO).

Prejudices and stereotypes of employers toward third-country nationals are hardly ever expressed directly, but in some cases such views influence them to not employ any foreigners.

It can be noted that not every employer can afford hiring a third country citizen. The Czech and the Slovak respondents in particular mentioned that only big companies can afford having non-EU citizen staff. The procedures linked to employment of third-country citizens are time- and money-consuming.

Usually a job seeker is not able to go through this procedure alone. Companies occasionally have no dedicated budget for such a purpose [for HR representatives responsible for hiring migrants] or they have problems approving it. (employment agency, 17, SL[48])

We can plan ahead for almost a year, so we can cope with the length of the procedure[49], but what about other employers? (employer, 4, CZ).

In the examined countries, migration policies are new and continuously developing projects. The benefits of a foreign labour force are not obvious to the local authorities, and therefore the idea of limiting access to the national labour markets gains more support. The opinion that the "complexity of procedures reflects the lack of the state's interest in employment of foreigners" is not rare. Moreover, xenophobia and bias on the part of the local employers towards third-country nationals is another obstacle encountered in the research.

There are different reasons for employing a foreign worker, but undoubtedly **the reasons are universal**, as they were repeated independently in the five investigated countries. Some of the employers have chosen foreign workers because of their qualifications (language skills), while others were looking for any employee willing to work in certain conditions. Respondents of all countries agreed that motivation to choose a foreign person instead of a native **depends on the type of business**: *"Some employers look for cheap labour, others for foreign employees having special skills and competences, native speakers of different languages, or exotic domestic workers"* (civil servant, 1, RO).

We should take into consideration that the real reasons for employing a foreigner could be different from the declarations presented to the researchers. The respondent who says that he prefers to employ Ukrainians because they are hardworking employees gives the impression of being open to foreigners. However, while describing his preferences, the respondent employing a household worker with unlimited working hours points out that: "*an employee is hardworking, has no family, and is available 24 hours a day*" (employer, 1, HU). These characteristics show the real motivations for third-country nationals' employment, and might lead to possible abuse.

48 To identify the sources of quotations cited in the text, additional information in the brackets indicate the group of respondents, the number of the interview and the country it has been conducted in.
49 The entire process of engaging a new worker from a third country in the Czech Republic usually takes about 6-9 months.

The most common reasons for employing a foreign worker are:

- **Lack of skilled domestic labour force.** There are some sectors with shortages of workers. In these cases it does not matter whether the specialist is a foreigner or not.

  In IT, for example, the Indians are just as good as the Hungarians, but the good Hungarians have already been taken abroad… One of our clients could hire about ninety development engineers, but there are not enough Hungarians… There are these firms, you know, that moved in and offer services, and they need natives of every language who know the trade. (Relocation agency, 1, HU).

  Every employer tries to make profit based on small investments and low costs. In the construction industry there was a huge gap in the labour force. People left Romania and we had to keep the business so we looked for cheap labour. I had some connections there [Republic of Moldova] and had people hired here (employer, 7, RO).

On the other hand, there are positions which local job seekers are reluctant to take. Consequently, employers might prefer foreigners: "*The Czechs are lazy; there is a generous social welfare system which does not force them to work*" (employer, 2, CZ); while:

(…) foreigners seem to work more, they do not have such demands as the Czechs, they do not complain so much (NGO, 4, CZ).

They are hardworking, not complaining, do not demand cars, do not require secretaries (agent, 21, PL).

- **Specific qualifications**. Foreigners` language skills are in high demand in certain areas of employment e.g. in education translation services or international business. Other skills are connected with certain trade markets or particular kind of services which can be performed only by people coming from a given cultural background.

  some job positions require [employing foreigners] just because of the name itself, such as Thai massage or a Chinese chef (civil servant 2, SL).

there are such places, like catering, where offering a Chinese dish or kebab requires a foreigner. Obviously this is not Polish cuisine. Foreigners are recruited to get business on the market, to create any substitute for authentic ethnic cuisine or to follow traditional ethnic recipes. They look more credible (civil servant, 4, PL).

- **Economy.** As a motivation for employing third-country nationals, lower costs are frequently mentioned . However, some employers raised the issue that the costs of employing a third-country national are the same as those of employing a domestic worker, if not higher. There are cases when the employer needs to cover accommodation, travel or meal costs. Obviously, this concerns only legally employed workers and the employer has no option to save on any fees.

Polish respondents in our research claim that it is a myth that all migrant workers are "cheaper":

Specialists arriving e.g. from Ukraine, expect salaries comparable to the Poles' salaries. (work agency, 9, PL)

This is not the case that workers from Ukraine or India or Belarus earn very little money here, they simply get the right money. (employer, 15, PL)

I am responsible for that person, I provide accommodation – this is an additional cost. I would not bear this cost when employing a Pole, and here I do, because I would like them to have a place to live and I help them with that process.
(employer, 23, PL)

In all project countries, it was noticed that third-country nationals are usually less demanding than local workers, and they accept either lower wages and/or worse working conditions compared to the local nationals.

There are positions that are paid a minimum wage and employers cannot find a skilled labour force in Slovakia (employers' union 19, SL).

In Poland foreigners agree to work in conditions which would not be acceptable for Polish workers for the same salary, e.g. in conditions below certain standards of safety or hygiene or taking up afternoon shifts. An

employee coming from another country is not in a hurry to go home after work and is willing to accept different working hours. (employer, 13, PL)

- **Loyalty.** The other issue present in the research is the specific loyalty of foreign workers: "*The majority of Poles working for the lowest salary in humiliating conditions would leave the job after three months and seek employment opportunities abroad*" (trade union, 17, PL).

From the declarations on the intention to employ foreign workers emerges an impression of a rather positive employer-employee relationship, which could be **reinforced by introduction of employment policies open to foreigners** or campaigns promoting cooperation with foreigners in different branches of the economy.

As mentioned by the researchers, it is evident that the **nationality of a foreigner often determines the sector** in which the person works. Ukrainians often work in household employment and agriculture (seasonal work) in all researched countries. Thais are often employed in massage parlours. Arabs work in hotels and catering branches. Catering and the food industry is more diversified in the researched countries: in Hungary there are Serbian, Albanian and Kosovan workers in bakeries; in Poland many Armenians find employment as kebab sellers.

It is important to note that in some sectors **workers are more exposed to exploitation than in others**. These are: agriculture, domestic work, and construction. Foreign workers employed in those branches are more often employed on an irregular basis and are therefore more vulnerable to work abuses.

When comparing the Czech Republic, Hungary, Poland and Slovakia, one finds an element shared by all four economies: the **Ukrainian workforce**. Ukraine, although not an EU Member State, is seeking links with the European community. Ukraine's economic, social, and recently also political situation is very unstable, which pushes a large population group to look for employment opportunities abroad. The grounds for seeking jobs abroad for the majority of the Ukrainian workforce in the discussed countries are similar: geographical neighbourhood and almost no language barriers, as the Ukrainian language is very similar to the other Slavic languages, Czech, Polish and Slovak. In Hungary, however, even though a language barrier exists, the Ukrainian workers are still desirable thanks to the Hungarian minority living in Ukraine.

Knowledge about the procedure of employing TCNs

Access to basic information about the procedure for employing foreigners is not a problem in any of the analysed countries. Information can be found online, through phone-line services, or at the offices of competent authorities. However, many respondents complain that even if they have general knowledge about the issue, they can not obtain comprehensive detailed information on the procedure in one place. Some respondents pointed out that there should be a governmental body responsible for providing complete and detailed information. Moreover, some statements of interlocutors may indicate that they actually do not possess knowledge about employers' obligations when hiring third-country nationals:

> *My obligations? To pay their salary, respect their working hours or pay them for overtime, give them days off, annual leave and so on. I know.* (employer, 7, RO)

The key factor in understanding the interrelation between knowledge and the employment of foreigners is **the size of an enterprise**. In Slovakia, respondents did not have any problems with the procedure as all of them represented big international companies with specialised HR departments. In other countries, it was repeatedly stated that large companies can afford having a specialised department, or at least a personnel manager responsible for foreigners' employment, while small businesses cannot afford such workers. In Polish or Romanian smaller companies, accountants were the ones dealing with such formalities. Employers themselves often did not have much knowledge, and they trusted their staff.

> *I really don't know because I don't deal with these issues. I have people who would take care of it if I need to hire a foreigner. But now I don't.* (employer, 9, RO)

Since there are no governmental agencies to satisfy employers by the provision of detailed information, **external institutions supporting the process of employing migrants** were founded in every country: NGOs, relocation agencies, and lawyers with detailed knowledge, all capable of arranging all formalities on behalf of employers and/or employees.

For example, in Hungary relocation agencies prepared summaries and lists for their clients, who may need knowledge about the procedure.

> *Our clients are well aware of the procedure. We always prepare a comprehensive brochure in which we state that third-county nationals are required to have a work permit. … In case the legislation changes, we write it down in advance. … It is worth noting that even the Office of Immigration was ignorant of the changes that were to come into effect on January 1 [2014]. Their clerks will not bother reading the official journal to keep track of changes. It is not their job.* (relocation agency, 1, HU)

In Poland, and similarly in the Czech Republic, private persons started to offer their assistance in addition to HR departments and lawyers specialising in migrant issues. So-called 'agents' arrange everything for a foreigner or employer (Poland). Sometimes they represent a couple of clients simultaneously. They receive substantial remuneration for their services; nevertheless they complain that "the *procedure has become extremely complicated and difficult"* (agent, 21, PL).

The question of their indispensability arises, while analysing messages recorded in the interviews. All the agents overemphasize their role in the procedure of employment of third-country nationals. In other words, they take care of their customers while binding and making them dependent on the agent's services. Therefore, it is recommended to **make an effort in facilitating the procedure and support employers in their independent actions**. Also, raising awareness about the legislation and procedures regarding the employment of foreigners should be considered.

Employers' difficulties in employing foreigners

Most of problems occur not because the employers' knowledge is limited, but because theoretical knowledge on procedures is different from the reality.

It never works as a whole, as it should; there will always be some difficulties, no matter how hard you have worked to be prepared. We do not have a problem finding any formal information, but you have to experience how it works. And that is where I need help. (employer, 4, CZ)

> *(…) First, a foreign employee can be hired only if the employer can prove that the respective vacancy cannot be filled by a Romanian, EU or EEA national*

> *or permanent resident in Romania; the prospective foreign employee must provide evidence of completed education, professional experience or training as required for the respective job and according to the legislation in place. Also, the employee must provide proof of criminal and medical records.*
> *[Then] the employer must submit a motivated request along with a number of documents related to the legal registration of the firm or company and prove that it actually operates in the same field for which the authorization is requested. He has to present a proof of tax clearance for the last trimester and prove that there has never been any sanction for illegal employment. It is also very important that the number of work authorizations issued fall under the annual quota. Documents related to the identity of the prospective employee must be submitted.* (civil servant, 2, RO)

It was confirmed that complicated procedure discourages many employers. Already at the beginning of the process, a motivated employer willing to hire a foreigner for the first time "*is terrified by a lot of information on the issue*" (civil servant, 2, PL). Some people were discouraged by a two-stage procedure: a labour market test and applying for a work permit. In Poland, until April 2014, an employer who wanted to obtain permission to employ a foreign worker had to visit two offices. Since May 2014 the employer needs to visit only one, the Labour Office, in order to make a test. The responsibility for obtaining a work permit lies solely with the worker. Employers frequently gave up at the preliminary stage, discouraged by too many initial obligations: "*not every employer is satisfied that he has to deal with all the formalities, because firstly, it takes time, and secondly he does not want to be responsible for another person*" (NGO, 8, PL).

Most discouraging is a long and expensive procedure. In the Czech Republic, the entire process of engaging a new worker from a third country usually takes about 6-9 months: "*It is terrible how many things you have to do for that: I started in autumn, sometime in October, and only now* [March], *I finally know I have arranged the work permits*" (employer, 1, CZ).

In Slovakia bureaucratic burdens make employment of third-country nationals unnecessarily troublesome. The requirement that various documents must be either notarised or certified with apostille and translated into Slovak cause delays in meeting official deadlines for submission of the documents or documents are incomplete.

It can also be dejecting that after collecting all necessary documents, the work permit is valid for only a short period of time. *"One very important aspect is that the authorization is valid one year and only for the assigned post and it can be renewed yearly"* (civil servant, 2, RO).

Additionally, not only procedures turn out to be obstacles. Hungarian entrepreneurs complain that engaging foreign nationals may present an extra barrier: they often have to pay travel expenses, accommodation and subsistence for that person. In this sense, foreigners become an extra financial burden. Employers admit that sometimes completing the procedure is possible only thanks to assisting NGOs.

It was stated several times that the most difficult thing is employing a third country citizen for the first time: *"But I think that for someone who starts, it is a disaster. He does not know and obviously cannot know (...) [how to do it]"* (employer, 1, CZ).

Therefore in order to **encourage legal employment of foreigners**, there should be formal support on a local level and different forms of incentives available for beginners (individuals or small business).

Regular and irregular employment

The term "illegal work" is defined in the five researched countries both as a legal institution and a social phenomenon. This twofold understanding might explain why the discussion about third country nationals' employment becomes controversial, and why researchers in all countries faced the problem of lack of trust when interviewing employers.

According to the legal regulations, "legal employment" of a foreigner is a situation in which s/he has any kind of authorisation to stay in the country (e.g. residence permit, visa) and an authorisation to exercise work (e.g. work permit), no matter whether this is included in one or more documents. In contrast, "illegal work" means employment without at least one of these necessary documents. Nevertheless, there is another approach to "illegal work," which means infringement of other legal norms, e.g. worker's social rights or other labour laws.

In the social meaning, "illegal work"[50] is perceived as a "not completely legal job", and "grey market" and is accepted by the society. There is a great

50 There are different levels of irregularity. One can have a permit to stay, but not a permit to work, or the documents can be expired. Most serious and less frequent are cases in which irregular employment is combined with irregular stay. For example, when a person entered the country on a tourist visa but found a job and overstayed.

number of situations in which the third-country national is working illegally. People tend to excuse the avoidance of obligations and legal regulations, e.g. his/her visa just expired; s/he has a family so s/he must earn money; s/he is a good worker, but at the moment has some problems with her/his residence permit, etc. In such cases, both the employer and the employee often ignore their disobedience of the law and continue playing against the system.

Irregular employment and its most common forms, such as unregistered employment, or registering at minimum wage,[51] is widespread in each of the studied countries, regardless of the nationality of the workers, foreign or domestic. The participants in the study repeated that it is a **"practice widespread in the society"**. The author of the Hungarian report concluded that irregular employment can be traced back to the previous political regime in the country. Employment outside the sectors of the formal economy existed in the socialist system, and for a long time it was tolerated by the authorities.

Last, but not least, irregularly employing third-country nationals is frequently based on a consensus between the employer and the worker: both want to receive extra profits. Unfortunately, the consequences for each party are different, and usually they are more painful for migrants.

Why do employers decide to employ irregularly?

The respondents' answers in the studied countries demonstrate that there are two categories of employers: the ones who violate employment laws **intentionally**, knowing the risks and aware of the consequences, and the ones who are not **fully aware of the consequences** of their actions. Examples of unintentional irregular employment include: belated renewal of a work permit for a third-country national and introducing changes in the job description, e.g. the place of work, and not reporting it to the competent authorities. In both cases, employers may complain about the procedures being too complicated, but what is decisive here is the employer's motivation.

There are some repeating motives for irregular migrants' employment in all examined countries:

- **Irregular employment is a widespread practice**

Respondents indicated quite frequently that the real driving force of irregular employment is that it is a **widespread practice**, one tolerated by the societies of the Czech Republic, Hungary, Poland and Slovakia.

51 The employer officially pays the minimum wage to the worker and pays less taxes. The rest of salary is given "under the table", without informing the state.

Illegal employment is generally a problem of the whole society. (NGO, 7, SL)

People who want to work and find themselves in a situation in which they have no possibility of getting legal work, accept illegal employment just to earn money somehow. (employment agency, 15, SL)

- **Regular employment is too expensive**

Respondents, regardless of the studied country, indicated that in general, employers tend to "*save on costs as employees cost a lot"* (employer, 14, SL). They avoid paying taxes, social security and health care contributions, and it does not matter if it is a domestic or a foreign worker:

To tell the truth, legal employment is quite expensive. That would be probably the main reason for the illegal employment of Czech workers. (civil servant, 2, CZ)

People need money. It is much easier to make money 'under the table' for both the employee and the employer. I cannot pay anybody less than the minimum salary, gross salary (…). On the other side, I cannot pay all my people the minimum salary. So everybody has legal contracts, nobody works illegally, but the salary is the minimum of national wage. Then they get paid extra. If I payd taxes out of the real salaries these people get, I would have to shut down my business in two months (employer, 8, RO).

- **Procedure is too complicated, too expensive, and too long**

Complicated administrative procedures and increasing bureaucracy may discourage employers from legal employment of third-country nationals. In every country it is "*necessary to submit [a certain] amount of documents such as proof of health insurance, proof that a foreigner meets the prerequisites for employment, etc."* (scholar, 20, SL). The respondents often complained that it was impossible to be well prepared and to have all required documents. They would complain even more when the regulations got stricter.

Now it is [complicated] because you need to get a work authorization and a visa for someone to come. Before [2007] it was very easy. Moldovans crossed the border easily without any special arrangements. Now you need one hundred papers for one employee. (employer, 7, RO)

Civil servants expect various unnecessary papers and require visiting their office several times during one procedure. Hungarian employers expressed the opinion that registering third-country nationals is worthwhile only if their workforce is needed in the long term. If an employer decides to change the position of a third-country worker, s/he must the change work permit as well. Therefore some business people might decide to take an easier path by omitting all formalities.

- **Unfriendly attitude of administration**

There are quite frequent voices saying that some decisions regarding work permits of third-country nationals are taken against them in order to protect domestic labour market.

In the Czech Republic, civil servants and the NGOs spoke about the baffling case of an employee who had held the same position for four years, each year being granted a work permit and then in the fifth year, when theoretically the person could apply for a permanent residence, the work permit was denied:

> *(...) well, they are for example people who have already been here for a couple of years and they would like to apply for a permanent residence permit, and suddenly they are not granted the permit and they have to deal with it somehow.* (civil servant, 2, CZ)

Not surprisingly, migrants do not accept decisions of this kind and make new strategies for managing the problem of negative decisions issued by authorities. One of the strategies used in such cases can be self-employment, as seen in some countries. For example, in the Czech Republic statistics show a massive increase of self-employed persons from third countries since 2009, when the authorities began issuing considerably less work permits. Another strategy is to study and work which is possible in Poland and the Czech Republic, and to some extent in Hungary[52]. Those who do not have possibility of studying or opening their own business work illegally.

- **Inspections are insufficient**

Due to the insufficiency of labour inspection mechanisms in general and a significant number of foreigners working in violation of the binding provisions, the likelihood of an employee being detected is rather low. Chances

52 Students can work during their term-time for a maximum of twenty-four hours a week, and outside their term-time or for a maximum period of ninety days or sixty-six working days.

for impunity are higher for shorter periods of employment. And even if the employer were to be caught and fined, it still might be profitable.

> *Such employers prefer to pay a fine of up to 5,000 PLN than to hire on a contract of employment. There are no medical examinations, no health and safety training.* (employer, 13, PL)

> *Some level of irregular employment is necessary to sustain the market, and sometimes it is worth paying the fine.* (scholar, 4, HU)

On the other hand, employers are aware of the potential lack of administrative power among institutions controlling the labour market. In Poland these competences lie within the Labour Inspection and the Border Guard.

> *PIP[National Labour Inspectorate] cannot inspect a farm, there is no such power, unless the farmer has the status of an employer – and has signed an employment contract. Of course, this is not the case, and therefore he can only be controlled by the Border Guard* (scholar, 10, PL).

Respondents, including those representing Labour Inspectorates, were aware that the inadequate number of staff conducting such inspections influences the number of inspections. Moreover, the competences of controlling bodies are also limited. On the other hand, the labour inspectorate has the obligation to report on the status of third-country nationals to the Border Guard. The separation of these controls would significantly contribute to the enforcement of migrants' labour rights, regardless of their immigration status.

- **Foreigners do not trust institutions**

Employers take advantage of migrants' mistrust toward the institutions. They feel confident that third-country nationals working illegally will not denounce them, as they risk too much. There is a widespread opinion that the support for undocumented migrants is insignificant compared to the real consequences of reporting, namely a decision obliging the foreigner to return to his/her home country and forbidding reentry to the European Union country for a period of 6 months to 5 years.

Generally, people need jobs and it's easier to settle things directly with your employer than to go to institutions. Institutions don't give you a salary, something to put on the table for your family when you get home, so who has time to wait for one public institution to do something. And who has money to go to court? (employer, 7, RO).

- **Ignorance of the consequences**

The consequences for the employer are not as large and long-lasting as for the foreign worker. The employer is obliged to pay a fine (in Poland the fine is rather small, in the Czech Republic it is quite high but rarely enforced) but still, the punishment for the foreigner is much more painful: in the case of being caught performing irregular work s/he will be returned to the country of origin.

Often individuals employ [a foreigner illegally] *(…) thinking that this is 'nothing special' to hire someone without a contract. They often do so with Polish citizens for cleaning, baby-sitting or tutoring. In fact, everything should be formalised, and we know that often it is not. Well, they might think that the situation with a foreigner would be the same, without considering the consequences for themselves and for the foreigner* (civil servant, 12, PL).

- **Easy exploitation of foreign irregular workers**

Some explanations for choosing foreign workers were repeated by many interlocutors. Third-country nationals as workers are usually more flexible, which means they tend to accept more challenging working conditions than local workers would .

In agriculture, you have to start working at dawn, and even when it is 35 degrees you also need to work ….. In agriculture, the working conditions are not that pleasant to Hungarian workers, in general (civil servant, 1, HU).

It is easier to abuse foreigners and not pay them salaries (…). A foreigner is less likely to assert her/his claims, because s/he risks too much (civil servant, 7, PL).

[Irregular workers are becoming] cheaper labour compared to legally employed colleagues. In part, , binding laws passed by the current government push employers towards illegal employment (…). Clearly,

obstacles are thrown in their way. And anyone who wants to employ or to be self-employed faces so many obstacles that employers prefer illegal work/employment (employment agency 15, SL).

Reflecting on the above-cited quotation from an employer, who would hire a migrant contrary to the binding provisions because he is "hardworking, has no family, is available 24h a day," we might ask ourselves if the same employer would engage a worker regularly if s/he fit the description?

When trying to answer why some employers decide to engage third-country nationals irregularly, we can also consider why some others do not follow their footsteps. Some employers were of the opinion that the regulations are so "detailed and thorough" that employing foreign nationals irregularly is hardly possible.

You can perhaps employ irregularly those who are already here. But if you have to bring in someone from outside, that is the hardest thing you may ever face. (...) As for Thai massage you cannot employ anybody irregularly. You can't bring in anybody irregularly. Once they are in, it is easier to do things the regular way. (...) The process is so complex and thorough that it is impossible to get around it. It does not happen very often that someone just comes over from Thailand as a tourist and starts working irregularly. I can hardly imagine anyone risking that. (employer 3, HU).

Some other entrepreneurs feel more responsible for their migrant employees. They provide support for their staff members. This strategy considers correlation between migrant workers' well being and the success of the business. The entrepreneur knows that difficulties with the legal status of a migrant might imply his/her own troubles, e.g. having more controls and fines to pay. In some cases, entrepreneurs declared fear of inspections and assumed penalties to be extremely large.

We've never been in such a situation and do not want to be, when someone is employed illegally and works for us. It is pointless to be bothered in the future by inspections, have problems, receive a penalty higher than the amount I would pay a worker every month. (employer, 16, PL)

It is a big problem, because the labour inspection can find out, or the Border Guard, and the penalties imposed are high. Someone has to be very irresponsible to hire a foreigner without the necessary documents (...). [Otherwise] you constantly work under the stress that something may come out (employer, 18, PL).

Those quotations might suggest the conclusion that a decrease in irregular employment is only possible as a consequence of an increased number of controls. But employers who want to employ irregularly will do so regardless of the consequences. Moreover, some of them are equipped with knowledge of the sanctions mechanism: e.g. inspectors' competences, amounts of penalties, and conditions of criminal liability. In one case, mentioned by an interviewee in Poland, an employer intentionally denounced his foreign worker to the authorities and paid a fine as a consequence, but since it was much lower than a regular salary he would have to pay to the employee, he still made his profit.

Why do employees agree to be employed irregularly?

Illegal employment is possible because third-country nationals agree to participate in this process. While foreigners explain their decisions using various narratives, the most common is a purely **economic reason.** Income in a receiving country is still attractive, even if lower than remunerations earned by native employees.

Foreigners who came to make some money in Hungary are determined to work because they want to support their families. They may be paid badly in Hungary, but often it is more than what they could get at home. This all depends of course on their personal circumstances, but usually they deem that they are better off this way, rather than being unemployed. (civil servant, 3, HU)

Third-country nationals may also be forced by circumstances, especially when they need to support their families [in the country of origin] and they are able to earn more money in Slovakia than at home, albeit illegally. (employers union 19, SL)

One of the reasons foreigners decide to work illegally is a situation which precludes working in the official market. In Romania, asylum seekers do not have the right to work for the first 12 months of the asylum procedure.

Working illegally is the only way they can survive. The financial assistance they receive from the state is about 1 USD/day so they really cannot survive otherwise (ngo, 4, RO).

Sometimes third-country nationals decide to risk taking a job without a contract as they expect that employer will finally employ them according to the law. Unfortunately, **they are deceived by their employer**, *"who promises that they will eventually be hired legally"* (civil servant, 1, RO). Other examples of betrayal can be observed when employers offer a gross salary and, theoretically, foreigners have the chance to decide how they want to be paid. However, in the real situation, having such an offer, migrants might be afraid of losing their job and decide to take the risk and work against the law.

It is also convenient for them. I ask them, would you rather pay taxes to the state than have more money at the end of the month. Of course they need the money. (employer, 8, RO)

Finding a legal job is not easy. Most migrants find jobs within their own communities and very often they are underpaid. They know that if they make any requests towards legalising their work, they will get fired. (ngo, 6, RO)

Rigid regulations on employment of third-country nationals also push migrants towards irregular employment. "*If you cannot get a legal job what should you do? Rob people? Beg for money?"* (employer, 7, RO).

In all countries a work permit is valid for one specific position for a specified employer. If the parties (an employee or an employer) want to change it, the whole procedure of receiving a work permit must start again, which is inconvenient and time-consuming for all. There are also other explanations for why workers do not insist on signing a contract with their employers.

Very often, citizens of Ukraine do not want to be bound up with any contract. For this reason, they come to work to Poland while in Ukraine they have sick leave, holidays or unemployed status. Binding with the Polish employer could cause their agreement to be discovered by the Ukrainian employer or administration and the employee would have to face some unpleasant consequences. So sometimes they do not want to sign any contracts. (union of employers, 11, PL)

These statements by employers could be considered as excuses or justifications for not guaranteeing foreign employees equal social rights and legal contracts.

Although the research has not proved it, there is another entrepreneurs' opinion which justifies illegal employment, namely the risk that migrants would leave for better jobs in Western Europe. Expecting that third-country workers will soon leave the country and the job, employers do not offer a contract.

> *Obtaining a job in Hungary is looked at by some of the foreigners as a stepping stone to the EU. Once they are in and can afford staying legally or illegally in the country, some of the foreign employees will look for opportunities in other EU countries with better salary and better conditions – sometimes they simply disappear.* (employer, 3, HU)

But if this fear is well-founded, upholding the strategy of employment used hitherto will not reverse this process, as there will be more migrant workers willing to leave the country in search for safer employment opportunities.

Regardless of the motivation for illegal employment, its consequences remain the same: **an employer hardly bears any risk of financial sanctions whereas a third-country national,[53] apart from the fines, faces the risk of expulsion and a ban on entering the Schengen area.**

Moreover, a foreigner is almost always more vulnerable to potential abuse of his/her employment rights, in particular, when s/he does not speak the language fluently or does not know the local standards and realities.

> *We all know that it is one thing to have rights on paper and but the reality is different. If they are new here and don't know anybody, who can help them?* (employer, 7, RO)

> *Foreigners are not aware of their rights. Most of them sign their employment contract without reading its content.* (civil servant, 1, RO)

Due to **lack of knowledge of foreigners' rights**, there is a risk that the employer would offer a third-country national worse employment conditions

53 A migrant working irregularly is not obliged to pay a fine in every country. In Poland s/he might be charged from 240 to 1,200 euro and in the Czech Republic 3,600 euro. In Hungary s/he does not receive any fines.

(e.g. lower remuneration, increased workload, inconvenient schedule) than the domestic employees.

> *To all this, it is necessary to add that the line between illegal employment and exploitation is very thin.* (NGO 6, SL)

> *Slovaks know their rights better, while foreigners do not understand current legislation so well.* (civil servant 2, SL) *Therefore, foreigners can be abused more by working illegally than the locals, as they are often unaware [of their rights]. At the same time, illegal employment of foreigners may be caused by increased bureaucracy in public administration.* (scholar 20, SL)

> *A Czech person is more risky, s/he "peaches" on you more easily because there is no language barrier. The foreigners are simple and gullible; they are not well versed in the system and have no chance to get the information.* (employer, 2, CZ)

The impact of Directive 2009/52/EC

Changes related to the European and international economic integration, the development of new technologies, the demographic ageing of European societies, and the development of segmented labour markets in many countries contributed to the need for strategic actions aimed at increasing the flexibility and security of labour markets in the European Union. This involves the adoption of the model of the so called "flexicurity" by the EU member states, which in result should ensure that EU citizens enjoy a high level of employment security, i.e. the possibility to easily find a job at every stage of their professionally active life and have a good prospect for career development in a quickly changing economic environment[54].

> *This support particularly applies to the legal immigration of highly qualified workers from third countries, mainly immigration of students, academics and researchers, artists, entrepreneurs and foreign Slovaks living in other countries.* (civil servant 3, SL)

54 Towards Common Principles of Flexicurity: More and better jobs through flexibility and security, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2007, p. 3-4, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0359&from=EN (30.06.2014).

However, on the other hand, respondents underlined that there is a "*natural protection of the labour market. Due to high unemployment in Slovakia, it is understandable that the employment of foreigners is restricted"* (employer 8, SL). Some even explained that the European Union wanted to keep out poorly qualified migrants who would work irregularly, and European regulations, such as Directive 2009/52/EC, help achieve this goal.

In the research in the five countries, we tried to determine whether employers and other labour market actors have knowledge of the Directive and its implementation on the national level. We also looked for their opinions on the purpose of such provisions. The outcome of the research shows that employers do not perceive the Directive as an important tool to prevent irregular employment of migrants. Moreover, the tendency to engage them on an irregular basis becomes evident and socially acceptable regardless of the Directive's implementation.

In Romania, civil servants mentioned several times that it is difficult to measure the significance of the Sanction Directive, as it is still in progress.

> *The transpositions regarding the employers have been mostly transposed but those regarding the rights of undocumented employees have not been clearly transposed yet.* (civil servant, 1, RO)

Knowledge of the existence of the Sanctions Directive and its implementation in national legal frameworks varies among the researched countries, according to the collected data. Still, some similarities can be observed.

The employers have heard about the implementation of the Sanctions Directive or they **knew about the national regulations transposing the Directive, but they did not attach much importance to it.** Only Romanian employers did not know anything about legislation on employing third-country nationals. In other countries, the interviewed employers declared they have heard about new regulations, but since it concerns irregular employment they did not pay much attention to it, as they comply with the binding provisions. Even if they knew about the changes in the law, they did not recognise which provisions have been implemented, according to the European Union regulations. They were familiar with relevant legislation to the extent necessary, as they assumed, for their work.[55] Bigger companies also

55 It was difficult to measure the real knowledge of employers during the research – testing (asking precise questions) was rather inconvenient, so level of knowledge of the regulations is based on their declarations. Asked about their obligation to keep a copy of documents (visa, residence permit), some employers

suggested that their HR departments or lawyers have more knowledge about it, so they do not need to know all the details. Amendments to the law were considered to be more challenging for small businesses. On the other hand, NGOs and academics have detailed knowledge about these issues and share opinions on implementation of the Directive.

Based on country research, it was not possible to determine in which country the employers have the most thorough knowledge of the Directive. However, it was evident that in the Czech Republic respondents seemed to be more aware of these regulations. This could be a result of a large scale campaign on irregular migration held at the time new regulations came into force. In Poland, a much smaller information campaign took place; leaflets and important information for the employers in the shape of business cards were distributed to employers of third-country nationals. The information campaign in Poland was rather invisible, at least our respondents did not recall receiving any of the cards or leaflets that civil servants spoke about, and therefore it may not have had much impact on raising the knowledge of employers.

A general opinion of all respondents was that **the regulations do not change greatly their approach towards the employment of foreigners.** There were just some minor additional responsibilities imposed on the employers, like an obligation to confirm the legal status of an employee before the expiration of a contract or a duty to report such employment to more agencies than previously. Still, they did not change much in the procedure itself.

Employers themselves emphasize that there was no significant change, except for the introduction of the penalties for employing an irregular migrant. They explained that now they should be more careful **not to accidentally make a mistake with documents or procedure;** however, large enterprises did not consider this to be a problem. Consequently, such an approach may be more inconvenient to small businesses, as the penalties will be considered too high for them. "*I think the purpose is primarily intimidating. In practice, I cannot see any difference, we are just more afraid that we can make a mistake, but we have an experienced personnel department"* (employer, 3, CZ).

A doubt was expressed several times, in all researched countries, as to whether the Directive or its national implementation could have any impact on the regular or irregular employment of foreigners, or whether it could significantly increase the quality of employees' protection from exploitation. Many of the respondents had the opinion that **the most considerable**

responded that they keep it anyway (as they store personal documents), some replied that they knew about this duty or explained that other people in the firm look after all the formalities.

problems are caused by bureaucracy, inaccessible legalisation channels and the economic situation of the country.

The mere existence of the Sanctions Directive, including some critical comments from NGOs and scholars, was perceived positively. The respondents in the five countries agreed that the **aim was to prevent employment of irregular migrants.** Respondents stated that it is crucial not to punish illegally employed foreigners, but their employers who benefit from their work.

> *… the purpose of the Sanctions Directive is to punish the dishonest employers who profit from the illegal employment of foreign workers. (…)* (NGO, 3, CZ)

> *The aim of the Directive was to protect illegally employed third-countries nationals but at the same time to anchor a penalty system for employers who employ foreigners illegally.* (employer 12, SL)

The intention to **help foreigners to claim back payment and legalise residence** during the time of the procedure was assessed positively.

> *The possibility in the Directive to claim back payment can be actually looked at as a progressive element.* (scholar, 5, HU)

> *[The positive side of this Directive] is also the possibility for a third-country national, in case of need, to legalize his/her residence in the territory of Slovakia*
> *(…) to avoid a deportation.* (civil servant 2, SL)

Unfortunately, the implementation of these intentions was deemed ineffective. In the Czech Republic the information about the right to enforce due remuneration from the employer is handed over to an employee in writing 30 days prior to his/her expected return to the country of origin.

> *Strictly speaking, they do not offer anything to them, handing over the information in writing is good for nothing. (…) Thus it has got huge limitations.* (NGO, 1, CZ)

Moreover, it was pointed out critically that **migrant workers finding themselves in vulnerable situations have much more to lose than their**

employers. In the Czech Republic cases of the deportation of ilrregularly working foreigners were reported in which the employer was not even properly identified. This leads to unjust situations where illegally employed foreigners are expelled, and their employers, while being responsible for the violation, are neither punished nor even identified, which obviously contradicts the intentions of Sanctions Directive.

According to the Czech transposition, the employer shall pay the owed wages to the foreigners only after s/he has been penalized with a financial sanction. Setting the imposition of a fine as a precondition to the payment of the owed salary is perceived as unfair and unnecessary. In practice, it would often not come to sanctioning the employer due to procedural reasons.

The provision that it is possible to set the liability of the main contractor or subcontractor only within three months from the infringement was also criticized in the Czech report, where the respondents with legal background described this provision mostly as inapplicable, especially because the identification and untangling of the subcontracting chains is very difficult and time-consuming, taking more than 90 days.

Financial sanctions imposed on employers, as stipulated in Article 5 of the Directive, should be effective, proportionate, and dissuasive. Comparison of data in the five countries shows a discrepancy between them: the amount of the fines oscillates from 5 EUR to a maximum of 2,500 EUR in Poland, and up to 200,000 EUR in the Czech Republic for a natural person illegally employing third-country nationals for personal purposes. In Hungary the fine is from 650 to 1,300 EUR for a private person, and from 200 to 5,000 EUR for employers who are legal entities. In Slovakia the fine is between 2,000 to 200,000 EUR. In Romania sanctions for delegating work to an illegal third-country national include a fine from 340 to 1350 EUR for each illegally staying third-country nationals employed and the fine cannot exceed 22 500 EUR.

Some respondents see the **implementation only as a fulfilment of an obligation** which was unnecessary or even inconvenient for the country.

> *We had to transpose it the way we transposed it.* (civil servant, 6, CZ)

> *It is implemented, I would even say, rudely so that it would not affect the employers if possible. (...) In fact, it is made so that it* [a lot of provisions] *could not be applied at all.* (expert, 1, CZ)

The Directive was not passed with good intentions, but it was a result of the work of lobbying groups. (employer 14, SL)

Surprisingly, the opinions on the implementation of the Directive in the Czech Republic, Hungary, Poland, Slovakia and Romania are also very similar.

The expected **deterrent effect of the sanctions** was assessed as potentially discouraging from employing on an irregular basis. However, it needs to be underlined, that the research was conducted among the employers who claimed not to have had violated the rules of employment of third country nationals, even before the introduction of the new provisions. Respondents mentioned that in the case of smaller companies the deterrent factor might primarily be the fine, for bigger companies it could be their exclusion from public procurement. In the case of a small fine the company will pay it, and when the fine is too high it would not be enforceable.

High penalties imposed on the employers do not necessarily mean that employers actually pay the fees. (...) The higher the fine imposed on employers the less chance that the state can recover anything. At the moment approximately one and a half million people in Romania are working illegally. That costs our economy more than 4.1 billion EUR annually in terms of social contributions and income tax on profits. Imposing very high fines is not the way to combat illegal work. Instead of paying their fines, most companies claim insolvency and the state cannot recover anything. (civil, servant, 1, RO).

Sometimes awareness of the sanctions causes opposite effects, encouraging irregular employment.

The level of penalty is in fact lower than the taxes owed to the state, so if you take into account strictly the economic aspect, it may even be worthwhile to hire illegally. (NGO, 8, PL)

It was mentioned several times, in all researched countries, that the **implementation is considered a missed opportunity**. States implemented the Directive to a minimal extent. In all countries it was emphasized that new regulations are **not applicable to the citizens of third countries residing legally who have been exploited at their jobs.**

Our limited research does not substantiate the theory that sanctions had any impact on the irregular employment since the introduction thereof. Even if **the numbers of discovered irregular migrants in studied countries are currently lower than a few years ago**, the decrease cannot be simply attributed to the impact of the Directive. For example in the Czech Republic the similar downturn occurred in 2008, which obviously cannot be referred to the sanctions.

The purpose of the Sanction Directive is to combat irregular migration but also to protect undocumented migrants from exploitation. Unfortunately, during the research no evidence was found that the protection of undocumented migrants was strengthened in the countries after the implementation of the Directive. According to the data provided by researchers from the studied countries, **no residence permit was granted on humanitarian grounds** and **no procedure was initiated to recover back payments** from the employers of migrant workers.

The purpose of the Sanction Directive is to combat irregular migration and protect undocumented migrants from exploitation. Unfortunately, during the research no evidence was found that the protection of undocumented migrants was strengthened in the countries after the implementation of the Directive. According to the data provided by researchers from the studied countries, so far **no residence permit was granted on humanitarian grounds** and **no criminal investigations have been undertaken against any employer.** As one of the respondents summarized:

> *The legislation is not the main issue here. There are a number of practical obstacles that should be considered. Most migrants refuse to take any legal action against an employer in a country they do not know and where they do not speak the language (…).* (civil servant, 2, RO)

> *(…) In practice the Directive offers no protection of migrants' rights. So for me, as a practitioner, and considering the lack of clear mechanisms in place, I would say it is merely a declaration. Obviously, the national legislation is subject to amendments and improvement, especially regarding the recovery mechanism… [But] in the current state it offers no decent protection.* (ngo, 5, RO)

The statistics seem to confirm that the migrants are anxious to make use of the newly introduced instruments. In this case, the significance of the Directive is not visible:

No foreigner has been given a residence permit in order to claim his right arising from the Sanctions Directive, not a single employer has been convicted of illegal employment, no administrative proceedings on the liability of the main implementer has been commenced. (...) Is it necessary to say anything more? (NGO, 2, CZ)

...good ideas but I do not see much impact... (civil servant,4, CZ)

This explains why the relevant authorities have not encountered a case of illegal employment of third-country nationals who would be a subject to the provisions of the Directive in practice. (civil servant 3, SL)

By the end of the research, the provisions of Sanctions Directive had not been fully implemented in any of the project countries. This can be interpreted in a number of ways:

- The problem of undocumented migrants working irregularly exists on a rather negligible scale;
- The Directive gets around substantial economic issues and problems of migrant workers existing in these countries. The countries avoid introducing comprehensive changes to their law and regulations, and only implement necessary, obligatory EU regulations.
- The control mechanisms of employment (including working conditions and legal status of foreigners) are insufficient and the high level of society's acceptance supports irregular employment in a way.

Concluding remarks

Based on the collected data, similarities and differences in the studied countries, some conclusions can be drawn:

- The controversy in relation to the Sanctions Directive is that it guarantees minimal protection **only to undocumented migrants** while employees (foreigners and domestic workers) who are abused by the employer should have equal rights regardless of their residence status.
- **The employment procedures are overcomplicated.** The highest amount of complaints concerned bureaucratic and administrative burdens which are complex and time-consuming. Simplification of the procedure could be achieved through lowering the criteria for obtaining a residence permit

(e.g. for specific professions), opening the work permit for more than one employer, and fostering communication between competent authorities to issue the decisions faster. In each country the instructions on "how to employ a third-country national" should be described in a comprehensive and intelligible way on one Internet site. All relevant authorities (Labour Inspectorate, the ministry responsible for work of foreigners, etc.) should use the same information. The need to **abolish labour market tests** wherever they exist was also mentioned several times.

- **Not enough support is offered to individual entrepreneurs and small businesses** employing third-country nationals. The analysis shows that large companies with HR departments possess sufficient knowledge and capacity to employ a third-country national. Thus, it would be beneficial to provide a **support system for individual entrepreneurs and small businesses**, e.g. in the form of individual, no cost consultations.
- **Motivation instead of penalization, is a key to achieving compliance with the law on employment.** Currently, neither employers nor employees have sufficient incentives to make their relation fully legal, especially in the case of short-term employment. Since the sanctioning mechanism does not seem to be working, the parties of the employment relationship could be encouraged by economic policies and more flexible regulations to report the employment to the authorities. Presently the main objective of labour inspection is to detect and penalize all kinds of labour law infringements. It would be worthwhile to reconsider the role that labour inspections play in the labour market apart from the penalisation. The educational function of labour inspections could be enhanced, particularly for the employers who unintentionally violated the law.
- **The cooperation between the immigration police and labour inspections makes it impossible for the latter to effectively protect the migrant workers.** The separation of these controls would significantly contribute to the enforcement of migrants` labour rights, regardless of their immigration status. Therefore no information should be exchanged between these two authorities.
- **There is not sufficient awareness** of rights and obligations among the migrant workers. Migrants should be thoroughly informed of the risks of irregular employment. Awareness-raising campaigns should be carried out more frequently through events, newsletters, and publications in the countries of origin and/or at the consultates.

Chapter 8.
Statistical findings

We attempted to collect accessible and comparable statistical data with the aim of assessing the impact of the Sanctions Directive through the numbers.

However, obtaining comparable statistical data proved to be quite challenging. There are several reasons hereto:

- Despite many similarities, national legal systems differ from each other in details, where understanding of the same terms varies considerably, e.g. institutions entitled for inspections, legal grounds for expulsion
- National agencies collect the data separately from each other and provide numbers that may overlap e.g. information from labour inspectorates differ from the ones provided by the police, numbers of detected undocumented migrants may be registered twice in the case of joint inspections;
- Some numbers are only estimates;
- Relevant public authorities either do not collect certain statistical data, do not have available data yet or they refuse to provide certain information;
- There is no statistical data regarding particular groups of third-country nationals such as undocumented migrants.

Therefore, this part of the report should only be viewed as an estimation of the numbers and thus a serious simplification of the processes.

Lack of data

It is surprising how little data crucial for the assessment of the impact of the Employer Sanctions Directive is actually collected by the official bodies in the analysed Member States. Difficulties in obtaining reliable information from responsible authorities or no existence of necessary data suggests that the public authorities are not yet prepared to deal with the Directive's application, in terms of collecting evidence and analysing the concerned environment.

The Directive's provisions (Article 14 and 16) oblige the Member States to communicate the number of inspections performed to the Commission, including their results, information about complaints lodged against employers (art. 13), back payments (art. 6) and other measures (art. 7) introduced

by the Directive. So far, only the numbers of inspections and detected undocumented third-country nationals have been registered in all of the countries participating in the project.

Criminal offences as stipulated in Article 9 of the Directive

The number of detected criminal acts according to Article 9 has not reached ten a year in any of the analysed countries. Regrettably Romanian and Polish numbers remain unknown.

Member State	2011	2012	2013	Jan-June 2014	Observations
Czech Republic	4	4	2	1	Offences detected
Hungary	0	3/3	1/0	0	Offences detected/offenders convicted
Poland	-	0	n/a	n/a	Data not available due to procedural delays
Romania	n/a	n/a	n/a	n/a	
Slovakia	0	0	0	0	

Table 9. Number of offences falling under the Article 9 of the Directive

Complaints and claims lodged against employers

There is no data available as to whether undocumented third-country nationals have filed any complaints against abusive employers. Likewise, there are not any available numbers regarding claims brought to courts with the purpose of recovering outstanding remuneration from employers.

Inspections

A great difference in a number of inspections conducted can be observed. While in the Czech Republic, Hungary and Slovakia inspections count in the tens of thousands, in Poland and Romania, there are only a few hundred inspections annually. There are different institutions, which are entitled to conduct inspections aiming at detection of irregular employment of migrants. They can be the labour inspectorate, the police, border police or immigration services, as well as the customs or the tax office. They conduct single controls or joint inspections. The detailed numbers regarding each of the agencies in each country are to be found in the Annex.

Increase in the number of inspections in the Czech Republic in 2012 and 2013 was a result of restructurring and elevated subsidizing of the labour inspectorates.

Member State	2009	2010	2011	2012	2013	January-June 2014
Czech Republic		2.333	665	35.557	36.101	8.258
Hungary	31.431	25.056	21.931	19.080	18.468	10.900
Poland		1.961	2.199	2.135	2.026	n/a
Romania	3.630	1.240	1.355	736	604	359
Slovakia	15.887	13.375	14.008	12.854	20.977	n/a

Table 10. Number of inspections carried out by the labour inspectorates

Irregularly staying third-country nationals

The **number of detected undocumented migrants performing work** is very low and comparable in all countries. It oscillates between 10 to 100 undocumented migrants every year. It's clear that there is no rule as to how the inspections affect the numbers of detected third country nationals performing work. To some extent it is contradictory – the highest numbers of inspections was observed in Hungary, where the numbers of detected undocumented migrants are the lowest. Last years the number of detected illegally staying third-country nationals decreased in all countries.

Member State	2010	2011	2012	2013
Czech Republic	n/a	n/a	46	11
Hungary	6	0	12	11
Poland	104[55]	78	59	19
Romania	59	79	14	10
Slovakia	32	22	13	12

Table 11. Number of detected UDM`s performing work

Among the countries' sanctioning mechanisms, the biggest difference could be observed with the scale of financial sanctions imposed on employers violating the ban on employing illegal third-country nationals. However, once again there cannot be found a pattern between the level of minimum sanctions and the number of employed undocumented migrants detected or criminal offences investigated. See a table with the numbers for 2013.

Member State /minimal sanction for a legal person	Offences detected	UDMs detected
Czech Republic (9 300 EUR)	2	11
Slovakia (2 000 EUR)	0	12
Hungary (2 500 EUR)	1	11
Poland (720 EUR)	n/a	19
Romania (340 EUR)	n/a	10

Table 12. The height of the minimal financial sanctions for the legal persons

56 The high number of detected irregularly staying third country nationals in 2010 was a result of detecting a group of employees working for one employer

Residence permits

Below you can find a comparison between the number of detected criminal offences falling under the provisions of the Directive and the number of residence permits granted to the victims of these offences. While in some countries the data is not collected, in others it is visible that the number of detected offences does not translate into the number of residence permits granted to the victims.

Table 13. Comparison: criminal offences/residence permits

		2011	2012	2013	January-June 2014
Czech Republic	detected criminal offences	4	4	2	1
	residence permits	0	0	0	0
Hungary	detected criminal offences	0	3	1	0
	residence permits	0	0	0	n/a
Poland	detected criminal offences	n/a	0	n/a	n/a
	residence permits	n/a	n/a	n/a[56]	n/a
Romania	detected criminal offences	n/a	n/a	n/a	n/a
	residence permits	n/a	n/a	n/a	n/a
Slovakia	detected criminal offences	0	0	0	0
	residence permits	n/a	0	1	0

57 An interestingly high number of 48 residence pernits was recorded in Poland in 2013. However, our investigation revealed that it must have been a registration error coupled with a change of a database management system. An off-the-record estimated number is 0.

Chapter 9.
Conclusion

This research demonstrates that while the labour rights of regular and irregular migrants are almost universally violated, no adequate safeguards are available for workers. It also makes it clear that the Sanctions Directive has little or no impact on the situation of undocumented migrant workers in the five project countries.

The key argument supporting the introduction of the Employers' Sanctions Directive was the identification of "illegal" employment as a 'pull factor' for 'illegal' migration. And while there is no doubt that the availability of employment opportunities is often a reason behind cross-border mobility (regular, as well as irregular), to ignore other factors would be an oversimplification. Socio-economic, political and personal indicators make the issue at stake far more complex.

The majority of the clients that we have assisted during our legal aid programme were migrants who lost their legal status during their stay on the Member State's territory and were desperate to regain it. Others were refused asylum and feared persecution upon their return to the country of origin. Already accustomed to exploitation in their workplaces, since this is all they have experienced so far in a hosting country, they refused to engage in any legal actions other than the struggle for a residence permit. It seems safe to assume that the majority of migrants would rather have a regular job, pay taxes and contribute to the social security system, than remain in the irregular situation and live under a constant threat of deportation. Thus, an assumption that it is migrant's intention to remain in the irregular situation, is unsubstantiated in our view.

On the other hand, undeclared work is undoubtedly a factor enabling employees' labour exploitation. These are jobs often executed in poor working conditions, with low wages and long working hours in unsafe working environments. Should there be any irregularity involved, and as it follows, a risk of imminent deportation upon denouncement, there is no limit to the possible exploitation of the worker.

The repressive approach of current policies, such as the Sanctions Directive, manifested through increased, targeted inspections and criminalization of employers, becomes the primary cause for reinforcement of migrants` vulnerability. This concerns not only the mechanisms of irregular migration control, but also the **restrictions on the access to the labour markets for regular migrants**, namely **high requirements for obtaining a work permit, binding the employee to one employer and imposing expulsion on any migrant worker infringing law on employment of TCNs** by neglecting the gravity of the violation and intent.

Upon the completion of our 2,5 year project, focused on the Sanctions Directive, we concluded that the Directive suffers from a number of vulnerabilities, despite introducing a few safeguards for the employees subjected to exploitation.

- **A personal scope.** A connecting factor for the instruments aimed at protection of the employees is the unlawfulness of their stay on the territory of the EU. As our legal assistance programme shows the regular migrant workers are almost equally vulnerable to the abuse from the employer as the irregular workers. Under current legislations a sanction of expulsion is imposed on a migrant in case s/he is detected performing irregular work, while at the same time the definition of irregular employment is significantly wide and irrespective of the employee`s willfulness. A growing dependency on the employer, only increased with the introduction of the Single Permit Directive, enhances the risk of exploitation. This is a major group of migrants who refrain from making use of available instruments (complaint, lawsuit). The gap in protection is particularly visible in the case of the Central European countries: where the numbers of undocumented migrants, even though difficult to estimate, are smaller than in other Member States. At the same time, the labour administration lacks necessary powers to protect the (undocumented) migrants and the system of civil jurisdiction fails to resolve disputes in a timely manner.

- The **deterrent effect of sanctions** was particularly difficult to substantiate based on the outcomes of our research and the statistical findings. The employers who claimed not to have had violated the rules of employment of TCNs, even before the introduction of the new provisions, admitted that the sanctions should conceivably deter employers from engaging in irregular employment. At the same time, the conviction of the labour inspectorates posing no threat to the motivated abusive employers was rather universal. Also, due to the triviality of sanctions, they were perceived as an easily manageable expense. We also failed to observe any difference between the number of detected TCNs in the states of the highest and lowest

minimum financial sanction. However, it needs to be mentioned, that very high sanctions applicable in the Czech Republic, were an effective argument in the employer-employee mediations regarding the payment of outstanding remuneration, when raised by the NGO representing the employee. On the other hand, the high minimum limit of fines for legal persons proved to be inadequately strict for small and middle enterprises being sanctioned in most cases, while the labour inspectorates would not succeed in sanctioning any organised groups of perpetrators due to lack of proof. These are also valid arguments when making the sanctions subject to the proportionality and effectiveness test.

▸ Accordingly, the introduction of **criminal measures** seemed to have not affected the employers, nor the law enforcement agencies in the countries where the research was conducted. It is confirmed by the very low numbers of detected criminal offences falling under the provisions of the Directive. While the scope of our research did not cover the law enforcement agencies, this report cannot give a reliable answer to the question of why so few criminal offences had been detected. However, underreporting is surely a significant factor. The employees living and working in the shadow, do not seek contact with the police. During our project, only in four cases did we manage to encourage an undocumented migrant worker to report a crime. **A lack of protection mechanisms for the victims of crimes or prospects for obtaining a residence permit, creates no incentive for a migrant worker to cooperate with the police**. The scope of these provisions does not account for the employer`s offences as violence or deceit, allowing the perpetrators to avoid criminal liability. It is clear that the only offences against undocumented TCNs that will be detected, are the offences coupled with the "immunity" for the victim.

▸ The project findings are coherent with the conclusions of the European Commission on the application of the Directive[58] that the transposition of the researched Member States has resulted in weak or non-existing mechanisms of enforcement of irregular migrants rights. In none of the countries under research has a **complaint mechanism** been facilitated. In all of the countries covered by our research, **undocumented migrant workers cannot satisfy their claims against the employers.** The labour inspectorates` limited powers coupled with their cooperation with immigration police, prevent the inspectorates from enforcing outstanding remuneration on behalf of the

58 COM(2014)286 Communication from the Commission to the European Parliament and the Council 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

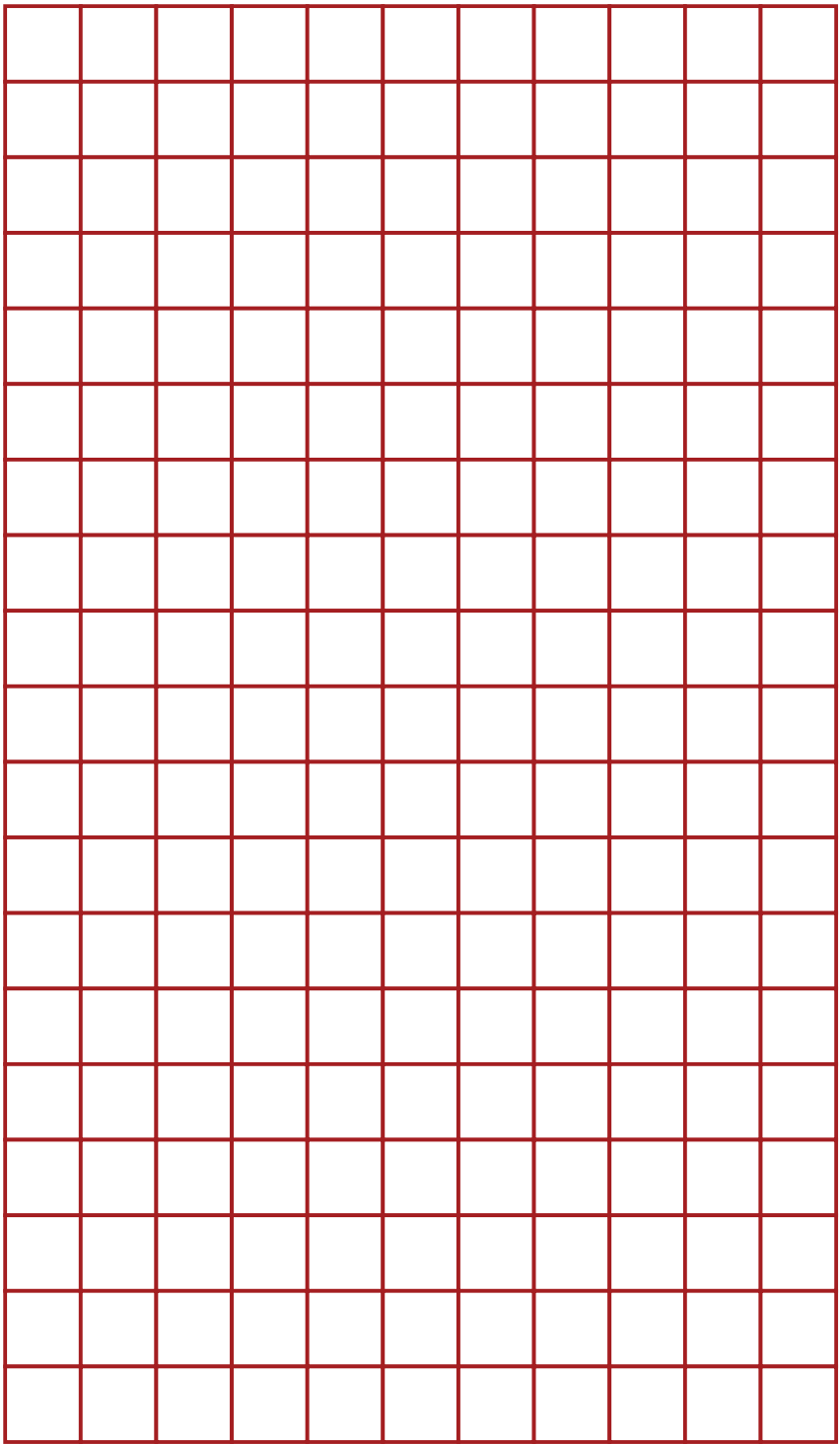
employee. Also in some states the lawmakers used the process of transposition to establish additional obstacles for the migrant workers, e.g. conditioning the recovery of back payments on the penalization of the employer. It is therefore necessary to **develop an unified understanding of how an effective complaint mechanism should be defined:** since our research shows that without a separation of the labour and immigration inspection agencies, no complaints or mechanisms imposing obligations on employers can be effective. Only in a few cases did the migrant workers we assisted decide to pursue their claims in the court and still, in the majority of cases, they changed their minds before the first court hearing and withdrew their lawsuits or disappeared. Lengthy proceedings, requirements for evidence, the necessity of finding witnesses and linguistic barriers were an effective deterrent . On the other hand, our report demonstrates that the most effective tools were the informal ways of dispute resolution – mediation, pre-trial call for payment or a warning. Those had to be facilitated by legal advisors in order to be effective, which brings us to a conclusion that access to information and free of charge legal aid are essential in protecting this vulnerable group. Obviously in case of employers determined to exploit employees, these measures would not take effect.

Accordingly, **no mechanisms facilitating the recovery of outstanding remuneration after the employee has been returned** to the country of origin have been introduced in any of the countries. In one case in Slovakia, the court actually demanded the withdrawal of the claim upon the return of a migrant to his country of origin.

- As we predicted, a very **low level of awareness** of the Directive and its benefits among undocumented migrant workers as regards their rights was recorded. On the other hand, we found out that also the employers, small and medium companies especially, often lack access to information and support in attempts to comply with the rules of employment of migrant workers as they are becoming increasingly complex.

- Not only are the **numbers** of undocumented migrants in each country difficult to estimate, the states do not collect or process data indispensable to assess the impact of the Sanctions Directive. The only statistics accessible are the numbers of detected third country nationals and inspections as these are obligatory under the provisions of Directive. Without **any information on claims, complaints or even residence permits** (e.g. Romania), the policy makers have no way of knowing where the necessary adjustments should be made. Based on our research interviews with civil servants and NGO experts, it is safe to assume that the use of these measures has been extremely rare.

While we were able to identify some of the main obstacles towards the full enjoyment of labour rights by regular and irregular migrants, we are certain that the most severe cases of abuse and exploitation of migrant workers still remain in the shadow. It is therefore crucial that the EU and state policies take account of the fact that without effective safeguards for the migrants, bringing them to light will not be possible.



Chapter 10.
Recommendations

We recommend that the EU institutions:

1. Insist on precise and effective implementation of the Sanctions Directive's safeguards by Member States, with particular attention to:
   - an effective complaint mechanism (Article 13),
   - mechanisms facilitating recovery of outstanding remuneration from employers on Member States territory also after a third-country national has or has been returned to the country of origin (Article 6),
   - systematically providing objective information (Article 6(2)),
   - liability of subcontractors (Article 8),
   - granting residence permits (Article 6(5), 13 (4)).
2. Extend the personal scope of the protective measures for migrants established in the Sanctions Directive to all migrant workers.
3. Revise the Sanctions Directive with the aim of enabling all migrant workers to exercise their rights without facing a risk of expulsion, particularly through ensuring their legal stay on Member State territory in the case they:
   - complain about labour exploitation,
   - intend to start court proceedings in order to recover outstanding remuneration and to receive damages,
   - fall victim to a criminal act.
4. Undertake further research on the impact of the employers' sanctions on irregular migration
5. Take legislative steps towards transforming the provisions of the EP resolution on effective labour inspections[59] into binding EU law.
6. Develop a rights-based approach to irregular migrant workers, acknowledging their equality before the law.
7. Establish more easily accessible channels for legal labour migration, across skill levels and labour sectors.
8. Closely monitor and collect necessary data on the effectiveness of the Sanctions Directive's protective measures.

59 European Parliament resolution of 14 January 2014 on effective labour inspections as a strategy to improve working conditions in Europe http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0012+0+DOC +XML+V0//EN

9. Consider the Central European perspective when developing and implementing policies related to labour and irregular immigration.
10. Promote regularisations based on employment and social security contributions.

We strongly recommend that the Member States:

1. Ensure full implementation of the protective measures introduced by the Sanctions Directive and extend their personal scope to all migrant workers residing on their territory.
2. Strengthen the role of labour inspection as an agency protecting all workers, regardless of their status, by:
   - introducing a clear separation between immigration status and workplace inspection in order to ensure that migrant workers can safely complain against abusive employers without risking expulsion,
   - granting labour inspectors an authorisation to enforce outstanding remuneration from employers,
   - providing labour inspection with sufficient human and financial resources.
3. Introduce awareness-raising programmes to inform migrant workers and employers about the rules governing the employment of third-country nationals.
4. Introduce simplified residence and work permit procedures for irregular third-country nationals if an employer has an intent of employing a third-country national or has already done so under fair working conditions.
5. Ratifiy the ILO Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families[60].
6. Transpose the Seasonal Workers Directive[61] in consultation with civil society organizations.
7. Introduce ongoing regularisations based on employment and social security contributions.

60 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted by General Assembly resolution 45/158 of 18 December 1990; http://www.ohchr.org/EN/ProfessionalInterest /Pages/ CMW.aspx

61 Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.L_.2014.094.01.0375.01.ENG

Chapter 11.
About the participating NGOs

Association for Legal Intervention (SIP) is a human rights and watchdog organization based in Poland. Its mission is to ensure social cohesion by promoting equality of all people before the law. SIP offers support to migrants, asylum seekers and refugees through legal and social counselling, but also engages in advocacy and strategic litigation in relation to immigration policies in Poland.

Association for Legal Intervention (SIP)
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Association for Integration and Migration (SIMI) is a non-governmental organisation, which has been supporting all migrants and asylum seekers in the Czech Republic, regardless of their legal status, for over 20 years. The main objective is to provide free of charge legal and social counselling as well as to perform variety of advocacy and raising awareness activities. Since 2005, SIMI has been focusing on the situation and rights of undocumented workers in the Czech Republic and thorough the Europe and has implemented 5 major projects aiming to protect the rights of undocumented migrants via individual assistance and search for systematic changes in the field of irregular migration.

Sdružení pro integraci a migraci
Senovážná 2,110 00 Praga 1
THE CZECH REPUBLIC
E-mail: poradna@refug.cz
Website: http://www.migrace.com/en/

Human Rights League (HRL) is a civic association established in 2005 by lawyers and attorneys dedicated to providing legal assistance to foreigners and refugees in Slovakia. Its aspiration is to support building of transparent and responsible immigration, asylum and integration policies respecting

human rights and dignity. Its initiatives aim to support self-empowerment of foreigners and refugees. Human Rights League is an organization combining provision of direct services - quality and free-of-charge legal aid to migrants and refugees in Slovakia with advocacy and strategic litigation in relation to establishment, development and implementation of immigration, asylum and integration policies in Slovakia. It also strives to contribute to education of new generation of young lawyers knowledgeable and skilled in the area of asylum and immigration law. Human Rights League cooperates with Trnava University Law Faculty facilitating its Asylum Law Clinics.

Liga za ľudské práva (Human Rights League)
Hurbanovo nám. 5
811 03 Bratislava
SLOVAKIA
E-mail: hrl@hrl.sk
Website: http://www.hrl.sk/en

Hungarian Association for Migrants (Menedék) is involved in promoting the social integration of foreign citizens migrating into Hungary, as well as Hungarian and other citizens emigrating from here.
For almost twenty years, the association has established a complex system of services, through which it has supported and continues to support thousands of refugees and other foreigners in finding a new home in our country. One of the main activities of the association is helping asylum-seekers, refugees and other migrants to find a way through their bureaucratic affairs, to get access to various services and liaise with other institutions, to get acquainted with Hungarian culture, language and social conditions, as well as to get involved in the community. The association's other main activity is to organise and run training courses for professionals who deal with immigrants in the course of their work – such as social workers, teachers, police officers or even armed security guards working in immigration detention centres. Besides the support of immigrants and professionals, it is very important for Menedék to make the majority society more open toward and accepting of foreigners arriving in our country, as this is an indispensible condition for the successful integration of

migrants. In order to achieve this, Menedék tries to build a bridge between the host society and immigrants by realising various educational and cultural projects and programmes.

Menedék – Migránsokat Segítő Egyesület
Népszínház 16,
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HUNGARY
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Website: http://menedek.hu/en

The Romanian Forum for Refugees and Migrants (ARCA) is a Romanian based non-governmental organization founded in 1998 with the scope of defending and promoting the rights of refugees, asylum seekers and other categories of migrants and maximizing their potential in Romania. Its goals are to assist clients to achieve legal status and economic self-sufficiency and become fully active participants in the social and civic life of our society. It also seeks to give them voice to influence decision makers and enact change at the policy level, build the capacity of public officials and civil society on refugees' and migrants' rights, and increase public awareness around the issues confronting these people. The main activity areas to achieve the above goals are the provision of: legal counselling and social service delivery, language training and cultural orientation, advocacy on issues affecting our clients' rights, capacity building and training on integration-related issues, human trafficking, youth activities, etc.

ARCA Forumul Român pentru Refugiaţi şi Migranţi
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024071, Bukareszt
ROMANIA
E-mail: office@arca.org.ro
Website: http://www.arca.org.ro/

Society of Goodwill (GWS) was established in 1990 in Slovakia. The mission of Society of Goodwill since its inception is to participate actively in humanitarian aid to people who are unable to fully take care of themselves for their

sustained, long-term health condition, changing their status or other social disability. It is a non-governmental organization with the longest experience in migration, refugees and asylum seekers issues. In the years 2005 to 2012 was successfully implemented projects within programme Solidarity and Management of Migration Flows, namely the projects funded by the European Refugee Fund and the European Return Fund.

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Chapter 12.
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Chapter 13.
Annex

Czech Republic

Number of Inspections	2010	2011	2012	2013	January-June 2014
By labour inspectorates	2.333	665	35.557	36.101	8.258
By border police	36.199	32.982	49.732	n/a	n/a
By customs	1.660	1.752	1.329	678	295
Joint inspections	619	11.218	35.557	36.101	8.258

	2010	2011	2012	2013	Jan.-June 2014
Number of all expulsion decisions	2.507	2.153	2.006	702	n/a

Hungary

Numbers of administrative infringements falling under the directive detected by	2009	2010	2011	2012	2013	Jan.-June 2014
Office of Immigration and Nationality	15	5	6	69	175	39
Labour Inspectorate	150	48	24	37	37	22
Of other measures imposed on employers (art.7 of the Directive)	150	48	24	37	37	22

Number of inspections	2009	2010	2011	2012	2013	Jan.-June 2014
Inspections by labour inspectorates	31.431	25.056	21.931	19.080	18.468	10.900
Joint “complex” inspections (with Police)	1.125	1.168	1.939	1.907	2.848	708
Other joint inspections	7.064	3.957	6.476	4.399	3.810	2.026

	2010	2011	2012	2013	Jan.-June 2014
Number of all expulsion decisions	1.507	1.393	1386	966	742
Number of expulsion as a result of labour inspections	6	15	15	8	10

Poland

Number of inspections	2010	2011	2012	2013
By labour inspectors	1.961	2.199	2.135	2.026
By Border Guards	1.537	1.372	1.016	1.011
Joint inspections	151	174	92	91

Number of expulsion decisions	2010	2011	2012	2013
All expulsion decisions	1.669	1.134	967	1.006
Expulsion decisions issued due to lack of residence status	762	688	633	614
Expulsion decisions issued due to the labour law infringements	120	187	95	94

Romania

Numbers of administrative infringements falling under the directive detected by	2009	2010	2011	2012	2013	Jan.-June 2014
Labour Inspectorate	142	56	78	78	29[62]	6

Number of inspections	2009	2010	2011	2012	2013	Jan.-June 2014
By labour inspectorates	3.630	1.240	1.355	736	604[63]	359
By General Inspectorate for Immigration	625	940	644	282	156	134

Number of expulsion decisions	2009	2010	2011	2012	2013	Jan.-May 2014
All expulsion decisions	n/a	3.294	2.663	2.441	2.189	723
Expulsion decisions due to the lack of residence status	5.045	3.294	1.501	1.030	2.088	723

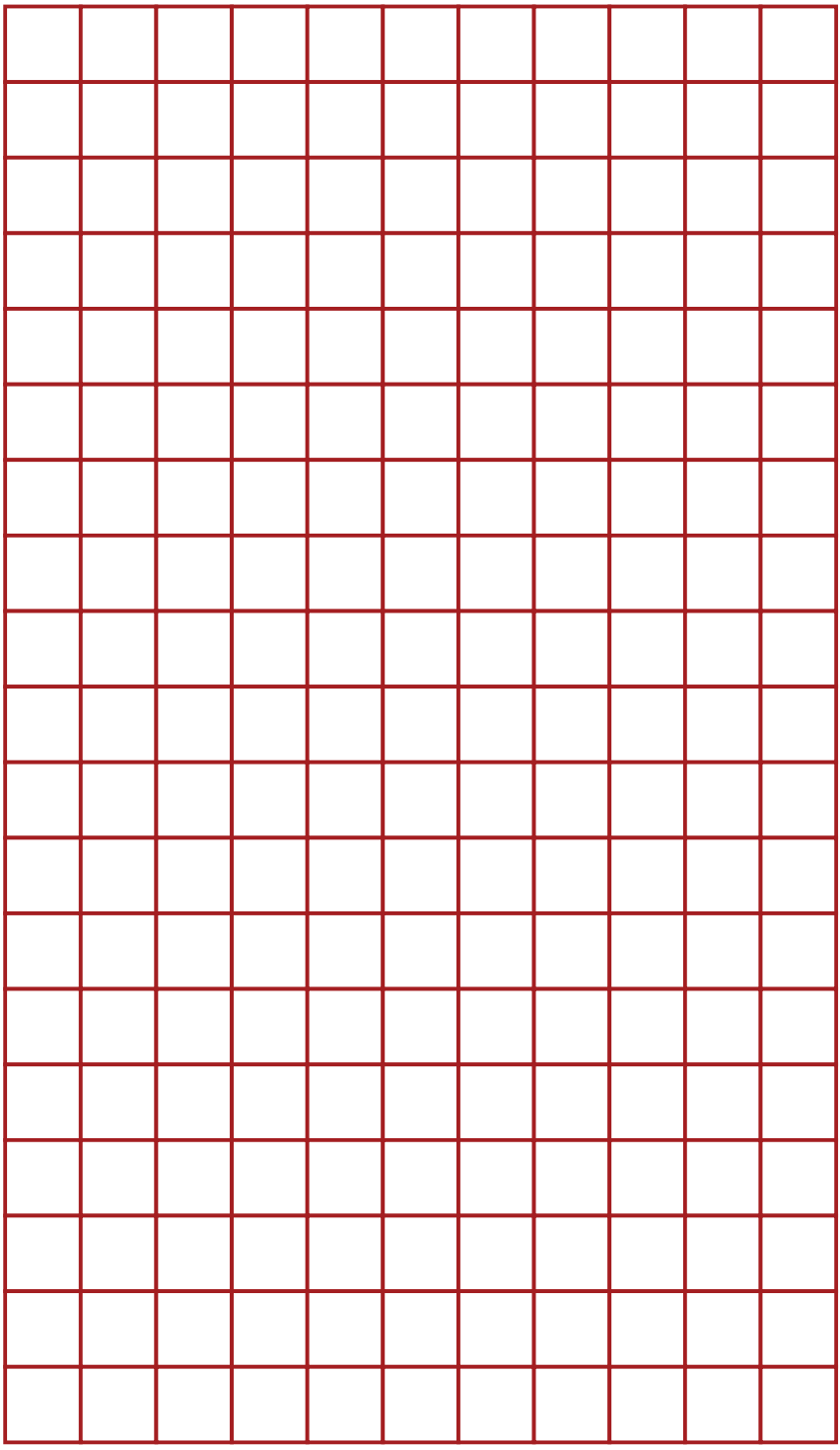
62 The figures are available only for January – November.
63 The figures are available only for January – November.

Slovak Republic

Number of inspections	2009	2010	2011	2012	2013
By labour inspectors	9.890	7.885	9.500	8.801	15.974
By Bureau of Labour	5.056	4.211	3.376	3.292	4.718
By Tax officers / Financial Directorate	941	1.279	1.132	761	285
By Bureau of Border and Foreigners Police	637	644	738	594	528
By Police officers	22.588	7.280	3.782	299	744
Joint inspections	157	207	206	165	169

Number of detected migrants performing irregular work	Year 2009	Year 2010	Year 2011	2012	2013
By Labour Inspectorate (cases without residence permit)	0	0	0	0	0
By Labour Inspectorate (residence permit for other purpose)	6	32	22	13	12
By the Police Force (cases without residence permit)	378	18	6	6	2
By the Police Force (residence permit for other purpose)	148	22	21	4	7

Number of expulsion decisions	2009	2010	2011	2012	2013
All expulsion decisions	n/a	n/a	700	571	643
Issued due to the lack of a residence status	1.235	903	621	514	576
Issued due to the labour law infringements (estimated figures for undocumented migrants)	133	164	84	37	51
Number of third country nationals performing Illegal work expulsed by the Foreigners Police	71	33	39	14	20



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Spoločnosť ľudí dobrej vôle

Menedék
Migránsokat Segítő Egyesület

ARCA
Forumul Român pentru Refugiați și Migranți

HUMAN RIGHTS LEAGUE
LIGA ZA ĽUDSKÉ PRÁVA

SDRUŽENÍ ASSOCIATION
PRO INTEGRACI FOR INTEGRATION
A MIGRACI AND MIGRATION