



UNION EUROPEENNE DE L'ARTISANAT ET DES PETITES ET MOYENNES ENTREPRISES
EUROPÄISCHE UNION DES HANDWERKS UND DER KLEIN- UND MITTELBETRIEBE
EUROPEAN ASSOCIATION OF CRAFT, SMALL AND MEDIUM-SIZED ENTERPRISES
UNIONE EUROPEA DELL' ARTIGIANATO E DELLE PICCOLE E MEDIE IMPRESE

UEAPME position paper on the proposal for an EU directive for Sanctioning employers employing illegal immigrants

General comments

European craft, small and medium sized enterprises are completely against the employment of illegal immigrants. Moreover the employment of illegal immigrants who are victims of human trafficking is unacceptable. Illegal employment and undeclared work have substantial consequences for the well functioning of the economy. It distorts competition in particular in the labour intensive sectors such as the growing services sector, which impacts over proportionally on SMEs and it deprives the social protection systems in Europe from an important part of social contributions needed for their sustainability. Therefore UEAPME welcomes the European Commission's **proposal** aiming at creating a level playing field across the different member states on this issue. We support this initiative as long as it contributes in combating undeclared work in each of the 27 EU member states.

While agreeing with the Commission on the usefulness of sanctions for the employer who employs illegal immigrants, the focus of this initiative should not only be on the company but also on the worker, who is an illegal immigrant. One should therefore concentrate also on ways to discourage illegal migration, in particular economic immigration.

UEAPME also agrees with the Commission's view on the need for using a policy mix to address this issue. This policy mix should include stronger sanctions and stronger controls as well as better implementation of decisions, but also address all kinds of incentives for illegal employment (which include over regulation of the labour market, excessive tax and social duties, etc) and foresee a general awareness raising campaign.

More generally SMEs, in particular micro enterprises have more difficulties to have an easy access to and a clear understanding of the necessary information concerning the existing social and legal obligations for third-country nationals.

Therefore sanctioning of employers which employ illegal immigrants should happen in a three step approach:

1. Prevention and information: Companies, in particular micro enterprises need support from intermediaries such as professional organisations or chambers
2. Warning: Proportionality is crucial. One has to distinguish between cases where there is a minor administrative error without the bad intention of the employer and cases where the employer willingly employs illegal immigrants against his better knowledge. These cases have to be distinguished and should be treated differently.

3. Sanctions: Sanctions can only be the last resort if it is clear that the employers act repetitively with full awareness of the illegality.

Finally, the employer should not be held responsible if the illegal immigrant has false papers. The small entrepreneur has neither the time nor the capacity to check whether the papers are genuine.

Specific remarks

Article 2 Definition

UEAPME strongly recommends for the definition of worker, employer and subcontractor to relate to national legislations as it is already the case in most EU labour law directives.

Examples

- Posting of workers directive (96/71/EC)

Art 2.2: "for the purposes of this directive, the definition of a worker is that which applies in the law of the Member State"

- Directive to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (2001/23/EC)

Article 2 (d) 'employee' shall mean any person who, in the Member State concerned, is protected as an employee under national employment law.

Article 2. 2. This Directive shall be without prejudice to national law as regards the definition of contract of employment or employment relationship.

Article 3 Prohibition of illegal employment

The general prohibition of any form of illegal employment is welcome by UEAPME.

Article 4 Employers obligations

The control and combat of illegal migration, in particular on the labour market is first and foremost the role of public authorities. Basically the necessary action in order to pursue companies which employ illegal immigrants must not lead to more administrative burdens for those companies, in particular SMEs which comply with the law. Therefore, legal obligations for entrepreneurs to control working permits - which exist in some countries - should be regarded as sufficient when controlling the legality of a third country nationals' status.

This would contribute to the Commission's new initiative of simplifying and reducing administrative burdens and cutting red tape for companies, in particular SMEs.

The obligation for the employer to make a copy of the residence permit does exactly lead to this type of unnecessary administrative burden. Furthermore, the obligation to inform the national authorities of any new employment within one week is disproportional burdensome for SMEs.

Concerning the case of “manifestly incorrect documents”, as stated in Article 4(3), employers’ obligations are rather unclear. It would be necessary to give more detailed explanations in the recitals of the proposal for a directive.

Article 6 Financial Sanctions

UEAPME agrees generally with the usefulness of proportionate and dissuasive financial sanctions but the exact form and amount should be decided at national level. However, European craft, small and medium sized enterprises strongly oppose the principle that the employer should cover the return costs of the illegally employed third country national. As the control of the legal entry and residence is first and foremost the role of public authorities, this type of sanction is highly questionable in terms of responsibility.

Article 7 Back payments to be made by the employer

Principally the employer should not use illegal employment. Therefore UEAPME agrees that back payments for the exact amount of the outstanding salary should be made by the employer. However, the proposals of the Commission could lead to further incentives for the uptake of illegal employment as it puts the illegal worker in a better situation in relation to a legally employed worker in respect to his protection and towards back payments. Therefore UEAPME strongly objects to the Commission’s proposal of an automatically triggered procedure for claiming back outstanding remuneration and the assumption that the work situation lasted at least 6 months, unless the employer can prove differently. This type of new burdens put only on the employer, like the burden of proof, is the prototype of additional pull factors for illegal immigration.

Article 8 Other measures

UEAPME considers the proposal to recover public benefits which the employer received over the last 12 months is too extreme. However, the withdrawal of these benefits for the concrete period in which the employer illegally employed third country nationals is acceptable.

Furthermore, it should be clarified that the temporary or permanent closure of the establishment only applies in cases of criminal offences.

UEAPME would like to limit the article 8 to paragraphs a) and b)

Article 9 Subcontracting

Concerning the liability of subcontractors, UEAPME rejects the notion that the main contractor can be held responsible for the behaviour of its subcontractors. SMEs, in particular micro enterprises have neither the possibility nor the capacity to carry out such an oversight role. Furthermore, the main contractor is not responsible for the employees of a subcontractor and therefore there cannot be any obligations stemming from this situation for him.

Art. 14 Facilitation of complaints

UEAPME is against a better treatment for illegal employees in relation to legal workers who are or were subject to exploitative working conditions for the facilitation of complaints and who are willing to cooperate with the authorities:

Conclusions

- European craft, small and medium sized enterprises are against any form of illegal employment and welcome the Commission's intention to combat illegal employment of third country nationals
- SMEs in particular smaller companies need support and assistance to be fully aware of their complete obligations
- Sanctions, together with better controls and awareness raising campaigns contribute to this end
- The exact form and amount of financial sanctions should be decided at national level
- The focus of this initiative should not only be on the company but also on the worker, who is an illegal immigrant
- Any sanctions should apply after an initial warning, besides cases where the employer was clearly aware of his wrong doing, and be proportionate to the seriousness of the situation
- Illegally employed workers should not have a better legal standing than legally employed workers
- The main contractor is not to be held responsible for the behaviour of the subcontractor

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