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**JOINT COMMENTS OF ETUC, PICUM AND SOLIDAR
ON EXPECTED COMMISSION PROPOSALS TO FIGHT 'ILLEGAL' EMPLOYMENT
AND EXPLOITATIVE WORKING CONDITIONS**

With this document, ETUC, PICUM and SOLIDAR would like to highlight key points that forthcoming European Commission initiatives on irregular migration, especially regarding the proposal for legislation on sanctions for employers who employ 'illegally present third-country nationals', cannot neglect. These points have been selected in accordance with the official positions of the three organisations.

A number of other organisations have expressed their wish to be mentioned as supporting the key messages in this document. These organisations are: the European Women's Lobby (EWL), the European Network Against Racism (ENAR), the International Catholic Migration Commission Europe (ICMC) and the Jesuit Refugee Service (JRS).

1) All human beings have human rights.

All individuals residing on the European Union territory, regardless of their legal status, are human beings and as such are the subjects of fundamental human rights. When they are performing work, they are subjects of fundamental rights at work, as acknowledged in the European Charter of Fundamental Rights, and in other international instruments¹. Any instrument aiming at reducing irregular migration must recognize and promote these rights.

¹ See: Parliamentary Assembly of Council of Europe Resolution 1509 (2006) Human rights of irregular migrants; UN International Convention for the Protection of the Rights of All Migrant Workers and the Members of Their Families; Association of Southeast Asian Nations, *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*, 13 January 2007, at point 2. For a listing of the instruments within the international framework and on the European level that uphold the human rights of undocumented migrants, see PICUM, *Undocumented Migrants Have Rights! An Overview of the International Human Rights Framework* (2007), available online at www.picum.org.

The lack of recognition and implementation of these rights contributes to the level of exploitation of undocumented migrant workers. Respect for human rights can never be seen as a 'pull factor' for irregular migration!

Therefore, the Commission must put 'flesh on the bone' when referring in their proposals to the need to act in accordance with fundamental rights by clarifying what these rights are and how the measures proposed will help to protect and promote those rights.

2) "Illegal" people do not exist.

The European Union institutions should adopt language that is consistent with the standards set by international and regional organisations and many civil society actors in referring to undocumented migrant workers and refrain from terminology such as "illegal workers" and "illegal migration".

The term "illegal immigrant" does not exist in international law and has very negative connotations. The internationally accepted term is 'irregular' or 'undocumented' 'migrant (worker)'². It should be clearly understood that most workers that perform jobs without having the proper immigration documents do work which is perfectly legal, such as, for example, harvesting fruit, building houses or taking care of the sick and elderly.

'Irregularity' simply means not having, or having lost, the proper documents allowing them to either reside in a given territory or to work there.

3) No end to irregular migration without beginning to accept legal migration.

'Stemming the flow' of irregular migrants involves measures including broadening legal channels for entry as a first priority. ETUC, Solidar and PICUM have already developed several opinions and positions on this³.

They therefore regret that the Commission, in the order of initiatives it is taking, has announced to take - as a first priority - steps 'to intensify the fight against employment of illegally staying third-country nationals', while its proposals on facilitating entry for high skilled and seasonal workers and to provide for a framework of rights for migrants will be issued only in a later stage.

4) Good governance first.

Addressing irregular migration is not just an issue of workers and employers, but also an issue of good governance. Situations of irregularity may occur because in many Member States administrations work slowly and bureaucratically, and because there are increasingly complex systems regarding applications and the renewal of permits,

² See footnote 1

³ See, among others, Solidar's Position on the European Commission Communication on illegal immigration: a rights-based approach to the question of irregular migration; PICUM's Comments on the Communication from the Commission on "Policy priorities in the fight against illegal immigration of third-country nationals" COM (2006) 402 final (www.picum.org/HOMEPAGE/CommentsCOM2006402%20final.pdf); ETUC Resolution Toward a pro-active EU policy on migration and integration, (www.etuc.org/a/1159)

visa requirements etc. in place, related to a diversification and proliferation of immigration statuses. Administrative simplification and increasing the transparency of procedures are urgently needed, and employers and workers encountering problems in this regard should be granted a 'grace period' to get things right, instead of immediately being seen as criminal actors that should be punished or expelled.

5) Combating irregular migration = combating labour exploitation.

"Illegal" employment is not a 'pull factor', but the availability of employment opportunities is. The overwhelming majority of migrants, like all human beings, would rather have regular employment contracts, pay taxes and contribute to the social security system, than live outside the legal system under a constant threat of deportation.

Tackling "illegal" employment means ensuring first and foremost that labour exploitation will be addressed, and that those benefiting (sometimes with huge profit) from the exploitation of migrants will have to pay. To ensure that the fundamental human rights (including labour rights) of undocumented workers remain a key tenet of how the EU addresses irregular migration, we recommend the following:

- Reaffirm the principle of the uniqueness of labour law and uphold rights and forms of protection at the workplace. Labour law exists to protect the worker in an unequal position of power, which is especially the case for undocumented workers.
- Safeguard the right to organize for all workers regardless of their legal (immigration) status, by ensuring that legislation is unbiased and does not exclude undocumented workers from exercising the right to join a trade union.
- Strengthen the role of labour inspection in its primary duty of protecting workers and not enforcing immigration law, by:
 - De-linking immigration status with workplace inspection, to ensure that undocumented workers can safely file a complaint against an abusive employer without being threatened with expulsion.
 - Investing in training and awareness-raising measures to inform labour inspectors, undocumented workers, and those offering them assistance (e.g. NGOs, trade unions, local authorities) about the possibilities for filing an official complaint.
 - Providing labour inspections with sufficient human and financial resources to work effectively
- Complaint procedures should be established that provide for the establishment of an independent body, such as an Ombudsman, where migrant workers can report exploitative working and living conditions in a confidential manner. This is the only way to ensure that such situations are revealed and exposed.
- Undocumented migrant workers who want to escape from situations of irregularity and exploitation should be granted a certain legal space to complain about their situation, to sue their employer for unpaid wages, and to receive damages and payments due to them, without being expelled in advance.

Procedures could be simplified and mechanisms developed (such as a legal presumption about unpaid wages, which can be refuted by the employer, or the granting of temporary residence permits to those who report exploitation⁴) to make sure that migrant workers do not bear the brunt of punishment for their exploitation and to allow migrant workers and their representatives to collect evidence.

- Female undocumented migrants are especially vulnerable and are often the victims of forced labour and trafficking for exploitation in the sex industry. Complaint procedures and measures to tackle irregular employment in highly feminized sectors such as domestic work should therefore be designed in such a way as to provide women with proper protection.

6) Combating labour exploitation = combating human trafficking

Protecting the rights of irregular migrant workers and opening up legal channels for economic migration are important ways to prevent trafficking in human beings. It will reduce the recourse of potential migrants to unofficial intermediaries, and thereby will reduce the risk that they fall victim to criminal organisations that enjoy enormous profit by trafficking human beings for labour or sexual exploitation.

7) Design of sanctions crucial to prevent penalizing workers

If penalties and sanctions are developed, they should not negatively affect workers or penalise them instead of the employer.

Some proposals are:

- inserting labour standards and rights into CAP (Common Agricultural Policy) agreements: violation of labour standards could be used to halt payments to producers who violate labour law or exploit workers⁵;
- ensuring retailers and other main contractors are responsible for the whole supply chain. Introducing forms of client liability or joint and multiple liability for wages and working conditions can be very effective to make employers and their organisations accountable and to make them take action; those that 'know or could have known' that the products or services they are buying from their agencies or subcontractors have a price that indicates they are far below official market prices and wages should be held responsible;

⁴ The Italian government has put forward legislation to this effect, proposing to extend provisions currently granted to the victims of trafficking for the sex trade to undocumented migrants who report exploitation. The bill (no. 1201/2006), which has yet to be approved by Parliament, grants undocumented migrants a residence permit if the authorities find that they are being 'severely exploited'.

⁵ The bill put forward by the Italian government (see footnote no. 4) also bans employers who are found to be exploiting labourers from receiving regional, national or EU subsidies of any kind a year. The regional government of Puglia's regional law n. 28/2006 bans employers who exploit migrant workers from receiving local, national or EU funding for up to 5 years.

- presuming that, when an irregular work situation is detected, the employer has not paid proper wages or contributed to tax and social security funds, and thereby setting payment of e.g. six months of wages and tax and premium payments as the sanction; this would put the burden of proof on the employer;
- adopt regulations that allow public authorities to take away presumed profit, as has been introduced in some countries to sanction profits in drug dealing.

8) Ensuring accountability of all actors in the labour market is a pre-condition.

A system of penalties based on the capacity of public authorities to monitor, control and intervene can only be effective if it is part of a wider policy addressing and ensuring the various actors in the labour market are accountable. Employers and their organisations should be clearly asked to take responsibility for what is happening in their companies and sectors, and to show a more unambiguous commitment in this regard. Social partners at all relevant levels should be asked to investigate good practices, and promote measures and methods of self-regulation that may contribute to the reduction of recourse to irregular employment practices, such as the introduction of certification, fair trade marks, social labelling, etc. At the same time, the introduction of licensing systems and chain responsibility in agency work and subcontracting are clearly important tools to prevent abusive and manipulative intermediaries on the labour market.

Such measures, rather than ideologically being depicted as 'red tape', should be seen as helping to prevent a shadow economy flourishing on the basis of unfair competition with those companies which do abide by the rules.

More and better enforcement of the Posting Directive, more and better cooperation between labour inspectorates supported by an EU "Sociopol", the urgent adoption of the Temporary Agency Directive, inserting a labour rights clause in the CAP and in other EU funding mechanisms and a proposal to introduce joint and several liability for main contractors are important measures to take at EU level, which can support policies to address and combat irregular employment and exploitative working conditions.

9) Enhancing the role of trade unions, NGOs and civil society at large is key.

The role of trade unions and NGOs is largely underestimated. Trade unions and NGOs have, for a long time, been involved in getting in contact with and/or encouraging membership of migrant workers. Several positive initiatives have already been taken.

Granting of specific dedicated services based on membership of trade unions, associations and civil society organisations is a relevant step on the path to combat exploitation and to ensure recognition of the fundamental rights of undocumented migrants not only as workers but also as individuals on EU territory.

A commendable experience, even if it is still in an experimental stage, is cooperation between unions in the host country with unions in countries of origin to establish contact and provide information about rights to potential migrant workers.

Therefore, the capacities of civil society (e.g. NGOs, trade unions, professionals from diverse fields) should be strengthened to continue to provide expertise and support concerning undocumented workers' living and working conditions by:

- Ensuring that they are not penalized or criminalized for providing assistance to undocumented workers: supporting undocumented migrants with regard to respect for their human rights and the improvement of their living and working conditions should never be confused with 'facilitating illegal immigration'!
- Allowing them to maintain a relation of confidentiality and trust with undocumented workers, by not obliging them to reveal sensitive personal data and/or data about their workplace without the worker's agreement.

10) A stronger framework of international standards is needed.

Last but not least, the EU should promote the ratification of all the relevant international instruments issued by the UN, ILO and Council of Europe⁶, and especially of the International Convention for the Protection of the Rights of All Migrant Workers and Members of Their Families⁷, which reiterates a number of rights applicable to migrant workers and their families, including various rights applicable to undocumented workers.

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⁶ See Footnote 1

⁷ Adopted by UN General Assembly, Resolution 45/158 of 18 December 1990