REMUNERATION RIGHTS OF IRREGULAR MIGRANT WORKERS IN THE EUROPEAN UNION*

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The European Union, being a hub for many internationals, has a substantial number of migrants in its member states. The matter of the fact is, many of those migrants engage in unauthorized employment and this sets them up for exploitation and the danger of not receiving remuneration or wages for their work. Although their employment can be considered illegal, it should not be a reason for having no legal rights to remuneration. The paper discusses who is considered an irregular worker and identifies two groups that fall under the definition of irregular workers, it examines the right to remuneration for all workers, and uses a doctrinal approach to analyze and describe which EU directives explicitly regulate the right to remuneration for irregular workers, and examines the rulings of the European Court of Justice to determine if any significant rulings have been made which establish the inclusion of irregular workers under other employment related directives.

Keywords
Irregular Workers, Migrant Workers, Workers Remuneration, European Union Law, Employers Sanctions Directive

Introduction

Every human being is entitled to work, this basic right is engraved in every human rights agreement and all constitutions. This comes from the idea that every person should be allowed to freely choose their job and work in order to make a livable wage and live in dignity. With the right to work, comes the right to receive remuneration for the services provided. This right is mainly governed by the national labor laws, which establish the obligations of the employer to pay wages, set minimum wages and provide remedies and access to justice in case of conflict. This matter is no different when it comes to migrant workers since it applies to every human being with no exclusion or discrimination and as such, they are usually extended the same protections provided for the nationals of the country. However, due to many reasons and different pull factors, some people may engage in employment without having the legal right to, which is the case of irregular migrant workers.

Irregular migrant workers are those who take up employment in a country they are not a national of and have no right to work in, which exposes them to exploitation from employers, especially in regard to their wages, whether it is the right to be paid the minimum wage, or even be paid at all.

This paper is concerned with the remuneration rights of irregular workers in the European Union, since many people choose to take up employment there due to the pull

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factors, such as the availability of opportunities, higher wages than in their home countries and the freedom of movement. While the number of irregular workers in the EU is hard to identify, it is no question that it is a huge number and multiple people consider it as a hub for migration. However, many of those irregular workers end up in a situation where they do not receive wages and are not in a legal status to consider claiming them.

The main purpose of this paper is to identify what rights irregular workers have in regard to their remuneration and wages, and what legal remedies are available for them to ensure their rights and access to justice, since it has been considered a controversial topic and a matter that lacks clarity and has gaps in its regulations. The importance of identifying those rights comes from two sides, the first side is that the matter of irregular migration and irregular employment is an issue that is yet to be solved in the EU and having a comprehensive regulation can help in tackling it; the other side is that employers prefer to employ irregular migrant workers since it saves them money and due to the weak position the workers are in, which ultimately affects the labor market and could cause fewer opportunities for authorized workers and nationals. Therefore, it becomes important to identify if this matter is regulated clearly or if it lacks legislation and has gaps.

This paper will use the doctrinal legal research methodology to describe and provide a detailed analysis of the regulations and laws in the European Union concerning the matter. It involves identifying who irregular workers are according to the EU perspective, the right to remuneration for workers generally, and then a more detailed study of the EU position and directives on irregular workers' right to remuneration, and lastly, an examination of the case law on the topic and what precedents have been passed.

1. Irregular migrant workers in the EU: who are they?

It is essential to understand who irregular migrant workers are in order to determine what laws and regulations apply to their remuneration rights, however, before jumping into defining the term 'irregular migrant', it is worth going over and understanding who migrant workers generally are.

Many international conventions, European Union directives and conventions and domestic laws gave a definition for migrant workers. For example, the "Migration for Employment" Convention (International Labor Organization 1949) in its Article 11 defined migrant workers as "*a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant for employment" and* the European Convention on the Legal Status of Migrant Workers (Council of Europe 1977) in its article (1) defined them as *"a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment".* Regardless of the difference in the definitions across the conventions and regulations, a general understanding can be formed that a migrant worker is an individual who migrates from one country in order to seek remunerated employment and residence legally in another country, which they are not a citizen of.

For the purposes of this paper, we are covering migrant workers specifically in the European Union, therefore, it must be noted that when identifying someone as a migrant worker, we are excluding citizens from Switzerland and of the European Economic Area (EEA) which includes all countries of the European Union in addition to Iceland, Norway and Liechtenstein. Workers from those countries enjoy the liberty of moving across the borders and seeking employment under the identity of "mobile workers" due to the free movement of workers principle according to the economic freedoms of the European Union.

After understanding the definitions of migrant workers, we can form a definition of irregular migrant workers, as the workers who are unauthorized to engage in remunerated employment in the member state. According to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN General Assembly 1990) Article 5, irregular migrant workers are workers who are not authorized to enter, or stay and engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party, and in accordance with the definition of migrant workers in the EU, previously mentioned, it is the person who is not authorized to reside and take up paid employment.

While many assume all irregular workers are also persons who are in an irregular situation in the member state, that is not the case, not all irregular workers are persons who came illegally and started working. Irregular workers can be categorized into two groups with respect to their legal situation in the member state, as per the following (Ruhs & Ruhs 2022, 12):

1. Migrant workers who do not have the legal right to reside;
2. Migrant workers who have the legal right to reside but are working in violation of the employment restrictions attached to their legal status.

The first group, workers who do not have the right to reside, refers to persons who illegally entered the member state – such as by illegally crossing the borders – usually referred to as illegal migrants. Or in other cases, those who have entered legally but overstayed their visa or residence status are the persons who initially had the right to enter the member state for a limited time and have illegally and without authorization stayed in the country after the expiry of their legal authorization. Those people, therefore, due to their status, do not have the right to work and will be recognized as irregular workers.

The second group includes migrant workers with a legal right to reside in the member state, however, that right does not extend to the right of work. This group can include persons visiting a member state with a visa, or those who are authorized to enter for tourism purposes; it also includes asylum seekers, to whom the right to work has not been extended, while waiting for the decision regarding their application; it can also include persons with residence status who have restrictions relating to their work rights, for example, international students in member states might have restrictions on the amount of hours they can work.

In conclusion, not all irregular workers are illegal residents of the member states they take up employment in, however, they are engaging in employment through no authorization or without the legal right to do so. This conclusion can also explain the uncertainty of the number of irregular workers in the EU.

2. The right to remuneration for workers

Every human being is entitled to seek employment, the freedom to choose their job, and to make a livable wage. The most fundamental convention concerning human rights known as the "Universal Declaration of Human Rights" (UN General Assembly 1948) guarantees that right. In Article 23, the right to work is emphasized, in addition to the right of equal pay for equal work with no discrimination, and the right to remuneration.

The employment relationship consists of three main components: the worker, the employer and the link between the two, where the worker performs services for the employer under certain conditions in return for remuneration. The existence of this relationship is guided by the facts that were agreed upon by the two parties, regardless of the name the contract has been given. This is known in law as the principle of the primacy of fact, which is explicitly enshrined in some national legal systems (ILO International Labor Conference 2004, 23).

Thus, generally speaking, every person is entitled to take employment with any employer to receive just remuneration, and that relationship will be considered an employment relationship, if the person is subordinated to their employer, and receives remuneration for the services they perform. This is a right guaranteed and protected by all human rights conventions. This is also seen in The European Charter of Fundamental Rights (European Union 2012) in Article 15(1): *"Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation".*

Countries are responsible for ensuring that right within their labor legislation, and accordingly, they provide their own definitions of the employment relationship, and rules to protect workers' rights such as remuneration, benefits and access to justice. With this in mind, countries also regulate who falls under the definition of a worker for the application of labor law. For example, many legislations usually exclude domestic workers from the application of labor laws and regulate their relationship in a different regulation. This does not mean that domestic workers have less rights, just that certain countries' labor laws might not be inclusive of all types of workers and may regulate the employment of specific workers under different acts. Therefore, an irregular worker's relationship with their employer might fall outside of the scope of the labor law of the state they work in.

In relation to the European Union (EU) and the regulations relating to labor law, most of the legislation takes the form of directives which, depending on their topic, provide for the minimum standards of protection that must be incorporated into the national law of the member states. The main finding here, recognized by many researchers and scholars, is that the EU lacks a uniform, single concept, or a definition of who is a worker and whom does it include. It mainly refers to the member states' national law definitions or practice when it comes to the application (Boudalaoui-Buresi & Szpejna 2020).

The Court of Justice of the European Union (CJEU) plays a huge part in interpreting the EU legislation in its judgments. According to one of its rulings (Lawrie-Blum v Württemberg) that *"the concept of a worker must be defined in accordance with objective criteria, accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of*

time a person performs services for and under the direction of another person in return for which he receives remuneration."

When it comes to the existence of migrant workers and their rights, by going back to the European Charter previously mentioned, Article 15(2) states that *"Nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union".* This concept is also seen in the European Convention on the Legal Status of Migrant Workers, in Article 16: *"In the matter of conditions of work, migrant workers authorised to take up employment shall enjoy treatment not less favourable than that which applies to national workers by virtue of legislative or administrative provisions, collective labour agreement or custom."* This concludes that all rights and protections that the EU has passed shall also include and apply to migrant workers. The main key word here is "authorized," from which it is understood that irregular workers, being unauthorized to work, are not included.

While the matter of exploiting migrant workers still stands and is an issue of its own, the exclusion of irregular migrant workers contributes to the harsh work conditions they endorse, specifically in the remuneration area. Employers will usually favor employing irregular workers specifically for low-skilled jobs, since it saves them money: in one aspect, their wages are less than the wages offered to regular workers, in another aspect, they will not need to pay any taxes or social contributions that come with hiring a regular worker. Another aspect is, due to their irregular situation, workers will usually prefer to endure these acts since they are afraid of the consequences of them coming forward, such as deportation or criminalization. This often leads to cases in violation of the forced labor conventions and human trafficking conventions; as such, irregular workers are always in danger of falling between the thin lines of being victims of forced labor in the cases when the employer deceives them and does not pay them, holding over their head that due to their irregular situation they will not have access to their rights and will face criminal charges if they are caught working without any authorization. Even though, according to international conventions, their irregular status should not interfere with their right to dignity and rights to equality, which should also apply to their remuneration.

This is not to say that the European Union has kept completely silent and endorsed the illegality of the situation. This statement, however, begs the question, do those workers have any rights to remuneration? And what has the EU said in this regard? The next chapter of this article discusses this aspect and studies the regulations and case law relating to the remuneration of irregular migrant workers.

3. The EU position on the remuneration of irregular migrant workers

As discussed previously, the EU directives offer protection for regular migrant workers the same way as for national citizens of the member states, however, that protection does not extend to the irregular workers and specifically to matters of remuneration. This chapter is concerned with shedding light on whether the EU has regulated the matter and what directives could apply to protect the remuneration of irregular workers.

The matter of irregular workers is sensitive and requires specific attention and directed regulations to ensure the application of their rights, keeping in mind that

irregular workers are actually in violation of a state's policies about their residence and/or employment restrictions. With those facts in mind, there are three approaches that can be taken to ensure the employment rights of irregular workers in the European Union: the full protection approach, the no protection approach and the protection with consequences approach (Dewhurst 2010).

The full protection approach is yet to be taken in the EU; this approach would appear as if to say, that irregular workers can have the same rights that are offered to regular workers. As exciting as this sounds, a consequence of this approach, from our perspective, could be undermining the member states' migration policies and the ability to control the flow of irregular migration to their country. The no protection approach entails the denial of all employment rights to undocumented workers, on the basis of the nullity of their employment contract. The protection with consequences approach would entitle irregular workers to employment rights, however, doing so, it exposes the worker to detection by the authorities and subsequent detention and deportation (Dewhurst 2020).

To examine the EU position on the remuneration rights of irregular workers, we can only turn to the Employers Sanctions Directive (Directive 2009/52/EC), which extends some employment remuneration rights to irregular workers, in addition to the CJEU case law on the matter, in case any judgments had extended the remuneration rights to irregular workers.

3.1 The Employers Sanctions Directive

Until 2009, the approach towards irregular workers' employment rights for remuneration have been ambiguous, that is, until the European Parliament and the Council has adopted the Employers Sanction Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. This directive illustrates a "protection with consequences" approach and is considered a huge development in the area of protection of irregular migrant workers. While the main aim of this directive is essentially eliminating the pull factors that encourage irregular workers to take employment illegally and combating illegal migration (Czerniejewska & Others 2014), it still serves as a tool to collect the remuneration of those workers and protect it.

In the preamble of the directive, Recital (5) covers the scope of this directive, as it states, *"This Directive should not apply to third-country nationals staying legally in a Member State regardless of whether they are allowed to work in its territory."* Therefore, it only applies to irregular workers who have entered the state illegally, since as we previously mentioned, irregular workers can be categorized into two groups.

In regard to protecting remunerations, Article 6 (1) of the directive states what obligations the employer has in regard to remuneration for the irregular worker: *"(a) 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."*

Additionally, Recital (17) of the preamble states *"Member States should further provide for a presumption of an employment relationship of at least three months' duration so that the burden of proof is on the employer in respect of at least a certain period. Among others, the employee should also have the opportunity of proving the existence and duration of an employment relationship"*

According to those two Articles, the minimum protection for irregular workers is to receive an amount of at least 3 months' worth of remuneration for their work, and the wages are to be at least in accordance with the minimum wages in the member state they worked in. The exact amount of remuneration and the duration of months worked can be proven by either the employer or the worker. In case the duration cannot be proved, a presumption is made that it is at least 3 months.

The directive also ensures through its articles that this right is enforceable even when the worker is no longer in the country: in Article 6 paragraph 2(a), and paragraph 4 of the same article, the directive states that 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.

Since this directive takes the "protection with consequences" approach, the irregular workers will be subject to the member states' migration policies regarding deportation, however the directive encourages member states to grant a temporary residence permit to those workers, linked to the length of the relevant proceedings to receive the remuneration, according to Recital (27) of the Preamble.

While, as we said, this is a step forward, the reality of the application of this directive does not match the expected outcomes. The European Trade Union Confederation (ETUC) has published a paper on their position on the directive (ETUC 2021), in which they argued that the implementation of the directive needs effective firewalls between labour inspectorates and immigration authorities so that migrant workers do not run the risk of detention or deportation due to interactions with labour inspectors, during labour inspections or when pursing judicial remedy. They also argued that the grant of a residence permit for the purposes of claiming wages is hardly ever granted. They called on implementing more protective measures such as exemption from punishment, entitlement to regularization of the employment relationship and access to a regular residence permit. They also criticized the scope of this directive relating to whom it covers, where they stated that the exclusion of third country nationals that have the right to reside is not correct, since they also face the same problems in enforcing their rights, as they also are not authorized to take up employment.

3.2 Case-law of the Court of Justice of the European Union on the remuneration rights of undocumented workers

The CJEU interprets EU law to make sure it is applied in the same way in all EU countries and settles legal disputes between national governments and EU institutions. Therefore, it is important to examine the court's rulings regarding the remuneration of irregular workers to check if it has provided further interpretations that can exclude them in any specific directives, or if it had set a principle that concerns the matter.

For the matter of the remuneration of migrant workers, a significant ruling has been made by the CJEU in the Tümer case (Tümer v Raad). The case concerned Tümer, a Turkish national, who was living and working irregularly in the Netherlands. His employer had not paid him his wages, and later went insolvent, following which Tümer claimed that as an employee with wages unpaid from his insolvent employer, he was entitled to insolvency benefits related to this pay from the Employee Insurance Schemes Implementing Body (WW). His claim was in accordance with the EU Employers Insolvency Directive (Directive 2008/94/EC) which gives rights to the employees in the case of their employer's insolvency: according to article (3) of the directive, Member States shall take the necessary measures to ensure that guarantee institutions take over outstanding claims resulting from contracts of employment or employment relationships in cases of employer insolvency. The Directive defers to the definition of "employee" used by each Member State, therefore, the Dutch court had dismissed his claim, since Article 3(3) of the Law on Unemployment excludes "illegally staying third-country nationals" from the definition of "employee" and, accordingly, from any entitlement to the insolvency benefit. He is not considered an "employee" under the definition due to his irregular status and cannot sue for back pay. The highest Dutch court for administrative disputes had referred the case to the CJEU to clarify whether or not the Directive allows for the definition of an "employee" under national law to exclude undocumented migrant workers and therefore exclude them from the protections in the Directive, including in cases where there are alternative methods to recovery under civil law (Picum 2020).

With regard to this case, the CJEU had ruled that the terms of the Insolvency Directive cannot be read as a blanket exclusion of those without legal residence in Member States, nor can illegal residence serve automatically as a legitimate basis for exclusion (Ruhs & Ruhs 2022, 12). The court had also stated that the main idea behind this directive is to provide minimum protections for employees in case of their employer's insolvency: therefore, the irregular worker cannot be excluded.

This ruling is significant since it has encouraged an expansive and inclusive interpretation for the directive and outlined that the legal status of the worker should not interfere with their rights in accordance with the directive's objectives.

This broad interpretation has opened the door to asking the question if other EU directives can also be interpreted in the same manner, therefore, offering irregular workers protection under other related directives, especially with the court's interpretation of the term of worker in the Lawrie-Blum ruling, which stated that *"The term 'worker' covers any person performing for remuneration work the nature of which is not determined by himself for and under the control of another, regardless of the legal nature of the employment relationship"*. Unfortunately, this statement has not been confirmed by any other judgments yet.

Conclusion

The matter of remuneration for irregular migrant workers in the European Union lacks clarity. While regular workers have their remuneration rights stated clearly in directives and case law, irregular workers do not. The European Charter of Fundamental Rights, which states that "everyone" is entitled to work, creates ambiguity relating to the right

to receive wages, and the EU lawmaker, by not giving a definitive definition of who is a worker in any of its directives and referring the matter to national laws, which usually exclude irregular workers, also creates contradiction when compared to the CJEU definition given in the Lawrie-Blum ruling that did not exclude irregular workers and relied mainly on the elements of the relationship (subordination) rather than the legal status of the worker. As it also has been mentioned, the significant ruling in the Tümer case has left many unanswered questions as to how that ruling can affect the application of other directives on the cases of irregular workers. The employers' sanctions directive, while being considered a huge development, has left a group of irregular workers out of the protections it had extended and faces criticism for the lack of effectiveness and mechanisms to ensure its application. Suffice to say, the matter of irregular workers' employment rights needs to be considered and given more attention due to its importance and the gaps in regulation. Its importance comes from two sides: from one side, it has to do with irregular migration to European countries, a topic of importance to tackle for the EU, and from the other side, with human rights, since irregular workers are more likely to be exploited and be taken advantage of.

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