

# EUROPEAN PARLIAMENT

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**\*\*\*I**

## **REPORT**

on the proposal for a directive of the European Parliament and of the Council  
providing for sanctions against employers of illegally staying third-country  
nationals

(COM(2007)0249 – C6-0143/2007 – 2007/0094(COD))

Committee on Civil Liberties, Justice and Home Affairs

Rapporteur: Claudio Fava

Rapporteur for opinion (\*):

Edit Bauer, Committee on Employment and Social Affairs

(\*) Associated committees - Rule 47 of the Rules of Procedure

### ***Symbols for procedures***

- \* Consultation procedure  
*majority of the votes cast*
- \*\*I Cooperation procedure (first reading)  
*majority of the votes cast*
- \*\*II Cooperation procedure (second reading)  
*majority of the votes cast, to approve the common position*  
*majority of Parliament's component Members, to reject or amend the common position*
- \*\*\* Assent procedure  
*majority of Parliament's component Members except in cases covered by Articles 105, 107, 161 and 300 of the EC Treaty and Article 7 of the EU Treaty*
- \*\*\*I Codecision procedure (first reading)  
*majority of the votes cast*
- \*\*\*II Codecision procedure (second reading)  
*majority of the votes cast, to approve the common position*  
*majority of Parliament's component Members, to reject or amend the common position*
- \*\*\*III Codecision procedure (third reading)  
*majority of the votes cast, to approve the joint text*

(The type of procedure depends on the legal basis proposed by the Commission.)

### ***Amendments to a legislative text***

In amendments by Parliament, amended text is highlighted in ***bold italics***. In the case of amending acts, passages in an existing provision that the Commission has left unchanged, but that Parliament wishes to amend, are highlighted in **bold**. Any deletions that Parliament wishes to make in passages of this kind are indicated thus: [...]. Highlighting in *normal italics* is an indication for the relevant departments showing parts of the legislative text for which a correction is proposed, to assist preparation of the final text (for instance, obvious errors or omissions in a given language version). Suggested corrections of this kind are subject to the agreement of the departments concerned.

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(\*) Associated committee - Rule 47 of the Rules of Procedure



## **DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION**

**on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals  
(COM(2007)0249 – C6-0143/2007 – 2007/0094(COD))**

**(Codecision procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to the European Parliament and the Council (COM(2007)0249),
  - having regard to Article 251(2) and Article 63(3)(b) of the EC Treaty, pursuant to which the Commission submitted the proposal to Parliament (C6-0143/2007),
  - having regard to Rule 51 of its Rules of Procedure,
  - having regard to the report of the Committee on Civil Liberties, Justice and Home Affairs and the opinions of the Committee on Employment and Social Affairs, the Committee on Agriculture and Rural Development and the Committee on Women's Rights and Gender Equality (A6-0026/2009),
1. Approves the Commission proposal as amended;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend the proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council and the Commission.

### **AMENDMENTS BY PARLIAMENT\***

**to the Commission proposal for a**

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL  
providing for *minimum standards on* sanctions against employers of illegally staying  
third-country nationals**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 63(3)(b) thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Having regard to the opinion of the Committee of the Regions<sup>3</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>4</sup>,

Whereas:

- (1) The European Council meeting of 14 and 15 December 2006 agreed to increase cooperation among Member States in the fight against illegal immigration and in particular that measures against illegal employment should be intensified at Member State and EU level.
- (2) A key pull factor for illegal immigration into the EU is the possibility of obtaining work in the EU without the required legal status. Action against illegal immigration and illegal residence should therefore include measures against that pull factor.
- (3) The centrepiece of such measures should be a general prohibition on the employment of third-country nationals who do not have the right to be resident in the EU, accompanied by sanctions against employers who infringe that prohibition.
- (3a) *As this Directive provides for minimum rules, Member States remain free to adopt or maintain more severe sanctions, measures and employers' obligations.*
- (4) The provisions should not *apply to* third-country nationals **■** staying *legally in the Member States whether or not allowed to work in their territory*. This excludes *persons who enjoy the Community right of free movement, as defined in Article 2(5) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*<sup>5</sup>. It also excludes third-country nationals who are in a situation covered by Community law, such as those who are lawfully employed in another Member State and who are posted by a service provider to another Member State in the context of the provision of services. *This Directive should apply without prejudice to national law prohibiting the employment of third-country nationals staying legally but working in breach of their residence status.*
- (4a) *For the specific purposes of this Directive, certain terms should be defined. Such definitions should be used only for the purposes of this Directive.*

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\* Political amendments: new or replacement text is marked in bold and italics and deletions are indicated by the symbol **■** Technical corrections and adaptations by the services: new or replacement text is marked in italics and deletions are indicated by the symbol **||**.

<sup>1</sup> OJ C [...], [...], p. [...].

<sup>2</sup> OJ C [...], [...], p. [...].

<sup>3</sup> OJ C [...], [...], p. [...].

<sup>4</sup> OJ C [...], [...], p. [...].

<sup>5</sup> *OJ L 105, 13.4.2006, p. 1.*

- (4b) *The definition of employment should encompass its constituent elements, namely activities that are or ought to be remunerated undertaken for or under the direction and/or supervision of the employer, irrespective of the legal relationship.*
- (4c) *The definition of employer may also include an association of persons recognised as having the capacity to perform legal acts without legal personality.*
- (5) To prevent the employment of illegally staying third-country nationals, employers should be required before recruiting a third-country national, including in cases where the third-country national is being recruited for the purpose of posting to another Member State in the context of the provision of services, to check that they have a **valid** residence permit or another authorisation for stay **showing that the third-country national is legally staying on the territory of the Member State.**
- (5a) To enable Member States in particular to check for forged documents, **employers** should also be required to notify the competent authorities of the employment of a third-country national. **In order to minimise the administrative burden, Member States may provide for such notifications to be undertaken within the framework of other notification schemes. Member States should be able to decide for a simplified procedure for notification by employers who are natural persons where the employment is for their private purposes.**
- (6) Employers that have fulfilled the obligations set out in this Directive should not be held liable for having employed illegally-staying third-country nationals, in particular if the competent authority later finds that the document presented by an employee had in fact been forged or misused, **unless the employer knew that the document was a forgery.**
- (6a) *To facilitate the fulfilment by employers of their obligations, Member States should use their best endeavours to handle requests for renewal of residence permits in a timely manner.*
- (7) To enforce the general prohibition and to deter infringements, Member States should provide for appropriate sanctions. These should include financial penalties and contributions to the costs of returning illegally staying third-country nationals, **together with the possibility of reduced financial penalties on employers who are natural persons where the employment is for their private purposes.**
- (8) The employer should in any case be required to pay to the third-country nationals any outstanding remuneration for the work they have undertaken and any outstanding taxes and social security contributions. **If the level of remuneration cannot be determined, it should be presumed to be at least the wage provided for by the applicable laws on minimum wages, collective agreements or practices in the relevant occupational branches. The employer should also be required to pay, where appropriate, any costs arising from sending outstanding remuneration to the country to which the illegally employed third-country national has returned or has been returned. In case when back payments are not made by the employer, Member States should not be obliged to fulfil this obligation in place of the employer.**

- (8a) *The illegally employed third-country national cannot derive a right to entry, stay and access to the labour market from the illegal employment relationship or from the payment or back payment of remunerations, social security contributions or taxes by the employer or by a legal entity which has to pay instead of him.*
- (9) Member States should ensure that claims are *or can be* lodged and *that* mechanisms *are in place* to *ensure* that recovered amounts of outstanding remuneration are *able to be* received by the third-country nationals to whom they are due. *Member States should not be obliged to involve their missions or representations in third countries in those mechanisms. Member States should, in the context of establishing effective mechanisms to facilitate complaints and if not already foreseen by national legislation, consider the possibility and added value of enabling a competent authority to bring proceedings against an employer for the purpose of claiming back outstanding remuneration.*
- (10) 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 put on the employer in respect of at least a certain period. *The employee, inter alia, should also have the opportunity of proving the existence and duration of the employment relationship.*
- (11) Member States should provide for the possibility of further sanctions against **■** employers, including exclusions from entitlement to *some or all* public benefits, aids or subsidies, including agricultural subsidies; exclusions from public procurement procedures; and recovery of *some or all* public benefits, aids or subsidies, including EU funding managed by Member States, that have already been granted. *Member States should be able to decide not to apply those further sanctions against employers who are natural persons where the employment is for their private purposes.*
- (12) This Directive, and in particular its Articles 8, 11 and 13, should be without prejudice to the provisions of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Union<sup>1</sup>.
- (13) In view of the prevalence of subcontracting in certain affected sectors, it is necessary to ensure that *at least the contractor, of which the employer is a direct subcontractor, can be held ■* liable to pay financial sanctions *next to or in place of the employer. In specific cases, other contractors should be held liable to pay financial sanctions next to or in place of an employer ■ of ■* illegally staying third-country nationals. *Back payments which are to be covered by the liability provisions of this Directive should also include contributions to national holiday pay funds and social funds regulated by law or collective agreements.*
- (14) Experience has shown that the existing systems of sanctions have not been sufficient to achieve complete compliance with prohibitions against the employment of illegally staying third-country nationals. One of the reasons is that administrative sanctions

<sup>1</sup> OJ L 248, 19.9.2002, p. 1. Regulation as last amended by Regulation (EC) No 1995/2006 of 13 December 2006 (OJ L 390, 30.12.2006, p. 1).

alone are likely not to be enough to deter certain unscrupulous employers. Compliance can and should be strengthened by the application of criminal sanctions.

- (15) To guarantee the full effectiveness of the general prohibition, there is therefore a particular need for more dissuasive sanctions in serious cases, such as: repeated infringements, illegal employment of a significant number of third-country nationals, particularly exploitative working conditions **■**, where the employer knows that the worker is a victim of human trafficking **and the illegal employment of a minor. This Directive obliges Member States to provide for criminal penalties in their national legislation in respect of those serious infringements. It creates no obligations regarding the application of such penalties, or any other available system of law enforcement, in individual cases.**
- (16) In all cases deemed to be serious according to the present Directive the infringement should therefore be considered a criminal offence throughout the Community when committed intentionally. The criminal offence should be without prejudice to application of the Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings<sup>1</sup>.
- (17) The criminal offence should be punishable by effective, proportionate and dissuasive criminal sanctions **■**. **The obligation to ensure effective, proportionate and dissuasive criminal sanctions under Article 10 of this directive is without prejudice to the internal organization of criminal law and criminal justice in the Member States.**
- (17a) **Legal persons should also be able to be held liable for the offence referred to in Article 10, because many employers are legal persons. The provisions of this Directive do not entail an obligation to introduce criminal liability of legal persons in Member States.**
- (18) To facilitate enforcement, there should be effective complaint mechanisms by which relevant third-country nationals can lodge complaints directly or through designated third parties such as trade unions or other associations. The designated third parties should be protected, when providing assistance to lodge complaints, against possible sanctions under rules prohibiting the facilitation of unauthorised residence.
- (19) To supplement the complaint mechanisms, Member States should **be able to** grant residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals who have been subjected to particularly exploitative working conditions **or who were an illegally employed minor** and who cooperate in criminal proceedings against the employer. Such permits should be granted **in a manner comparable to third-country nationals who fall under the terms of Council Directive 2004/81/EC of 29 April 2004 on the residence permits 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**<sup>2</sup>.

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<sup>1</sup> OJ L 203, 1.8.2002, p. 1.

<sup>2</sup> OJ L 261, 6.8.2004, p. 19.

- (20) To ensure a *satisfactory* level of enforcement *of this Directive* and to *reduce, as far as possible*, differences in the level of enforcement in the Member States, *Member States should ensure that effective and adequate inspections are carried on their territory and should communicate to the Commission data on the inspections they carry out.*
- (20a) *Member States should be encouraged to determine every year a national target for the number of inspections in respect of the sectors of activity in which the employment of illegally staying third-country nationals are concentrated on their territory.*
- (20b) *With a view to increasing effectiveness of inspections for the purpose of application of this Directive, Member States should ensure that: national legislation gives adequate powers to competent authorities to make the inspections; information about illegal employment, including the results of previous inspections, is collected and processed for effective implementation of this Directive; and sufficient staff are available with the skills and qualifications needed to carry out effectively the inspections.*
- (20c) *Member States should ensure that inspections for the purpose of application of this Directive do not affect, from a quantitative or qualitative point of view, inspections carried out to assess employment and working conditions.*
- (20d) *In the case of posted workers who are third-country nationals, Member States' inspection services may avail themselves of the cooperation and exchange of information provided for in Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>1</sup>, in order to verify that the third-country nationals concerned are lawfully employed in the Member State of origin.*
- (20e) *This Directive should be seen as complementary to measures to counter undeclared work and exploitation.*
- (20f) *In accordance with point 34 of the Interinstitutional agreement on better law-making<sup>2</sup>, Member States are encouraged to draw up, for themselves and in the interest of the Community, their own tables, which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.*
- (21) Any processing of personal data undertaken in the implementation of this Directive must be in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>3</sup>.
- (22) Since the objective of this Directive, namely to counteract illegal immigration by acting against the employment pull factor, cannot be sufficiently achieved by the

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<sup>1</sup> OJ L 18, 21.1.1997, p. 1.

<sup>2</sup> OJ C 321, 31.12.2003, p. 1.

<sup>3</sup> OJ L 281, 23.11.1995, p. 31.

Member States alone and can therefore, by reason of the scale and effects be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

- (23) This Directive respects fundamental rights and observes the principles recognised in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union. Specifically, it has to be applied with due respect for the freedom to conduct a business, equality before the law and the principle of non-discrimination, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties, in accordance with Articles 16, 20, 21, 47 and 49 of the Charter.
- (23a) *In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, these Member States are not taking part in the adoption of this Directive and are not bound by it or subject to its application.*
- (24) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

HAVE ADOPTED THIS DIRECTIVE:

#### Article 1

##### Subject matter and scope

■ This Directive *prohibits the employment of illegally staying third-country nationals in order to fight illegal immigration. To this end, it* lays down *minimum* common standards on sanctions and measures to be applied in the Member States against employers ■ who *infringe this prohibition*.

#### Article 2

##### Definitions

For the *specific* purposes of this Directive, the following definitions shall apply:

- (a) "third-country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty *and who is not a person enjoying the Community right of free movement, as defined in Article 2(5) of the Schengen Borders Code*;

- (b) "employment" means exercise of **■** activities *covering whatever form of labour or work regulated under national law or established practice* for *or* under the direction *and/or supervision* of *an employer*;
- (c) "illegally staying" means the presence on the territory of a Member State of a third-country national who does not fulfil, or no longer fulfils, the conditions for stay or residence in that Member State;
- (d) "illegal employment" means employment of a third-country national who is illegally staying on the territory of a Member State;
- (e) "employer" means any *natural person or any legal entity*, including *temporary work agencies*, for *or* under the direction *and/or supervision* of whom *the employment is undertaken*;
- (f) "subcontractor" means *any* natural **■** person *or any legal entity*, to whom the execution of all or part of the obligations of a prior contract is assigned;
- (fa) *"legal person" means any legal entity having such status under applicable national law, except for States or public bodies exercising State authority and for public international organisations;*
- (fb) *"temporary-work agency" means any natural or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction;*
- (fc) *"particularly exploitative working conditions" means working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion with the terms of employment of legally employed workers, which, for example, is affecting workers' health and safety, and which is contrary to human dignity;*
- (fd) *"remuneration of illegally staying third country national" means the wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer and that are equivalent to those which would have been enjoyed by comparable workers in a legal employment relationship.*

### Article 3

#### Prohibition of illegal employment

1. Member States shall prohibit the employment of illegally staying third-country nationals.
2. Infringements of this prohibition shall be subject to the sanctions and measures laid down in this Directive.

- 2a. *A Member State may decide not to apply the prohibition in paragraph 1 to illegally staying third-country nationals whose removal has been postponed and who are allowed to work in accordance with national law.*

#### Article 4

##### Employers' obligations

1. Member States shall oblige employers to:
  - (a) require *that a* third-country *national before taking up the employment hold and present to the employer his/her valid* residence permit or *other* authorisation for *its* stay **■** ;  
**■**
  - (b) keep for at least the duration of the employment *a copy or record of the residence permit or other authorisation to stay* available for *possible* inspection by the competent authorities of the Member States;
  - (c) notify the competent authorities designated by Member States of **■** the start **■** of employment of third-country nationals **■** within *a period laid down by each Member State*.
2. *Member States may provide for a simplified procedure for notification under paragraph 1(c) where the employer is a natural person and the employment is for his or her private purposes.*

*Member States may provide that notification under paragraph 1 (c) above is not required where the employee has been granted a long term residence status under Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents<sup>1</sup>.*

3. Member States shall ensure that employers *who* have fulfilled their *obligations set out in paragraph 1 shall not be held liable for infringing the prohibition referred to in Article 3* unless *they know that* the document presented as a *valid* residence permit or another authorisation for stay is *a forgery*.  
**■**

#### Article 6

##### Financial sanctions

1. Member States shall take the necessary measures to ensure that *infringements of the prohibition referred to in Article 3 are* subject to effective, proportionate and dissuasive sanctions against the employer.

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<sup>1</sup> *OJ L 16, 23.1.2004, p. 44.*

2. Sanctions in respect of *infringements of the prohibition referred to in* Article 3 shall include:
  - (a) financial *sanctions which shall rise according to the number of* illegally employed third-country *nationals; and*
  - (b) payments of the costs of return of **■** illegally employed third-country *nationals* in those cases where return procedures are carried out. *Member States may instead decide to reflect at least the average costs of return in the financial sanctions under point (a).*
- 2a. *Member States may provide for reduced financial penalties in cases 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.*

#### Article 7

##### Back payments to be made by employers

1. In respect of each infringement of *the prohibition referred to in* Article 3, Member States shall ensure that the employer *is responsible to pay*:
  - (a) any outstanding remuneration to the illegally employed third-country national. *The agreed level of remuneration is presumed to have been at least the wage provided for by the applicable laws on minimum wages, collective agreements or practices in the relevant occupational branches unless one of the employer or the employee can prove differently, while respecting, where appropriate, the mandatory national provisions concerning wages;*
  - (b) *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;
  - (ba) *where appropriate, any cost arising from sending back payments to the country to which the third-country national has returned or has been returned.*
2. In order to *ensure the availability of effective procedures to apply paragraphs 1(a) and 1(c), and having due regard to Article 14*, Member States shall *enact mechanisms to ensure that illegally employed third-country nationals*:
  - (a) *can introduce a claim, subject to a period of prescription defined under national law, against his/her 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;*

- (b) *when foreseen by national legislation, can call on the competent authority of the Member State to launch the procedures to claim back outstanding remuneration without the need for him/her to introduce a claim in that case.*

*Illegally employed third country nationals shall be systematically and objectively informed about their rights under this paragraph and under Article 14, before the enforcement of any return decision.*

3. *In order to apply paragraphs 1(a) and (b), Member States shall provide that a work relationship of at least 3 months duration be presumed unless the employer or the employee, inter alia, can prove differently.*
4. 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 *referred to* under paragraph 1(a) *and that is recovered under the claims referred to in paragraph 2*, including in cases in which they have or have been returned.
5. In respect of *cases where resident permits of limited duration have been granted under Article 14(3)*, Member States shall *define under national law the conditions under which the duration of these permits may be prolonged* until the third-country national has received any back payment of their remuneration recovered under *paragraph 1*.

## Article 8

### Other measures

1. Member States shall take the necessary measures to ensure that *employers shall* also, if appropriate, be subject to the following measures:
  - (a) exclusion from entitlement to *some or all* public benefits, aid or subsidies, *including EU funding managed by Member States* for up to five years;
  - (b) exclusion from participation in a public contract *as defined in Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts*<sup>1</sup> for up to five years;
  - (c) recovery of *some or all* public benefits, aid, or subsidies, including EU funding managed by Member States, granted to the employer *for up to* 12 months preceding the detection of illegal employment;
  - (d) temporary or permanent closure of the establishments that have been used to commit the infringement, *or temporary or permanent withdrawal of a licence*

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<sup>1</sup> *OJ L 134, 30.4.2004, p. 114.*

*to conduct the business activity in question, if justified by the gravity of the situation.*

- 1a. *Member States may decide not to apply paragraph (1) where the employer is a natural person and the employment is for his or her private purposes.*

#### Article 9

##### Subcontracting

1. Where the employer is a subcontractor *and without prejudice to the provisions of national law concerning the rights of contribution or recourse or in the field of social security*, Member States shall ensure that the **■** contractor *of which the employer is a direct subcontractor may, next to or in place of the employer, be held liable to pay:*
  - (a) any *financial* sanction imposed under Article 6, and
  - (b) any back payments due under *Article 7(1) (a) and (c)-(3)*.
2. *Where the employer is a subcontractor, Member States shall ensure that the main contractor and any intermediate subcontractor, where they knew that the employing subcontractor employed illegally staying third-country nationals, may next to or in place of the employer be held liable to make the payments identified in paragraph 1 in place of the employing subcontractor or the contractor of which the employer is a direct subcontractor.*
- 2a. *A contractor that has undertaken due diligence obligations as defined by national law shall not be held liable under paragraphs 1 and 2.*
- 2b. *Member States may provide for more stringent liability rules under national law.*

#### Article 10

##### Criminal offence

1. Each Member State shall ensure that the infringement referred to in Article 3 constitutes a criminal offence when committed intentionally, in *each of* the following circumstances *as defined by national law*:
  - (a) the infringement continues or is *persistently* repeated **■** ;
  - (b) the infringement is in respect of *the simultaneous employment of* a significant number of illegally employed third-country nationals **■** ;
  - (c) the infringement is accompanied by particularly exploitative working conditions **■** ;

- (d) the infringement is committed by an employer who, *while not having been charged with, or convicted of, an offence established pursuant to Framework Decision 2002/629/JHA*, uses work or services exacted from a person ■ with the knowledge that *the illegally staying third-country national* is a victim of *such* trafficking ■ .

*(da) the infringement relates to the illegal employment of a minor.*

2. Member States shall ensure that *inciting, aiding and abetting the intentional conduct* referred to in paragraph 1 *is punishable as a criminal offence*.

#### Article 11

##### *Penalties* for the criminal offence

1. Member States shall *take the necessary measures to* ensure that *natural persons who commit* the criminal offence referred to in Article 10 *are* punishable by effective, proportionate and dissuasive criminal *penalties*.
2. The criminal *penalties* provided for in this article may *under national law be applied without prejudice to* other sanctions or measures *of a non-criminal nature, unless it is precluded by general principles of law and may be accompanied* by the publication of the judicial decision *relevant* to the *case*.

#### Article 12

##### Liability of legal persons

1. Member States shall ensure that legal persons can be held liable for the ■ offence referred to in Article 10 where such offence has been committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on
- (a) a power of representation of the legal person, or
  - (b) an authority to take decisions on behalf of the legal person, or
  - (c) an authority to exercise control within the legal person.
2. Member States shall also ensure that a legal person may be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of the criminal offence referred to in Article 10 for the benefit of that legal person by a person under its authority.
3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, *inciters* or accessories in the offence referred to in Article 10.

## Article 13

### *Penalties for legal persons*

Member States shall **take the necessary measures to** ensure that a legal person held liable pursuant to Article 10 is punishable by effective, proportionate and dissuasive **penalties**, which **may** include **measures** such as **those referred to in Article 8**.

***Member States may decide that a list of employers who are legal persons and who have been held liable for the criminal offence referred to in Article 10 is rendered public.***

## Article 14

### Facilitation of complaints

1. Member States shall **ensure that there are** effective mechanisms through which third-country nationals in illegal employment can 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 foreseen by national legislation**.
- 1a. ***Member States shall ensure that third parties which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage either on behalf of or in support of an illegally employed third-country national, with his/her approval, in any administrative or civil proceedings provided for with the objective of implementing this Directive.***
2. Providing assistance to third-country **nationals** to lodge complaints **should not be considered as** facilitation of unauthorized residence **under Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence<sup>1</sup>**.
3. In respect of criminal offences covered by **Article 10(1)(c) and (e)** Member States shall **define under national law** the conditions **under which they may grant case by case** permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals **involved, in a manner comparable to third-country nationals who fall under the terms of Directive 2004/81/EC**.

## Article 15

### Inspections

1. Member States shall ensure that **effective and adequate inspections are carried out** on their territory to control employment of illegally staying third-country nationals.

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<sup>1</sup> OJ L 328, 5.12.2002, p. 17.

*Such inspections* shall be based *primarily* on a risk assessment to be drawn up by the competent authorities in the Member States **■** .

2. *With a view to increasing effectiveness of inspections, Member States shall on the basis of a risk assessment regularly identify the sectors of activity in which the employment of illegally staying third-country nationals are concentrated on their territory.*

*In respect of each of those sectors, Member States shall each year before 1 July communicate to the Commission the inspections, both in absolute numbers and as a percentage of the employers for each sector, carried out in the previous year as well as their results.*

#### *Article 15a*

##### *More favourable provisions*

*This Directive shall be without prejudice to the right of Member States to adopt or maintain provisions that are more favourable to third-country nationals to whom it applies in relation with Articles 7 and 14, provided that such provisions are compatible with this Directive.*

#### Article 16

##### Reporting

1. By [*three* years after the date referred to in Article 17] at the latest, and every three years thereafter, *the Commission shall submit a report to the European Parliament and the Council including, where appropriate, proposals for amending the provisions in Articles 7, 8, 9, 14 and 15. The Commission shall in particular examine in its report the implementation by Member States of the provisions of Article 7, paragraphs 2 and 5.*
2. Member States shall *send the Commission all the* information *that is appropriate for drawing up those reports. The information* shall include the *number* and results of inspections carried out pursuant to *Article 15 (1), measures applied under Article 14 and, as far as possible,* measures applied under *Articles 7 and 8.*

**■**

#### Article 17

##### Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months from the date of publication in the Official Journal of the European Union] at the latest. They shall forthwith communicate to the Commission the text of those provisions **■** .

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### Article 18

##### Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

#### Article 19

##### Addressees

This Directive is addressed to the Member States.

Done at ||,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*

## EXPLANATORY STATEMENT

It is estimated that there are between 4.5 million to 8 million illegal immigrants in the EU, a figure that is steadily increasing notably because of easy access to illegal work.

Illegal employment is concentrated in certain sectors namely construction, agriculture, cleaning and hotel/catering.

One of the social consequences of this phenomenon is that these immigrants are employed under exploitative conditions. Illegal immigrants help meet the needs of some unscrupulous employers who are willing to take advantage of workers prepared to undertake what are mostly low-skilled and low paid jobs.

On the one hand, illegal employment can depress wages and working conditions, may distort competition between businesses and means that the undeclared workers will not benefit from health insurance and pension rights. On the other hand, illegally employed third country nationals (TCNs) are in an additionally vulnerable position because if apprehended they are likely to be returned to their country of origin.

The present Commission's proposal, issued in May 2007<sup>1</sup>, intends to contribute to combating illegal immigration and exploitation of workers who are undocumented TCNs.

The rapporteur believes that, although the protection of the rights of illegally employed immigrants is not the main aim of the Commission proposal, it should nevertheless be included in the proposal's definitions.

This proposal aims to achieve a minimum level of harmonisation at the European level and requires Member States to prohibit illegal employment, provides for common sanctions, and requires employers to undertake preventive measures and other controls.

The idea is that the employer, and not the illegally employed third-country national, who should be punished.

The measure seeks to provide a harmonised EU framework for imposing sanctions on employers for hiring TCNs who do not enjoy a regular status of stay in the EU.

The proposal would establish a common policy consisting of three main features. First, employers would be subject to a number of new administrative obligations that would need to be fulfilled before recruiting any TCNs. Non-compliance would lead to a series of punitive measures, financial sanctions and criminal penalties. Second, the procedure for operationalising complaints would be harmonised; and third, each Member State would be required to inspect the employee records in 10% of its registered companies.

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<sup>1</sup> *Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third country nationals*

## Observations by the Rapporteur

The Rapporteur regrets the narrow scope of the proposed directive.

The provisions of this Directive are designed to reduce illegal immigration into the EU. Consequently, the appropriate legal basis is Article 63(3)(b) of the EC Treaty. That legal base does not cover measures relating to TCNs who are legally staying in the EU but who may also be a victim of labour exploitation. For example, the instrument does not cover nationals of those Member States who have joined the EU since 2004 and 2007 and who are still subject to transitional arrangements, thereby limiting their free access to the labour markets of a number of the EU-15 Member States.

Article 2 - In order to offer a better protection against exploitation, the definitions of terms such as “employer”, “subcontractor”, “remuneration” should be as all-encompassing as possible. For example, “employer” should include temporary work agencies and other intermediaries.

Remuneration should also include overtime rates – this is important when the employer has to pay any outstanding remuneration to the illegally employed third-country national.

Article 4 - The Rapporteur welcomes the preventive measures foreseen by the proposal: the article 4 obliges employers to examine the residence permits or other authorisation for stay of potential employees before hiring them, and also to maintain records on the dates of the start and end of the employment and to transmit these to the relevant authorities. For economic operators, the administrative burden can be considered as proportionate to the objective of the proposal. Member States should provide employers with clear guidelines and on-going advice on the identification of residence permits and other authorisations for stay. Sharing of best practices among Member States should be encouraged at the EU level.

The Rapporteur is in favour of a simplification of these formalities when the employer is a private person.

It is not asked to the employers to have a rigorous knowledge of the aspect of the residence permits or other authorisation for stay. The Rapporteur considers that an employer can be held liable only if the document is manifestly incorrect or if the employer knows that it is a forgery. He also believes that measures should be taken by Member States in order to provide employers with clear guidelines and on-going advice on the identification of residence permits and other authorisations for stay. A system of sharing of best practices among Member States should also be put in place at the EU level.

For more flexibility, Member States should be allowed to give a reasonable delay for employers to bring the situation of the employed third country national in line with national law.

Article 6 - Sanctions include financial penalties; the Rapporteur proposes that a reduction of these penalties can be consented when the employer is a natural person who employs illegal TCN to provide domestic help and personal services.

Article 7 - It is natural that employers pay the outstanding remuneration that is due to the illegally employed TCN; however, this provision should be extended to any other work-related financial entitlements and to all the costs resulting from transferring the remuneration and the entitlements to abroad, in the case of the third country national having returned to his/her country, in order not to penalise the TCN.

When the agreed remuneration cannot be established, this can be determined with reference to the applicable laws on minimum wages, collective agreements or practices or to the minimum income under which citizens of the Member State concerned are entitled to social assistance.

Member states are required to foresee mechanisms to ensure that the TCN receive back outstanding payments automatically, without the need for the TCN to introduce a claim, and even in cases where the person has returned. This could be seen as more favourable and discriminatory for EU workers who are required to lodge a complaint with the relevant bodies to secure outstanding payment. However, the Rapporteur would like to remind the logical backing the Commission's proposal: the undocumented TCN live underground, they fear detention and return, constitute an "easily exploitable" workforce and are much more vulnerable than other workers.

The Rapporteur supports the Commission's proposal that states that a work relationship is presumed to be of at least 6 months, unless the employer or the illegally employed third-country national can prove differently.

Article 8 - This article foresees other sanctions for firms who employ TCN, such as exclusion from entitlement to public funds, contracts and recovery of benefits received. The Rapporteur considers that it is important that the provisions of this article are also extended to EU funding and to EU procurement.

Article 9 - The Proposal also extends its provisions to subcontractors and the Commission's intention was that all the undertakings in a chain of subcontracting are held jointly and severally liable to pay financial sanctions against an employer at the end of the chain who employs illegally staying TCNs. However, the Rapporteur understands that it would be difficult to place a burden on the main contractor as the latter is not in a position to control compliance in practice. Therefore, he accepts to limit the liability of subcontractors in the chain.

Article 10 - Furthermore, in certain specified cases, contraventions may even constitute a criminal offence, in which case the employer may face placement under judicial supervision and a judicial winding-up order as well as other sanctions. This is the case when the working conditions are particularly exploitative, when the employer knows or ought to have known, that the TCN is a victim of trafficking in human beings or when the TCN is a minor.

Article 14 - Most notably, the Proposal asks that Member States establish mechanisms that allow exploited migrant workers to lodge complaints against their employers, if not personally, then through third parties.

Further, in certain specific cases and under the conditions of Articles 4 to 15 of Directive 2004/81/EC<sup>1</sup>, illegal immigrants may be able to benefit from a temporary residence permit.

Article 15 - The Commission's proposal requires Member States to ensure that the employee records of at least 10% of the companies established on their territory are inspected; the current average national requirement is 2 %.

The Rapporteur welcomes the idea of increasing the number of inspections – this would improve enforcement and send a clear message to employers that the threat of being caught in case of violation is real or increased.

However, the Rapporteur is aware about the fact that the proposal will increase the administrative burden on the Member States, because compliance with that provision would require a substantial increase in financial and personnel resources by the Member States. Therefore, he proposes that the percentage of 10% is replaced by 5%.

### *Conclusion*

The fight against illegal immigration is a key component of the EU's strategy on immigration. In this field, the main aim of this directive should be to stop the exploitation of illegal migrants and not have the side effect of reducing the possibilities for TCN to find work. The present directive would be very useful in that sense. In this context, we also find it necessary to introduce measures aimed at protecting the rights of migrant workers, including illegal migrants, who have been exploited by their employers.

In this respect, effectiveness depends largely on enforcement, which is a responsibility of the Member States, which the Commission is and will be called to monitor.

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<sup>1</sup> 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

23.1.2009

## **MINORITY OPINION**

pursuant to Rule 48(3) of the Rules of Procedure  
by Giusto Catania

The approach proposed – which follows the logic of the Returns Directive, to which we are firmly opposed – is wrong and counterproductive, because:

- it is repressive vis-à-vis the weakest link in the chain, namely migrants;
- it fails to solve the problem, which is the fact that between 4.5 and 8 million migrant workers in Europa are forced to work illegally because of their status;
- it draws on a legal base which relates to the combating of illegal immigration rather than to clandestine employment per se.

The compromise reached will enable Member States to punish migrants very severely, without safeguarding them from expulsion and without providing in general for the regularisation of persons reporting cases of exploitation. On the other hand, under the rules negotiated, the agents of exploitation will only be punishable in extremely serious cases, and, moreover, by means of provisions that are very vague (which raises doubts as to their conformity with the key principles of criminal law).

The only positive aspect of the compromise is the provision on the exclusion from public subsidies of employers who exploit migrants.

We consider the proposal to be damaging to migrants and counter-productive as regards the need for a common policy to promote lawful entries and stays.

15.9.2008

## **OPINION OF THE COMMITTEE ON EMPLOYMENT AND SOCIAL AFFAIRS (\*)**

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a European Parliament and Council directive providing for sanctions against employers of illegally staying third-country nationals  
(COM(2007)0249 – C6-0143/2007 – 2007\_0094(COD))

Rapporteur(\*): Edit Bauer

(\*) Associated committees – Rule 47 of the Rules of Procedure

### **SHORT JUSTIFICATION**

Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals is a part of migration policy package as it was foreseen in the Policy Plan on legal migration<sup>1</sup> and Policy priorities in the fight against illegal immigration of the third-country nationals /2006/<sup>2</sup>. This proposal was followed up in 2007 by documents:

- Commission Communication on circular migration and mobility partnership between the European Union and third countries<sup>3</sup>,
- proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment<sup>4</sup>,
- proposal for a Council Directive 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<sup>5</sup>,
- Commission Communication on stepping up the fight against undeclared work<sup>6</sup>.

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<sup>1</sup> COM(2005)0669.

<sup>2</sup> COM(2006)0402.

<sup>3</sup> COM(2007)0248.

<sup>4</sup> COM(2007)0637.

<sup>5</sup> COM(2007)0638.

<sup>6</sup> COM(2007)0628.

The aim of this proposal is to slow down the illegal migration, while other proposals for legislation regulate the legal migration. Proposals on migration-policy regulation make clear distinctions between legal and illegal migration. This proposal is dealing exclusively with illegal migration. Based on experience, one of the strongest pull-factor is the possibility of employment in EU.

The legal bases for the proposal is Art.63(3)(b) EC Treaty.

Estimations on the number of the third-country nationals in the EU vary between 4,5 to 8 million. Illegal employment is concentrated in certain sectors: construction, agriculture, cleaning, and hotel/catering.

The European Parliament in its Resolution "The fight against illegal immigration of third-country nationals" called on the Union and the Member States to take "firm steps to combat the illegal employment of immigrants, activating a range of penalties on employers, stepping up workplace inspections on the basis of the human and material resources needed to fight illegal recruitment, and promoting measures to protect immigrants."

The proposal follows two main principles:

- sanctions for employing illegal migrants should be proportionate, dissuasive and effective,
- principle of subsidiarity should be applied.

There is no doubt, that common definitions, approaches and minimum standards of combating illegal migration are needed as a basis of the common European migration policy.

## AMENDMENTS

The Committee on Employment and Social Affairs calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a directive

##### Recital 4

*Text proposed by the Commission*

(4) The provisions should not cover third-country nationals who are not illegally staying. This excludes third-country nationals who are family members of citizens of the Union exercising their right

*Amendment*

(4) The provisions should not cover third-country nationals who are not illegally staying. This excludes third-country nationals ***who are residing lawfully in a Member State but who are not permitted***

to free movement within the Community, and those who, under agreements between the Community and its Member States, on the one hand, and the countries of which they are nationals, on the other, enjoy rights of free movement equivalent to those of citizens of the Union. It also excludes third-country nationals who are in a situation covered by Community law, such as those who are lawfully employed in another Member State **and who are posted by a service provider to another Member State in the context of the provision of services.**

**to work on its territory, third-country nationals** who are family members of citizens of the Union exercising their right to free movement within the Community, and those who, under agreements between the Community and its Member States, on the one hand, and the countries of which they are nationals, on the other, enjoy rights of free movement equivalent to those of citizens of the Union. It also excludes third-country nationals who are in a situation covered by Community law, such as those who are lawfully employed in another Member State.

#### *Justification*

*The first part of this amendment (replacing 'neoprávnene' with 'oprávnene') is a linguistic correction only and does not concern the other languages. The Directive should also be applied to posted workers.*

## **Amendment 2**

### **Proposal for a directive**

#### **Recital 7**

##### *Text proposed by the Commission*

(7) To enforce the general prohibition and to deter infringements, Member States should provide for appropriate sanctions. These should include financial penalties **and contributions to the costs of returning illegally staying third-country nationals.**

##### *Amendment*

(7) To enforce the general prohibition and to deter infringements, Member States should provide for appropriate sanctions. These should include financial penalties, **but provision should also be made for imposing more moderate financial penalties in specified and limited cases where the workers concerned are employed as domestic help. When setting the amount of the financial penalties, Member States may take into account the need to compensate the burden arising from their duty to ensure that employers pay any outstanding remuneration to the illegally employed third-country national and, where appropriate, the costs of sending back payments to the country to which the illegally employed third-country national has returned or has been**

*returned or deported.*

### Amendment 3

#### Proposal for a directive Recital 8

##### *Text proposed by the Commission*

(8) The employer should in any case be required to pay to the third-country nationals any outstanding remuneration for the work they have undertaken **and any outstanding taxes and social security contributions.**

##### *Amendment*

(8) The employer should in any case be required to pay to the third-country nationals any outstanding remuneration for the work they have undertaken. ***If such remuneration cannot be determined, it should be based by default on the minimum wage, as established by national law, or, if no minimum wage is established in national law, on the equivalent level of remuneration considered to be the minimum income entitling citizens of the Member State concerned to social assistance in that Member State, or on collective agreements or practices in the relevant sector in the Member State in which the employer is established. The employer should also be required to pay, where appropriate, any costs arising from sending outstanding remuneration to the country to which the illegally employed third-country national has returned or has been returned or deported.***

### Amendment 4

#### Proposal for a directive Recital 10

##### *Text proposed by the Commission*

(10) Member States should further provide for a presumption of **a work** relationship of at least six months duration so that the burden of proof is put on the employer in respect of at least a certain period.

##### *Amendment*

(10) Member States should further provide for a presumption of **an employment** relationship of at least six months duration so that the burden of proof is put on the employer in respect of at least a certain period **and should provide for the**

*employee also to have the opportunity of proving the existence and duration of the employment relationship. For the purpose of calculating outstanding remuneration, the employment relationship should be presumed to have taken place in accordance with the laws, regulations, administrative provisions and/or collective agreement(s) applicable to comparable employment relationships.*

## Amendment 5

### Proposal for a directive Recital 13

#### *Text proposed by the Commission*

(13) In view of the prevalence of subcontracting in certain affected sectors, it is necessary to ensure that all the undertakings in a chain of subcontracting are held jointly and severally liable to pay financial sanctions against an employer at the end of the chain who employs illegally staying third-country nationals.

#### *Amendment*

(13) In view of the prevalence of subcontracting in certain affected sectors, it is necessary to ensure that all the undertakings in a chain of subcontracting, ***including temporary employment agencies providing temporary staff to undertakings using their services***, are held jointly and severally liable to pay financial sanctions against an employer at the end of the chain who employs illegally staying third-country nationals.

#### *Justification*

*Temporary employment agencies should be included in the 'subcontracting chain'.*

## Amendment 6

### Proposal for a directive Recital 17

#### *Text proposed by the Commission*

(17) The criminal offence should be punishable by effective, proportionate and dissuasive criminal sanctions, which should ***also*** apply to ***legal persons*** throughout the Community, ***because many***

#### *Amendment*

(17) The criminal offence should be punishable by effective, proportionate and dissuasive criminal sanctions, which should apply to ***employers*** throughout the Community, ***be they natural or legal***

*employers are* legal persons.

*persons, including the legal  
representatives of* legal persons.

#### Amendment 7

##### Proposal for a directive Recital 18 a (new)

*Text proposed by the Commission*

*Amendment*

*(18a) In order to provide for an effective level of protection against exploitative labour conditions, legal entities, victims' associations, non-governmental organisations and other bodies such as trade unions should be entitled to intervene in legal proceedings either on behalf of or in support of any victim, without prejudice to national rules of procedure concerning representation and defence before the courts. To encourage victims to lodge complaints, designated third parties should be entitled to keep confidential the identity and place of residence of complainants.*

#### Amendment 8

##### Proposal for a directive Recital 20

*Text proposed by the Commission*

*Amendment*

(20) To ensure a *sufficient* level of enforcement and *to avoid significant* differences in the level of enforcement in the Member States, a certain proportion of companies established in each Member State should be inspected.

(20) To ensure a *satisfactory* level of enforcement *of this Directive* and *reduce, as far as possible*, differences in the level of enforcement in the Member States, a certain proportion of companies established in each Member State should be inspected. *Those inspections may be carried out within the framework of other inspection activities, such as the monitoring of compliance with health and safety provisions in the workplace. A clear distinction should be maintained between labour inspection, the objective of which*

*is to verify the proper application of labour law, and immigration inspection, which does not share the same objectives or ethics. Member States should not, in particular, reallocate the funding granted to labour law enforcement agencies to immigration inspection activities for the purpose of application of this Directive.*

## **Amendment 9**

### **Proposal for a directive Recital 21 a (new)**

*Text proposed by the Commission*

*Amendment*

*(21a) This directive should not prevent Member States from adopting measures designed to convert undeclared employment relationships into declared employment relationships or from bringing within the law the situation of undeclared workers.*

*Justification*

*This provision is necessary to define the scope of this directive in relation to national measures taken by Member States on their own initiative to combat undeclared work and regularise the situation of undeclared workers.*

## **Amendment 10**

### **Proposal for a directive Article 2 – point b**

*Text proposed by the Commission*

*Amendment*

(b) "employment" means exercise of **remunerated** activities for **and** under the direction of **another person**;

(b) "employment" means exercise of activities **that are or ought to be remunerated under applicable national law** for **or** under the direction **and/or supervision of an employer**;

## Amendment 11

### Proposal for a directive Article 2 – point e

*Text proposed by the Commission*

(e) "employer" means any person, **including legal persons**, for **and** under the direction of whom a third-country national exercises **remunerated** activities;

*Amendment*

(e) "employer" means any **natural or legal** person for **or** under the direction **and/or supervision** of whom a third-country national exercises activities **that are or ought to be remunerated under applicable national law, including temporary employment agencies**;

*Justification*

*Employer should be defined as natural or legal person, including temporary employment agencies.*

## Amendment 12

### Proposal for a directive Article 2 – point e a (new)

*Text proposed by the Commission*

*Amendment*

**(ea) "natural person acting in the capacity of an employer" means any person for whom a third-country national exercises remunerated activities as a domestic worker;**

*Justification*

*The situation of natural persons acting in the capacity of employers of domestic workers must be defined in connection with Article 4 to provide for a simplified system of employers' obligations and Article 6 to ensure financial penalties can be made more appropriate to this particular form of employment relationship.*

## Amendment 13

**Proposal for a directive**  
**Article 2 – point e b (new)**

*Text proposed by the Commission*

*Amendment*

***(eb) "legal person" means any legal entity having the status of a legal person under applicable national law;***

**Amendment 14**

**Proposal for a directive**  
**Article 2 – point f**

*Text proposed by the Commission*

*Amendment*

(f) "subcontractor" means a natural or legal person to whom the execution of all or part of the obligations of a prior contract is assigned.

(f) "subcontractor" means a natural or legal person to whom the execution of all or part of the obligations of a prior contract is assigned, ***including temporary employment agencies and other intermediaries;***

*Justification*

*Temporary employment agencies should be included in the definition of subcontractors in view of the increasingly important role they play in subcontracting and employing third country nationals.*

**Amendment 15**

**Proposal for a directive**  
**Article 2 – point f a (new)**

*Text proposed by the Commission*

*Amendment*

***(fa) "Remuneration" means any net wages and salaries as well as any work-related financial entitlements and in-kind benefits that are equivalent to those which would have been enjoyed by comparable workers in a declared employment relationship;***

**Amendment 16**

**Proposal for a directive**  
**Article 3 – paragraph 2**

*Text proposed by the Commission*

***Infringements of*** this prohibition shall be subject to the sanctions and measures laid down in this Directive.

*Amendment*

***Employers infringing*** this prohibition shall be subject to the sanctions and measures laid down in this Directive.

*Justification*

*This amendment seeks to clarify the text.*

**Amendment 17**

**Proposal for a directive**  
**Article 4 – paragraph 1 – point a**

*Text proposed by the Commission*

(a) require ***the production by*** third-country nationals ***of a*** residence permit or another authorisation for stay ***valid for the period of the employment in question;***

*Amendment*

(a) require third-country nationals ***to present, before being employed, a valid*** residence permit or ***other*** authorisation for stay;

***Where the duration of the employment contract exceeds the period of validity of the valid residence permit or other authorisation for stay, Member States shall oblige employers to require the employed third-country national to present, on the date of expiry of the residence permit or other authorisation for stay presented before being employed, a new valid residence permit or other authorisation for stay. Failure by the employed third-country national to present a new valid residence permit or other authorisation for stay shall entitle the employer to rescind the employment relationship from the date of expiry of the residence permit or other authorisation for stay.***

**Amendment 18**

**Proposal for a directive**  
**Article 4 – paragraph 1 – point b**

*Text proposed by the Commission*

(b) ***copy or record the content*** of the residence permit or other authorisation for stay ***before employment begins***;

*Amendment*

(b) ***include a copy*** of the residence permit or other authorisation for stay ***in the documentation required in connection with the procedures already provided for by the Member State when workers are employed and notify the competent authorities of the Member State of both the start and the termination of employment of third-country nationals***;

*Justification*

*To avoid increasing the bureaucratic burden on employers, information and notifications concerning the employment of third country nationals should be incorporated into the normal procedures relating to the employment of workers which are already in place under the national systems.*

**Amendment 19**

**Proposal for a directive**  
**Article 4 – paragraph 2**

*Text proposed by the Commission*

***2. Member States shall oblige employers acting in the course of business activities or who are legal persons to notify the competent authorities designated by Member States of both the start and the termination of employment of third-country nationals at the latest within one week.***

*Amendment*

***deleted***

**Amendment 20**

**Proposal for a directive**  
**Article 4 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. Member States may provide for a***

*simplified system of employers' obligations for natural persons acting in the capacity of an employer.*

## **Amendment 21**

### **Proposal for a directive**

#### **Article 4 – paragraph 2 b (new)**

*Text proposed by the Commission*

*Amendment*

***2b. Member States may allow employers and workers a sufficient period of time within which to bring an irregular employment situation within national law.***

*Justification*

*It would be appropriate to enable Member States to allow employers and employees a period of time in which to regularise the worker's employment situation (which would also be useful in the event of protracted administrative procedures).*

## **Amendment 22**

### **Proposal for a directive**

#### **Article 4 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

3. Member States shall ensure that employers are considered to have fulfilled their obligation under ***paragraph 1(a)*** ***unless*** the document presented as a residence permit or ***another*** authorisation for stay ***is manifestly incorrect***.

3. Member States shall ensure that employers are considered to have fulfilled their obligation under ***paragraph 1(a)*** ***except if*** the document presented as a ***valid*** residence permit or ***other*** authorisation for stay ***has anomalies that could not be overlooked by a reasonably attentive employer or if it is established that the employer could not reasonably have been unaware of the falsification of the document in question***.

## Amendment 23

### Proposal for a directive Article 5

*Text proposed by the Commission*

*Amendment*

#### *Article 5*

*deleted*

***Consequence of fulfilling the employers' obligations***

***Member States shall ensure that employers are not liable for infringing Article 3 where they can show that they fulfilled the obligations set out in Article 4.***

*Justification*

*The article is obsolete.*

## Amendment 24

### Proposal for a directive Article 6 – paragraph 2 – introductory part

*Text proposed by the Commission*

*Amendment*

Sanctions in respect of ***each infringement*** of Article 3 shall include:

Sanctions ***applied*** in respect of ***infringements*** of Article 3 shall include:

*Justification*

*Article 3 does not specify infringements but is concerned with prohibiting the employment of illegally staying third country nationals, infringement of these provisions constituting an offence because of the resulting danger in social terms.*

## Amendment 25

### Proposal for a directive Article 6 – paragraph 2– point b

*Text proposed by the Commission*

*Amendment*

***(b) payments of the costs of return of each illegally employed third-country national in those cases where return procedures***

*deleted*

*are carried out.*

*Justification*

*On employers cannot be imposed responsibility for return of illegal migrants. The Directive should not bring upon the employers the cost of repatriation for each illegally employed third country national in those cases where return procedures are carried out. It is however admissible to impose financial penalties to the employers who employ illegally staying third country nationals, which would include also the cost of repatriation.*

**Amendment 26**

**Proposal for a directive**

**Article 6 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

**2a. Member States may provide for reduced financial penalties where the employer is a natural person acting in the capacity of an employer;**

**Amendment 27**

**Proposal for a directive**

**Article 7 – paragraph 1 – introductory part**

*Text proposed by the Commission*

*Amendment*

1. In respect of **each infringement** of Article 3 Member States shall ensure that the employer pays:

**1. Without prejudice to Article 4(2b),** in respect of **infringements** of Article 3 Member States shall ensure that the employer pays:

**Amendment 28**

**Proposal for a directive**

**Article 7 – paragraph 1 – point a**

*Text proposed by the Commission*

*Amendment*

(a) any outstanding remuneration to the illegally employed third-country national;

(a) any outstanding remuneration to the illegally employed third-country national; **where the agreed level of remuneration cannot be established, it shall be deemed**

*to be the minimum wage as established by national law. In Member States where no minimum wage is established, the agreed level of remuneration shall be determined by reference to the minimum income entitling citizens of the Member State concerned to social assistance in that Member State or in line with applicable collective agreements or practices in the relevant sector;*

#### **Amendment 29**

##### **Proposal for a directive**

##### **Article 7 – paragraph 1 – point b**

*Text proposed by the Commission*

(b) any ***outstanding*** taxes and social security contributions, including relevant administrative fines.

*Amendment*

(b) ***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;

#### **Amendment 30**

##### **Proposal for a directive**

##### **Article 7 – paragraph 1 – point b a (new)**

*Text proposed by the Commission*

*Amendment*

***(ba) where appropriate, any costs arising from sending back payments to the country to which the third-country national has returned or has been returned or deported.***

## Amendment 31

### Proposal for a directive Article 7 – paragraph 2

#### *Text proposed by the Commission*

2. In order to apply paragraph 1(a), Member States shall:

*(a)* enact mechanisms to ensure that the necessary procedures to claim back outstanding remuneration are triggered automatically without the need for the third-country national to introduce a claim;

*(b)* provide that a work relationship of at least 6 months duration be presumed unless the employer can prove differently.

#### *Amendment*

2. In order to apply paragraph 1(a), Member States shall enact mechanisms to ensure that the necessary procedures to claim back outstanding remuneration are triggered automatically without the need for the third-country national to introduce a claim.

***2a. In order to apply paragraphs 1(a) and (b), Member States shall*** provide that a work relationship of at least 6 months duration be presumed unless the employer ***or the employee*** can prove differently.

## Amendment 32

### Proposal for a directive Article 8 – introductory part

#### *Text proposed by the Commission*

Member States shall take the necessary measures to ensure that ***an employer*** acting in the course of business activities ***may*** also, ***if*** appropriate, ***be subject*** to the following measures:

#### *Amendment*

Member States shall take the necessary measures to ensure that ***employers infringing Article 3 while*** acting in the course of business activities ***shall*** also ***be subject, where*** appropriate, to the following measures:

### Amendment 33

#### Proposal for a directive Article 8 – point a

*Text proposed by the Commission*

(a) exclusion from entitlement to public benefits, aid or subsidies for up to five years;

*Amendment*

(a) exclusion from entitlement to public benefits, aid or subsidies, ***including Community funding managed by Member States***, for up to five years;

### Amendment 34

#### Proposal for a directive Article 8 – point d

*Text proposed by the Commission*

(d) temporary or permanent closure of the establishments that have been used to commit the infringement.

*Amendment*

(d) temporary or permanent closure of the establishments that have been used to commit the infringement, ***or the temporary or permanent withdrawal of a licence to conduct the business activity in question, if justified in particular by the gravity of the infringement or the percentage of illegally employed third-country nationals by the employer concerned.***

### Amendment 35

#### Proposal for a directive Article 10 – introductory part

*Text proposed by the Commission*

1. Each Member State shall ensure that ***the*** infringement ***referred to in*** Article 3 constitutes ***a criminal*** offence when committed intentionally, in the following circumstances:

*Amendment*

1. Each Member State shall ensure that infringement ***of*** Article 3 constitutes ***an*** offence when committed intentionally, in the following circumstances:

#### *Justification*

*This modification underlines the gravity of infringement of the provisions of Article 3 which, in certain circumstances, present a greater degree of danger in social terms and should*

*therefore be penalised accordingly.*

### **Amendment 36**

#### **Proposal for a directive**

##### **Article 10 – paragraph 1 – point (d)**

###### *Text proposed by the Commission*

(d) the infringement is committed by an employer who uses work or services exacted from a person, with the knowledge that that person is a victim of trafficking in human beings.

###### *Amendment*

(d) the infringement is committed by an employer who uses work or services exacted from a person, with the knowledge that that person is a victim of trafficking in human beings **or is underage**.

###### *Justification*

*Severe penalties should apply to employers knowingly making use of illegally resident underage labour. Minors are an extremely vulnerable social category requiring social protection.*

### **Amendment 37**

#### **Proposal for a directive**

##### **Article 10 – paragraph 2**

###### *Text proposed by the Commission*

2. Member States shall ensure that participation in or instigation of the conducts referred to in paragraph 1 constitutes a criminal **offences**.

###### *Amendment*

2. Member States shall ensure that participation **or complicity** in or instigation **or concealment** of the conducts referred to in paragraph 1 constitutes a criminal **offence**.

### **Amendment 38**

#### **Proposal for a directive**

##### **Article 11 – paragraph 1**

###### *Text proposed by the Commission*

1. Member States shall ensure that the commission of the criminal offence referred to in Article 10 is **punishable** by effective, proportionate and dissuasive

###### *Amendment*

1. Member States shall ensure that the commission of the criminal offence referred to in Article 10 is **punished** by effective, proportionate and dissuasive

criminal sanctions.

criminal sanctions.

### Amendment 39

#### Proposal for a directive Article 11 – paragraph 2

##### *Text proposed by the Commission*

2. The criminal sanctions provided for in this article may be accompanied by other sanctions or measures, ***in particular*** those provided for in Articles 6, 7 and 8, and by the publication of the judicial decision relating to the conviction or any sanctions or measures applied.

##### *Amendment*

2. The criminal sanctions provided for in this article may be accompanied by other sanctions or measures, ***for example*** those provided for in Articles 6, 7 and 8, and by the publication of the judicial decision relating to the conviction ***or the decision to apply*** sanctions or ***other*** measures applied.

##### *Justification*

*Under existing legislation, the degree of seriousness and resulting danger arising in social terms determines whether an act is classifiable as a criminal offence. Measures taken against employers infringing the provisions of Article 3 are governed exclusively by this article. Hence the formulation 'in particular' is inappropriate.*

### Amendment 40

#### Proposal for a directive Article 13 – point a

##### *Text proposed by the Commission*

(a) exclusion from entitlement to public benefits ***or*** aid;

##### *Amendment*

(a) exclusion from entitlement to public benefits, aid ***or subsidies, including Community funding managed by Member States;***

### Amendment 41

#### Proposal for a directive Article 14 – paragraph 1

##### *Text proposed by the Commission*

1. Member States shall provide for effective mechanisms through which third-

##### *Amendment*

1. Member States shall provide for effective mechanisms through which third-

country nationals in illegal employment can lodge complaints against their employers, directly or through designated third parties.

country nationals in illegal employment can lodge complaints against their employers, directly or through designated third parties *in accordance with Article 14a.*

#### **Amendment 42**

##### **Proposal for a directive**

##### **Article 14 – paragraph 3 a (new)**

*Text proposed by the Commission*

*Amendment*

***3a. In respect of criminal offences covered by Article 10(1)(d), Member States shall, in accordance with Articles 4 to 15 of Directive 2004/81/EC, grant residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals who are victims of trafficking in human beings and who cooperate in proceedings against the employer.***

#### **Amendment 43**

##### **Proposal for a directive**

##### **Article 14 a (new)**

*Text proposed by the Commission*

*Amendment*

##### ***Article 14a***

##### ***Designated third parties***

***Member States shall ensure that legal entities, associations, non-governmental organisations, local authorities and other bodies such as trade unions, which have, in accordance with the criteria laid down in the relevant national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may, either on behalf or in support of an illegally employed third-country national, intervene in any judicial, administrative and/or criminal proceedings provided for***

*with the objective of implementing this Directive.*

#### **Amendment 44**

##### **Proposal for a directive Article 15 – paragraph 1**

*Text proposed by the Commission*

1. Member States shall ensure that ***at least 10% of companies established on their territory per year are subject to*** inspections to control employment of illegally staying third-country nationals.

*Amendment*

1. Member States shall ensure that ***effective and adequate*** inspections ***are carried out on their territory*** to control employment of illegally staying third-country nationals.

#### **Amendment 45**

##### **Proposal for a directive Article 15 – paragraph 2**

*Text proposed by the Commission*

2. ***The selection of companies to be inspected shall be based on a risk assessment to be drawn up by the competent authorities in the Member States taking into account factors such as the sector in which a company operates and any past record of infringement.***

*Amendment*

2. ***Member States shall, on the basis of risk assessments, regularly identify the sectors of activity in which the employment of illegally staying third-country nationals is prevalent on their territory. Member States shall publicise the sectors identified as a result of those risk assessments.***

#### *Justification*

*Member States should assess the risk of concentration of employing illegal immigrants in different sectors. This would help to concentrate the inspections in those sectors, where risk is higher, what allows decreasing the requested percentage of inspection. This could contribute to lowering the costs of implementing measures foreseen by this Directive.*

#### **Amendment 46**

**Proposal for a directive**  
**Article 15 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. Member States shall ensure that inspections referred to in paragraphs 1 and 2 are, without prejudice to labour inspections, carried out also with the view to assessing work conditions.***

**Amendment 47**

**Proposal for a directive**  
**Article 15 – paragraph 2 b (new)**

*Text proposed by the Commission*

*Amendment*

***2b. In the case of posted workers who are third-country nationals, Member States' inspection services may avail themselves of the cooperation and exchange of information provided for in Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996\* concerning the posting of workers in the framework of the provision of services, in order to verify that the third-country nationals concerned are lawfully employed in the Member State of origin.***

***\*OJ L 18, 21.1.1997, p. 1***

**Amendment 48**

**Proposal for a directive**  
**Article 15 a (new)**

*Text proposed by the Commission*

*Amendment*

***Article 15 a***

***Relationship to national measures***

***This directive shall not prejudice national measures to encourage the conversion of undeclared work into declared***

***employment relationships and to help undeclared workers bring their status within the law.***

*Justification*

*It is necessary to define the relationship between the scope of this directive and national measures taken by Member States on their own initiative to combat undeclared work and regularise the situation of undeclared workers.*

**Amendment 49**

**Proposal for a directive  
Article 16 – paragraph 1**

*Text proposed by the Commission*

By [Three years after the date referred to in Article 17] at the latest, and every three years thereafter, Member States shall transmit information to the Commission on the implementation of this Directive in the form of a report which shall include the numbers and results of inspections carried out pursuant to **Article 15** and details of measures applied under Article 8.

*Amendment*

By [Three years after the date referred to in Article 17] at the latest, and every three years thereafter, Member States shall transmit information to the Commission on the implementation of this Directive in the form of a report which shall include ***the sectors identified pursuant to Article 15(2)***, the numbers and results of inspections carried out pursuant to **Article 15(3)** and details of measures applied under Article 8.

**Amendment 50**

**Proposal for a directive  
Article 16 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***Member States may, at the time of the first report, also present an assessment of any effects that the implementation of this Directive has had on the employment of legally staying third-country nationals.***

## Amendment 51

### Proposal for a directive Article 16 – paragraph 2

#### *Text proposed by the Commission*

On the basis of those reports, the Commission shall submit a report to the European Parliament and the Council.

#### *Amendment*

On the basis of those reports, the Commission shall, ***within twelve months following the reception of the reports presented by the Member States***, submit a report to the European Parliament and the Council. ***That report may be accompanied by proposals for an amendment of this Directive.***

## PROCEDURE

<b>Title</b>	Sanctions against employers of illegally staying third-country nationals
<b>References</b>	COM(2007)0249 – C6-0143/2007 – 2007/0094(COD)
<b>Committee responsible</b>	LIBE
<b>Opinion by</b> Date announced in plenary	EMPL 19.6.2007
<b>Associated committee(s) - date announced in plenary</b>	12.7.2007
<b>Drafts(wo)man</b> Date appointed	Edit Bauer 5.6.2007
<b>Discussed in committee</b>	25.6.2008                      9.9.2008
<b>Date adopted</b>	10.9.2008
<b>Result of final vote</b>	+:                      24 -:                      6 0:                      13
<b>Members present for the final vote</b>	Jan Andersson, Edit Bauer, Iles Braghetto, Philip Bushill-Matthews, Milan Cabrnach, Alejandro Cercas, Ole Christensen, Derek Roland Clark, Jean Louis Cottigny, Proinsias De Rossa, Carlo Fatuzzo, Ilda Figueiredo, Roger Helmer, Stephen Hughes, Karin Jöns, Ona Juknevičienė, Jan Jerzy Kułakowski, Jean Lambert, Bernard Lehideux, Elizabeth Lynne, Thomas Mann, Maria Matsouka, Mary Lou McDonald, Elisabeth Morin, Juan Andrés Naranjo Escobar, Csaba Óry, Siiri Oviir, Pier Antonio Panzeri, Rovana Plumb, Jacek Protasiewicz, Bilyana Ilieva Raeva, Elisabeth Schroedter, José Albino Silva Peneda, Jean Spautz, Gabriele Stauner, Ewa Tomaszewska, Anne Van Lancker, Gabriele Zimmer
<b>Substitute(s) present for the final vote</b>	Petru Filip, Donata Gottardi, Rumiana Jeleva, Sepp Kusstatscher, Claude Moraes, Csaba Sógor

25.6.2008

## **OPINION OF THE COMMITTEE ON AGRICULTURE AND RURAL DEVELOPMENT**

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals  
(COM(2007)0249 – C6-0143/2007 – 2007/0094(COD))

Rapporteur: Giuseppe Castiglione

### **SHORT JUSTIFICATION**

The draftsman is in favour of this proposal for a directive and fully endorses its aims. Laying down measures and sanctions, including criminal sanctions, to deter employers from giving work to persons living in the EU illegally not only helps to combat illegal immigration, but also serves to foster market-oriented fair competition and, indirectly, to strengthen the right that every worker has to enjoy proper, decent working conditions.

The agricultural sector has one of the largest pools of illegal migrant labour, which satisfies a demand for workers, generally employed on a seasonal basis, to do jobs that European citizens are, more often than not, unwilling to do (tomato picking in Italy being one example). Non-Community labour thus tends to be employed in short, not to say very short, bursts (workers are employed many times over for brief spells on the same farm).

Precisely because there are large numbers of employees without the proper authorisation, and the nature of their employment is short lived, the draftsman considers it necessary to make changes to the Commission proposal over and above the general amendments intended essentially to save employers from additional red tape.

First of all, he finds it entirely acceptable that an employer should be required on principle to pay workers the outstanding remuneration owed to them, as well as unpaid social security contributions and taxes. However, he believes that if the procedure for claiming back pay arrears were triggered automatically, as the Commission is proposing, illegal migrant workers and EU workers would be treated differently in the eyes of the law, a distinction for which there appears to be no justification. It is difficult to see why the obligations under an employment relationship involving illegal immigrants should be governed by rules other than

those applying in labour law, which is subject to the general principle of application whereby it is up to a worker to ask the courts to establish the extent of his entitlement.

Another unwarranted instance of unequal treatment, this time in relation to EU workers employed illegally, might arise from the fact that employment will be presumed to last at least six months. A presumption to that effect imposes the burden of proof on the employer, who would have to show that a given worker had been employed for less than six months. The necessary demonstration to the contrary would be particularly difficult for the employer (it is easier to prove that something has happened than to prove that it has not!) and would entail a totally disproportionate additional sanction, bearing in mind that, according to the evidence, the average duration of employment in the agricultural sector is about 40 days. Furthermore, the presumption could have the unfortunate effect of encouraging illegal immigration by non-Community nationals, attracted by the prospect of receiving at least six months' pay in any event, even if they worked for only a few days.

Finally, as regards the disqualifications, the draftsman believes that greater latitude should be accorded to the Member States, to enable them to allow in a more effective way for the specific features of each sector and the consequences, not least in social terms, likely to ensue if such measures were implemented.

## AMENDMENTS

The Committee on Agriculture and Rural Development calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

### Amendment 1

#### Proposal for a directive Recital 4

##### *Text proposed by the Commission*

(4) The provisions should not cover third-country nationals who are not illegally staying. This excludes third-country nationals who are family members of citizens of the Union exercising their right to free movement within the Community, and those who, under agreements between the Community and its Member States, on the one hand, and the countries of which they are nationals, on the other, enjoy rights of free movement equivalent to those

##### *Amendment*

(4) The provisions should not cover third-country nationals who are not illegally staying. This excludes third-country nationals who are family members of citizens of the Union exercising their right to free movement within the Community, and those who, under agreements between the Community and its Member States, on the one hand, and the countries of which they are nationals, on the other, enjoy rights of free movement equivalent to those

of citizens of the Union. It also excludes third-country nationals who are in a situation covered by Community law, such as those who are lawfully employed in another Member State and who are posted by a service provider to another Member State in the context of the provision of services.

of citizens of the Union. It also excludes third-country nationals who are in a situation covered by Community law, such as those who are lawfully employed in another Member State and who are posted by a service provider to another Member State in the context of the provision of services, ***or have been granted asylum or have refugee status.***

## **Amendment 2**

### **Proposal for a directive Recital 8 a (new)**

*Text proposed by the Commission*

*Amendment*

***(8a) In order to ensure the effectiveness of this Directive, any undue profit generated by the illegal employment of third-country nationals should be returned. Outstanding remuneration and other work-related financial entitlements to be paid back should therefore be equal to those which would have been enjoyed by comparable workers in a declared employment relationship.***

## **Amendment 3**

### **Proposal for a directive Recital 13**

*Text proposed by the Commission*

*Amendment*

(13) In view of the prevalence of subcontracting in certain affected sectors, it is necessary to ensure that all the undertakings in a chain of subcontracting are held jointly and severally liable to pay financial sanctions against an employer at the end of the chain who employs illegally staying third-country nationals.

(13) In view of the prevalence of subcontracting in certain affected sectors, it is necessary to ensure that all the undertakings in a chain of subcontracting are held jointly and severally liable to pay financial sanctions against an employer at the end of the chain who employs illegally staying third-country nationals, ***provided it is established that they were not acting in good faith and that they were aware that the final employer's contracting practices***

*were illegal;*

*Justification*

*The presumption of innocence needs to be protected.*

**Amendment 4**

**Proposal for a directive**  
**Recital 18**

*Text proposed by the Commission*

(18) To facilitate enforcement, there should be effective complaint mechanisms by which relevant third-country nationals can lodge complaints directly or through designated third parties such as trade unions or other associations. The designated third parties should be protected, when providing assistance to lodge complaints, against possible sanctions under rules prohibiting the facilitation of unauthorised residence.

*Amendment*

(18) To facilitate enforcement, there should be effective complaint mechanisms by which relevant third-country nationals can lodge complaints directly or through designated third parties such as trade unions or other associations. The designated third parties should be protected, when providing assistance to lodge complaints, against possible sanctions under rules prohibiting the facilitation of unauthorised residence. ***The mediating role of sectoral organisations with a major grassroots presence should be boosted.***

*Justification*

*This would apply to farmers' organisations, which, thanks to their permanent contacts with all interested parties, could have a major role to play in conflict resolution.*

**Amendment 5**

**Proposal for a directive**  
**Article 4 – paragraph 2**

*Text proposed by the Commission*

2. Member States shall oblige employers acting in the course of business activities or who are legal persons to notify the competent authorities designated by

*Amendment*

2. Member States shall oblige employers acting in the course of business activities or who are legal persons to notify the competent authorities designated by

Member States of both the start and the termination of employment of third-country nationals at the latest within one week.

Member States of both the start and the termination of employment of third-country nationals at the latest within one week. ***Where the law of a Member State already requires employers to notify the competent national authority of the start of employment and/or subsequent related developments, the obligation to notify the employment of a third-country national shall be discharged in relation to that authority.***

#### **Amendment 6**

##### **Proposal for a directive Article 4 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. Member States shall, in any event, take every step required to make for the necessary degree of cooperation and a proper exchange of information among the various national authorities concerned.***

#### **Amendment 7**

##### **Proposal for a directive Article 6 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. Member States shall take the necessary measures to ensure that any infringement of Article 3 is subject to effective, proportionate and dissuasive sanctions against the employer.

1. Member States shall take the necessary measures to ensure that any infringement of Article 3 ***for which employers are made responsible under Article 5*** is subject to effective, proportionate and dissuasive sanctions against the employer.

## Amendment 8

### Proposal for a directive

#### Article 6 – paragraph 2 – point b

*Text proposed by the Commission*

*Amendment*

***(b) payments of the costs of return of each illegally employed third-country national in those cases where return procedures are carried out.***

***deleted***

## Amendment 9

### Proposal for a directive

#### Article 7 – paragraph 2 – point a

*Text proposed by the Commission*

*Amendment*

***(a) enact mechanisms to ensure that the necessary procedures to claim back outstanding remuneration are triggered automatically without the need for the third-country national to introduce a claim;***

***(a) take the steps required to ensure that a third-country national staying illegally may apply to claim back outstanding remuneration in accordance with the national procedures provided for that purpose;***

## Amendment 10

### Proposal for a directive

#### Article 7 – paragraph 2 – point b

*Text proposed by the Commission*

*Amendment*

***(b) provide that a work relationship of at least 6 months duration be presumed unless the employer can prove differently.***

***deleted***

## Amendment 11

### Proposal for a directive

#### Article 7 – paragraph 4

*Text proposed by the Commission*

*Amendment*

***4. In respect of criminal offences covered***

***deleted***

*by Article 10(1)(c), Member States shall take the necessary measures to ensure that the execution of any return decision is postponed until the third-country national has received any back payment of their remuneration recovered under paragraph 1(a).*

## Amendment 12

### Proposal for a directive

#### Article 8 – introductory part

*Text proposed by the Commission*

Member States shall take the necessary measures to ensure that an employer acting in the course of business activities may also, *if appropriate*, be subject to the following measures:

*Amendment*

Member States shall take the necessary measures to ensure that an employer acting in the course of business activities may also, *in more serious or exceptionally serious cases*, be subject to *at least one of* the following measures:

## Amendment 13

### Proposal for a directive

#### Article 8 – point c

*Text proposed by the Commission*

(c) recovery of public benefits, aid, or subsidies, including EU funding managed by Member States, granted to the employer during the *12 months preceding the detection* of illegal employment;

*Amendment*

(c) recovery of public benefits, aid, or subsidies, including EU funding managed by Member States, granted to the employer during the *time* of illegal employment; *where the actual duration of the illegal employment cannot be determined, an employment relationship of at least three months' duration shall be assumed;*

*Justification*

*The 12-month period chosen is too long and would lead to unfair hardship, thus violating the principle of proportionality.*

## Amendment 14

### Proposal for a directive Article 14 – paragraph 2

*Text proposed by the Commission*

2. Member States shall not impose sanctions against designated third parties providing assistance to the third-country national to lodge complaints, on the grounds of facilitation of unauthorised residence.

*Amendment*

2. Member States shall not impose sanctions against designated third parties providing assistance to the third-country national to lodge complaints, on the grounds of facilitation of unauthorised residence, ***this being especially so in the case of the representative organisations of particular sectors.***

*Justification*

*This would apply to farmers' organisations, which, thanks to their permanent contacts with all interested parties, could have a major role to play in conflict resolution.*

## Amendment 15

### Proposal for a directive Article 15 – paragraph 2

*Text proposed by the Commission*

2. The selection of companies to be inspected shall be based on a risk assessment to be drawn up by the competent authorities in the Member States taking into account factors such as the sector in which a company operates and any past record of infringement.

*Amendment*

2. ***Where the*** selection of companies to be inspected ***is*** based on a risk assessment ***(deletion)*** drawn up by the competent authorities in the Member States taking into account factors such as the sector in which a company operates and any past record of infringement, ***the Member States may be authorised to deviate from the requirement in paragraph 1 once they have informed the Commission of this.***

## **Amendment 16**

### **Proposal for a directive Article 15 a (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 15a**

##### ***Safeguarding the level of protection***

***Nothing in this Directive shall constitute grounds for a reduction in the level of protection of vulnerable third country nationals already afforded by Member States in the fields covered by this Directive.***

## **Amendment 17**

### **Proposal for a directive Article 16 – first indent**

*Text proposed by the Commission*

*Amendment*

By [Three years after the date referred to in Article 17] at the latest, and every three years thereafter, Member States shall transmit information to the Commission on the implementation of this Directive in the form of a report which shall include the numbers and results of inspections carried out pursuant to Article 15 and details of measures applied under Article 8.

By [Three years after the date referred to in Article 17] at the latest, and every three years thereafter, Member States shall transmit information to the Commission on the implementation of this Directive in the form of a report which shall include the numbers and results of inspections carried out pursuant to Article 15 and details of measures applied under Article 8 ***or Article 13.***

## PROCEDURE

<b>Title</b>	Sanctions against employers of illegally staying third-country nationals
<b>References</b>	COM(2007)0249 – C6-0143/2007 – 2007/0094(COD)
<b>Committee responsible</b>	LIBE
<b>Opinion by</b> Date announced in plenary	AGRI 27.9.2007
<b>Drafts(wo)man</b> Date appointed	Giuseppe Castiglione 8.10.2007
<b>Discussed in committee</b>	25.6.2008
<b>Date adopted</b>	25.6.2008
<b>Result of final vote</b>	+: 34 –: 1 0: 0
<b>Members present for the final vote</b>	Vincenzo Aita, Bernadette Bourzai, Niels Busk, Luis Manuel Capoulas Santos, Giuseppe Castiglione, Albert Deß, Gintaras Didžiokas, Michl Ebner, Carmen Fraga Estévez, Ioannis Gklavakis, Lutz Goepel, Friedrich-Wilhelm Graefe zu Baringdorf, Esther Herranz García, Lily Jacobs, Elisabeth Jeggle, Heinz Kindermann, Stéphane Le Foll, James Nicholson, Neil Parish, María Isabel Salinas García, Agnes Schierhuber, Willem Schuth, Czesław Adam Siekierski, Alyn Smith, Petya Stavreva, Witold Tomczak, Donato Tommaso Veraldi, Janusz Wojciechowski, Andrzej Tomasz Zapałowski
<b>Substitute(s) present for the final vote</b>	Katerina Batzeli, Ilda Figueiredo, Wiesław Stefan Kuc, Astrid Lulling, Maria Petre, Brian Simpson
<b>Substitute(s) under Rule 178(2) present for the final vote</b>	Paulo Casaca

22.11.2007

## OPINION OF THE COMMITTEE ON WOMEN'S RIGHTS AND GENDER EQUALITY

for the Committee on Civil Liberties, Justice and Home Affairs

on the proposal for a directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals  
(COM(2007)0249 – C6-0143/2007 – 2007/0094(COD))

Rapporteur: Esther De Lange

### SHORT JUSTIFICATION

On 16 May 2007, the Commission issued a Proposal for a Council Directive *providing for sanctions against employers of illegally staying third-country nationals*. The current proposal is part of a comprehensive European Migration Policy and intends to reduce the pull factor for illegal immigration by targeting the employment of third-country nationals who are illegally staying in the EU. The measure aims at providing an EU-wide framework for imposing sanctions on employers employing third country nationals who do not legally reside in the EU. Key features of this framework include:

- a general ban on employing third country nationals who reside illegally in the EU;
- an obligation on employers to carry out checks before employing third country nationals and an increase of the number of inspections carried out by the Member States;
- sanctions and other measures in case of non-compliance and - in case of serious infringements, such as exploitative working conditions or knowledge of trafficking of human beings - criminal sanctions.

It is important to underline that the proposal is based on the criterion of illegal stay and not on irregular employment as such. Based on Article 63(3)(b), TEC it only covers third country nationals who are residing in the EU illegally and who are employed. It does not cover, for example, measures relating to third-country nationals who are legally staying in the EU but who are working in violation of their residence status, for example students from third countries who work more hours than permitted. According to the European Commission, estimates of the number of third-country nationals illegally staying in the EU vary between 4,5 to 8 million. Unfortunately, these estimates are not disaggregated by gender and the gender specific problems these migrants may face are not identified.

The draft opinion amends the proposal from a strictly gender perspective. The drafts person believes that female illegal migrants are especially vulnerable, and are often the victims of

forced labour, trafficking and violence. Therefore, there is an urgent need for the inclusion of a number of gender-related provisions in the proposal, such as training for relevant authorities to enable them to identify and address gender specific issues; informing third-country nationals about the possibility to lodge complaints against their employers; the inclusion of gender disaggregated statistics and gender-specific information in the national reports, etc.

## AMENDMENTS

The Committee on Women's Rights and Gender Equality calls on the Committee on Civil Liberties, Justice and Home Affairs, as the committee responsible, to incorporate the following amendments in its report:

Text proposed by the Commission<sup>1</sup>

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Amendments by Parliament

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Amendment 1  
Recital 15 a (new)

***(15a) Given that women are often victims of forced labour, human trafficking, sexual violence and other forms of violence, special attention should be paid to female illegal migrants and their specific problems.***

Amendment 2  
Recital 15 b (new)

***(15b) In the business and services sectors in which illegally resident third-country nationals are most likely to be employed there is a high proportion of women employees. Given the large number of illegally staying women employed in the domestic service sector, Member States should provide the families that employ such women with a legal means of ensuring that they have welfare protection.***

### *Justification*

*In connection with illegal immigration, it is important to stress that women are victims of dual discrimination and are more vulnerable, for the purpose of ensuring appropriate treatment for both women and men, according to their different needs.*

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<sup>1</sup> OJ C .., 17.7.2007, p. ....

Amendment 3  
Recital 18 a (new)

***(18a) Member States should invest in awareness-raising measures in order to inform relevant third-country nationals and designated third parties offering them assistance about the ways in which they may file an official complaint. Complaint procedures in sectors in which a significant proportion of women are employed should be designed in such a way as to take into consideration gender specific issues and provide women with sufficient protection.***

Amendment 4  
Recital 19

(19) To supplement the complaint mechanisms, Member States should grant residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals who have been subjected to particularly exploitative working conditions and who cooperate in criminal proceedings against the employer. Such permits should be granted under the same conditions as those granted under 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.

(19) To supplement the complaint mechanisms, Member States should grant residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals who ***are minors, pregnant women or mothers of children up to three months old or who*** have been subjected to particularly exploitative working conditions and who cooperate in criminal proceedings against the employer. Such permits should be granted under the same conditions as those granted under 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.

*Justification*

*Pregnant women and minors require special protection.*

Amendment 5  
Recital 19 a (new)

***(19a) Member States should ensure that the competent authorities, the social partners and associations representing immigrants receive training and information on equal opportunities, non-discrimination, gender issues and multiple discrimination, so as to provide them with the instruments and qualifications needed to identify and address gender specific issues.***

Amendment 6  
Article 3, paragraph 1

Member States shall prohibit the employment of ***illegally staying*** third-country nationals.

Member States shall prohibit the employment of third-country nationals ***officially recognised as illegally staying***.

*Justification*

*The fact that a third-country national is illegally resident must be legally established by decision of the courts.*

Amendment 7  
Article 7, paragraph 1, point (b)

(b) any outstanding taxes and social security contributions, including relevant administrative fines.

(b) any outstanding taxes and social security contributions, including ***family allowances*** ***and*** relevant administrative fines.

Amendment 8  
Article 7, paragraph 1 a (new)

***1a. In the event of infringement of Article 3, Member States shall ensure that, in respect of workers who are pregnant or are mothers of children up to three months old, the employer complies with the provisions of Article 7(1)(a) and (b) and all other provisions applying under national laws***

*covering this specific situation.*

*Justification*

*It is important to protect illegally employed women who are pregnant and to guarantee their right to care and assistance, as well as to remuneration and the payment of social security contributions.*

Amendment 9  
Article 7, paragraph 4

4. In respect of criminal offences covered by Article 10(1)(c), Member States shall take the necessary measures to ensure that the execution of any return decision is postponed until the third-country national has received any back payment of their remuneration recovered under paragraph 1(a).

4. In respect of criminal offences covered by Article 10(1)(c), Member States shall take the necessary measures to ensure that the execution of any return decision is postponed until the third-country national has received any back payment of their remuneration recovered under paragraph 1(a); ***such return shall in no way undermine the fundamental rights or threaten the life or health of the illegally employed person.***

*Justification*

*Third-country nationals cannot be returned to countries in which a war is in progress or in which they may be subjected to repressive action or imprisonment as a result of their activities in the EU.*

Amendment 10  
Article 7, paragraph 4 a (new)

***4a. In respect of criminal offences covered by Article 3 and, in particular, Article 10(1)(c) or (d), Member States shall take the necessary measures to ensure that the execution of any return decision is postponed where the illegally staying third-country national is a minor, a pregnant woman or the mother of a child up to three months old.***

*Justification*

*Appropriate treatment must be ensured for pregnant women and minors.*

Amendment 11  
Article 10, paragraph 1, point (c)

(c) the infringement is accompanied by particularly exploitative working conditions, ***such as a significant difference in*** working conditions ***from those*** enjoyed by legally employed workers; or

(c) the infringement is accompanied by ***abuse, gender-based discrimination or*** particularly exploitative working conditions, ***involving violence, threats, intimidation or degrading treatment, which are*** ***significantly different from the*** working conditions enjoyed by legally employed workers; or

*Justification*

*'Particularly exploitative working conditions' requires further clarification.*

Amendment 12  
Article 14, paragraph 1

(1) Member States shall ***provide for*** effective mechanisms through which third-country nationals in illegal employment can lodge complaints against their employers, directly or through designated third parties.

(1) Member States shall ***promote awareness-raising campaigns and set up*** effective mechanisms through which third-country nationals in illegal employment can lodge complaints against their employers, directly or through designated third parties ***and in a confidential manner.***

Amendment 13  
Article 14, paragraph 3

3. In respect of criminal offences covered by Article 10(1)(c), Member States shall under the conditions of Articles 4 to 15 of Directive 2004/81/EC grant residence permits of limited duration, ***linked to*** the length of the relevant national proceedings, to third-country nationals who are or have been subjected to exploitative working conditions and cooperate in proceedings against the employer.

3. In respect of criminal offences covered by Article 10(1)(c), Member States shall under the conditions of Articles 4 to 15 of Directive 2004/81/EC grant residence permits of limited duration ***and protection during*** the length of the relevant national proceedings, to third-country nationals who are or have been subjected to exploitative working conditions and cooperate in proceedings against the employer. ***Such permits shall also be granted to children born during the period of residence. Housing and food should be provided upon request.***

*Justification*

*Given the large number of women among illegally staying third-country nationals in employment, it is important for protection to be extended to children born during the period*

*of residence in an EU Member State.*

Amendment 14

Article 14, paragraph 3 a (new)

***3a. Given the considerable number of female illegal migrants and the specific problems they encounter, Member States shall ensure that the competent authorities, the social partners and associations representing immigrants receive training and information on gender issues, equal opportunities and non-discrimination on grounds of gender and race, in order to provide them with the tools and skills needed to better identify and address gender specific issues.***

Amendment 15

Article 14, paragraph 3 b (new)

***3b. In respect of prohibitions covered by Article 3, Member States shall under the conditions of Articles 4 to 15 of Directive 2004/81/EC grant residence permits of limited duration in accordance with relevant national procedures to third-country nationals who are minors, pregnant women or mothers of children up to three months old.***

*Justification*

*Pregnant women and minors require special protection which includes residence permits of limited duration.*

Amendment 16

Article 16, paragraph 1

By [Three years after the date referred to in Article 17] at the latest, and every ***three years*** thereafter, Member States shall transmit information to the Commission on the implementation of this Directive in the

By [Three years after the date referred to in Article 17] at the latest, and every ***two years*** thereafter, Member States shall transmit information to the Commission on the implementation of this Directive in the form

form of a report which shall include the numbers and results of inspections carried out pursuant to Article 15 and details of measures applied under Article 8.

of a report which shall include the numbers and results of inspections carried out pursuant to Article 15 and details of measures applied under Article 8. ***Statistics provided in the report shall be disaggregated by gender and gender specific problems shall be identified.***

Amendment 17  
Article 16, paragraph 2

On the basis of those reports, the Commission shall submit a report to the European Parliament and the Council.

On the basis of those reports, the Commission shall submit a report to the European Parliament and the Council. ***The data provided in the report shall be disaggregated by gender and gender specific problems shall be identified.***

## PROCEDURE

<b>Title</b>	Sanctions against employers of illegally staying third-country nationals
<b>References</b>	COM(2007)0249 - C6-0143/2007 - 2007/0094(COD)
<b>Committee responsible</b>	LIBE
<b>Opinion by</b> Date announced in plenary	FEMM 19.6.2007
<b>Drafts(wo)man</b> Date appointed	Esther De Lange 3.7.2007
<b>Discussed in committee</b>	2.10.2007                      20.11.2007
<b>Date adopted</b>	20.11.2007
<b>Result of final vote</b>	+:                      22 -:                      0 0:                      1
<b>Members present for the final vote</b>	Edit Bauer, Hiltrud Breyer, Esther De Lange, Ilda Figueiredo, Věra Flasarová, Lívia Járóka, Piia-Noora Kauppi, Rodi Kratsa-Tsagaropoulou, Roselyne Lefrançois, Siiri Oviir, Marie Panayotopoulos-Cassiotou, Zita Pleštinšká, Anni Podimata, Christa Prets, Teresa Riera Madurell, Eva-Britt Svensson, Anna Záborská
<b>Substitute(s) present for the final vote</b>	Jill Evans, Iratxe García Pérez, Lidia Joanna Geringer de Oedenberg, Donata Gottardi, Anna Hedh, Filiz Hakaeva Hyusmenova

## PROCEDURE

<b>Title</b>	Sanctions against employers of illegally staying third-country nationals			
<b>References</b>	COM(2007)0249 – C6-0143/2007 – 2007/0094(COD)			
<b>Date submitted to Parliament</b>	16.5.2007			
<b>Committee responsible</b> Date announced in plenary	LIBE 19.6.2007			
<b>Committee(s) asked for opinion(s)</b> Date announced in plenary	EMPL 19.6.2007	ITRE 19.6.2007	AGRI 27.9.2007	FEMM 19.6.2007
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	21.1.2009			
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<b>Members present for the final vote</b>	Alexander Alvaro, Roberta Angelilli, Mario Borghezio, Catherine Boursier, Emine Bozkurt, Philip Bradbourn, Mihael Brejc, Kathalijne Maria Buitenweg, Maddalena Calia, Michael Cashman, Giusto Catania, Jean-Marie Cavada, Carlos Coelho, Elly de Groen-Kouwenhoven, Panayiotis Demetriou, Gérard Deprez, Agustín Díaz de Mera García Consuegra, Bárbara Dührkop Dührkop, Claudio Fava, Urszula Gacek, Kinga Gál, Patrick Gaubert, Roland Gewalt, Jeanine Hennis-Plasschaert, Ewa Klamt, Magda Kósáné Kovács, Stavros Lambrinidis, Henrik Lax, Roselyne Lefrançois, Baroness Sarah Ludford, Viktória Mohácsi, Claude Moraes, Javier Moreno Sánchez, Rareș-Lucian Niculescu, Martine Roure, Sebastiano Sanzarello, Inger Segelström, Csaba Sógor, Vladimir Urutchev, Ioannis Varvitsiotis, Manfred Weber, Tatjana Ždanoka			
<b>Substitute(s) present for the final vote</b>	Edit Bauer, Simon Busuttil, Iratxe García Pérez, Elisabetta Gardini, Genowefa Grabowska, Ona Juknevičienė, Sylvia-Yvonne Kaufmann, Antonio Masip Hidalgo, Nicolae Vlad Popa, Eva-Britt Svensson, Stefano Zappalà			