



**COUNCIL OF
THE EUROPEAN UNION**

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NOTE

From :	the Presidency
To :	Permanent Representatives Committee
No Cion prop.:	9871/07 MIGR 43 SOC 227 DROIPEN 49 CODEC 623
Subject:	Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals

1. On 16 May 2007, the Commission presented a proposal for a directive providing for a minimum harmonisation of administrative, financial and criminal sanctions, against employers of illegally staying third country nationals.
2. This proposal was discussed at the Council bodies since June 2007. An orientation debate was held at the Justice and Home Affairs Council of 24 and 25 July 2008.
3. In the European Parliament, the Employment Committee, (leading Committee for Articles 2 (a part of it), 4, 7 and 15, voted in September 2008 and the LIBE Committee took an orientation vote in early November 2008. The vote in Parliament's plenary session is envisaged, at this stage, for mid-December. Contacts have taken place with the Rapporteur of each of the two Committees since last spring and several informal dialogues have taken place during last month.

4. These discussions were conducted in a constructive manner, with an approach of converging views on the importance of this proposal and its goals. The European Parliament has also paid particular attention to the rights of employees, particularly concerning back payments, and the most serious situations, especially in relation to criminal penalties and to the facilitation of complaints. As a matter of fact, the negotiations have much progressed in a short time.
5. The Presidency, after trying to find a common approach within the Council, it has focused in recent weeks on negotiations with the co-legislator on the basis of the abovementioned approach, and on informing and consult regularly with Member States.

This approach does not mean that an agreement of all Member States on all Articles has been reached: some Member States maintain their opposition to certain provisions, as a matter of principle, particularly to provisions related to criminal penalties, some delegations still have difficulties certain specific points. For example, Article 9 on subcontracting has never been formulated in a way that can ensure consensus. The principle has been to retain the highest common denominator, as part of a package that could obtain the support of the greatest possible number of Member States.

6. The Presidency believes today that a quick agreement is possible and intends to keep on negotiating a compromise package on the basis of the proposal included in the Annex to this document. It hopes that the Member States analyse such a comprehensive package and it seeks on that basis to finalize the negotiations in time in order to meet the goal of an agreement in first reading before the end of the year.
7. The text attached contains two main categories of Articles (recalling that the recitals have not yet been discussed with the European Parliament):
 - (a) **Articles that already constitute a compromise drafting discussed with the European Parliament** and which the latter would be ready in principle to accept. These are Articles 1, 3, 6, 8, 9, 12, 13, 16, 17 *et seq.*

For other Articles, the drafting of a compromise has also taken place but in each case a specific point remains to be addressed. This is the case of Article 2, with the question of the definition of remuneration, of Article 4, in which Parliament might want to add a provision, of Article 11, with the question of the possibility of publishing a list of convicted employers, and of Article 15, with the question of the relationship between the various inspection activities.

(b) the second category of provisions concerns **three Articles that are subject to less advanced negotiations with the European Parliament**, because of their sensitivity:

- **Article 7** on the back payments, for which, in summary, Parliament's approach is closer to an obligation of result requested from Member States rather than to an obligation to ensure the means (the mechanism) for such a result which has been Council's approach. Parliament also adopted a provision that links the enforcement of a return decision to a prior collection of back payments from the employer.

The compromise proposal contained in the attached document has not yet been submitted to the European Parliament and aims, while maintaining the structure of Parliament's position, to provide for a wording closer to that intended by the Council;

- **Article 10** on criminal offences, on which Parliament could agree to move in the direction of the Council, in line with the approach in the Directive on environmental protection. Parliament however insists in return in including the provision the case of employing victims of human trafficking. The Council could agree on such an approach, provided that consistency with the existing instrument in this field is safeguarded. This is the aim of the proposal made in (d) of this Article in the attached document;

- **Article 14** on the facilitation of complaints, on which a partial agreement exists but there are two points which are yet to be concluded finalise. The first concerns the Parliament's request to provide for an opportunity for assistance or representation of the third-country national by various legal entities. The Council could, in the context of a linkage with a compromise on Article 7, agree, provided that the adopted wording excludes criminal proceedings and is better targeted.

The second point is related with Parliament's request for the possibility under certain conditions to grant a residence permit (limited to the duration of proceedings in which the third-country national cooperates) . For this purpose, the European Parliament suggested a drafting of compromise much more moderate than its original position This new drafting results from a delicate internal compromise. The Council could, through an adjustment of wording, live with it because it gives Member States great flexibility.

The proposals that could be made by the Council are, in the attached document, in Article 14, paragraphs 1 (a) and 3, for which Parliament has not yet been informed. .

8. **Coreper is invited to allow the Presidency to continue negotiations on the basis of the compromise proposal in the Annex which is considered as a package.** Member States will be regularly informed for the developments of the negotiations and Coreper will be shortly called to examine a new compromise text in order to try to conclude these negotiations.

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

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

Definitions¹

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 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;

¹ The European Parliament might insist on a definition of remuneration.

- (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 supervision of whom the employment is undertaken;
- (f) "subcontractor" means any natural person or any legal person, to whom the execution of all or part of the obligations of a prior contract is assigned;
- (g) "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;
- (h) "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;
- (i) "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, in particular, is affecting workers' health and safety, and which is contrary to human dignity.

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.
3. 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 that notification under paragraph 1 (c) above is not required where the employer is a natural person and the employment is for his or her private purposes.²
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 5

Consequence of fulfilling the employers' obligations

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² The European Parliament has indicated that it will propose a new drafting of its following amendment introducing an additional paragraph: “*Member States may allow employers and workers a sufficient period of time within which to bring an irregular employment situation within national law.*”

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.
2. Sanctions in respect of infringements of the prohibition referred to in Article 3 shall include:
 - (a) financial sanctions which shall rise in line with 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 paragraph (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 7³

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 ;

³ This suggestion for a compromise on Article 7 has not been submitted to the European Parliament.

- (b) any outstanding taxes and social security contributions relating to the illegal employment, as well as relevant administrative fines, as defined in national law;
 - (c) 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 apply paragraph 1(a), Member States shall enact mechanisms to ensure that the necessary procedures to claim back outstanding remuneration are triggered automatically or that illegally employed third country nationals:
 - (a) can introduce a claim subject to a period of prescription defined under national law and can enforce a judgement against the employer for any outstanding remuneration including in cases in which they have or have been returned;
 - (b) are systematically informed about the possibility to introduce such a claim, 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 can prove differently.
- 4. Member States shall facilitate back payments of remuneration recovered under paragraph 1 (a). In this respect, Member States shall ensure that the necessary mechanisms, including the availability of civil procedures, are in place to ensure that illegally employed third-country nationals are able to receive any back payment of remuneration that is recovered under the claims referred to in paragraph 2, including in cases in which they have or have been returned.

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 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 to conduct the business activity in question, if justified by the gravity of the situation.
2. 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)-(3).
2. A contractor that has undertaken due diligence obligations as defined by national law shall not be held liable under paragraph 1.
3. 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 be held liable to make the payments identified in paragraph 1 next to or in place of the employing subcontractor or the contractor of which the employer is a direct subcontractor.

4. 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 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 of 19 July 2002 on combating trafficking in human beings, knows that the illegally staying third-country national is a victim of such trafficking⁴.
 - (e) 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.

⁴ Drafting suggestion made by the Legal Service of the Council and not submitted to the European Parliament

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

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.

Article 14

Facilitation of complaints⁵

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.
- 1a. Member States shall define the conditions under which designated third parties such as associations or 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 engage, either on behalf or in support of an illegally employed third-country national, in any administrative or civil proceedings provided for with the objective of implementing this Directive⁶.
2. Providing assistance to third-country nationals to lodge complaints should not be considered as facilitation of unauthorized residence under Directive 2002/90/EC.

⁵ Paragraphs 1a and 3 have not been submitted to the European Parliament.

⁶ This paragraph is inspired by an amendment of the European Parliament but is more restrictive and excludes criminal proceedings. The European Parliament has indicated that it will provide the Council with a more concise formulation of its amendment.

3. In respect of criminal offences covered by Article 10(1)(c) and (d) and (e), Member States shall define 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 who are or have been subjected to particularly exploitative working conditions or who are victims of trafficking, in accordance with Council directive 2004/81/EC on residence permits issued to third country nationals who are victims of trafficking or who have been subject of an action to facilitate illegal immigration and who cooperate with the competent authorities, or who are minors and who cooperate in proceedings against the employer⁷.

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. 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 number of inspections carried out in the previous year as well as their results.

⁷ The Council Legal Service suggested the following drafting as a possible alternative:
“3. *In respect of criminal offences covered by Article 10(1)(c) and (e) Member States shall define 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 Council Directive 2004/81/EC on residence permits issued to third-country nationals who are victims of trafficking or who have been subject of an action to facilitate illegal immigration and who co-operate with the competent authorities.*”

3. Inspections referred to in paragraphs 1 and 2 may be carried out within the framework of other inspection activities, such as labour inspections carried out also with the view to assessing working conditions. They shall be without prejudice of the other purposes of those inspections activities.
4. 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.

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, provided that such provision are compatible with this Directive.

Article 16

Reporting

1. By [three years after the data 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, 14 and 15.
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