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NOTE

from :	Presidency
to:	Working Party on Migration and Expulsion
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. Delegations will find attached compromise suggestions submitted (in bold type) by the Presidency, for examination by the Working Party at its meeting on 1 September 2008.
2. The proposals contained in this document do not deal with provisions relating to the questions submitted to the JHA Council for its policy debate on 24 July 2008. The relevant articles will not be discussed at the meeting on 1 September and will be the subject of new compromise proposals in due course.

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

1. 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 sanctions and measures to be applied in the Member States against employers who infringe this prohibition.
2. **This Directive shall not apply to third-country nationals staying legally in the Member States but not allowed to work in their territory¹**

Article 2

Definitions

For the **specific** purposes of this Directive, the following definitions shall apply:²

- (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;

¹ The text of former paragraph 2 of Article 1 is suggested to become a recital which would read: **"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. "**

It is suggested to add at the end of recital 4 the following wording: **"Member States should be able not to apply the Directive to illegally staying third-country nationals whose removal has been postponed in accordance with national law".**

² It is suggested to add a recital whereby it should be confirmed that the definitions included in this Directive should be used only for the purposes of this legal instrument.

- (b) "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;
- (c) **"employment" means exercise of activities that are or ought to be remunerated for or under the direction of someone by any person who in the Member State concerned is protected under national employment law and/or in accordance with national practice;**
- (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 of whom **the employment is undertaken [...];**
- (f) "client" means any natural person or any legal entity, [...] for whom a main contractor, either directly or by way of subcontracting, executes works or provides goods or services ;
- (g) "main contractor" means any natural person or any legal entity,[...] who takes the primary responsibility for executing works or providing goods or services and concludes a contract to do so with the client ;
- (h) "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 concluded.
- (i) "legal person" means any legal entity having such status under applicable national law, except for States or public bodies [...] and for public international organisations.

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

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 a valid residence permit or other authorisation for their 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 **who do not hold a long-term resident's EC residence permit under Directive 2003/109/EC**⁴ within a period laid down by each Member State, which shall not exceed ten days.
2. Member States shall ensure that employers are considered to have fulfilled their obligation under paragraph 1(a) unless the document presented as a valid residence permit or another authorisation for stay is manifestly incorrect⁵ or the employer knows that it is a forgery.

³ A recital will be inserted indicating that a Member State could provide for more severe sanctions under national law.

⁴ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents.

⁵ In relation to this provision it is suggested to insert the following wording in recital 5 of the Preamble:

“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 residence permit or another **valid** authorisation for stay [...]. The burden on employers should be limited to checking that the document is not manifestly incorrect, such as bearing a manifestly wrong photograph or other anomaly that would be apparent to a reasonably attentive employer who is untrained in the identification of false documents. To enable Member States in particular to check for forged documents, businesses and legal persons should also be required to notify the competent authorities of the employment of a third-country national.”

3. **Member States shall ensure that** employers who have fulfilled their obligations set out in paragraph 1 shall not be held liable for infringing Article 3.

Article 5

Consequence of fulfilling the employers' obligations

[Transferred to paragraph 3 of Article 4]

Article 6

Financial sanctions

1. Member States shall take the necessary measures to ensure that any infringement of the prohibition referred to in Article 3 is subject to effective, proportionate and dissuasive sanctions against the employer.
2. **Financial** sanctions in respect of each infringement of the prohibition referred to in Article 3 shall include **in particular** sanctions in relation to each illegally employed third-country national **and** payments of the costs of return of illegally employed third-country nationals in those cases where return procedures are carried out.

Article 7⁶

Back payments to be made by employers

1. In respect of each infringement of the prohibition referred to in Article 3 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 and can enforce a judgement against the employer for any outstanding remuneration including in cases in which they have or have been returned;

⁶ It is suggested to insert the following recital in the Preamble:
"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".

- (b) are as soon as possible and systematically informed about the possibility to introduce such a claim, before the enforcement of any return decision.
2. In respect of the claims referred to paragraph 1, Member States shall provide that:
- (a) a work relationship of at least 3 months duration be presumed unless the employer or the employee can prove differently and.
 - (b) the agreed level of remuneration be 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.
3. Member States shall take the necessary measures to facilitate the receipt by illegally employed third-country nationals of any back payment of remuneration that is recovered under the claims referred to in paragraph 1, including in cases in which they have or have been returned.
4. In respect of [...] infringements of the prohibition referred to in Article 3, Member States shall ensure that the employer is responsible to pay any outstanding taxes and social security contributions relating to the illegal employment, as well as relevant administrative fines, as defined in national law.

Article 8

Other measures

1. Member States shall take the necessary measures to ensure that employers may also, **if justified by the gravity of the situation or the percentage of illegally employed third-country nationals**, be subject to the following measures :
- (a) exclusion from entitlement to public benefits, aid or subsidies for up to five years;
 - (b) exclusion from participation in a public contract **as defined in Directive 2004/18/EC⁷** for up to five years;

⁷ Directive 2004/18/EC on the co-ordination of the procedures for the award of public works contracts, public supply contracts and public service contracts.

- (c) recovery of 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. [...]
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 main contractor 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 **may provide** that the client may, 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.
- [...]
2. 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, in place of the employing subcontractor, be held liable to make the payments identified in paragraph 1.
3. A contractor or a client that has undertaken due diligence obligations as defined by national law shall not be held liable under paragraph 1 or 2.

4. Where the employer is a subcontractor, Member States shall ensure that the client, 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 in place of the employing subcontractor or the contractor of which the employer is a direct subcontractor.

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 the following circumstances:
- (a) the infringement continues or is repeated after competent national authorities or courts have within a period of two years made a previous finding that the employer has infringed Article 3. A previous finding shall be regarded as a final administrative or court decision without possibility for further appeals;
 - (b) the infringement is in respect of the simultaneous employment of several illegally employed third-country nationals. This shall be the case if at least four third-country nationals in question are illegally employed or if the number of third-country nationals that are illegally employed constitutes at least 50% of the employer's employees.
 - (c) the infringement is accompanied by particularly exploitative working conditions, such as a significant difference in working conditions or terms of employment from those enjoyed by legally employed workers.
 - (d) [Deleted]
 - (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.
2. The criminal penalties provided for in this article may under national law be applied without prejudice to other sanctions or measures, in particular those provided for in Articles 6, 7 and 8, and may be accompanied by the publication of the judicial decision relating to the conviction or any sanctions or measures applied.

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.
4. [Deleted]

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 shall include criminal or non-criminal fines and may include other measures such as:

- (a) exclusion from entitlement to public benefits, aid or subsidies for up to five years;
- (b) exclusion from participation in a public contract for up to five years;
- (c) recovery of public benefits, aid, or subsidies, including EU funding managed by Member States, granted to the employer up to 12 months preceding the detection of illegal employment;
- (d) placing under judicial supervision;
- (e) a judicial winding-up order.

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.⁸
2. Member States shall not impose sanctions on the grounds of facilitation of unauthorised residence against designated third parties providing assistance to the third-country national to lodge complaints.

⁸ **It is recalled that recital 18 refers to the types of bodies that could be designated as such third parties.**

3. In respect of criminal offences covered by Article 10(1)(c), Member States may [...] under national legislation 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 **particularly** exploitative working conditions and cooperate in proceedings against the employer.
4. [Deleted]

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.
2. 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.
3. In each of the sectors identified under paragraph 2, Member States shall ensure that, subject to paragraph 4, each year at least 5% of employers are subject to inspections to control employment of illegally staying third-country nationals.⁹
4. Member States shall reach the 5% level referred to in paragraph 3 by [*three years from the date of entry into force of the Directive*] at the latest.

⁹ It is suggested to insert a recital in the Preamble stating that the inspections could also be used to control matters other than the employment of illegally staying third country nationals.

Article 16

Reporting

1. [After the date referred to in Article 17], Member States shall each year before 1 May transmit to the Commission the sectors identified pursuant to Article 15(2) **in relation to the risk assessment referred to in that paragraph** and data on the numbers and results of inspections carried out pursuant to Article 15(3).
2. By [Three years after the data 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 measures applied under Article 8 [...].

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

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