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COMMISSION OF THE EUROPEAN COMMUNITIES

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2007/0094 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**providing for sanctions against employers of illegally staying third-country nationals**

(presented by the Commission)

{SEC(2007) 596}

{SEC(2007) 603}

{SEC(2007) 604}

## EXPLANATORY MEMORANDUM

### 1) CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

This proposal forms part of the EU's efforts to develop a comprehensive migration policy. In September 2007, the Commission plans to present a first proposal on legal migration in accordance with its December 2005 Policy Plan<sup>1</sup>.

One of the factors encouraging illegal immigration into the EU is the possibility of finding work. This proposal aims to reduce that pull factor by targeting the employment of third-country nationals who are illegally staying in the EU. Building on existing measures in the Member States, the aim is to ensure that all Member States introduce similar penalties for employers of such third-country nationals and enforce them effectively.

The Commission suggested these measures in its July 2006 Communication on Policy priorities in the fight against illegal immigration of third-country nationals<sup>2</sup>. The European Council endorsed this suggestion in December 2006, inviting the Commission to present proposals.

- **General context**

The employment of third-country nationals who are illegally staying (hereinafter "illegal employment") is the result of migrants seeking a better a life and meeting the demand from employers willing to take advantage of workers who will undertake what are usually low-skilled, low-paid jobs. The scale of the phenomenon is necessarily hard to quantify: estimates of the number of third-country nationals illegally staying in the EU vary between 4,5 to 8 million. Illegal employment is concentrated in certain sectors: construction, agriculture, cleaning, and hotel/catering.

On the one hand, acting as a pull factor for illegal immigration, illegal employment, like undeclared work by EU citizens, leads to losses to public finances, 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 that depend on contributions. On the other hand, illegally employed third-country nationals are in an additionally vulnerable position because if apprehended they are likely to be returned to their country of origin.

This proposal is concerned with immigration policy, not with labour or social policy. Under this proposal, it is the employer who will be sanctioned, not the illegally employed third-country nationals (but the Commission's 2005 proposal for a Return Directive would, as a general rule, require Member States to issue a return decision to third-country nationals staying illegally).

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<sup>1</sup> COM(2005) 669.

<sup>2</sup> COM(2006) 402.

- **Existing provisions in the area of the proposal**

Council Recommendation of 22 December 1995 on harmonising means of combating illegal immigration and illegal employment<sup>3</sup> provided that employers wanting to recruit foreign nationals should be encouraged to verify their residence or employment situations and that an employer of a foreign national without authorisation should be made subject to penalties. Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals<sup>4</sup> provided in particular that employment of third-country nationals who do not possess the necessary authorisation should be prohibited and should give rise to criminal and/or administrative penalties. This proposal builds on those Recommendations by requiring Member States to prohibit illegal employment, to provide for sanctions, and to require employers to undertake preventive measures and other controls.

EU policy against illegal immigration includes provisions against human trafficking and against smuggling people across borders. The Framework Decision on combating trafficking in human beings<sup>5</sup> criminalises the trafficking of a person for the purpose of labour or sexual exploitation and approximates penalties. Illegal employment under this proposal could also constitute the more serious criminal offence of trafficking if the conditions of the Framework Decision are met, including the use of coercion or deceit for the purpose of labour exploitation. However, this proposal covers the situation where there is no coercion or deceit.

A 2002 Directive<sup>6</sup> and accompanying Framework Decision<sup>7</sup> deal with people smuggling by defining offences of facilitation of unauthorised entry, movement and residence and approximating penalties. It cannot be excluded that illegal employment might be coupled with facilitation of entry and/or residence, but this proposal also covers employers having no involvement with the entry or residence of illegally employed third-country nationals.

- **Consistency with the other policies and objectives of the Union**

The employment of illegally staying third-country nationals is part of the wider problem of undeclared work, i.e. paid activities that are lawful as regards their nature but not declared to the public authorities<sup>8</sup>. Undeclared work and other related aspects involves EU citizens no less than third-country nationals, and the Commission will present a Communication on this topic in autumn 2007.

The measures envisaged under this proposal are consistent with and supportive of the policy and actions at Community level to prevent and combat tax fraud.

This proposal complies with fundamental rights. It does not affect third-country nationals' rights as workers, such as the rights to join a trade union, to participate in and benefit from collective bargaining and to enjoy working conditions that come up to

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<sup>3</sup> OJ C 5, 10.1.1996, p. 1.

<sup>4</sup> OJ C 304, 14.10.1996, p. 1.

<sup>5</sup> OJ L 203, 1.8.2002, p. 1.

<sup>6</sup> OJ L 328, 5.12.2002, p. 17.

<sup>7</sup> OJ L 328, 5.12.2002, p. 1.

<sup>8</sup> COM(98) 219.

health and safety standards. As regards the infringement for which employers may be held liable, it should be noted that, under this proposal, an employer who controls the documents of prospective employees will not be held liable, for example, if those documents prove in fact to be forgeries. Criminal sanctions are limited to serious cases where a criminal penalty is proportionate to the scale or seriousness of the infringement. Personal data that employers and authorities are required to handle when implementing this proposal will need to be processed in accordance with Directive 95/46/EC on the protection of individuals with regard to the processing of personal data<sup>9</sup>.

## 2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

*Consultation methods, main sectors targeted and general profile of respondents*

Meetings were held with the ETUC and UNICE/Business Europe. Member States were consulted within the framework of the Commission's Committee on Immigration and Asylum.

Preparation of the proposal also benefited from seminars and workshops bringing together representatives of the social partners and other NGOs. Through the external study ordered by the Commission to support the impact assessment, further consultation of Member States (including their enforcement bodies), trade unions and employer organisations, and NGOs was undertaken using questionnaires and interviews.

*Summary of responses and how they have been taken into account*

The Commission took account of comments made in reaction to its July 2006 Communication.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

The following options were considered in the impact assessment:

*Option 1: Status quo.* Although most (if not all) Member States already have employer sanctions and preventive measures in place, these have not been shown to be effective. This option would not create a level playing field, and the situation may even deteriorate since differences between Member States could increase. The level of existing sanctions may be so low as not to offset the economic advantage of illegal employment. No clear message would go out to employers, third countries and third-country nationals that loopholes to escape sanctions were being reduced.

*Option 2: Harmonised sanctions for employers of illegally staying third-country*

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<sup>9</sup> OJ L 281, 23.11.1995, p. 31.

*nationals across the EU with an enforcement obligation on Member States (obligation to undertake a certain number of workplace inspections).* This option would reduce the variation in legislation and its enforcement, and foster a level playing field. The minimum level of employer sanctions would be raised in several Member States, which would increase deterrence. Illegal employment would possibly be reduced as a result of improved enforcement.

*Option 3: Harmonised preventive measures: common requirements across the EU for employers to copy the relevant documentation (residence permit) and to notify the competent national bodies.* This option would reduce illegal employment, since the employer could determine at an early stage if a potential employee is allowed to work. A minimum additional burden would be placed on employers; several Member States already require employers to check documents. A level playing field would be promoted because the same procedures would be followed across the EU. However, identity fraud and document forgery might increase. Data protection would need to be ensured.

*Option 4: Harmonised employer sanctions and preventive measures (i.e. Options 2 and 3).* Under this option, the positive impacts of Options 2 and 3 would be mutually reinforced, and a clearer message sent out of the EU's commitment to fighting illegal employment.

*Option 5: EU awareness raising campaign on consequences of hiring an illegally staying third-country national.* This option would require low resources to implement and could have a small, temporary, but positive impact on compliance. However, it would not lead to any medium or long-term reduction in illegal employment. Employers are already aware of the negative consequences of illegal employment.

*Option 6: Identification and exchange of good practices between Member States on the implementation of employer sanctions.* Better enforcement is deemed necessary by all stakeholders, and this option would increase the capacity and thus effectiveness of enforcement bodies. However, resources for inspections would still be dependent on Member States. The contribution to the creation of a level playing field would be limited, because variations in sanctions and preventive measures would remain and may even increase.

Comparing the options and their impacts, and in the light of Member State and stakeholder views, the preferred option is a combination of Options 4 and 6. As a supporting measure the proposed new measures should be accompanied by awareness-raising campaigns targeted at employers (in particular individuals and small and medium-sized enterprises). Option 4 is reflected in this proposal, while Option 6 and the supporting awareness-raising campaigns are reflected in the accompanying Commission Staff Working Paper.

### **3) LEGAL ASPECTS OF THE PROPOSAL**

- **Summary of the proposed action**

The proposal contains a general prohibition on the employment of third-country nationals who are illegally staying. Infringements would be sanctioned by penalties (which may be administrative in nature) consisting of fines and, in the case of businesses, the possibility of other measures, including exclusion from and recovery of

public subsidies. Criminal penalties would be available in serious cases.

To ensure the effectiveness of the prohibition, employers would be required to undertake certain checks before recruiting a third-country national, the procedure for making complaints would be facilitated and Member States would be required to undertake a certain number of inspections.

The stronger sanctions and higher enforcement obligations that this Directive applies in relation to illegally staying third-country nationals as compared to those applicable under existing Community instruments in particular in the context of the provision of services in relation to EU citizens and legally staying third-country nationals are justified in the light of the objective of this Directive and non-discriminatory in view of the different status of illegally staying third-country nationals.

- **Legal basis**

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 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. Therefore tackling such situations, although also important for reducing the employment pull factor, is not covered by this proposal.

- **Principle of subsidiarity**

The principle of subsidiarity applies insofar as the proposal does not fall under the exclusive competence of the Community.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reason(s).

If Member States act alone there is a risk of significantly different levels of sanctions and enforcement in different Member States. This could lead to distortions of competition within the single market and to secondary movements of illegally staying third-country nationals to Member States with lower levels of sanction and enforcement.

Community action will better achieve the objectives of the proposal for the following reason(s).

In an area without internal borders, action against illegal immigration needs to be undertaken on a common basis. This is the case not only at the common borders but also with regard to action to reduce pull factors. Community action will be more effective in reducing the employment pull factor. A common minimum level of sanctions on employers will ensure (1) that all Member States have sufficiently high sanctions to have deterrent value, (2) that sanctions are not so different as to give rise to secondary movements of illegally staying third-country nationals, and (3) that there is a level-playing field for businesses across the EU.

The proposal provides for only a minimum level of harmonisation.

The proposal therefore complies with the principle of subsidiarity.

- **Principle of proportionality**

The proposal complies with the principle of proportionality for the following reason(s).

The instrument chosen is a directive, which gives Member States a high degree of flexibility in terms of implementation. Under Article 63, penultimate subparagraph, of the EC Treaty, Member States are free to maintain or introduce measures other than those set out in the Directive provided they are compatible with the Treaty and with international agreements.

The implementation of the Directive may entail some additional financial and administrative burden on Member States' national and regional governments in order to develop the required enforcement strategy and to meet the required minimum number of inspections. Moreover, some additional burden on those governments could result from a potential increase in administrative and criminal proceedings. Those increased burdens are however limited to what is required to ensure the effectiveness of the proposal.

For economic operators, the burdens are limited to carrying out checks before employing third-country nationals, notifying the competent authorities and keeping records. These burdens are proportionate to the objective of the proposal.

- **Choice of instruments**

Proposed instruments: directive.

Other means would not be adequate for the following reason(s).

A directive is the appropriate instrument for this action: it sets binding minimum standards but gives Member States flexibility when incorporating it into national legislation and enforcement practice.

#### 4) **BUDGETARY IMPLICATION**

The proposal has no implication for the EU budget.

#### 5) **ADDITIONAL INFORMATION**

- **Review/revision/sunset clause**

The proposal includes a review clause.

- **Correlation table**

Member States are required to communicate to the Commission the text of national provisions transposing the Directive as well as a correlation table between those provisions and this Directive.



- **Detailed explanation of the proposal**

#### Articles 1 and 2

The proposal does not cover EU citizens, including those whose eligibility for employment in a particular Member State is restricted by transitional arrangements.

The definition of "employer" covers not only natural or legal persons employing others in the course of business activities, but also private individuals in their capacity as employers of for example house cleaners. From the perspective of reducing the pull factor of illegal employment, it makes no sense to exclude individual employers.

#### Article 3

The central provision of the proposal is a general prohibition on the employment of third-country nationals who do not have the right to be resident in the EU.

#### Articles 4 and 5

Employers would, before recruitment of third-country nationals, be required to check that they have a residence permit or another authorisation for stay. Employers who are a business or a legal person (such as a registered non-profit association) would further be obliged to notify the competent national authorities. Employers who can show that they had carried out those obligations would not be liable to sanctions.

As regards dealing with forged documents, it is clearly unreasonable to require employers to detect these. The Commission's July 2006 Communication stated that common guidelines be developed on minimum security standards, in particular with respect to issue procedures, for documents including residence permits. But employers should not escape liability when documents are manifestly incorrect (for example, a document with a photograph that is manifestly not that of the prospective employee or a document that has clearly been tampered with).

#### Article 6

Infringements by employers would be punishable by effective, proportionate and dissuasive sanctions, which may be administrative sanctions. In respect of each infringement, these sanctions should include fines and the costs of returning the third-country national.

The third-country nationals in question would not be subjected to sanctions by virtue of this proposal. The Commission has made a separate proposal for a Directive<sup>10</sup> which, as a general rule, would require Member States to issue a return decision to any third-country national staying illegally.

#### Article 7

Employers would be required to pay any outstanding remuneration to illegally employed third-country nationals and Member States to put in place mechanisms to

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<sup>10</sup> COM(2005) 391.

ensure that third-country nationals, even if they have left the Member State, receive any back payment of wages.

#### Article 8

For business employers, other measures would be available including disqualification from public benefits, subsidies (including EU funding managed by Member States) and public procurement procedures. It would also be possible to recover public subsidies, including EU funding managed by Member States, granted to the employer during the preceding 12 months. The same possibility exists under the Financial Regulation in respect of EU funding directly managed by the Commission.

#### Article 9

To the extent that a financial penalty cannot be recovered from a subcontractor it should be recoverable from other contractors in the chain of subcontracting, up to and including the main contractor.

#### Articles 10 and 11

Administrative fines and other measures may not be enough to deter certain employers. Member States would therefore be required to provide for criminal penalties for four types of serious cases: repeated infringements, the employment of a significant number of third-country nationals, particularly exploitative working conditions, and where the employer knows that the worker is a victim of human trafficking. To ensure in particular that individual employers are liable to criminal sanctions only in serious cases, a repeated infringement is criminalised only where it is the third infringement within a two-year period.

#### Article 12 and 13

Member States should ensure that legal persons can be held liable for criminal offences. It is not specified whether the liability of legal persons should be criminal liability. Thus, Member States that do not recognise the criminal liability of legal persons are not obliged to change their systems.

#### Article 14

To make enforcement more effective, mechanisms need to be in place through which third-country nationals can lodge complaints directly or through designated third parties. Such third parties should be protected against possible sanctions under rules prohibiting the facilitation of unauthorised entry and residence. Trade unions and NGOs have stressed the need for such a provision.

Additional measures are proposed to protect the third-country nationals in cases of particularly exploitative working conditions leading to criminal liability. First, those who cooperate in proceedings should benefit from the same possibility of being granted a temporary residence permit as already exists under EC law for victims of human trafficking who cooperate with the authorities. Secondly, their return should be postponed until they have actually received back payment of their remuneration.

#### Article 15

Member States would be required to undertake a certain number of controls on the basis of a risk assessment.

Proposal for a

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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>11</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>12</sup>,

Having regard to the opinion of the Committee of the Regions<sup>13</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty<sup>14</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.
- (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

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<sup>11</sup> OJ C [...], [...], p. [...].

<sup>12</sup> OJ C [...], [...], p. [...].

<sup>13</sup> OJ C [...], [...], p. [...].

<sup>14</sup> OJ C [...], [...], p. [...].

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.

- (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 residence permit or another authorisation for stay valid for the period of employment. The burden on employers should be limited to checking that the document is not manifestly incorrect, such as bearing a manifestly wrong photograph. 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.
- (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.
- (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.
- (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.
- (9) Member States should ensure that claims are lodged and mechanisms created to guarantee that recovered amounts of outstanding remuneration are received by the third-country nationals to whom they are due.
- (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.
- (11) Member States should provide for the possibility of further sanctions against business employers, including exclusions from entitlement to public benefits, aids or subsidies, including agricultural subsidies; exclusions from public procurement procedures; and recovery of public benefits, aids or subsidies, including EU funding managed by Member States, that have already been granted.
- (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>15</sup>.
- (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

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<sup>15</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).

severally liable to pay financial sanctions against an employer at the end of the chain who employs illegally staying third-country nationals.

- (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 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 and where the employer knows that the worker is a victim of human trafficking. Working conditions should be considered particularly exploitative where there is a significant difference in pay or in working conditions, particularly those affecting workers' health and safety, from those enjoyed by legally employed workers.
- (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>16</sup>.
- (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 employers are legal persons.
- (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 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<sup>17</sup>.
- (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.

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<sup>16</sup> OJ L 203, 1.8.2002, p. 1.

<sup>17</sup> OJ L 261, 6.8.2004, p. 19.

- (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>18</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 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.
- (24) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and 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*

1. This Directive lays down common sanctions and measures to be applied in the Member States against employers of third-country nationals who are illegally staying on the territory of the Member States, in order to take action against illegal immigration.

*Article 2*  
*Definitions*

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

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<sup>18</sup> OJ L 281, 23.11.1995, p. 31.

- (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 person, including legal persons, for and under the direction of whom a third-country national exercises remunerated activities;
- (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.

*Article 3*  
*Prohibition of illegal employment*

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

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

*Article 4*  
*Employers' obligations*

1. Member States shall oblige employers to:
  - (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;
  - (b) copy or record the content of the residence permit or other authorisation for stay before employment begins;
  - (c) keep for at least the duration of the employment the copies or records available for inspection by the competent authorities of the Member States.
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.
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.

*Article 5*  
*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.

*Article 6*  
*Financial sanctions*

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.
2. Sanctions in respect of each infringement of Article 3 shall include:
  - (a) financial penalties in relation to each illegally employed third-country national;
  - (b) payments of the costs of return of each illegally employed third-country national in those cases where return procedures are carried out.

*Article 7*  
*Back payments to be made by employers*

1. In respect of each infringement of Article 3 Member States shall ensure that the employer pays:
  - (a) any outstanding remuneration to the illegally employed third-country national;
  - (b) any outstanding taxes and social security contributions, including relevant administrative fines.
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.
3. Member States shall take the necessary measures to ensure that illegally employed third-country nationals receive any back payment of remuneration recovered under paragraph 1(a), including in cases in which they have or have been returned.
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).

*Article 8*  
*Other measures*

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:



- (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 during the 12 months preceding the detection of illegal employment;
- (d) temporary or permanent closure of the establishments that have been used to commit the infringement.

*Article 9*  
*Subcontracting*

1. Where the employer is a subcontractor, Member States shall ensure that the main contractor and any intermediate subcontractor are liable to pay:
  - (a) any sanction imposed under Article 6, and
  - (b) any back payments due under Article 7.
2. The main contractor and any intermediate subcontractor shall under paragraph 1 be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution or recourse.

*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 two previous findings that the employer has infringed Article 3;
  - (b) the infringement is in respect of a significant number of illegally employed third-country nationals. This shall be the case if at least four third-country nationals are illegally employed;
  - (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
  - (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.

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

*Article 11*  
*Sanctions for the criminal offence*

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

*Article 12*  
*Liability of legal persons*

1. Member States shall ensure that legal persons can be held liable for the criminal 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, instigators or accessories in the offence referred to in Article 10.

*Article 13*  
*Sanctions against legal persons*

Member States shall ensure that a legal person held liable for a criminal offence pursuant to Article 10 is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

- (a) exclusion from entitlement to public benefits or aid;
- (b) exclusion from participation in a public contract for up to five years;

- (c) temporary or permanent disqualification from the practice of agricultural, industrial or commercial activities;
- (d) placing under judicial supervision;
- (e) a judicial winding-up order.

*Article 14*  
*Facilitation of complaints*

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.
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.
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.

*Article 15*  
*Inspections*

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.
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.

*Article 16*  
*Reporting*

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.

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 and a correlation table between those provisions and this Directive.

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 Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*