

## EXPLANATORY MEMORANDUM ON EUROPEAN COMMUNITY LEGISLATION

Proposal for a Directive of the European Parliament and of the Council  
providing for sanctions against employers of illegally staying third-country  
nationals

Submitted by the Home Office on 20 June 2007.

### SUBJECT MATTER

1. This is a Commission proposal for a directive of the European Parliament and of the Council providing for common sanctions against employers of illegally staying third-country nationals in EU Member States.
2. This Explanatory Memorandum relates to a Commission proposal to tackle the causes of illegal migrant working. The Commission believes that illegal employment is one main pull factor driving illegal immigrants. It accordingly underlines the importance of the proposal for a Directive providing rules to avoid the illegal employment of third country nationals. The dossier proposes that, as part of a comprehensive European Migration policy, Member States introduce, co-ordinate and enforce similar measures on the prevention of illegal migrant working.
3. The proposal sets out how to provide for measures against employers of third-country nationals who are illegally resident and working in EU Member States. Infringements would be sanctioned by penalties (which may be administrative or criminal in nature) consisting of fines and, in the case of businesses, the possibility of other measures, including exclusion from and the 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 regular inspections.
4. It is a proposal for legislation specifically on those who have entered the EU illegally and 'overstayers' who entered the EU legally, but whose rights to stay have expired. It does not apply to those who have valid leave to remain, but who are working in breach of their visa requirements. Equally, these options will not affect EU citizens from those countries who acceded to EU membership in 2004 and 2007 under transitional arrangements and with restricted rights to work in some Member States, including the UK.

5. Of the 27 EU Member States, at least 26 already have employer sanctions and preventative measures against illegal migrant working. Nineteen of these have criminal sanctions, but the requirements of the legislation and the implementation of these measures vary greatly between states. In addition, there is an acknowledged problem that irrespective of the criminal sanctions available, there are still high numbers of illegally working migrants.

### **SCRUTINY HISTORY**

6. This is the first draft of the proposal for an EU Directive providing for sanctions against employers of illegally staying third-country nationals and has therefore not been previously submitted for parliamentary scrutiny.
7. The draft directive is a result of a Communication from the Commission on policy priorities in the fight against illegal immigration of third country nationals (Dossier number 11881/06, COM(06) 402) which was published on 19 July 2006 and deposited in Parliament on 24 July. A Home Office Explanatory Memorandum was deposited on 17 August and the document was cleared by the European Scrutiny Committee on the 11 October 2006 (report 27722) and by the House of Lords European Union Committee sub-committee F (Home Affairs) on the 18 October 2006.

### **MINISTERIAL RESPONSIBILITY**

8. The Home Secretary has responsibility for the prevention of illegal working on a reserved basis throughout the United Kingdom.
9. There is no devolved responsibility for these matters.

### **LEGAL AND PROCEDURAL ISSUES**

#### **i) Legal basis**

10. The Commission has adopted the measure under Article 63(3)(b) of the EC Treaty. At working group level the Commission indicated that it would be desirable for the scope of this proposal to include migrant workers with legal status who are working in breach of their conditions, however, this has not been possible as the current legal base can only cover measures that relate to immigration and illegal residence.

#### **ii) European Parliament procedure**

11. The proposal will be subject to the co-decision procedure.

#### **iii) Voting procedure in the Council**

12. Qualified Majority Voting

#### iv) Impact on United Kingdom Law

13. The Government supports the general purpose of the draft Directive, which is that Member States introduce, co-ordinate and enforce similar measures on the prevention of illegal migrant working. Current controls on the prevention of illegal migrant working in the UK are provided in section 8 of the Asylum and Immigration Act 1996 (as amended by subsequent legislation) and applies exclusively to those employing illegal migrant workers. These measures came into force on 27 January 1997. (Separate penalties exist under the 1971 Immigration Act for those with visas who are found to be working in breach of their conditions of stay, in addition to those who have entered and are living/working in the UK illegally.)
14. Under section 8, it is an offence to employ a person over 16 who is subject to immigration control and who has no permission to work in the UK, or works for an employer in breach of their conditions of stay in the UK. This goes further than the EU proposals, as it applies to all migrant workers working unlawfully, irrespective of whether they are in the country legally or illegally. The current maximum fine available to the courts on summary conviction of an individual for the existing offence of employing an illegal worker under section 8 is £5,000. In addition, following conviction after indictment, the employer can receive an unlimited fine.
15. The draft EU directive proposes that employers would be required to undertake certain checks before recruiting a third-country national. Similar measures are currently in place in the UK; employers are encouraged to check original documents presented by all potential employees to establish a statutory defence against a charge under section 8.
16. New measures to replace section 8 were provided in the Immigration, Asylum and Nationality Act 2006. These include civil penalties for each illegal migrant worker found, and those employers prosecuted for the more serious offence of knowingly employing an illegal migrant worker could be imprisoned for up to two years and/or receive an unlimited fine. However, certain aspects of the new legislation, such as the level of civil penalty to be levied, are currently subject to a public consultation and the 2006 Act measures have yet to be commenced.
17. Secondary legislation to bring these measures into force is due to be introduced in autumn 2007, following the publication of the results of the public consultation. The EU proposals would have no discernable impact upon the provisions of this legislation.
18. It is too soon to anticipate whether we will need further legislation to implement the main proposals of this legislation. However, broadly speaking we believe that relevant legislation is either currently in place or is imminent. As there is no devolved responsibility for immigration issues, this would not have a direct effect upon Scotland, Wales or Northern Ireland.

## **v) Application to Gibraltar**

19. Measures under Title IV in which the UK participates apply to Gibraltar by virtue of Article 299 (4) TEC.

## **vi) Application to the European Economic Area**

20. This proposal does not apply to the non-EU EEA States.

## **SUBSIDIARITY**

21. The Commission is determined to reduce the perceived pull factor for illegal immigration into the EU by focussing on the prevention of illegally resident migrants from working. The Commission is concerned that a disparate approach across the European Union is not conducive, and argues that co-operation and co-ordination on enforcement and legislative matters between Member States would produce a more constructive approach.
22. The Commission contends that the legislation providing for preventative measures and sanctions used by the individual member states would not be sufficient to tackle the problem. Therefore, the Community considers that it is acting within the limits of the powers conferred upon it by the Treaty and that it is conforming to the principle of subsidiarity.

## **POLICY IMPLICATIONS**

### General remarks

23. In terms of legislative requirements, the UK is already compliant, or is potentially compliant with the majority of the proposals made and this does not present any substantial alterations to our policy on the prevention of illegal migrant working. As this is a Title IV measure, the UK has an opt-in and is currently considering, in consultation with relevant OGDs, whether or not to participate in this proposal.
24. These proposals are not purely restricted to illegal working policy (although that is the main focus) and will have wider-reaching affects. This is because there are accompanying measures proposed in the directive, which are designed to stimulate the transformation of undeclared work into declared employment, by touching upon the areas of taxation, social security, labour law, the provision of specific services to interested employers and employees, which indicate the need for a wider consultation across Government departments.
25. As the main policy holder, the Border and Immigration Agency has developed good working relationships with other governmental departments to work towards this broad remit, but there are still aspects of the proposals that may adversely affect UK Government policy which need to be carefully considered before taking a final decision on whether to participate in this proposal.

The relevant issues are pointed out below.

### **Articles 1& 2 – common sanctions against employers**

26. The potential administrative costs that would result from these measures may be mitigated by the fact that these requirements would be required of all EU employers. However, the potential costs to smaller businesses and those private individuals acting as employers (i.e. of cleaners, nannies, etc.), is potentially problematic. Furthermore, some sectors may feel that they bear a disproportionate cost in operating PAYE on a transient workforce.

### **Articles 4 & 5 – checking of working entitlement prior to employment to establishment of defence against legal sanctions, including notification of national authority**

27. The proposed requirement to notify the “competent authorities” department of the starting and leaving date of all workers provides a point of contention, and may impose an additional significant administrative burden on employers if this is taken to require a new system of registration.

28. However, there are arguably existing measures that already do this – for example, the granting and acceptance of a P45 from an employer to an employee notifies the relevant departments of changes to an individual’s working status. The national monitoring of working status through the National Insurance Number (NINO) system is operated by the Department for Work and Pensions (DWP) (with recent strengthening of the allocation of NINO based upon illegal working legislation introduced in 2004) and HM Revenue & Customs (HMRC) are also able to monitor employment of individuals through payment of tax and National Insurance contributions.

29. Furthermore, proposed Biometric Identity Documents will require registration of biometric details of all those foreign nationals working in the UK by the Border and Immigration Agency. These will be supported by threats of sanctions for non-compliance (financial penalty / curtailment of leave / imprisonment, or a combination of these).

### **Article 7 – employers would be required to pay any outstanding remuneration to illegally employed foreign nationals**

30. This may present problems. Under current law, there are provisions in place to protect payment rights for those legally employed in the UK. However, individuals cannot generally enforce statutory employment rights if they work illegally and it is for the courts to decide on individual cases presented. There are potential exceptions to the general position, for example, if it was found that a worker was unaware of their illegality and it was reasonable for him to have been unaware of it. In addition, there is no legal obstacle to *prevent* the employer from paying the individual for the work, but without the illegal worker seeking to take action, which may or may not be successful depending on the will of the court, there is currently nothing to compel the employer to do so. However, these Articles present real questions here about providing illegal

migrants with protection under UK law and that by introducing these requirements, this may lead to a significant administrative burden on government departments.

**Article 8 – sanctions on employers including disqualification from / renumeration of received public benefits, EU subsidies for set periods of time.**

31. Powers currently exist to disbar offending employers from being company directors, but nothing specific to recoup any public funding received. This may prove difficult to administer and may potentially cause administrative difficulties.

**Article 9 – where financial penalties cannot be applied to sub-contractors, these will become payable further up the employment chain**

32. The proposed definition is goes much wider than the current UK definition of employer which is restricted to those in contractual employment, whether express or implicit. This may create obstacles to prosecution, undermining the objectives of the directive. There are concerns that this would appear to complicate an area that is already fraught with difficulties and whilst the absolute clarity of communication to employers is essential, the potential impact on commercial relationships should not be underestimated. The proposal also places responsibility, and therefore liability, on all employers within the sub-contractual chain which goes wider than current UK policy.

**Articles 10 & 11 – criminal sanctions should be made available to tackle serious breaches of legislation and deter further infringements**

33. The current maximum fine available to the courts on summary conviction of an individual for the existing offence of employing an illegal worker under section 8 is £5,000. In addition, following conviction after indictment, the employer can receive an unlimited fine. In our current public consultation, we are currently requesting feedback from participants regarding our illegal working action plan, whereby the employment of 4 illegal workers or more indicates a more serious offence.
34. There are concerns that the introduction of a criminal offence through an EU Directive is a red line issue for HMG (and for many other Member States we believe) and is currently being considered by the ECJ. We are awaiting further comments on this matter.

**Articles 14 – allows foreign nationals to register complaints and have protection against exploitative working conditions, leading to criminal liability.**

35. There are measures currently in place to take allegations of trafficking or worker abuse associated with illegal migrant workers; for example, the Gangmaster Licensing Authority currently have arrangements with the

"Crimestoppers" helpline.

36. Existing UN and EU Conventions both cover support for victims of trafficking, reflection periods, support for victims etc. In addition, the UK is a signatory to the EU convention in respect of "forced labour" and sexual exploitation.

**Article 15 – member states would be required to undertake a certain number of controls on the basis of a risk assessment**

37. Whilst there is no central department responsible for workplace inspections, there are existing provisions for government departments to undertake inspections on workplaces, for example, where there are believed to be cases of illegal migrant working (Home Office), potential breaches of tax or customs regulations (HMRC), benefit fraud (DWP), health and safety concerns (HSE) or general criminality (Home Office).

**REGULATORY IMPACT ASSESSMENT**

38. A full Regulatory Impact Assessment (RIA) for the measures in the 2006 Act were published on 22 June 2005, prior to the passage of the Immigration, Asylum and Nationality Bill through Parliament. The RIA is available to download from the preventing illegal working pages of the BIA website via: [www.bia.homeoffice.gov.uk](http://www.bia.homeoffice.gov.uk)

**FINANCIAL IMPLICATIONS**

39. The costs expected as a result of measures to be introduced under the Immigration Asylum and Nationality act 2006 were covered by a Regulatory Impact Assessment conducted in June 2005 (prior to the introduction of the primary legislation). Whilst these cover the new sanctions and regulations to be introduced under the 2006 Act, it is, as yet, unclear how much the measures proposed under the Directive might affect these existing calculations, but the existing RIA provides reasonably accurate guidance on this.

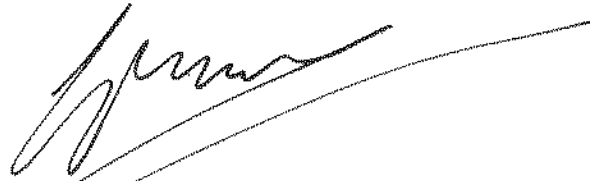
**CONSULTATION**

40. The Government maintains close contact with colleagues in other government departments and non-governmental bodies, including voluntary sector organisations concerned with immigration and asylum. This is done through a variety of bilateral and multilateral meetings, organised as required, but there are also structured working groups, including the Illegal Working Group. This is jointly chaired by Ministers from the Home Office and the DTI, contains representatives from business, trades unions, representatives of employer organisations and has met regularly since 2002.
41. In addition, we announced a public consultation on our proposed policies to prevent illegal migrant working on 15 May and have distributed consultation documents to a wide audience. This consultation will run for 12 weeks, as

recommended by Cabinet Office, and a report on the results will be available later this year (October / November).

#### **TIMETABLE**

42. The Directive proposal was announced on 16 May and published on 23 May 2007. Discussions on this draft proposal have already begun at Working Group level in Brussels and the incoming Portuguese Presidency has indicated that they will give this dossier priority.



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