



**COUNCIL OF
THE EUROPEAN UNION**

**Brussels, 3 July 2008 (07.07)
(OR. en,fr)**

11000/08

**Interinstitutional file:
2007/0094 (COD)**

LIMITE

**MIGR 46
SOC 370
DROIPEN 57
CODEC 844**

NOTE

from:	Presidency
to:	Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)
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 level of harmonisation of administrative, financial and criminal penalties against employers of illegally staying third-country nationals. This proposal forms part of the EU's efforts to develop a comprehensive migration policy and aims at combating a key pull factor encouraging illegal immigration and leading to the exploitation of migrants. Its objective is to establish a common deterrent framework within which Member States will act.
2. This proposal for a Directive has been under discussion in Council bodies (Working Party on Migration and Expulsion and SCIFA) since June 2007.

In addition, in accordance with the decision taken by COREPER at its meeting on 5 July 2007, the Working Party on Social Questions¹ and the Working Party on Substantive Criminal Law² have submitted their opinions on the proposal for a Directive as regards the areas falling within their competence.

Further to the work done under the Slovenian Presidency, the French Presidency has drawn up a draft compromise, discussed by the Working Party on Migration and Expulsion on 1 July 2005³.

3. In the European Parliament, votes are due to be held by the Committee on Employment in September, and by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) in October. As the schedule currently stands, the plenary vote could be held in November 2008. Informal contacts have already taken place with the rapporteurs.
4. With a view to preparing for the policy debate to be held in the JHA Council on 24 and 25 July 2008, the following points are referred to SCIFA:
 - (a) **Articles 10 to 13 on criminal penalties**, as set out in Annex to this document. We would point out that the Council Legal Service has delivered an opinion on this question⁴.

Some delegations have expressed reservations or doubts, during the experts' proceedings, as to the possibility or desirability of introducing minimum standards as regards criminal penalties in this Directive.

Most delegations seem prepared, however, to include such standards in the Directive given that they are essential for the effective prevention and combating of the employment of illegally staying third-country nationals.

¹ (11764/2/07)
² (6407/08)
³ (10770/08)
⁴ (14655/07)

The text of the compromise presented by the Presidency conforms to the latter approach while leaving Member States the necessary room for manoeuvre.

SCIFA is requested to examine all these articles, in particular with a view to identifying any changes in the respective positions and helping to prepare the terms of the general ministerial discussion at the next JHA Council on the appropriateness of the current Articles 10 to 13 to the objective of combating a key pull factor encouraging illegal immigration.

- (b) **Article 15 on inspections**, as set out in Annex to this document.

Some delegations expressed reservations on the inclusion of a quantified target for inspections (5%) to be achieved three years from now in the sectors of activity identified by each Member State as being the most exposed. Other delegations are able to accept the balance established by this solution.

SCIFA is requested to re-examine the content of this article with a view to the ministerial discussion at the next JHA Council meeting.

5. Lastly, SCIFA is requested to examine **Article 9 on subcontracting** on the basis of the wording set out in Annex, in order to provide guidance for the proceedings of the Working Party on Migration and Expulsion at its next meeting on 1 September 2008.

(Amendments to the text as set out in 10770/08 are shown in bold)

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 shall ensure 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. **Member States may decide not to apply paragraph 1 where the client is a natural person and the employment is for his private purposes.**
3. 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.
4. **A client or** a contractor that has undertaken due diligence obligations as defined by national law shall not be held liable under paragraph 1 or 3.
5. 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 **a significant number of** 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 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 **for up to** 12 months preceding the detection of illegal employment;
- (d) placing under judicial supervision;
- (e) a judicial winding-up order.

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 is 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, **except where the employer is a natural person and the employment is for his private purposes**, are subject to inspections to control employment of illegally staying third-country nationals⁵.
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.

⁵ It is suggested that a recital be inserted in the Preamble stating that the inspections could also be used to control matters other than the employment of illegally staying third country nationals.