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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. At its meeting of 2 September 2008, the Working Party examined Articles 1-9 and 14, 16-17 of the draft Directive on the basis of then submitted Presidency compromise suggestions.
2. The results of the discussions are set out in the Annex to this Note, with delegations' comments in the footnotes. New Presidency compromise suggestions are highlighted in bold.

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 standards on sanctions and measures to be applied in the Member States against employers who infringe this prohibition.¹

Article 2

*Definitions*²

For the specific purposes of this Directive, the following definitions shall apply:³

- (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 A recital is suggested to be added: "This Directive should not apply to third-country nationals staying legally in the Member States, allowed or not to work, in their territory. 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 **PT** suggested adding a definition on the term "particularly exploitative working conditions" which is used in Articles 10 and 14.

³ 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 remunerated⁴ for or under the direction of an employer;⁵
- (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 [...];⁶
- (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, with the exception of a natural person for whom the employment is undertaken for his/her private purposes;⁷
- (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 assigned.
- (i) "legal person" means any legal entity having such status under applicable national law, except for States or public bodies in the exercise of State authority and for public international organisations.

⁴ **NL** suggested deleting the wording "are or ought to be remunerated".

⁵ **HU** suggested adding at the end of the sentence: "irrespective of the legal relationship". **BE, CZ, FI, SE** maintained reservations on the definition, asking for its linkage with national law. **PL** expressed concern about the wording "for **or** under". **IT** suggested drawing on the language of Directive 2002/14/EC providing a framework for informing and consulting employees. **ES** preferred the wording in doc. 12067/08.

⁶ **CZ, FI, SE** maintained reservations on the definition, asking for its linkage with national law.

⁷ **IT** (which suggested deletion) **AT, NL** [also for points (g) and (h)] - and **SE** maintained reservations on this definition.

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.⁸

Article 4

*Employers' obligations*⁹

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 stay¹⁰;
 - (b) keep for at least the duration of the employment a copy or record¹¹ of the residence permit or other authorisation to stay available for possible inspection by the competent authorities of the Member States.
 - (c) notify the competent authorities designated by Member States of the start of employment of third-country nationals [...] within a period laid down by each Member State, [...].¹²

⁸ A recital will be inserted indicating that a Member State could provide for more severe sanctions under national law.

⁹ **NL** maintained a reservation on paragraphs 1(c), 2 and 3, asking for their deletion.

¹⁰ **ES** maintained its reservation on the wording “ or other authorization for their stay” - idem for point (b).

DE suggested that cases where a residence permit is not required to work (such as work for three months within a twelve-month period) should be excluded from the scope of this Article.

PL queried on the scope of this Article with regard to employees whose access is not restricted in the labour market of the Member State concerned.

¹¹ **DE** did not support the obligation to keep a copy or record of the residence permit.

¹² **BE, EL, ES, HU, IT** and **PT** maintained scrutiny reservations on the point suggesting that the termination of the employment should also be notified. **DE** supported the current wording. **PL** suggested making this point optional.

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 incorrect¹³ [...].¹⁴
3. Member States shall ensure that employers who have fulfilled their obligations set out in paragraph 1 shall not be held liable for infringing **the prohibition referred to in Article 3** unless they know that the document presented as a valid residence permit or another authorisation for stay is a forgery.¹⁵

Article 5

Consequence of fulfilling the employers' obligations

[Transferred to paragraph 3 of Article 4]

¹³ 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.”

¹⁴ **DE** considered that the wording of this paragraph should be clarified or deleted. **IT, PT** also supported the deletion of the provision.

¹⁵ **PL** queried about the cases where a valid residence permit expires after the start of the employment. **IT** entered a reservation on the reference to "knowledge of forgery". **IT** maintained a reservation and **DE** a scrutiny reservation on the point.

Article 6

*Financial sanctions*¹⁶

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 include¹⁷ in particular sanctions in relation to [...] ¹⁸ illegally employed third-country nationals and payments of the costs of return of illegally employed third-country nationals in those cases where return procedures are carried out.¹⁹

Article 7²⁰

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 nationals²¹:
 - (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;

¹⁶ **DE** sought clarification that criminal sanctions are not to be used under this Article.

NL suggested adding the following wording as paragraph 3:

"Member States shall take the necessary measures to ensure that, in case of an infringement of the prohibition referred to in Article 3 by an employer who is a contractor, financial sanctions may also be imposed - in place of or next to financial sanctions imposed on the employer - on the client of the contractor, unless the client has undertaken due diligence obligations as defined under national law".

¹⁷ **SE** suggested rendering this provision optional on a case-by-case basis.

ES suggested transferring this point to Article 7 or in a new paragraph in Article 6, without prejudice to the financial sanctions in paragraphs. 1 and 2.

¹⁸ **ES, Cion** opposed the deletion of the word "each".

¹⁹ **NL** pointed out that the cost related to return should be included in the lump sum imposed on the employer regardless of the actual return.

²⁰ 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".

²¹ **DE** suggested inserting a specific prescription time for the claims.

- (b) are as soon as possible and systematically informed about the possibility to introduce such a claim, before the enforcement of any return decision.²²
2. In respect of the claims referred to paragraph 1, Member States shall provide that:
- (a) a work relationship of at least 3 months²³ 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, **while respecting, where appropriate, the mandatory national provisions concerning wages.**
3. Member States shall **ensure that the necessary mechanisms, including the availability of civil procedures, are in place to ensure that** illegally employed third-country nationals **are able to receive** any back payment of remuneration that is recovered under the claims referred to in paragraph 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.²⁴

²² **DE** maintained a scrutiny reservation on this point with regard to the notions of "as soon as possible and systematically".

²³ **CZ, ES, HU, AT** maintained reservations scrutiny reservations on the presumption of a work relationship and on its presumed duration of three months.

²⁴ Following a query by **SE**, **CLS** pointed out that if a measure is to fall within tax policy, it must nevertheless contribute to the pursuit of that policy's objectives. In that regard, **CLS** considers that the proposed Directive aims exclusively at preventing and / or sanctioning employment of illegal immigrants. If a provision such as Article 7(4) can contribute to combat the said employment, this provision forms part of the general aim and it has not the specific objective of a tax policy matter. **CLS** considers that Article 7 (4) does not fall within a competence conferred by the EC Treaty under the tax provisions.

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 [...], be subject to the following measures :²⁵
 - (a) exclusion from entitlement to **some or all** public benefits, aid or subsidies for up to five years;
 - (b) exclusion from participation in a public contract as defined in Directive 2004/18/EC²⁶ for up to five years;
 - (c) recovery of **some or all** public benefits, aid, or subsidies, including EU funding managed by Member States, granted to the employer for up to [...] 12 months preceding the detection of illegal employment;
 - (d) temporary or permanent closure of the establishments that have been used to commit the infringement, or temporary or permanent withdrawal of a licence to conduct the business activity in question. [...]
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.²⁷

²⁵ **DE, NL** maintained scrutiny reservations on points (1)(a), (b) [only **DE**] and (c).

²⁶ 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.

²⁷ **EL** expressed concern regarding the optional character and the added value of the provision as well as the deletion of the word "household" which might enlarge overtly the derogations.

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 provide²⁸ 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 7.²⁹
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 knew³⁰ 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.

²⁸ **BE** (which maintained a reservation on the Article) and **ES** suggested replacing "may" with "shall".

²⁹ **IT** suggested deleting the provision referring to the client. **NL** maintained its reservation in particular with regard to point (b), while suggesting transferring the substance of this Article to Article 6(3) (see relevant footnote) as a possibility to impose a fine on anyone in the chain of contractors and thus, deleting Article 9.

FI, **PL** (which suggested deleting Article 9) and **SE** maintained their reservations. **DE** entered a scrutiny reservation on the provision as well as on the IT and NL suggestions.

DE, **LV** and **AT** expressed concerns about the scope of the term "client" (whether it includes private individuals or not).

³⁰ **EL** suggested adding "or ought to have known".

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 **and as defined by national law**:
 - (a) the infringement continues or is **persistently** repeated [...];
 - (b) the infringement is in respect of the simultaneous employment of a **significant number of** illegally employed third-country nationals. [...];
 - (c) the infringement is accompanied by particularly exploitative working conditions [...];
 - (d) [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 [...].

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, **including EU funding managed by Member States**, 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.³¹
2. **Providing assistance to third-country nationals to lodge complaints should not be considered as facilitation of unauthorized residence under Directive 2002/90/EC.**
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 conditions³² and cooperate in proceedings against the employer.
4. [Deleted]

³¹ It is recalled that recital 18 refers to the types of bodies that could be designated as such third parties.

EL suggested that the complaints should be lodged within a reasonable period defined by Member States.

³² **BE** maintained a reservation on the notion of "particularly exploitative working conditions". **SI** pointed out that it would up to the judiciary to define it.

SE suggested, in connection with its reservation for Article 10 (1)(c), deleting the paragraph. **PT** expressed concerns about the impact of the provision in the return policies of the Member States. **ES** maintained a reservation on the point. **SI** pointed out that it would up to the judiciary to define the

Article 15

*Inspections*³³

1. Member States shall ensure that effective and adequate inspections are carried out on their territory to control employment of illegally staying third-country nationals. **Such inspections shall be based primarily on a risk assessment to be drawn up by the competent authorities in the Member States.**

2. **With a view to increasing the number and effectiveness of inspections:**
 - (a) **Member States shall ensure that:**
 - (i) **national legislation gives adequate powers to competent authorities to make the inspections referred to in paragraph 1;**
 - (ii) **information about illegal employment, including the results of previous inspections, is collected and processed for effective implementation of this Directive; and**
 - (iii) **sufficient staff are available with the skills and qualifications needed to carry out effectively the inspections referred to in paragraph 1.**
 - (b) Member States shall on the basis of a risk assessment regularly identify the sectors of activity in which the employment of illegally staying third-country nationals are concentrated on their territory. **In respect of each of those sectors, Member States shall each year before 1 May notify to the Commission:**
 - (i) **a national target for the number of inspections, expressed as a percentage of the employers in the sector, for the current year; and**
 - (ii) **the number of inspections carried out in the previous year as well as their results and impact.**

³³ 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. 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 8³⁴ [...].

On the basis of those reports **and the notifications made under 15(3)(b)**, the Commission shall submit a report to the European Parliament and the Council including, where appropriate, proposals for amending the provisions in Article 15.

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.

³⁴ **AT** maintained a reservation on the focus of the report to Article 8.

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