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COMMISSION STAFF WORKING PAPER

Accompanying document to

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

**Measures to prevent and reduce the employment of third country nationals
who are illegally staying or working in breach of their residence status**

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Measures to prevent and reduce the employment of third-country nationals who are illegally staying or working in breach of their residence status

1. This paper accompanies the Commission's proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals. The proposal aims to reduce the pull factor encouraging illegal immigration into the EU through the possibility of finding work.
2. In the course of preparing the proposal for a Directive (hereinafter "legislative proposal"), it became clear that legislation providing for preventive measures and sanctions would not of itself be sufficient to tackle the problem. This paper therefore recommends additional measures to help achieve the policy objective of reducing the employment of illegally staying third-country nationals (hereinafter "illegal employment").
3. Measures are identified in each of the following areas:
 - Acting against undeclared work
 - Improving enforcement
 - Identifying and exchanging good practices
 - Improving the gathering and exchange of information.
4. The aim is to ensure that these measures are in place to help implement the proposed Directive in the Member States once adopted. There would be a certain value in taking some or all of the measures in this paper even before the Directive is implemented; but these measures are designed to complement the legislation and would not of themselves be a sufficient response to the problem.
5. These measures have a wider scope than the legislative proposal, which applies only to third-country nationals who are illegally staying. To reduce the employment pull factor it is important also to tackle the situation of third-country nationals working in breach of their residence status, e.g. working full-time on a student visa. EU citizens are not covered, and nor are third-country nationals who cannot be considered to be illegally staying or working in breach of their residence status: family members of EU citizens, citizens of EEA and non-EU Schengen states, and employees posted to another Member State in the context of the provision of services.

1. ACTING AGAINST UNDECLARED WORK

6. Action against the employment of third-country nationals who are illegally staying or working in breach of their residence status needs to complement and reinforce action against the wider problem of undeclared work of which it is part.
7. The European Employment Strategy and the employment guidelines pursue a comprehensive policy aimed at transforming undeclared work into formal employment. The Council Resolution of 20 October 2003 on "transforming

undeclared work into regular employment” emphasizes the need for a comprehensive approach including both preventative measures and sanctions. Undeclared work (including that carried out by third-country nationals) is in fact a complex phenomenon and may be a structural feature in specific sectors and areas of the EU due to a number of economic, institutional and historical factors which go well beyond individual choices. Accompanying measures, which stimulate the transformation of undeclared work into declared employment (touching upon taxation, social security, labour law, provision of specific services to interested workers/firms), need also to be envisaged. The Joint Employment Report 2006/2007 stresses the need for more comprehensive approach to tackle undeclared work combining active labour market policies, flexible contractual arrangements, lifelong learning and modern social protection systems, in line with the flexicurity policy principles.

8. In autumn 2007, the Commission will present a Communication on the wider policy approach on undeclared work which will present recent analytical work on the measurement of undeclared work and discuss avenues for tackling this phenomenon.

9. **Recommended measures:**

(1) The Commission will adopt a Communication on undeclared work.

2. **IMPROVING ENFORCEMENT**

10. The impact assessment has shown that enforcement is key to providing an effective instrument. The adoption by Member States of the sanctions in the proposed Directive would not of itself be enough to ensure that the competitive and financial advantages of employing third-country nationals who are illegally staying or working in breach of their residence status are no longer perceived as dwarfing the risk of being caught.

11. Enforcement of immigration legislation is the responsibility of the Member States, not the EU. Nevertheless, measures at EU level are justified in order to help ensure the effectiveness of the sanctions in the proposed Directive and to prevent distortions of competition that varying levels of enforcement could bring about. To complement the enforcement obligations in the legislative proposal, this section therefore recommends other non-legislative measures to improve enforcement. First, consideration is given to issues that arise in cross-border situations.

2.1. **Cross-border enforcement issues**

12. Work on the impact assessment identified one of the challenges for enforcement as being that there is insufficient international cooperation. Two specific areas of concern raised in the preparatory work relate to bogus posted workers and the cross-border enforcement of sanctions.

13. Legally employed **third-country nationals may be posted to another Member State in the context of the provision of services**. In such cases it is the service provider, as employer, that would be responsible for complying with the prohibition in the proposed Directive on employing illegally staying third-country nationals.

Accordingly it is the authorities in the Member State in which the service provider is established that would be responsible for enforcing the prohibition.

14. What if an enforcement body conducts a workplace inspection and finds third-country nationals who claim to be legally employed and legally posted but whose claims the enforcement body doubts and wishes to have checked? The case-law of the European Court of Justice has established that posted third-country national workers may not be the subject of administrative formalities or additional conditions when they are lawfully employed by a service provider established in another Member State, without prejudice to the right of the host Member State to check that these conditions are complied with in the Member State where the service provider is established¹. The most appropriate way in this case to make the relevant check (that the third-country national is legally staying with a work permit in the Member State where the service provider is established) would seem to be through administrative cooperation between the national authorities responsible for enforcement. A further complication in respect of measures against the employment of illegally staying third country nationals is, however, that in several Member States it is not the labour inspectorate that is responsible for enforcing such measures. This issue merits also further examination and reflection.
15. Article 4 of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services² imposes obligations on Member States as regards cooperation between national administrations, especially in the context of possible cases of unlawful transnational activities. In its April 2006 Communication 'Guidance on the posting of workers in the framework of the provision of services', the Commission found, *inter alia*, that there is considerable scope for improving administrative cooperation between labour inspectorates³. Furthermore, the Commission committed itself to monitor closely developments (and improvements) in the Member States with respect to all aspects covered, including cooperation between Member States and that it will take the appropriate steps and measures to rectify the situation, if necessary. The adoption of the follow-up Communication (and its accompanying Staff Working Paper) responding to the commitment made by the Commission in its April 2006 Communication is foreseen for the beginning of June 2007.
16. As regards the **cross-border enforcement of sanctions**, the recognition and enforcement of criminal fines will be made possible by the implementation of Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties⁴. However, that instrument does not apply to non-criminal fines. The Commission will seek information from Member States as to the extent of practical problems in the cross-border enforcement of sanctions in this area, and, in the light of the replies, suggest appropriate improvements.

¹ COM(2006) 159, at Section 2.2.

² OJ L 18, 21.1.1997, p.1.

³ COM(2006) 159, 4.4.2006. See also the accompanying Commission Staff Working Paper SEC(2006) 439, at Section 5.2.2.

⁴ OJ L 76, 22.3.2005, p. 16.

2.2. Other enforcement issues

17. One way of reducing the incentives for employers to employ third-country nationals who are illegally staying or working in breach of their residence status is to **ensure compliance with legislation relating to working conditions**. Member States should therefore, as suggested in the Commission's July 2006 Communication, apply effective sanctions for breaches of legislation in particular on health and safety at the workplace which often occur in the context of illegal employment.
18. The preparatory work for the legislative proposal and in particular the impact assessment work have identified other ways of enhancing enforcement of the prohibition on employing illegally staying third-country nationals:
- **Better coordination and cooperation between all stakeholders within the Member States** is needed at local level and between the local, regional and national levels (e.g. between immigration authorities, labour inspectorates, social security offices, tax offices, and police). This may require specific frameworks for cooperation to be set up, which may need to include data protection rules.
 - **Alliances of, or involving, the social partners** would be a promising approach.
 - **More human and financial resources for enforcement bodies** may be necessary.
 - **Better information is needed on which to base enforcement strategy**. An effective enforcement strategy needs to be based on information and intelligence and risk assessment.
 - **Simplifying and/or modernising administrative formalities**, e.g. changing the work permit system. In this regard the Commission may in its proposal for a general framework directive addressing labour immigration (to be presented in September 2007) consider proposing that legal migrants be issued with a single joint work/residence permit, to be held by the worker and containing biometric identifiers. Such a permit would be less easy to forge and would simplify procedures for immigrants and employers.
 - **Awareness-raising campaigns** have been undertaken in most Member States.
19. **Recommended measures:**
- (2) The Commission will seek information from Member States as to the extent of practical problems in the cross-border enforcement of sanctions in this area, and, in the light of the replies, suggest appropriate improvements.
 - (3) Member States should apply effective sanctions for breaches of legislation in particular on health and safety.
 - (4) Member States should consider the following ways of enhancing enforcement:
 - (a) Better coordination and cooperation between all stakeholders.

- (b) Alliances of, or involving, the social partners.
 - (c) More human and financial resources for enforcement bodies.
 - (d) Better information on which to base enforcement strategy.
 - (e) Simplifying and/or modernising administrative formalities.
 - (f) Awareness-raising campaigns, the target audiences of which should include individuals and businesses and especially small and medium-sized enterprises.
- (5) The Commission may in its proposal for a general framework directive addressing labour immigration consider proposing that legal migrants be issued with a single joint work/residence permit.

3. IDENTIFYING AND EXCHANGING GOOD PRACTICES

20. Once the proposed Directive is adopted by the European Parliament and the Council the Commission will, as has been the practice with other directives in the field of immigration, organise meetings of the **Contact Committee** to enable the Member States and the Commission to exchange views on issues arising from the transposition of the Directive into national legislation.
21. The impact assessment also identified the **identification and exchange of good practices** as being part of the preferred option. Both preventive measures and enforcement should be covered, and, in addition to the issues relating to enforcement identified in the previous section, could include issues such as:
- systems of employer inspections, including possible exchanges of officials;
 - the training of enforcement officials, and also employers and designated third parties (such as trades unions and NGOs) through which illegally staying third-country nationals can lodge complaints;
 - the detection of systematic and large-scale illegal employment;
 - the application of sanctions;
 - methods for regularising/ removing third-country nationals identified as working illegally by the enforcement process;
 - the links between illegal employment of third-country nationals without the right to work and the wider informal economy.
22. The methods used in this exchange of experience could include research, evaluation and peer learning activities. To provide a framework for exchange, the Commission recommends that **a network of national contacts points** be established. Unlike the Contact Committee whose purpose is to assist Member States particularly in the legal transposition of a directive, the network would have a wider remit to deal also for example with relevant issues outside the scope of the Directive. The Commission

would be fully associated with the network and could provide logistical support. The network could itself decide what precise activities need to be undertaken. It could, for example, decide to translate standards and best practices into a Handbook for practitioners and a common training curriculum for enforcement officials.

23. **Recommended measures:**

- (6) The Commission will ask Member States to nominate national contact points and convene a kick-off meeting.

4. **IMPROVING THE GATHERING AND EXCHANGE OF INFORMATION**

24. In order to assess **numbers of third-country nationals who are illegally staying or working in breach of their residence status and their work**, various indirect methods have been used. In addition, direct surveys have also been conducted by researchers and NGOs who are in a position to gain the trust of illegally staying third-country nationals. The undocumented nature of illegal immigration means, however, that there remain uncertainties as to the numbers involved; these uncertainties make it more difficult to design policies to tackle the problem. As stated in the Commission's July 2006 Communication⁵, policies to fight illegal work should be supported by improved information both on the phenomenon of work undertaken by third-country nationals who are illegally staying or working in breach of their residence status and on Member States' measures to reduce such employment. This should include information to be collected directly from illegally staying third-country national workers in cooperation with NGOs.

25. The proposed **Regulation on Community statistics on migration and international protection**⁶ provides for the collection of certain statistics to help obtain a clearer picture of third-country nationals refused entry to the Member State's territory at the external border; third-country nationals found to be illegally present in a Member State's territory; and third-country nationals who are returned. However, Member States are not required to provide estimates or data on those who are illegally resident.

26. For the purposes of monitoring application of the proposed Directive, it may be necessary to collect statistics on third-country nationals found to be illegally present specifically as a result of the enforcement of employer sanctions. The additional disaggregation by "grounds for the apprehension" that this would require could be adopted by the Commission under the implementing rules provided for by the Regulation; discussions would need to be initiated no later than two years after the entry into force of the Regulation. The earliest date for implementation would be 2010, which could be shortly before or in parallel with the implementation of the proposed Directive in the Member States.

27. At national level, work on the impact assessment identified **lack of information as a challenge for enforcement** both to develop effective control strategies (e.g. few risk analyses, limited access to information from tax authorities and banks on companies

⁵ COM(2006) 402, at paragraph 40.

⁶ The Regulation is expected to be formally adopted in the course of 2007.

under suspicion, employees reluctant to testify against those who exploit them) and to assess outcomes (e.g. those reported as having breached regulations, how many employers/ companies were charged and eventually subjected to sanctions). These are matters for Member States to tackle, which they are doing. There is however a two-fold role for action at EU level: (i) to facilitate the exchange of good practice on these matters (see section 3 above), and (ii) to facilitate the exchange of relevant information.

28. Mechanisms already exist to facilitate the exchange of different types of information between Member States:

- The **mutual information mechanism concerning Member States' measures** in the areas of asylum and immigration⁷ is a channel for exchanging information and views on national asylum and immigration measures which are likely to have a significant impact on several Member States or on the EU as a whole. In relation to the proposed Directive, the mechanism could be used by Member States to share their policy intentions and long-term programming, including draft and final legislation, concerning action against employers of third-country nationals who are illegally staying or working in breach of their residence status.
- **ICONet** is a secure web-based information and coordination network for Member States' Migration Management Services⁸. It can be used to exchange strategic, tactical and operational information concerning illegal migratory movements and the fight against such phenomena. The Commission is responsible for managing the network and will consider how to include in this information exchange matters relating specifically to action against employers of third-country nationals who are illegally staying or working in breach of their residence status.

29. **Recommended measures:**

- (7) The Commission will consider the need for an additional disaggregation of statistics required by the Regulation on Community statistics on migration and international protection for the purposes of monitoring and evaluating the proposed Directive.
- (8) Member States' should use the mutual information mechanism to share their intentions and long-term programming, including draft and final legislation.
- (9) The Commission will consider how to include matters relating specifically to illegal employment in the information exchange through ICONet.

⁷ OJ L 283, 14.10.2006, p. 40.

⁸ OJ L 83, 1.4.2005, p. 48.