Immigration policy: sanctions against employers of illegally staying third-country nationals

2007/0094(COD) - 18/06/2009 - Final act

PURPOSE: to prohibit the employment of illegally staying third-country nationals in order to fight illegal immigration in the EU and to provide minimum common standards on sanctions and measures to be applied in the Member States against employers who infringe that prohibition.

LEGISLATIVE ACT: Directive 2009/52/EC of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

BACKGROUND: one of Europe's greatest "pull" factors for illegal immigrants is the possibility of finding work and a better way of life in the European Union. Illegal immigrants help meet the needs of some employers who are willing to take advantage of workers prepared to undertake what are mostly low-skilled and low paid jobs. The scale of the phenomenon is hard to quantify and estimates vary from between 4.5 million to 8 million. Illegal employment is concentrated in certain sectors namely construction, agriculture, cleaning and hotel/catering. New rules are needed to put an end to abuses by unscrupulous employers who make contracts with illegally-staying providing them in the labour market with low salaries and poor labour conditions. To fight against illegal immigration, it is necessary to lay down a framework containing common sanctions and measures to be applied to employers who infringe that prohibition.

CONTENT: following a first reading agreement with the European Parliament, the European Parliament and the Council adopted a Directive aimed at fighting illegal immigration by **prohibiting the employment of illegally staying third-country nationals**. The Directive lays down **minimum common standards** on sanctions and measures to be applied in the EU Member States against employers who infringe that prohibition.

Obligations on employers: before employing a third-country national, Member States shall oblige employers to:

- require that a third-country national before taking up the employment holds and presents to the employer a valid residence permit or other authorisation for his or her stay;
- keep for at least the duration of the employment a copy or record of the residence permit or other authorisation for stay available for possible inspection by the competent authorities of the Member States;
- 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 .

Member States may provide for a **simplified procedure for notification** where the employers are natural persons and the employment is for their private purposes. Member States may provide that notification is not required where the employee has been granted long-term residence status under Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.

Member States shall ensure that employers who have fulfilled their obligations shall not be held liable for an infringement of the prohibition unless the employers knew that the document presented as a valid residence permit or another authorisation for stay was a forgery.

Sanctions: to enforce the general prohibition and to deter infringements, Member States should provide for appropriate sanctions.

1) financial sanctions: these shall include:

- financial sanctions which shall increase in amount according to the number of illegally employed third-country nationals;
- payments of the costs of return of illegally employed third-country nationals in those cases where return procedures are carried out.

Member States may provide for reduced financial sanctions where the employer is a natural person who employs an illegally staying third-country national for his or her private purposes and where no particularly exploitative working conditions are involved.

2) Back payments to be made by employers: in respect of each infringement of the prohibition, Member States shall ensure that the employer shall be liable to pay:

- any outstanding remuneration to the illegally employed third-country national. The agreed level of remuneration shall be presumed to have been at least as high as the wage provided for by the applicable laws on minimum wages, by collective agreements or in accordance with established practice in the relevant occupational branches, unless either the employer or the employee can prove otherwise, while respecting, where appropriate, the mandatory national provisions on wages;
- an amount equal to any taxes and social security contributions that the employer would have paid had the third-country national been legally employed, including penalty payments for delays and relevant administrative fines;
- where appropriate, any cost arising from sending back payments to the country to which the third-country national has returned or has been returned.

3) Other measures: Member States shall take the necessary measures to ensure that employers shall also, if appropriate, be subject to the following measures:

- exclusion from entitlement to some or all public benefits, aid or subsidies, including EU funding managed by Member States, for up to five years;
- exclusion from participation in a public contract for up to five years;
- 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;
- 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, if justified by the gravity of the infringement.

4) Criminal offence: Member States shall ensure that the infringement of the prohibition constitutes a criminal offence when **committed intentionally**, in each of the following circumstances as defined by national law: (i) the infringement continues or is persistently repeated; (ii) the infringement is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals; (iii) the infringement is accompanied by particularly exploitative working conditions; (iv) the infringement is committed by an employer who, while not having been charged with or convicted of an offence

established pursuant to Framework Decision 2002/629/JHA, uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a victim of trafficking in human beings; (v) the infringement relates to the illegal employment of a minor.

Member States shall ensure that inciting, aiding and abetting the intentional conduct is punishable as a criminal offence.

Rights to third-country nationals employed illegally: it is also provides that third-country nationals employed illegally may also benefit from the following rights:

Right to claim for outstanding remuneration: Member States shall enact mechanisms to ensure that illegally employed third-country nationals:

- may introduce a claim, subject to a limitation period defined in national law, against their employer and eventually enforce a judgment against the employer for any outstanding remuneration, including in cases in which they have, or have been, returned; or
- when provided for by national legislation, may call on the competent authority of the Member State to start procedures to recover outstanding remuneration without the need for them to introduce a claim in that case.

Right to be informed: illegally employed third-country nationals shall be systematically and objectively informed about their rights before the enforcement of any return decision.

Right to complain: Member States shall ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when provided for by national legislation. Providing assistance to third-country nationals to lodge complaints shall not be considered as facilitation of unauthorised residence. Member States shall define in national law the conditions under which they may grant, on a case-by-case basis, **permits of limited duration**, linked to the length of the relevant national proceedings, to the third-country nationals involved, under arrangements comparable to those applicable to third-country nationals who fall within the scope of Directive 2004/81/EC.

Subcontracting: where the employer is a subcontractor, Member States shall ensure that the contractor of which the employer is a direct subcontractor may, in addition to or in place of the employer, be liable to pay: (i) any financial sanction imposed under this Directive; (ii) any back payments due. Member States may provide for **more stringent liability rules under national law**.

Legal persons: a legal person held responsible for a criminal offence shall also be held liable in every M

Liability of legal persons: Member States shall ensure that legal persons may be held liable for the offence referred to this Directive where such an offence has been committed for their benefit by any person

who has a leading position within the legal person, acting either individually or as part of an organ of the legal person, on the basis of: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person.

Member States shall also ensure that a legal person may be held liable where the lack of supervision or control has made possible the commission of the criminal offence for the benefit of that legal person by a person under its authority.

As regards the **penalties** for legal persons, the Directive provides that Member States may decide that a list of employers who are legal persons and who have been held liable for the criminal offence is made public.

Inspections: to ensure a satisfactory level of enforcement of this Directive and to reduce, as far as possible, differences in the level of enforcement in the Member States, Member States should ensure that effective and adequate inspections are carried out on their territory and should communicate data on the inspections they carry out to the Commission before 1 July of each year. 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.

More favourable provisions: Member States may adopt or maintain provisions that are more favourable to third-country nationals (in particular back payments to be made by employers and facilitation of complaints) or eventually, in certain cases, impose stricter obligations on employers.

to whom it applies in relation with Articles 6 and 13, provided that such provisions are compatible with this Directive.

Report: by 20 July 2014, and every three years thereafter, the Commission shall submit a report to the European Parliament and the Council including, where appropriate, proposals for amending pertinent provisions of the Directive.

Territorial provisions: Ireland, the United Kingdom and Denmark are not taking part in the adoption of this Directive and are therefore not bound by it or subject to its application.

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