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### **COMMISSION PROPOSAL FOR A DIRECTIVE ON SANCTIONS AGAINST EMPLOYERS OF ILLEGALLY STAYING THIRD-COUNTRY NATIONALS**

#### **Summary**

European employers fully support the objective of the Commission proposal, i.e. reducing illegal immigration by tackling the employment of third-country nationals who are staying illegally in the EU.

The phenomenon of illegal migration is complex with employment being one of many pull factors. An adequate response to address the challenge of illegal migration therefore requires measures to be taken across a broad range of policy domains, ranging from the need to tackle the key causes of undeclared work to facilitating legal migration flows.

European employers have serious concerns about important provisions of the draft Directive. By introducing EU-wide legal definitions of “employment” and “employer”, the proposal directly interferes in national social and labour law. In addition, while sanctions should be effective, dissuasive and proportionate, Member States are best placed to decide on and set effective sanctions for non-compliance with the provisions of the Directive. BUSINESSEUROPE therefore does not believe that the Commission proposal complies with the subsidiarity principle.

Moreover, the draft Directive fails to respect the proportionality principle. The Directive would impose overly burdensome and costly administrative requirements on EU companies. In addition, some of the sanctions foreseen in the Commission proposal (notably the temporary or permanent closure of the establishment) are also disproportionate unless they are clearly and exclusively linked to well-defined cases of systematic criminal behaviour for the purposes of exploitation or human trafficking.

Moreover, BUSINESSEUROPE would like to stress that companies cannot and should not assume responsibilities of public authorities. It is therefore strongly opposed to the provision on subsidiary liability. This would place an impossible burden on the main contractor as the latter is not in a position to control compliance in practice.

Given that the large majority of Member States already have sanctions for illegal employment in place, the priority should be to improve enforcement of existing legislation. European employers believe that the proposal should be modified to address the concerns expressed in this paper. BUSINESSEUROPE will closely monitor the legislative process and is ready to play an important role in this debate.



## **I. Introduction**

1. On 16 May 2007, the Commission adopted a proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals.
2. The Commission proposal requires companies to check the residence permit or other authorisation for stay before recruiting a third-country worker. Companies that fail to do so would be liable to sanctions consisting of: fines (including costs of returning illegally staying third-country nationals), payment of outstanding wages, taxes and social security contributions and other administrative measures.
3. The draft Directive also foresees criminal penalties in serious cases, i.e. where it concerns repeated infringements, employment of at least four illegal third-country nationals, particularly exploitative working conditions and where the employer knows that the worker is a victim of human trafficking.
4. Member States would be required to set up effective complaint mechanisms and inspect at least 10% of companies established on their territory each year.

## **II. General comments**

5. BUSINESSEUROPE strongly believes that well-managed migration policies are essential for European societies and economies. Immigration from third countries can be part of the response to the demographic challenge. Increased availability of labour and skills can help to alleviate both short-term and long-term shortages on labour markets and consequently contribute to economic growth.
6. Although it is not clear whether the EU has the competence to take measures which relate to Member States' criminal law, European employers fully support the objective of the Commission proposal, i.e. reducing illegal immigration by tackling the employment of third-country nationals who are staying illegally in the EU. Illegal employment creates unfair competition for the vast majority of companies who respect the law and leads to losses in tax and social security revenues, while illegally employed third-country nationals themselves are more likely to be vulnerable to or victims of abuse and exploitation. BUSINESSEUROPE is firmly opposed to any kind of exploitation or abuse of migrant workers.
7. Employment is one of many pull factors for illegal migration. The phenomenon of illegal migration is complex and can only be tackled by taking action across a broad range of policy domains, both in the EU and in the countries of origin.
8. In addition, stepping up the fight against illegal migration must also be accompanied by measures aimed at facilitating legal migration. While sanctions for those employing illegal workers should be effective and dissuasive, it is essential that these are not taken in an isolated way but are flanked by efforts to put in place flexible and efficient channels for legal migration flows, effective coordination with migrants' countries of origin, action to fight against organised crime, quick repatriation of illegal migrants respecting their legitimate rights, etc.



9. In order to avoid a situation where an employer recruits workers with irregular status due to the lack of qualified or specific human resources and limited possibilities for legal migration, BUSINESSEUROPE reiterates the importance of creating unbureaucratic, rapid and transparent procedures at national level to recruit migrant workers.
10. The Commission rightly states that the employment of illegally staying third-country nationals is part of the wider problem of undeclared work. It is therefore essential to identify and address the reasons, which can vary from country to country, lying behind this broader phenomenon of undeclared work. Higher sanctions and better enforcement will only have limited effect if policy-makers do not tackle the key causes of illegal employment such as high labour costs, inflexible labour markets, etc.
11. While supporting the objective of the Commission proposal, European employers have serious concerns about important provisions of the draft Directive.
12. BUSINESSEUROPE is concerned that the Commission proposal does not respect the general principles of subsidiarity, proportionality and respect for the different legal systems and traditions of the Member States.
13. According to European employers, the proposal is not only concerned with immigration policy but also – and strongly – with employment or social policy. On several occasions, the draft Directive enters into the area of social policy. For example, the Commission proposal introduces EU-wide legal definitions of “employment” and “employer”. BUSINESSEUROPE strongly opposes measures aimed at harmonising definitions of “employment”, “employer” and “worker” at EU level, including by means of a Directive in the field of immigration. In fact, EU labour law directives leave the definition of such concepts to Member States. Likewise, for the purpose of this directive, the Commission should refer to the definitions of employment, employer and worker which apply in the law of the Member States. In addition, the automatic presumption of a six-month work relationship in case of infringement would interfere with the way the length and content of employment contracts are determined in national labour law.
14. While sanctions should be effective, dissuasive and proportionate, Member States are best placed to decide on and set effective sanctions for non-compliance with the provisions of the Directive.
15. In addition, companies would also be obliged to perform tasks that are the responsibility of Member States such as checking whether subcontractors comply with the law. However, companies cannot and should not assume responsibilities of public authorities.
16. Proposed EU measures must also be proportional to the problem faced. BUSINESSEUROPE has strong doubts about several provisions of the Commission proposal which would impose disproportionate sanctions (except in well-defined cases of systematic criminal behaviour for the purposes of exploitation or human trafficking) and burdensome and costly administrative requirements on EU companies.



17. BUSINESSEUROPE suggests that the Commission proposal should take into greater account those situations where employers have handled the situation in a responsible way or have acted in good faith but would nevertheless be liable to sanctions under the provisions of the Directive. Likewise, it is important for employees to cooperate with employers by providing the latter with the necessary documents so that their employers can fulfil the obligations under this proposal.
18. European business believes that there should be a qualitative element to distinguish between criminal and administrative sanctions.
19. In most Member States, an extensive legislative framework providing sanctions for illegal employment is already in place. Therefore, further progress in fighting illegal employment can and should primarily be achieved by concentrating efforts on improving enforcement. However, it is of crucial importance to tackle not only the symptoms but also the causes of illegal employment such as high labour costs, inflexible labour markets, etc.
20. European employers regret that the Commission Impact Assessment seriously underestimates the costs for companies of complying with the administrative requirements of the Directive.
21. In addition, the draft Directive should not set a threshold of companies to be inspected each year in each Member State. Instead, it should focus on how to enhance the quality and effectiveness of inspections.

### **III. Specific comments**

#### Definitions (Article 2)

22. For the purposes of this proposal, the Commission defines key concepts such as employer, employment, third-country national, illegally staying, etc.
23. BUSINESSEUROPE is not in favour of initiatives aimed at explicitly or implicitly harmonising national definitions of employment, employer (and employee) at EU level. Such definitions are and should be left to the discretion of Member States, bearing in mind variations in concepts and traditions. By defining “employer” and “employment”, the draft Directive enters into the area of national labour legislation.
24. In addition to being opposed in *principle* to an EU-wide definition of such concepts as “employment” and “employer”, European companies also consider some of the proposed definitions in the draft Directive flawed. For example, the definition of employment is much too broad as it does not specify clearly enough that it does not cover those involved in a contract for services.

#### Employers' obligations (Article 4)

25. As a preventive measure, the proposal for Directive requires employers to verify before recruiting a third-country national whether the latter has a residence permit or other authorisation for stay valid for the period of employment in question (article 4.1). Employers who are a business would further be obliged to notify the competent national authorities (article 4.2).



26. Preventive measures, i.e. measures placing the responsibility on the employer to declare new employees and verify their status, differ considerably across Member States. Moreover, details on the type of documents which employers must check are complex and not always easy to understand. This presents a particular challenge for SMEs.

Companies have the responsibility to employ only workers who are in possession of a valid work permit. In order to comply with the provision to check the residence status of third-country nationals, BUSINESSEUROPE insists that Member States should provide clear permit guidelines and on-going practical advice to employers on permit types, how they work and what the related documents look like. In this respect, the identification and exchange of good practices between Member States should not be limited to the implementation of employer sanctions but extended to supportive measures on verifying legal documents and dealing with candidates presenting themselves who are not allowed to work.

27. In addition, European employers have strong reservations regarding the notification obligation. In the vast majority of Member States, companies already have to declare any new employee (start of employment relationship, pay, working hours, etc.) to the employment and/or social security administration. Adequate cooperation and exchange of information between the relevant government bodies should ensure there is no need for companies to resubmit already available information. Moreover, the requirement to report at the latest within one week would add to the burden carried by employers on taking on a migrant worker while it is also unclear what the purpose of such reporting would be.

Financial sanctions (Article 6)

28. The Commission proposal requires Member States to take the necessary measures to ensure that any infringements of the prohibition to employ illegally staying third-country nationals is subject to effective, proportionate and dissuasive sanctions against the employer (article 6.1). Sanctions would include financial penalties and payment of the costs of return of each illegally employed third-country national in those cases where return procedures are carried out (article 6.2).
29. BUSINESSEUROPE agrees that infringements of the prohibition of illegal employment should be subject to effective, proportionate and dissuasive sanctions, including financial penalties. However, European employers believe that the provisions of article 6 do not respect the fundamental principle of proportionality, in particular the provision which would further sanction employers with the payments of the costs of return.
30. In BUSINESSEUROPE's view, the obligation to pay the costs of return as a sanction would be justified only if workers have been deliberately recruited for illegal employment or "trafficked" into the country by the employer who is employing them. However the current wording of the directive does not make it clear whether mere negligence would be sufficient to sanction the employer with the costs of return. Putting an additional burden on employers would not be justified in such cases. Likewise, it is disproportionate and unreasonable that employers would have to pay return costs in the situation where, for example, a



third-country national has migrated under his or her own initiative, been illegally resident for years and is caught whilst working for someone for a few weeks.

Back payments to be made by employers (Article 7)

31. The proposal for a Directive stipulates that employers of illegally staying third-country nationals who have not carried out the pre-recruitment check would have to pay outstanding wages, taxes and social security contributions (article 7.1). To this end, Member States are required to enact mechanisms to ensure that the necessary procedures to claim back outstanding remuneration are triggered automatically without the need for the third-country national to introduce a claim, while a work relationship of at least six months' duration would be presumed unless the employer can prove differently (article 7.2).
32. European employers agree that employers having committed infringements should be liable to pay outstanding wages, taxes, etc. However, the EU level should refrain from establishing new procedures which differ from national practice. Any introduction of a different system for third-country nationals would result in an unjustified difference of treatment of these workers compared with EU workers. In this respect, BUSINESSEUROPE is strongly opposed to the provision in article 7.2 which would create an automatic back-payment system for third-country nationals. In most Member States, EU workers are required to lodge a complaint with the relevant bodies to secure outstanding payment. There is no reason to put into place a new and different system for third-country nationals.
33. This also applies for the presumption of a six-month employment period for illegally employed third-country nationals in article 7.2 (b). This would interfere with the way the length and content of employment contracts are determined in national labour law. Moreover, the Commission does not specify why precisely a six-month employment relationship should be presumed. In BUSINESSEUROPE's view, this is arbitrary and could even have the perverse effect of stimulating illegal immigration of third-country nationals as they could receive six months' pay even if they have worked for a (much) shorter period of time.

Other measures (Article 8)

34. In addition to financial sanctions for employing illegally staying third-country nationals, the Commission proposal also foresees other administrative measures such as: exclusion from entitlements to as well as recovery from public benefits, aid or subsidies; exclusion from participation in a public contract; and temporary or permanent closure of the establishments that have been used to commit the infringements.
35. BUSINESSEUROPE believes that sanctions should be proportional to the problem faced which it does not think is the case with the set of other measures specified in article 8. It therefore firmly opposes the proposed measures, notably the temporary or permanent closure of the establishments used to commit the infringement, unless they are clearly and exclusively linked to well-defined cases of systematic criminal behaviour for the purposes of exploitation or human trafficking.



36. Moreover, European employers also have strong concerns regarding the highly specific nature of the proposed measures. Member States are best placed to decide on and set effective sanctions for non-compliance with the provisions of the Directive. The principle of subsidiarity should therefore be respected.

#### Subcontracting (Article 9)

37. The Commission proposal foresees that all the undertakings in a chain of subcontracting would be held jointly and severally liable to pay financial sanctions against a subcontractor at the end of the chain who employs illegally staying third-country nationals.
38. BUSINESSEUROPE is strongly opposed to this provision. According to European companies, subsidiary liability is not an appropriate solution to establish responsibility. All sub-contractors must ensure that they comply with the law – contractors and user organisations must therefore be able to expect that sub-contractors are fulfilling their responsibilities. The subsidiary liability principle would also place an impossible burden on the main contractor as the latter is not in a position to control compliance in practice.

#### Criminal offence (Article 10)

39. The draft Directive also foresees criminal penalties in serious cases, which are defined as follows: repeated infringements (a third infringement in two years), employment of at least four illegal third-country nationals, particularly exploitative working conditions and situations where the employer knows that the worker is a victim of human trafficking.
40. BUSINESSEUROPE questions the validity of some of the criteria used to determine the criminal nature of the offence such as, for example, the mere use of a specified number of illegal workers. More specifically, there should be a qualitative element to distinguish between administrative and criminal sanctions. This distinction could be based on the fact that the employer takes advantage of the illegal status of third-country workers to impose working conditions different from those stipulated in legal or conventional provisions or to infringe workers' rights. Provided that such a qualitative dimension exists, it does not make sense to use the number of workers as a criterion as just one worker would be enough to consider a specific behaviour to be a criminal offence.

#### Liability of legal persons (Article 12)

41. The proposal requires Member States to ensure that sanctions for the criminal offence can be imposed on legal persons where such an offence has been committed by any individual who has a leading position within the legal person. To this end, it sets out the criteria to determine when an individual has a leading position within the legal person (article 12.1).



42. BUSINESSEUROPE believes that the definition of leading positions within legal persons should be left at national level. There is no reason for separate arrangements only for sanctions for illegal employment.

Facilitation of complaints (Article 14)

43. Article 14.1 states that Member States shall provide for effective mechanisms through which third-country nationals in illegal employment can lodge complaints against their employers, directly or through designated third parties.
44. European employers are strongly opposed to the introduction at EU level of separate rights for action for designated third parties. It is a matter for national governments to decide on the introduction of such a right as well as on the definition of “designated third parties”.

Inspections (Article 15)

45. The Commission proposal requires Member States to inspect at least 10% of companies established on their territory per year. A risk assessment on the basis of factors such as the sector in which a company operates and past records of infringement should help identify the selection of companies to be inspected.
46. BUSINESSEUROPE fully agrees with the Commission that enforcement of sanctions is key to tackle illegal employment. However, the draft Directive should not set a threshold of companies that need to be inspected in each Member State per year. Instead of stipulating how many companies should be inspected, an alternative approach could consist in encouraging Member States to increase the capacity of and, where applicable, cooperation between enforcement bodies. Moreover, the requirement to check 10% of companies might be unrealistic for many countries, especially in a one-year period. Finally, the Commission fails to provide clear and convincing arguments that justify why precisely a threshold of 10% should be set.
47. The proposal covers not only natural or legal persons employing others in the course of business activities, but also private individuals when they act as employers (for example domestic services). It is therefore illogical that the Commission only considers inspections of companies.



## **Conclusions**

48. BUSINESSEUROPE fully supports the objective of the Commission proposal, i.e. reducing illegal immigration by tackling the employment of third-country nationals who are illegally staying in the EU.
49. However, European employers are opposed to important provisions of this draft Directive. The proposal directly interferes in national social and labour law. In addition, the draft Directive fails to respect the proportionality principle. Furthermore, there is a real risk that this proposal will discourage employers from considering or hiring third-country nationals for fear of sanctions. Against the background of demographic ageing and labour shortages that impact adversely on growth and competitiveness, Europe should be particularly cautious not to take well-intentioned but ill-conceived initiatives that could have detrimental long-term consequences.
50. BUSINESSEUROPE therefore believes that the proposal should be modified to address the concerns expressed in this paper. European employers will monitor the legislative process and are ready to play an important role in this debate.

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