

An EU Framework on Sanctions against Employers of Irregular Immigrants Some Reflections on the Scope, Features & Added Value

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On 16 May 2007, the European Commission issued a Proposal for a Council Directive *providing for sanctions against employers of illegally staying third country nationals* COM(2007) 249.¹ The measure aims at providing a harmonised EU framework for imposing sanctions on employers for hiring third country nationals (TCNs) who do not enjoy a regular status of stay in the EU. The proposal would establish a common policy consisting of three main features. First, employers would be subject to a number of new administrative obligations that would need to be fulfilled before recruiting any TCNs. Non-compliance would lead to a series of punitive measures, financial sanctions and criminal penalties. Second, the procedure for operationalising complaints would be harmonised; and third, each member state would be required to inspect the employee records in 10% of its registered companies.

What is the key argument supporting Community action in this area? The proposal states that a common deterrent is needed to discourage the phenomenon of irregular immigration.² The European Commission is of the opinion that employment is a key 'pull factor' attracting irregular immigration, and that the imposition of sanctions on employers would reduce the illegal employment of TCNs. Thus, the proposal raises a number of questions that need to be debated: What are the strengths and weaknesses in the rationale, scope and legal basis of the proposed legislation? What is the added value to the EU for having a common European policy over this area? Are the grounds

justifying Community action sufficiently robust? As we will argue, the proposal suffers from a number of vulnerabilities. Among others, we highlight the following:

1. *A partial personal scope.* The use of irregularity of stay of the TCN as the sole connecting factor for the sanctions overlooks everyone else who may be a victim of labour exploitation.

2. *The predominance of the employment dimension.* There is a very strong employment dimension embracing the content and aims of the initiative, which may call for the need to reconsider the treatment of this issue from an exclusive immigration control perspective. Are immigration rules an effective way to tackle the problem of exploitation in the workplace?

3. *An uncertain EU added value.* The value added of applying criminal sanctions to employers needs to be tested against the EU principles of proportionality and effectiveness.

This paper proceeds in four sections. The first section provides a short overview of the main contents of the proposal by looking at the obligations and sanctions applicable to the employer, the procedures foreseen for the presentation of complaints as well as the set of guarantees provided to the TCN worker. Section two assesses the rationale, personal scope and context of the measure. Section three analyses its added value and compatibility with some general principles of Community law. Finally, we offer some conclusions in the last section.

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1. Main features of the proposal: Prevention, criminalisation, complaint mechanisms & guarantees

The proposed Directive plans to harmonise at European level a nexus between employment, immigration and criminal law. This section presents its key features.

1.1 Obligations & sanctions

The act would establish specific administrative burdens for employers seeking to employ TCNs. In particular, Art. 4 stipulates that the member states shall oblige employers to:

1. ask the TCNs to present a valid residence permit or another similar document. This requirement would be fulfilled unless the documentation is manifestly incorrect (e.g. the photograph does not correspond to the holder or when the document has been clearly tampered with);
2. copy or record the content of the residence permit;
3. keep the copies or records available during the phase of employment in the event of inspection; and
4. communicate to the relevant authorities the start date and termination of the labour relationship.

In case of non-compliance with these obligations, the following financial sanctions, punitive measures and/or criminal offences would apply:

1. *Financial sanctions.* The proposal calls the member states to ensure that the sanctions are “*effective, proportionate and dissuasive*”.³ They would include fines linked to each of the TCNs employed irregularly as well as payments of the costs in the event that the worker involved is subject to return to the country of origin or transit. The exact amount of fine and/or penalty would be determined at the discretion of the relevant body in the member state involved. The employer would also have to pay the TCN’s back payments which would include any outstanding remuneration/wages, taxes and social security contributions.⁴

2. *Other punitive measures*⁵.

- a) An employer could be excluded 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 the member states that has been granted to the employer during the 12 months preceding the detection of irregular employment;⁶ and

d) temporary or permanent closure of the establishments that have been used to commit the infringement.

3. *Criminal offences.* Art. 10 provides that illegal employment will constitute a criminal offence when committed intentionally and when there have been at least one of the following four types of serious cases:

- a) repeated infringements consisting of a continuation of the irregular employment after the competent national authorities or courts have reached at least two findings against the employer regarding illegal employment within a period of two years;
- b) significant number of illegally employed TCNs, when at least four are being employed;
- c) particularly exploitative working conditions in comparison for instance with ‘legally employed workers’; and
- d) knowledge by the employer that the worker is a victim of human trafficking.⁷

In order to ensure that individual employers are only held liable to criminal sanctions under these serious cases, the initiative stipulates that repeated infringement shall be criminalised where it is the third infringement within a two-year period. Furthermore, Art. 11.1 calls upon the member states to apply “*effective, proportionate and dissuasive criminal sanctions*” against those employers who have been found in breach.⁸

Where the employer is a legal person,⁹ Art. 13 foresees the applicability of criminal sanctions and other punitive measures, such as the exclusion from entitlement to public benefits or aid, exclusion from participation in public contracts up to five years, temporary or permanent disqualification from the practice of agricultural, industrial or commercial activities, placement under judicial supervision and a judicial winding-up order. The measure also provides sanctions in cases of sub-contracting (Art. 9).¹⁰

Art. 15 requires member states to ensure that the employee records of at least 10% of the companies established on their territory are inspected. The selection of the companies subject to this sort of inspection would be based on risk assessments carried out by the competent national authorities, taking into account the sector of activity in question and any past record of infringement.

1.2 Complaint mechanisms & guarantees

Art. 14 of the proposal foresees: “*The Member States shall provide mechanisms through which third-country nationals in illegal employment can*

lodge complaints against their employers, directly or through designated third parties.” The Explanatory Memorandum clarifies that third parties need to be protected when providing assistance to lodge complaints, against possible sanctions under rules prohibiting the facilitation of unauthorised residence.

Art. 14.3 offers additional measures to protect TCNs in the case of particularly exploitative working conditions,¹¹ such as the possibility to grant a residence permit linked to the duration of the relevant national proceedings to the TCN who has lodged the application. In order to ensure effectiveness in relation to ‘back payments’ by the employer, Art. 7.2 provides that the latter will need to pay any outstanding remuneration, taxes and social security contributions. Member states will also have the possibility to enact a series of instruments guaranteeing that the claiming procedures are automatic, and that a work relationship of at least 6 months duration would be presumed.

2. The rationale & scope: Weaknesses & vulnerabilities

The proposal aims at harmonising the criminalisation of the employment of irregularly staying TCNs all across the EU.¹² According to the European Commission’s Impact Assessment accompanying the proposal,¹³ the initiative aims at contributing to reduce irregular immigration, reducing employment of irregularly staying third-country nationals; creating a level playing field for EU employers;¹⁴ and facilitating the reduction of exploitation of irregularly staying third-country nationals.¹⁵

2.1 Irregularity of stay as the connecting factor

One of the core objectives of the initiative is to deter irregular immigration by tackling undeclared work, which is denominated by the proposal as illegal employment. The latter is defined as the “*employment of a third country national who is illegally staying on the territory of a Member State*” (Art. 1.d). The irregular nature of stay of the non-EU national constitutes the connecting mechanism for considering employment as illegal, and therefore for the Directive to become operational. The exclusive use of the linking factor of irregularity of residence confines the personal scope of the measure to a partial or sectoral approach, as it would not cover all categories of migrants, let alone migrant workers, who may also be subject to irregular employment independently of their administrative status of stay.

A TCN may enjoy a legal status of stay and yet still perform work falling outside the national legal framework. S/he may also enjoy a regular status of residence but have no or limited rights of access to employment.¹⁶ Further, the personal scope of the proposal does not cover nationals of those member states who have joined the EU in two latest rounds of enlargement and who are still subject to transitional arrangements, thereby limiting their free access to the labour markets of a number of the EU-15 member states.¹⁷

In addition to the narrow personal scope, the irregularity of stay will be determined according to the respective national immigration legislation. The dominance of the national level in this context brings about a highly diverse picture.¹⁸ There is at present no common definition of an irregular immigrant or what constitutes irregular immigration at EU level. Any Community action in this field must start from clear, precise and unconditional definitions of these terms in EU law that are not subject to the vagaries of national variations, administrative practices and discretion.¹⁹

As stated above, the proposal has been presented as forming part of the common EU immigration policy. Yet, when looking at the actual content and goals, the dimensions of employment, social affairs and the harmonisation of criminal law are also very strongly present. What are the implications of its multi-dimensional nature?

2.2 The legal context

The measure has its legal basis in Art. 63.3.b of Title IV of the EC Treaty (Visas, Asylum, Immigration and Other Policies Related to the Free Movement of Persons), which contains measures aimed at tackling the phenomenon of irregular immigration.²⁰ While the paramount goal is “*taking action against illegal immigration*”, the principal focus is employment and working conditions. One must ask, therefore, whether the current legal basis really is the most appropriate one.

The strong links of the proposal with the wider area of employment are evident from the content, i.e. irregular employment or undeclared work, as well as the target group, i.e. the employers. The employers are the main subject of the obligations and system of sanctions.²¹ This includes any legal or natural person, but also private individuals for and under the direction of whom a TCN carries out employment activities.²² Further, the proposal claims it will contribute to the reduction of labour exploitation, which is clearly an employment issue. In light of this, the actual effects that the legislative measure could have in the area of irregular immigration would be only a by-product of the

wider fields of action covered by the act. Therefore, the initiative more correctly falls within the context of employment and social affairs (Title VIII of the EC Treaty on *Employment*), instead of immigration.

Further, one of the core objectives of the proposal is to achieve a minimum level of harmonisation at European level that would establish a prohibition on the employment of TCNs irregularly present in the territory of a member state through the application of a series of administrative measures, financial sanctions and criminal penalties against the employer.²³ At first glance, one could think that the proposal should have been based on the EU Third Pillar, as this is the proper venue for the harmonisation of substantive criminal law.²⁴

This view would disregard, however, the proactive role that the European Court of Justice (ECJ) has played in widening EC competence over this field beyond Title VI of the TEU.²⁵ In Case 176/03, *Commission v. Council, Criminal Sanctions for the Protection of the Environment*,²⁶ the ECJ recognised for the first time that the European Community has the competence to act in criminal matters when they are related to a specific Community policy, and on the condition that they are essential to ensure full effectiveness for enforcing EC law and to combat serious shortcomings in the implementation of the Community's objectives.²⁷ The fact that Case 176/03 is related to environmental law does not in principle prevent other EC policies from benefiting from the liberalisation.²⁸

After looking at the weaknesses related to its rationale and scope, one aspect that still remains critical is the relationship with proportionality and effectiveness. The lawfulness and legitimacy of the exercise of Community competence in this area, and its EU added value, need to be carefully addressed from this perspective.

3. Is there an added value to harmonising sanctions against employers?

As a general rule, the European Community has competence to enact legislation only when the objectives of that action cannot be sufficiently achieved by the member states themselves, thereby passing the test of comparative efficiency.²⁹ In light of this requirement, the European Commission is obliged to justify the reasons why the action would be better achieved at European level in all those policies where it does not possess exclusive competence.³⁰

The proposal's Explanatory Memorandum argues that action at the national level would not be sufficient because there would be a risk of "significantly different levels of sanctions and enforcement in different Member States" which

could "lead to distortions of competition within the single market and to secondary movements of illegally staying third-country nationals to Member States to lower levels of sanctions and enforcement". In the view of the European Commission, a common minimum level of sanctions on employers would ensure that:

1. All member states would have a sufficiently high level of sanctions to serve as deterrence;
2. Sanctions would not be so different as to give rise to secondary movements of irregularly staying TCNs; and
3. There would be a level playing field for businesses across the EU as every EU employer would be aware that their peers and competitors would be subject to the same minimum sanctions.

Do these three official grounds justify Community action?

3.1 Illegal employment as 'pull factor'

While the real long-term implications of applying criminal sanctions to employers to reduce irregular immigration are not easy to ascertain, using the pull factor argument as one of the main justification for founding a European policy is dubious. As the European Commission well knows, the picture is far more complicated. The general availability of labour and other rationales, such as the socio-economic inequalities, structural conditions and political scenarios in the countries of origin and destination, provide some illumination on cross-border human mobility. The argument of illegal employment as pull factor oversimplifies a phenomenon that is by its very nature complex and multifaceted.

The person on the move is not active or passive in relation to simple pull or push factors driving her/his mobility and stay, and/or the degree of restrictiveness of the immigration policies about these elements in the receiving countries. Instead, human mobility follows a complex web of autonomous rationales and purposes, which are independent from any single determining factor. The EU's internal experience with free movement of workers is the most obvious example of this. Even very substantial differences in unemployment rates, job opportunities and levels of social benefits from one member state to another do not result in a redistribution of workers in the EU that would satisfy any economist.

3.2 The diversity of sanctions & ineffective enforcement mechanisms

According to the information provided by the Impact Assessment of the proposal,³¹ at least 26 of the 27 EU member states have employer sanctions

already in place (information on Cyprus was apparently not available). One of the arguments put forward by the European Commission to have a common framework is that current national enforcement mechanisms are in fact not effective in practice. However, the Commission has not shown how the proposal would be more successful in helping to remedy current enforcement difficulties.³²

In addition, the argument that irregularly staying TCNs inside the EU seek out those juridical systems where employer sanctions are more lenient is particularly difficult to substantiate. If the sanctions would have any potential effect, in practice, this would rather be related to the sphere of employers and for instance, their decision to move and settle in another member state, to continue hiring TCNs under irregular status of stay, etc.

3.3 The test of proportionality and effectiveness

A Community policy could have disproportionate effects when taking into account the different laws, policies and practices in the context of employment in an EU of 27. Based on that diversity, the application of a higher number of punitive measures and administrative burdens (*sphere of control*), as well as of criminal sanctions (*sphere of penalties*) could also raise a number of issues when making them subject to the proportionality and effectiveness tests.

As regards *the sphere of control*, the proposal will increase the administrative burdens on both the state and the employer. For instance, the Directive calls for inspections of employee records in 10% of a member state's work establishments, whereas, according to the European Commission's Impact Assessment, only 2% of the establishments in the member state are subject to such inspections. Compliance therefore would require a substantial increase in financial and personnel resources by the member states. Furthermore, the initiative does not establish any criteria or mechanisms for controlling the quality of the required inspections, which may reduce their effectiveness.

Inspections will be based on risk assessments. In our view, these should not constitute the sole ground upon which an inspection would take place. The inspection mechanism based on risk analysis must not bring about the objectionable practice of business 'profiling'. Such a practice would be discriminatory in nature, with the result that some labour sectors and employers would be subject to greater checks than others because of their 'risky features'. This could be the case, for instance, for small- and medium-sized enterprises as they

contribute significantly in the generation of employment, and of ethnic minority business.

Employers will be transformed into 'watchdogs of the EU' regarding irregular immigration. They will be forced to play the role of controller of access to employment by TCNs. At the same time, employers will be subject to more administrative and bureaucratic burdens without receiving any help from the EU on how to fulfil their obligations.

Also on grounds of proportionality, why do only irregularly staying TCNs have the right to recover back payments? Should not EU nationals also enjoy these rights against unscrupulous employers? This could lead to discrimination in relation to all other workers not falling within this narrow legal category and personal scope.

Concerning *the sphere of penalties*, in case of non-compliance, the employer may face criminal sanctions. The use of criminal law may actually have counterproductive effects in the dimension of employment and working conditions. By establishing a tighter penal framework, the proposal could undermine the achievement of its own objectives in terms of creating jobs, guaranteeing employment security, preventing exploitation and increasing labour opportunities in the EU. In fact, employers may be potentially encouraged to stop hiring TCNs for fear of being sanctioned. The European policy could in this way lead to penalising all employment of TCN workers. Therefore, the measure could be manifestly inappropriate with regard to the objective it seeks to pursue.

In light of the above, is there not a simpler, more effective and balanced way, other than sanctions and punitive measures, to achieve the goals being pursued by the proposal? We argue here that their application might even lead to more instability and insecurity for the employer and the TCN worker.

One of the general objectives of the proposal is to reduce exploitation of irregularly staying TCN. However, the European Commission has not taken into account that the phenomenon of irregular immigration and the disadvantageous working conditions that some TCN workers face are linked with the rigidity of national immigration legislation. This restrictiveness is too often mismatched with the socio-economic realities and labour market needs of the member states. In this regard, and as the European Foundation for the Improvement of Living and Working Conditions has rightly pointed out in one of its latest studies, "*it could be important to adjust the rules on entry and work permits to the actual conditions of labour demand*".³³

The Community approach should instead focus on establishing quick, easy and facilitated procedures by which an employer who wishes to hire a TCN in need of a work permit can obtain one, or where an employer who has already employed a TCN can procure the necessary work authorisation. The necessary administrative documents need to be issued rapidly and without disrupting business, wherever the business case is made. Helping employers to do business and meet their needs would be a more effective and proportionate approach to promote economic development and growth in the EU.

3.4 The package of guarantees

The most effective way to prevent penalising the TCN worker when implementing any legislative framework on sanctions on employers is to put into practice an effective, transparent, open and flexible procedure for the presentation of complaints, and to take duly into account the human rights context.³⁴ The worker needs to be protected during the whole complaint process in order to guarantee that s/he does not suffer a higher level of insecurity of work and residence. It is also necessary that the persons who would be allowed to lodge a complaint would not only include the TCN under irregular employment conditions, but also other designated third parties who may provide assistance.³⁵

As the European Trade Union Confederation (ETUC), the Platform for International Cooperation on Undocumented Migrants (PICUM) and the NGO Solidar have emphasised in their Joint Comments applicable to the Commission's proposal,³⁶ the establishment of effective complaint mechanisms to be used by the TCNs against the employer would be the only viable way to ensure that the system provided by the proposed Directive would be effective. It is fundamental that the member states implement a parallel system of protection for those workers who have lodged a complaint against their employer until the final decision by the competent authorities is reached.

Therefore, the minimum set of guarantees put forward by the European Commission's initiative are welcome and positive in nature, yet their value added remains unclear to the already existing guarantees in the national arena. On the other hand, the negotiations of the proposal inside the Council should not lead to the establishment of a common framework of criminalisation of employers having undesired implications for the employability of TCNs and their protection against cases of exploitation. The minimum set of guarantees for the TCN workers as provided by the proposal needs to constitute the *sine qua non* for the initiative to succeed.

3.5 A level playing field for employment

The creation of a level playing field for employment would very much depend on the way in which the Directive would be implemented and enforced in the national arena. Leaving too much discretion to the member states in operationalising the harmonised "minimum standards on prevention and criminalisation" could undermine the achievement of a 'common level playing field' for business all across the EU. This goes along with the lack of evidence on the way in which the proposal would constitute a remedy to current enforcement difficulties and inefficiencies in the national arena.

3.6 The role of the national parliaments in the proportionality and subsidiarity check

The mandate for a Reform Treaty agreed by the Council in the Brussels Presidency Conclusions of 21-22 June 2007 has, among other major innovations, enhanced the role of national parliaments in evaluating the implementation of EU policies, including those related to immigration. In particular, the mandate gives them a stronger position in relation to the principles of subsidiarity and proportionality. There will be a "reinforced control mechanism of subsidiarity" so that "*if a draft legislative act is contested by a simple majority of the votes allocated to national parliaments, the Commission will re-examine the draft act, which it may decide to maintain, amend or withdraw*".

In fact, when the Reform Treaty enters into force, critical opinions such as the one expressed by the Bundesrat in Germany about the proposal and its incompatibility with the principles of proportionality and subsidiarity,³⁷ will find a proper venue for consideration and debate. This proposal may in fact be one of the first legislative acts to test this mechanism.

4. Conclusions

This paper has reviewed the scope, features and added value of the proposal for a Directive providing for sanctions against employers of illegally staying third country nationals 2007(249). We have first argued that the scope of the initiative raises a series of vulnerabilities. The definition of illegal employment on the sole basis of the irregular nature of stay consolidates a sectoral and partial Community approach which would only cover certain categories of TCN workers. This will result in discrimination. Furthermore, the proposal's link with the area of employment and working conditions are evident when looking at the content and aims, as well as the target group, namely employers. The impact on undeclared work and

labour exploitation is entirely unknown and inadequately argued.

In light of these deficiencies, the limited personal scope and the employment relevance have fundamental implications for the legal basis as well as the general framing of the act as a purely immigration-control measure.

On whether there is an EU added value, the official justification provided by the European Commission does not seem to constitute a sustainable or solid ground upon which to construct a common policy. The compatibility of the proposal with the principles of proportionality and effectiveness is open to debate. By mainly focusing on penalising employers and criminalising employment, and on giving priority to immigration control, the value added of having a Community framework may be undermined.

Finally, a common immigration policy should not focus its action and efforts on applying a stricter criminal framework fostering the criminalisation of the recruitment of people. Instead, the Community approach should address generally the issue of undeclared work from an employment and social affairs-related perspective. The prevention of exploitation of the TCN workers and the improvement of working conditions are important objectives to be pursued, but employers and employees must first be provided with a clear, efficient, swift and transparent labour and residence permit(s) system. Only after such a common EU system is in place might it be appropriate to apply penalties to those employers who fail to use it.

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Notes

- ¹ Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249 final, 2007:0094 (COD), Brussels, 16.5.2007.
- ² Towards a Comprehensive European Migration Policy: Cracking down on employment of illegal immigrants and fostering circular migration and mobility partnerships, Press Release, European Commission, IP/07/678, Brussels, 16 May 2007.
- ³ Art. 6 of the proposal. A similar wording was used by the European Court of Justice in its Judgement *Commission v. Greece*, Case 68/88, 21 September 1989, ECR [1989] 2965.
- ⁴ See Art. 7.3 which states that “Member States shall take the necessary measures to ensure that illegally employed third-country nationals receive any back payment of remuneration recovered in Para. 1.a, including in cases in which they have or have been returned”. Further, Art. 7.4. says that “In respect of criminal offences covered by Art. 10.1.c, Member States shall take the necessary measure to ensure that the execution of any return decision is postponed until the third-country national has received any back payment of their remuneration recovered under Para. 1.a”.
- ⁵ Article 8 of the proposal.
- ⁶ According to the Explanatory Memorandum of the proposal, “It would also be possible to recover public subsidies, including EU funding managed by Member States, granted to the employer during the preceding 12 months. The same possibility exists under the Financial Regulation in respect of EU funding directly managed by the Commission”.
- ⁷ E. Guild and P. Minderhoud (2006), *Immigration and Criminal Law in the European Union: The Legal Measures and Social Consequences of Criminal Law in Member States on Trafficking and Smuggling of Human Beings*, Martinus Nijhoff Publishers: Leiden.
- ⁸ Article 11.2 says that “The criminal sanctions provided for in this article may be accompanied by other sanctions or measures, in particular those provided for in Articles 6, 7 and 8, and by the publication of the judicial decision relating to the conviction or any sanctions or measures applied”.
- ⁹ Article 12 on “Liability of Legal Persons” stipulates that Member States shall ensure that legal persons will be held liable when the offence has been committed “any person acting either individually or as part of an organ of the legal person”. According to para. 3 of the same provision “Liability of a legal person...shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories”.

¹⁰ Article 9 reads as follows: “1. Where the employer is a subcontractor, Member States shall ensure that the main contractor and any intermediate subcontractor are liable to pay: (a) any sanction imposed under Art. 6, and (b) any back payments due under Art. 7. 2. The main contractor and any intermediate subcontractor shall under paragraph 1 be liable jointly and severally, without prejudice to the provisions of national law concerning the rights of contribution and resource”.

¹¹ Explanatory Memorandum, “Detailed Explanation the Proposal”, p. 9.

¹² Art. 3 provides that “Member States shall prohibit the employment of illegally staying third country nationals. Infringements of this prohibition shall be subject to the sanctions and measures laid down in this Directive”.

¹³ Commission Staff Working Document, Accompanying document to the Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, Impact Assessment, SEC(2007) 603, Brussels, 16.5.2007.

¹⁴ The Impact Assessment (p. 37) provides in this regard that “every employer would be aware that their peers and competitors were subject to the same minimum sanctions should they employ illegally staying third-country nationals, and minimum obligation to request provide and keep documentation.”.

¹⁵ The Impact Assessment clarifies that “although the last of those specific objectives (to contribute to reduced exploitation) does not fall within the scope of the relevant legal base, Article 63.3.b EC, it is appropriate to include it in view of the exploitative conditions which often exist in this area...This objective is however secondary: while the policy options should be assessed as to the extent to which they contribute to reduced exploitation, the primary aim of this initiative is not to fight exploitation”, see page 12.

¹⁶ The justification that has been used is included in the Impact Assessment of the proposal which says that “although practical terms tackling such situations is also important for significantly reducing the employment pull factor, the legal basis for the legislative proposal, Art. 63.3.3.b of the EC Treaty, could not also permit measures in relation to this second category of third-country nationals”. Commission Staff Working Document, Accompanying document to the Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, Impact Assessment, SEC(2007) 603, Brussels, 16.5.2007. See also the Commission Staff Working Paper, Accompanying document to Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, SEC(2007) 596, Brussels, 16.5.2007.

¹⁷ Art. 2(a) of the proposal stipulates that “third country national” means any person who is not a citizen of the Union within the meaning of Art. 17.1 of the Treaty. The Explanatory Memorandum states that “The Proposal does not cover EU citizens, including those whose eligibility for employment in a particular Member State is restricted by transitional arrangements”. The right to take employment and remain as workers has been limited as regards the nationals of eight of the ten Member States which joined the EU on 1 May 2004 (with the exception of Malta and Cyprus) and the two states which joined on 1 January 2007 (Bulgaria and Romania). See J.Y. Carlier and E. Guild (eds) (2006), *The Future of Free Movement of Persons in the EU*, Collection du Centre des Droits de L’Homme de la’Université Catholique de Louvain, Brussels: Bruylant.

¹⁸ E. Guild (2004), “Who is an Irregular Immigrant”, in B. Bogusz, R. Cholewinski, A. Cygan and E. Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Leiden: Martinus Nihjoff, pp. 3-28. See also R. Cholewinski (2005), “Preventing Irregular Immigration”, in F. Julien-Laferriere, H. Labaye and O. Edström (eds), *The European Immigration and Asylum Policy: Critical Assessment Five Years after the Amsterdam Treaty/La Politique Européenne D’Immigration et D’Asile: Bilan Critique Cing Ans Après Le Traité D’Amsterdam*, Bruylant: Brussels, pp. 95-120.

¹⁹ About the negative implications inherent in the use of this terminology, see PICUM’s Comments on the Communication from the Commission on “Policy Priorities in the Fight against Illegal Immigration of Third-Country Nationals COM(2006) 402 final, February 2007, (retrievable from www.picum.org). See also Solidar, “Irregular migrants have rights: Solidar Position on the European Commission Communication on illegal immigration: A rights-based approach to the question of irregular migration” (www.solidar.org).

²⁰ Article 63.3.b provides that: “The Council shall,..., adopt: (3) measures on immigration policy within the following areas: (b) illegal immigration and illegal residence, including repatriation and of illegal residents”. It is worth remembering that since November 2004, policies related to the area of irregular immigration are subject to the co-decision procedure envisaged by Art. 251 EC Treaty, which means that the role of the European Parliament will be of fundamental importance during the negotiations of the initiative, and the

Council will not be the only determining actor deciding about its future. European Council, Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Art. 251 of that Treaty, OJ L 396/45, 31.12.2004.

²¹ Art. 1 reads as follows “This Directive lays down common sanctions and measures to be applied in the Member States against employers of third-country nationals who are illegally staying on the territory of the Member States, in order to take action against illegal immigration”.

²² Art. 1.c.

²³ The recital of the proposal expressly says that “administrative sanctions alone are likely not to be enough to deter certain unscrupulous employers. Compliance can and should be strengthened by the application of criminal sanctions”.

²⁴ Art. 29 TEU provides that “Without prejudice to the powers of the European Community, the Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice...That objective shall be achieved...through: approximation, where necessary, of rules on criminal matters in the Member States,...”. Art. 31.1 TEU further stipulates that “Common action on judicial cooperation in criminal matters shall include: (e) progressively adopting measures establishing minimum rules relating to constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism, and illicit drug trafficking”.

²⁵ E. Sanfrutos Cano (2007), “The Third Pillar and its Court of Justice: A ‘Praetorian Communitarisation’ of Police and Judicial Cooperation in Criminal Matters?”, paper presented in the Third CHALLENGE Training School on Police and Judicial Cooperation in Criminal Matters in the EU: Which Future for EU’s Third Pillar?, 13-14 April 2007, Centre for European Policy Studies, CEPS, Brussels.

²⁶ Judgement *Commission v. Council*, Criminal Sanctions for the Protection of the Environment, Case C-176/03, 13 September 2005, ECR [2005] I-7879. On the protection of the environment through criminal law see Council of the European Union, 2807th Council meeting Justice and Home Affairs, 10267/07 (Presse 125), Luxembourg, 12-13 June 2007, page 41.

²⁷ For an examination of some of the implications of Case C-176/03 *Commission v. Council* as regards the respective competences of the Member States and the European Community in relation to criminal law see House of Lords, European Union Committee, *The Criminal Law Competence of the European Community*, 42nd Report of Session 2005-06, Paper 227, House of Lords, London. See also S. White (2006), ‘Harmonisation of Criminal Law under the First Pillar’, *European Law Review*, 31, pp. 81-92; C. Tobler (2006), ‘Case C-176/03, *Commission v. Council*, judgement of the Grand Chamber of 13 September 2005’, *Common Market Law Review*, 43, pp. 835-854; P. Greatorex and N. Peter (2005), ‘Gloves off: *Commission v. Council*’, *New Law Journal*, 155, pp. 1706-1707; N. Peter (2005), ‘The rise and rise of criminal environmental penalties’, *New Law Journal*, 155, p. 1708.

²⁸ Communication from the Commission to the European Parliament and the Council on the implications of the Court’s judgment of 13 September 2005 (Case C 176/03 *Commission v Council*), COM/2005/0583 final, Brussels, 23.11.2005, which in paragraph 8 says that “From the point of view of subject matter, in addition to environmental protection the Court’s reasoning can therefore be applied to all Community policies and freedoms which involve binding legislation with which criminal penalties should be associated in order to ensure their effectiveness”.

²⁹ Craig, P. and G. de Búrca, *EU Law: Text, cases and materials*, Oxford: Oxford University Press, 2000. According to Art. 5 EC Treaty states that “The Community shall act within the limits of the powers conferred upon by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of scale or effects of the proposed action, be better achieved by the Community”.

³⁰ See Protocol on the application of the principles of Proportionality and Subsidiarity as attached to the Amsterdam Treaty.

³¹ P. 14.

³² Avis du Comité des Evaluations d'Impact, Accompanying documents to the Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, SEC(2007)606.

³³ European Foundation for the Improvement of Living and Working Conditions (2007), *Employment and Working Conditions of Migrant Workers* (retrievable from www.eurofound.ei.int).

³⁴ On the recognition of irregular migrants as human beings and the need to protect their rights see R. Cholewinski (2000), "The EU acquis on Irregular Immigration", *European Journal of Migration and Law*, Vol. 2, Nos. 3-4, pp. 361-405.

³⁵ Art. 14.2 continues by saying that "Member States shall not impose sanctions against designated third parties providing assistance to the third-country national to lodge complaints, on the grounds of facilitation of unauthorised residence".

³⁶ Joint Comments of ETUC, PICUM and Solidar on Expected Commission Proposals to fight 'illegal' employment and exploitative working conditions, Brussels, 26 April 2007. Other organisations which expressed their will to be mentioned in the documents included: the European Women's Lobby (EWL), the European Network Against Racism (ENAR), the International Catholic Migration Commission Europe (ICMC) and the Jesuit Refugee Centre (JRC).

³⁷ See Bundesrat, Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über Sanktionen gegen Personen, die Drittstaatsangehörige ohne legalen Aufenthalt Beschäftigen, Drucksache 364/07, Ratsdok 9871/07, 06.07.07.

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