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COMMISSION STAFF WORKING PAPER

Accompanying document to the

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

Summary of the impact assessment

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1. INTRODUCTION

Illegal immigration into the EU is encouraged by the possibility of finding work. This document is a summary of an impact assessment report that examines policy options for reducing that pull factor for illegal immigration by targeting the employment of third-country nationals who are illegally resident in the EU.

The report is based on consultations with Member States and other stakeholders. The data were collected from consultations as well as from case studies and literature reviews. The data-gathering and a large part of the consultations were undertaken by an external study ordered by the Commission. The study and report were drafted with input from meetings of an inter-service steering group convened by the Directorate-General for Justice, Freedom and Security.

1. PROBLEM DEFINITION

1.1. Scope of the problem

Illegal immigration is driven by a range of push and pull factors. Decisions to migrate are based on push factors such as unemployment or permanently low wage levels and natural disasters or ecological devastation, and of pull factors such as informal employment with higher wage levels, political stability, maintenance of the rule of law and effective protection of human rights. An instrument focussed on reducing the employment pull factor will not on its own eliminate the problem of illegal immigration; the present initiative is thus part of the EU's comprehensive approach to reducing illegal immigration. Tackling illegal immigration is in turn one part of the EU's efforts to develop a comprehensive migration policy.

The legislative proposal concerns the employment of third-country nationals who are staying illegally in the EU. These include those who entered the EU illegally and 'overstayers' who entered the EU legally but whose rights to stay have expired. The legislative proposal does not cover the employment of third-country nationals who are staying legally in a Member State but who have no or limited rights to work, and the limited rights are being exceeded. These include students, researchers, tourists and legally present family members of third-country nationals who do not have the right to work or only have the right to work a specified number of hours per week. Although tackling such situations is also important for significantly reducing the employment pull factor, the legal basis for the legislative proposal (Article 63(3)(b) of the EC Treaty) could not also permit measures in relation to this second category of third-country nationals.

The remainder of this summary refers only to illegally staying third-country nationals.

The options considered here would not affect EU citizens from the EU-10 and Bulgaria and Romania who under transitional arrangements have restricted rights to work in some Member States.

1.2. Size of the problem

Determining the size of the problem is difficult. Apart from the difficulties of measuring undocumented persons and undocumented work, where data or estimates do exist it is in

many cases difficult to identify whether they include EU citizens subject to work restrictions under transitional arrangements and if so, to separate the figures for third country nationals. Nevertheless, it is evident that there are high numbers of illegally staying third-country nationals across the EU and that numbers have grown in recent years.

Most estimates that are available relate to the period prior to 2004 and the accession of the EU-10 and count nationals from those countries and Bulgaria and Romania as third country nationals. This makes it difficult to present a clear overview. The estimates of the total number of illegal migrants in the EU include two to three million (Global Migration Perspectives 2005), 4.5 million (IOM 2000) and seven to eight million (United Nations' Trends in Total Migrant Stock: The 2003 Revision).

The estimates of annual increases of illegal immigrants into the EU include 500 000 (Wiener Zeitung 2005) and 350 000 (Global Migration Perspectives 2005). However, aggregating available estimates for 21 individual Member States suggests that there is an annual inflow of illegal migrants to the EU of between 893 000 and 923 300. Although reliable figures are not available it is reasonable to assume that significant numbers of illegal migrants either leave voluntarily, are regularised or are returned to their country of origin. Thus the net flow of illegal migrants is much less than the total inflow.

Some Member States have undertaken large-scale regularisation programmes, which will have also (at least initially) reduced the numbers of illegally staying third-country nationals. However, the medium to long-term effects are unclear as such programmes may themselves constitute a pull factor for more illegal migration to the EU.

1.3. Nature of the problem

A strong motivation for coming to the EU is the perception that comparatively well paid work is available. In practice the work that is accessible is mainly low paid jobs in the informal unregulated economy. The low salaries and bad working conditions that illegally staying third-country nationals are forced to accept make them sought after employees.

The employment of illegally staying third-country nationals does not necessarily crowd out locals from jobs. Instead, there are signs that whole industries are already dependent on illegally staying third-country nationals, as the kind of jobs they take would not be done by nationals at a wage level that would still maintain the international competitiveness of the sector concerned (e.g. horticulture). In terms of effects on product/service markets, making use of undeclared work is widespread particularly in certain sectors, but not limited to third-country nationals.

Effects on product/service markets may be positive in purely economic terms. Illegally staying third country nationals can bring substantial economic benefits to their host countries in their capacity as workers. Their low wages bring down the costs of goods and services, making firms and sometimes entire industries more competitive.

Construction, agriculture and horticulture, house work / cleaning, catering and other hospitality services are repeatedly identified as the sectors most prone to undocumented work in general, and that of illegal migrants in particular. This reflects in part the nature of the work that is required in these sectors (e.g. seasonal and flexible).

As concerns effects on competition and the internal market, in countries where the informal economy is less strong, employers of illegal migrants pose unfair competition to others within certain sectors. In other countries, the custom of making use of undeclared work in general, and also illegal third country nationals, is so wide-spread, that all companies within the sectors concerned have adapted to this situation, and employ illegally themselves or cope with unfair competition by other means.

Illegal migrants contribute positively economically not just to host economies but also to countries of origin. Migrant sending countries benefit significantly from labour outflows as these offer relief from unemployment, boost the participation of female workers and produce a flow of remittances. For many third countries the dependency on these remittances has increased over the years. However, there are significant costs that offset these benefits, e.g. lack of payment of social security contributions, exploitation of many illegal migrants, and the distortion of the labour market by downward pressure on wages and conditions.

1.4. Existing national measures targeting employers

At least 26 of the 27 EU Member States already have employer sanctions and preventive measures. The legislation of 19 Member States provide for criminal sanctions. However, not only does the content of these measures vary greatly, but also the combinations of measures implemented. Moreover; most Member States have high numbers of illegally staying third-country nationals in work despite having those sanctions in place. Many stakeholders point out that enforcement of the sanctions is key for an effective instrument.

There are a number of challenges that Member States face in enforcing their policies in relation to undeclared work, including:

- lack of coordination and cooperation between the actors responsible for combating illegal work,
- absence of frameworks that govern such coordination and cooperation,
- insufficient human and financial resources allocated to enforcement bodies,
- obstacles to field operations,
- lack of information to undertake effective controls,
- lack of data to assess the outcome of inspections, and,
- insufficient international cooperation.

The wide variety of existing national measures is also a problem: it goes against the creation of a level playing field for employers across the EU and it does not provide the picture that it is an EU common goal to fight the employment of illegally staying third-country nationals.

2. OBJECTIVES

The overall objective is:

- **To contribute to reducing illegal immigration.**

The specific objectives are:

- **To reduce employment of illegally staying third-country nationals.**
- **To create a level playing field for EU employers.**
- **To contribute to reduced exploitation of illegally staying third-country nationals.**

Although the last of those specific objectives does not fall within the scope of the relevant legal base, Article 63(3)(b) EC, it is appropriate to include it for assessing the options in view of the exploitative conditions which often exist in this area.

3. POLICY OPTIONS

The option of regularising illegally staying third-country nationals was rejected at an early stage, due to a lack of data on current practices and effects of regularisation measures. Moreover, regularisation is argued by many to be a pull factor for illegal immigration and therefore unhelpful in this exercise.

Policy Option 1 – Status quo

Policy Option 2 – Harmonised sanctions for employers of illegally staying third-country nationals across the EU, with an enforcement obligation on Member States

In this option, which requires EU level regulatory action, harmonised sanctions for employers of illegally staying third-country nationals would be established across the EU. The infringement would be the employment of an illegally staying third-country national. Fines, other penalties (such as ineligibility for public contracts and subsidies) and, for serious cases, criminal sanctions would be put in place. In view of the importance of enforcement, Member States would be required to undertake a certain number of controls on company premises (expressed as a % of number of registered companies).

Policy Option 3 – Harmonised preventive measures: common requirements across the EU for employers to copy the relevant documentation (residence permit) and to notify the competent national bodies

This option would involve legislative action at EU level to require common measures to prevent the employment of third-country nationals. The employer would be required to ask the prospective employee for documents concerning residence rights, and copy and forward them to the relevant national authorities. The employer would be obliged to retain a copy and ensure the safe-keeping and confidentiality of these documents. The relevant national authority would be responsible for checking the documents (e.g., whether they are forged) and the status of the migrant, and informing the employer if the employee cannot be legally

employed. The employer would not have to wait for a reply from the authority before hiring a new employee, but would need to lay off the person in case of a negative reply from the authorities.

Employers failing to submit copies of relevant documentation to the competent authority would not necessarily be subject to a penalty, but employers who could show that they had carried out the checks would not be liable to sanctions if the worker were subsequently found to have been an illegally staying third-country national.

Policy Option 4 – Harmonised employer sanctions and preventive measures

This regulatory option, which would imply EU level legislative action, consists of a combination of options 2 and 3 above.

Policy Option 5 – EU awareness raising campaign

This non-regulatory option would consist of organising an EU awareness raising campaign. It would seek to make employers aware of their legal obligations and the negative consequences of hiring illegally staying third-country nationals. Social partners and other relevant actors could be involved.

Policy Option 6 – Identification and exchange of good practices

This option would involve the identification and exchanges of good practices and information between Member States on different subjects (e.g. enforcement mechanisms, legislative means, identification and seizure of facilitators, etc.) taking place in a structured form, e.g. peer learning, with assistance from the Commission in issuing guidelines, identifying national contact points and arranging meetings.

4. COMPARING THE OPTIONS

Table – Assessment of Policy Options – comparison

<i>Objective to be achieved/ problem addressed</i>	<i>Policy Options (Anticipated impacts rated from – to √√√√√)</i>					
	Option 1	Option 2	Option 3	Option 4	Option 5	Option 6
To reduce employment of illegally staying third-country nationals	0 or √	√√	√	√√√	0	√
To reduce illegal immigration to the EU	√	√√	√√	√√√	0	√√
To create a level playing field for employers	0 or –	√√√	√√√	√√√√	0	√
To contribute to reduced exploitation of illegally staying third-country nationals	0 or –	0 or -	0	0 or -	0	√√
To develop common rules which are likely to be complied with in practice and enforced	0	√	√√	√√	0	√
To complement and reinforce existing (and forthcoming) acquis	N/A	√√	√√	√√√	√	√√√
To reduce human trafficking, organised crime and smuggling	0 or –	0 or –	0 or –	–	0	√√
<i>Fundamental rights</i>						
▪ Protection of personal data (Art. 8)	0	0	–	–	0	0
▪ Right to an effective remedy and fair trial (Art. 47)	0	0	0	0	0	0
▪ Non-discrimination (Art. 21)	0	0	0	0	0	0 or √
▪ Principles of legality and proportionality of criminal offences and penalties (Art. 49)	0	√	√	√	0	0 or √
<i>Costs relative to status quo</i>						
+ Higher cost than status quo; 0 Unchanged costs; – Lower costs than status quo	0	+	+	+	+	+

The preferred option is a combination of:

- **Option 4:** Harmonised employer sanctions for employers of illegally staying third-country nationals, with an enforcement obligation on Member States, and harmonised preventive measures: common requirements across the EU for employers to copy the relevant documentation and to notify the competent national bodies; and,
- **Option 6:** Identification and exchange between Member States of good practices.

Main benefits of the preferred option

- Positive impacts on the reduction of illegal employment of third-country nationals.

- Universal presence and minimum levels of sanctions and enforcement across the EU would increase their deterrent effect.
- Rapid progress towards a level playing field for companies across the EU.
- The preventive measures would impose a universal but ‘light’ burden to request and keep documentation on prospective employees but the onus on checking the bona fide nature of these documents would rest with competent authorities. This would allow employers to proceed in good faith to hire workers who had provided documentation that appeared to meet requirements.
- Requiring Member States to inspect 10% of registered companies, as foreseen in the legislative proposal, would improve enforcement and send a clear message to employers that the threat of being caught in case of violation is real or increased.
- The identification and exchange of good practice on implementation and enforcement (option 6) would contribute to improving enforcement.
- A clear messages to third countries and prospective illegal migrants that the problems are being addressed and that the risks to illegal migrants have increased. Such a message emanating from the EU level would have a value distinct from and greater than that from the national level.
- As concerns fundamental rights, overall it can be expected that exploitation would be reduced as a result of exchange of good practices on how to protect victims of such exploitation and sharing of information on how to mitigate negative effects for those who collaborate with law enforcement. Positive impacts are also likely on the principles of legality and proportionality of criminal offences and penalties as the crime for serious infringements would be defined across the EU.

Main disadvantages of the preferred option

- Illegal employment of third country nationals would not be eliminated. Effectiveness in this respect depends largely on enforcement, which is the responsibility of the Member States. Even with the enforcement obligation and the the sharing of good practices, the effectiveness of inspections would still be dependent on the Member States.
- In purely economic terms, sensitive sectors (mainly construction, agriculture, housework/cleaning, catering and other hospitality services), are likely to be negatively affected.
- Possible negative effects on illegally staying third-country nationals of stricter sanctions against employers (risk of increased exploitation because such workers may be pushed further underground and have a weaker bargaining position). However, such possible effects would be counterbalanced by the deterrent effect of especially the proposed criminal sanctions in cases of particularly exploitative working conditions.
- As concerns fundamental rights, there are possible negative effects on protection of personal data. To what extent this would occur depends on what measures are taken by employers and authorities to ensure the confidentiality thereof.