

Directive 2009/52/EC of the European Parliament and of the Council
of 18 June 2009 providing for minimum standards on sanctions and
measures against employers of illegally staying third-country nationals

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article
63(3)(b) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee⁽¹⁾,

Having regard to the opinion of the Committee of the Regions⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽³⁾,

Whereas:

- (1) The European Council meeting of 14 and 15 December 2006 agreed that cooperation among Member States should be strengthened in the fight against illegal immigration and in particular that measures against illegal employment should be intensified at Member State and EU level.
- (2) A key pull factor for illegal immigration into the EU is the possibility of obtaining work in the EU without the required legal status. Action against illegal immigration and illegal stay should therefore include measures to counter that pull factor.
- (3) The centrepiece of such measures should be a general prohibition on the employment of third-country nationals who do not have the right to be resident in the EU, accompanied by sanctions against employers who infringe that prohibition.
- (4) As this Directive provides for minimum standards, Member States should remain free to adopt or maintain stricter sanctions and measures and impose stricter obligations on employers.
- (5) This Directive should not apply to third-country nationals staying legally in a Member State regardless of whether they are allowed to work in its territory. Furthermore, it should not apply to persons enjoying the Community right of free movement, as defined in Article 2(5) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)⁽⁴⁾. Moreover it should not apply to third-country nationals who are in a situation covered by Community

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law, such as those who are lawfully employed in a Member State and who are posted by a service provider to another Member State in the context of the provision of services. This Directive should apply without prejudice to national law prohibiting the employment of legally staying third-country nationals who work in breach of their residence status.

- (6) For the specific purposes of this Directive, certain terms should be defined and such definitions should be used only for the purposes of this Directive.
- (7) The definition of employment should encompass its constituent elements, namely activities that are or ought to be remunerated, undertaken for or under the direction and/or supervision of an employer, irrespective of the legal relationship.
- (8) The definition of employer may include an association of persons recognised as having the capacity to perform legal acts without having legal personality.
- (9) To prevent the employment of illegally staying third-country nationals, employers should be required, before recruiting a third-country national, including in cases where the third-country national is being recruited for the purpose of posting to another Member State in the context of the provision of services, to check that the third-country national has a valid residence permit or another authorisation for stay showing that he or she is legally staying on the territory of the Member State of recruitment.
- (10) To enable Member States in particular to check for forged documents, employers should also be required to notify the competent authorities of the employment of a third-country national. In order to minimise the administrative burden, Member States should be free to provide for such notifications to be undertaken within the framework of other notification schemes. Member States should be free to decide a simplified procedure for notification by employers who are natural persons where the employment is for their private purposes.
- (11) Employers that have fulfilled the obligations set out in this Directive should not be held liable for having employed illegally staying third-country nationals, in particular if the competent authority later finds that the document presented by an employee had in fact been forged or misused, unless the employer knew that the document was a forgery.
- (12) To facilitate the fulfilment by employers of their obligations, Member States should use their best endeavours to handle requests for renewal of residence permits in a timely manner.
- (13) To enforce the general prohibition and to deter infringements, Member States should provide for appropriate sanctions. These should include financial sanctions and contributions to the costs of returning illegally staying third-country nationals, together with the possibility of reduced financial sanctions on employers who are natural persons where the employment is for their private purposes.
- (14) The employer should in any event be required to pay to the third-country nationals any outstanding remuneration for the work which they have undertaken and any outstanding taxes and social security contributions. If the level of remuneration cannot be determined, it should be presumed to be at least as high as the wage provided for by

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- the applicable laws on minimum wages, by collective agreements or in accordance with established practice in the relevant occupational branches. The employer should also be required to pay, where appropriate, any costs arising from the sending of outstanding remuneration to the country to which the illegally employed third-country national has, or has been, returned. In those cases where back payments are not made by the employer, Member States should not be obliged to fulfil that obligation in place of the employer.
- (15) An illegally employed third-country national should not derive a right to entry, stay and access to the labour market from the illegal employment relationship or from the payment or back payment of remuneration, social security contributions or taxes by the employer or by a legal entity which has to pay instead of the employer.
- (16) Member States should ensure that claims are or may be lodged and that mechanisms are in place to ensure that recovered amounts of outstanding remuneration are able to be received by the third-country nationals to whom they are due. Member States should not be obliged to involve their missions or representations in third countries in those mechanisms. Member States should, in the context of establishing effective mechanisms to facilitate complaints and if not already provided for by national legislation, consider the possibility and added value of enabling a competent authority to bring proceedings against an employer for the purpose of recovering outstanding remuneration.
- (17) Member States should further provide for a presumption of an employment relationship of at least three months' duration so that the burden of proof is on the employer in respect of at least a certain period. Among others, the employee should also have the opportunity of proving the existence and duration of an employment relationship.
- (18) Member States should provide for the possibility of further sanctions against employers, inter alia, exclusions from entitlement to some or all public benefits, aids or subsidies, including agricultural subsidies, exclusions from public procurement procedures and recovery of some or all public benefits, aids or subsidies, including EU funding managed by Member States, that have already been granted. Member States should be free to decide not to apply those further sanctions against employers who are natural persons where the employment is for their private purposes.
- (19) This Directive, and in particular its Articles 7, 10 and 12, should be without prejudice to Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities⁽⁵⁾.
- (20) In view of the prevalence of subcontracting in certain affected sectors, it is necessary to ensure that at least the contractor of which the employer is a direct subcontractor may be liable to pay financial sanctions in addition to or in place of the employer. In specific cases, other contractors may be liable to pay financial sanctions in addition to or in place of an employer of illegally staying third-country nationals. Back payments which are to be covered by the liability provisions of this Directive should also include contributions to national holiday pay funds and social funds regulated by law or collective agreements.

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- (21) Experience has shown that the existing systems of sanctions have not been sufficient to achieve complete compliance with prohibitions against the employment of illegally staying third-country nationals. One of the reasons is 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 penalties.
- (22) To guarantee the full effectiveness of the general prohibition, there is therefore a particular need for more dissuasive sanctions in serious cases, such as persistently repeated infringements, the illegal employment of a significant number of third-country nationals, particularly exploitative working conditions, the employer knowing that the worker is a victim of trafficking in human beings and the illegal employment of a minor. This Directive obliges Member States to provide for criminal penalties in their national legislation in respect of those serious infringements. It creates no obligations regarding the application of such penalties, or any other available system of law enforcement, in individual cases.
- (23) In all cases deemed to be serious according to this Directive the infringement should be considered a criminal offence throughout the Community when committed intentionally. The provisions of this Directive regarding criminal offences should be without prejudice to the application of Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings⁽⁶⁾.
- (24) The criminal offence should be punishable by effective, proportionate and dissuasive criminal penalties. The obligation to ensure effective, proportionate and dissuasive criminal penalties under this Directive is without prejudice to the internal organisation of criminal law and criminal justice in the Member States.
- (25) Legal persons may also be held liable for the criminal offences referred to in this Directive, because many employers are legal persons. The provisions of this Directive do not entail an obligation for Member States to introduce criminal liability of legal persons.
- (26) To facilitate the enforcement of this Directive, there should be effective complaint mechanisms by which relevant third-country nationals may lodge complaints directly or through designated third parties such as trade unions or other associations. The designated third parties should be protected, when providing assistance to lodge complaints, against possible sanctions under rules prohibiting the facilitation of unauthorised residence.
- (27) To supplement the complaint mechanisms, Member States should be free to grant residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals who have been subjected to particularly exploitative working conditions or who were illegally employed minors and who cooperate in criminal proceedings against the employer. Such permits should be granted under arrangements comparable to those applicable to third-country nationals who fall within the scope of Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings

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- or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities⁽⁷⁾.
- (28) 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.
- (29) Member States should be encouraged to determine every year a national target for the number of inspections in respect of the sectors of activity in which the employment of illegally staying third-country nationals is concentrated on their territory.
- (30) With a view to increasing the effectiveness of inspections for the purposes of applying this Directive, Member States should ensure that national legislation gives adequate powers to competent authorities to carry out inspections; that information about illegal employment, including the results of previous inspections, is collected and processed for the effective implementation of this Directive; and that sufficient staff are available with the skills and qualifications needed to carry out inspections effectively.
- (31) Member States should ensure that inspections for the purposes of applying this Directive do not affect, from a quantitative or qualitative point of view, inspections carried out to assess employment and working conditions.
- (32) In the case of posted workers who are third-country nationals, Member States' inspection authorities may avail themselves of the cooperation and exchange of information provided for in Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services⁽⁸⁾, in order to verify that the third-country nationals concerned are lawfully employed in the Member State of origin.
- (33) This Directive should be seen as complementary to measures to counter undeclared work and exploitation.
- (34) In accordance with point 34 of the Interinstitutional Agreement on better law-making⁽⁹⁾, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables, which will, as far as possible, illustrate the correlation between this Directive and the transposition measures and to make them public.
- (35) Any processing of personal data undertaken in the implementation of this Directive should be in compliance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁽¹⁰⁾.
- (36) Since the objective of this Directive, namely to counteract illegal immigration by acting against the employment pull factor, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary to achieve that objective.

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- (37) This Directive respects the fundamental rights and observes the principles recognised in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union. Specifically, it should be applied with due respect for the freedom to conduct a business, equality before the law and the principle of non-discrimination, the right to an effective remedy and to a fair trial and the principles of legality and proportionality of criminal offences and penalties, in accordance with Articles 16, 20, 21, 47 and 49 of the Charter.
- (38) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of that Protocol, those Member States are not taking part in the adoption of this Directive and are therefore not bound by it or subject to its application.
- (39) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is therefore not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

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- (1) [OJ C 204, 9.8.2008, p. 70.](#)
- (2) [OJ C 257, 9.10.2008, p. 20.](#)
- (3) [Opinion of the European Parliament of 19 February 2009] (not yet published in the Official Journal) and Council Decision of 25 May 2009.
- (4) [OJ L 105, 13.4.2006, p. 1.](#)
- (5) [OJ L 248, 16.9.2002, p. 1.](#)
- (6) [OJ L 203, 1.8.2002, p. 1.](#)
- (7) [OJ L 261, 6.8.2004, p. 19.](#)
- (8) [OJ L 18, 21.1.1997, p. 1.](#)
- (9) [OJ C 321, 31.12.2003, p. 1.](#)
- (10) [OJ L 281, 23.11.1995, p. 31.](#)