5.6 There are two ways in which the damage may be corrected: either the operator may take the necessary restoration measures, in which case they will be financed directly by the operator, or the competent authority may have the measures implemented by a third party and recover the costs from the perpetrator of the damage. A combination of the two approaches is also possible in the interests of greater effectiveness.

5.7 When there is more than one party liable for the damage, the Directive leaves to the Member States to decide how to apportion the costs, the two main options being either joint and several liability or apportioned liability. While this dual system is intended to facilitate adaptation to the legal systems of the Member States, it should nonetheless be pointed out that determining the proportion of environmental damage is extremely difficult, which makes this system difficult to implement in practice.

5.8 Lastly, it should be stressed that the requirement of financial security for operators subject to water, soil and biodiversity legislation helps to make repair more effective, whilst avoiding the negative consequences of insolvency.

Brussels, 13 March 2008.

The President
of the European Economic and Social Committee
Dimitris DIMITRIADIS

Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals (Own-initiative opinion)

(2008/C 204/16)

On 27 September 2007 the European Economic and Social Committee, under Rule 29(2) of its Rules of Procedure decided to draft an own-initiative opinion on the

Proposal for a Directive of the European Parliament and of the Council providing for sanctions against employers of illegally staying third-country nationals

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 21 February 2008. The rapporteur was Ms Roksandić, the co-rapporteur, Mr Almeida Freire.

At its 443rd plenary session, held on 12 and 13 March 2008 (meeting of 12 March), the European Economic and Social Committee adopted the following opinion by 118 votes to 56 with seven abstentions.

1. **Conclusions and recommendations**

1.1 The EESC expresses regret at the fact that the proposed directive on 'Sanctions against employers of illegally staying third-country nationals' was not referred to the EESC for an opinion, although it is stated in the introduction to the directive that this is so. The proposed directive does not ordinarily come under one of the areas for which consultation of the Committee is mandatory; however the Committee believes that it is necessary to consult representatives of civil society organisations in such instances and related cases, because they concern the regulation of key areas which not only fall within the domain of freedom, security and justice, but also have an impact on employment and social policy.

1.2 The EESC has decided on its own initiative to draw up an opinion on this proposal for a directive. The Committee believes that organised civil society, and especially the social partners, has a most important role to play in shaping and implementing the Directive proposed by the European Commission on 'Sanctions against employers of illegally staying third-country nationals'.

1.3 In its opinions to date [1], the Committee has highlighted the need for simultaneous action to be taken to create opportunities for legal immigration and to deal with the causes of 'irregular' immigration.

[1] See the EESC opinion of 15.12.2004 on 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions — Study on the links between legal and illegal migration', rapporteur Mr Pariza Castaños (OJ C 157, 28.6.2005).
See the EESC opinion of 9.6.2005 on 'Green paper on an EU approach to managing economic migration', rapporteur Mr Pariza Castaños (OJ C 286, 17.11.2005).
See the EESC opinion of 15.12.2005 on 'Communication from the Commission to the Council and the European Parliament: The Hague Programme: Ten priorities for the next five years — The Partnership for European renewal in the field of Freedom, Security and Justice', rapporteur Mr. Pariza Castaños (OJ C 65, 17.3.2006).

1.4 The Committee endorses the proposal, because in practice it promotes respect for human rights. However, the Committee has some doubts about the proposed directive's content, the time frame in which the proposal has been made, and the order in which the legislative proposals have been put forward. The employment of immigrants is an issue closely connected to the operation of the labour market and illegal employment in general, and therefore cannot be prevented by punishing employers alone.

1.5 In view of the connection between two different fields of the European Commission's work, which have a bearing on immigration at EU level, namely the area of freedom, security and justice on the one hand, and employment and social policy on the other, the Committee would highlight the importance of harmonising existing European Union legislation with the legislation on legal and illegal immigration which is currently in the pipeline. The Committee believes that the problem of illegal immigration cannot be solved simply by closing borders and applying coercive measures.

1.6 Legal migration and immigration within and into the EU urgently need to be regulated, as do efforts to combat undeclared work. The Committee recommends that the Commission carefully examine the possibility of further activities to combat undeclared work.

1.7 International experience shows that the fight against undeclared work is at its most effective when based on a number of parallel and concurrent courses of action. Accordingly, in addition to allowing the legal migration of workers in those sectors of the economy with the highest numbers of illegal immigrant workers, it is necessary to organise information and educational campaigns which highlight the impact of undeclared work. Furthermore, there should be a policy of uniform sanctions against employers — irrespective of the nationality of the undeclared workers. The proposed directive should, therefore, be part of a broader package of measures to combat undeclared work — including among illegal immigrants — and not represent a fundamental policy instrument, as proposed by the Commission.

1.8 The Committee would stress the importance of effective implementation of the directive in Member States, whose task will not be an easy one because i) the monitoring bodies do not have enough qualified staff, ii) there are difficulties in dividing up responsibilities between the bodies concerned and iii) there are a large number of companies for which monitoring is envisaged.

1.9 The Committee believes that those proposals in the directive which would lead to benefits in practice should be consolidated. The changes and additions proposed by the Committee are listed under the heading 'Specific comments', and are aimed at securing a more appropriate division of responsibility, as well as improvements in the situation of undocumented workers. If these proposals were to be ignored, such workers might be subjected to even more exploitation.

2. **Introduction**

2.1 The proposed directive is one of several legislative proposals put forward by the European Commission in line with its communications on the Policy plan on legal migration of 2005 ([2]) and on the Policy priorities in the fight against illegal immigration of third-country nationals (July 2006) ([3]). In these communications, the Commission proposed to reduce the factors encouraging illegal immigration into the EU, the most important being the possibility of finding work. Member States would introduce similar penalties for employers of third country nationals and implement them effectively. The European Council endorsed the Commission proposal ([4]) in December 2006.

2.2 The proposal for a directive was followed up in 2007 by the:

— Commission Communication on circular migration and mobility partnerships between the European Union and third countries ([5]);

— Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ([6]);

— Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State ([7]); and the

— Commission Communication on stepping up the fight against undeclared work ([8]).

3. **Summary of the proposed directive**

3.1 The aim of the directive is to make the work offered by employers less attractive to migrants who do not have the proper permits (reduce the 'pull factor'). Building on existing measures in the Member States, the directive would ensure that i) all Member States introduce similar penalties for employers of third-country nationals who do not have the proper residence permits and ii) these penalties are enforced effectively.

3.2 The Directive is concerned with immigration policy, not with labour or social policy. Its legal basis is Article 63(3)(b) of the EC Treaty, and it is designed to reduce illegal immigration into the EU.

3.3 The proposal does not concern legal immigration and employment which conflicts with the residence status awarded (as in the case of students or tourists) or undeclared work by third-country nationals.

([2]) COM(2005) 669 final.
([3]) COM(2006) 402 final.
([4]) Communication from the Commission on Policy priorities in the fight against illegal immigration of third-country nationals — COM(2006) 402 final.
([5]) COM(2007) 248 final.
([6]) COM(2007) 637 final.
([7]) COM(2007) 638 final.
([8]) COM(2007) 628 final.

4. **Content of the proposal**

4.1 The directive prohibits the employment of third-country nationals staying in the EU illegally. Infringements would be sanctioned by penalties (which may be administrative in nature) consisting of fines and, in the case of businesses, possible other measures, such as exclusion from and recovery of public subsidies and exclusion from participation in public procurement contracts. Criminal penalties may be imposed in serious cases.

4.2 Article 2 sets out the definition of employment for the purposes of the directive. Employers are defined as natural and legal persons, for whom a third-country national is employed to do paid work.

4.3 Employers are obliged i) to check, before employing a third-country national, whether that person has a legal residence permit valid for at least the duration of employment and ii) to keep a copy of that document for possible inspection. Employers are then deemed to have fulfilled their obligation, unless the document presented is manifestly incorrect. Only businesses and legal persons are obliged to notify the competent authorities of both the start and the termination of employment of third-country nationals within one week at the latest.

4.4 Employers who do not comply with the ban on employing illegally resident third-country nationals will be punished by effective, proportionate and dissuasive sanctions. Employers are penalised for each infringement with fines and an obligation to cover repatriation costs (the employer must pay such third-country nationals any outstanding remuneration for their work, as well as any outstanding taxes and social security contributions). In line with Article 10, under certain circumstances an infringement may constitute a criminal offence when committed intentionally.

4.5 Member States are also to introduce financial penalties (fines and the costs of repatriating third-country nationals) as well as other sanctions (temporary exclusions from entitlement to public funds and from public procurement procedures, recovery of EU funding already awarded, temporary or long-term closure of establishments). The liability of legal persons and possible sanctions against them are also stipulated. Existing Member State provisions on the liability of legal persons may be maintained.

4.6 Where the employer is a subcontractor, Member States are to ensure that both the main contractor and the subcontractor are held jointly liable for the payment of all financial sanctions and back payments due.

4.7 The employer must reimburse all outstanding contributions and taxes to the third-country national concerned. In addition, Member States must put mechanisms in place to ensure that the recovery procedures are triggered automatically, without the third-country national concerned having to submit a claim. A work relationship is presumed to last at least 6 months, unless the employer can prove differently. Member States must ensure that such illegally employed third country nationals receive any back pay recovered, including in cases where they have returned to their country or have been repatriated. Where a criminal offence is involved, third country nationals are not to be repatriated until they receive all the back pay due.

4.8 Member States must ensure that every year at least 10 % of companies established on their territory are subject to inspections to monitor the employment of illegally resident third-country nationals. The selection of companies to be inspected is to be based on a risk assessment which takes into account factors such as the sector involved and any past record of infringement.

4.9 Member States must transpose the directive within two years of its publication in the Official Journal of the EU.

5. **General comments**

5.1 The proposal for a directive affects two different areas of the Commission's work, which in the implementation of immigration policy are closely intertwined: the area of freedom, security and justice, and employment and social policy. The Committee is not against the idea, set out in the proposal, to put pressure on both dishonest employers and illegal organisations trading in people who have no papers. The Committee endorses the proposal, because it promotes respect for human rights.

5.2 The Committee feels that it would be necessary for the European institutions to take into account EU institutions' decision-making and to:

— ensure that the legislation on legal and illegal immigration which is currently in the pipeline ties in with existing EU legislation;

— clarify the implications and repercussions, both for people migrating within the EU and those immigrating into the EU from third countries.

It is necessary to be quite clear about these delicate issues, because they concern not only security, justice and competition policy, but also human rights, and this in turn affects the market, four freedoms, and workforce, both from a collective and individual point of view, and also because immigration is necessary for the EU. In its opinions to date, the Committee has highlighted the need for simultaneous action to be taken to create opportunities for legal immigration and to deal with the causes of 'irregular' immigration.

5.3 Legal migration and immigration within and into the EU urgently needs to be regulated. Restrictions on migration in Member States have caused a number of problems, prevented the free movement of workers between certain Member States, and led to some third-country nationals, as well as EU citizens, being employed in breach of regulations and exploited by their employers. Steps to combat undeclared work in the EU and in individual Member States should deal with everyone employed

in this way on the same basis, irrespective of whether they are EU citizens or third country nationals. The Committee therefore urges the Commission to closely examine the possibility of extending the legal basis of the proposed directive to allow measures also to be taken against illegal work by any person who does not have the necessary permits or documents.

5.4 The Committee believes that the 'pull factor' for migrants referred to in the directive, which the latter is aiming to lessen, is not the possibility of irregular work itself, but rather the possibility of employment in another country. That is why steps to simplify the procedures for obtaining a single residence and work permit will without a doubt help reduce the pull factor. However, Member States themselves should also contribute to simplifying procedures.

5.5 Employers stress the need to fight illegal work and unfair competition, because those employers who employ workers illegally are creating illegal and unfair competition for other, honest employers.

5.6 Although implementation of the directive is the responsibility of the Member States, the Commission should be made aware that this will not be an easy task, because i) there are not enough administrative monitoring bodies, ii) there are difficulties in dividing up responsibilities between the individual bodies concerned and iii) there are a large number of companies to be monitored. The strength of the directive should be in its actual implementation.

5.7 European institutions should use the same terms as those used by international and regional organisations and in international law, which as a consequence are internationally recognised, such as 'irregular' or 'undocumented migrant worker' and not 'illegal workers' or 'illegal immigration'. The term 'illegal immigrant' has very negative connotations. The proposed directive could help exacerbate such notions; it could give rise to increased discrimination and xenophobia towards all migrant workers, who might be subjected to inspections on the basis of their appearance alone.

5.8 Notwithstanding any doubts regarding the proposed directive, the Committee believes that the proposals in the directive which could lead to benefits in practice should be consolidated. These have been listed under the heading 'Specific comments'.

6. **Specific comments**

6.1 **Article 1** — This article should offer Member States which have already taken steps to regulate irregular immigration the possibility of maintaining national measures that are more favourable to workers.

6.2 **Article 2** — the definitions should be modified as follows:

— 2(b): 'employment' means exercise of activities **which are remunerated or performed in circumstances of economic dependence** for and under the direction of another person;

— **temporary employment agencies** should be added to the definition of 'employer' 2(e) and 'subcontractor' 2(f), as the current definition is unclear. Many workers from third countries are employed by go-betweens, which includes agencies.

6.3 **Article 4(1)(c)** — the employer should retain a copy of residence permits for longer than the period of employment itself, given that in some sectors employment is generally short term and the employer often changes.

6.4 Article 5

— In cases where employers have i) fulfilled their obligations in respect of illegal employment and ii) checked residence permits and retained copies as required, and it subsequently transpires that a third-country national does not have a valid residence permit after all, the employers still have a duty to pay any outstanding remuneration and meet the other commitments set out in Article 7 of the directive. For this reason, the following should be added to the end of the article: 'This does not affect their duty to pay all outstanding remuneration and fulfil the obligations set out under Article 7'.

— A provision should be added stipulating that employers must respect employment procedures laid down by Member States. It is conceivable that employers might only check residence permits and ignore the work permits that are a requirement in many Member States. Thus undeclared employment of third country nationals could well grow, in spite of the fact that employers are complying with the directive's provisions.

6.5 Article 6

— In the sanctions listed under 2(a) it should be stipulated that the financial penalties should high enough to cover any gain made by the employer in relation to each illegally employed third-country national. Thus the financial penalty would add up to the amount stipulated for one illegally employed person, and would rise in line with the number of illegally employed third country nationals. There is a clear difference between the gains of private employers who employ workers illegally as home helps or on farms, and those employers who illegally employ three, four or more workers in activities specifically geared to making a profit.

— Provision should be made for increasing the financial penalty for employers who continue to employ third country nationals illegally or who reoffend. This penalty should be substantially increased each time such illegal employment is repeated or continued, in order to act as a deterrent.

— It would be unreasonable to expect employers to cover the costs of returning each illegally employed third-country national, as well as the financial penalties. This, in effect, would mean shifting the responsibility of individual countries' immigration authorities to employers. Employers should only have to pay these costs where a criminal offence has been committed, in line with Article 10.

6.6 Article 7

— It should also be stipulated that the obligation to pay applies from the day that the claim for payment is submitted, and not from the date the claim takes legal effect.

— The rights of workers under the employment contract should continue to apply, irrespective of whether or not they have a residence or work permit.

— Difficulties could be faced in practice in the payment of outstanding wages to a worker who has already returned home; this should be taken into account. Moreover, it is necessary to ensure that wages are paid to the right person.

— In addition, it should be made clear that employers must calculate any outstanding remuneration in accordance with the laws, regulations, administrative decisions and/or collective agreements that normally apply to such employment.

6.7 **Article 8** refers to other measures to be adopted by Member States.

— It would be useful to include a compulsory list of such measures.

— The measure listed under point d), concerning the temporary or permanent closure of establishments that have been used to commit the infringement, seems unreasonable, especially since it could also affect legally employed workers. When implementing this measure, workers employed at the establishments concerned, and their representatives, should be consulted.

6.8 **Article 9** defines the responsibility of the main contractors and any intermediate subcontractors for paying sanctions and back payments. It would be useful here to clarify under which circumstances this does and does not apply. In some sectors with long chains of subcontractors, such as the car industry, it would prove difficult to hold manufacturers and subcontractors who produce various parts in different locations and countries jointly liable. The Committee believes that main contractors should, by taking reasonable precautionary measures, be able to ensure that they are not held liable in this way.

6.9 Article 10

— Under this article an infringement constitutes a criminal offence (in line with Article 3) when committed 'intentionally'. However, since this is difficult to prove, a better definition of criminal offence would be to show that the employer 'knew' or 'could have known' about the criminal offence.

— With regard to the infringement set out under 1 (a), every repeat infringement of Article 3 should be deemed to be a criminal offence.

— In the case of an infringement deemed to be a deliberate criminal offence, as described in paragraph 1(a), it is important to take into account the possibility that legal proceedings will be time-consuming. There is the risk that the provision will not be applied at all if Member States decide that determining whether an infringement has occurred should be subject to a decision by a court or national authority within a period of two years. Because these processes can be so time-consuming, and because all legal remedies would be invoked to lodge an appeal, the provision may not be put into practice at all.

— In implementing this article in the Member States, a clear division of competences needs to be stipulated between the administrative bodies that impose sanctions, and individual competent courts, in order to avoid potential conflicts over competences.

6.10 Article 14

— Member States should be required to provide effective mechanisms that ensure procedures can be carried out quickly and without major costs.

— Likewise, Member States should guarantee that sanctioning bodies will provide information on the launch of procedures to the representatives concerned without delay.

— In paragraph 3, it would be useful to grant special status not only to third-country nationals who are or have been subjected to exploitative working conditions and are cooperating in criminal proceedings against the employer, but also to witnesses.

6.11 Article 15

This provision, stipulating that Member States ensure that at least 10 % of companies are inspected every year, is to be welcomed. However, the effectiveness of the proposed directive will depend on the actual implementation of this provision. In most Member States, extra staff and financial resources will be necessary to carry it out. Were this not to be provided, such additional obligations would undoubtedly give rise to unequal treatment of those concerned.

Brussels, 12 March 2008.

The President

of the European Economic and Social Committee

Dimitris DIMITRIADIS

APPENDIX

to the opinion of the European Economic and Social Committee

The following amendments, which received at least a quarter of the votes cast, were rejected in the plenary session debate (Rule 54(3) of the Rules of Procedure):

Point 1.7

Amend as follows:

'International experience shows that the fight against undeclared work is at its most effective when based on a number of parallel and concurrent courses of action. Accordingly, in addition to allowing the legal migration of workers in those sectors of the economy with the highest numbers of illegal immigrant workers it is necessary to organise information and educational campaigns which highlight the impact of undeclared work. ~~Furthermore, there should be a policy of uniform sanctions against employers — irrespective of the nationality of the undeclared workers.~~ The proposed directive should, therefore, be ~~part of a broader package of~~coordinated with measures to combat undeclared work — including among illegal immigrants~~— and not represent a fundamental policy instrument, as proposed by the Commission~~.'

Outcome of the vote

For: 64 Against: 101 Abstentions: 9

Point 5.3

Amend as follows:

'Legal migration and immigration within the and into the EU urgently needs to be regulated. Restrictions on migration in Member States have caused a number of problems, prevented the free movement of workers between certain Member States, and led to some third-country nationals, as well as EU citizens, being employed in breach of regulations and exploited by their employers. Steps to combat undeclared work in the EU and in individual Member States ~~should deal with everyone employed in this way on the same basis, irrespective of whether they are EU citizens or third country nationals. The Committee therefore urges the Commission to closely examine the possibility of extending the legal basis of the proposed directive to allow measures also to be taken against illegal work by any person who does not have the necessary permits or documents~~are now on the agenda of the Commission and of social partners and measures how to combat this negative phenomena are being discussed. The Committee recommends that the measures to eliminate the illegal migration and undeclared work are closely coordinated.'

Outcome of the vote

For: 56 Against: 102 Abstentions: 10

Point 6.6

Add as follows:

'**Article 7**

— It should also be stipulated that the obligation to pay applies from the day that the claim for payment is submitted, and not from the date the claim takes legal effect.

— The rights of workers under the employment contract should continue to apply, irrespective of whether or not they have a residence or work permit.

— Difficulties could be faced in practice in the payment of outstanding wages to a worker who has already returned home; this should be taken into account. Moreover, it is necessary to ensure that wages are paid to the right person.

— In addition, it should be made clear that employers must calculate any outstanding remuneration in accordance with the laws, regulations, administrative decisions and/or collective agreements that normally apply to such employment.

— In most Member States EU workers are required to lodge a complaint with the relevant bodies to secure outstanding payment. The stipulation in Article 7(2)(a), that there is no need for the illegally employed third country nationals to introduce a claim in order to trigger the necessary procedures to settle outstanding remuneration, would bring unjustified distinction between those third country nationals and other EU or legally employed third country nationals.

— However, the Committee accepts that the Member States may provide illegally staying third-country nationals with all the assistance they need to reclaim any outstanding remuneration, and that the article should contain a guarantee to this effect.

— The Committee believes that the presumption of a work relationship duration of (in this case) six months, as set out in Article 7(2)(b), may have the effect of stimulating irregular immigration into the EU and introduces unjustified distinction, insofar as it puts an irregular worker in a highly advantageous position compared to other workers. Moreover, this is clearly an inappropriate solution for short- and very short-term work relationships (seasonal farm work, for example).'

Outcome of the vote

For: 59, Against: 111, Abstentions: 11

Point 6.8

Add as follows:

'**Article 9** defines the responsibility of the main contractors and any intermediate subcontractors for paying sanctions and back payments. It would be useful here to clarify under which circumstances this does and does not apply. The main contractor and subcontractors who are not directly employing the illegally staying third country nationals should be jointly and severally liable to the sanctions mentioned in Article 6 and Article 7 only in case that it should be proved that they knew that their subcontractor was employing illegally staying third country national. In some sectors with long chains of subcontractors, such as the car industry, it would prove difficult to hold manufacturers and subcontractors who produce various parts in different locations and countries jointly liable. The same applies to the constructions sector. The Committee believes that main contractors should, by taking reasonable precautionary measures, be able to ensure that they are not held liable in this way.'

Outcome of the vote

For: 57 Against: 106 Abstentions: 8

Point 6.9

Delete as follows:

'**Article 10**

— Under this article an infringement constitutes a criminal offence (in line with Article 3) when committed "intentionally". ~~However, since this is difficult to prove, a better definition of criminal offence would be to show that the employer "knew" or "could have known" about the criminal offence.~~

— With regard to the infringement set out under 1 (a), every repeat infringement of Article 3 should be deemed to be a criminal offence.

— In the case of an infringement deemed to be a deliberate criminal offence, as described in paragraph 1(a), it is important to take into account the possibility that legal proceedings will be time-consuming. There is the risk that the provision will not be applied at all if Member States decide that determining whether an infringement has occurred should be subject to a decision by a court or national authority within a period of two years. Because these processes can be so time-consuming, and because all legal remedies would be invoked to lodge an appeal, the provision may not be put into practice at all.

— In implementing this article in the Member States, a clear division of competences needs to be stipulated between the administrative bodies that impose sanctions, and individual competent courts, in order to avoid potential conflicts over competences.'

Outcome of the vote

For: 66 Against: 100 Abstentions: 10

Point 6.11

Amend as follows:

'**Article 15**

~~This provision,~~ The effectiveness of the proposed provision stipulating that Member States ensure that at least 10 % of companies are inspected every year~~, is to be welcomed. However, the effectiveness of the proposed directive~~ will depend on the actual implementation of this provision. The Member States must choose which companies to inspect on the basis of a risk assessment that takes account, alongside other suitable criteria, of factors such as the degree of the sector's vulnerability to employment of illegally staying third-country nationals, or whether the companies have a past record in this area. The article should reflect these qualitative criteria, and state that it would be desirable for Member States to ensure that at least 3 % of the companies thus selected are inspected every year. In most Member States, extra staff and financial resources ~~will~~may be necessary to carry it out. ~~Were this not to be provided~~Without this, such additional obligations ~~would undoubtedly~~could give rise to unequal treatment of those concerned.'

Outcome of the vote

For: 65 Against: 105 Abstentions: 8