



Ad-Hoc Query on on implementing Council Directive 2009/52/EC

Requested by HU EMN NCP on 17. January 2013

Compilation produced on 21 March 2013

Responses from Belgium, Bulgaria, Cyprus, Czech Republik, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom plus Norway (23 in Total)

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1. Background Information

After the Commission external contractor has prepared the first conformity assessment, there is an ongoing internal consultation in Hungary on the correct transposition of Directive 2009/52/EC.

The Ministry of Interior is looking for information on the transposition of Directive 2009/52/EC in the European Union Member States regarding Article 7 (1) (d).

In this regard we would be interested in the following issues:

1. Which authority is competent in your Member State to take the necessary measures as foreseen in Article 7 (1) (d), in particular regarding the temporary or permanent closure of the establishments?






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2. How is transposed into your national legislation the above mentioned Article?

The HU EMN NCP would very much appreciate if we could receive your responses by **31 January 2013**.





2. Responses¹

	Belgium	Yes	<ol style="list-style-type: none"> 1. The judge of the industrial (labour) tribunal 2. The text is as follows: “In addition, the judge may, giving reasons for his decision on that matter, order the total or partial closure, for a period of one month to three years, of the company or the establishments of the company, association, grouping or business of the convicted person or of which the convicted person is the managing director”.
	Bulgaria	Yes	The Article 7 (1) (d) in question is not transposed into the Bulgarian legislation because it is not appropriate for the national labour market conditions.
	Cyprus	Yes	<p>1. It is not explicitly named in the law which authority is vested with the competency to take measures for the temporary or permanent closure of the establishments, due to the fact that the competent authority may be different in every other case. The Aliens and Immigration Law provides that the Director of the Civil Registry and Migration Department under the Ministry of Interior notifies about the violation, <u>every other authority which is competent under its own Law</u>, for providing licence for the operation of that specific establishment. The competent authority will then take the necessary measures under its own Law (either administrative or judicial) in order to implement the provisions of this article (if it considers this measure as appropriate and justified on the basis of the gravity of the violation).</p> <p>2. Article 7 (1) (d) of the Directive, has been transposed into the national legislation under the “Aliens and Immigration Law” (article 18) as follows “ Each authority, other than the ones determined under this Law, after having been notified by the Director of the Civil Registry and Migration Department for a violation of article 18RB (...), imposes to the employers the following measures, given that they are dimmed appropriate and having the relevant authority under the Law...(paragraph (d) “temporary or permanent closure of the establishment that has been used for committing the violation or suspension or revocation of the licence to practice that specific activity, if this is justified by the gravity of the situation”</p>
	Czech Republic	No	This EMN NCP has provided a response to the requesting EMN NCP. However, they have requested that it is not disseminated further.
	Estonia	Yes	<p>Directive 2009/52/EC Article 7 (1) d are not transposed to Estonian legislation. The main measure from Directive (concerning employers) was made in Penal Code § 260 as allowing criminal sanctions against employers who take to work person staying in Estonia without legal basis.</p> <p>Our Ministry’s roundtable find above mentioned measure unnecessary as disproportionate and unduly limiting the rights of persons.</p>

¹ If possible at time of making the request, the Requesting EMN NCP should add their response(s) to the query. Otherwise, this should be done at the time of making the compilation.





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	Finland	Yes	<p>1. In Finland, the court within which jurisdiction, the commercial activities are occurring, can issue a temporary or permanent ban on the commercial activities of an establishment. The court issues the ban upon the request of the prosecutor, if the establishment in question has violated the rules and regulations regarding commercial activities.</p> <p>2. Finland has not transposed the mentioned article in the Finnish legislation, as it is optional and its aims are included in the Act on Issuing a Ban on Commercial Activity 1059/1985 (own translation of the name of the Act, Laki liiketoimintakiellosta). Finland is preparing a report for the Commission external contractor regarding the transposition of the mentioned directive.</p>
	France	Yes	<p>1. According to Article R8272-7 of the Labour Code, the prefectural authority of the administrative “departement” in which the establishment is located takes the necessary measures as foreseen in Article 7 (1) (d) of Directive 2009/52/EC.</p> <p>2. The law of 16 June 2011 has transposed into French law the Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. The severity of the administrative sanctions has been increased. The law of 16 June 2011 should allow the prefectural authority to react swiftly upon observing situations of employment of irregular migrants. In particular, administrative sanctions can lead to a temporary administrative closure of the establishment where the offence has been committed.</p> <p>According to Articles L.8272-2 and R.8272-8 of the Labour Code, this decision is taken on a temporary basis for a maximum period of 3 months, taking into account the repeated occurrence and the seriousness of the facts observed, as well as the proportion of employees concerned.</p> <p>A temporary administrative closure decision can be combined with preventive seizure of the professional material of the offenders.</p>
	Germany	Yes	<p>Article 7 (1) d) of Directive 2009/52/EC is already transposed into German law by virtue of Section 15 (2) of the Trade Regulation Ordinance (Gewerbeordnung) in conjunction with Sections 48 and 49 of the Administrative Procedure Act (Verwaltungsverfahrensgesetz) and Section 35 of the Trade Regulation Ordinance. The local trade offices (Gewerbeämter) or the authorities responsible for issuing or withdrawing trading licences are the ones which issue bans on business activities or close operational establishments.</p>
	Greece	Yes	<p>1. The responsible authority to take the necessary measures as foreseen in Article 7 (1) (d) of the Directive 2009/52/EC, in particular regarding the temporary or permanent closure of the establishments, is the Labour Inspection Body (L.I.B.). The L.I.B. is an agency that reports directly to the minister of Labour and whose role is to monitor if the provisions of labour legislation are applied, to investigate the complaints of the victims of discrimination and to impose administrative sanctions in cases of violation of labour legislation.</p> <p>2. The Directive 2009/52/EC has been transposed into greek national legislation by law 4052/12. In particular in relation with article 7 (1) (d), the relevant national provision, in cases of infringement of the prohibition of illegal employment, makes a basic distinction between i) the withdrawal (temporary or permanent) of the licence to conduct the business activity in question and ii) the closure (temporary or permanent) of the undertaking where the infringement has been committed. Further it distinguishes between short (up to 3 days) and long (over 3 days) closure of the undertaking concerned as well as between temporary and permanent closure of the undertaking. Regarding to the closure of an establishment a reasoned decision of the Head of the competent Regional Labour Inspection Body is required in the first case, while in the second case a decision of the labour Minister following by a reasoned opinion of the competent Labour Inspector or of the Head of the competent Regional Labour Inspection Body is required.</p>




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	Hungary	Yes	After the Commission external contractor has prepared the first conformity assessment, there is an ongoing internal consultation in Hungary on the correct transposition of Directive 2009/52/EC.
	Italy	Yes	<ol style="list-style-type: none"> 1. Public vigilance bodies of the Ministry of Labour and Social Policies. 2. The Italian Government implemented Directive 52/2009/EC into national law with the ratification of Legislative Decree n. 109 on July 16th, 2012. The decree was passed in light of various existing national legislation, including: the “Consolidated Text enacting provisions governing immigration and the status of aliens”, referred to in Legislative Decree n. 286/1998 and its successive amendment, Decree n. 394/1999; Decree n. 231 of 8th June 2001, establishing direct criminal liability for companies and legal entities, in accordance with Article 11 of law n. 300/2000; Decree n. 12 of 22nd February 2002, converted with amendments by law n. 73/2002, laying “Urgent provisions for completion of the emergence of activity held abroad and irregular work”; Decree n. 124 of 23rd April 2004, "Rationalization of inspection tasks in the field of social security and labour”, in accordance with Article 8 of law n. 30/2003; and finally, Article 12 of Decree n. 138 of 13th August 2011, converted with amendments by law n. 148/2011, which introduced “the offense of illegal intermediation and labour exploitation” into the new Penal Code via Article 603 bis. <p>Nevertheless, closure of the establishments that have been used to commit the infringement was already envisaged in the national legislation by art. 14 of Legislative Decree n. 81 of 9 April 2008, as modified by art. 11 of Legislative Decree n. 106 of 3 August 2009. In particular, closure is envisaged for establishments using undocumented staff in an amount equal to or 20% higher than the total number of occupied workers.</p>
	Latvia	Yes	<ol style="list-style-type: none"> 1. In Latvia the State Labour Inspectorate is the competent authority for taking the necessary measures as foreseen in Article 7(1)(d). 2. The norm of the Article 7(1)(d) is transposed in the State Labour Inspectorate Law. An official of the Labour Inspectorate has the duty to take a decision without delay regarding the suspension of activities of establishment without prior notice by issuing a written order if during survey of an establishment under supervision and control it is detected that 50% or more of the persons employed therein are illegally employed persons.
	Lithuania	Yes	<ol style="list-style-type: none"> 1. Ministry of Social Security and Labour 2. Article 7 (1) (d) is transposed in national legislation. The mentioned provisions are provided in the Criminal Code Art 292¹ of the Republic of Lithuania, namely: <u>Article 292 The employment of illegally staying third-country nationals in Lithuania.</u> <ol style="list-style-type: none"> 1. The employer or his agent, who employed for business purposes illegally in Lithuania staying third-country nationals or employed five or more illegally in Lithuania staying third-country nationals or employed illegally in Lithuania staying third-country citizen in particularly exploitative working conditions, or employed illegally in Lithuania staying third-country minor citizen shall be punished by a fine or by arrest or by imprisonment for up to two years. 2. A legal entity shall also be held liable for an act provided for in this Article. <p>Therefore, according to Art. 292¹ (2) legal entity shall also be held liable. This liability is concretized in Art 52, 53 of Republic of Lithuania Criminal Code:</p>





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			<p><u>Article 52. Restriction of Operation of a Legal Entity</u></p> <p>1. When imposing the penalty of restriction of operation of a legal entity, a court shall prohibit the legal entity from engaging in certain activities or order it to close a certain division of the legal entity.</p> <p>2. Operation of a legal entity may be restricted for a period from one year up to five years. The term of this penalty shall be counted in years and months.</p> <p><u>Article 53. Liquidation of a Legal Entity</u></p> <p>When imposing the penalty of liquidation of a legal entity, a court shall order the legal entity to terminate, within the time limit laid down by the court, the entire economic, commercial, financial or professional activity and to close all divisions of the legal entity.</p> <p>Art 292 provisions came into force and are binding since January 01, 2012.</p>
	Luxembourg	Yes	<p>1. In Luxembourg the Directive 2009/52 was transposed by Law of 18 December 2012 (published in the Memorial A-296 of 21 December 2012). Article 7 1 (d) of the Directive 2009/52/EC is transposed in article 572-6 of the Labour Code. According to this article the employer who hires an irregular third country national migrant can be subject to the following accessories penal sanctions:</p> <ol style="list-style-type: none"> a. Interdiction up to 3 years to exercise the professional or social activity which directly or indirectly triggered the offense; b. The temporary closure up to 5 years or the definitive closure of the company or of the establishment which was used to commit the infraction. <p>This offenses are be investigated and confirmed by the officers and agents of the Grand Ducal Police, Customs and Excise Officers, members of the Inspectorate of Labour and functionaries of the department which issues the authorisations of establishment for business (Ministry of Small and Medium size enterprises) duly authorized by the Ministry for this effect.</p> <p>The temporary or definitive closure of the establishment or company will be ordered by court decision requested by the Public prosecutor office, an interested party or by a professional association.</p>
	Netherlands	Yes	<ol style="list-style-type: none"> 1. The Labour Inspectorate is competent to bring to a halt the activities of an establishment in case the employer has repeatedly committed an offence. 2. Transposition was not necessary: the Economic Offences Act provided for closure of establishments. Recently, a new Act has come into force, which regulates closure through administrative law.
	Poland	Yes	<ol style="list-style-type: none"> 1. According to Polish system, the court is the competent authority to rule the ban on the pursuit of the economic activity towards a person who has been condemned for an offence related to this particular economic activity. This measure gives additional possibilities to the court in order to adopt sanctions adequate to the severity of every particular case. <i>The court has a possibility to rule as regards a person who has been condemned for a crime related to the pursuit of the economic activity, the prohibition of the pursuit of that economic activity.</i>



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			<p>The art. 7 para. 1d of the Directive 2009/52/EC was also the base to introduce to the Act of 20 April 2004 on the promotion of employment and labour market institutions a new paragraph 9 in art. 18m. On the base of this provision the Marshal of voivodenship shall delete from a register an employment agency in case it has entrusted work to third country nationals illegally staying on the territory of Poland.</p> <p>2. In PL opinion there was no need to introduce a specific provision transposing the art. 7 para. 1d to national legislation. Its transposition is based on generally applicable provisions of Penal Code art. 41 para. 2.</p> <p>In general terms Directive 2009/52/EC was transposed into Polish law by Act on the results of employing third-country nationals staying in the Republic of Poland illegally that went into force in Poland on 21 July 2012 (more info: http://www.emn.gov.pl/portal/ese/719/9381/Entry_into_force_of_the_Act_regulating_the_results_of_employing_thirdcountry_n_at.html?search=150883807).</p>
	Portugal	Yes	<ol style="list-style-type: none"> 1. Immigration and Border Service (SEF) 2. There was no need of transpose this measure once that was already considered in the PT general sanctions regime. In fact the Immigration Law (Act 23/2007, 4 July, amended by Act 29/2012, 9 August) establishes in the article 198.º-A (2) (a) the possibility to apply accessory sanctions foreseen in article 21.º (1) of the general regime of regulatory offences (Decree-Law 433/82, of 27 October, with amendments of Decree-Law 356/89, of 17 October, Decree-Law 244/95, of 14 September, Act 109/2001, 24 December). Further, the article 198.º-A (3) (Immigration Law) establishes a limit for five years for the maximum duration of the sanctions foreseen on Article 7 (1) of Directive 2009/52/EC.
	Slovak Republic	Yes	<ol style="list-style-type: none"> 1. The responsible authority is the respective Trade Licensing Office relevant according to the seat of the legal entity or the residence of the natural person. 2. The respective Article (7.1 d)) was transposed into the Slovak legislation via the Act No. 82/2005 on Illegal Work and Illegal Employment as follows: Article 1, Section 3, Paragraph 3 – temporary or permanent closure of the establishments used to commit this infringements or temporary or permanent withdrawal of a licence to conduct the business activity in question, if justified by the gravity of the infringement. The repeated infringement of the illegal employment ban is considered as a serious breach of this Act for the purposes of withdrawal of the licence to conduct the business activity.
	Slovenia	Yes	<ol style="list-style-type: none"> 1. The competent authority is Labour Inspectorate. 2. In Slovenia according to Labour Inspection Act labour inspector has the power and duty to prohibit the continuation of performance of the work process and the use of labour resources of the company until the irregularities has been dismissed (for example, in the case of illegal employment). Labour Inspection act also provides for the right of labour inspector to, upon established irregularities, seal the means of production, work premises, work sites or other premises in which domestic economic or non-economic activity is carried out. Furthermore, the labour inspector may also issue a decision prohibiting employer to carry out all of its activities and may also fill the proposal for its winding up, liquidation or bankruptcy.
	Spain	Yes	Article 54 of the Organic Law 4/2000, of 11 January, on the rights and freedoms of aliens in Spain and their social integration (hereinafter


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			<p>referred as the Organic Law 4/2000), establishes the following, under the heading “Very serious offences”, paragraph 1d):</p> <p>1. The following shall be deemed very serious offences:</p> <p>d) Hiring alien workers without having previously obtained the relevant residence and work permit; an offence shall be incurred for each such alien worker hired; provided such a hiring does not constitute a criminal offence.</p> <p>In addition, article 55 of the Organic Law 4/2000, under the heading "Penalties", states the following, in its paragraph 6:</p> <p>6. In the case of the breach defined in Article 54.1.d in the present Statute, the Governmental Authority may order, without prejudice to the relevant penalty, the closure of the establishment or premises for a period of six months to five years.</p> <p>On its part, Paragraph 2 of the same article 55, states the following:</p> <p>2. The penalties for the administrative offences defined in the present Organic Law shall be imposed by the Government Sub-Delegation or, in single-province Autonomous Communities, by the Government Delegation. When an Autonomous Community has powers with respect to initial work permits for aliens, the imposition of the penalties defined in this Statute for the offences described in the following Paragraph shall correspond to the Autonomous Community, and shall be exercised by the Authority to be determined by the latter, within the scope of its powers.</p> <p>In breaches defined as a minor offence in Article 52.c, d and e, as a serious offence in Article 53.1.b and 53.2.a and as a very serious offence in Article 54.1.d and f, the penalty procedure shall be initiated by a report issued by the Labour and Social Security Inspectorate, in accordance with the penalty procedure established for breaches of the social order, with the power to impose penalties corresponding to the Authorities referred to in the previous Paragraph.</p>
	Sweden	Yes	<p>Directive 2009/52/EC is not yet transposed into Swedish law. The process is on-going right now with the intention of the amended legislation being put into force on 1st of July 2013. The suggestion for amended legislation was sent to the Council on Legislation on 31st of January 2013. In the proposition on amended legislation the Government is not suggesting any amendments based on article Article 7 (1) (d) since this is being said to be already covered in the Swedish legislation. In the suggested legislation it is the Swedish Police that will carry out the necessary inspections.</p>
	United Kingdom	Yes	<p>The UK has chosen not to opt into this Directive (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:168:0024:0032:EN:PDF).</p> <p>Whilst supportive of the intentions set out in the Directive in addressing illegal working by third country nationals, the UK chose to instead rely upon the existing powers provided through primary domestic legislation.</p> <p>There were a number of areas within the Directive that gave cause for concerns and whilst we achieved some agreements to amendments in advance of the laying of the Directive, it was the UK’s considered view that the existing legislation and regime achieved the same aim whilst avoiding the need for further administrative burdens.</p>

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			<p>The Directive sought to impose requirements on both business and the state. Firstly, employers are required to report regularly on those they employ and secondly there is a requirement for an inspectorate functionality placed upon the state. There were concerns as to the additional costs that this would impose upon both business and the state when compared to the existing regime in relation to illegal working by third country nationals.</p> <p>Under immigration legislation employers are required to check that a potential employee has the right to work. This extends from those who are British or EEA citizens, through those who are permanently settled here to those who are here temporarily and subject to conditions on the employment they may undertake. These checks are relatively straightforward and the employer maintains documentary evidence that the checks have been completed. The checks are required only once where a person is settled here or a British or EEA citizen (save for those from nations subject to transitional arrangements, i.e. accession states) but are required on a reiterative basis where the employee has temporary stay in the UK. There are also some instances where the employer must contact the UK Border Agency to confirm that the employee can work, for instance where the employee is renewing their visa/stay.</p> <p>The UK Border Agency supports employers by providing guidance and telephone helplines. The Agency also leads on enforcing the illegal working legislation through intelligence led operations.</p> <p>Where an employer is found to have employed someone who has no right to work or outside the conditions on employment (such as students limited to set hours of working in term times), the Agency can levy a civil penalty up to a maximum of £10,000 per employee. Further, where there is evidence that an employer has wilfully employed people with no right to work or has done so on a number of occasions, they may fall liable for prosecution and be liable for a term of imprisonment a fine or both.</p>
	Norway	Yes	Norway has not implemented this directive.
