

# European Communities

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## EUROPEAN PARLIAMENT

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9 November 1977

DOCUMENT 352/77

## Report

drawn up on behalf of the Committee on Social Affairs, Employment and  
Education

on the proposal from the Commission of the European Communities to the  
Council (Doc. 426/76) for a directive on the harmonization of laws in the  
Member States to combat illegal migration and illegal employment

Rapporteur: Mr F. PISONI



By letter of 16 November 1976 the President of the Council of the European Communities requested the European Parliament, pursuant to Article 100 of the EEC Treaty, to deliver an opinion on the proposal from the Commission of the European Communities to the Council for a directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment.

The President of the European Parliament referred this proposal to the Committee on Social Affairs, Employment and Education as the committee responsible and to the Legal Affairs Committee for its opinion.

On 24 November 1976 the Committee on Social Affairs, Employment and Education appointed Mr Pisoni rapporteur.

It considered this proposal at its meetings of 26 January, 17 February, 1 April, 28 April, 26 May and 19 September 1977.

At its meeting of 29 September 1977 the committee adopted the motion for a resolution and the explanatory statement by 11 votes to 1.

Present at the final vote: Mr Van der Gun, chairman; Mrs Dunwoody, vice-chairman; Mr Pisoni, rapporteur; Mr Albers, Mr Calewaert (deputizing for Mr Delmotte), Mrs Dahlerup (deputizing for Lady Fisher of Rednal), Mr Dinesen, Mr Feit, Mr Lezzi, Lord Murray of Gravesend, Mr Schreiber and Mr Vandewiele.

The opinion of the Legal Affairs Committee is attached.

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The Committee on Social Affairs, Employment and Education hereby submits to the European Parliament the following motion for a resolution, together with explanatory statement:

MOTION FOR A RESOLUTION

embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment

The European Parliament,

- having regard to the proposal from the Commission of the European Communities to the Council<sup>1</sup>,
  - having been consulted by the Council pursuant to Article 100 of the EEC Treaty (Doc. 426/76),
  - having regard to the report of the Committee on Social Affairs, Employment and Education and the opinion of the Legal Affairs Committee (Doc. 352/77),
1. Congratulates the Commission for having tackled the very serious phenomena of illegal migration and illegal employment which lead to unacceptable exploitation of individuals as well as to social and economic imbalances, and approves the type of action proposed;
  2. Agrees with the basic objectives of preventing and penalizing such occurrences and with that of mitigating as far as possible the wrongs suffered by illegal migrant workers as a result of their situation, and emphasizes that this last consideration should guide all action taken in their regard;
  3. Consequently strongly deplors and finds it unacceptable that the directive wholly overlooks the fundamental principle of the employers' obligations and the correlative protection of the rights of illegal migrant workers deriving from the work they perform;
  4. Considers it essential to undertake an extensive information campaign on the Member States' legislation on immigration, on the actual living and working conditions in these countries and on the distressing human, social, economic and legal consequences of illegal migration, not only in the Community countries but, above all, in the migrant workers' countries of origin, where unquestionably the aim of prevention can be better realized and misleading propaganda more effectively countered;

<sup>1</sup> OJ No. C 277, 23.11.1976, p.2

5. Considers it of the greatest importance that public opinion should be made aware of these problems and that workers' and employers' organizations should share in the responsibility for prosecuting the aims of the directive;
6. Stresses the need for the maximum strengthening, extension and diversification of controls to stop the inflow of illegal entrants;
7. Expresses its deep disappointment that the Commission of the European Communities has totally failed to propose, as it could have done, notably under Articles 5 and 100 of the EEC Treaty, any measures aimed at harmonizing national legislations, with particular reference to the definition of identical offences and the stipulation of equivalent penalties;
8. Points out that this legislative omission may in practice result in differences in national attitudes and policies towards illegal migration and illegal employment, thus jeopardizing the efforts to combat these phenomena;
9. Invites, therefore, the Commission of the European Communities to tackle as soon as possible the problems arising from the need to harmonize penal measures against offences in the areas with which this directive is concerned, turning to account the progress already achieved, be it only for the present at the level of studies and projects, in the fields of taxation, customs and excise, agriculture and food products;
10. Hopes that in the longer term the Community will succeed in achieving 'common legal standards', including penal provisions, in the critical area of the protection of human rights, both civil and social;
11. Expressly requests that in respect of illegal migrant workers, prevention should be the primary consideration and that a strict policy of prosecuting all those who, in whatever way, draw illicit benefit from the irregular situation of these workers should be pursued; for it would be unjust to place the profiteers and their victims on the same footing, especially in the matter of penalties;
12. Further requests that the Member States adopt, in their legislation, as liberal an attitude as possible when it comes to regularizing the position of illegal migrants and their families;
13. Draws attention to the fundamental importance of close cooperation among Member States in all spheres, making maximum use of the machinery for reciprocal administrative and legal assistance, particularly for the purpose of stopping the inflow of illegal migrants and of identifying and prosecuting all those who traffic in and exploit this particular type of labour, in whichever country they may operate;

14. Appeals urgently to the Member States to adopt rules that are as far as possible uniform, so as to prevent imbalances which might vitiate the aims of the present directive;
15. Joins the Legal Affairs Committee in regretting that the proposal does not fully put into effect the Council's resolution of 9 February 1976 on illegal migration and looks to the Commission to submit further proposals in the near future, concerning in particular the social and the legal aspects of the problem;
16. Acknowledges and supports the valuable liaison work which the Commission of the European Communities will have to perform to promote uniform legislation in the Community and increase still further the effectiveness of the cooperation among its Member States;
17. Expresses its own deep conviction that the final solution of the distressing problem of migration, legal and illegal, is to be found in practical economic development aid to improve local employment opportunities in the migrants' countries of origin and, in the Member States, in a new appreciation of, and a new approach to, the many kinds of occupations disdained by Community citizens because they are regarded as having insufficient status and being insufficiently remunerative, and which, despite high unemployment in the Community, inevitably attract, and are filled by, manpower from third countries;
18. Considers it essential that, in pursuing the aims of the present directive, practical expression be given to the principles laid down in the preceding paragraphs;
19. Consequently invites the Commission to adopt, pursuant to the second paragraph of Article 149 of the EEC Treaty, the following amendments:

Council Directive  
on the harmonization of laws in the  
Member States to combat illegal migration  
and illegal employment

Preamble, recitals and Article 1 unchanged

Article 2

The Member States shall take the measures necessary to ensure that:

- (a) workers subject to the provisions of the present Directive are duly and accurately informed of the employment, living and working conditions and of the conditions and procedures laid down by their national regulations governing the entry, residence and employment of such workers;

- (b) for the purposes of preventing and identifying illegal migration and illegal employment there shall be an adequate control:

- at places of entry to their territory or at places of employment,
- of temporary employment agencies which make manpower available to third parties in another Member State.

The Member States shall take the measures necessary to ensure that:

- (a) unchanged

- (b) unchanged

<sup>1</sup> Complete text in OJ No. C 277, 23.11.1976, p.2



- (c) the socio-economic categories concerned and public opinion in the individual countries are made aware of the need to combat illegal migration and put an end to the exploitation associated with it.

Article 3

The Member States shall take the measures necessary to ensure that:

- (a) sanctions shall be applied to natural or legal persons who knowingly either organize or participate in activities which either are intended to lead or lead to illegal migration and illegal employment, as defined in Article 1 of this Directive.
- (b) the sanctions foreseen against the persons referred to in subparagraph (a) of this Article shall include the possibility of imprisonment in serious cases of violation of the national legislation concerning entry, residence and employment, and liability in respect of repatriation costs of the workers concerned.

The Member States shall take the measures necessary to ensure that:

- (a) unchanged
- (b) the sanctions foreseen against the persons referred to in subparagraph (a) of this Article shall include the possibility of imprisonment in serious cases of violation of the national legislation concerning entry, aiding and abetting illegal entry, residence and employment, and liability in respect of repatriation costs of the workers concerned.

Article 4

The Member States shall take the necessary measures to ensure that workers sentenced for taking up illegal employment may appeal against such sentence. Where the sentence is of deportation, appeal shall involve a stay of execution.

The Member States shall take the necessary measures:

- (a) to ensure that workers sentenced for taking up illegal employment may appeal against such sentence. Where the sentence is of deportation, appeal shall involve a stay of execution.

(b) to grant in a general way to illegal workers every practical means of upholding their rights in criminal, administrative and civil proceedings, enabling them to rely on all possible proofs and to obtain, where necessary, free legal assistance.

Articles 5 and 8 unchanged

EXPLANATORY STATEMENT

The directive under consideration is essentially concerned with the following problems:

I. AIMS(A) Prevention and control

1. The Committee on Social Affairs, Employment and Education fully supports the aims of prevention and control of illegal migration and illegal employment in view of the very serious consequences, summarized below, which they entail for the illegal workers and for the countries of immigration:

2. Consequences for illegal workers<sup>1</sup>

(a) All the multilateral and bilateral agreements intended to ensure, if only partially, equality of treatment between workers from a Member State and workers from third countries refer solely to those foreign workers who have entered and are working in a given country legally: thus clandestine migrants, in addition to having to face the difficulties of language and adaptation common to all migrants, are discriminated against as compared with other workers, enjoy very little legal protection of the rights deriving from the work they perform, and suffer from insecurity under the constant threat of forced repatriation or conviction for infringement of residence laws;

(b) As a rule, illegal migrants are not entitled to, and much less in a position to claim, social security benefits, except for those social services which in some countries are available to all persons present on their territory;

(c) The tragic situation of illegal migrants is further aggravated by the following facts: they are exploited by landlords; they generally perform the less desirable tasks, for which, moreover, they are paid at less than the usual rates; and their work accident rate is higher than in the case of regular workers.

3. Consequences for the countries of immigration<sup>2</sup>

(a) Illegal immigration is an obstacle to effective national manpower planning and can produce disequilibria in the labour market since the illegal migrants, forced, of necessity, to accept unsecure and badly paid employment, form a reservoir of temporary manpower on which the employers can draw.

<sup>1</sup> See Council of Europe: Report by Professor Tugrul Ansay on illegal migration RS 274 (1975) Revised - pp.3, 4, 5 and 6

<sup>2</sup> See Commission of the European Communities: Working Document SEC (75) 1705, 22.4.75: 'Illegal immigration' pp. 2, 5 and 6

(b) The use by unscrupulous employers of illegal manpower can have medium- and long-term effects, particularly on investment in the production sector, and so disrupt the implementation of development plans established by the Governments of the Member States;

(c) Illegal migrants tend to concentrate in areas which are not only densely populated but also have a high proportion of migrants with regular status, so creating problems in housing and social services: moreover, this concentration of foreign workers is detrimental to peaceful neighbourliness and frequently embitters relations between the native population and foreigners to the point of generating manifestations of racism and xenophobia;

(d) The availability of illegal labour for the least attractive and lowest paid jobs produces disadvantages for native workers in the same occupations by lowering standards of pay and hampering social and technological progress<sup>1</sup>;

(e) Public health in the host country is seriously endangered by the fact that illegal migrants are not subject to medical control and generally live in insanitary conditions;

(f) Finally, the availability of illegal labour encourages and promotes tax evasion.

4. This state of affairs, as the first recital of the proposal for a directive rightly emphasizes, is not only in glaring contradiction with elementary humanitarian principles, but also with the aims of social advancement stated in the preamble to the EEC Treaty, and as such cannot be further tolerated.

5. Moreover, the objectives of prevention and suppression of illegal migration and illegal employment are included in the Action Programme in Favour of Migrant Workers and their Families<sup>2</sup> and have been strongly advocated by the Economic and Social Committee<sup>3</sup> and the European Parliament<sup>4</sup> in the opinions they have delivered on the Action Programme.

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<sup>1</sup> See 'L'emploi, la croissance et les besoins essentiels' p.126, International Labour Office, Geneva, 1975

<sup>2</sup> See Supplement 3/76, Bulletin of the European Communities

<sup>3</sup> See ESC 1111/75, point 12

<sup>4</sup> See Doc. 160/75/rev.: especially point 32

6. The position has been stated even more clearly and significantly by the Council of the European Communities which, in its resolution of 9 February 1976 on the Action Programme referred to above, recognized the need to 'strengthen cooperation between Member States in the campaign against illegal immigration of workers who are nationals of third countries and ensure that appropriate sanctions are laid down to repress trafficking and abuses linked with illegal immigration .....'<sup>1</sup>.

7. It should also be recalled that the International Labour Office fully supports the above objectives in its Convention No. 143<sup>2</sup> and that the Council of Europe is taking a similar stance<sup>3</sup>.

(B) Mitigation of harmful effects suffered by illegal workers as a result of their 'illegal status'

8. This aim, which clearly deserves full support, unfortunately boils to a mere statement of principle, in spite of the provisions 'favouring' such workers in cases of expulsion, which stipulate that they shall not be liable for repatriation costs (Article 3(b)) and that appeal against deportation shall involve a stay of execution (Article 4).

9. The fact that the Commission has confined itself to these proposals is all the more regrettable in that, first, the only way to 'mitigate the harmful effects ... etc.' is clearly by granting rights to illegal workers, and secondly, the Council of Ministers of Social Affairs itself has recognized, in the resolution of 9 February 1976<sup>4</sup> already quoted, that it is important to ensure that 'the obligations of employers (towards illegal migrants) are fulfilled and the rights of workers relating to the work they have carried out safeguarded...'.  

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<sup>1</sup> See OJ No. C 34, 14.2.1976, p.3, para. 5(b), first part

<sup>2</sup> See Convention No. 143 of 24.6.1975: 'Convention sur les migrations dans des conditions abusives et sur la promotion de l'égalité de chances et de traitement des travailleurs migrants': first part and particularly Articles 2 and 3. International Labour Office, Geneva

<sup>3</sup> See draft resolution on illegal migration and illegal employment of foreign workers, RS 300 (76), 28.10.1976. This document is now before the Committee of Ministers of the Council of Europe

<sup>4</sup> See OJ No. C 34, 14.2.1976, p.3, para. 5(b), final part

10. It should also be noted in this connection that, according to the Commission's statements, which are supported by the Legal Affairs Committee in its opinion, Article 100 of the EEC Treaty which is the legal basis for the proposal for a directive could be used to lay down rules for the harmonization of provisions on prevention and suppression, and hence generally, in the area of criminal law, but not for legislation in the social sphere, to which, of course, the recognition of the rights of illegal migrants belongs.

## II. PREVENTIVE ACTION

### (A) Information

11. The phenomena which the proposal for a directive is intended to combat occur not only because they are clearly, though more often than not implicitly, aided and abetted by a wide range of self-interested social categories in the Member States, but also because the gravity of the consequences of illegal migration and illegal employment, described above<sup>1</sup>, is not fully known and appreciated.

12. This being so, it is necessary not only to provide illegal migrants with information, as proposed in the directive, but also to make public opinion in the individual Member States, and the main economic and social categories concerned, more aware of the problems at issue: in particular, trade union and employers' organizations should be fully involved.

13. It should also be recognized that if information on the legal obstacles to entry into Community countries and on the difficulties of living and working in these countries is to have a genuinely preventive effect, i.e. discourage migration, it would be desirable to carry out ad hoc information campaigns in the countries of origin with the collaboration, of course, of the governments concerned.

14. Such collaboration should be proposed and established not only within the framework of the existing good relations between the European Community, on the one hand, and the developing countries and those of the Mediterranean basin, on the other, but above all with an eye to the general advantage inherent in bringing an end to the infringements of human dignity, as well as the suffering, hardship and exploitation which result from illegal migration.

15. Such collaboration would also make it possible to clamp down on the activities and misleading propaganda of illegal manpower traffickers and middlemen at their source.

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<sup>1</sup> See paragraphs 1, 2 and 3 of the explanatory statement

(B) Controls

16. The alarming proportions which illegal migration has now reached demonstrate clearly that controls at frontiers have not been effective so far, owing to a variety of factors (including the development of tourism) which there is little point in discussing at length.

17. This fact, together with the need, recognized in the proposed directive, to improve procedures for identifying illegal migration, both now and in the future and to prevent it and put a stop to the resulting illegal employment, will entail, apart from tightening the controls described above, the extension and intensification of checks on non-Community workers in places of work and on the activities of temporary employment agencies, especially those which procure employment abroad.

18. For the purposes of these checks it would be useful, in addition, of course, to that of governmental bodies normally responsible for the observance of labour legislation<sup>1</sup>, to obtain, as far as possible, the cooperation of trade unions and of employers' organizations.

19. It should be stressed that only the implementation of a coordinated system of strict controls can produce the desired preventive and deterrent effect with regard to illegal migration and illegal employment.

III. HARMONIZATION OF PENAL LAWS

20. Even if, as is stated in paragraph 1 of the motion for a resolution by Mr De Keersmaecker on the relationship between Community law and criminal law<sup>2</sup>, we must acknowledge the fact that 'a general harmonization of the national criminal law of the Member States of the Community is a complicated and sensitive subject', specific provisions of the EEC Treaty may be cited as a valid basis for harmonization, perhaps initially on a sector by sector basis, in particular:

(a) Article 5, which stipulates that 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community';

<sup>1</sup> On checks and controls, see also point V(42) of the explanatory statement

<sup>2</sup> Doc. 531/76

(b) Article 100, which stipulates that 'the Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market'.

21. In substance, therefore, these provisions indicate the basic requirement (the existence of obligations to be fulfilled), the aim (to ensure fulfilment of these obligations) and the instrument (a directive) for harmonization of criminal law.

22. Harmonization in the field under discussion is justified by the danger that divergent rules may thwart the aims of the proposed directive, possibly by diverting illegal migrants to Member States which adopt less stringent laws.

23. Furthermore, the course proposed and favoured by the Committee on Social Affairs, Employment and Education is not unrealistic, given the ever-increasing awareness and willingness which the Member States, as well as the Community institutions, have displayed and are displaying on the need to tackle the problems connected with preventing and penalizing offences in fields covered by Community regulations, directives and decisions.

24. This has had an initial practical consequence of considerable importance. On 10 August 1976 the Commission submitted to the Council the following two acts on which Parliament has been consulted and will shortly deliver an opinion<sup>1</sup>:

- a draft for a Treaty amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those Treaties;
- a draft for a Treaty amending the Treaty establishing a Single Council and a Single Commission of the European Communities so as to permit the adoption of common rules on the liability and protection under criminal law of officials and other servants of the European Communities.

25. Admittedly, these acts do not provide for the harmonization of criminal law, but they nevertheless represent an innovation and a wholly unexpected change for the better by comparison with the position adopted until recently, which excluded the entire field of criminal law from any Community measure or proposal.

<sup>1</sup> Doc. 290/76



26. The first of the above Treaties, which is the most relevant to the present discussion, is specifically designed to introduce common rules covering offences committed against all the obligations deriving from Community law (not only from the Treaty, but also from regulations based on it), in order to remedy the existing shortcoming represented by the absence in some Member States of judicial bodies responsible for offences under Community law committed outside their territory.

27. The above objectives will be pursued in practice by means of the mechanisms of the 'transfer of proceedings' and 'judicial assistance' between the Member States, without involving any far-reaching change in national criminal law.

28. Necessarily brief mention has been made of these mechanisms because they could be used as specific reference points for the collaboration which must be established by the Member States in order to achieve the aims of the proposed directive as regards penal law and, in particular, to prosecute all traffickers and exploiters of illegal workers, in whichever Member State they may operate (see paragraph 13 of the motion for a resolution).

29. Taking due note of the existing lack of harmonization in the field under discussion, emphasis should be laid on the need for the Member States, through close collaboration, to adopt regulations, which should be as uniform as possible, covering both the definition of identical offences and the provision for identical penalties, to avert the risk mentioned in point 22 (see paragraph 14 of the motion for a resolution).

#### IV. PUNITIVE MEASURES: SANCTIONS

30. Given the need to combat illegal migration and illegal employment, which have dramatic consequences for hundreds of thousands of people, the Committee on Social Affairs, Employment and Education supports the provisions for penalties which, in serious cases, would include imprisonment.

31. However, since the original wording of Article 3 of the proposed directive is insufficiently clear, Member States should be recommended to observe the following general principles in the enactment and application of these sanctions:

- (a) on evident human and social grounds, every effort should be made to prevent the prosecution of illegal migrants, who are compelled to be the passive victims of and parties to the phenomena which we are combating: to this end, in examining breaches by migrants of regulations on entry, residence and employment in the Member States, overriding consideration should be given both to the question of action in good faith and to the important social and economic factors which had led them to commit offences;

(b) however, the severest possible penalties should be imposed on all those who draw illicit benefit from the position of illegal migrants and, in particular, middlemen and traffickers - the slave traders of the twentieth century.

32. Annex I to the report contains a summary table of existing penalties in the Member States against illegal migration.

33. The following general conclusions may be drawn from this table:

(a) except by expulsion, some Member States do not penalize illegal workers and others, such as the Netherlands, are modifying their legislation on the basis of this principle;

(b) in all the Member States, middlemen and illegal manpower traffickers frequently face heavy penalties, which may include imprisonment and/or fines and administrative penalties;

(c) employers engaging illegal workers are liable, in all the States, to imprisonment, fines and administrative penalties.

34. All this confirms the validity of the principles set out above as regards penalties, which do not depart on the whole from those followed by the legal systems of the Member States.

#### V. RIGHTS OF ILLEGAL MIGRANTS

35. While due account should be taken of the considerations set out in point 10 of this explanatory statement, it must also be emphasized that the granting to illegal migrants of rights deriving from the work they perform, and hence the fulfilment of the corresponding obligations by the employers, is essential not only for humanitarian and social reasons but also in terms of utilitarian 'self-interest', if a radical solution to the problems arising from illegal migration and illegal employment is to be found.

36. When it is remembered that these phenomena not only create tragic situations for the migrants concerned<sup>1</sup>, but also give rise, in the countries of immigration (which are usually EEC countries), to the very serious consequences described above<sup>2</sup>, it must be concluded that it is in the Community's own fundamental interest to eliminate the prime cause of the persistence and spread of these phenomena, in other words the low cost at which illegal labour is available through systematic violation of wage and labour legislation.

<sup>1</sup> See point I, (A) (1) of this explanatory statement

<sup>2</sup> See point I, (A) (2) of this explanatory statement

37. The fact is that controls and repressive measures in themselves will not suffice: the economic advantages offered by illegal labour to those prepared to use and exploit it must be eliminated.

38. It is on the basis of these considerations that the Committee on Social Affairs, Employment and Education, in full agreement with the desiderata of the Legal Affairs Committee<sup>1</sup>, most insistently urges the Commission of the European Communities to submit as soon as possible further proposals to fill in the gaps in the present proposal concerning the social aspects of the phenomena here examined, and implement the Council resolution to which repeated reference has been made.

39. It is equally important to enable illegal workers to uphold their rights more generally in the criminal, administrative and civic fields, since they should be treated not only as workers but also as natural persons enjoying full rights: in this connection the proposed directive's provision concerning the suspensive effect of an appeal against a sentence of deportation (Article 4) is certainly to be welcomed.

40. In order to put the above proposals into practice, we must take account of such factors as the limited economic opportunities open to illegal migrants, their low level of education, language problems, the manner in which they have arrived in the Member States (often without documents etc.) and the particular conditions in which they are working.

41. This will entail not only providing for the possibility of receiving free legal aid, but also permitting migrants to produce all possible elements of proof. On this last point, attention should be drawn to the genuinely liberal attitude expressed in the ministerial order of 18 March 1975, in which the Dutch Government laid down rules for the regularization of the position of illegal workers<sup>2</sup>.

42. The above measures, and the fact that the position of illegal migrants present in the Community at the moment of entry into force of the present directive<sup>3</sup> will be, it is hoped, regularized, would ensure that the controls operated on these migrants do not assume any intolerable features or pursue any objectives of persecution and discrimination.

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<sup>1</sup> See opinion of the Legal Affairs Committee, point 31(d)

<sup>2</sup> See Annex II - point C - Netherlands - (c)

<sup>3</sup> See VI, 45 of the explanatory statement

VI. REGULARIZATION OF THE POSITION OF ILLEGAL MIGRANTS AND EXPULSION

43. On these problems the Commission proposal is not only inadequate and reticent but, worse still, would seem to suggest, though only indirectly in the last part of Article 4, expulsion as the only option for dealing with illegal migrants at present in the Community.

44. The Committee on Social Affairs, Employment and Education believes that a solution of this nature to the problem posed by the presence of such migrants is wholly unacceptable for the following reasons:

- (a) expulsion or repatriation on a large scale would not only be inhuman and unrealistic but, given the present numbers of illegal migrants, would resemble nothing less than mass deportation;
- (b) the majority of illegal migrants have become part of the economic and productive process of the individual Member States, and usually perform manual and tiring work which is increasingly spurned by national workers: their expulsion would therefore only lead to a negligible improvement in the employment situation, while creating serious problems for various economic activities.

45. These considerations prompt the proposal that, in respect of illegal migrants and their families present in the Community at the time of the entry into force of the directive under consideration, the principle of the regularization of their situation should be applied wherever possible.

46. In addition, Annex II to the report shows that, generally speaking and with one exception, the Member States have themselves endorsed the above principle<sup>1</sup>.

47. In future, when tackling the problem of possible new arrivals of illegal migrants, the priority should be given to the considerable importance of preventive action as described in section II above (information and, in particular, controls), and every effort made to ensure that these measures have their desired effect; secondly, further measures should be adopted to regulate those social aspects on which the present proposal is silent, and in particular the application of wages and labour legislation to the migrants concerned, and so remove those economic causes which, as has been explained, encourage the persistence of the phenomena to be combatted; finally, there should also be provision for expulsion measures.

<sup>1</sup> See, in particular, the rules adopted by the Dutch Government: Annex II - point C - Netherlands - (c)

48. The Committee on Social Affairs, Employment and Education feels it useful and important to stress that the principles embodied in the present report are not only similar, as has been pointed out, to those informing Convention No. 143 of the International Labour Office in Geneva<sup>1</sup> and the text which the Council of Europe is about to adopt<sup>2</sup>, but also those enunciated by the Economic and Social Committee in its opinion on the proposal for a directive here considered<sup>3</sup>.

49. This similarity of principles not only enhances the validity of the arguments presented above, but also incontestably reinforces the request<sup>4</sup> of the Committee on Social Affairs, Employment and Education, seconded by the Legal Affairs Committee<sup>5</sup> among others, that the Commission of the European Communities submit as soon as possible further proposals, particularly on the social and legal aspects of the phenomena under consideration, based on the principles embodied in the present report.

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<sup>1</sup> See footnote 2 to point 7 of the explanatory statement

<sup>2</sup> See footnote 3 to point 7 of the explanatory statement

<sup>3</sup> See ESC 237/77, 23.2.1977

<sup>4</sup> See point 38 of the explanatory statement

<sup>5</sup> See conclusion in point 31(d) of the opinion of the Legal Affairs Committee

PENAL MEASURES AGAINST ILLEGAL MIGRATION IN FORCE IN THE NINE MEMBER STATES AS AT 1 SEPTEMBER 1976<sup>1</sup>

<u>COUNTRY</u>	<u>LEGISLATION</u>	<u>EMPLOYERS</u>	<u>WORKERS</u>	<u>INTERMEDIARIES</u>	<u>HIRE OF LABOUR (TEMPORARY WORK)</u>
B	Royal Decree No. 34 of 20.7.67, Law of 30.6.71 and Law of 22.7.76	<p><u>Penal sanctions:</u> + Payment of the travelling expenses of the person employed without authorization, and of the members of his family, to his previous fixed place of residence. + 8 days to 1 month's imprisonment and/or fine of Bfrs 1,000 to 2,000 per person, up to a maximum total of Bfrs 150,000 (the Court may order the temporary or permanent closure of part or all of the company concerned). + If the same offence is repeated within 3 years, the sentences are increased to 1 month to 1 year's imprisonment and/or a fine of Bfrs 1,000 to 5,000.</p> <p><u>Administrative sanctions:</u> Fine of Bfrs 10,000 to 50,000 per person unlawfully employed, up to a maximum total of Bfrs 500,000.</p> <p>In the event of several concurrent offences, the administrative fines are</p>	Although they may be expelled or denied the right of abode, the new Law does not provide for additional fines on or the imprisonment of workers.	<p><u>Penal sanctions:</u> 8 days to 1 month's imprisonment, and/or fine of Bfrs 1,000 to 2,000 per person not possessing Belgian nationality or a work permit, up to a maximum total of Bfrs 150,000.</p>	The operation of a temporary employment agency without authorization or without complying with the employment regulations is punishable by 8 days to 1 month's imprisonment and/or a fine of Bfrs 26 to 500 per person, up to a maximum fine of Bfrs 50,000. An administrative fine of Bfrs 500 to 10,000 per person, up to a total maximum of Bfrs 200,000, may be imposed in place of a prison sentence.

<sup>1</sup> This table of the laws in the Member States has been supplied by the Commission, which has asked us to examine it with some caution, as it is not sufficiently detailed and does not take account of de facto jurisprudence.

imposed separately, up to a combined total of twice the maximum fine.

DK Law of 5.6.52,  
Law of 7.2.61,  
as amended on  
20.5.63,  
27.5.70 and  
21.3.73

+ Where the employer has consented to illegal migration, he must reimburse the expenses incurred by the authorities arising from the illegal residence and explosion of the worker.  
+ Furthermore, the provision of false information to the authorities and conspiring to conceal the presence of a foreigner from the police are punishable by a fine or, in serious cases, by up to 6 months' imprisonment.

+ Any breach of the provisions governing residence and work permits, and failure to register with the authorities and attempts to evade checks, are punishable by a fine, together with up to 6 months' imprisonment in serious cases. (Any foreigner failing to contribute to the unemployment fund is also liable for a fine).  
+ Workers may be expelled for (a) non-compliance with the provisions on residence and work permits; (b) constituting a threat to the security of the State or to public order; (c) committing a criminal offence.

+ Obligation to reimburse expenses incurred by the authorities arising from the discovery of a person who has been unlawfully engaged in employment with the assistance of an intermediary.  
+ Fines; imprisonment for fraudulent acts designed to conceal the presence of a foreigner from the police.

Unauthorized hiring of workers recruited for a third person is punishable by imprisonment or a fine.

D Law of 28.4.65,  
Order of  
10.9.65, Law of  
25.6.69, as  
amended on  
14.11.73, Order  
of 22.2.74 and  
Law of 25.6.75

Temporary or permanent engagement of a foreign worker not possessing a work permit: fine of up to DM 50,000. If, in addition, the working conditions of the person unlawfully employed are less favourable than those of lawfully employed workers, the employer

+ Working without a permit: fine of up to DM 1,000 (up to DM 500 in cases of simple carelessness).  
+ The law provides for:  
- explosion from certain regions (11 cases, including breach of the employment regulations)

Intermediaries who, without authorization, recruit and/or find employment for foreigners not possessing permits may be imprisoned for up to 3 years (from 6 months to 5 years in serious cases) or fined (up to DM 30,000 if the intermediary was not authorized to engage in such activities).

Unauthorized hiring of labour is punishable by a fine of up to DM 30,000. If, in addition, the worker concerned does not possess a work permit: up to 3 years' imprisonment (6 months to 5 years'

is liable for up to 3 years imprisonment or a fine (6 months to 5 years' imprisonment in serious cases).

- deportation (following a breach of security or public order).

imprisonment where financial gain is the main motive) or fine.

F Law of 10.8.32, Ruling No. 46-2658 of 2.11.45, and Orders of 26.3.46 and 21.11.75

+ Persons employing a foreign worker not possessing authorization to work must pay the State a sum amounting to not less than 500 times the standard rate of the guaranteed minimum tax per employee (approx. FF 2,850).  
+ Employing a person not possessing authorization to work (Art. L 341-6 of the Code du Travail): 10 days to 1 month's imprisonment and/or fine of FF 600 to 1,000 (further offences punishable by up to 2 months' imprisonment and a fine of up to FF 2,000 per foreigner unlawfully employed).  
+ Indirectly conspiring in the unlawful residence of a foreigner (Ruling 2.11.45, Art. 21): 2 months to 2 years' imprisonment and/or fine of FF 2,000 to 200,000.  
+ Failure to register at the special record office (Art. 341-8 of the Code du Travail): fine of FF 80 to 160 for each offence.

Depending on whether the procedure invoked is that for  
+ illegal entry,  
+ Breach of the residence laws for foreigners,  
+ constituting a threat to public order, the Minister of the Interior (except where the worker's position is regularized) may order the worker to leave the country by applying one of the following measures:  
- expulsion and an order that they be conducted to the frontier in the case of those who have entered the country without the required documents;  
- denial of right of abode for those whose residence permits have expired;  
- expulsion for those who fail to comply with the general regulations concerning residence.  
In addition, fines and, possibly imprisonment may be imposed for  
+ illegal entry (1 month to 1 year's imprisonment - fines of up to FF 3,600);  
+ breach of an expulsion order (up to 3 years'

+ Individuals or groups participating at any stage whatsoever in the process of the recruiting and introduction into the country of migrant workers: 2 to 5 years' imprisonment and/or fine of FF 10,000 to 200,000. The following penalties may also be imposed: expulsion from certain regions (if the intermediaries are foreigners); suspension of driving licence and confiscation of vehicle in cases of persons ferrying migrant workers across the frontier; temporary or permanent withdrawal of the authorization to engage in the activities in which the offenders are involved; payment of the costs of publishing the sentence.  
+ Any attempt to circumvent the monopoly of the National Immigration Office: 2 months to 1 years' imprisonment and/or fine of 2,000 to 10,000  
Hiring of foreign workers (recruited outside France) and exercising any temporary employment activity outside an approved agency: fine of FF 2,000 to 10,000 (in the event of repeated offences, fine of FF 4,000 to 20,000 and/or 2 to 6 months' imprisonment).



+ Obtaining reimbursement of the National Immigration Office fee or demanding money in exchange for a contract etc. (Art. L 341-7-1 of the Code du Travail): fine of FF 2,000 to 10,000 (further offences punishable by a fine of FF 4,000 to 20,000 and/or 2 to 6 months' imprisonment).  
+ False declaration (e.g. fictitious contracts, invalid contracts bearing names recommended by the suppliers of labour - Art. L 364-2 of the Code du Travail): 2 months to 1 year's imprisonment and/or fine of FF 2,000 to 10,000 (further offences: up to two years imprisonment and fine of up to FF 20,000).

imprisonment);  
+ failure to possess a residence permit and illegal residence (10 days to 2 months' imprisonment - fine of up to FF 2,000).

(further offences punishable by up to 2 years' imprisonment and fines of up to FF 20,000).  
+ Directly or indirectly conspiring in illegal residence: 2 months to 2 years' imprisonment and fine of FF 2,000 to 200,000.  
+ Demanding money in exchange for introducing foreigners into the country or finding them employment: fine of FF 2,000 to 10,000 (further offences: fine of FF 4,000 to 20,000 and two to six months' imprisonment).  
+ Illegal or improper provision of lodgings (often hostels) for migrants; fine of FF 2,000 to 20,000 and/or 2 to 6 months' imprisonment. (non-compliance with a ban on such activities: fine of FF 2,000 to 500,000 and/or 6 months to 3 years' imprisonment).

IR 1935 Aliens Act, amended in 1955

No specific penal measures. However, employers may be prosecuted under general labour law (e.g. for conspiracy).

Expulsion.  
(However, attention should be drawn to the safeguards contained in the European Convention on Establishment of 13.12.55, of which Ireland is a signatory).

Prosecution depends on the interpretation of the law as a whole (such as that on conspiracy) and, indirectly, the law on temporary employment agencies.

Breaches of the Employment Agencies Act are punishable by a fine of up to £50. (Further offences: additional fine of up to £10 for each day during which the Act is breached).

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|---|---|--|--|--|
| I | Regulation on aliens of 1931 and 1960, Law on the engagement of workers of 29.4.49, as amended on 30.5.70, Order 51/22/IV of 4.12.63 and amendment of 23.1.73 | <ul style="list-style-type: none"> <li>+ Engagement of workers not possessing a work permit: fine of Lit 2,000 to 10,000 per worker.</li> <li>+ Failure to inform the authorities that a worker has ceased employment: fine of Lit 500 to 1,000 per worker and per day from the date of the offence.</li> <li>+ Engaging a worker without going through the Employment Office: fine of Lit 100,000 to 1,000,000. (in serious cases, 15 days to one year's imprisonment).</li> <li>+ Use of an intermediary (such as temporary employment agencies): fine of Lit 2,000 per worker and per day of employment.</li> </ul> | <ul style="list-style-type: none"> <li>Expulsion procedures.</li> <li>+ Expulsion decided by the judge or ordered by the prefect for breaching the residence regulations (administrative procedure), or ordered by the Ministry of the Interior for reasons of public order.</li> <li>+ Repatriation ordered by the prefect. (N.B. expulsion, as opposed to repatriation, implies that the foreigner may not re-enter the country without special authorization from the Ministry of the Interior).</li> </ul> | <p>The same penalties are imposed on both manpower traffickers and illegal temporary employment agencies, as temporary employment is banned.</p> <ul style="list-style-type: none"> <li>+ Supplying workers to a third person or acting as intermediary are punishable by a fine of Lit 2,000 per worker and per day of employment.</li> <li>+ Finding employment for workers without authorization: fine of up to Lit 500 to 20,000. Where the motive is financial gain, the fine is increased to Lit 80,000 and the offence punishable by up to 3 months' imprisonment.</li> </ul> |
| L | Law of 28.3.72 and Regulation of 12.3.72  | <ul style="list-style-type: none"> <li>Employing a worker not possessing a work permit: 8 days to 1 month's imprisonment and/or fine of Lfrs 2,501 to 50,000.</li> </ul>   | <ul style="list-style-type: none"> <li>+ In principle, the same sanctions are applied to workers as to employers.</li> <li>+ Expulsion or order to leave the country.</li> <li>+ All workers (including foreigners) come under the law of 26.7.75, designed to prevent redundancies for conjunctural reasons, Chapter IV of which prohibits the engagement in paid work of any person whose position does not conform with the laws on deductions from</li> </ul>  | <ul style="list-style-type: none"> <li>Assisting in providing accommodation for foreigners, thereby facilitating their illegal entry: 1 to 7 days' imprisonment and a fine of Lfrs 501 to 2,500.</li> <li>Unauthorized supplying of temporary labour: 8 days to 3 years' imprisonment and/or fine of Lfrs 2,501 to 50,000.</li> </ul>  |

wages and social security. Offences are punishable by a fine of Lfrs 2,501 to 50,000 and, in the event of further offences within five years, 8 days to 6 months' imprisonment and a fine of up to twice the maximum fine.

N Law of 20.2.64, Contravening the regulations on the engagement of foreign workers: up to 1 month imprisonment and/or fine of Fl 1,000. N.B. The draft law provides for up to 6 months' imprisonment or a fine of up to Fl 10,000.

In principle, the law also applies to workers. N.B. Under the draft law, the worker cannot be prosecuted (although he remains liable for expulsion). Furthermore, any person possessing a residence permit for an unlimited period, which is granted after 5 years' work in the country, is no longer considered a foreigner.

Unauthorized supplying of labour to a third person: up to 6 months' imprisonment and/or a fine of up to Fl 10,000 (this applies equally to nationals and to foreigners not possessing work permits; no special penalty applies to the latter).

UK 1953 Aliens Act, amended in 1970; 1971 Immigration Act (sections 23-24) which came into force in 1973

No specific sanctions. Indirectly, the employer may be considered as harbouring a migrant worker, thereby facilitating the residence and accommodation of a worker not possessing a permit: fine and/or imprisonment under ordinary law, which considers such actions a breach of the Act.

+ Expulsion of 'non patrials' not complying with the conditions of admittance and residence; + Expulsion where the Home Secretary deems it necessary in the public interest.

Assisting illegal entry: + up to 6 months' imprisonment or fine of up to £4,000; + in cases of 'conviction or indictment': fine or up to 7 years' imprisonment; + confiscation of the vehicle used in manpower trafficking; + possibly, charge of conspiracy, as in cases involving temporary employment agencies.

Temporary employment agencies which, without authorization, supply workers (including aliens) to third persons are liable for a fine of up to £400. (N.B. The charge of conspiracy may also be brought in cases of organized recruitment).

Positions adopted by the manpower-importing Member States on the problem of  
regularizing the position of illegal migrants

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A. - FRANCE

Between 1 June and 1 November 1973, the French authorities regularized the position of illegal workers. The same measure had been taken some years previously in respect of Portuguese workers, 80% of whom had entered France illegally.

B. - BELGIUM

After initial regularization measures had been implemented in February 1966, the Belgian Government adopted measures to regularize the position of workers from non-Community countries resident in Belgium on 1 August 1974, provided that they were employed on or had been resident prior to that date. The deadline for applications for permits originally fixed for the end of October 1974, was extended on several occasions before expiring at the end of January 1975.

The position of approximately 8,000 illegal migrants, out of a suspected total of 20,000, was regularized as a result of these measures.

C. - NETHERLANDS

The Dutch authorities solved this problem by applying the ministerial order of 18 March 1975, the most important provisions of which are summarized below. Attention is drawn to their markedly liberal nature:

- (a) Fundamental requirement for regularization: the alien in question must have entered the Netherlands at least five months before the entry into force of the order;
- (b) Means of proving that the above requirement had been fulfilled: valid evidence could take the form of the usual legal documents, such as a passport containing a stamp showing date of entry, or less typical documents, such as copies of transfer orders to the migrant's family in his country of origin, a letter of dismissal, or any document constituting evidence of the payment of social security and insurance contributions etc.
- (c) Other requirements: the migrant had to: possess a valid passport; be capable of fulfilling the usual health requirements for the granting of a work permit; fall within the stipulated age limited (18-35 years for unskilled workers, maximum 45 years for skilled workers); be checked by a doctor for tuberculosis; possess adequate accommodation.

Further means of regularization: following marriage to a Dutch citizen or payment of compensation for an accident at work.

- (d) Procedures: persons claiming to have fulfilled the above requirements were to report to the local police authorities: regularization of a migrant's position automatically covered members of his family. It also meant that migrants who were out of a job were registered as unemployed and were thus entitled to receive all the appropriate benefits.

D. - UNITED KINGDOM

Considerable numbers of immigrants entered the United Kingdom in the late 1950's and the early 1960's, leading to the adoption of a series of laws on the immigration of workers from the Commonwealth designed to check the uncontrolled inflow of immigrants. The Home Secretary decided not to exercise the power, granted under the 1971 Immigration Act to expel Commonwealth and Pakistani citizens who had illegally entered the country before 1 January 1973. By applying to the Home Secretary, and subject to verification of the facts, these citizens can obtain a residence permit for an unlimited period. Under the immigration regulations, the same applies to their families once they have obtained immigration visas.

E. - GERMANY

Germany has so far made no attempt to regularize the position of illegal migrants. However, following the revelation in the press of various unfortunate cases involving illegal workers whom the authorities wished to repatriate (Moroccan street-cleaners in Düsseldorf in 1970, Turkish workers in the Hesse and Palatinate Länder in 1972), their position may well be regularized, in view of the fact that they have been unscrupulously exploited.

OPINION OF THE LEGAL AFFAIRS COMMITTEE

Draftsman : Mr CALEWAERT

At the meeting of the Legal Affairs Committee on 25 November 1976 Mr CALEWAERT was appointed draftsman. On 14 March 1977 the Committee discussed the proposal on the basis of an introductory statement by the draftsman.

The Committee examined a draft opinion at its meeting on 25/26 April 1977.

At the Legal Affairs Committee's meeting of 12 July 1977, the draftsman introduced a revised draft opinion, which was adopted by 5 votes in favour, 2 against and 2 abstentions.

The following were present: Sir Derek Walker-Smith, chairman; Mr Riz, Vice-Chairman; Mr Calewaert, draftsman; Lord Ardwick, Mr Bayerl, Mr Fletcher-Cooke, Lord Murray of Gravesend, Mrs Squarcialupi, Mr Vernaschi (deputising for Mr Scelba).

## I. Background

1. The European Parliament in its Resolution<sup>1</sup> on the Commission Action Programme for Migrant Workers, and the Economic and Social Committee in its opinion<sup>2</sup> on the same subject both pressed for firm action on illegal migration.

2. On 9 February 1976 the Council adopted a resolution<sup>3</sup> on an action programme for migrant workers and members of their families. While most of the resolution concerned itself with legal migrants from third countries in the Community, a section dealt with illegal migration. It stated that it was important:

- to strengthen collaboration of Member States to combat such illegal migration;
- to ensure the provision of appropriate sanctions to repress trafficking;
- to ensure the fulfillment of employers' obligations and the protection of workers' rights relating to the work they have carried out without prejudice to other consequences of the unlawful nature of their residence and employment.

3. The Council resolution can thus be seen as a mandate given by the Member States through their representatives in the Council of Ministers to the Community institutions on the one hand and to the Member States on the other<sup>4</sup>. This is a subject where both the Community and the Member States are partly competent; under the Treaties, the Community is *inter alia* competent as to the free movement of Community workers and in the field of social policy; but Member States remain sovereign in regulating the entry on to their territory of nationals from non-Member States. In some respects the dividing line between the two is difficult to draw (for example, where immigration from third countries into the Community threatens to restrict Community workers' freedom of movement). The resolution does not indicate which tasks in the action programme are to be tackled by which body. In this field of mixed competence, it is therefore not immediately clear which possibilities for action are open to the Community institutions.

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1 OJ No. C239 of 20.10.1975

2 OJ No. C12 of 17.1.1976

3 OJ No. C34 of 14.2.1976, p.2

4 See paragraph 7 of the resolution

4. From a legal point of view, there are three main possibilities under the EEC Treaty:

- (a) a Recommendation under Articles 118<sup>1</sup> and 189<sup>2</sup>;
- (b) a directive under Article 100<sup>3</sup>; or
- (c) measures under Article 235<sup>4</sup>

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1

Article 118 reads as follows:

'Without prejudice to the other provisions of this Treaty and in conformity with its general objectives, the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to:

- employment;
- labour law and working conditions;
- basic and advanced vocational training;
- social security;
- prevention of occupational accidents and diseases;
- occupational hygiene;
- the right of association, and collective bargaining between employers and workers.'

2

Article 189 reads as follows:

'In order to carry out their task the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.'

3

Article 100 reads as follows:

'The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.'

4

Article 235 reads as follows:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.'



The essential difference between (a) (a Recommendation) and (b) (a directive) is that a directive has binding force while a Recommendation does not; the main difference between (a) and (b) on the one hand, and (c) (action under Article 235) on the other, is that the use of Article 235 is restricted to cases where the Treaty has not otherwise provided the necessary powers to attain a Community objective. In all cases, action must, of course, be confined within the over-all limits of Community competence laid down by the Treaties.

## II. Commission proposal

5. The Commission proposal covers the first two, but not the third, of the resolution's aims on illegal migration and employment set out in paragraph 1 above. The title of the proposal shows that its main aim is to combat such migration and employment, not to provide social and economic protection for the migrant concerned. Your committee regrets that it has not yet proved possible to deal with this aspect of the problem and hopes that it will not be long before further action is taken.

6. The proposal would require Member States:

- to ensure that migrant workers covered by the directive be given accurate information about employment, living and working conditions and about their requirements concerning entry, residence and employment (Article 2(a));
- to ensure adequate control either at places of entry to their territory or at places of employment (Article 2(b));
- to control temporary employment agencies which make manpower available to third parties in another Member State (Article 2A (a) and (b));
- to ensure the application of sanctions on natural or legal persons who knowingly either organise or participate in activities which either are intended to lead or lead to illegal migration or illegal employment (including liability for repatriation costs and, in serious cases, the possibility of imprisonment) (Article 3.);
- to ensure that workers sentenced for taking up illegal employment may appeal and for a stay of execution if there is an appeal against deportation.

The proposal is for a Council directive under Article 100 of the EEC Treaty.

### III. Legal questions which arise

7. The general question of Community law and criminal law was recently discussed in detail in the report<sup>1</sup> drawn up by Mr. Paul de Keersmaecker on behalf of the Legal Affairs Committee. This draft opinion therefore concentrates on the most important legal question raised by this particular proposal: the choice of Treaty Article to be used as a legal basis and the choice of legal instrument. In this regard it is interesting to note that following the debate on the De Keersmaecker report, Parliament adopted a resolution<sup>2</sup> which invited 'the Commission to consider the use of Article 100 of the EEC Treaty to harmonise existing provisions of national legislation relating to sanctions for breaches of Community law ...'.

8. Since beginning its work on the proposal the Legal Affairs Committee has also seen the draft report prepared by Mr. Pisoni for the Committee on Social Affairs, Employment and Education<sup>3</sup>. The amendments proposed raise questions of interest from a legal point of view. During its discussion of the proposal, the Legal Affairs Committee decided that it might be appropriate to make some comments on them in its opinion.

### IV. The choice of legal basis and legal instrument

9. The first question which arises is whether the legal instrument used should or should not have binding force. This is essentially a question as much of policy as of law. But it is generally agreed that the problem of illegal migration and illegal employment is so serious that firm action is necessary. This needs more than a non-binding Recommendation, however detailed its provisions. It needs the binding force of a directive.

10. It should perhaps be added that a regulation could also theoretically be used (under Article 235 of the EEC Treaty) but its detailed character would hardly be suitable for use in the field of criminal law where Member States have widely diverging traditions. In contrast, a directive, while binding as to the result, leaves national authorities free as to the choice of method used. Your committee thinks that a directive is the most suitable legal instrument to use in this case.

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1 Doc. 531/76

2 OJ No. C57 of 7.3.1977

3 PE 47.688/rev.

11. Which Treaty Article should form the basis of the directive?  
Article 100 can be used only 'for the approximation of such provisions laid down by legislation, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.'  
Article 235 can be used only 'if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this treaty has not provided the necessary powers.' If Article 100 can be used, Article 235 is excluded; if it cannot, the use of Article 235 can be considered. The choice of legal basis thus depends on the question whether Member States' legislation is such as to have a direct affect on the establishment or functioning of the common market.

12. In this regard it should be mentioned that until now the Commission has been unwilling to use Article 100 in the domain of criminal law, particularly for breaches of Community legislation. The reply given to a series of questions by Members of the European Parliament<sup>1</sup> shows the Commission's thinking at that time. This led the Legal Affairs Committee to consider in what circumstances Article 100 could be used to harmonise criminal law. It was thought that, should enforcement by criminal sanctions be required and should the criteria in Article 100 be fulfilled, that Article might be used.<sup>2</sup>

13. The essential question is whether the present laws of the Member States directly affect the establishment or functioning of the Common Market. It is clear that although all Member States have legislation in the field of illegal migration and illegal employment, the scope of such legislation, the definition of which actions constitute criminal offences, and the sanctions to be applied all differ widely.

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<sup>1</sup> Questions No. 17 by Mr Bayerl, No. 18 by Mr Fellermaier, No. 19 by Mr Hansen, and No. 20 by Mr Broeks; see Doc. 399/74 and OJ Annex No. 184 of December 1974.

See also Answer to Written Question No. 596/74 by Mr Kater in OJ No. C108 of 15 May 1975.

See also Doc. 531/76, paragraphs 27 and 28.

<sup>2</sup> See De Keersmaeker report Doc. 531/76, paragraph 30.

14. As pointed out in Paragraph 6 of the Commission's Explanatory Memorandum, the laws are such that illegal migration into some parts of the Community for the purpose of employment threatens to jeopardise the constant improvement of living and working conditions for workers, one of the fundamental aims of the Community (Preamble and Article 117 of the EEC Treaty).

15. It could perhaps have been added that wide divergencies in the severity with which illegal migration and employment is treated may, by causing differential rates of illegal migration and illegal employment in the Member States, also have a direct effect on Community workers' freedom of movement (Article 48 EEC Treaty).

16. Your committee is therefore of the view that the use of Article 100 is legally justified in order to harmonise Member States' criminal legislation and administrative provisions for the prevention and penalisation of illegal migration and illegal employment. It welcomes this first proposal by the Commission for the use of Article 100 in the field of criminal law.

V. Amendments proposed in Mr Pisoni's draft report

17. Your committee recognises that it is unusual for a committee asked for its opinion to comment on the draft report being examined by the committee responsible. But it was expressly decided by the Legal Affairs Committee that in this case it would be appropriate to make some comments on the draft report. This would, of course, be limited to its legal, not its political or social, implications.

18. As pointed out above, the Commission proposal does not fully put into effect that part of the Council resolution which dealt with illegal migration. In particular, it does not cover the safeguarding of workers' rights to the work they have carried out. Moreover, it only includes limited provisions on the question of information. (In this regard the Commission's proposed Article 1(1)(b), which states that one of the directive's aims shall be:

'to mitigate the harmful effects which such workers suffer, through no fault of their own, as a result of their illegal migration or illegal employment'

is slightly misleading. For the Commission proposals would improve the workers' situation only in that they would no longer be liable for repatriation costs and would have an automatic right of appeal and stay of execution in cases of deportation). Mr Pisoni's amendments are designed to provide details on these points and more details on the question of control. But the Legal Affairs Committee thinks it advisable to comment individually on each proposed amendment.

Article 1(1)(b)

19. The Commission's proposal states that an aim of the directive is to 'mitigate the harmful effects which such workers suffer, through no fault of their own, as a result of their illegal migration or illegal employment'. The amendment would add: '.. particularly by ensuring that employers fulfil their obligations and that the rights of such workers inherent in the work they perform are protected.' These words are taken verbatim from Paragraph 5(b) of the Council resolution (where, however, the text continues: 'without prejudice to other consequences of the unlawful nature of their residence and employment').

20. The amendment raises the fundamental question whether employers' obligations and workers' rights should be included in this Article 100 directive or whether it would be better to make them the subject of a separate directive. Unless the directive to be adopted contains provisions on employers' obligations and workers' rights, the amendment serves no purpose, and should not be adopted.

Article 2(1)(b) new

21. In Article 2 on provision of information a new sub-paragraph is proposed as follows:

'the socio-economic categories concerned and public opinion in the individual countries are made aware of the need to combat illegal migration and put an end to the exploitation associated with it'

It is not clear which 'individual countries' are meant here. If it is 'Member States', your committee would comment that it is positive measures rather than information which will effectively reduce exploitation. It recommends that the amendment be rejected.

Article 2(2) new

22. Again on the provision of information Mr Pisoni proposes a new paragraph as follows:

'the Commission shall promote in all manpower-exporting third countries the introduction of measures not only to provide the information described in paragraph 1(a) of this Article, but also to explain the distressing consequences of illegal migration'

From a legal point of view such an amendment should not be included in a directive. For under Article 189 (EEC) a directive is addressed to Member States, not to the Commission. It should therefore not be adopted.

Article 2A (a) and (b) new

23. On the question of control Mr Pisoni proposes the following text:

'(a) there shall be an adequate control:

- at places of entry to their territory (the amendment deletes the word 'or' proposed by the Commission), at places of employment and in the migrants' likely places of residence;
- of temporary employment agencies which make manpower available to third parties in another Member State;

(b) the controls referred to in sub-paragraph (a) of this Article are assigned not only to the administrative bodies normally responsible for the entry and residence of aliens in the individual States, but also to labour inspectorates and social service departments in cooperation with trade-union and employers' organizations.'

Your committee would stress that in regard to control Member States' positions differ considerably. Since Article 189 of the Treaty states that 'a directive is binding as to the result to be achieved' but leaves national authorities free as to the methods to be used, it is difficult to see how the proposed amendments can be included in a directive. This amendment should not be accepted.

Article 3(c) new

24. On sanctions the addition of a new sub-paragraph is proposed as follows:

'The sanctions referred to in sub-paragraphs (a) and (b) of this Article shall be applied with the utmost severity against any persons committing acts having as their purpose or effect the exploitation of the position of illegal migrants'

A legal problem arises from the words 'shall be applied'. This implies that the directive is being addressed directly to national judges not to Member States (as is required by Article 189). The amendment should therefore not be approved.

Article 3(d) new

25. The same problem as in Article 3(c) arises in the proposed Article 3(d), which should therefore be rejected.

Article 3 A (a) new

26. Mr Pisoni's proposed amendment is as follows:

'Employers are obliged to pay illegal workers for their services the full statutory economic wage applicable to legally employed migrant workers from third countries and illegal workers are granted a right to this wage which they can uphold in court'

In some Member States there are no provisions for a statutory economic wage. It does not seem appropriate for such a major change in some Member States' general social legislation to be required by means of a directive on the particular problem of illegal migration and illegal employment. It would be better to give this further consideration. Your committee therefore recommends the rejection of this amendment.

Article 3A (b) new

27. This amendment reads as follows:

'A reasonable period of time is provided for employers to report voluntarily any cases of illegal employment in their undertakings during which, by granting to illegal workers the rights referred to in sub-paragraph (a) of this Article, they can avoid incurring the sanctions laid down in Article 3, paragraphs (a) and (b), except, where applicable, for liability in respect of the repatriation costs of those illegal workers who choose to return to their country of origin.'

It is closely linked to Article 3A(a) above and gives rise to similar comments.

Article 4(b) new

28. In the Article on the migrant workers' right of appeal, it is proposed to add the following sub-paragraph:

'To grant in a general way to illegal workers every practical means of upholding their rights in criminal, administrative and civil proceedings, enabling them to rely on all possible proofs and to obtain, where necessary, free legal assistance'

Your committee would like to see a fuller explanation in the Explanatory Statement of why the present situation gives rise to a need for this amendment. Unless it can be shown to be necessary, it would recommend its rejection.

Article 4A (1) new

29. This amendment reads as follows:

'The policy adopted towards illegal migrants and their families present in Community territory at the time of entry into force of the present Directive shall be to promote, as far as possible, the proper settlement of their position and full equality of rights with legal migrants from third countries'

As has been indicated above, there are legal difficulties involved in including social provisions in an Article 100 directive whose aim is to harmonise provisions to prevent and penalise illegal migration and employment. This amendment should therefore not be included in this directive.

Article 4A (2) new

30. This amendment reads as follows:

'Deportation shall be one of the methods of dealing with illegal migrants and their families entering the Community after the date referred to in sub-paragraph 1 of this Article'

This gives rise to the same comments as Article 2A(a) and (b). Member States must be left free to choose the methods used to achieve the desired aim. It should be rejected.



VI. Conclusions

31. (a) Your committee thinks that a directive adopted under Article 100 of the EEC Treaty is the correct legal instrument to use in this case.
- (b) It recognises the seriousness of the problem and hopes that the Council will treat the proposal as a matter of urgency.
- (c) It suggests that the Social Affairs Committee take account of the comments set out in paragraphs 17 - 30 above when adopting its draft report.
- (d) It regrets that the proposal does not fully put into effect that part of the Council resolution of 9 February 1976 which dealt with illegal migration and hopes that the Commission will make further proposals in particular on the social aspects of the problem in the near future.

Minority Opinion

A minority of the Legal Affairs Committee felt that Article 100 of the EEC Treaty was not a sufficient legal basis for the harmonisation of laws in Member States to combat illegal migration and illegal employment.