

European Communities

445.22

EUROPEAN PARLIAMENT

Working Documents

1977 - 1978

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 Council¹,
 - 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;

¹ 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

¹ 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 workers¹

(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 immigration²

(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.

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

² 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 progress¹;

(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 Families² and have been strongly advocated by the Economic and Social Committee³ and the European Parliament⁴ in the opinions they have delivered on the Action Programme.

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

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

³ See ESC 1111/75, point 12

⁴ 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'¹.

7. It should also be recalled that the International Labour Office fully supports the above objectives in its Convention No. 143² and that the Council of Europe is taking a similar stance³.

(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 1976⁴ 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...'.

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

² 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

³ 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

⁴ 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 above¹, 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.

¹ 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 legislation¹, 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 law², 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';

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

² 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 opinion¹:

- 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.

¹ 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 concerned¹, but also give rise, in the countries of immigration (which are usually EEC countries), to the very serious consequences described above², 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.

¹ See point I, (A) (1) of this explanatory statement

² 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 Committee¹, 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 workers².

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 directive³ 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.

¹ See opinion of the Legal Affairs Committee, point 31(d)

² See Annex II - point C - Netherlands - (c)

³ See VI, 45 of the explanatory statement