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Report

tabled on behalf of the Committee on Social Affairs, Employment and Education

on the amended proposal from the Commission of the European Communities to the Council (Doc. 58/78) for a Directive concerning the approximation of the legislation of the Member States, in order to combat/illegal migration and illegal employment

Rapporteur: Mr F. PISONI

1.2.1

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 concerning the approximation of the legislation of the Member States in order to combat illegal migration and illegal employment.

At its plenary sitting of 18 November 1976 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 1977, 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.

On 15 November 1977 Parliament adopted¹ the motion for a resolution in the Pisoni report (Doc. 352/77), tabled on behalf of the Committee on Social Affairs, Employment and Education.

By letter of 19 April 1978 the President of the Council once again requested the European Parliament to deliver an opinion on the amended proposal.

On 28 April 1978 the proposal (Doc. 58/78) was referred to the Committee on Social Affairs, Employment and Education as the committee responsible and to the Legal Affairs Committee for its opinion.

On 16 May 1978 the Committee on Social Affairs, Employment and Education confirmed the appointment of Mr Pisoni as rapporteur.

The committee considered the proposal at its meeting of 19 June 1978.

At this meeting the Committee on Social Affairs, Employment and Education adopted the motion for a resolution and the explanatory statement by 9 votes to 3 with 1 abstention.

Present : Mr Nolan, Vice-Chairman and acting Chairman; Mrs Dunwoody, Vice-Chairman; Mr Pisoni, rapporteur; Mr Albers, Mrs Cassanmagnago Cerretti, Mr Dinesen, Mr Howell, Mrs Kellett-Bowman, Mr Lezzi, Mr Pistillo, Mr Ripamonti (deputizing for Mr Granelli), Mrs Squarcialupi and Mr Veronesi (deputizing for Mr Eberhard).

The opinion of the Legal Affairs Committee is attached.

¹See OJ No. C 299, 12.12.1977, p. 16

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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 amended proposal from the Commission of the European Communities to the Council for a Directive on the approximation of the legislation of the Member States to combat illegal migration and illegal employment

The European Parliament,

- having regard to the amended 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. 58/78),
 - having regard to the resolution adopted on 15 November 1977²,
 - having regard to the report of the Committee on Social Affairs, Employment and Education and the opinion of the Legal Affairs Committee (Doc. 238/78),
1. Expresses its keen satisfaction that the Commission of the European Communities, in response to Parliament's requests³ and in accordance with the wish expressed by the Council in its resolution of 9 February 1976⁴, has accepted and enacted in particular the principle whereby illegal migration and illegal employment should be effectively combated not only by means of preventive and penal measures but also by ensuring that the rights of illegal migrant workers relating to the work they have carried out are protected and that employers fulfil their obligations in this respect;
 2. Approves therefore the proposals of the Commission and, in view of the extreme seriousness and urgency of the phenomena and problems which they are intended to combat, appeals urgently to the Council to adopt them within the shortest possible time.

¹ OJ No. C 97, 22.4.1978, p.9

² OJ No. C 299, 12.12.1977, p.16

³ See in particular paragraphs 3 and 15 of the resolution adopted at the sitting of 15 November 1977: OJ No. C 299, 12.12.1977, p.16

⁴ Resolution on an Action Programme for migrant workers and members of their families: OJ No. C 34, 14.2.1976, p.3, point 5(b)

EXPLANATORY STATEMENTI. INTRODUCTION

1. In its resolution of 9 February 1976¹ on an Action Programme for migrant workers and members of their families², the Council of Ministers of the European Communities recognized the need to: 'strengthen co-operation 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 and that the obligations of employers are fulfilled and the rights of workers relating to the work they have carried out safeguarded without prejudice to other consequences of the unlawful nature of their residence and employment; '.

2. Thus the principle was established for Community action in this sphere to pursue simultaneously the following objectives:

- cooperation between Member States in the campaign against illegal immigration;
- the adoption of appropriate sanctions;
- the fulfilment of employers' obligations and the protection of workers' rights relating to the work they had carried out.

3. These guidelines constitute not only recognition of the soundness of the requests made on several occasions by the European Parliament, by the Economic and Social Committee and by the Standing Committee on Employment, but is fundamentally in accordance with the principles contained in Convention No. 143 of the International Labour Organization in Geneva³ and with those on which the regulations to be adopted by the Council of Europe⁴ are based.

II. INITIAL PROPOSAL FOR A DIRECTIVE FROM THE COMMISSION OF THE EUROPEAN COMMUNITIES

4. In order to implement the above-mentioned proposals made by the Council of Ministers, on 4 November 1976 the Commission of the European Communities submitted to the Council a proposal for a directive on the harmonization of laws in the Member States to combat illegal migration and illegal employment⁵ whose principal aims were to:

¹ OJ No. C 34, 14.2.1976, p.3, point 5(b)

² Supplement No. 3/76 to the Bulletin of the European Communities

³ See Convention No. 143 of 24.6.1975: 'Convention concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers'. - First part and Articles 2 and 3 in particular

⁴ See 'Draft resolution on illegal migration and illegal employment of foreign workers' at present being considered by the Committee of Ministers of the Council of Europe

⁵ See OJ No. C 277, 23.11.1976, p.2

- (a) prevent and repress illegal migration and illegal employment;
- (b) mitigate the hardship suffered by illegal migrants by reason of their situation;
- (c) strengthen cooperation between the Member States.

5. In particular, the proposal would require Member States:

- (a) to ensure that migrant workers be given accurate information about employment, living and working conditions and of the conditions and procedures laid down by national regulations governing the entry, residence and employment of such workers;
- (b) to ensure adequate control either at places of entry to their territory or at places of employment, and also of temporary employment agencies which make manpower available to third parties in another Member State;
- (c) to apply sanctions, including the possibility of imprisonment and liability in respect of repatriation costs of the workers concerned, to natural or legal persons who knowingly either organize or participate in activities which either are intended to lead or do lead to illegal migration or illegal employment;
- (d) to ensure that workers sentenced for taking up illegal employment may appeal against such sentence and, where the sentence is one of deportation, appeal shall involve a stay of execution.

III. OPINION OF THE EUROPEAN PARLIAMENT

6. The European Parliament adopted its opinion on this proposal on 15 November 1977¹, approving without amendment the motion for a resolution contained in the report² presented by Mr Pisoni on behalf of the Committee on Social Affairs, Employment and Education.

7. This report gave a detailed analysis of the problems and extremely serious human, social, economic and political consequences of illegal migration and illegal employment and made a whole series of observations on the proposed regulations and their implications.

8. In particular:

- (a) it considered of the greatest importance that public opinion should be made aware of these problems and that workers' and employers' organizations should share the responsibility of prosecuting the aims of the directive;

¹ See OJ No. C 299, 12.12.1977, p.16

² See Doc. 352/77, 9.11.1977

- (b) it stressed the need for the maximum strengthening, extension and diversification of controls to stop the inflow of illegal entrants;
 - (c) it expressed its deep disappointment at the failure to propose any measures aimed at harmonizing national legislation, with particular reference to definition of identical offences and the stipulation of equivalent penalties;
 - (d) it invited the Commission to tackle as soon as possible the problems arising from the need to harmonize penal measures against offences in the areas concerned;
 - (e) hoped that the Community would succeed in achieving 'common legal standards' including penal provisions, in the area of the protection of human rights, both civil and social;
 - (f) requested that in respect of illegal migrant workers, prevention should be the primary consideration (by means of information and control) and that a strict policy of prosecuting all those who draw illicit benefit from the irregular situation of these workers should be pursued in order not to put on the same footing the profiteers and their victims, especially in the matter of penalties;
 - (g) it requested further that the Member States adopt, in their legislation, as liberal an attitude as possible when it came to regularizing the position of illegal migrants and their families;
 - (h) it drew attention to the fundamental importance of close cooperation among Member States in the sphere of legal and administrative procedures, also with a view to adopting rules that are, as far as possible, uniform;
 - (i) expressed finally its conviction that the final solution of the distressing problem of migration, legal and illegal, was, and is still to be found, in practical economic development aid to the migrants' countries of origin and, in the Member States, in a new appreciation of, and a new approach to, the many kinds of occupation 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 manpower from third countries.
9. Furthermore, it expressly requested in the form of specific amendments to the proposed regulations:
- (a) that the socio-economic categories concerned and public opinion in the individual countries should be made aware of the need to combat illegal migration and put an end to the exploitation associated with it;

(b) that illegal workers be granted, in a general way, 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.

10. However, what the European Parliament criticized most severely was the fact that the regulations proposed by the Commission omitted the fundamental principle of the recognition of the rights of illegal migrant workers deriving from the work they had performed and of the obligations to be fulfilled by employers in this respect.

11. Paragraph 3 of the motion for a resolution strongly deplored and considered unacceptable this omission, which among other things, clearly contrasted with the wishes expressed by the Council of Ministers in the aforementioned resolution of 9 February 1976¹.

12. This position was reiterated in paragraph 15, in which, in complete agreement with the conclusions expressed in the opinion of the Legal Affairs Committee², it invited the Commission to make further proposals in the near future, on the social and legal implications and aspects of the recognition of illegal migrant workers' rights.

13. On this point it may be useful to mention the considerations set out in the explanatory statement³ in which recognition of these rights was considered 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'. 'When it is remembered that these phenomena not only create tragic situations for the migrants concerned, but also give rise, in the countries of immigration (which are usually EEC countries), to the very serious consequences described above, 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.' '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.'

14. These points, among others, were endorsed and strongly reaffirmed by the majority of speakers during the plenary sitting at which this report was debated⁴.

¹ See point 1 of this explanatory statement

² See point 31(d) of the opinion of the Legal Affairs Committee forming part of Doc. 352/77

³ See points 35 (last part), 36 and 37 of the explanatory statement contained in Doc. 352/77

⁴ See report of proceedings on 14 to 18 November 1977: Official Journal of the European Communities - Annex No. 223 - November 1977; pp. 19 to 33

IV. AMENDED PROPOSAL FOR A DIRECTIVE FROM THE COMMISSION OF THE EUROPEAN COMMUNITIES

15. It is on the basis of the aforementioned observations, with which the Economic and Social Committee also agrees¹, that the Commission, as it mentions in its introductory report², has decided to amend its initial proposal in order to incorporate provisions on the social aspects referred to in the Council's resolution.

16. The amended proposal³, which requires the Member States to pursue all objectives and fulfil all obligations already laid down in the initial proposal⁴, is characterized above all by its provision for measures to ensure that the rights of illegal workers deriving from the work they have carried out are safeguarded and that the obligations of employers in this respect are fulfilled.

17. The Committee on Social Affairs, Employment and Education, on the basis of the above-mentioned considerations, cannot but express its very great satisfaction that the Commission has thus remedied the very serious omission in its previous proposal for a directive, as requested by the European Parliament, and in particular expresses a favourable opinion on the wording of Article 7 of the present proposal which regulates the social and legal aspects of the matter, laying down inter alia that: employers shall fulfil all the obligations arising from the present or previous employment of illegal migrant workers as would be the case for legal employment, with regard in particular to

- (a) remuneration, including where appropriate, redundancy payments on expiry of a contract and annual leave to which the worker is entitled but has not taken;
- (b) social security contributions and taxes.

18. Also worthy of note is the fact that in the aforementioned article it is further laid down that illegal migrants sentenced to deportation shall receive treatment no less favourable than that accorded their own nationals as regards credit or reimbursement of social security contributions paid by such persons and their employers.

19. Our committee is also especially satisfied with the following points:

¹ See OJ No. C 77, 30.3.1977, p.9

² See COM(78) 86 final, point 5

³ See Doc. 58/78 and OJ No. C 97, 22.4.1978, p.9

⁴ See points 4 and 5 of this explanatory statement

- (a) essentially concurring with an amendment tabled by the European Parliament¹, paragraph 3 of the above-quoted Article 7 affords an illegal migrant, whether or not sentenced to deportation, every opportunity to assert his rights and those of his family in respect of his wages and social security contributions, access to all possible supporting evidence and, where applicable, to legal aid;
- (b) also in concurrence with another amendment tabled by the European Parliament², paragraph 3 of Article 2 lays down that the socio-economic categories concerned and public opinion in the Member States shall be made aware of the need to combat illegal employment and put an end to the resulting exploitation;
- (c) further, in accordance with the wishes of the European Parliament in the second half of paragraph 5 of its resolution adopted in November 1977³, Article 9 lays down that Member States shall secure the collaboration of organizations representing employers and workers in the adoption and execution of measures implementing the directive;
- (d) furthermore, endorsing the points considered essential by paragraph 4 of the aforementioned resolution, paragraph 2 of Article 2 lays down that the Member States shall endeavour, when necessary, to obtain the cooperation of non-Member States concerned for the purpose of circulating in those States information likely to be of help in preventing illegal migration and illegal employment.

20. The extreme importance of all these changes included in the amended proposals for a directive is well illustrated in the comments made in the explanatory statement to the report presented at the plenary sitting of November 1977⁴: reference is here made to them, while re-emphasizing their soundness.

21. If reference is made to that explanatory statement and to the European Parliament's resolution⁵, it can be seen, however, that, as the Commission itself admits in its report on the proposal for a directive⁶, no action has been taken on Parliament's requests for measures aimed at harmonizing sanctions at Community level and stipulating equivalent penalties for all Member States.

¹ See new paragraph (b) of Article 4 of the initial proposal for a directive in OJ No. C 299, 12.12.1977, p.19 and point 9b of this explanatory statement

² See new paragraph (c) of Article 2 of the initial proposal for a directive in OJ No. C 299, 12.12.1977, p.18 and point 9a of this explanatory statement

³ See OJ No. C 299, 12.12.1977, p.16

⁴ See Doc. 352/77

⁵ See, in particular, paragraphs 7 to 10: OJ No. C 299, 12.12.1977, p.17

⁶ See point 10 of the introductory report in Doc. 58/78, p.3

22. Even though this omission gives particular cause for regret, since the above-mentioned measures would certainly have made a considerable contribution to achieving the objectives of these regulations, it is possible to sympathize at present with the Commission when it points to the serious difficulties besetting measures of this kind, difficulties which would certainly have obstructed and considerably delayed the presentation of this proposal.

23. A further cause for regret is that, in the proposal, no provisions are made for the grave problem of what is to become of illegal immigrants and their families at present in the Community. While recalling the observations made in this respect in the explanatory statement of the above-mentioned resolution of the European Parliament¹, one can only repeat the urgent request to Member States expressed in paragraph 12 of the aforementioned resolution² to adopt in their legislation, as liberal an attitude as possible when it comes to regularizing the position of these people.

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24. On the basis of the above considerations, the Committee on Social Affairs, Employment and Education expresses a favourable overall opinion on the essential points of the proposal for a directive presented by the Commission of the European Communities, and acknowledges that it has complied in a relatively short time with at least the most important of the requests put forward by the European Parliament.

¹ See points 43 to 47 of the explanatory statement in Doc. 352/77

² See OJ No. C 299, 12.12.1977, p.17

OPINION OF THE LEGAL AFFAIRS COMMITTEE

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.

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 and on 12 July 1977 adopted a revised draft opinion (PE 48.335/fin.).

On 15 November 1977 Parliament adopted¹ the draft motion for a resolution contained in Mr. Pisoni's report (Doc. 352/77) on behalf of the Social Affairs Committee.

By letter of 19 April 1978 the Secretary-General of the Council requested Parliament's opinion on the amended proposal.

On 28 April 1978 the proposal (Doc. 58/78) was referred to the Social Affairs Committee as committee responsible and to the Legal Affairs Committee for its opinion.

At the meeting of the Legal Affairs Committee on 22/23 May 1978 Mr. Calewaert was appointed draftsman.

On 22 September 1978 the Committee examined and adopted this opinion, with 9 votes in favour and 4 abstentions.

Present : Sir Derek Walker-Smith, Chairman; Mr Calewaert, draftsman; Lord Ardwick, Mr Berkhouwer (deputizing for Mr Pianta), Mr Broeksz, Mrs Ewing, Mr Fletcher-Cooke, Mr Forni, Mr Krieg, Lord Murray of Gravesend, Mr Radoux, Mr Santer and Mr Schmidt.

¹ OJ No. C 299 of 12 December 1977.

Background

1. This proposal is an amended version of the one¹ on which the Legal Affairs Committee gave its opinion² to the Social Affairs Committee in July 1977.
2. In that opinion the committee
 - (a) approved the choice of a directive under Article 100 as a basis for Community action;
 - (b) commented on the proposed amendments under discussion at that time in the Social Affairs Committee; and
 - (c) regretted that the proposal did not fully put into effect the Council Resolution³ of 9 February 1976 on illegal migration and expressed the hope that the Commission would make further proposals, in particular on the social aspects of the problem, in the near future.

Present proposal

3. The present proposal takes account of Parliament's opinion on the earlier version. A number of modifications have been made to the provisions already included in the original proposal. But the major change is the inclusion, in response to Parliament's demands, of new provisions so as to implement the whole of the Council Resolution. It is on these, new, provisions, that concentration needs to be focused now.

The aim of the new provisions

4. The new provisions are designed to ensure that "the rights of workers relating to the work that they have carried out are safeguarded without prejudice to the other consequences of the unlawful nature of their residence and employment" (Council Resolution of 9 February 1976). In particular, it is provided that, where an illegal migrant or a migrant in illegal employment is of good faith (Article 1(2)(b)):
- his repatriation costs are borne by the employer or by other guilty persons (Article 5); and
 - the rights and obligations arising from his contract of employment shall be the same as if the migrant's situation were not illegal (Article 7 - which also deals with the migrant's social security situation).

¹ Doc. 426/76

² PE 48.335/fin.

³ OJ No. C 34 of 14 February 1976

Effect of the new provisions

5. The combined effect of Articles 1(2)(b), 5 and 7 is that:
- an illegal migrant or migrant in illegal employment remains guilty of infringing the relevant national provisions;
 - if he is of bad faith the provisions designed to mitigate the hardships suffered by him do not apply; and
 - if he is not of bad faith the following obligations arise:
 - (a) the employer is liable to fulfil his side of the contract and has primary responsibility for repatriation costs;
 - (b) in the absence of an employer, or if he defaults, other guilty persons are liable for repatriation costs;
 - (c) the migrant is liable to fulfil his side of the employment contract.

Decisions required of national authorities

6. The new provisions imply a number of decisions by national authorities:
- (a) the decision(s) as to the illegality of the migration and/or employment;
 - (b) the consequent decision on deportation;
 - (c) the decision as to the migrant's good or bad faith;
 - (d) the decision as to the guilt of the other persons referred to in Article 5(b);
 - (e) possible decisions arising from the migrant's contract of employment and social security contributions;
 - (f) possible decisions as to his entitlement to legal aid.

Comments

7. It should be noted that, while the proposal implicitly requires Member States to make provisions for these decisions, it leaves them maximum flexibility in this regard. Except for the decision of the migrant's bad faith (which is expressly required to be taken by judicial authorities) the proposal does not specify whether it is administrative or judicial authorities which are to act; similarly, Member States are left free to decide whether the directive should be implemented and enforced by means of civil, criminal or administrative law. The proposed directive thus specifies the result to be achieved but leaves to the national authorities a wide choice of form and methods, as is required by Article 189 of the EEC Treaty.

8. It should also be noted that under Article 5 it is the employer who has primary responsibility for repatriation costs. This is so even if he has acted in good faith. To take a concrete example, it is possible that the employee has in good faith received from an organiser of migration false documents which he then gives to the employer. The employer could not know that he was acting illegally in employing the migrant. It is strange that in such a case it is the employer, not the organiser, who must bear the cost of repatriation. Article 5 should be amended in favour of the employer who acts in good faith, as follows:

"Member States shall take the necessary measures to ensure that, in the case of deportation of an illegal migrant who has not been recognised as acting in bad faith by the judicial authorities concerned, repatriation costs are borne:

- (a) by the employer(s) concerned unless he (they) did not and could not reasonably have known that the employment was illegal;
 - (b) in the absence of an employer, or in the case of his (their) default, or if he (they) did not and could not reasonably have known that the employment was illegal, by any other person(s), proven guilty of having organized, aided and abetted or participated in the act of illegal migration or illegal employment;
- and, where an illegal migrant has two or more employers or employments, Member States shall be free to determine the extent of each employer's liability, if any.

Conclusions

9. The Legal Affairs Committee

- (a) welcomes the Commission's decision to submit an amended proposal on this subject;
- (b) advises the Social Affairs Committee to adopt the amendment to Article 5 in paragraph 8 above;
- (c) with this reservation advises the Social Affairs Committee to approve the amended proposal.

