

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(78) 86 final.

Brussels, 3 April 1978.

PROPOSAL FOR A COUNCIL DIRECTIVE

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

(submitted to the Council by the Commission)

EXPLANATORY MEMORANDUM

1. In their respective Opinions on the proposal for a Council Directive on the harmonisation of the laws of the Member States to combat illegal migration and illegal employment, forwarded to the Council on 4 November, 1976¹, the European Parliament² and the Economic and Social Committee³ informed the Council of their concern over the fact that the Commission proposal did not contain specific provisions on the protection to be granted to illegal migrant workers.

2. The Commission wishes to point out, in this connection, that in its action programme for migrant workers and their families⁴, it stressed not only the need to step up the campaign against illegal migration and employment through action in the sphere of detection, prevention and sanctions, but also the extent to which illegal migrant workers are at the mercy of all types of exploitation and intimidation.

For obvious humanitarian reasons any action at Community level which did not deal with this aspect of the problem would be incomplete and out of line with the measures advocated by the International Labour Organisation in Convention No. 143 concerning migration in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers and the World Tripartite Employment Conference in its declaration of principle adopted in Geneva on 17 June, 1976.

3. In its Resolution of 9 February, 1976 on an action programme for migrant workers⁵, the Council states that measures to be taken to combat illegal migration and clandestine employment should not be restricted to strengthening cooperation between the Member States in this sphere and adopting appropriate penalties, but should also include the protection of the rights of illegal migrant workers relating to the work they have carried out, and the execution by employers of their obligations.

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¹ OJ No C 277 of 23.11.1976, p. 2

² OJ No C 299 of 12.12.1977, p. 16

³ OJ No C 77 of 30.3.1977, p. 9

⁴ COM(74) 2250 final

⁵ OJ No 34 of 14.2.1976, p. 2

4. In implementing the Council Resolution, however, the Commission considered it preferable to deal with the problems connected with illegal migration in several stages and had mainly restricted its initial proposal to the approximation of national laws designed to prevent illegal migration and clandestine employment and stamp out abuses in these spheres.

5. The deep-felt concern expressed by the European Parliament and the Economic and Social Committee led the Commission to re-examine the whole question; faced with the choice of either modifying its initial proposal, in order to introduce the other elements of the Council Resolution, or of limiting itself to amendments in the initial proposal to take into account the suggested changes to the text and, at a later date, submitting to the Council other proposals containing mandatory provisions regarding the other aspects of the problem, it decided in favour of the first solution and is thus proposing to the Council a modified proposal for a Directive covering measures which might be envisaged, that is:

- strengthening of cooperation between the Member States in the campaign against illegal migration and clandestine employment,
- the adoption of appropriate penalties,
- the fulfilment of employers' obligations,
- the protection of workers' rights relating to the work they have carried out.

6. This revised proposal does not necessitate recourse to other dispositions of the Treaty, and remains based on Article 100, which is sufficient and necessary for putting into force the Council Resolution.

7. The proposal for a Directive is cast in terms which take into account the main aim of illegal immigration, that is, unlawful engagement in paid employment: it defines "illegal employment", "illegal migration" and "illegal migrant" (Article 1(1)).

8. The objectives of the proposal for a Directive (Article 1(2)) follow the guidelines laid down by the Council, i.e.:

- the prevention and penalisation of illegal migration and illegal employment,
- the mitigation of prejudice suffered by illegal migrant workers as a result of their situation by safeguarding their rights and securing fulfilment of employers' obligations.

9. Preventive action (Article 3) involves the following:

- information services for migrants as a means of counteracting misleading information,
- the organisation of effective controls.

In particular, as regards the organisation of controls, the Commission is of the opinion that effective control at the internal frontiers of the Community is becoming more and more impracticable. This will become increasingly the case when the Community establishes a Passport Union and abolishes all internal control on Community territory. It consequently underlines the necessity for providing checks on non-Community labour at the place of employment.

Moreover, abuses in the matter of temporary employment which have, in some Member States, led to more stringent controls in this sector, also prompted the Commission to call for closer supervision of the activities of temporary employment agencies.

10. As regards punitive sanctions as such, the proposal for a Directive is based on the premise that severe penalties with deterrent effect are indispensable (Article 4).

Contrary to certain suggestions for harmonising penalties at Community level and defining equivalent penalties in the Community instrument for all the Member States, the Commission, as in its initial proposal, has simply proposed the adoption of severe penalties. The penal systems of the Member States, under which penalties against the persons referred to in the proposal are - or will be - administered, are so different that such harmonisation will be extremely difficult. The information which Member States supply to the Commission for the purpose of drawing up a report for the Council on the application of this Directive (Article 11) will show whether it will subsequently be possible to make progress in this direction.

11. With regard to the social aspects of measures to combat illegal immigration and illegal employment, that is, the protection which should be provided for illegal migrant workers who, as is stressed in the opinion of the Economic and Social Committee, are frequently the victims of unscrupulous individuals and in many cases believe that they have complied with the laws of the host country; they are covered by the provisions of Articles 5 to 7.

12. Equally, a further important consideration has led the Commission to introduce provisions which are of a nature to protect the rights of the illegal migrant workers, inherent in the work which they have accomplished.

Insofar as the Member States will see that these obligations on the employer are fulfilled, and the rights of migrant workers are safeguarded, the cost of this illegal manpower will tend to equate with that of legally employed manpower, and may even exceed it. Consequently, it cannot be denied that the measures proposed in this field are of a persuasive nature, and strengthen the prevention of illegal employment.

13. Measures to penalise illegal employment should take into account the social and human consequences they may have for the illegal migrant worker who is caught. It goes without saying that the benefit of these provisions is tied to the good faith of the worker.

In view of the unstable financial situation in which they generally find themselves, the Commission considers that in principle, the costs of repatriation should not be borne by these workers but by the persons who have gained by their work, or even their illegal immigration, that is, their employers and any intermediaries involved (Article 5). Furthermore, the Commission wishes to point out that the Economic and Social Committee stressed the need for stay of execution in the event of an appeal by an illegal migrant worker against a sentence of deportation; this provision has, therefore, been retained in the new proposal (Article 6).

14. Article 7 reiterates, in the form appropriate to the Directive, the section of the Council Resolution on the fulfilment of obligations by the employer and the safeguarding of workers' rights ensuing from work carried out.

This means that employers must fulfil their obligations concerning remuneration, including any benefits connected with dismissal and outstanding paid leave, social security contributions and taxation. At the same time, the worker must also meet his obligations as though he had pursued his occupation in compliance with the law (paragraph 1).

Although contravening legislation governing the employment of foreign labour, the working relationship between the employer and his worker has existed and has created obligations and rights; in view of the illegal migrant worker's vulnerable position, it is essential that the authorities ensure that his rights are protected.

15. Furthermore, social security contributions should be credited to the worker or reimbursed, in cases where a national would be similarly eligible (paragraph 2).

16. Lastly, and again in connection with the protection of the illegal migrant, the Commission's proposal that the worker should be able to assert his rights and those of his family and, where applicable, receive free legal aid, was based on an amendment adopted by the European Parliament and the Opinion of the Economic and Social Committee (paragraph 3).

17. The collaboration of the Member States (Article 8), with the support of the Commission, is essential in order to prevent measures from being taken at random and in ignorance of similar measures in the other Member States; account must also be taken of their effects in the latter.

18. Lastly, in response to the Economic and Social Committee's expression of concern, the Commission has proposed that the two sides of industry should also collaborate (Article 9) on this matter.

ANNEX I

PROPOSAL FOR COUNCIL DIRECTIVE

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

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and, in particular, Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas, as stated in the preamble to the Treaty, the social advancement and constant improvement in the living and working conditions of the people of Europe constitutes one of the aims of the Community; whereas these social aims involve the full employment of the workers of the Member States under the best conditions;

Whereas, the illegal employment of non-Community labour on Community territory generally occurs under abusive conditions, such as discriminatory remuneration, misuse of social security laws, ignoring the provisions of labour laws on the protection of workers; whereas this is prejudicial to the employment

of all workers, and whereas it therefore constitutes an obstacle to the achievement of the social aims of the Community and, in particular, the improvement of living and working conditions which the Member States have recognised should be promoted as provided for in Article 117 of the Treaty;

Whereas, moreover, in view of the growing interdependence and integration of national labour markets, measures taken by Member States individually against migration for the purpose of illegal employment, or the absence of such measures, inevitably impinge on the effectiveness of measures taken by the other Member States; whereas in addition to measures within the sphere of competence of the Member States themselves, Community action is needed to combat the illegal employment of non-Community workers;

Whereas in its Resolution of 9 February 1976 on an action programme for migrant workers and members of their families¹ the Council considers that "it is important 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 suppress trafficking and abuses linked with illegal immigration and that the obligations of employers are fulfilled and the rights of workers relating to the work that they have carried out safeguarded without prejudice to the other consequences of the unlawful nature of their residence and employment";

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(1) O.J. N° C 34 of 14 February, 1976, p. 2.

Whereas in the absence of any specific and direct reference to Community action in this sphere in the Treaty, the general provisions of the Treaty and the means established therein must be invoked, in this case the approximation of provisions laid down by law, regulation or administrative action in the Member States;

HAS ADOPTED THIS DIRECTIVE:

Article 1

1. For the purposes of this Directive, the following definitions shall apply:

- a) "illegal migration" shall mean entry into and residence in a Member State of a person who is not covered by the provisions of Article 48 of the Treaty and the legislation derived therefrom and who seeks or takes employment therein in violation of the relevant provisions laid down by law, regulation or administrative action;
- b) "illegal employment" shall mean the paid employment of a person referred to in subparagraph a) above in violation of the provisions laid down by law, regulation or administrative action relating to the employment of foreign labour in each Member State;
- c) "illegal migrant" shall mean a person in a situation of illegal migration or illegal employment as defined in subparagraphs a) and b) above.

2. This Directive is intended to approximate the legislation of the Member States:

- a) concerning the prevention and suppression of illegal migration and illegal employment;
- b) to mitigate the hardships suffered by illegal migrants by reason of their situation, except in the case of illegal workers whose bad faith has been recognised by the juridical authorities concerned.

Article 2

1. Member States shall adopt the necessary provisions to ensure that the persons referred to in Article 1(1)(a) are duly and accurately informed of employment, living and working conditions and of the procedures laid down by national regulations governing the entry, residence and employment of foreign labour and the possible

consequences of failure to observe such provisions.

2. The Member States shall endeavour, when necessary, to obtain the collaboration of non-Member States concerned, for the purposes of circulating in those States, information likely to be of help in preventing illegal migration and illegal employment in the territory of the Member States.

3. Member States shall take the necessary measures to ensure that the socio-economic categories concerned and public opinion in the Member States are aware of the need to combat illegal employment and put an end to the resulting exploitation.

Article 3

For the purposes of preventing and detecting illegal migration and illegal employment, Member States shall organise adequate control, especially of employers and persons and undertakings supplying manpower to third parties.

Article 4

Member States shall take the necessary measures to ensure that:

a) sanctions are applied to persons who

organise, aid or abet or participate in illegal immigration and illegal employment within the meaning of Article 1(1) of this Directive;

- b) the sanctions applicable to the persons referred to in subparagraph a) of this Article shall include the possibility of imprisonment in serious cases of violation of national legislation concerning entry, residence and employment.

Article 5

Member States shall take the necessary measures to ensure that in the case of deportation of an illegal migrant, repatriation costs are borne:

- a) by the employer(s) concerned;
- b) in the absence of an employer, or in case of his (their) default, by any other persons known to be guilty of having organised, aided and abetted or participated in the act of illegal immigration or illegal employment.

Article 6

Member States shall take the necessary measures to ensure that migrants who have been sanctioned according to the provisions of Article 4 may appeal against such sentence. Where the sentence is of deportation, appeal shall involve a stay of execution.

Article 7

1. Member States shall take the necessary measures to:
- a) ensure that employers of illegal migrants fulfil all the obligations arising from the present or previous employment of such workers as would be the case for legal employment. These obligations concern

in particular:

- remuneration, and where provision is made therefor in legislation or collective agreements, redundancy payments on expiry of a contract and annual leave to which the worker is entitled but has not taken;
- social security contributions and taxes;

b) an illegal migrant who is found guilty of illegal employment, whether or not he is subject to deportation shall fulfil all the obligations arising from employment as in the case of legal employment.

2. Member States shall take measures to ensure that migrant workers who are subject 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.

3. Member States shall take the necessary measures to ensure that an illegal migrant, whether or not subject to deportation, shall be given every opportunity to assert his rights and those of his family before the proper authorities, have access to all possible supporting evidence and, where applicable, free legal aid.

Article 8

Member States shall collaborate closely with one another to achieve the aims of this Directive. The Commission shall assist in such collaboration.

Article 9

Member States shall take the necessary steps to secure the collaboration of organisations representing employers and workers in the adoption and execution of measures implementing this Directive.

Article 10

1. Member States shall institute the necessary provisions in laws, regulations and administrative acts to comply with this Directive within 24 months of the date of its notification and shall inform the Commission thereof without delay.

2. Once notification of this Directive has been effected, Member States shall inform the Commission, in sufficient time to enable it to submit its comments, of all draft laws, regulations or administrative provisions they intend to adopt in the field covered by this Directive.

Article 11

Within two years of the expiry of the period of 24 months provided for in Article 10(1), Member States shall forward to the Commission all relevant information to enable it to present to the Council, to the Parliament and the Economic and Social Committee, a report on the application of this Directive.

Article 12

This Directive is addressed to the Member States.