

Opinion of the Economic and Social Committee (16 January 2002)

Caption: Example of an opinion delivered by the Economic and Social Committee at the request of the Council of the European Union.

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Opinion of the Economic and Social Committee on the ‘Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities’ (16 January 2002)

On 21 September 2001 the Council decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the above-mentioned proposal.

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 19 December 2001. The rapporteur was Mr Pariza Castaños.

At its 387th plenary session (meeting of 16 January 2002) the Economic and Social Committee adopted the following opinion with 93 votes in favour and two abstentions:

1. Introduction

1.1. The proposal for a Directive responds to the need to regulate a very important aspect of Community immigration policy, i.e. the entry and residence of third-country nationals for the purpose of paid employment or self-employed economic activities in a Member State.

1.2. According to the Commission Communication on a Community immigration policy ⁽¹⁾, the lack of proper legal channels for labour migration is one of the reasons why such immigrants enter illegally ⁽²⁾. The Communication also points out that the European Union's demographic and economic needs call for a more open immigration policy ⁽³⁾ and, as a consequence, more accessible legal entry channels for workers ⁽⁴⁾.

1.3. Existing conditions of entry in the Member States are so restrictive that it is very difficult for migrants to enter legally. Most third-country nationals therefore enter illegally, even though they make a significant contribution to the European economy.

1.4. According to the Commission Communication, the European Union must recognise the positive contribution of immigrant labour and accept that immigration is likely to increase in the future. Significant changes to immigration legislation are needed in order to make it easier for immigrants to enter legally. The proposed Directive should respond to this need for new legislation.

2. Gist of the proposed Directive

2.1. The Directive regulates, in two separate chapters, the entry and residence of third-country nationals for the purpose of paid employment or self-employed economic activities.

2.2. In order to work as an employed person, third-country nationals — or their future employer on their behalf — must apply for a ‘residence permit — worker’. This application must be submitted via the representation of the Member State in which the applicant is resident, or in the territory of the Member State concerned, if the applicant is already legally present there.

2.3. The application must be accompanied by various documents, such as the offer of work and proof that this job vacancy cannot be filled on the labour market of the Member State concerned. The applicant must also submit documents proving the necessary skills, evidence of having sufficient resources, a certificate of good conduct (if required by the Member State), sickness insurance, etc.

2.4. The requirement of proof that a job vacancy cannot be filled in a Member State is deemed to be fulfilled if the vacancy has been made public for four weeks via employment services (including Community employment services, i.e. EURES) and has not been filled by persons with priority in employment, i.e. citizens of the Union and third-country nationals who meet the criteria laid down in the Directive.

2.5. Each Member State may define specific sectors which suffer from an ongoing labour shortage.

Employers in these sectors will not have to make vacancies public, but will be able to contract third-country nationals directly.

2.6. Initial permits are temporary (maximum of three years) and renewable. Applications for renewal are subject to the same requirements as initial applications. During the first three years of residence, renewals are subject to the criteria concerning Community preference in employment.

2.7. A permit may be revoked if the holder has been unemployed for a period exceeding three months within a 12-month period, during the first two years of residence, and six months after the first two years.

2.8. The Directive lays down the rights conferred on holders of a 'residence permit — worker', but grants Member States the power to restrict some of these rights.

2.9. The Directive also defines other permits and the specific conditions for obtaining such permits, i.e. 'residence permit — seasonal worker', 'permit — transfrontier worker', 'residence permit — intra-corporate transferee', 'residence permit — trainee' and 'residence permit — youth exchange/au pair'.

2.10. In order to work as a self-employed person, third-country nationals must apply for a 'residence permit — self-employed person'. The application may be submitted in their country of origin or in the territory of the Member State concerned if the applicant is legally present there. Applicants must also produce evidence of sufficient financial means to cover the minimum investment, as well as other documents, such as a certificate of good conduct (if required by the Member State), proof of the necessary skills, etc. Applicants must also demonstrate that the envisaged activity will benefit employment or economic development in the Member State concerned.

2.11. The 'residence permit — self-employed person' will be subject to similar deadlines and similar conditions of renewal and revocation as the 'residence permit — worker'.

3. General comments

3.1. The proposal for a Directive must help meet the objective stated by the Commission, i.e. to facilitate legal immigration and simplify entry and residence procedures. However, the Committee is not convinced that the conditions of entry proposed in the Directive are the only ones that would allow all types of workers (skilled and unskilled) to enter legally.

3.2. According to the proposed Directive, the only legal channel for labour migration is prior possession of an offer of employment. While this is clearly the main channel, it cannot be the only one. Possession of an offer of employment while still in the country of origin may be an appropriate condition for temporary and specialised workers (engineers, computer experts, etc.) and workers recruited by large and medium-sized companies. However, when the person concerned works in a field such as domestic service, child care, care of the elderly or arts and crafts, or for a small company, it will be essential for the employee and the migrant worker to know each other beforehand.

3.3. Immigration legislation that aims to provide legal channels for immigration into the Member States of the European Union must provide for two different entry channels. The first is discussed in the Directive, i.e. entry based on possession of an offer of employment while still in the country of origin. The second channel is to enter a Member State temporarily in order to seek employment.

3.4. If legislation only allows for the first channel, some workers will enter the Union legally, but others will probably continue to enter illegally and work in the shadow economy.

3.5. For this reason the Committee proposes introducing a temporary six-month entry and residence permit for the purpose of seeking work, which would be monitored by each Member State in cooperation with the social partners. Applicants for these permits would have to provide proof of sufficient resources and sickness insurance. They would also have to provide information on their professional expertise.

3.6. The proposal for a Directive also incorporates a number of restrictive criteria from existing immigration legislation in the Member States, e.g. the conditions governing applications for (Article 5) and renewal of (Article 7) a residence permit, and the possibility of revocation if the holder has been unemployed for more than three months within a 12-month period (Article 10(3)(a)). These aspects are discussed below.

4. Specific comments

4.1. Application for a ‘residence permit — worker’ and ‘residence permit — self-employed person’. Article 5(2)

4.1.1. Applications for residence for the purpose of paid employment or self-employed economic activities may be submitted in the territory of the Member State concerned, providing the applicant is legally present there. This condition may, however, prevent existing illegal immigrants from regularising their situation: only by giving them the option of submitting their application for residence in the Member State itself can they attain legal status. Although this Directive does not address illegal immigration, it should remain neutral on this point so as not to shut the door on possible national regularisation measures.

4.2. Particulars and documents that must accompany applications for a ‘residence permit — worker’. Article 5(3)

4.2.1. Some of the requirements concerning particulars and documents that must accompany applications for a ‘residence permit — worker’ are inappropriate. The proof of good conduct requirement (Article 5(3)(e)) may cause applicants to suffer arbitrariness or discrimination by the authorities in their country of origin. Evidence of the skills necessary for the performance of the envisaged activities (Article 5(3)(g)) should only concern the future employer, as is the case with any other employee. The requirement of sufficient resources to support the applicant (Article 5(3)(h)) is irrelevant if the applicant has submitted proof of an offer of work. Neither should sickness insurance be required, as applicants will be eligible through their employment. The Committee believes these requirements should be reconsidered.

4.3. Application of the proof laid down in Article 6 to renewal of permits. Article 5(4)

4.3.1. Where job vacancies are concerned, nationals and citizens of the Union should have priority over new applicants for residence, but not over third-country nationals who have already been granted legal residence. This Committee therefore suggests shortening Article 5(4) as follows: ‘Third-country nationals who have been legally resident in a Member State, with a “residence permit-worker”, shall not be required to provide evidence of fulfilment of the requirement laid down in Article 6’.

4.3.2. In the same vein, the Directive should stipulate that a ‘residence permit — worker’ will always be renewed with free access to the labour market, i.e. renewals will not be subject to the condition of Community preference in employment. Article 7(2) must therefore be amended, as it currently states that third-country nationals are subject to this condition during the first three years of residence.

4.4. Renewal of the ‘residence permit — worker’. Article 7(1)

4.4.1. According to Article 7(1), applicants for renewal must submit the same documentation as applicants for an initial permit. This is highly restrictive and could lead to many third-country nationals with legal residence falling foul of the law. This Committee therefore believes that requirements for renewal must be simplified as far as possible.

4.5. Restriction of the permit to specific professional activities or fields of activities. Article 8

4.5.1. The restriction of the initial permit to specific professional activities or fields of activities or to specific regions should not apply to renewals.

4.6. Revocation of the ‘residence permit — worker’. Article 10

4.6.1. The Committee believes that the clause allowing a residence permit to be revoked due to a period of unemployment exceeding three months within a 12-month period, during the first two years, or six months after two years (Article 10.3.) should be deleted. This is a very restrictive measure which will cause third-country nationals considerable insecurity.

4.7. Rights of holders of a ‘residence permit — worker’. Article 11

4.7.1. The Committee proposes including a new paragraph in Article 11 to the effect that the rights granted to holders of a ‘residence permit — worker’ (as laid down in Article 11(1)) should be supplemented by the following, insofar as these conditions also apply to nationals:

- right to education and study grants;
- right to teach and carry out scientific research;
- right to social assistance for access to housing;
- right to free legal aid for people in need.

4.8. The clause allowing Member States to restrict some of these rights (Article 11.2.) should be reconsidered as it could give rise to discriminatory measures.

4.9. Seasonal workers — deposit of a security

4.9.1. The Committee thinks that the possibility for the Member States to require employers to deposit a security — refundable on the return of the seasonal worker — should be reconsidered. It is not in the power of employers to ensure that seasonal workers actually return to their home State.

4.10. Application for a ‘residence permit — self-employed person’. Article 18(2)

4.10.1. Applications for a ‘residence permit — self-employed person’ may also be submitted in the territory of the Member State concerned, providing the applicant is legally present there. In this instance, too, the Committee would point out that the Directive must not shut the door on possible national regularisation measures.

4.11. Particulars and documents that must accompany applications for a ‘residence permit — self-employed person’. Article 18(3)

4.11.1. The particulars and documents that must accompany an application for a ‘residence permit — self-employed person’ include proof of good conduct (Article 18(3)(e)). The Committee believes that this requirement should be reconsidered as it may cause applicants to suffer arbitrariness or discrimination by the authorities in their country of origin.

4.12. Renewal of the ‘residence permit — self-employed person’. Article 20(1)

4.12.1. As in the case of workers, self-employed persons wishing to renew their residence permit during the first three years must submit the same documentation as applicants for an initial permit. The Committee believes that renewals must be subject to less stringent requirements than the initial application, in order to help immigrants keep their situation legal.

4.12.2. The initial restriction of Article 21 to specific activities or fields of activities or to a specific region should not apply to renewals.

4.13. Revocation of ‘residence permit — self-employed person’. Article 23

4.13.1. A ‘residence permit — self-employed person’ may also be revoked due to a period of unemployment exceeding three months within a 12-month period, during the first two years, or six months after two years (Article 23(3)). The Committee believes this radical measure must be reconsidered if the self-employed person submits a new ‘migration plan’.

4.14. Rights of holders of a ‘residence permit — self-employed person’

4.14.1. In the same way that Article 11 defines the rights of holders of a ‘residence permit — worker’, the rights of self-employed persons must also be defined, taking account of the comments made in point 4.8. of this opinion.

5. Final comments

5.1. The Commission will shortly present a Communication on combating illegal immigration. Although the Committee is to issue an opinion on this matter, it would reiterate in the present opinion the comments it made on the Commission Communication on a Community immigration policy ⁽⁵⁾, viz. ‘The most important “pull” factor in non-Community immigration has been the existence of an available labour market. The most noteworthy aspect is that a labour market specifically geared to illegal immigrants has been able to exist’. According to the Committee therefore: ‘Combating the black economy, which profits from illegal immigration, requires practical legal measures and social agreements.’’

5.2. The Committee calls on the European Council, in accordance with the Laeken conclusions, to demonstrate greater commitment and alacrity in drawing up a genuine common asylum and immigration policy, in so doing it should support the Commission's initiatives and take into account the ESC's opinions.

5.3. In the Committee's view the European Union and the Member States should ratify the International Convention on the Protection of the rights of all migrant workers and members of their families, as approved by the UN General Assembly in 1990.

Brussels, 16 January 2002.

The President of the Economic and Social Committee
Göke FRERICHS

(¹) COM(2000) 757 final.

(²) Point 3.1 of the Communication: ‘...Many economic migrants have been driven either to seek entry through asylum procedures or to enter illegally. This allows for no adequate response to labour market needs and plays into the hands of well organised traffickers and unscrupulous employers’.

(³) Point 2.4 of the Communication.

(⁴) Point 3.4.2 of the Communication. Paragraph 5: ‘...to facilitate rather than create barriers to the admission of economic migrants’.

(⁵) ESC opinion in OJ C 260, 17.9.2001