SOC/105
Green Paper on a
Community return policy

Brussels, 18 September 2002

OPINION

of the Economic and Social Committee

on the

Green Paper on a Community return policy on illegal residents
(COM(2002) 175 final)

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On 11 April 2002 the Commission decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

Green Paper on a Community return policy on illegal residents
(COM(2002) 175 final).

The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 4 September 2002. The rapporteur was **Mr Pariza Castaños**.

At its 393rd plenary session on 18 and 19 September 2002 (meeting of 18 September) the Economic and Social Committee adopted the following opinion by 126 votes, with three abstentions.

1. Gist of the Commission proposal

1.1 This Green Paper contains a range of proposals, observations and questions on the subject of illegal status and the various steps that may be taken to ensure that illegal residents return to their countries of origin. It is consistent with the conclusions of the Laeken European Council of December 2001 and is based on the illegal immigration action plan adopted by the Council on 28 February 2002.

1.2 The Green Paper raises numerous questions, and suggests a number of ways of addressing the problems involved. It is a discussion paper which is intended to initiate a wide-ranging debate involving the whole of European society – not just the European institutions, but also the applicant States, non-governmental organisations, academic circles and civil society organisations.

1.3 Part I discusses return as an integral part of Community immigration and asylum policy. It distinguishes between two categories of persons: persons who are legally resident, who, for various reasons (retirement, wish to participate in development projects in their country of origin, refugees able to return home, etc.), decide to return on a voluntary basis and need help to do so; and those who are illegally resident (illegal immigrants, asylum seekers whose applications have been rejected but who have remained, etc.).

1.4 In the case of illegal residents, the Commission favours voluntary return wherever possible. However, in cases where voluntary return is not possible, forced return will be necessary.

1.5 The Commission states that illegal residents must return to avoid admission policy being undermined. As far as possible, returns should be voluntary, both for humanitarian reasons and because voluntary returns require less administrative efforts than forced returns. It also suggests that forced returns might serve to dissuade potential illegal immigrants.

1.6 On the subject of asylum, the Green Paper describes various situations where persons must be returned: asylum seekers whose applications have been rejected, persons who have benefited

from protection but no longer require it, etc. In such cases, voluntary return should again be given priority, but forced returns might be necessary as a last resort. In all cases, the obligations imposed by international treaties must be respected, including prohibition of collective expulsions and expulsion to countries where the individual concerned would be exposed to serious risk.

1.7 The Commission stresses that human rights must be respected in all procedures, and emphasises that illegal residents must have adequate possibilities to lodge an appeal before a court during the return procedure.

1.8 Part II discusses at length cooperation on returns between the Member States. The Commission suggests a range of proposals and questions on the subject of return procedures, conditions, etc.

1.9 A person who has been legally resident may only be returned by means of an expulsion order, and only if one of the following circumstances applies: expiry or revocation of the residence permit, conviction of a crime punishable by at least one year's imprisonment, the existence of serious grounds for believing that serious criminal offences have been committed or solid evidence of intention to commit such offences.

1.10 The Commission points out that long-term residents benefit from special protection from expulsion, and asks whether such protection should be extended to other groups. It also discusses the conditions under which residence permits may be revoked.

1.11 The Commission believes that detention or internment centres where people are held pending removal must be subject to rules governing their operation and to minimum standards of accommodation and infrastructure. It also raises a number of questions concerning the establishment of common rules on these matters at EU level.

1.12 The Member States should cooperate on all aspects of the transit of returnees through other States and work to improve operational cooperation at technical level.

1.13 In Part III, the Commission suggests that a common policy on readmission should be put in place, pointing out the difficulties of reaching agreements with countries of origin, given that in the current circumstances readmission agreements are not in the interests of many countries. It considers that such agreements should be included as part of future association and cooperation agreements.

2. Preliminary considerations

2.1 The EESC believes that a person "without papers" is a human being with the same basic rights and dignity as other people. In its opinion on the Commission communication on a

common policy on illegal immigration[1], it thus expressed the view that an immigrant without papers is not a person without rights:

– "...Some clarification is needed when the term "illegal immigration" is used to refer to individual migrants. Although it is not lawful to enter a country without the required documents and authorisation, those who do so are not criminals. (...) Irregular immigrants are not criminals, even though their situation is not legal."

– "The Committee's other main objection to the content of the communication concerns the way irregular immigrants in the EU should be treated. The communication speaks only of return policy: (…) [but this] cannot be the sole response to irregular situations."

– "Within the framework of policy coordination, the Commission should urge the Member States to prepare regularisation measures, averting the risk of irregular immigration being considered as a "back door" to legal immigration. In regularising the situation of those involved, consideration should be given to the degree to which they have settled in social and employment terms."

– "Turning to readmission and return policy, the Committee would emphasise that the voluntary aspect should be encouraged, and the utmost consideration given to humanitarian values. The Member States of the EU must not enter into readmission agreements with third countries where serious political instability or human rights' violations are rife. The Committee will scrutinise the green paper on a Community return policy with great care."

– "A common policy against illegal immigration must take account of all its contributory factors. It must not be restricted to law enforcement and judicial policies alone which, although certainly necessary, cannot by themselves diminish irregular immigration."

– "The Committee calls for greater speed and responsibility on the part of the Council in its legislative work concerning immigration and asylum. The present delay in drafting the directives and regulations proposed by the Commission makes it difficult to ensure that migration takes place through legal channels."

2.2 On the basis of these considerations and those set out in other opinions[2], the EESC believes that compulsory return should not be the EU's only or prime response to immigrants currently in the EU in an irregular situation. What is needed is a comprehensive policy incorporating both return and regularisation.

2.3 Making return the only option for persons in an irregular situation is not only unfair and inappropriate for the persons concerned, but, given that several million human beings may be

1 OJ C 149, 21.6.2002 (rapporteur: **Mr Pariza Castaños**)

2 See the opinion on Community immigration policy, OJ C 260, 17.9.2001 (rapporteur: **Mr Pariza**), opinion on the status of third-country nationals who are long-term residents, OJ C 36, 8.2.2002 (rapporteur: **Mr Pariza**), ESC opinion on the open coordination method for immigration and asylum of 29/30.5.2002 (rapporteur: **Mrs zu Eulenburg**).

involved, it is also unrealistic. Even of those persons who are the subject of expulsion orders, only a small percentage is effectively expelled - expulsion is a costly and difficult process, and many of the States of origin refuse to readmit the persons concerned.

2.4 If the policy of compulsory return is not combined with regularisation measures, the numbers of people in irregular situations will remain unchanged, feeding the hidden economy and leading to increased exploitation in employment and social exclusion.

2.5 The Committee wishes to stress that the Commission, the Parliament, the Economic and Social Committee and various experts concur in the view that the Union needs a large number of immigrants to fill both skilled and unskilled jobs. The Union needs legal immigration to enable its economic and social system to function, but the Member States are closing the door on this possibility, causing illegal immigration to rise. Most of the immigrants currently in the Union illegally are engaged in economic activities and employment which have a positive impact on the economic and social development of the European Union.

2.6 The real victims of the current unfair situation are people without papers. The total legal and administrative uncertainty to which they are subject drives them into the hidden economy, and in some cases into exploitation at work or social exclusion.

2.7 Human rights considerations and economic and social needs dictate that under certain conditions, the situation of many immigrants currently in the Union illegally ought to be regularised, although illegal immigration should not become a "back door" to legal immigration.

3. The Seville European Council

3.1 At Seville, the European Council decided to give a fresh impetus to the common immigration and asylum policy, establishing timetables for the adoption of political and legislative decisions in the second half of 2002 and 2003.

3.2 With regard to policy on expulsion and repatriation, the Council agreed to adopt a framework for a repatriation programme based on the Commission Green Paper, by the end of the year.

3.3 The Council also agreed to integrate immigration policy into the Union's relations with third countries. It agreed new commitments aimed at furthering progress on the common immigration and asylum policy, in particular timetables for the adoption of legislation on family reunification, changes to the Dublin Convention, refugee status and the status of long-term residents.

3.4 The Committee would remind the Council and Commission that it has issued opinions on these legislative proposals. It hopes that these will be studied and that Community legislation will incorporate the views expressed therein. The Council must seek to ensure that the legislation adopted on immigration and asylum is not minimal and far removed from the substance of the opinions of the Parliament and the Committee. The Union needs adequate legislation on immigration and asylum

which addresses economic, professional and humanitarian factors, international conventions and the Charter of Fundamental Rights in a balanced manner.

3.5 As the Committee has stated in previous opinions, in order to combat illegal immigration, appropriate channels for legal immigration must exist. The Committee is surprised and disappointed that the Seville European Council failed to agree a timetable for adoption of the directive on conditions of entry and residence for persons entering the Union for economic purposes. It is essential that means of legal immigration function if illegal immigration is to be prevented. In this regard, the Seville Council failed to send out the right message to promote steady progress on the common immigration and asylum policy.

4. Comments

4.1 The Committee welcomes the Commission's decision to present this Green Paper as a discussion document paving the way for a wide-ranging debate. It has approached this opinion with an open and constructive spirit, and hopes that other institutions and organisations will also draw up opinions.

4.2 Voluntary return

4.2.1 The EESC supports the existence of EU and Member State policies to assist and cooperate in voluntary return aimed at ensuring that persons who are legally resident but decide to return have the necessary means to enable them to return under satisfactory conditions.

4.2.2 The Committee would stress that organisations such as the IOM[3] or the UNHCR[4] must always be involved in the voluntary return of illegal residents. These organisations can provide confirmation of exit and re-entry of the returnee to his or her country of origin and monitor the conditions of re-entry. Internationally recognised NGOs can also play a role in these activities.

4.2.3 Voluntary return must be combined with the granting of favourable conditions for future migration. Persons who have returned voluntarily should be given preference if they subsequently apply to migrate to the Member State which they left.

4.2.4 Both the EU and the Member States must ensure that adequate resources are available to support voluntary return. There must be ongoing programmes with sufficient funding for the reintegration of returnees in their countries of origin. The Committee would welcome the creation of a European return programme based on support for reintegration. Internationally respected NGOs, which have a great deal of experience in managing return and social integration programmes, should also be involved in managing these programmes.

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3 International Organisation for Migration

4 United Nations High Commission for Refugees

4.3 **Forced return**

4.3.1 The Commission proposal rightly gives priority to voluntary return and treats forced return as a last resort. The EESC shares the Commission's view that this is an extremely harsh measure, and a very significant encroachment on the freedom and wishes of the individuals concerned. The people concerned have often sold all of their possessions to emigrate and have acquired debts. Return can thus put them in a desperate situation.

4.3.2 The Commission itself points out that under Article 19 of the Charter of Fundamental Rights of the European Union, collective expulsions are prohibited, and no one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. But the fact remains that the UNHCR and various NGOs have drawn attention to a number of collective expulsions and expulsions of illegal immigrants and asylum seekers to countries where human rights violations are rife.

4.3.3 The EESC supports the Commission's view[5] that a European return policy should respect human rights and fundamental freedoms. It points out that Articles 3, 5, 6, 8 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 3, 4, 19, 24 and 47 of the Charter of Fundamental Rights of the European Union contain provisions which are applicable to a policy on return of illegal or irregular residents. It is important to stress that many of these immigrants are in a difficult humanitarian situation, and that the rules and practices that are agreed must be drawn up and implemented in accordance with criteria based on human rights law and the moral principles of solidarity.

4.3.4 The Commission announces its intention to draw up a proposal for a directive on minimum standards for return procedures. The EESC supports common legislation on the basis of the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights. A number of internationally respected NGOs have pointed out that some aspects of current legislation and practice in the Member States run counter to human rights and the Charter of Fundamental Rights of the European Union.[6]

4.3.5 Return by means of an expulsion order of persons whose residence permit has expired must be considered an extreme measure. It must first be considered whether such persons have indicated a wish to renew their residence. If such is the case, any possibility of regularisation must always be given priority over expulsion.

4.3.6 When residents in an irregular situation have been resident legally under special protection status, any family, social or employment ties they have developed must also be taken into account, and a harsh procedure of expulsion or forced return avoided.

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5 Green Paper, paragraph 2.4 on human rights and return.

6 Amnesty International, the Red Cross and other NGOs have drawn up a number of reports.

4.3.7 The Committee considers that it is reasonable to expel third-country nationals who have been convicted by the courts of a crime punishable by imprisonment of at least one year, in accordance with Directive 2001/40/EC of May 2001. However, it does not support expulsion for suspected crimes that have not been tried in court. The presumption of innocence must always prevail, in line with Article 48 of the Charter of Fundamental Rights.

4.3.8 Expulsions in connection with crimes must be subject to all the legal safeguards which normally apply under the rule of law. Thus, the Committee considers that the Green Paper must rule out the possibility of expulsion for crimes which have not been tried and are thus not proven. The Committee would refer in particular to the possibility of expulsion on the grounds of "the existence of serious grounds for believing that a third-country national has committed serious criminal offences" and "the existence of solid evidence of his or her intention to commit such offences." It must always be the job of the courts to pass judgment on whether a crime has been committed and to issue expulsion orders.

4.3.9 As the Commission states, expulsion decisions must take account of the type of residence permit concerned. Long-term residents, family members of a citizen of a Member State, refugees and persons under other forms of international protection must be expelled only where there are serious risks to public safety and public order. Effective judicial protection must be a guaranteed part of the expulsion process. The EESC believes that minors and other vulnerable persons must always benefit from the highest possible levels of protection.

4.3.10 Harmonisation of Community legislation must avoid forced return in a certain number of specific situations:

– If return would separate the person concerned from family members, whether from a spouse who is a national or legal resident or from children or relatives in the ascending line.
– When return would be harmful to minors dependent upon the person concerned.
– When the person concerned suffers from a serious physical or mental illness.
– When the safety, life and freedom of the person concerned would be at serious risk, either in his country of origin or in the transit country.

4.3.11 The right to appeal against an order of expulsion or forced return must always have suspensive effect, since this is the only means of guaranteeing the rights of the individuals concerned.

5. Detention pending removal

5.1 Detention pending removal is a significant encroachment on personal liberty. Any minimum standards drawn up at EU level must ensure that detention orders are issued by a judicial authority and may be subject to appeal.

5.2 Persons awaiting removal or expulsion must not be detained in ordinary prisons, since illegal residents are not criminals.[7] Detention centres should be set aside for this purpose, and prisons may only be used where the expulsion is the result of crimes having been committed.

5.3 Conditions in such centres should be the subject of rules at EU level. The detainees must be able to exercise their human rights, with the exception of freedom of movement. Detention pending removal should not exceed 30 days. Minors not accompanied by parents or guardians should be cared for by the authorities, and should not be held in detention centres.

5.4 Detention centres should be combined with an alternative solution whereby the person awaiting removal may remain in his usual residence, provided that he complies with an obligation to present himself regularly to the authorities. Decisions on whether or not an individual is to be detained must take account of the situation of the person concerned. For example, a person with family or employment ties who is to be forcibly returned owing to expiry of his or her residence permit should not be detained.

5.5 The EESC asks that the Commission and Council clarify the purpose of detention prior to expulsion in the case of people who cannot be expelled, be it due to the absence of the necessary agreement with their country of origin, because their country is at war, because they are subject to persecution or due to lack of respect for human rights. The situations of prolonged internment which occur in some Member States are not acceptable from a human rights perspective.

5.6 In addition to drawing up minimum standards, the EU should also keep an up-to-date list of countries to which people may not be removed owing to lack of freedom or war or humanitarian crisis.

5.7 Persons who are seriously physically or mentally ill should be neither detained nor expelled, since they require medical care.

6. **Readmission agreements**

6.1 The Commission and Member States are currently finding it difficult to reach readmission agreements with third countries. Clearly, readmission agreements are in the interests of the EU alone. The EESC considers that such agreements should be complemented by other political and economic instruments which are in the interests of third countries. The EU's relations with third countries should always be based on humanitarian criteria.

6.2 The EU's association agreements with third countries should include clauses designed to regulate migratory flows in a legal manner and to ensure that European immigration policy plays a positive role in the economic and social development of these countries. In this regard, consideration should be given to readmission agreements.

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7 OJ C 149, 21.6.2002 (rapporteur: **Mr Pariza Castaños**)

6.2.1 The EESC supports the decision of the Seville European Council to maintain the objectives of development cooperation, ensuring that any penalties applied to third countries do not affect cooperation commitments. The best way of easing migratory pressure from developing countries is to step up European Union policies to assist their development.

6.3 The Committee would point out that a previous opinion[8] expressed the view that respect for human rights is an essential precondition for the signature of readmission agreements.

7. Return and development aid

7.1 European return policy vis-à-vis third countries must be positive for the development of these countries. It must not create additional problems. Returnees must be integrated into society and play a positive role in its economic and social development. Aid for return must enable returnees to be integrated in the labour market and promote the development of economic activities.

7.2 The positive link that should exist between return and development must apply to both voluntary and forced return, although success will always be greater when return is accepted on a voluntary basis.

7.3 Returns should be accompanied by programmes tailored to personal situations, reflecting the financial, professional, social and family circumstances of the people concerned and the economic and social situation in the country to which they are returning. The programme should incorporate actions by organisations cooperating in the process.

7.4 Funding for Community return programmes must not take away from Community or Member State development programmes. They must be new programmes which add to the resources currently available.

7.5 Internationally recognised international organisations (IOM, Red Cross, UNHCR, etc.) must be associated with the EU and the Member States in the management of these programmes.

7.6 The Commission has announced the impending publication of a Communication on immigration and development aid. The EESC considers this a necessary initiative and hopes that the Commission will take its views into account.

8. Final comments

8.1 The Council is rightly stepping up the pace of its work on combating illegal immigration. A number of EESC opinions have expressed the view that it is largely the responsibility of the Council and the Member States that the EU still lacks common laws on immigration and asylum, which hampers lawful management of migratory flows.

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8 OJ C 149, 21.6.2002 (rapporteur: **Mr Pariza Castaños**)

8.2 All EU institutions and bodies must stand firm against extremist political behaviour that is developing in some areas, particularly that of a racist nature. They must act in a highly responsible manner and seek to educate citizens politically as to the reality of migratory flows. Information and opinions broadcast by the media must be based on objective foundations and be presented in a responsible manner. Some unscrupulous politicians use citizens' concerns to whip up racism and xenophobia. The EESC supports action by civil society organisations to combat racism and xenophobia.

Brussels, 18 September 2002.

The President
of the
Economic and Social Committee

Göke Frerichs

The Secretary-General
of the
Economic and Social Committee

Patrick Venturini