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REPORT OF THE ECONOMIC AND SOCIAL COUNCIL

Draft International Convention on the Protection of the
Rights of All Migrant Workers and Their Families

Working paper concerning self-employed migrant workers submitted
by Finland, Greece, India, Italy, Norway, Spain and Sweden

Proposals for additional provisions in article 2 and part IV
of the Draft International Convention on the Protection of
the Rights of All Migrant Workers and Their Families

1. PROPOSED TEXT FOR ARTICLE 2 (2) (g)

Self-employed persons are migrant workers when they are engaged otherwise than under a contract of employment, in a State of which they are not nationals in an economic activity essentially occupying themselves and members of their family.

2. PROPOSED TEXT FOR ARTICLE 62 bis

Self-employed migrant workers

(1) Self-employed migrant workers as defined in article 2 (2) (g) and members of their families shall be entitled to all the rights provided for in parts II and III of the Convention with the exception of such rights which are exclusively applicable to workers having a contract of employment.

(2) Without prejudice to articles 37 and 52 of the present Convention, the termination of the economic activity of the self-employed migrant worker shall not in itself imply the withdrawal of the authorization for him or for the members of his family to stay or to engage in a remunerated activity in the State of employment.

(3) The self-employed persons shall enjoy equality of treatment with self-employed nationals of the State of employment in respect of access to any state subsidies or other support measures affecting their activity.

3. EXPLANATORY NOTE

1. It is the intention of the co-sponsors to give full application to the mandate with which the General Assembly by its resolution 34/172 entrusted the open-ended working group and which includes all categories of migrant workers and the different situations in which they may find themselves. Among these various categories the self-employed migrant workers deserve particular consideration. Indeed, an important and growing number of people work either alone or run an essentially family-based enterprise as craftsmen, street vendors, restaurant owners, shopkeepers, etc.

2. The category of self-employed migrant workers is an example of the diversity and the changing nature of the labour market. Even the legislation in most countries opens up the possibility of engaging in the same type of work under different institutional arrangements. E.g. a carpenter may very well engage in work under an employment contract for an employer or establish himself as an own-account worker with a sub-contract with the same employer. The nature of the work remains the same, so do the risks of unfair remuneration, lack of social protection, problems of occupational safety and health. It would therefore be inappropriate to exclude from the Convention categories of persons engaging in work of a similar nature as the employed migrant workers and facing similar problems as they do.

3. Self-employed migrant workers may in some respect be even more vulnerable than migrant workers with an employment contract. They are generally not members of trade unions or other organizations aiming at their social protection. Their living is often dependent on a volatile and precarious market situation. They may be easily exploited by contractors. Furthermore, it is also as important to protect the self-employed from, say, expulsion in the case of insolvency, as it is to protect the wage-earning migrant workers from expulsion in the case of unemployment.

4. Frequently, the self-employed migrant workers develop their small economic activity together with members of their family. If members of family of the self-employed are employed by him or her, they will come under the general definition of migrant workers. If they were not covered by the Convention they would run the risk of exploitation either within the family or in the society, and be excluded from the rights provided for in the Convention, such as cultural identity, education for the children, social protection, etc.

5. A separate definition of the category of self-employed is needed, since their situation is in most cases regulated by legislation separate from the labour laws. The establishment of a small shop, for example, may require special licence under the legislation on trades and occupations. Such licence may also be linked with the labour and residence regulations in so far as the authorization may be conditional upon a certain length of stay or previous work permit.

6. The definition itself should be wide enough to cover the situation in different countries, while avoiding the inclusion of "investors". The notion of self-employed implies that the person concerned works actively in his business and does not merely hold an interest in it nor acts merely as a supervisor. Thus, "investors" or mere shareholders of a company would, by definition, be excluded from the application of the Convention.

7. For these reasons, the co-sponsors propose, in article 2 (2) (g), a definition based on the concept that the self-employed must be engaged "in an economic activity essentially occupying themselves and members of their family" thereby implying that the activity by necessity has to be small and that the self-employed migrant worker himself participates in the work.

8. Given the qualifications and reasons mentioned above, it would seem inappropriate to establish exactly numbered upper limits as to the amount of investment or number of employees. It would be extremely difficult to draw a balance between the economic conditions and legal systems in various member States. Upper limits would also imply a prohibition of growth for the migrant workers' enterprise and a limitation of their economic and social progress.

9. While it is understood that the self-employed would essentially occupy themselves and members of their family, it would not be wise to be too restrictive in this respect. The self-employed migrant worker should not be excluded from the application of the Convention by the mere fact that he employs, e.g. his sister or brother who are not covered by the definition of members of family in the convention (art. 3). Such brothers and sisters being employed would be covered in any case by the general definition in article 2 and by the relevant provisions of the Convention.

10. In addition to defining the concept of the self-employed migrant worker, the co-sponsors have attempted to indicate the provisions of the Convention applicable to the persons so defined. This has been done by proposing the insertion, in part IV, of article 62 bis.

It has to be pointed out, that part IV applies to self-employed migrant workers only when they are in a regular situation as regards their admission, stay and employment or other economic activity (art. 57). Of course self-employed migrant workers in an irregular situation are entitled to the protection provided for in part II of the Convention like all other groups of irregular migrant workers.

Article 62 bis intends to grant the self-employed who are in a regular situation the same protection of the Convention as is granted for wage-earning migrant workers, with the exception of such situations which are linked with employment contracts or such situations generally relevant to salaried employees only.

11. The co-sponsors felt that in the same way as article 51 protects the salaried migrant worker in case of loss of employment, the self-employed migrant workers need protection also in case of termination of their economic activity, and therefore introduced paragraph 62 bis (2). Naturally, the prerogatives of the State of employment would fully apply in accordance with articles 37 and 52.

12. It is also deemed necessary to include in article 62 bis a third paragraph dealing with possible support measures concerning entrepreneurial activities of the self-employed. The aim is to prevent States from discriminating between self-employed nationals and self-employed migrant workers.
