

## ILPA Response the Economic Migration to the EU Written Evidence to the House of Lords Select Committee on the European Union

May 2005

### *Introduction*

We welcome the decision of Sub-Committee F of the Select Committee on the European Union to undertake an inquiry into European Union policy on economic migration.

This submission draws upon our response to the Commission's *Green Paper on an EU Approach to Managing Economic Migration* (COM (2004) 811). A copy of that response is annexed to this submission.

### *The central question*

The "central question" identified in the call for evidence is "whether there should be a common EU policy on economic migration or whether Member States should remain free to make decisions in this area independently of each other."

Our general assessment is that the economic and demographic imperatives of Member States mean that significant lawful migration to Europe is likely to remain a necessity. Equally, economic and demographic circumstances in other parts of the world mean that significant irregular migration is likely to occur in the absence of effective legal channels.

We recognise that it is legitimate for Member States to wish to retain control over decisions concerning admission for economic purposes, so as to be able to respond to their specific labour market needs and conditions.

However, we also take the view that there is a conflict between the single market principle and the absence of a legal framework with respect to economic migration at the EU level. We therefore support action at the EU level with one or more of these objectives: the creation of legal rights of mobility for third country nationals between Member States, the protection of fundamental rights (including social rights), the avoidance of regulatory competition between Member States, and the co-ordination of relations with third states.

1. *Should a Community approach attempt to set common rules on the admission of third country nationals for employment or should it address each sector of the labour market separately?*

We are not convinced that there is a case for EU intervention in order to discourage or restrict Member State policies which tend to *favour* the admission of third country nationals for economic purposes. Member States should be free to allow economic migration in response to their own circumstances.

We would argue however that there may be legitimate reasons for EU intervention to discourage Member States policies which *restrict* admissions. This is because individual Member States may limit inward migration in ways which are detrimental to the wider EU economy. This would be even more the case if economically active third country nationals had more extensive rights to move between Member States than is currently the position.

Specifically, we propose the recognition at the EU level of the principle of labour market need, so that Member States would be expected to admit workers where a labour market test was met.

We also propose the recognition at the EU level of the possibility to switch status. Where a labour market test is met, the fact that an individual is already in the state on a different basis ought not to be an obstacle to their admission as an economic migrant.

2. *Would there be a place for quotas in a common policy?*

We are sceptical as to the merits of quotas in relation to economic migration. Where a labour market test is being applied, and a quota is operated in addition, the implication is that a gap in the host state economy is not being addressed. In our view, any EU policy should seek to avoid the rigidities implied by quotas, whether at EU or Member State levels.

3. *Do the same considerations apply to self-employment as to employment?*

Our view is that migration for employment and self-employment raise closely-related issues. There is significant overlap between the categories, in that essentially similar activities can be carried out on either basis. In addition, the policy issues posed by employment and self-employment are quite similar, since the central question in either case is whether there is an economic need for the individual in the given state.

4. *To what extent do enlargement and free access to the labour market for workers from the new Member States affect a common policy?*

Legally, the Act of Accession requires the older Member States to “give preference to workers who are nationals of the Member States over workers who are nationals of third countries as regards access to their labour market.” This applies even where the older Member States are applying ‘national measures’.

The 2004 enlargement can be expected to lead to some fall in demand for economic migration from outside the EU. Nevertheless, it is inevitable that there will continue to be significant numbers of third country nationals working within the EU. For that reason, the 2004 enlargement does not affect the case for a more developed legal framework with respect to economic migration by third country nationals.

5. *Should the “Community preference” principle be maintained? Should it apply to third country nationals legally resident in the EU and, if so, to all workers or only long-term residents?*

(i) EU, EEA and Swiss nationals

At present, that principle of preference is a legal obligation with respect to EU nationals – and therefore EEA and Swiss nationals - by virtue of Articles 1-6 of Regulation 1612/68. We have no objection to that.

(ii) Third country nationals

Section 2.2.1 of the Commission Green Paper relies on the definition of ‘Community preference’ set out in the Council resolution of 20 June 1994. That resolution required that a system preference be extended from EU nationals to “non-Community manpower lawfully resident on a permanent basis in that Member State and already forming part of the Member State’s regular labour market.”

That approach is reflected in Article 11(1)(a) of Directive 2003/109 which confers

a right of equal treatment in access to employment on long-term residents. This guarantee only applies however after a minimum of five years’ residence in the given Member State, and is not applicable to Britain, Denmark or Ireland.

Our view is that the current rules do not respect the principle of non-discrimination in the labour market. We would argue for the system of preference to be extended to any third country resident who is free to take the employment in question.

6. *What rights should third country workers have? Should there be any differentiation between workers admitted on a conditional basis and long-term residents?*

(i) Generally

We take the view that there is a strong case for setting out a framework of minimum rights of migrant workers at the EU level. This is desirable both because upholding the rights of migrant workers is a legitimate objective in itself at the EU level, and because it is necessary to avoid any tendency to regulatory competition between member states in their treatment of migrant workers.

We agree with the proposition in section 2.6 of the Green Paper that "Third country workers should enjoy the same treatment as EU citizens in particular with regard to certain basic economic and social rights before they obtain long-term resident status".

We suggest that the list of social rights set out in Article 11(1) of Directive 2003/109 could form the basis for EU action in relation to third country workers. That Article recognises *inter alia* the following:

- equal treatment in access to employment and self-employment
- equal treatment of conditions of employment
- equal treatment in vocational training
- equal recognition of professional qualifications
- equal treatment in housing, social assistance, social security and taxation
- equal access to and participation in workers' organisations and representative bodies.

(ii) The right to change employer

We would highlight in particular the right of migrant workers to change employer, discussed in section 2.5 of the Commission Green Paper. This right is implicitly recognised for long-term residents by Article 11(1)(a) of Directive 2003/109, but is not protected for other third country nationals.

The right of a worker to resign and to change employer is a basic labour market principle. Without it, a migrant worker is vulnerable to exploitation by their employer, including in particular the failure to pay the going rate for the job, the refusal to honour contractual commitments, and the denial of labour rights.

We therefore agree with the statement in the Green Paper that workers who are *not* admitted on special (temporary) labour market schemes should be free to change employer. We do not agree however that they should have to meet again the test of labour market need in order to do so.

As regards those on temporary schemes, we do not agree with the suggestion that they should be excluded from the right to change employer, as these workers are often among the most vulnerable in the employment relationship. At the very least, the right to change employer should be recognised among employments covered by the scheme in question.

(iii) Protection against discrimination

We would also call attention to the lack of protection in EU law for third country nationals against discrimination by employers on grounds of nationality or immigration status. Again, this right is protected for long-term residents, but not others, by Article 11(1)(a) of Directive 2003/109.

In our view, the lack of protection against discrimination on these grounds is a serious omission

from the EU's extensive code of protection against discrimination in employment. We propose that this omission be rectified through a specific directive, adopted under Article 137 EC. This would ensure a minimum set of standards applicable to all Member States.

*7. Should there be a common EU policy on the "regularisation" of illegal workers (amnesties)?*

The lack of discussion of the position of unauthorised workers is in our view a weakness of the Green Paper. Unauthorised work appears to be a significant phenomenon in at least some sectors and states within the EU. A situation of unauthorised work is undesirable for those Member States, which find their immigration, tax and labour laws undermined. It is undesirable for legal workers and their employers, as they are forced to compete with others who breach those laws. It is also undesirable for unauthorised workers themselves, given their greater vulnerability to abuse by employers and intermediaries.

Against that background, our view is that recognition should be given at the EU level to the right of Member States to introduce regularisation policies where they deem it necessary in the light of their own circumstances. The choice of criteria and time periods should also be a matter for them. It is inappropriate to attempt to place limits on this possibility at the EU level.

We would also argue that there may be a case for EU level requirements in this area, in order to respect the rights of all migrant workers, while avoiding regulatory competition between Member States in their policies towards unauthorised workers. We support an EU requirement that unauthorised workers be covered by key labour and social rights, including entitlements linked to the employment relationship, health care and some forms of social provision. We also support recognition of a duty on Member States to grant regularisation in defined circumstances, such as a proven period of residence in that state.

*8. Should measures be taken to protect third countries from—or compensate them for—the loss of skilled workers?*

We agree with the spirit of section 2.7 of the Green Paper, that it is important to respond to the possible negative impacts on less developed states of economic migration to the EU. We take the view that in general outward migration need not be economically damaging to states of origin, particularly because of remittances and the potential benefits when emigrants later return.

The most difficult issue in this area concerns migration by persons who have been educated or trained at state expense in the state of departure.

In our view, it is neither desirable nor realistic to attempt to prevent individuals from moving to take up the opportunities available to them. We are not persuaded either by the idea of a system of compensation by states of destination, since it is not clear how the amount of such compensation would be determined, and government to government transfers might have the effect of encouraging education for emigration.

Instead, we would favour an extension to the EU level of the approach followed in Britain, which aims at preventing recruitment activities in key sectors in less developed states. In our view, this is an area in which it is particularly desirable to have EU level action, in order to ensure coherence in the relationship with third countries, while preventing any regulatory competition between Member States.

*9. What considerations should the Government take into account in deciding whether to opt into a common EU policy?*

Our view is that Britain should be an active participant in the development of law and policy at the EU level in relation to economic migration. This would involve opting in to Directive 2003/109, while being prepared to agree to future initiatives which follow from the Green Paper.

We would highlight in particular the potential benefits to Britain of its being covered by the principle of cross-border mobility for economically active third country nationals. This would give British employers access to a pool of workers resident in other Member States. The possibility of moving on to other Member States at a later date would encourage third country nationals to locate in Britain. It would also allow migration to other Member States in circumstances where

there was a reduced demand for skills of a particular kind in Britain.

We would also argue that there is a British interest in participation in measures which lay down minimum standards and which avoid regulatory competition. Through such participation, the Government would have the opportunity to influence the content of measures to be adopted. Its participation in EU action would also protect its position as a state which wishes to have high standards as regards the treatment of migrant workers.