ILPA Response to Commission Green Paper on an EU Approach to Managing Economic Migration, COM(2004) 811

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Introduction

1. We welcome the Commission's decision to return to the question of action at the EU level in relation to economic migration by third country nationals. We share the Commission's assessment that an effective framework governing economic migration to the EU is desirable. Europe's economic and demographic imperatives make legal migration unavoidable. Equally, economic and demographic circumstances in other parts of the world mean that significant irregular migration is likely to occur in the absence of realistic legal channels.

2. We start from the assumption that Member States are likely 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. In our view, the implication is that proposals at the EU level should not seek to deal with every aspect of the subject-matter.

3. We recognise however that there is a conflict between the single market principle and the current absence of a legally integrated labour market. We support action at the EU level in relation to economic migration which has a clear rationale in terms of EU interests, the interests of other Member States, respect for fundamental rights (including social rights), or the co-ordination of relations with third states.

4. The Green Paper asks in section 2.1 whether EU action should on the whole be 'horizontal' (applicable to all economic migration) or 'sectoral' (applicable to certain categories only). Our preference would be for general 'horizontal' standards, particularly on the right to move between Member States, on fundamental rights, and on relations with third states. In our view, 'sectoral' action is likely to lead both to an undesirable degree of differentiation among economic migrants, and to an unnecessary degree of micro-management of Member State admission decisions.

5. This response is not in general written from a British perspective. We do however highlight points on which British participation could be encouraged. British policy since 1999 has been to decline to opt-in to immigration measures which would require it to grant a right of admission to certain categories of person. While we would prefer that Britain participated in EU initiatives in relation to immigration law and policy, we do not believe that any British reluctance should influence the content of those measures.

Preference rules and third country nationals

6. Section 2.2.1 of the Green Paper notes that the Council resolution of 20 June 1994 defined the principle of 'Community preference' to require that

preference be given both to EU nationals and 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." This principle is secured for EU nationals – and therefore EEA and Swiss nationals - by Articles 1-6 of Regulation 1612/68. For permanently resident third country nationals, it is secured by Article 11 of Directive 2003/109 – except that that measure does not apply in Britain, Denmark or Ireland.

7. We support the suggestion in section 2.2.1 of the Green Paper that preference should also be given to *other* "third-country manpower already present in a Member State." We understand this to refer to persons in employment and self-employment in a Member State, but who are not permanently resident there, and who therefore do not come within the 1994 Resolution or Directive 2003/109. In practice, this question is linked to the possibility for economic migrants to change employer, which is a principle we strongly support (paras 23-26, below). To the extent that non-permanently resident workers and self-employed persons are permitted to take other employment, we would conclude that they should be included in the 'preferred' category.

8. Section 2.2.1 of the Green Paper also asks whether preference could be given to third-country workers resident in other Member States. We address this within a wider discussion of rights of movement between Member States (paras 18-21, below).

Member State admission policies

9. We are not convinced that in general it is desirable for EU action to discourage or restrict Member State policies which tend to *favour* the admission of third country nationals for economic purposes. If a Member State decides that its economic circumstances justify the admission of certain individuals or categories, or the operation of more relaxed procedures, then – as long as the principle of Community preference is respected - it is not obvious that the EU or other Member States have an interest in impeding such a decision.

10. In particular, we do not consider that the following - referred to in section 1 of the Green Paper - are sufficient to justify intervention aimed at restricting Member State admissions: the right of short-term travel among Schengen states, the possibility for third country nationals to become posted workers in any Member State, or their acquisition of a right of movement under Directive 2003/ 109 (Long-Term Residents' Directive) after a minimum of five years in a first Member State. In our view, EU intervention to restrict Member State admissions could only be justified if the right to engage in economic activity in other Member States arose soon after admission to a first Member State (e.g. six months).

11. Section 2.2.2 of the Green Paper asks whether "the admission of third-country nationals to the EU labour market [should] be allowed only if there is a specific job vacancy or could there also be more flexible systems such as green cards, etc." We take this to refer to the possibility of workers being admitted for economic activity without being tied to a particular employer. It follows from the analysis at para 9 above that in our view it is inappropriate for EU action to seek to limit Member States which wish to introduce 'green

card' systems. Such a limit would moreover be at odds with the right to change employer, which in our view ought as far as possible to be protected at the EU level (paras 23-26, below).

12. By contrast, we would argue that there are legitimate reasons for EU standards to discourage Member States policies which *restrict* admissions. In particular, individual Member States may limit inward migration in ways which are detrimental to the wider EU economy, so that other Member States and the EU institutions have an interest in intervention.

13. The case for EU standards to favour the admission of third country nationals would be even stronger if a right of movement between Member States were introduced for economic migrants (see paras 18-21, below). In those circumstances, restrictive policies would have a direct knock-on effect upon the labour supply in other Member States, such as to justify EU standards and/ or scrutiny.

14. In particular, we would propose the recognition at EU level of the principle of labour market need, so that Member States would be under a duty to admit workers where a labour market test was met. We would also propose the recognition at the EU level of the possibility to switch statuses: where labour market tests and procedures are satisfied, 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.

Posted workers

15. Section 2.2.2 of the Green Paper asks about the "procedure to follow for those third-country nationals who seek entry to the EU to carry out an economic activity … but who do not actually enter the EU labour market." This raises the question of the posting of third country workers both within the EU, and to the EU.

16. We do not wish to question the principle established in *Vander Elst* that EU companies should be free to post third country employees to carry out a service contract in another Member State. In some instances the second Member State will wish to have proof that the worker in question is legally employed in the state from which he is being posted. In our view, if such enquiry is necessary, a mechanism should be provided at the EU level for the provision of such proof.

17. We would also favour a common EU approach to the transfer of workers from outside the EU under GATS. Since this is in essence an international trade matter, we favour its being dealt with at the EU level.

Movement between Member States

18. In our view, legislation at the EU level to create a right of movement between Member States for economic migrants is imperative. The provisions of the Long-Term Residents' Directive, which require five years' residence before a right to move can arise, are inadequate in relation to economic migration. Entry to a given Member State would be more attractive for potential inward migrants if they knew that, within a short period of time, they would also be able to take up employment or self-employment in other Member States.

Such a position would also be economically beneficial, through the greater integration of Member State labour markets – as the Green Paper makes clear in section 2.2.1.

19. A right of movement between Member States for workers could be realised in different ways. One possibility would be to provide that workers in a given Member State who were free to change employer should also be free to move to employers in other Member States. We would not however support a solution simply along these lines. It could have the perverse effect of providing an incentive for Member States not to allow freedom to change employer. It would also lead to a lack of transparency, as a result of variations between Member States.

20. In our view, the freedom to move between Member States for workers should instead be achieved by defining at the EU level a period of employment after which a worker will have *both* the right to change employers within a Member State and the right to move to take employment in other Member States. In our view, the importance of the right to change employer (see paras 23-26, below) implies that such a period should not exceed 12 months.

21. The answer to the question of preference for third country nationals resident in other Member States is linked to the right to change employer. In our view, a person who is free to take up employment in the second Member State in question should be included in the 'preferred' category protected in EU law.

22. We would add that such a scenario would call attention to the absence of provision for the aggregation of periods of residence in different Member States for the purpose of acquisition of 'long term resident' status under Directive 2003/109. The status of 'long-term resident' can only be acquired after five years' residence in a single Member State. The status is lost after six years' absence from the territory of that State, even if the individual has lived in more than one other Member State, so that they could not have acquired the status elsewhere. Our assessment is that the absence of provision for aggregation is inconsistent with any notion of a free movement in order to engage in economic activity.

The right to change employer

23. The possibility for workers to change employer is discussed in section 2.5 of the Green Paper. In our view, the right of a worker to resign and to change employer is a crucial labour market principle. Without it, a migrant worker is significantly more vulnerable to abuses by employers, including in particular the failure to pay the going rate for the employment, the refusal to honour contractual commitments and the denial of labour rights. The pressure on a migrant worker is all the greater because their claim to residence in the state in question may depend on residence in the state in question, while their frequent exclusion from entitlement to social assistance may mean that they are without any income if they become unemployed. We therefore take the view that there should be a strong presumption against limitations on the right to change employment.

24. We agree with the statement in section 2.5 of 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. We would add that the right to change employer must involve the right to change sector, since in many situations this may be the only realistic option for an individual. It should also entail the right to take secondary employment, since that in practice may be a way for an individual to lessen the possible impact of dismissal or resignation from the employment for which they were admitted.

25. We do not agree with the proposition that those on temporary schemes should be excluded from the right to change employer. These workers are often among the most vulnerable to employer abuses, and therefore most in need of the right to change employer. At the very least, such a right should be recognised among employments covered by the scheme in question.

26. We would further argue that this is an area where EU action is clearly justified. As we argued above, in order to be effective, the right to move between Member States may require recognition of a right to change employers within a Member State. There is moreover a risk that Member States will seek a competitive advantage through the restriction of the freedom to change employer. We also take the view that the freedom to change employer is one of a number of basic social rights which should be protected at the EU level (next).

27. Finally, it follows that in our view work permits should be issued to workers rather than their employers. This is the corollary of the significance of the right to change employer.

Social rights

28. In our view, it is desirable that the EU lay down minimum standards as regards the treatment of economic migrants within individual Member States. This would uphold the fundamental social rights of migrant workers, while ensuring that Member States do not seek to undercut one another in the conditions on which workers were admitted.

29. For that reason, 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” (emphasis added).

30. In this regard, we would suggest that the list of social rights set out in Article 11 of Directive 2003/109 could form the basis for EU action in relation to third country workers. That Article recognises *inter alia* the following:

    - the right to change employer (see further paras 23-26 above),
    - the right not to be discriminated against by employers on grounds of nationality or immigration status (see further para 30 below),
    - equal treatment in access to employment and self-employment
    - the recognition of equivalent qualifications and experience, wherever obtained,

- equal treatment in vocational training,
- equal access to and participation in workers' organisations and representative bodies,
- equal treatment in housing, social assistance, social security and taxation.

31. We would call attention in particular to the right of third country nationals not to be discriminated against by employers on grounds of nationality or immigration status. 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 a specific directive, adopted under Article 137 EC, to address this omission.

32. More generally, our view is that legislation on minimum standards should best be adopted under the social policy provisions of the Treaty (Article 137 (1) EC, points (c) and in particular (g)). This would avoid any possible disputes as to the applicability of Article 63(3)(a) EC to the subject-matter. It is true that this uncertainty would be removed if the Constitutional Treaty is adopted, since it would presumably permit such legislation under its Article III-267(2)(b). Even in that event however, we would argue that recourse to Article III-210 would be preferable, since legislation would be applicable to all Member States, i.e. including Britain, Denmark and Ireland.

Procedural rights

33. We would call attention to the importance of legal mechanisms by which economic migrants can challenge adverse decisions. Article 10 of Directive 2003/ 109 provides a model as regards negative decisions on admission/ residence. We would propose that the economic migrants also have the possibility to bring a legal challenge to negative decisions as regards any application for permission to work or engage in self-employment. In our view, what is at issue here is the fundamental right of access to justice in relation to administrative decisions. It would therefore be appropriate to have EU legislation on this procedural right even in the absence of substantive standards requiring permission to work or engage in self-employment in the EU.

Relations with other countries

34. 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 states of origin of economic migration to the EU. In our view, this is an area in which it is clearly desirable to have EU level action, in order to prevent abusive competitive practices by states and/ or recruitment agencies which operate from them.

35. The Green Paper asks "what could the EU do to encourage brain circulation ..?" In our view, one straightforward solution is that third country workers should have protection for their immigration status within the EU for a long period after they return to their state of origin. If they do not have this protection, then they may be put off returning by the uncertainties associated with it. One implication is that it is necessary to revise Article 9(1)(c) of Directive 2003/109, which at present requires that long-term resident status

is lost after 12 months' absence from the territory of the EU. In addition, it would be necessary to legislate to protect the status of economic migrants who have not spent sufficient time in any Member State in order to qualify as long-term residents under Directive 2003/109.

36. The Green Paper also asks about the problem of loss of human capital investments by countries of origin. Our starting-point is that any measures to address a 'brain drain' should respect the right of individuals to move to take up opportunities available to them. We also take the view that in general outward migration need not be economically damaging to states of origin, not least because of remittances and the potential benefits when emigrants later return. In any event, attempts to restrict outward movement are inevitably vulnerable to evasion.

37. We recognise that migration by persons who have been educated or trained at state expense in the state of departure raises difficult issues. We are not persuaded however that a system of compensation by states of destination is feasible. It is not clear how the amount of such compensation would be determined, and anyway government to government transfers appear a very imprecise method of addressing the question. In our view, this question is best addressed as a distinct element of development aid in cases where there clear patterns of migration of persons educated and trained at state expense. In our view, that could legitimately be provided for at the EU level.

Unauthorised workers

38. One omission from the Green Paper which concerns us is the question of policy on unauthorised workers. It is clear that unauthorised work is 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 who 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.

39. Against that background, our view is that recognition should be given at the EU level to the right of states to introduced 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.

40. We also support recognition of the principle that unauthorised workers should be covered by key labour and social rights. This would include all entitlements linked to the employment relationship, as well as rights to health care and social assistance. It would also include an entitlement to export or to have refunded social security contributions made while an unauthorised worker.

41. We would add that the principle that unauthorised workers should be covered by labour and social rights is increasingly recognised in international human rights law. It has been endorsed within their fields of competence by each of the European Committee on Social Rights in relation to the European Social Charter (decision on complaint 14/2033 *FIDH v France*, adopted 8 September 2004), the Inter-American Court of Human Rights

(Advisory Opinion OC-18/03, 17 September 2003) and the Committee on Freedom of Association of the International Labour Organisation (Report 332 on complaint against the USA by AFL-CIO and CFT, 2003). It also finds expression in Part III of the UN International Convention on the Protection of the Rights of Migrant Workers and their Families (in particular, Articles 25, 26, 28 and 30), which came into force in 2003.

Conclusion

42. In conclusion, we would emphasise our view that the central issue in this area is the incomplete integration of the EU labour market as regards third country nationals. In concrete terms, what is required above all is the establishment of a right of movement between Member States, and a framework of minimum rights for economic migrants. If these were addressed at the EU level, we believe that the result would be of benefit both to the EU economy and to the social and economic position of migrant workers.