

EU Policy on Labour Migration: Implications for Migrants' Rights

The EU's approach to economic migration encourages the immigration of only highly qualified workers, failing to ensure the application of human rights standards towards low or unskilled and semi-migrant workers.

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December 18

European cooperation over the entry and residence of migrants' for employment-related purposes has been facing many difficulties since the Treaty of Amsterdam came into force in 1999. In 2001, the European Commission's proposal for a general directive laying down the basic conditions and rules of admission concerning migrants for employment purposes failed to find agreement in the European Council. Since then, the official discourse has regularly advocated the overarching importance of the principle of subsidiarity and national competence over this policy area (EC, 2001). Nevertheless, trying to abide by previously-acquired political commitments related to the establishment of a common area of freedom, security and justice, the Commission re-launched the debate about the 'added value' of common rules on labour migration. The 'Green Paper on an EU Approach to Managing Economic Migration' was presented in 2004 (EC, 2004).

Although most of the civil society actors who participated in the consultation process were in favour of a more skilled-transversal/horizontal and human rights-based approach, the majority of Member States expressed their support for a policy that prioritises measures to attract highly qualified migrants over others. The Hague Programme (a multi-annual programme setting the agenda for immigration and asylum policies for the period 2005 to 2010) reaffirms the reluctance shown by some Member States to reach a harmonised position towards legal labour migration (EC, 2005a). Following these discussions, in 2005, the Commission presented a 'Policy Plan on Legal Migration', introducing a list of actions and legislative initiatives that it intended to adopt by the end of 2009 with respect to the "coherent development of EU legal migration policy" (EC, 2005b). This Plan falls short of the expectations expressed by the majority of civil society actors. Whilst it foresees common rules on the social and legal rights of economic migrants,

Member States remain fundamentally free to set admission volumes and conditions of entry. Bilateral agreements between Member States and third countries continue to characterise the management of economic migration in the European Union.

Policy Plan on Legal Migration

The Policy Plan on Legal Migration argues that:

[T]he current situation and prospects of EU labour markets can be broadly described as a 'need' scenario. Some Member States already experience substantial labour and skills shortages in certain sectors of the economy, which cannot be filled within the national labour markets.

These shortages concern "the full range of qualifications – from unskilled workers to top academic professionals". EU demographic deficits – falling birth rates and an ageing population – are listed as the second main reasons for taking measures in the field of legal migration.

On this basis, a comprehensive plan for migration policy embracing all skill levels was expected. However, this is not what the Policy Plan represents. Although the Green Paper had floated the idea of a "horizontal framework covering conditions of admission for all third-country nationals seeking entry into the labour market of the Member States", this was rejected by several Member States. Instead the Policy Plan proposes four 'specific instruments' and a 'general framework directive' designed to "guarantee a common framework of rights for all third-country nationals in legal employment already admitted in a Member State, but not yet entitled to long-term residence". The four specific directives will cover the following categories of third-country nationals: highly skilled or qualified workers, seasonal workers, intra-corporate transferees and remunerated trainees. But the Commission's approach clearly indicates the emphasis on attracting highly qualified workers to the EU.

This new 'fragmented approach' reflects the Commission's step-by-step approach, which it took to avoid another failure, as in the case of the proposal put forward in 2001. It also implies that the final objective of reaching a homogeneous framework of rights for all migrant workers entering the EU 'legally' is in jeopardy. Civil society organisations, academia, trade unions and some consultative

institutions like the European Economic and Social Committee (EESC)² warn that the implementation of the Policy Plan could endanger guiding principles such as fair and equal treatment, fundamental rights and non-discrimination (Caritas Europa et al., 2008; ETUC, 2007).

But the main criticism remains the clear discrepancy between migrant labour needs and allegedly suitable measures to match these needs. The likely need for low-skilled workers in the years ahead, as stated in the Plan, is not comprehensively addressed. The only directive dealing with this is the one on seasonal workers, but, given the temporary nature of the seasonal workers programmes, it does not address the problem in the medium and long-term. The Plan fails to offer an adequate and realistic road-map for meeting the EU's future labour needs (Castles, 2006). The risk is that the EU's important demand for low- and semi-skilled labour will continue to be largely addressed by undocumented migrant.

Economic migration: A predominantly national prerogative

A number of governments have used the increased hostility towards migrants among majority populations to introduce more restrictive measures. In Italy, for example, Members of Parliament approved a bill that basically criminalises irregular migration and all those who are helping irregular migrants. Spain attempted to provide incentives to unemployed migrant workers to return home as a way to address the impact of the economic crisis on the building industry (Closa, 2008, p.198). Whilst this is less restrictive than the Italian measures, it was not welcomed by organisations working in the field because the measure is neither realistic nor effective. Given the slowness and weakness of European legislation in the field of economic migration, it seems unlikely that Member States will find it necessary to intervene at the Community level.

At the structural level, whether or not the ratification process of the Lisbon Treaty will be concluded constitutes a matter of concern for the advocates of a stronger European policy on economic migration. The new Treaty would finally extend the 'Community

1 In this text, migrant or migrant worker will be used, although the official term used by the European Union is third-country national, i.e., any person who is not a citizen of the European Union within the meaning of Article 17(1) of the Treaty of Amsterdam.

2 In its Opinions, the EESC adopts the view that immigration policy and legislation should fully respect the human rights of all people and the principles of equal treatment and non-discrimination.

method' to the decision-making process in this policy area, thus giving more power to the European Parliament (co-decision) and less to the Member States (qualified majority voting in the Council)³. This favourable change in the institutional framework has to be seen, however, in the context of an even more important change. Whilst the new Treaty will mean that Member States lose decision power in the Council, it will at the same time reinforce their competence in the area of economic migration. This is stated in the text of Article 79(5) of the Lisbon Treaty referring to the general Article on immigration:

This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

The provision was already included in the negotiations for the directive on highly qualified migrants and in the Hague Programme, but it would be the first time it appears in a constitutive text. This provision against 'more Europe' has been recalled in the French Presidency's European Pact on Immigration and Asylum (Carrera & Guild, 2008). The Pact, even though it is not a legally binding document, represents a strong political reaffirmation of the principles of subsidiarity and nationalism. This is particularly evident in the field of economic migration, as no reference is made to the Commission's proposals on highly qualified migrant workers in the Pact, although it calls for an increase in the 'attractiveness' of the European Union to this category of workers.

A new multi-annual programme following the Hague Programme is currently being discussed and is scheduled to be formally adopted by the Heads of State and Government in December 2009. The programme will seek to consolidate and put into practice "a policy on immigration and asylum that guarantees solidarity between Member States and partnership with non-Union countries." (EC, 2009) This so-called 'Stockholm Programme' is expected to provide new political impetus to proceed in the overall 'communitarisation' of immigration and asylum policy. Nevertheless, it would be unrealistic to expect that it will bring about a common and transparent framework for economic migration based on international human rights principles and standards, as well as mutual accountability.

According to the European Commission, "implementation of the principles and objectives of the Pact on Immigration and Asylum will provide the basis for EU action in the coming years" (ibid, p. 23).

Two directives: A European 'Blue Card' for highly qualified immigrants

In 2007, the Commission published the two draft

Directives on the so-called 'Blue Card' proposal for highly qualified immigrants (EC, 2007a & 2007b). The criteria for obtaining the Blue Card include a work contract, professional qualifications and a certain minimum salary level.

Attracting highly qualified workers is seen as a strategic priority for the economic development of Europe. Furthermore, the low numbers of migrant workers the subject of the Directive was viewed by the Commission as the ideal start for the implementation of the Policy Plan on Legal Migration.

A major concern about the Blue Card proposal is that highly qualified migrant workers will receive more generous treatment than other migrant workers, which will institutionalise discrimination on the basis of skill level in the acquisition of labour rights (Lusetich, 2007). On 25 May 2009, the Council of the European Union adopted, without discussion, the Blue Card Directive. Following publication in the Official Journal of the EU⁴, Member States will have two years to incorporate the new provisions into their domestic legislation⁵.

In a second Directive, the Commission proposes to guarantee a common set of rights to all third-country workers lawfully residing in Member States, but not yet entitled to long-term residence status, and to introduce a single application procedure along with a single residence/work permit. The proposal illustrates to some extent the Commission's willingness to close the 'rights gap' between third-country workers and EU citizens by granting the former employment-related rights in such fields as working conditions, education and vocational training, recognition of diplomas, social security and housing (EC, 2007b). It is, therefore, unfortunate that this proposal did not receive preferential treatment.

As negotiations in the Council are still ongoing, it would be premature to give a definitive opinion on this proposal. However, some general observations can already be made. The proposal is the most important of the Policy Plan's package, because it addresses the problem of migrant labour force exploitation. Regulating the social and economic rights of migrant workers means reducing unfair competition between Member States and ensuring decent working conditions. Whether or not this objective will be met is a matter of political will. Extended negotiations usually lead to a watering down of the initial proposal. Hence, it will not be surprising if the final Directive offers less protection than originally envisioned.

As stated by the European Economic and Social Committee (2008):

The starting point for this debate must be the principle of non-discrimination. Migrant workers, whatever the period for which they

are authorised to reside and work, must have the same economic, labour and social rights as other workers.

In this sense, seasonal workers shouldn't be excluded from the scope of the Directive, even if the Commission is drawing up a specific Directive on this category of workers. This exclusion would endanger the right of equal treatment and should be considered particularly alarming in the light of the renewed EU turn towards temporary migration programmes.

Furthermore, civil society actors are arguing that:

[G]iven the increasing globalisation of the labour market and the international mobility of workers, a new approach regarding the portability of acquired social security rights would be advisable. (Bridges not Walls, 2008)

Directive proposals on seasonal workers, intra-corporate transferees and remunerated trainees should be launched by the Commission before the end of 2009.

BOX 5: The European Union's Return Directive

Adopted in June 2008, the Return Directive sets EU-wide rules for the return of illegal immigrants to their home country. The text gives migrants the option of leaving EU territory voluntarily within a period of 7 to 30 days. If they fail to do so, national authorities can issue a removal order and detain them for a period of up to 18 months. Immigrants in that category are also banned from the EU territory for a period of five years. The Return Directive has been largely criticised for its restrictive nature. The Bolivian president Evo Morales has described it as a 'shameful' directive that violates basic human rights.

The need for international accountability

When introducing the Policy Plan on Legal Migration, the European Commission wrote that the package aimed, among other things, to introduce tools for a "fair and rights-based approach to all labour immigrants". The Commission repeated this human rights rhetoric in its Communication on the proposed Stockholm Programme:

... to maximise the positive effects of legal immigration for the benefit of all – the countries of origin and destination, host societies and immigrants – a clear, transparent and equitable approach that respects human beings is required.

This is, however, not backed up by a commitment to international accountability and scrutiny. International labour migration, by its very nature, involves more than one country, and, therefore, requires

4 Published in the Official Journal of the EU on 25 June 2009.

5 The new Directive does not apply to the United Kingdom, Ireland or Denmark.

3 Since 2001, the unanimity voting process has been considered as one of the main obstacles to 'communitarisation'.

mechanisms to ensure that each country involved is held accountable for the laws, policies and practices that have an impact on the lives of migrant workers and their families. This is the case for countries of origin, transit and destination. For this accountability to be effective, it is important that all interested actors are involved in this process, not only governments, but also civil society and international agencies.

Laws and regulations developed by the EU should, in our view, be guided by relevant international labour and human rights standards as agreed and adopted by the international community. Because the effective implementation of the UN human rights protection regime is essential to guarantee respect for the human rights of all migrant workers, it is necessary for all EU Member States to ratify all of the core UN human rights treaties. The most relevant of such instruments to the rights of economic migrants is the UN Migrant Workers Convention⁶. This Convention covers the entire migration process and provides many areas of protection for migrant workers and their families. Besides issues related to employment, it includes provisions on human rights, slavery and forced labour, personal liberty and security, protection against violence, confiscation of identity documents, expulsion, medical care, the education of migrant workers' children, family reunification, transfer of earnings, recruitment, and the right to the protection and assistance from the country of origin's consular services.

In addition to the UN Migrant Workers Convention, the International Labour Organization (ILO) conventions set internationally recognised labour standards that are of importance to all workers, including migrant workers. Most relevant are Conventions 97 and 143. Convention 97 is based on the principle of equal treatment of nationals and regular migrant worker in labour-related areas. Convention 143 aims to eliminate irregular migration and irregular employment, and sets requirements for the respect of the rights of migrants with irregular status.

When one looks at the ratification status of these three important conventions, one sees that the EU Member States are not doing well. None of the Member States have ratified the UN Migrant Workers Convention, even though both the European Parliament and the European Economic and Social Committee have, on several occasions, urged them to do so (European Parliament, 2009). As far as the ILO conventions are concerned, the results are only slightly better, with 10 Member States having ratified Convention 97, and 5 Member States having ratified Convention 143.

6 The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families was adopted in 1990 and entered into force in July 2003. For further information see: "Guide on Ratification", the International Steering Committee for the Campaign of the Ratification of the Migrants' Rights Convention, Geneva (2009).

This means that, in order to ensure international accountability, we have to look at ways to make the most of the implementation of the other UN conventions. All EU Member States have ratified other core human rights treaties such as the Committee on the Elimination of Discrimination Against Women (CEDAW), Committee on the Rights of the Child (CRC) and the Committee on the Elimination of Racial Discrimination (CERD) (17 December 2008).

However, recognition of rights on paper is not sufficient to guarantee their implementation. State parties have an obligation to submit regular reports to the monitoring committees set up under these treaties. Governments collect information from their relevant ministries and administrative units in order to draft the initial and subsequent periodic reports. This exercise prompts them to take stock and analyse their legislation and practices in relation to a given treaty.

Conclusion

In conclusion, we can state that there is a need for a common and transparent framework that is based on international human rights principles and standards, as well as on mutual accountability. The sectoral approach favoured by the European Commission, the European Council and the Member States complicates the migration management system, largely excludes semi- and low-skilled migrant workers and does not take into account respect for the basic human rights of all migrant workers and members of their families, regardless of their status. ■

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