

The Commission published its proposal for a directive on migration for highly qualified employment on 23 October 2007.¹ The question of first entry by third country nationals to the member states' territory and labour market, while within the competence of the EC since 2001,² has been the hardest of the immigration and asylum powers on which to find agreement in the Council. The Commission made a first proposal in 1999, but that was withdrawn after it failed to find sufficient support. That first attempt by the Commission to achieve a directive on first entry for economic activities was characterised by a uniform approach – applying to all types of economic activity.

In this second attempt, the Commission has divided up the field into sectors and is seeking to address it piece by piece. The reason for this is undoubtedly because the consultations that the Commission carried out before embarking on this venture indicated more support in the member states for highly qualified migration than for low-skilled. However, while such an approach may appeal to some interior ministries in some member states, as I will outline below, it also has its dangers. This proposal is accompanied by a second one designed to create a single procedure for labour migration and a set of common rights. The Commission states that the two are consistent.

¹ COM (2007) 637.

² COM (2001) 386.

EU Policy on Labour Migration A First Look at the Commission's Blue Card Initiative

Elspeth Guild

Two measures, one adopted and one proposed by the Commission, increase the pressure on the EU to move towards a common position on economic migration. The first Directive 2003/109 provides for free movement of third country nationals who have resided lawfully in the EU for five years or more and thereby acquire long-term resident status. They acquire the right to move and reside in any member state for economic purposes, including work (though member states can delay this by up to a year), as well as non-economic reasons. Thus, leaving first admission to the member states becomes generally less attractive when each member state individually controls first entry. In the interest of coherence, five years down the road when third country nationals get the right to move and work anywhere in the EU, there is an argument in favour of a common set of rules on first admission of labour migrants.

Secondly, the Commission has proposed a measure creating a common system of sanctions against employers for engaging third country nationals without permission to take employment in the member states.³ This proposal has run into substantial criticism from a number of organisations on the ground that it is not reasonable to sanction businesses for hiring

³ COM (2007) 247.

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employees when there is no EU-wide measure that permits them to do so lawfully. Without a clear and common EU system whereby businesses can obtain permission to hire third country nationals, fining them for failing to do so lacks legitimacy.

There are, however, two factors that must be taken into account: one that raises problems for Community action in the field, while the other limits the scope of action. First, free movement for workers who are citizens of the Union has not yet been achieved. For nationals of eight member states that joined the EU in 2004, transitional restrictions on free movement of workers are still being applied by a number of important labour destinations such as Germany and Austria. These restrictions are unlikely to be lifted until 2011. For workers from the two member states that joined the EU in 2007, the situation is even more difficult. For these workers, a (albeit small) majority of member states are applying transitional restrictions that can continue until 2014 (with a possible extension in exceptional circumstances). Citizens of the Union are excluded from the scope of the proposal so while a third country national could enjoy labour migration to, for instance, Germany under the proposal, a similarly qualified Czech or Bulgarian national is excluded. This is likely to cause political tensions in the Council.

Secondly, many member states are already bound by international commitments in the field of labour migration which are primarily found in ILO Convention 97 (of which ten member states have signed and ratified) and the Council of Europe's Convention on the Legal Status of Migrant Workers 1977 which ten Member States have signed (though a different ten from the ILO Convention). While the Council of Europe Convention is based on the principle of reciprocity, some important migrant sending countries for Member States are parties such as Moldova and Ukraine. Clearly, if the standards of the Commission's proposal fall below the standards of these two international agreements then the Member States who are bound by the international agreements will not be able to support it. Sadly, on a first analysis of the proposal, this appears to be the case.

This briefing note looks at the key issues arising in the proposal for a directive and sets out the

main debates. So far, the proposal has elicited a fairly positive response from the business community.⁴ Whether the initial enthusiasm at the possibility of establishing a common labour migration system is justified in light of the detail of the proposal is still open to question.

The Objectives of the Proposal

In December 2005, the Commission issued a Communication on a Policy Plan on Legal Migration (COM (2005) 669), which announced that between 2007 and 2009 it would put forward five legislative proposals on labour immigration. The new approach was to divide up economic migrants into categories: 1) highly qualified workers, 2) seasonal workers, 3) remunerated trainees and 4) intra-corporate transferees) and provide for their first admission separately in different instruments. These measures would also cover their rights and the procedures.

Thus this proposal is the first part of the larger project. There has been some discussion about the wisdom and desirability of dividing up the area into sectors on the basis of type of work. The main concern is that highly qualified workers will receive more generous treatment than other workers which will institutionalise discrimination on the basis of skill level in the acquisition and enjoyment of labour rights. However, as the Commission got nowhere with its earlier proposal which covered all third country national workers, perhaps it considers the only way forward in the field is sectorally.

The proposal states that it specifically aims *at effectively and promptly responding to fluctuating demands for highly qualified immigrant labour*. This objective causes some disquiet – how does the Commission propose to respond to dropping demand in a sector? Will there be sufficient protection for the individual who has moved across the world at the invitation of the EU against the termination of his or her work permit and dismissal from the labour market? At the moment, the proposal appears to protect the highly qualified worker from immediate exclusion from the labour market if he or she becomes unemployed. He or she will have a three-month grace period to find new

⁴ See www.euractiv.com/en/migration+mobility/blue-card-proposals-unanimously-welcomed/article-167869.

employment (which does not meet the standard in the Council of Europe Convention, which provides for five months). However, will this survive the negotiations in the Council? Further, when the Commission makes its proposal for the less-favoured economic migrants, will such protections, even if somewhat limited, be maintained?

The proposal is intended to *promote circular migration*.⁵ This is an objective contained in the Commission's communication of that name to encourage people to come and go between their country of origin and their country of employment. It has been criticised as an attempt to turn the clock back to the *gastarbeiter* (guest worker) programmes of the 1960s in Germany, Austria and the Benelux. Those programmes – which were based on the principle that no migrant worker would stay any substantial period in the host country, but would return and his or her place would be taken by another migrant worker – was of limited success. It was unpopular with employers who inevitably invest in the training of workers therefore prefer stability of their work force rather than endless change. It was also of limited success with migrant workers who once they got established in a job were reluctant to pick up stakes again and move back to their country of origin.

The Commission intends the proposal to deliver a *common fast-track and flexible procedure for the admission*. This is an extremely valuable objective – the Commission should focus on achieving this if it wishes to make an ally of the private sector. The most frustrating aspects of labour migration for companies across the EU are: a) lack of clarity in the rules; b) lack of consistency in the application of the rules; c) uncertainty of the time scale within which a work permit and visa will be issued. All these factors result in uncertainty when (and indeed if) the individual will be able to start work in the right country at the right time for the business to succeed in its programme. If the Commission can do something about this weakness in the fragmented EU labour migration picture, it will rightly receive praise and support from EU businesses.

The Grounds for the Proposal

The explanatory memorandum sets out the main arguments for highly qualified migration: the business argument – businesses need economic migrants to fulfil their recruitment needs; the demographic argument – the EU is no longer producing sufficient numbers of workers to meet its business needs; and the evidence of the failure of the current highly qualified regime exemplified by the fact that the highly qualified from the EU's North African neighbours go to Canada and the US, rather than to the EU. The diversity of the member states' schemes for highly qualified migration is also noted (apparently only 10 member states have such systems and the statistics on numbers admitted are far from satisfactory).

The Specific Content of the Proposal

Article 1 establishes the objective of the measure: a common set of rules for entry and residence of highly qualified third-country nationals and their family members and the conditions of their residence.

Article 2 defines the key terms:

- Highly qualified employment means work (the Community law definition) “for which higher education qualifications or at least three years of equivalent professional experience is required”. The use of the Community law definition of employment is very wise. To try to devise a new definition exclusive to this area would only cause confusion regarding the interpretation. The definition of highly qualified employment is at the heart of the measure. As only economic migrants who fit this category will be admitted, and as the proposal is designed so that once an individual fulfils the conditions, he or she has a strong presumption of getting the Blue Card, how one decides who is highly qualified is central. The definition here is good – it includes higher education qualifications without limiting them too much – for instance there is no mention of universities, etc. Additionally, it is valuable as it permits flexibility – where the worker has three-years equivalent experience. Of course the question what is equivalent may cause

⁵ MEMO/07/197.

teething trouble but the flexibility is wise in order to meet business needs.

- The 'EU Blue Card' is supposed to allow its holder to reside and work legally in the territory of the issuing member state and (subject to important caveats which could render the possibility illusory) to move to another member state for highly qualified employment. This is the much publicised aspect of the proposal – a Blue Card for EU labour migrants which would mirror in some ways the US Green Card. Of course, there are very substantial differences – most notably, the Blue Card will not provide the security of residence and access to the labour market that the US Green Card does. Further, the Blue Card scheme does not create a right of entry for a labour migrant.
- "Higher education qualification" means any degree, diploma or other certificate issued by a competent authority attesting the successful completion of a higher education programme, namely a set of courses provided by an educational establishment recognised as a higher educational institution by the State in which it is situated. This means that the member states must accept the certificates of third countries' institutions. This is a key component of the definition of a highly qualified migrant. The main issue here is how to bring about the recognition of diplomas where they will, in most cases, have been earned outside the EU. Even after almost 40 years, the system of mutual recognition of diplomas earned in the EU still creates headaches, particularly in regulated professions. The Commission may need to deliver more on this aspect if it wants to meet the needs of businesses.
- "Higher professional qualifications" adds the option of at least three years of equivalent professional experience while "professional experience" means the actual and lawful pursuit of the profession concerned. This part of the definition may help to resolve the problems of recognition of qualifications which the first part raises. It may, in the end, be easier to prove the individual has three years professional experience abroad – often a related business has employed the individual itself in the capacity for more than three years – than to go through what may

become complicated recognition of qualification procedures.

Article 3 sets out who is excluded (mainly persons seeking or receiving international protection – although why they should be excluded is something of a mystery – and those who have been expelled, etc.) and Article 4 protects bilateral agreements but prohibits member states from applying more favourable rules in order to prevent competition among the member states for highly qualified employees. The Commission stresses in the Explanatory Memorandum that more generous provisions of national law are excluded. Whether this will survive the negotiations in the Council is questionable. Will the member states really be willing to abandon their power to ease labour migration requirements for favoured businesses? In such a sensitive area it may be hard to get such agreement. Further, it is not clear from the proposal whether the Blue Card scheme will replace national labour migration programmes for highly qualified or run along side them. If the latter is permitted, then the exclusion of more favourable conditions is clearly pointless as member states can just open or adjust a national scheme which has a lower threshold for admission.

Article 5 sets out the conditions for admission of a highly qualified migrant, as follows:

- a contract/job offer for at least one year;
- compliance with regulated profession rules (as they apply to EU citizens) and for unregulated professions, the requirement is possession of a relevant qualification;
- sickness insurance (for the whole family);
- the individual is no risk to public policy, security and health (the traditional EU wording is used here); and
- a salary level that is at least three times the minimum gross monthly wage (or higher at member state discretion) in accordance with published rules; if there is no minimum gross monthly wage identifiable, then the social assistance level is taken as the comparator; this means there must be transparency in the salary levels required.

These conditions are critical to the proposal as they set out what are intended to be clear,

precise and unambiguous criteria on the basis of which the individual and the businesses can regulate their affairs. The salary level is a sound criterion but it may not be wise to leave it to the member states to set higher levels than those set out in the proposal. The key is foreseeability for the business – before a business makes the decision of which employee to take on or to move around the world, it needs to be certain that it will be able to do so and will not run into insurmountable (and incomprehensible) obstacles from the state authorities. Businesses can make these decisions based on salary levels, but they need to have very precise rules. The sickness insurance requirement will cause headaches for member states that are parties to the International Labour Organisation (ILO) Convention 97 of 1949 concerning Migration for Employment and the Council of Europe Convention, as both require equal treatment with own nationals in this area (or exclude sickness insurance as a ground for family reunification, as in Article 12 of the Council of Europe Convention).⁶

Provided the individual meets the criteria of the highly qualified definition, and the job and personal circumstances fulfil the conditions of Article 5, both the business and the employee should be confident that the individual will be admitted and able to carry out the job, although as there is no right as such created in the proposal, there could be problems. However, there is a trump card that a member state can play against the business and individual: quotas. Articles 7 and 19(5) of the proposal allow member states to determine volumes of labour migration – i.e. quotas. A member state need only set the quota at zero to frustrate the whole project.

Article 6 provides for a more relaxed set of rules for young workers under 30 years of age by loosening the income test. This will be helpful for recent graduates who wish to stay in a member state after their studies.

Article 7 provides for the issue of an EU Blue Card which creates the presumption in favour of entry (and re-entry) to the member states and the rights contained in the directive which are:

- limits on withdrawal of a Blue Card;

⁶ See Article 6 ILO 97; and Articles 12 and 19 Council of Europe Convention.

- a time limit of 30 days in which the authorities have to make a decision (exceptionally extendable to 60 days); written notification of the decision and a right to remedies in event of refusal.
- For the first two years the individual is limited to paid employment activities which meet the conditions for admission (any changes must be authorised); after the first two years equal treatment with own nationals as regards access to highly qualified employment; this means he or she no longer needs to prove that the entry requirements are still met, although he or she can still be restricted to highly qualified employment;
- Limits on access to public service jobs together with a standstill for member states to continue to apply exclusion provisions that are already in existence;
- The right to look for work for a period of three months in the event of unemployment;
- Equal treatment with own nationals as regards wages and working conditions; freedom of association; education and vocational training (but member states can restrict access to grants); recognition of diplomas (but in accordance with national procedures); social assistance (but member states can restrict this to long-term resident third-country nationals); export of pensions; tax benefits; access to goods and services, housing and employment services (but member states can exclude access to public housing); free access to the territory of the member state;
- Family reunification under Directive 2003/86 but with no need to show a prospect of permanent residence, a six-month time limit on determination of an application; no integration abroad tests; aggregation of residence periods in different member states to acquire a five-year permit.

In general the list of rights is a step in the right direction, but there are problems in that the list does not conform either to the ILO 97 or Council of Europe Convention standards. The key problems are:

- Article 6 ILO 97 requires equal treatment with own nationals for accommodation and

social security; Articles 13 and 18 of the Council of Europe Convention cover the same territory;

- Article 8 of the Council of European Convention prohibits binding a worker to one employer or territory after the first year;
- Article 9 of the Council of Europe Convention gives the worker five months (subject to an unemployment allowance proviso) to find a new job; indeed, EU nationals have the right to reside to look for employment in another member state for at least six months and longer if there is a real prospect of them finding employment;
- Article 12 of the Council of Europe Convention sets out the family reunification rules which do not include a sickness insurance requirement.

The three-month limit on looking for work once unemployed not only causes problems with other international instruments. There are good reasons for allowing a person a longer period to find work. The labour market can change rapidly. The individual who has made the decision to move with the whole family to a member state deserves fair treatment in the event that he or she becomes unemployed. That fair treatment includes a reasonable period of time in which to find a new job in the event of unemployment. The threat of expulsion as soon as or shortly after an individual becomes unemployed plays into the hands of unscrupulous employers as it gives the employer too strong a position in the immigration status of the individual after he or she moves to the state. The employee who wants to remain in a member state may be coerced into accepting worse conditions or keeping quiet about breaches of labour (or company) law on the part of the employer because the individual's immigration position depends too heavily on continued employment.

The family reunification provisions are likely to be very contentious as they are substantially more favourable than those that apply to long-term resident third-country nationals. So the directive will privilege third-country nationals who have never lived in the EU as regards family reunification over and above those who have lived their whole lives in the EU. This is likely to be hard to sell. Nonetheless, the

derogations for the family reunification directive show clearly exactly where the big problems are with that directive.

Article 9 provides that an application can only be refused where the applicant does not meet the requirements or presents falsified or fraudulent documents. Member states may still apply national rules on filling vacancies and give preferences to those already unemployed on their territory. Article 10 places limits on the withdrawal or non-renewal of a Blue Card which can only be on grounds that the individual no longer fulfils the conditions; failure to respect the conditions (other than notification after two years); or on public policy, security and health grounds. There is a certain lack of clarity in these provisions about what exactly the individual can and must do after two years and just how much freedom he or she will have at that time. While on the one hand, the Commission indicates that this is supposed to be an important staging point when the individual acquires a measure of independence from the business, on the other the actual wording of the provision does not seem to support this wholeheartedly.

Article 11 deals with the application procedures, which are rather woolly: member states can decide whether it is the individual or employer that applies; but the application must be considered whether the individual is outside the EU or lawfully resident within it; and there is an obligation to facilitate visas. A number of member states are particularly anxious to move the whole of the immigration process abroad so that the individual who is coming to the member state for more than three months has fulfilled all the requirements before entry onto the territory. While this ambition is unrealistic, not least in the field of labour migration where often it is the result of an individual studying on the territory or some other encounter on the territory that a business becomes aware of them and decides to hire them, some member state have invested heavily in it. For this reason it seems unlikely that the Commission's proposal that the processing of an application can take place either within or outside the member state is likely to survive.

After two years of residence and exercise of economic activities in one member state, the individual and family members may be able to

go to another member state to carry out activities under the same conditions, but the possibility of labour market tests and quotas makes this a fairly uncertain option. The necessary procedural rules are set out to make sure that responsibility is gradually shifted from the first to the second member state in these circumstances. This is a sensible proposal, but it may well run into difficulties if it is not made more explicit and if the possible spoiling options left to the member states, like the application of quotas, are not reduced.

In the final provisions there is a duty on the member states to report to the Commission annually and on the Commission to report to the European Parliament and Council on implementation of the directive every three years.

Conclusions

The Commission has reflected long and hard on how to achieve the final block in the legal migration bridge of the EU.

This proposal begins a process of finalising the measures on labour migration in the EU for third country nationals. Sensibly the Commission has started with a most favoured group – the highly qualified. Presumably, it considers that if it can get agreement on this group, it can hang the proposals on the other groups on the back of this one. While the proposal has some important weaknesses, not least that it proposes better rights for newcomers than the EU has granted to its long-term resident third-country nationals, it provides a starting place for discussion and debate. If it is possible to achieve one smooth, efficient and quick procedure for businesses to fill their third-country national employment needs according to clear and precise rules, it will be a substantial benefit to the EU economy.

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