European Trade Union Confederation (ETUC)
Confédération européenne des syndicats (CES)

Resolution on equal treatment and non discrimination for migrant workers

Adopted at the Executive Committee on 1-2 December 2010

Despite the major battle won by the trade unions against the content of the Bolkestein directive, for the sake of guaranteeing posted workers the application of employment and working conditions in the country where the activity takes place, various judgments by the European Court of Justice (Laval, Viking, Ruffert, Luxembourg, Germany) have highlighted the objective that we have been seeking to achieve.
These rulings have highlighted the loopholes in our current legal framework in terms of the hierarchy between fundamental social rights and the economic freedoms allowing, de facto, social dumping.
Faced with this situation, the ETUC is demanding a Social Progress Protocol, to be included in the Treaties, to state very clearly that economic freedoms and competition rules cannot have priority over fundamental social rights and social progress, and that in case of conflict social rights shall take precedence;, and to integrate this into the broader concept of social progress and upwards harmonisation of working conditions and social systems.
In addition, the ETUC has called for a revision of the Directive on posted workers.
Against that background, which is a cause of grave concern to us, the European Commission has tabled some new legislative initiatives which instead of correcting the loopholes identified; once again exacerbate the fragmentation of the labour market, this time through proposed directives devoted to immigration policy.
It is unacceptable that after the 5 well-known decisions by the ECJ, the Commission should be doggedly persisting in legislating with the desire to liberalise the single market, by favouring unfair competition, undermining the principle of equal treatment for the different groups of workers and seeking to erode the principle of the host country. All this despite the new legal framework constituted by the Lisbon Treaty, which guarantees a social market economy and requires the European legislator to work towards social progress, and by the European Charter on Fundamental Rights, which guarantees equality (Art. 20), non-discrimination (Art. 21 par.2), collective bargaining and the right to strike (Art. 28).
The actual trend of the European institutions consists of limiting the bargaining autonomy of the social partners and recognising only collective agreements universally or generally applicable, not those concluded at regional, sectoral or company level (cf Rüffert case).

These new proposals are:

- The Directive establishing a single request procedure with a view to the issue of a single permit authorising nationals from third countries to live and work on the territory of a Member State and establishing a common floor of rights for third-

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country workers living legally in a Member State

- The Directive establishing conditions for entering and remaining for third-country nationals for the purposes of seasonal work
- The Directive establishing conditions for entry and residence of third-country nationals in the framework of an intra-corporate transfer

The first question ringing our alarm bells is the choice of the legal basis. The point is that the proposed directives are based only on Art. 79 TFEU (immigration), and yet they have a massive impact on the labour markets and industrial relations systems in the EU and the Member States. The texts are not simply tools to manage movements of migrant workers, but also instruments which define the rights of those workers in an employment relationship, and should furnish better protection for those workers. This should be reflected in the choice of the legal basis.

Through the choice of a single legal basis relating specifically to immigration, the Commission has avoided the consultations with the social partners laid down in Art. 154 TFEU. Directives with a strong impact on the European labour market cannot be proposed and discussed by the European legislator without consulting the social partners and without a proper debate on the consequences of such proposals for the labour market. Accordingly, the ETUC proposes adding social policy as a legal basis and organising a hearing at the European Parliament to spotlight the consequences for the development of the labour market. How is this European labour market to be structured, and by whom? As to the legal framework for the protection of workers' rights, there is a need for greater coherence, and why are seasonal, posted and ICT workers excluded from the single permit? We need a horizontal instrument to regulate the issues of principle for workers within the EU and for workers outside migrating into the EU, on the basis of the principle of equal treatment and the struggle against discrimination.

The ETUC believes that it is vital for any initiative taken in the field of migration to be consistent with the broader policies on employment and development, and that it is essential to guarantee social inclusion and sustainable development in the home countries and the host countries.

The proposals in the field of economic migration absolutely must determine what are the real needs to promote a new increase in the number of migrant workers from third countries in the professions and sectors concerned, if it is now the time to introduce measures designed to increase the numbers of people in such migrant groups, and if adequate measures have been taken at EU and Member State level so as to create appropriate social conditions in order to support such a movement in all the social/familial aspects, and also to launch initiatives to avoid protectionist reactions and the abuses that they might trigger.

Against this background of an economic crisis and predictions of an increase in the number of jobseekers, the ETUC and its member organisations doubt very much that the Commission has properly evaluated the issues involved in this new legislation.

The ETUC therefore asks to reconsider the political expediency of now presenting an initiative on immigration with regard to seasonal work, and strongly recommends giving consideration in the first instance to the introduction of the necessary social support measures, such as:

- Bolstering the legal framework, at both national and European level, for the social and professional protection of seasonal workers in general, for example via a European social policy directive on seasonal work, tackling the minimum social and labour standards applicable to seasonal work in the EU, ensuring equal treatment between seasonal workers, locals and migrants, and promoting upwards convergence of living and working conditions for all seasonal workers;
- An EU instrument relating to the respective responsibilities of the main contractors and subcontractors and intermediaries, introducing the chain of responsibility and/or joint and several responsibility on wages, working conditions (and social security and taxes);

-Activities and initiatives by the EU for the sake of improving respect for wages and working conditions, reinforcing labour inspections at national level and guaranteeing better coordination at EU level;
-The implementation and enforcement of the new directive on temporary work.

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Directive establishing a single request procedure with a view to the issue of a single permit authorising nationals from third countries to live and work on the territory of a Member State and establishing a common floor of rights for third-country workers living legally in a Member State

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The ETUC is aware of the efforts being made by the EU to devise a global immigration policy that is fair and rights-based. However, the draft directive takes only partly account of our demand to allow all European Union citizens and third-country nationals living legally in the EU, including refugees, to have full access to the EU employment market (Art. 3.1).
The ETUC believes that some aspects of this proposal are somewhat problematic given the lack of evaluation of the potential impact that some measures might have on the employment market, industrial relations and social cohesion, and above all the exclusion of certain groups from the general rights framework, specifically posted workers, physical persons in connection with commercial and investment activities, seasonal workers, asylum seekers and persons under subsidiary protection.
To break the principle of equal treatment, curb the rights and not establish any guarantees to protect working conditions and social conditions for migrant and local workers could lead to a complicated situation in our societies.
Yet more than that, it continues to open the gates to the dangerous path of the fragmentation of the labour market, and in a sense, the acceptance of social dumping in industrial relations.
We are well aware of the progress of the situation regarding the debates on the proposed directive at both European Parliament and Council levels, but in light of the great importance that the ETUC attaches to this proposal, we want to maintain in particular the proposals by the European Parliament's Employment and Social Affairs Committee, in the sense of including all workers, without exception, in *Chapter III –The right to equality of treatment*.
We see it as fundamental that the directive should include all workers and ensure equal treatment and non-discrimination in employment and social standards in the place where the activity is carried out.
To this end, the ETUC will be getting back in toall the institutional players, and launching a campaign of information and debate within society, to get this important question being discussed right across the trade union movement, in political circles and in public opinion in general.

Directive on seasonal work

As we have already mentioned, this proposed Directive was not preceded by consultation of the social partners, since the Commission took as the legal basis Article 79 TFEU(immigration), as if this proposal had no direct impact on the labour market.

This initiative raises major questions as to its objective, the sectors, and the principles of equality of treatment and non-discrimination, especially at a time when unemployment is going from bad to worse in Europe.

We find ourselves faced with a new attempt to fragment the labour market and segment the workforce, an initiative that tends to reduce the social partners' bargaining autonomy.

We would have preferred the Commission to have started work before by clarifying

- Seasonal work in general, with regard to labour and social conditions and standards;
- The joint and several liability of the main businesses and the subcontractors and intermediaries;
- A bigger guarantee of the respect for working conditions and social protection at European level.

The proposal also creates a lot of uncertainty surrounding:

- The lack of a role for the social partners in the implementation of this directive;
- The scope: there is no definition of the sectors involved. We do not know whether it is directed at stationary workers or also in production or services in general;
- The guarantees of decent work, under conditions of equality of treatment and non-discrimination based on the application of the collective agreements;
- The Member States' own preventive controls which must be rendered possible. The deadline proposed (30 days) is a joke, making any concrete control impossible. There is also a need for sufficient guarantees to ensure that the single points of contact have the equipment, resources and skills necessary to be able to carry out their control function properly;
- The liability of the main business, the subcontractors and the intermediaries;
- The lack of concrete preventive measures and sanctions for fraudulent employers and genuine protection for workers;
- And in general, the lack of measures to ensure adequate implementation, enforcement and control.

For all these reasons, we consider this proposal as it stands to be inadmissible, and we call upon the Council and the Parliament either to reject such an initiative or, as appropriate, to subject it to an in depth revision, with prior consultation of the social partners and an open and public debate.

Directive establishing conditions for entry and residence for third-country nationals in the framework of an intra-corporate transfer (ICT)

The Commission is presenting the draft directive as a statement of the commitments entered into by the European Union under the General Agreement on Trade in Services (GATS) negotiated at WTO level.

This new proposal refers to nationals of countries which do not belong to the European Union, who are employed by a company based outside the European Union and are posted temporarily into one of its units situated on European territory. This type of posting therefore

needs to be distinguished from the kind covered by the 'Directive concerning the posting of workers in the framework of the provision of services' adopted in 1996, which relates to postings within the European Union and is based upon the rules in the treaty relating to the single market, whereas the draft directive presented relies on the provisions of the treaty devoted to immigration.

The scope of the Directive is much too broad. As it stands, it is open for use in all sectors and no restriction is made on the type or size of the companies wishing to use this new tool.

The definitions of managers, and specialists need to be clearly limited to those who are highly-qualified and have particular skills and whose personal capacities are indispensable to the proper conduct of the specific activities of the company in the host country. This means that the criterion for admission must be the qualifications and the place of work within the company, not the salary. In order to avoid any unfair competition, persons transferred within the same company must benefit from equal wages and working conditions as a local worker occupying an identical or similar post.

On the other hand one essential criterion for admission is the evidence to be provided of employment within the same group of undertakings for 12 months preceding the date of the ICT. As this is not an obligation on the Member States but is left to their discretion in the transposition process. This will mean that some countries will have stricter national rules than others, which might in practice lead to forum-shopping by companies.

However, we have doubts about the need for a specific instrument on persons transferred within the same company, and we wonder why the issue of access for highly-qualified executives in multinationals could not be addressed under the 'Directive on the European Blue Card', which would likewise establish the provisions necessary in terms of **equality of treatment**.

The ETUC believes that the possible relationship with the posted workers directive is highly problematic, and urges that no stone be left unturned in an effort to avoid further complicating what is already an explosive issue. The rights of the ICTs will be aligned with the working conditions of posted workers as laid down in legislation or universally applicable collective agreements. For the ETUC the ICT workers need to have equal treatment ensured with the local workforce. The trend of the European proposals consists of a restriction to universally applicable collective agreements (as the proposal takes over the wording of the posting of workers Directive – Rüffert case interpretation by the ECJ) this puts strain on the national collective bargaining systems.

This proposal does not foresee control mechanisms or sanctions, neither the right of trade unions to control, as might exist at national level.

Furthermore, the rights of works councils in terms of information, consultation or participation at national level need to be ensured in this directive.

As to the inclusion of **paid interns**, the ETUC believes that this is a very tricky point. Although we recognise the importance of guaranteeing mobility of skills and competences, we wish to emphasise that interns are potentially highly vulnerable to exploitation and abusive practices, a factor which can equally lead to unfair competition. The key to the success of international intern exchange programmes therefore lies in ensuring that paid interns really are being '**trained**' and are not in fact temporary workers in disguise, and that there is close

monitoring to establish whether their remuneration and their treatment comply with the standards generally applied to similar workers in the host country.