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**Extending the equality principle to non-EU migrants:
Analysing a Proposal for a Directive on Rights
for Third-country Workers**

Krzysztof Nowaczek

URGE

e-mail: krzysztof.nowaczek@urge.it

URGE is the Research Unit on European Governance of the Collegio Carlo Alberto Foundation
Address: URGE, Collegio Carlo Alberto, Via Real Collegio 30, 10024 Moncalieri (Turin), Italy
Website: www.urge.it

Introduction

The 1999 Tampere Programme – the political document outlining goals in a common EU immigration policy for years to come – called for ensuring fair treatment of third-country nationals by granting them rights and obligations comparable to those of EU citizens. Nearly a decade later, the above goal is yet to be fully achieved¹. To narrow the existing ‘rights gap’ between immigrant and EU workers, the European Commission issued in October 2007 a ‘Proposal for a Directive on rights for third-country workers’ (Commission 2007c) seeking to grant a common set of socio-economic rights to all third-country workers legally working in a member state. The proper implementation of the Directive, which may cost national governments around 5 billion Euros overall, may enhance integration of immigrants required for the better functioning of Social Europe. In spite of negotiations having started only in January 2008 and the prospect of protracted decision-making process in the Council, it is not too early to commence a discussion on a directive that may have a significant impact on not only domestic migration policies but also on migrants’ position in hosting societies.

The latest edition of the Migrant Integration Policy Index provides an interesting overview of a variety of national policies promoting integration across the European Union. On the basis of data gathered in a rigorous and systematic manner, the index measures ‘how close each country’s policies come to European standards of best practice’. It focuses on six policy areas: labour market access, family reunion, long-term residence status, political participation, access to nationality and anti-discrimination (MIPEX 2007: 4). The findings show that most EU member states are far from reaching ‘European standards of best practice’ in key policies. On the scale from 1 to 100, only two countries reached a score above 75 and not less than 13 member states had their policies marked below 50. While the EU 15 average is 60, average among states that joined the EU in 2004 is at the alarming level of 44. Against this background, all changes in migrant integration policies within the European Union should be vigorously monitored to ensure that instead of leading to the common lowest denominator reforms proposed at either domestic or European levels will bring policies closer to the suggested best practices.

It is in this context that the following paper seeks to analyse the latest EU initiative related to migration policy. Since for the sake of integration of immigrants, a well guaranteed catalogue of rights is crucial, the analysis will focus on the provisions extending the scope of equality principle to third-country workers. In particular, the focus will remain on the analysis of consequences of the new provisions for immigrants and welfare states. The current Proposal will be the object of a comparative analysis with previous legislations regulating rights of different categories of immigrants. With the Proposal having been issued in October 2007, it will be still at least a couple of years before the Directive can be adopted. Therefore, it might be necessary to make an attempt to foresee the chances for the adoption and to introduce key concerns that will need to be taken into account. In this context, the last section will present possible standpoints of member states during negotiations and discuss how the Lisbon Treaty may change the way migration/migrant related initiatives will be adopted at the EU level.

Genesis of the Proposal: socio-economic factors and legal framework

Understandably, the Proposal was introduced on the EU agenda against very complex socio-economic, political and legal backgrounds. They are discussed in details in the lengthy Staff Working documents prepared by the Commission (2007a and 2007b). However, they deserve at

¹ See for instance the speech of Commissioner Franco Frattini admitting this failure; ‘Shaping Migration Patterns’, the European Parliament, September 2007, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/07/556&format=HTML&aged=1&language=EN&guiLanguage=en>.

least some critical observations for the sake of better understanding of the reasoning standing behind the draft and the constraints that will need to be considered during negotiations in the Council.

The European Union continues to be one of the major receiving regions of immigrants with the flow of newcomers increasing steadily over the years. While the number of asylum-seekers has declined comparing to the 1990s, migration for family reunification² and labour migration reasons dominates among the inflows of permanent-type immigrants (see the figure below). In analysing temporary migration, movements for labour reasons are naturally predominant. Those migrants that are already in the EU tend to be over-represented among the unemployed³ and more often than natives are endangered of social exclusion⁴.

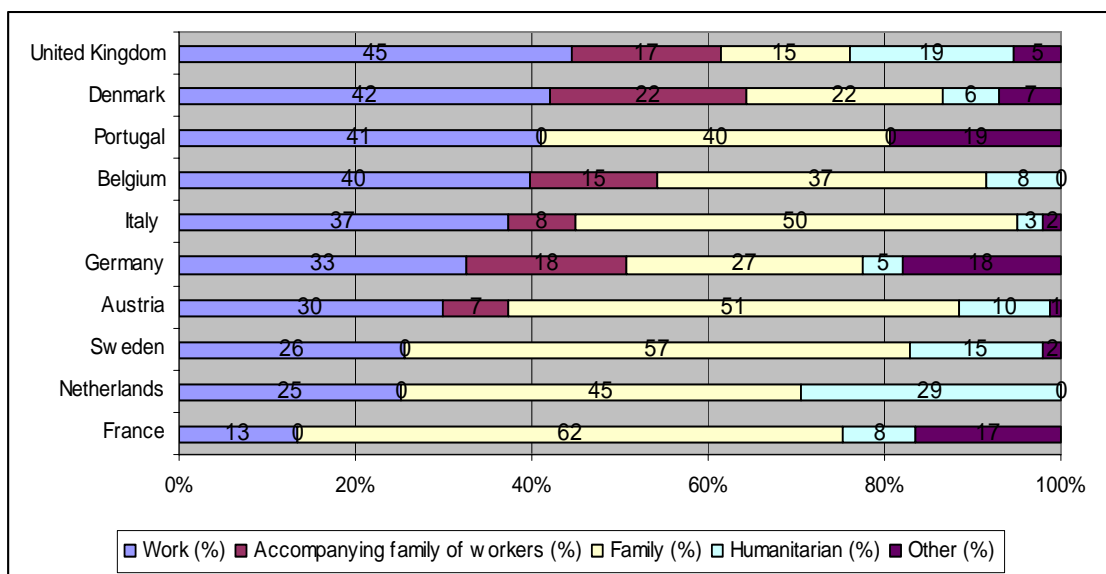


Figure 1: International migration by category of entry, selected EU countries, 2005 (OECD 2007: 37).

With the Lisbon Strategy about to finish its ten-year long agenda, the EU institutions along with national governments continue to 'make the EU a more attractive place to work' and to promote 'decent work for all'. In a context of ageing societies, labour market considerations, and in particular a low level of employment rate across the EU, became one of the major concerns of policy-makers. Although immigration is not considered as the answer for ongoing changes, it is true that no solution can be found without taking into account migrants' potential for EU economies. The enhanced inclusion of immigrants into labour markets is a necessity not only for a better economic performance but also for the sake of the social stability. This will not be achieved without a sound system of migrants' rights protection. The reasoning standing behind this and also other EU proposals is that the introduction of *common* provisions at the EU level would be, maybe not the shortest, but in the long-term perspective definitely the most effective solution.

² The EU legal regime on family reunification was codified in 2003 after three-year long negotiations (Council 2003c).

³ As a matter of fact, in not less than six EU member states, unemployment rate among foreign-born is more than twice bigger than that of native-born (OECD 2007).

⁴ Findings related to the social inclusion of immigrants can be found in the recently published report prepared by the High Level Advisory Group of Experts on the Social Integration of Ethnic Minorities and their Full Participation in the Labour Market (Süssmuth 2007); for the EU latest initiatives aiming to counteract social exclusion of people furthest from the labour market refer to the Commission Communication (Commission 2007e).

Initiatives in immigration/migrant policies have been constrained by the very limited Treaty basis and subsidiarity principle to be taken into account by legislators. Since the revision of the Treaty in 1997, Article 63 has stood at the foundation of the EU immigration policy. The Article called the Council to establish conditions of entry and residence and standards on procedures for the issuance of long-term visas and residence permits. This also included the requisites for family reunion (Article 63(3a)) and measures defining the rights and conditions under which nationals of third countries who are legally resident in a member state may reside in other member states (Article 63(4)). Before the ratification of the Lisbon Treaty, the Commission must draft its proposals on the basis introduced in the 1997 Treaty of Amsterdam (the Treaty of Nice did not change an institutional dimension of this policy field). As a matter of fact, in the very first words of the Proposal for a Directive on rights of third-country workers, the Commission refers explicitly to Article 63(3a), yet no reference to Article 63(4) is made. This is understandable if one considers that the latter article refers to a particular group of third-country nationals (i.e. long-term residents) and not the entire category of 'third-country workers'. According to the current Treaty foundations, the Commission proposes a draft legislation and the Council acts on a unanimity basis with the Parliament being merely consulted on a proposal.

Several legal provisions already adopted at the EU level provide for rights and protection for certain categories of third-country nationals. In 2000, two Directives on Equal Treatment were adopted (Council 2000a and 2000b), but they do not cover discrimination on the grounds of nationality. The 2003 Directive on Long-term Residents (Council 2003b) established a special status for third-country nationals legally residing in a member states for at least five years. In the field of social security, the Regulation from 2003 guaranteed the intra-EU portability of social security to third-country nationals legally residing in the EU, as well as to members of their families and to their survivors (Council 2003a).

Following the adoption of the Hague Programme defining the key objectives in the field of justice, freedom and security (Council 2004b) and the consultations on a EU approach to managing economic migration (Commission 2004), the Commission submitted the Policy Plan on legal immigration for the period 2005-2010 (Commission 2005b). To achieve the goals related to legal immigration, a horizontal directive, covering most categories of third-country workers and defining a common set of rights has been perceived as the foundation for other legislative initiatives (to be adopted throughout 2008 and 2009) regulating the inflow of various categories of migrant workers. Meanwhile, the Justice and Home Affairs Council of 19 November 2004 adopted a set of Common Basic Principles on integration of migrants (Council 2004a) followed by the Commission's Common Agenda for Integration (Commission 2005a). For better integration, enhancement of social inclusion, as envisaged in the Proposal, is fundamental.

Besides a reference to the relevance of the European Convention on Human Rights in the preamble, the Proposal does not mention any other instruments from the catalogue of international (immigration) standards. This is not surprising if one considers the ratification records of UN and ILO Conventions comprising the so-called International Charter on Migration⁵. The International Convention on the Protection of the Rights of all Migrant Workers and the Members of their Families has not been ratified by any single member state in

⁵ The accompanying Staff Working Document (Commission 2007b) mentions only one UN treaty, i.e. ratified by all EU Member States, the International Covenant on Economic, Social and Cultural Rights.

spite of the strong support for its ratification from the European Parliament⁶, the International Organization for Migration, trade unions and NGOs. Two key ILO Conventions, ILO Convention No. 97 on Migration for Employment and ILO Convention No. 143 on Migrant Workers have been ratified respectively by ten and five EU member states. The European Convention on the Legal Status of Migrant Workers, with not more than six ratifications among EU countries, refers directly to the principle of equal treatment in the economic sphere, yet it can be applied only to foreigners who are nationals of one of the contracting parties.

Overview of key elements of the Proposal: impact on migrants and domestic systems

The Commission defines the term 'third-country worker' as a third-country national who "has been admitted to the territory of a member state and is allowed to work legally there" (Article 2b). In practice it means that an immigrant does not have to be in actual employment to be covered by the equality principle. Such a broad definition of a 'worker' was envisaged to cover also situations prior to the employment (e.g. recognition of diplomas) or following it (e.g. unemployment benefit). However, several categories of workers such as intra-company transferees or temporary workers (i.e. those admitted for a period not exceeding 6 months in any twelve-month period) are not covered by the Directive provisions.

Article 12 of the Proposal stipulates that third-country workers will enjoy equal treatment with nationals in *at least* eight areas. According to the second paragraph of Article 12, in some cases member states may restrict the scope of equal treatment. The list below indicates the fields where equality principle should be observed along with possible restrictions introduced on a derogatory basis in the draft:

- i) working conditions, including pay and dismissal as well as health and safety at the workplace;
- ii) freedom of association and affiliation and membership of an organization representing workers or employers;
- iii) education and vocational training (in particular in the case of tuition fees at schools and universities), a member state may require proof of appropriate language proficiency for access to education and training, rights may be restricted in respect to study grants;
- iv) recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures;
- v) branches of social security (as defined in the Community legislation), rights may be restricted to third-country workers who are in employment except for unemployment benefits;
- vi) payment of acquired pensions when moving to a third country;
- vii) tax benefits;
- viii) access to goods and services and the supply of goods and services made available to the public including procedures for obtaining housing and the assistance afforded by employment offices, access to public housing might be restricted to those third-country nationals who have been staying or have the right to stay in the territory of member states for at least three years.

Moreover equal treatment principle with regard to working conditions, freedom of association and tax benefits may be restricted to those third-country workers who are in employment.

⁶ See for instance the 2007 European Parliament Resolution on the Policy Plan on Legal Migration (European Parliament 2007).

In total, the Proposal complements current Community legislation on the coordination of social security systems (including sickness and maternity benefits, invalidity benefits, old age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, unemployment benefits, family benefits and death grants). While the Regulation No 859/2003 (Council 2003) ensures that there will be no difference in treatment between a third-country national and a EU citizen when *moving* from one member state to another, the new legislation would provide an equal access to social security benefits for a third-country worker residing in *one* member state and as such would cover also those coming directly from a third country.

According to some estimates, broadening the scope of rights of third-country nationals, i.e. increasing the costs of labour force, could in turn lower demand for legal non-EU labour and give rise to shadow work. And it is at this point that the introduction of a single application procedure for a single work/residence permit foreseen in the same Proposal comes to play a crucial role in counteracting the effects that the former part of the Proposal may cause. By creating quicker and more efficient procedures, the scope of undeclared work may be reduced. Since only the component of the Proposal on a single application procedure will bring benefits and costs savings upon proper implementation, its joint submission with the part on a common set of right is understandable.

The existence of a 'rights gap' has been considered as a starting point for drafting the catalogue of areas where equal treatment between third-country workers and EU nationals should be guaranteed at the EU level. By reducing a 'rights gap', the Commission seeks to diminish 'unfair competition' originating in inferior treatment of third-country nationals. Furthermore, the introduction of a common set of rights would create a level playing field for all third-country workers, irrespective of the member state in which they stay (Commission 2007c: 3). The Commission warns that if member states act alone there is a risk of maintaining differences in treatment of third-country workers in different member states. This in turn, according to the Commission could lead to "(...)distortion of competition within the single market and can result in secondary movements of third-country nationals to those member states which grant more rights than others" (2007c: 7).

While the argument of narrowing the gap between rights granted to EU and third-country workers can be fully endorsed, the Commission does not explain sufficiently its concerns about 'rights shopping' across the European Union. It may be one of the very few instances where the Commission, rightly or wrongly, acknowledges that free movement of workers might be actually contrary to the principles of the single market. Even with the existing differentiation between scope of rights granted to migrants in different member states, the mobility of third-country nationals within the EU is neither a quantitatively significant phenomenon nor a politically contentious issue. At this point, the Commission is concerned more about the situation when one member state 'grants more rights than others' and not the opposite. And this is actually a 'rush to the bottom' in terms of immigrants' rights that have been observed recently across the European Union and that should be a major concern (see for instance recent policy changes in countries such as the Netherlands, France or Germany).

In the explanatory memorandum to the Proposal, the Commission claims that common action will ensure "(...)equal treatment in employment-related fields for workers admitted to the member States; and better integration of those workers" (Commission 2007c: 7). One can be quite sceptical about the source of such confidence, that it is the 'common action' that will contribute to reaching these objectives. Equal treatment can be provided only upon proper implementation of laws; integration of immigrants takes place at the very bottom level and as

such depends on the local administration and a plethora of (often) non-governmental organizations assisting migrants in this process.

In terms of promoting the 'equality principle', at least according to the Commission, "(...)Member States would have little incentive to adjust their policies to those of other Member States without the Community intervention". The Commission continued to stipulate that "(...)it is highly unlikely that Member States will introduce the principle of equal treatment for third-country workers without EU-level guidance and support" (Commission 2007a: 19-20). This is a very bold statement, based partially on the experience from previous migration-related initiatives. Basically, the Commission assumption means that no national government would increase the standards up to the European threshold without their counterparts in other states doing the same.

The European Commission perceives the Proposal as a 'freezing instrument' for harmonising the scope of rights across the EU. The Commission acknowledges that the prerogative to define the *content* of the rights remains as member states' competence. As a consequence, "rights granted to workers will further differ as no minimum rights are defined but equal treatment" (Commission 2007a: 32). Nevertheless, with member states having still the right to depart from this threshold, even the scope of rights will still differ across the EU. National governments can still guarantee higher standards for immigrants since the Proposal defines the *bottom* threshold of areas where the equality principle must be secured (see Articles 12 and 13). This may lead to the creation of higher standards in more foreign-labour hungry member states; a situation that the Commission is preoccupied about (as described above). Yet, with the possibility of exceptions to be applied by national governments during a transposition, the contrary could actually happen. Member states may eagerly use derogations they have been offered in the Proposal (Article 12(2)) since 'immigrants would come anyway'. To attract better qualified workers, a government will offer some 'extra' rights only to a selected category of workers (e.g. highly qualified immigrants). 'Regular' immigrants (i.e. those low skilled) may end up having the lowest possible status due to the implementation of all derogations. As a final effect, scope of rights granted to migrants will still differ across the EU and the existence of (at least) two categories of immigrants (i.e. low and highly skilled) will be codified in the Community legislation. Such a pessimistic scenario is naturally never mentioned in the impact assessment attached to the Proposal.

The list of areas covered under the equality principle makes an interesting comparison with the corresponding catalogue included in other EU migration policy-related documents. In general, in terms of its 'generosity', the scope of rights envisaged in the Proposal under scrutiny can be located somewhere midway among other Directives.

Simultaneously to this Proposal, the Commission issued a Proposal for a Directive on highly qualified migration regulating the rules for the access to the so-called EU Blue Cards (Commission 2007d). Different treatment between 'regular' workers and those highly qualified emerged from these two Proposals with a holder of a EU Blue Card enjoying an equal treatment with nationals also as regards to social assistance. Also the list of restrictions to the equal treatment principle that a member state may introduce is much shorter in the case of the draft on EU Blue Cards comparing to the Proposal for a Directive on Rights for Third-country Workers. Similarly to the above situation, the Directive on Long-term Residents (Council 2003b), included in the areas covered by the equality principle 'access to social assistance'.

In the 2005 Council Directive on the admission of researchers (Council 2005), the catalogue of areas where the equality principle should be guaranteed was (surprisingly) somewhat less generous. The legislators did not include three fields that are present in the

current Proposal under discussion, i.e. payment of acquired pensions when moving to a third country; education and vocational training; freedom of association. It is a remarkable finding since third-country researchers are considered a less 'contentious' category of immigrants than 'regular' third-country workers⁷.

The article on the equality principle included in the unsuccessful Proposal for the Directive on admission of economic migrants from 2001 (Commission 2001) covered a narrower scope of areas; it lacked 'payment of acquired pensions when moving to a third country', 'pay conditions' and 'access to education and study grants'. In legislation regulating the rights of family members of immigrants (Council 2003c), a list of areas covered by the principle of equality was much shorter and included merely: access to education and vocational guidance; initial and further training and retraining⁸.

In total, the existing Community legislation covering different categories of immigrants creates a patchy picture of third-country nationals' rights and in the end it establishes a system of differentiated treatment depending on the immigration status. In this context, Fintan Farrell, President of the Social Platform warned that "(...)the rights gap between artificially created categories of migrants will reinforce existing inequalities and discrimination in society"⁹. Also the European Parliament in its Resolution on the Policy Plan on Legal Migration recalled "(...)the need to avoid double standards of rights amongst different categories of workers and to safeguard particularly the rights of seasonal workers and paid trainees, who are more vulnerable to abuse" (European Parliament 2007). As a matter of fact neither of these two categories is included in the Proposal.

In the impact assessment to the Proposal, the Commission took also into account the legislative option in the form of a Directive focusing on the *commonalities* (Commission 2007b: 4-5). In this scenario, a directive would grant equal treatment in all employment-related fields *excluding* social security, the transfer of social security contributions and pensions and access to public services. Such a legislation would not change a status quo in terms of existing provisions in member states and as such would not contribute much to the improvement of immigrants' position in hosting societies. It is because 'rights gap' is most evident in these particular areas and without moving them under the 'equality principle' umbrella a Proposal would not provide any significant added value.

Choosing a more ambitious option, i.e. the one that includes equal treatment also in the fields of social security, etc. means some additional costs for some member states as their domestic schemes do not cover yet third-country workers. This implies an increase in the payment of social security benefits to third-country workers and in the expenditure on public services (Commission 2007b: 7). The Commission estimated the entire costs for the extension of equality principle on third-country workers across the entire European Union for nearly 5 billion Euros (see Table 1). This figure is not insignificant considering that cost savings and benefits owing to the introduction of a single stay/work permit will account for not more than half of that amount (i.e. estimated for between 1,19 and 2,37 billion Euros). On the other hand, the cost of an unsatisfactory integration of immigrants, very often caused by the limited scope

⁷ The adoption of the Directive on admission of researchers in the Council was a smooth and quick process. Nevertheless, only six Member States have properly implemented the Directive in their national legislation before the deadline for the transposition in October 2007.

⁸ Note that applicants' family members should be entitled to these rights, in the same way as the applicant, and *not* the EU national (Article 14).

⁹ Joint EU Council: Ministers stuck in a utilitarian approach on migration, Social Platform, 7 December 2007, <http://www.socialplatform.org/News.asp?news=15769>.

of rights, is significantly greater. Only in Germany, losses are estimated for 16 billion Euros per year (Fritschi and Jann 2008).

| | Administration costs | Implementation costs | Total additional expenditure |
|-----------------|----------------------|----------------------|------------------------------|
| Social security | 136.2 | 4,018.6 | 4,154.8 |
| Education | 11.7 | 573.2 | 584.9 |
| Health care | 5.1 | 176.7 | 181.8 |
| Housing | 0.1 | 3.6 | 3.6 |
| Total | 153.1 | 4,772.1 | 4,925.1 |

Table 1: Summary of the estimated additional administration and implementation costs in member states upon the adoption of the Directive, in million of Euros (Commission 2007a: 227).

The chances for the adoption: legal and political challenges

According to the established timetable, the Slovenian Presidency will seek to finish the reading of the Proposal at the expert level by June 2008, drawing up 'a list of issues that are simple and a list of issues that are problematic'. On such a basis, according to the Slovenian government, the forthcoming French Presidency 'will be able to start serious negotiations between the member states and the Parliament on possible final solutions'. To this end, finding the right set of rights has been considered as the main challenge of the Proposal¹⁰. Against this background, more than telling (if not promising) is the statement of Nicolas Sarkozy from January 2008 who declared that "(...)by the end of the French presidency, France wants Europe to have an immigration policy"¹¹.

Nevertheless even in the most optimistic scenario, it will be still a long way before the rules envisaged in the legislation would become reality. Considering that the Directive will be adopted in a 'regular' timeframe, deadline for the implementation of the provisions included in the Directive could be not earlier than 2011.

Owing to the current requirement of the unanimity in the Council, plethora of interests will need to be taken into account before the adoption of the Directive¹². In the Green Paper on an EU approach to managing economic migration, the Commission consulted stakeholders on what specific rights should be granted to third-country nationals residing temporarily in the EU and if the rights should be conditioned to a minimum stay (Commission 2004). The analysis of contributions submitted to the Paper informs that member states agree in general that some scope of basic rights, for instance as regards pay and working conditions or freedom of association, should be guaranteed to all economic migrants. The extended scope of rights must be differentiated depending on the length of stay. Such a system is already introduced in national policies and at least according to national governments the current framework is efficient and no further development of rights protection at the EU level is required. While member states remained sceptical about Community intervention in this area, other stakeholders, in particular human rights based NGOs, advocated for extending the scope of rights to all immigrants. In the opinion of the European Platform for Migrant Workers' Rights,

¹⁰ See EU Council Presidency Programme in the Area of Justice and Home Affairs; Priority tasks of the Slovenian Presidency in the field of Justice and Home Affairs Presentation of Dragutin Mate, Minister of the Interior of the Republic of Slovenia, to the LIBE Committee of the European Parliament, Brussels, 22 January 2008.

¹¹ New Year greetings to members of Parliament and the Paris Council – Speech by M. Nicolas Sarkozy, President of the Republic, available at: <http://www.ambafrance-uk.org/President-Sarkozy-s-New-Year.html>.

¹² By virtue of its special status in JHA related policies, Denmark will not participate in the adoption of the Directive. The United Kingdom and Ireland will have a possibility to opt out; since they are not bound by the Long-term Residents nor the Family Reunification Directives it is rather improbable that they will join the negotiations on the Proposal under scrutiny.

the EU should follow the call of the UN Secretary General Kofi Annan made during his speech to the European Parliament in January 2004 and develop its immigration initiatives on the basis of principles outlined in the International Convention on the Protection of the Rights of all Migrant Workers (European Platform for Migrant Workers' Rights 2005). In the Proposal, the Commission proposed a lower threshold of rights than that established in the International Convention. Against this background, the Commission will have to face a critique from both sides. On the one hand, human rights associations will again condemn the EU institutions for lowering standards. On the other hand, owing to the objections introduced already during the debate on the Green Paper, member states will refer to the subsidiarity principle and object the Community right to intervene in this field. And it is this latter concern on top of variety of domestic systems that will need to be bargained if the new law is to be adopted.

The 'generosity' in terms of rights granted to third-country workers varies significantly depending on areas and member states. To this end, in some cases disparity between national systems reaches a significant scale. It is very low in the case of working conditions, low in the sphere of education, fair in the access to social security but high as for the possibility of transfer of pension saving and restitution of security benefits and access to public services (Commission 2007a: 225). Similarly, variety of systems exists in terms of the presence of combined stay/work permit in domestic policies and the scope of coverage of 'equality principle'. The table below shows how different interests and starting positions of national governments will need to be taken into account if a unanimity among all of them is to be reached.

| | | Extension of third-country workers rights | |
|---|-----------------|--|---|
| | | Already present | Need for change |
| Existence of a single application procedure | Already present | Estonia, Greece, Spain, Luxembourg, Poland, Portugal | Germany, France, Italy, Cyprus, the Netherlands, Finland, Sweden |
| | Need for change | Ireland, Romania, Slovenia, Slovakia | Austria, Bulgaria, Belgium, Czech Republic, Latvia, Lithuania, United Kingdom |

Table 2: Division of member states depending on possible financial impact of the Directive (Commission 2007a: 67-68).

Interestingly enough, the recent changes introduced in the Treaty of Lisbon may turn the entire process of a decision-making upside-down. The new Article 79 calls the European Union to "(...)develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, and fair treatment of third-country nationals residing legally in Member States (...)". To this end, the new Treaty reiterated the already existing provision of the current Treaty on the introduction of the common conditions of entry and residence of immigrants (Article 79 2a). The EU will also adopt "the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States" (Article 79 2b)¹³. The above paragraph explicitly refers to the establishment of the definition of the rights of not only long-term residents (as it is drafted in the current version of the Treaty) but also those third-country workers without that status. In this respect, it is also this paragraph (and not only Article 79 2a)

¹³ Another new paragraph of the revised Treaty refers to the newly established EU framework for integration of immigrants: "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States" (Article 79(4)). Furthermore the Lisbon Treaty enables the European Council to decide and transfer over to the qualified majority in a certain number of areas including terms of employment of third-country citizens who are working legally within the Union.

that could stand as the Treaty basis, should a Proposal for a Directive on rights of third-country workers be submitted *after* the ratification of the new Treaty.

Furthermore, the Lisbon Treaty provides also for a completely revised procedure for the adoption of a directive in legal immigration matters. The European Parliament and the Council will act in accordance with the 'ordinary legislative procedure' (i.e. co-decision). Not only the position of the European Parliament is going to be strengthened significantly but the adoption of a proposal will require qualified majority. This means a completely new paradigm for a decision-making whereby the entire process cannot be spoiled anymore by one member state and governments will need to take the opinion of the European Parliament on board. In theory, it could mean more immigrant-friendly policy with the European Parliament being more liberal in this respect and with the decision-making procedure within the Council that does not lead towards the lowest common denominator (as it was the case with most immigration-related Directives adopted under the unanimity procedure).

There is still however a long path before this more optimistic scenario may become a reality. The Treaty has not been ratified yet and will not be before the end of 2008 (with at least one referendum in Ireland). If one considers that the Council will need at least two years for the adoption of the Directive¹⁴, the later stage of the decision-making process will overlap with the introduction of the new Treaty. It is still to be seen how that will influence the entire EU immigration policy-making machinery but depending on the progress, the Commission may consider submitting an amendment proposal under the new Treaty provisions following the forthcoming Parliament's resolution on the Proposal and ongoing negotiations in the Council¹⁵. Even under the new procedures, it still goes without saying that immigration portfolio is extremely difficult to be agreed among member states. Co-decision procedure means that should the Parliament and the Council completely disagree on the Directive provisions, the Proposal may be rejected causing it to fall. Under the new Treaty provisions, adoption of the Directive could also be hindered due to the reinforced control mechanism of subsidiarity (i.e. if a proposal is contested by a simple majority of the votes allocated to national parliaments, the Commission will need to review the draft, which it may decide to maintain, amend or withdraw).

Back in 1997, several NGOs and scholars criticised the choice of member states to keep legal immigration matters under the unanimity procedure. Would 'qualified majority voting' (QMV) change much? It is clear from the Table 2 that some countries may find it particularly difficult to accept provisions envisaged by the Commission. For states such as Germany, France, Italy, the Netherlands, Finland and Sweden, the application of the Directive will bring no (financial nor administrative) profits but rather additional costs for they have already introduced a single application procedure but they would need to extend rights of third-country workers on areas hitherto not taken into account. Unfortunately (for the success of the decision-making), countries that are in this particular position have been the most influential

¹⁴ The situation whereby Member States would like to have the Directive adopted without much involvement of the European Parliament would require almost record breaking fast negotiations (to be finished by the end of 2008) and as such is rather an impossible task. Two years passed between the first meeting of the Council's Working Party and the political agreement in the case of the Long-term Resident Directive (2001-2003). To agree on the Family Reunification Directive, the Council needed over three years (2000-2003).

¹⁵ Such a step could be probably warmly received by Lilli Gruber, the European Parliament's rapporteur for the Policy Plan on Legal Migration. Discussing priorities of EU immigration policy, she welcomed the Proposal for the Directive but wanted it to come under the co-decision procedure (giving the Parliament a greater say), without a veto in the Council, see: Press Release, Parliament adopts priorities on legal and illegal immigration policies, 26 September 2007, available at http://www.europarl.europa.eu/news/expert/infopress_page/018-10644-267-09-39-902-20070823IPR09787-24-09-2007-2007-false/default_en.htm.

during negotiations on the so far adopted immigration-related Directives. Technically speaking from the perspective of the QMV, their combined weight of votes in the Council (at least until 2014 when the new rules are going to be introduced) accounts for around 37 per cent. It would be still more than enough to block the decision-making with the rule for the required majority of 74 per cent in the Council.

While nationals from states that joined the European Union in 2004 and 2007 are still facing restrictions in the access to labour markets in some Western European countries, one final point deserves to be made about what position might be taken by new member states during negotiations. Back in 2005 when the debate on the EU approach to economic migration took place, the governments from these states declared that lifting up transitional measures was pre-requirement to the further debate on common measures related to third-country workers. Nevertheless, the situation in 2008, with significant outward migration from Poland, Slovakia or Baltic states, differs significantly. It may be the case that new member states will be more supportive towards the introduction of a common system, even with the transitional periods being still applied (at least in Germany and Austria).

Concluding remarks

After the failure in adopting a far-reaching and ambitious project of the Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment (European Commission 2001), the European Commission decided to issue in 2007 the Proposal representing the minimum, yet the most feasible scenario. However, as presented above, the adoption of a directive might be more than troublesome; as various interests will need to be considered and the process of negotiations will overlap with the introduction of the new institutional setting of the decision-making. In this context, a cautious position of member states is understandable. A directive would have a significant impact on domestic immigration policies, administrative procedures and immigrants' dependence on national welfare states. With a new legislation being agreed, there will be no possibility to return to the *status quo ante*. Undoubtedly, a debate on the Proposal will raise difficult questions about the limits of the European integration and the scope of immigrants' rights codified in the EU law.

Institutional and political constraints aside, the adoption of the Directive based on high standards may enhance the integration of immigrants. Considering that immigrants serve indeed 'the most dramatic case of rights in general' (Joppke 2001, 359), how the European Union ensures a fair treatment of third-country nationals may be perceived as a good indicator of the genuine character of the EU values and goals. During the negotiations on the Family Reunification and Long-term Residents Directives (Council 2003b and 2003c), the rules envisaged in the Commission's drafts were watered down by domestic delegations unfavourable to more liberal policies regarding immigrants and to a wide scope of the EU intervention into this politically sensitive field. Negotiators inserted several derogations, introduced new restrictions and limited the initial proposals in a manner that gave national governments even greater flexibility during the implementation of the EU directives. Now in 2008, in what is turning out to be the most relevant EU directive for third-country workers, the ongoing negotiations (and as a consequence their output) may suffer from the *déjà vu* effect. In a less optimistic scenario, a debate on the Proposal may offer a platform for more conservative voices and the entire debate might be jeopardised by anti-EU and anti-immigrant stakeholders. In order to avoid such a situation, a coalition of domestic and Brussels-based stakeholders, campaigning for a sound EU policy for immigrants, is a must. However, it would not be an easy task; in a very unfortunate turn of events, the Council decided to conceal minutes from its negotiation proceedings on the Proposal. We are again left misinformed about what happens behind the closed and gilded doors of the Council.

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