



## **ETUC position regarding European Commission's proposals on legal and 'illegal' migration**

Adopted by the ETUC Executive Committee, 6 December 2007

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### **1. Introduction**

- 1) This position builds on previous ETUC resolutions and positions on this issue, adopted since its Prague congress 2003<sup>1</sup> and especially chapter 2 of the Action plan as adopted at its congress in Seville in May 2007<sup>2</sup>.
- 2) In 2004, the Council of Ministers adopted the so called 'The Hague programme' on legal and illegal migration, and asked the Commission to present a policy plan on legal migration. The Commission started a consultation process with the Green Paper on economic migration<sup>3</sup>, to which the ETUC contributed with an extensive response in March 2005. The Commission came up with a Communication on a Policy Plan for legal migration in December 2005<sup>4</sup>, which foresaw the adoption of five legislative proposals on labour immigration. This approach aimed at laying down admission conditions for specific categories of migrants (highly qualified workers, seasonal workers, remunerated trainees and intra-corporate transferees) on the one hand, and securing the legal status of already admitted third-country workers and introducing procedural simplifications for the applicants on the other hand.

This new approach must be understood against the background of the previous initiative of the Commission, in 2001, to come up with a comprehensive horizontal draft Directive, dealing with a general framework for admission of migrants for employment and the rights those migrants would enjoy.

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<sup>1</sup> - Action Plan October 2003 <http://www.etuc.org/a/1944>

- ETUC response Green Paper economic migration March 2005, <http://www.etuc.org/a/1159>

Transitional measures December 2005, <http://www.etuc.org/a/1898>

- joint position ETUC, Solidar and Picum spring 2007, <http://www.etuc.org/a/4325>

<sup>2</sup> Congress document Seville, <http://www.etuc.org/a/3971>

<sup>3</sup> COM (2004) 811 final [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=192439](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=192439)

<sup>4</sup> COM (2005) 669 final [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=193722](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=193722)

This initiative, broadly supported by the European Parliament and the ETUC as well as civil society, failed to get support of Member States in the Council of Ministers, and was eventually withdrawn by the Commission.

- 3) In July 2006, the Commission presented a Communication on Policy priorities in the fight against illegal immigration of third country nationals<sup>5</sup> (TCN's), and suggested to reduce the 'pull factors' that encourage illegal immigration into the EU, the most important one being the possibility of finding work, by ensuring that Member States (MS's) introduce similar penalties for employers of such TCN's and enforce them effectively. The European Council endorsed this suggestion in December 2006, and invited the Commission to present proposals.

- 4) On 16 May 2007, the Commission presented a draft *Directive of the European Parliament and the Council, providing for sanctions against employers of illegally staying third-country nationals*<sup>6</sup> (further: '**Employers' sanctions Directive**').

Also on 16 May 2007, the Commission presented its *Communication on Circular migration and mobility partnerships between the EU and third countries*<sup>7</sup> (further: '**Communication on circular migration**').

On 23 October 2007, the Commission presented two draft Directives: The draft *Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment*<sup>8</sup> (further: '**Blue card Directive**'), and the Draft *Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State, and on a common set of rights for third-country workers legally residing in a Member State*<sup>9</sup> (further: '**Rights Directive**').

- 5) This position sets out key elements for ETUC's response to these various initiatives, where possible explicitly linked to specific paragraphs of the ETUC Congress document adopted in Seville in May 2007, which will allow ETUC to take active part in the legislative process with more detailed contributions and amendments, and which offers ETUC affiliates as well as third parties a single document for reference.

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<sup>5</sup> COM (2006) 402 final [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=194507](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=194507)

<sup>6</sup> COM (2007) 249 final [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=195730](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=195730)

<sup>7</sup> COM (2007) 248 final [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=195729](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=195729)

<sup>8</sup> COM (2007) 637 final [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=196320](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=196320)

<sup>9</sup> COM (2007) 638 final [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=196321](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=196321)

## **2. ETUC's commitment**

In its Action plan adopted at the Seville Congress of May 2007, the ETUC demanded a more proactive policy on economic migration and more investment in integration (chapter 2, paragraphs 2.41 to 2.52).

Summarized:

- a) There is an urgent need for policies with regard to migration and integration at EU level, based on the recognition of fundamental social rights of current citizens as well as newcomers and embedded in strong employment and development policies, both in countries of origin and in countries of destination. A common framework of EU rules on admission for employment is urgently needed. However, this framework should not be aimed unilaterally at the demand for temporary migration, as this would favour precarious jobs and hinder sustainable integration.
- b) The EU must develop a more proactive migration policy, geared towards 'managing' and not preventing mobility and migration for employment, that combines strong integration efforts with making employers and public authorities respect and enforce labour standards. This should offer old and new groups of migrant and ethnic minorities equal rights and opportunities in our societies, while promoting social cohesion.
- c) This policy must be based on a clear framework of rights as established by international UN and ILO conventions and Council of Europe instruments, and be developed in close consultation with social partners at all relevant levels.
- d) Labour market shortages should be primarily addressed by investing in the capacities and qualifications of unemployed and underemployed EU citizens (including those from a migrant or ethnic minority background) as well as long term resident third country nationals and refugees.
- e) In addition, possibilities should be created for the admission of economic migrants, by providing for a common EU framework for the conditions of entry and residence, based on a clear consensus between public authorities and social partners about real labour market needs, preventing a two-tier migration policy that favours and facilitates migration of the highly skilled while denying access and rights to semi- and lower skilled workers.

- f) Such policy should prevent the increasingly negative effects of the global competition for skilled labour: the potential devastating effects of the brain drain and youth drain on countries of origin, as well as the potential "brain waste" in terms of the underutilisation of skills and qualifications of migrants in the countries of destination.
- g) More proactive policies should also be developed to combat labour exploitation, especially of irregular migrants, demanding recognition and respect of their trade union and other human rights, and providing them with bridges out of irregularity. While there is a need to be tough on employers using exploitative employment conditions, more effective policies should be developed to prevent and remedy such exploitative situations.
- h) This must be linked to external (trade, development) policies that promote raising living standards and opportunities in sending countries, which would offer (potential) migrant workers and their families proper job opportunities at home. Cooperation and partnership with third countries, in particular developing countries and the European neighbourhood countries, should be strengthened.
- i) ETUC and affiliates will address employers and their organisations at national and EU level to explore ways to deal with economic migration and integration in social dialogue at all appropriate levels, recognizing the strong employment and labour market dimension of these issues.
- j) ETUC and its affiliates will develop policies and strategies to organise migrant workers, defend and promote their trade union rights and other human rights (whatever their legal status), develop strategies to incorporate the situation and demands of migrant workers into trade union work and integrate them in the structures of trade union organisations, prevent and combat exploitation, and improve their living and working conditions. ETUC and affiliates should also strengthen their cooperation with trade unions in sending countries.

Based on this programme of action, the ETUC Congress adopted the following action points:

- Work towards a more proactive Europe migration policy geared towards managing not preventing migration, combined with strong integration efforts and the enforcement of human rights, labour standards to combat the exploitation, especially of irregular migrants.

- Intensify actions and campaigns both at European and at national level in favour of ratification and application of all conventions and important instruments of the ILO, UN and Council of Europe conventions on the protection of the rights of all migrant workers and their families.
- Support policies that recognize the fundamental social rights of all workers and which favour social cohesion by preventing the creation of two-speed migration channels and the exploitation of workers in irregular administrative situations and the recruitment of migrants in precarious working and social protection conditions.
- Combat all forms of human trafficking.

ETUC's response to the various recent initiatives of the Commission in the area of migration is based on the commitment and programme of action as adopted by its Congress.

### **3. General comments**

#### **A. A piecemeal approach may lead to a two-tier migration policy, with less or no rights for lower skilled migrants**

Already in 2005, on the occasion of the consultation of the Commission's Green Paper on economic migration, the ETUC acknowledged the Commission's view that a successful Community policy in the area of economic migration can only be put in place progressively, taking into account the fact that the access of third country nationals to EU labour markets is a highly complex and sensitive issue.

EU legislation on the admission of economic migrants should therefore be conceived as a 'first step legislation', laying down certain common definitions, criteria and procedures, while leaving to the Member States to respond to the specific needs of their labour markets and to determine the volumes of admission of persons.

At the same time, it cannot be denied that there is growing interdependence between Member States with regard to decisions taken in the area of immigration, which call for more harmonization at EU-level. First of all, because of the already existing mobility of workers and services. Further harmonisation, not only of immigration law, but also regarding minimum working conditions and equal treatment in situations of cross border working, is necessary to bring about a European internal labour market, and to prevent social dumping.

Secondly, national policies with regard to asylum and with regard to the entrance of certain groups of migrant workers (such as high skilled workers) are already having an impact on the labour markets of other Member States, because of regulations with regard to mobility of long term third country nationals, the right to deliver services in other MS's, and the general impact of admission of TCN's on the European labour market.

Thirdly, the increased competition between industrialised countries on the global labour market for workers with high skills or scarce professions demands European coordination to provide a sustainable framework, that would benefit EU Member States as well as the workers concerned and their countries of origin.

In this context, the ETUC has always been in favour of taking a horizontal approach, along the lines of the original draft Directive of 2001, rather than coming up with a series of sectoral proposals.

One important argument against a sectoral approach is that this would increase the divergence in rights for several groups of workers and may contribute to a two-tier migration policy with less or no rights and protection for the lower skilled and low paid migrants. In ETUC's view, European migration legislation should cover all third country nationals, without general preferences or privileges.<sup>10</sup>

The ETUC understands the difficulties for the European Commission to adopt again a horizontal approach, taking into account the reluctance of many Member States to cooperate and legislate in the area of legal migration. The ETUC therefore sees the initiatives of the Commission to propose a Directive on admission for high skilled workers, accompanied by a proposal for a general framework Directive on rights for all third country nationals that are legally residing in an EU Member State, as positive steps in the right direction.

On the other hand, the ETUC has major problems with the fact that these proposals are preceded by a draft Directive on sanctions for employers employing irregular migrants (mostly occurring in the low skilled and low waged segments of labour markets and sectors), whereas in the legislative programme of the Commission there is little or no initiative to offer legal channels for migration for medium or lower skilled labour, except for the announced initiative on seasonal workers. Without such legal channels, sanctions for employers employing irregular migrants may not only turn out to remain largely ineffective, but may also lead to further repression, victimisation and exploitation of irregular migrant workers (see explanation below).

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<sup>10</sup> except for a possible preferential treatment of citizens of neighbouring countries on the basis of the EU neighbourhood policies, and preferential treatment based on bilateral agreements that are often based on historical links between host country and country of origin.

## **B. Inadequate legislative process and insufficient consultation of social partners**

The EU is still suffering from very inconsistent and inadequate legislative procedures when it comes to legal and illegal migration, which may lead to a very unsatisfactory process of decision making.

According to the current EU Treaties, in the area of illegal migration legislation can be adopted in co-decision with the European Parliament, and qualified majority voting in the Council. When it comes to legal migration however, the procedure is only consultation of the European Parliament and unanimity voting in the Council. Co-decision and qualified majority voting will be extended to the whole area of migration policy only if and when the Reform Treaty is ratified by all Member States.

However, even then there will still be Member States that have a special position with regard to the Justice, liberty and security chapter, as they have negotiated the possibility to 'opt in' (or not) every time a legislative initiative is taken (UK and Ireland) or have opted out altogether (Denmark). In this context, the ETUC is wondering how successful the current proposals can be.

On many occasions the ETUC has stressed the need for strong social partner consultation and involvement on any EU initiatives taken in the area of economic migration, i.e. migration for employment.

The current realities and patterns of mobility and migration already have an enormous impact on labour markets and industrial relations. New migration policies and strategies should be more closely linked to and embedded in employment and labour market policies. Social partners at all relevant levels (local, sectoral, national and European) are often best placed to assess and address labour market needs and promoting consensus between public authorities and labour market actors on the policies and instruments to be adopted.

The legal framework for decision making on migration at EU level does not explicitly foresee consultation of the European social partners. The ETUC however insists that the Commission and the Council recognize the social policy dimension of economic migration, and establish adequate procedures and practices for consultation of the European social partners in the legislative process.

## **4. Summary of conclusions**

In Annexes A-D more detailed comments can be found on the various initiatives.

### A. With regard to the Employers' sanctions Directive:

Irregular migration is a complex phenomenon, and employment one of many pull factors. An adequate response requires a wide range of measures and policies, addressing undeclared work and precarisation of work and the need to open up more channels for legal migration.

The ETUC has some strong concerns about the draft Directive, especially when put in place in the current context in which very limited legal channels for migration of TCN's in low skilled and low paid jobs exist in MS's, and little or no emphasis is placed on combating exploitative labour conditions. Taking into account that employers' organisations have especially complained about all the elements of the proposal that might allow it to have some real effect in practice, there is a great risk that especially those elements will be weakened or deleted in the course of the legislative process. This may have the effect of the Directive becoming a toothless instrument that will mostly drive the undocumented workers further underground. The ETUC calls on MS's and the EP to prevent this happening at all costs.

### B. With regard to the Circular Migration Communication:

In ETUC's view, the idea of circular migration must be carefully explored, and should certainly not replace more comprehensive policies in which more permanent legal channels for economic migration are also made available. Tackling brain drain and promoting ethical recruitment and a constructive policy of 'brain-exchange' should be part of such approach. However, in the context of such broader policies, measures that allow migrants more flexibility to move between their country of origin and country of residence without losing their immigration status and rights can be a positive incentive for migrants to explore the opportunities in their country of origin, and may thereby make a positive (although modest) contribution to alleviating the brain drain.

### C With regard to the Rights Directive:

This proposal is certainly the most important one in the package, and is as such highly valued by ETUC. We welcome the fact that the Commission clearly understands the need for a clear and unambiguous legal framework offering equal treatment to migrant workers, as has been demanded on many occasions by ETUC.



The ETUC agrees with the European Parliament<sup>11</sup> that this Directive should be submitted (and adopted) in advance of the specific Directives that will regulate the access of specific groups of migrants, and that different sets of rights and double standards for different groups of workers should be avoided.

D. With regard to the Blue Card Directive:

The global social responsibility for preventing brain drain is an area where a coordinated EU policy on high skilled migration would be very welcome, to prevent MS's competing with each other for skilled workers at the expense of countries of origin. ETUC would like to see more obligatory mechanisms and measures to prevent unethical and aggressive recruitment, and wants to emphasize the important role social partners can play in the development of such measures.

The 'Blue Card' initiative must not lower standards among workers already in Europe, or stop investment in their training. Also jobs in sectors where there are shortages will have to be made more attractive to the locally unemployed in terms of wages and working conditions. The Blue Card initiative must not replace policies and incentives to invest more in the currently unemployed, migrants, and women to enter higher skilled jobs.

This Directive is the first one in a series of announced proposals that would harmonise conditions for admission to the EU. The Commission has chosen a group of migrant workers that according to most MS's is very welcome to fill their high skilled labour market shortages. While the proposal has several weaknesses, it provides a starting place for discussion and debate on how to develop more legal channels for migration. The ETUC will therefore carefully study the Commission's proposals, and work closely with the European Institutions to improve them where necessary. We will also discuss these questions with European employers' organisations.

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<sup>11</sup> Report on the Policy Plan on Legal Migration, rapporteur Lilli Gruber, 17.9.2007, Final A6-0322/2007



## **ANNEXES**

### **ETUC's position regarding the various Commission initiatives**

#### **A. Employers' sanctions Directive**

##### **Summary of the proposed Directive**

On 16 May 2007, the Commission presented a draft Directive, providing for sanctions against employers of illegally staying third-country nationals.

The proposal is based on Article 63(3)b of the EC Treaty, which gives the EU competence to reduce illegal immigration to the EU. This (narrow) legal basis explains why, according to the explanatory memorandum, the proposal is concerned with immigration policy and not with labour or social policy. It also explains why the proposal does not cover TCN's who are legally staying in the EU but are working in violation of their residence status (such as students and tourists), nor covers labour exploitation of migrants who have the required residence and work permits or of EU citizens who are working in spite of restrictions based on transitional arrangements for the free movement of workers. The proposal also does not cover TCN's when working as posted workers.

The proposal takes as a starting point that a major factor that encourages illegal immigration is the possibility for illegal migrants to find work, and that therefore measures should be taken to reduce that pull factor.

The aim is to ensure that all MS's introduce similar penalties for employers of illegally staying TCN's and enforce them effectively.

Key elements of the proposal:

- the definition of employer covers both natural and legal persons employing others, both in the course of business activities and as private households (for instance care-takers and cleaners);
- the central provision is a general prohibition on the employment of TCN's who do not have the right to be resident in the EU;
- employers are required to check the residence status of a TCN before recruitment, and – when a business or legal person – are required to notify the competent national authorities. If they have carried out these obligations, they are not liable to sanctions;

- they are not liable in the event that the worker shows forged documents, unless these documents are manifestly incorrect;
- sanctions consist of fines, and the cost of return of the TCN
- the TCN would not be subject to sanctions on the basis of this Directive; however, on the basis of a separate draft Directive<sup>12</sup>, MS's would be required to issue a return decision to any illegally staying TCN;
- employers would be required to pay any outstanding remuneration and taxes and social security contributions; a work relationship of 6 months shall be presumed unless the employer can prove differently; MS's will have to ensure that TCN's also receive this back-pay when they have already left the country;
- in addition, business employers can be disqualified from public benefits, subsidies and public procurement;
- in case of subcontracting, the main contractor is jointly and severally liable with the subcontractor for sanctions and back pay;
- there will be criminal penalties for serious infringements, including 'particularly exploitative working conditions' (such as a 'significant difference in working conditions from those enjoyed by legally employed workers') and where the employer knows the worker is victim of human trafficking;
- TCN's should be given opportunities to lodge complaints directly or through third parties such as trade unions and NGO's, which should be protected against sanctions for supporting illegal immigrants;
- in case of particularly exploitative working conditions and criminal proceedings, the workers should receive a temporary residence permit to allow them to appear as witnesses in court, and their return should be postponed until they have received their back pay;
- MS's would be required to inspect at least 10 % of companies established on their territory per year.

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<sup>12</sup> COM (2005) 391 [http://ec.europa.eu/prelex/detail\\_dossier\\_real.cfm?CL=en&DosId=193255](http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=193255)

## **ETUC's position**

### **(ETUC Congress document Par. 2.49)**

*"More proactive policies should also be developed to combat labour exploitation, especially of irregular migrants, demanding recognition and respect of their trade union and other human rights, and providing them with bridges out of irregularity. While there is a need to be tough on employers using exploitative employment conditions, more effective policies should be developed to prevent and remedy such exploitative situations. Providing for a legal space in which irregular workers can complain about exploitative working conditions without immediately being threatened by expulsion, separating labour inspection from inspection on immigration status, recognising that labour rights and human rights can and do exist and should be dealt with independently from having the right documents in place, introducing chain responsibility of main contractors using agencies and subcontractors that do not respect minimum labour and human rights, are useful instruments that can be promoted by the EU."*

In its letter of 2 May 2007 to Commissioners Frattini and Spidla, accompanying the joint statement of ETUC, Solidar and PICUM about the expected initiative of the Commission, the ETUC stated among other things that it is an illusion that EU MS's can solve the problem of irregular migration by closing their borders and implementing repressive measures. Instead, the protection of human rights and enforcement of labour standards for migrant workers - whatever their nationality or legal status - should be the top priority. Any measures to be taken should be part of a more proactive migration policy, put pressure on employers and their organisations at national and European level to show a more unambiguous commitment to the enforcement of labour standards, and should be developed in close consultation and cooperation with social partners at all relevant levels. In addition, any measures should also include proposals to protect victims and reward their cooperation in combating labour exploitation, in order to promote a virtual process of diminishing incentives for irregular employment and to denounce the current vicious circle of invisibility, silence, blackmailing and complicity.

The current proposal clearly falls short on the above mentioned aspects. The aim of the proposal is **not** to combat labour exploitation but to tackle illegal employment of migrants without permit to stay. The Directive is proposed in advance of any proposal to open up legal channels for migration for medium or lower skilled migrants, and social partners have not been properly consulted. The ETUC therefore has serious doubts about whether the proposed instrument is the right one, proposed at the right moment in time, and in the right order of legislative proposals.

In this context, the ETUC is very concerned that it may have as its main effect the victimisation of migrant workers whatever their legal status.

Problematic aspects of the proposal:

- a) in the view of the ETUC, the issue of 'illegal employment of irregular migrants' is a complex issue to which there are no easy answers. It is not just an issue for DG Justice, Liberty and Security but also for DG Employment, as it has a strong connection to the functioning of labour markets and to undeclared work in general, and cannot be solved by focusing only on sanctions for employers; the Directive seems to assume that the submerged economy is functioning separately from the normal economy, and can be eradicated by administrative and penal sanctions; however, extensive evidence shows the close connection between the two, and also the existence of a considerable 'grey area'; in this regard, the inclusion of private parties employing irregular migrants in households may be particularly problematic, taking into account that until today proper policies to address undeclared work in domestic services, offering the tens of thousands of mostly female and often migrant workers doing domestic work some legal status and employment protection, are totally absent<sup>13</sup>;
- b) in practice, enforcement of the measures may turn out to be very difficult; the sanctions may have a deterrent effect on the relatively 'nice' employers, but may make the 'nasty' ones even nastier, with desperate undocumented workers driven even further underground (this effect is recognized in the impact assessment, where it says that the Directive may be an incentive for more trafficking!);
- c) the Directive may contribute to a negative 'profiling' of migrant workers in general, with more discrimination and xenophobia as a result; the obligation to check documents will lead 'foreign looking people' being singled out for checking (as experience in the USA has shown);
- d) without creating at the same time legal channels for migration and bridges out of irregularity (such as forms of regularisation etc.) those undocumented workers who need employment most to survive will turn to sectors with the most dangerous forms of work in terms of health and safety and rogue employers (as experience with the British Gangmasters Act has shown).

To prevent the draft Directive to have adverse effects, at least the following elements will have to be addressed and amended:

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<sup>13</sup> ETUC has addressed this issue also in its recent response to the Commission's consultation on Reconciliation of work and family life, ETUC website [www.etuc.org/a/3178](http://www.etuc.org/a/3178) and [www/etuc.org/a/3910](http://www/etuc.org/a/3910)

- 1) With regard to the scope of the Directive:  
the fact that it does not cover legally resident migrants, nor EU citizens, nor TCN workers when posted is due to the limited legal basis, but will lead to major problems. What to do when legal migrants or workers from for instance the new MS's that are still confronted with transitional restrictions are exploited? Will they be in a less favourable position than irregular TCN workers? What about the exclusion for posted workers? Will this not make subcontracting and hiring via agencies even more attractive? And the joint and several liability that is proposed an illusory measure? One issue to address is therefore the question of a wider legal basis and/or an additional initiative that would allow to also tackle labour exploitation of EU citizens and posted workers.
- 2) The proposal aims to establish a minimum level of sanctions and enforcement, to prevent distortion of competition and 'secondary movements' of illegally staying TCN's to MS's with lower levels of sanctions. However, in the absence of European policies on regularisation, this objective may run counter to national policies addressing irregular migration with different instruments, such as offering employers and/or workers grace periods to correct administrative faults, or regularisation programmes. Such national approaches must explicitly remain possible, and therefore the Directive should contain a clause that it is 'without prejudice to national measures more favourable to workers';
- 3) The definitions of employer and subcontractor are not very clear, and especially raise questions as to how temporary agencies would be included. This is particularly problematic as in practice irregular migrants are increasingly employed via intermediaries including temporary agencies.

They should therefore be included in the definition of subcontractor, or a separate definition should be added, to ensure that they are covered by the provision on joint and several liability of subcontractors and main contractors.

- 4) The draft Directive obliges MS's to inspect at least 10 % of companies established on their territory to control illegal employment. In ETUC's view, this is a very problematic obligation. On several occasions we have argued that it is important to separate the tasks of the labour inspection regarding protection of workers and their working conditions from the tasks of immigration inspection. Currently, for most undocumented migrants, the labour inspection is just another guise of the police that is chasing them to expel them from the country.

The setting of targets in the current situation, in which the budgets for labour inspection are reduced in many countries, will inevitably lead to less worker-oriented activity, and more immigration policing activity, and will be counterproductive in terms of combating labour exploitation.

The Directive also contains several positive elements but also these provisions can be improved:

- 1) The fact that a 6-month employment is presumed and the worker, when caught, will have to get back pay for this period can be seen as at least some kind of 'damage control' in the interest of the worker.

However, why only let him/her stay in the country until the money is paid when the employer is sued for a criminal offence?

Furthermore, it is questionable why the employer would have to pay the costs of return of the worker to his/her country of origin.

This seems to shift the responsibility for such things from the state to private parties. In our view, the employer should only be held liable for such costs when he has been involved in recruiting the worker illegally. On the other hand, it is in our view only logical to take away from the employer *any illegal profit* that he has had by employing the worker on an irregular basis. This would mean that it is not minimum wages but 'comparable wages' with similar legal workers, as well as all other benefits that the worker should have received, that has to be the basis for the back pay obligation.

In this context, the ETUC welcomes the definition of 'exploitation' given in the Directive, being when there is "a significant difference in pay or in working conditions, particularly those affecting workers' health and safety, from those enjoyed by legally employed workers" However, it must be without any doubt that the worker for instance can claim any damages when there is a work related accident.

More in general, it is our view that the worker's rights based on the employment contract should remain valid, even if the worker does not have the right to reside or work on the territory. This should be clarified in the Directive.

- 2) As mentioned above, the introduction of joint and several liability for subcontractors and main contractors is a key element of the proposal, without which it will be a toothless instrument. It is therefore of particular importance to ensure that all kinds of intermediaries and especially temporary agencies will be covered by this provision.



- 3) The ETUC highly values the obligation for MS's to provide effective mechanisms for complaints, and the prohibition to impose sanctions to third parties such as trade unions who assist TCN's in their complaints.
- 4) Effective sanctions are a key element, and the ETUC therefore especially welcomes the proposal to exclude businesses from public benefits, aid or subsidies, and participation in public contracts. A temporary or permanent closure of the establishment may be a measure that goes beyond what is reasonable, especially when the employment of legally employed workers is involved, and cannot be taken in our view without consultation of workers and their representatives in the business concerned.

Criminal sanctions may be justified when the employer is deliberately exploiting workers or can be held responsible for gross negligence. However, as 'intentions' are very difficult to prove, we suggest taking the approach that the employer can be sued when *he knew or could have known* (for instance) that the worker was a victim of trafficking.

To conclude:

Irregular migration is a complex phenomenon, and employment one of many pull factors. An adequate response requires a wide range of measures and policies, addressing undeclared work and precarisation of work and the need to open up more channels for legal migration.

The ETUC has some strong concerns about the draft Directive, especially when put in place in the current context in which very limited legal channels for migration of TCN's in low skilled and low paid jobs exist in MS's, and little or no emphasis is placed on combating exploitative labour conditions. Taking into account that employers' organisations have especially complained about all the elements of the proposal that might allow it to have some real effect in practice, there is a great risk that especially those elements will be weakened or deleted in the course of the legislative process. This may have the effect of the Directive becoming a toothless instrument that will mostly drive undocumented workers further underground. The ETUC calls on MS's and the EP to prevent this happening at all costs.

## **B. Communication on circular migration**

**(ETUC Congress document Par. 2.41)** .....A common framework of EU rules for admission is urgently needed. However, this framework should not be aimed unilaterally at the demand for temporary migration, as this would favour precarious jobs and hinder sustainable integration.

In the context of this position, the ETUC will only comment on the part of the document regarding circular migration, because of its clear connection to the proposed Blue Card Directive. In a separate position to be developed in the near future the ETUC intends to go further into detail with regard to the various aspects related to migration and development, and the possible role of mobility partnerships and EU mobility centres in countries of origin.

### **Summary of the Communication**

With its communication the Commission aims to start a discussion on 'circular migration' as a new alternative to illegal migration on the one hand and permanent migration on the other. Circular migration is defined as a form of migration that allows some degree of legal mobility back and forth between two countries. On the one hand, TCN's that are settled in the EU could be given the opportunity to go back temporarily to their country of origin to set up a business or for professional or voluntary activity, without losing their residence status in the EU. On the other hand, TCN's residing in third countries could be given the opportunity to come to the EU temporarily for work, study or training.

The assumption is that this form of migration would benefit both migrants, EU countries and countries of origin, and help prevent brain drain. The proposal is to introduce measures that foster circular migration in the Blue Card Directive (see below) and in the upcoming Seasonal workers Directive (in 2008).

Effective circular migration should be ensured by introducing rules that offer promises of continued mobility in exchange for abiding by the rules, which will reduce the temptation to overstay the temporary permit.

In addition, measures should be taken to support migrants that return home in their search for jobs, setting up of businesses etc. Finally, effective return must be guaranteed.

## **ETUC's position**

The ETUC has some serious doubts with regard to the recent emphasis in the migration debate on circular and temporary migration.

Although in itself possibilities for circular migration may be useful and attractive for both migrants, sending and receiving countries, we think that these positive potentials will only be able to materialize in a context of more comprehensive policies in which other (more permanent) legal channels for economic migration - including for lower skilled workers - are also available.

The current optimism about circular migration as an alternative to other forms of migration is a bit too dependent on the illusion that all forms of migration somehow benefit the country of origin (because of remittances), that all migrants would fit into this rigid model and would be interested to go back to their country of origin without the situation there being very much improved, and that countries of origin would be able to control their emigratory flows in the way the EU would like them to.....

Depending on what measures are put in place, the following questions should be addressed:

- will circular migrants' work permits be non-portable (i.e. restricted to specific employers or sectors), thereby increasing chances of exploitation and reducing chances of socio-economic mobility (and no chance to use acquired skills to move up the skills and career ladder....)?
- will policy-regulated circular migration systems become closed labour markets, with limited opportunities for access among new would-be migrants?
- which rights would apply? in the event that these are not clearly equal rights, a new incentive for unfair competition by migrants leading to their exploitation on the one hand, and to xenophobia on the other hand, would be created.
- since any temporary migration scheme will only function if migrants do indeed return after their statutory period of employment, will enforcement mechanisms become more draconian? and what about all the bureaucracy involved, with all the chances for 'grey areas' to develop (decisions not taken in time, overstaying for a few days means also loss of return rights?, etc.....)
- since circular migrants will be required to leave after short stays, will this preclude any kind of integration strategy (including learning the language, basic info about the receiving country and their

rights, etc)? If so, this will make them more vulnerable, socially excluded and easier to exploit.<sup>14</sup>

- as they will have to leave after a time, there will be no chances for naturalisation and/or gaining dual citizenship (which would in itself help them to 'circulate' more easily!)
- will they ever have the opportunity to get out of the system of circular migration, and become a permanent migrant?
- finally: will the system offer both migrants and employers situation that is so much more attractive that there will be less recourse to irregular migration? This can clearly be doubted, as long as more comprehensive migration, development and integration policies are absent.

In conclusion: in ETUC's view, the idea of circular migration must be carefully explored, and should certainly not replace more comprehensive policies in which more permanent legal channels for economic migration are also made available. Tackling brain drain and promoting ethical recruitment and a constructive policy of 'brain-exchange' should be part of such approach.

However, in the context of such broader policies, measures that allow migrants more flexibility to move between their country of origin and country of residence without losing their immigration status and rights can be a positive incentive for migrants to explore the opportunities in their country of origin, and may thereby make a positive (although modest) contribution to alleviating the brain drain.

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<sup>14</sup> ETUC agrees with BusinessEurope that there could be a potential contradiction between the strong emphasis put simultaneously on both circular and return migration on the one hand and the efforts to foster integration of third country nationals on the other hand.

## **C. Rights Directive**

**(ETUC Congress document Par. 2.43 and 2.44)** *The EU must therefore urgently develop a more proactive migration policy(...) that combines strong integration efforts with making employers and public authorities respect and enforce labour standards. This should offer old and new groups of migrant and ethnic minorities equal rights and opportunities in our societies, while promoting social cohesion. (...)*

*Such a policy should, in an integrated approach, be based on a clear framework of rights as established by international UN and ILO conventions and Council of Europe instruments, and be developed in close consultation with social partners at all relevant levels.*

The proposed *Council Directive on a single application for a single permit for TCNs to reside and work in the territory of a MS and on a common set of rights for third country workers legally residing in a MS* is based on Article 63.3.a EC (unanimity in Council and consultation of the European Parliament). It is to be read in conjunction with the 'Blue Card' initiative, on conditions for admission of highly skilled TCN's, published on the same day. Both proposals aim to replace the 2001 horizontal initiative on the conditions of entry and residence of TCN's for the purpose of paid employment and self employed economic activities, which failed to get support in the Council. The impact assessment to the proposed Rights Directive identifies a fully fledged legislative option in the form of a Directive regulating access to labour market and granting equal treatment for third country nationals as one of the most favourable options in view of the objectives sought. However, the Commission clearly does not regard this option as politically feasible.

These proposals must be distinguished from the existing Directive 2003/109 concerning the status of TCN's who are long term residents, which grants enhanced protection against expulsion and a general right to equal treatment - including access to the labour market under certain conditions - to TCN's who have been legally residing in a EU Member State for five years.

### **Summary of the proposed Directive**

The objective of the proposed rights Directive is two-fold:

- to cut red tape by providing a single permit to reside and to work lawfully;
- to narrow the rights gap between 'legally' residing third country workers and nationals.

About the single permit:

The proposal provides for a one stop shop system for TCN's who would like to reside in a MS for the purpose of work. A single application procedure for the residence permit and work permit is envisaged.

These provisions will complement the existing Regulation 1030/2002, which provides for a uniform format for residence permits for TCN's: information relating to the permission to work will be indicated on this residence permit. The proposed Rights Directive only deals with procedural aspects, including the availability of remedies in the event of a rejected application. The actual conditions for the granting of the single residence and work permit will be spelt out in separate initiatives on high skilled workers, seasonal workers etc.

About the right to equal treatment:

The proposal further grants legally working TCNs basic socio-economic rights on an equal footing with MS nationals. Such equal treatment would cover:

- a) working conditions, including pay and dismissal as well as health and safety at the workplace
- b) freedom of association and affiliation to a trade union or employers' organisation
- c) education and vocational training
- d) recognition of qualifications in accordance with national procedures
- e) social security (this covers maternity, illness, unemployment, old age, work related accidents and work related illness, family)
- f) payment of acquired pensions when moving to a third country
- g) tax benefits
- h) access to goods and services, including procedures for obtaining housing.

The issue of access to employment is not dealt with, as this is supposed to be addressed in the specific directives for high skilled workers, seasonal workers, etc.

MS's may decide to apply some restrictions. In particular, equal treatment with regard to working conditions and freedom of association may be limited to those third country workers who are in employment. An unemployed third country worker may also be denied access to social security, with the exception of unemployment benefit. Finally, the right to public housing may be reserved to TCN's who have been legally residing or who have the right to stay for three years (which is an improvement compared to the fact that currently only long term residents have access to housing, i.e. after 5 years).

The Directive will not apply to specific groups of TCN's, among them posted workers, seasonal workers and asylum seekers.

The Directive would apply without prejudice to more favourable provisions of Community Law, bilateral or multilateral agreements and of national law.

### **ETUC's position**

This proposal is certainly the most important one in the package, and is as such highly valued by ETUC. We welcome the fact that the Commission clearly understands the need for a clear and unambiguous legal framework offering equal treatment to migrant workers, as has been demanded on many occasions by ETUC. The ETUC agrees with the European Parliament<sup>15</sup> that this Directive should be submitted (and adopted) in advance of the specific Directives that will regulate the access of specific groups of migrants, and that different sets of rights and double standards for different groups of workers should be avoided.

Problematic elements are the scope of the proposed Directive, which excludes for instance seasonal workers that have been admitted for a period not exceeding six months in any 12 month period. The link to the upcoming proposal for a Directive on seasonal workers must be clarified, as it may be expected that this Directive will also contain rights of seasonal workers.

However, the ETUC does not accept an exclusion of seasonal workers especially when it comes to direct work-related issues such as pay and working conditions, in which equal treatment has to be guaranteed regardless of specific immigration status.

Several Articles of the Directive will have to be studied more in technical detail, to see if the texts are adequate and in line with ETUC's demands and concerns, especially when it comes to the right to equal treatment and the possible restrictions to it (Article 12).

However, already at this stage the ETUC would like to explicitly denounce the possibility for Member States to limit the right to equal treatment with regard to working conditions and freedom of association (Article 12,2,d) to workers 'who are in employment'. This limitation is highly questionable from an international fundamental rights perspective, does not exist in the Long term residents directive, and raises several questions for instance about the protection of workers when applying for a job and being in the recruitment process, or about their protection in, for instance, a dispute about dismissal that takes place after they have already lost their job.

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<sup>15</sup> Report on the Policy Plan on Legal Migration, rapporteur Lilli Gruber, 17.9.2007, Final A6-0322/2007

More generally, ETUC welcomes a reference to the Charter of Fundamental Rights in the explanatory memorandum (with special reference to the articles on freedom of association and on fair and just working conditions), but finds that references to international instruments such as relevant ILO and Council of Europe conventions are lacking.

With regard to the single permit for work and residence: although we recognize the benefits of simplification and a one stop shop approach, we have some doubts about the procedure and how to guarantee that socio-economic factors (labour market situation and needs) and actors (such as social partners) are properly taken into account. When a single procedure is introduced, it is likely that decisions will be taken by the interior ministries. This may mean that other ministries, such as labour and social affairs, are excluded and thus their voices in the questions of economic migration might be weakened, instead of strengthened as ETUC would like to see happening.



## **D. Blue Card Directive**

### ***(ETUC Congress document Par. 2.46 – 248)***

*2.46 Such a policy should recognise the need to prioritise investing in the capacities and qualifications of unemployed and underemployed EU citizens including those from a migrant or ethnic minority background, as well as long term resident third country nationals and refugees, to address labour market shortages, and not instead rely on simplistic and recruitment programmes that provide companies and member states with short term solutions without addressing long term consequences.*

*2.47 Such a policy should open up possibilities for the admission of economic migrants, by providing a common EU framework for the conditions of entry and residence, which should be based on a clear consensus between public authorities and social partners about real labour market needs on the one hand, and the illusion of closed borders on the other hand, preventing a two-tier migration policy that favours and facilitates migration of the highly skilled while denying access and rights to semi- and lower skilled workers;*

*2.48 Such policy should prevent the increasingly negative effects of the global competition for skilled labour: the potential devastating effects of brain drain and youth drain on countries of origin, as well as the potential "brain waste" in terms of the underutilisation of skills and qualifications of migrants in the countries of destination;*

The objective of the proposed Council Directive on the conditions of entry and residence of TCN's for the purposes of highly qualified employment is to improve the EU's ability to attract third country highly qualified workers. The Commission is concerned that highly qualified TCN's seem to favour the USA and Canada over the EU as a whole.

Differing admission systems, cumbersome procedures for admission and EU mobility are identified as potential reasons for the EU's relative unattractiveness. The Blue Card initiative therefore aims at laying down admission conditions for highly qualified workers.

### **Summary of the proposal**

The proposal establishes a fast track procedure for the admission of highly qualified third country workers based on common definition and criteria. Highly qualified employment is to be understood as work for which a higher education qualification or at least three years of equivalent professional experience is required. In order to qualify for admission the applicant must present:

- a work contract or a binding job offer of at least one year;
- evidence of professional qualifications or relevant professional experience;
- a valid travel document and if appropriate evidence of a valid residence permit;
- sickness insurance for periods where no such insurance coverage results from the work contract;
- the applicant must not be considered to pose a threat to public policy, public security or public health;

In addition to these requirements, the gross monthly salary specified in the work contract or job offer shall be at least three times the minimum gross monthly wage as set by national law. Member States where minimum wages are not defined shall set the national salary threshold to be at least three times the minimum income under which citizens are entitled to social assistance in that Member State, or to be in line with applicable collective agreements or practices in the relevant occupation branches. The Commission justifies this criterion by the necessity to ensure that the admission decisions do not negatively affect other workers in the medium term, thereby combating wage dumping.

A specific scheme for young professionals of less than 30 years of age is envisaged whereby the salary criterion is set at twice the minimum gross monthly wage. In addition, MS's may waive the salary requirement where the young applicant has completed higher education on the territory of the Community.

These criteria are considered as mandatory. Therefore unless provided otherwise by Community law or bilateral or multilateral agreements, MS's will not be allowed to set differing criteria for admissions. However, MS's may decide to give preference to EU citizens and already residing TCN's.

Workers admitted will be issued a residence and work permit for two years, renewable for another two years (the 'Blue card'). The Blue Card can be revoked in case of unemployment exceeding three consecutive months. The admission procedure shall be completed within 30 days; the deadline may be extended to 90 days in exceptional cases. Basic procedural safeguards regarding redress are provided.

The Blue Card will grant TCN's and their families a series of rights:

- without prejudice to the principle of Community preference, the holder of the Blue Card shall enjoy equal treatment with nationals after two years of legal residence as regards access to highly qualified employment (i.e. this means that the salary requirement

then no longer applies) although restrictions on certain activities may be retained;

- equal treatment as regards basic socio-economic rights (same list of rights as provided for in the Rights Directive: see above; but no restriction on freedom of association!). MS's may restrict equal treatment with regard to study grants, procedure for obtaining housing and social assistance;
- Immediate family reunification. However, by way of derogation to the family reunification Directive<sup>16</sup>, a restriction on access to the labour market for family members may be indefinite;
- right to move for work to a second MS under certain conditions after two years of legal residence in the first MS. Periods of residence in the EU shall be cumulated in order to obtain the long-term residence status after five years. In order to sustain the circular migration policy and to limit possible brain drain effects, an EU Blue Card holder may return to his country of origin for up to 24 months with a view to exercise an economic activity, or to perform voluntary service, or to study without losing his or her right to a long term resident status.

MS's may decide to apply more favourable conditions concerning mobility and residence.

### **ETUC's position**

In a first reaction the ETUC warned that the EU 'Blue Card' must not lower standards among workers already in Europe, or stop investment in their training. Also jobs in sectors where there are shortages will have to be made more attractive to the locally unemployed in terms of wages and working conditions. This is also true for the higher skilled segments of the labour markets, where there is a strong need as well to invest in the improvement of working conditions, equality, life long learning and measures to reconcile work and family life. The lack of investment in research, education and innovation in Europe, both in the private and the public sector is an important obstacle to the competitiveness of Europe. The Blue Card initiative must not replace policies and incentives to invest more in currently unemployed skilled workers including older workers, to invest in the upskilling of second and third generation migrants, and to invest in the untapped potential of women to enter high skilled jobs.

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<sup>16</sup> 2003/86

The ETUC has doubts about splitting off 'those we want' and 'those we do not want', which can in practice be difficult to define. Yet these proposals can be a step in the right direction if our concerns are acted on, and the social partners are involved at all relevant levels in assessing and addressing labour market needs.

The global social responsibility for preventing brain drain is an area where a coordinated EU policy on high skilled migration would be very welcome, to prevent MS's competing with each other for skilled workers at the expense of countries of origin, and to promote ethical recruitment practices of high skilled workers from developing countries. ETUC would like to see more obligatory mechanisms and measures to prevent unethical and aggressive recruitment, and wants to emphasize the important role social partners can play in the development of such measures.<sup>17</sup>

Problematic issues that need to be addressed in the legislative process are:

- unrestricted free movement for workers who are EU citizens has not yet been fully achieved. Citizens of the EU are not covered by the proposal. The Directive may therefore lead to unjustified privileged treatment of high skilled TCNs over high skilled EU citizens, which should not be accepted.
- several MS's are already bound by international commitments in the field of labour migration.<sup>18</sup> If the proposals of the Commission fall short of the standards in these conventions, these member states may have difficulty to support them. This is for instance the case with regard to the term given to a worker after losing his job to look for a new one (3 months in the Directive, 5 under the Council of Europe Convention);
- the Directive is based on the assumption that it is possible to define who the 'high skilled workers' are. However, this is partly based on the requirement that the worker has a 'higher education qualification'. This means that MS's must accept the certificates of third countries' institutions. In the absence of any system of recognition of diplomas outside the EU this may be highly problematic. One option is therefore to align the required qualifications with the EQF (European Qualifications Framework).

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<sup>17</sup> See recent agreement between social partners at EU level in the hospital sector

<sup>18</sup> ILO convention 97, which has been ratified by 10 Member States, and Council of Europe Convention on the legal status of migrant workers 1977, also ratified by ten although different MS's

On the other hand, the additional option of 'equivalent professional experience' may help resolve this problem, although also here the question arises of who is qualified to assess the equivalence.

- in addition there is a salary criterion of three times the gross minimum wage; this may be very problematic especially in Member States with a very low legal minimum wage (such as several new MS's); in ETUC's view, it might be more transparent and less ambiguous to talk about 'high skilled jobs' and define skills criteria for those jobs;
- Member States where minimum wages are not defined shall set the national salary threshold to be at least three times the minimum income under which citizens are entitled to social assistance in that Member State, or to be in line with applicable collective agreements or practices in the relevant occupation branches. The Commission justifies this criterion by the necessity to ensure that the admission decisions do not negatively affect other workers in the medium term, thereby combating wage dumping. However, to really **avoid wage dumping, the trade unions or their local representatives must be informed of and have a real influence on the wage** setting for the migrant worker.
- the scope of the Directive excludes persons seeking international protection as well as refugees and asylum seekers; although this is in itself logical, taking into account the different regulatory regimes applicable to asylum and migration and the need not to confuse the two, there is also a need for a renewed discussion on possibilities to allow asylum seekers and refugees to do paid work and to allow especially the higher skilled among them to maintain their professional skills and expertise, to prevent brain waste.
- the Directive prohibits MS's to apply more favourable rules in order to prevent competition between MS's. It is very questionable if this can be maintained. Will MS's really be willing to abandon their power to ease labour migration requirements for favoured business?
- at the same time, MS's will continue to have the right to determine volumes of labour migration (i.e. quota's etc.), so that even where an individual meets all the criteria, there is no guarantee that he/she will be admitted....
- the proposal provides for more relaxed rules for young workers (under 30), i.e. a lower salary level. Although this may be helpful for students from third countries who wish to stay in the EU, this provision seems to be a clear case of age-discrimination (with some

question marks as to which age group in this situation is the one that is treated less favourably);

- the three month limit to look for work once unemployed not only causes problems with other international instruments, but there are also other good reasons for allowing people a longer period (e.g. the threat of expulsion may play into the hands of unscrupulous employers or at least gives the worker a very weak negotiating position when it comes to accepting unfavourable working conditions).

Positive elements are:

- the attempt to deliver a common fast track, flexible and transparent procedure for admission (although it is questionable if the goal will in practice be achieved)
- the list of rights contained in the Directive, which is including the important area's of equal treatment with regard to wages, working conditions, education and vocational training and freedom of association
- the right to mobility within the EU after 2 years of employment
- the right to 'circular migration' i.e. temporary stay in the country of origin without losing residence rights in the EU
- favourable family reunification rights

However, the provisions in the area of family reunification especially are very questionable, as they are substantially more favourable than those which apply to long term resident TCN's. This may create a situation in which long term low skilled workers are discriminated against when compared to short term high skilled workers, in an area which is closely linked to fundamental human rights (the right to family life). For ETUC, this is highly problematic.

To conclude: this proposal is the first one in a series of announced proposals that would harmonise conditions for admission to the EU. The Commission has chosen a group of migrant workers that according to most MS's is very welcome to fill their high skilled labour market shortages. While the proposal has several weaknesses, it provides a starting place for discussion and debate on how to develop more legal channels for migration. The ETUC will therefore carefully study the Commission's proposals, and work closely with the European Institutions to improve them where necessary. We will also discuss these questions with European employers' organisations.

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