UNICE
THE VOICE OF BUSINESS IN EUROPE

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PROPOSAL FOR A DIRECTIVE ON THE CONDITIONS OF ENTRY AND RESIDENCE OF THIRD-COUNTRY NATIONALS FOR THE PURPOSE OF PAID EMPLOYMENT AND SELF-EMPLOYED ECONOMIC ACTIVITIES

UNICE POSITION PAPER

Executive summary

UNICE welcomes an EU Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

It agrees that increased availability of labour from third countries could help alleviate the adverse effects of the ageing population and of the growing shortages of labour in the EU Member States. Moreover, with the removal of controls at internal borders, a coherent EU legal framework on admission of economic migrants is necessary.

However, given the different situations on the national and regional labour markets, it is essential that EU rules on admission of economic migrants leave enough room for Member States to develop tailor-made solutions, which take into account their specific situation.

UNICE agrees that the individual economic needs test can be established as a general rule for granting a residence permit-worker provided that other options are also open to Member States. It therefore welcomes the derogations foreseen in article 6. Nevertheless, it believes that some unnecessary restrictions are attached to those derogations.

UNICE welcomes the establishment of a single national application procedure leading to one combined title, encompassing both residence and work permit. However, some requirements of the Directive are contrary to this simplification. For instance, the proposal foresees that Member States must complete the procedure of granting a permit at the latest within 180 days of receipt of the application. This would mean that an employer could remain with an unfilled vacancy for 180 days. Such a timeframe is totally unacceptable. The total duration of the procedure should not exceed 6 weeks.

Also, instead of laying down common rules based on a best practice approach, some requirements of the directive could result in bringing about more restrictive conditions than those existing today in some Member States. For example, the proposal foresees that the employer has to prove, with the necessary papers, that he/she could not find a suitable applicant for the vacancy within the EU and must therefore recruit someone from outside the Union**.** UNICE fears that this would generalise the most bureaucratic rules currently applied in Member States, which require the employer to provide a considerable amount of written documentation.

The proposal also contains provisions on working conditions, social security issues, pension rights payment, that do not belong in a directive on the conditions of entry and residence of third-country nationals, and should be therefore deleted.

The period of validity or of renewal of the residence-worker permits should be determined by Member States without imposing an upper limit at EU level. Concerning the restrictions attached to the permit, Member States should have the possibility to restrict it to specific activities for a certain period. However, restricting it to a specific region would be counterproductive in terms of labour market flexibility.

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INTRODUCTION

1. UNICE has noted the Commission's proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities[1].

2. The proposed Directive aims at:
   - establishing a general EU legal framework determining common conditions on entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities;
   - determining common procedures for the issue of permits by Member States;
   - laying down common criteria for admitting third country nationals to employed activities and self-employed activities with derogations from the general provisions for certain groups of persons (seasonal workers, transfrontier workers, intra-corporate transferees, trainees, etc);
   - providing a single national application procedure leading to one combined title, "residence permit-worker" or "residence permit-self-employed" encompassing both residence and work permit within one administrative act;
   - providing a set of rights conferred by the residence permit-worker or residence permit-self employed.

3. According to the Commission, the proposed Directive:
   - defines common rules based on a best practice approach;
   - simplifies and harmonises existing national rules by establishing a single procedure,
   - lays down a flexible framework allowing to react quickly to changing economic and demographic circumstances;
   - provides a practical tool to allow companies to recruit successfully and quickly from third countries (the "economic needs test").

GENERAL COMMENTS

4. UNICE agrees that increased availability of labour from third countries could help alleviate the adverse effects of the ageing population and of the growing shortages of labour in the EU Member States. Moreover, with the removal of controls at internal borders, a coherent EU legal framework on admission of economic migrants is

[1] Community legislation on immigration will not be applicable to Ireland and United Kingdom unless they decide otherwise. It will not be applicable to Denmark. UNICE notes that the Irish and UK governments have indicated their intention to co-operate with other EU States on immigration policy where appropriate.

necessary. UNICE therefore welcomes an EU Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities. However, given the different situations on the national and regional labour markets, it is essential that EU rules on admission of economic migrants leave enough room for Member States to develop tailor-made solutions, which take into account their specific situation.

5. UNICE fully supports the aims pursued by the Commission proposal. However, when it comes to the content of certain articles, the proposal sometimes is in contradiction with its proclaimed aims. For example, instead of laying down common rules based on a best practice approach, some requirements of the directive could result in bringing about more restrictive conditions than those existing today in some Member States. Moreover, the degree of detail in certain articles makes the directives go beyond Community competences and be in contradiction with the principle of subsidiarity.

6. UNICE agrees that the individual economic needs test can be established as a general rule for granting a residence permit-worker provided that other options are also open to Member States. UNICE therefore welcomes the derogations foreseen in article 6. However, it believes that some unnecessary restrictions are attached to those derogations.

7. The Directive foresees that Member States must ensure that a decision to grant a permit is adopted and communicated to the applicant at the latest within 180 days of its receipt. Such a timeframe is totally unacceptable. An employer cannot keep an unfilled vacancy for so long. Moreover, such a provision is in total contradiction with the aim of putting in place a more open EU immigration policy.

8. Finally, the proposal contains provisions, which go well beyond conditions for entry, residence and work permits as it also includes a section on working conditions, social security issues, pension rights payment, etc. UNICE believes that these aspects, which are already covered by EU and national legislation, do not belong in a directive on the conditions of entry and residence of third-country nationals and should be deleted.

9. UNICE believes that the envisaged directive should
    - be broad enough to take account of differences and developments in labour markets, business requirements and skills gaps across EU countries,
    - make provision for a flexible framework which can be easily adaptable to the changing economic and labour market circumstances,
    - provide Member States with various broad options for granting admission, and with efficient tools enabling them to respond quickly to companies needs,
    - ensure rapid and transparent national procedures,
    - deal with conditions under which the admission to the labour market and residence in one Member State can give rise to admission in other Member States.

10. UNICE insists that the envisaged Directive cannot result in more restrictive conditions than those currently in place in Member States.

11. Having read the proposal for a directive in the light of the above-mentioned requirements, UNICE has the following comments to make.

SPECIFIC COMMENTS

A. Economic needs test

12. Article 6(1) of the proposed directive lays down common criteria for admitting third country nationals to employed activities (economic needs test) and articles 6(2),6(3), 6(4) and 6(5) open different options for demonstrating compliance with these criteria.

13. Article 6(2) establishes as a general rule that Member States must base the decision to grant a residence permit-worker on the basis of an individual economic need test. However, the following paragraphs open the possibility to base decisions in other ways. These alternative options include:

    a) Article 6(3): a horizontal assessment ("Green Card programmes"). However Member States are not completely free when choosing this option. Firstly, such programmes are only valid for a specific number of jobs, in a specific sector, for limited period of time. Secondly, Member States have to establish that there is quantifiable shortage on the labour market for the sector concerned. Thirdly, "transparency provisions" will apply (obligation to include a statement of reasons based upon objective and verifiable criteria, regular review of the measures, publication before entery into force).

    b) Article 6(4): an income threshold to be fixed at national level. If the annual income offered to a third country national would exceed this defined threshold, the economic needs test would be deemed to be fulfilled. This derogation is not accompanied by further restrictions.

    c) Article 6(5): an employers' contribution to be paid by the future employer of a third country national to the competent authorities. The payment of this contribution would open the way to a "fast track" procedure with the payment leading to the economic needs test being deemed to be fulfilled. The money received from the employer will have to be spent on measures for the integration of third country nationals or for vocational training purposes.

14. As stated earlier on, UNICE agrees that the individual economic needs test can be established as a general rule for granting a residence permit-worker provided that other options are also open to Member States. UNICE therefore welcomes articles 6(3) and 6(4). However, it believes that the restrictions attached to article 6(3) and 6(4) are unnecessary, go beyond Community competence and do not respect the principle of subsidiarity. It would be preferable to reword article 6(3) and 6(4) to present their solutions as real alternatives rather than as derogations.

15. Article 6(2) foresees that the economic needs test is deemed to be fulfilled if a specific job vacancy has been made public via the employment services of several Member States for a period of at least four weeks, (for example by means of the EURES network) and no acceptable job application from within the EU labour market has been received. The published job vacancy must contain realistic, reasonable and proportionate requirements for the offered post. This shall be checked and scrutinised by competent authorities when evaluating an application for a residence permit.

16. According to UNICE, the requirement to publish the advertisement via the employment services of several Member States is unacceptable and inefficient. Experience shows that such a procedure is time-consuming and often ineffective. The sources where the announcement is published depend on the group of

applicants targeted and the territorial scope of publication can also differ widely. Such a procedure would also be too dependent on the efficiency of the different national employment services.

17. Article 6(1) gives the list of categories of people with privileged access to EU labour markets and for which it should be demonstrated that no one with the right competences from these categories was available in the short term to fill the vacancy.

18. Article 6(1)(e) gives privileged access to the labour market of any Member State to third country nationals who have been legally exercising activities as employed persons in another Member State for at least three years. This means that the third country nationals residing legally in a Member State but for less than three years would need to apply for permission to come and work in another Member State as if he/she was in his/her country of origin. UNICE believes that this constitutes an unnecessary obstacle to employment of many third country nationals already residing in a Member State that should be tackled. The admission of this category of third country nationals to the employment market of another Member State should be facilitated.

19. Article 6(1)(f) foresees privileged access to third country nationals "who have been legally resident in that Member State and have legally exercised activities as employee for more than three years over the five preceding years. This wording seems to foresee privileged access for people no longer residing in that Member State.

20. UNICE considers the list of categories of people for which it should be demonstrated that no one with the right competences from these categories was available in the short term to fill the vacancy is too long and could make the whole system unmanageable. One way of improving the situation would be to delete Article 6(1)(f).

21. UNICE believes that detailed prerequisites for application of "Green Card" programmes by Member States do not belong in an EU directive. Given the different conditions on the national labour markets, Member States should have the possibility to decide on the content of these programmes.

B. Evidence of fulfilment of the economic needs test

22. Article 5(3)(f) foresees that the application for a "residence permit-worker" needs to be accompanied by the appropriate evidence of fulfilment of the economic needs test. The explanatory memorandum brings further details: this evidence is to be taken care of by the future employer who will have to provide the applicant with the necessary papers demonstrating that:
    - the post was published and no acceptable application from within the EU labour market was received, or
    - the requirements under an existing national "green card programme" are fulfilled, or
    - the income threshold defined under national provisions is exceeded, or
    - the amount of money ("employers contribution") required under national provisions has been paid.

23. UNICE fears that the first requirement of providing papers demonstrating that no acceptable application from within the EU was received could become too bureaucratic and imply an excessive administrative burden for companies. Sometimes, the number of irrelevant applications can be very high. Would the "appropriate evidence" mean that employers would have to hand out a copy of all the applications received? Should this be the case, the procedure would simply be unmanageable.

24. If the individual economic needs test is to become the general rule, it is essential to avoid generalising the most bureaucratic rules currently applied in Member States, which require the employer to provide a considerable amount of written documentation (copies of advertisements, details of the responses received, number of people who applied, number short-listed for interviews and full reasons for not employing each EU citizen or other privileged worker, etc). Instead, one should draw inspiration from countries where the burden of proof of fulfilment of the economic needs test is not on the employer but on the public employment agency or where the explanation from the employer takes the form of a declaration giving information on the recruitment procedures and the reasons for deciding in favour of the applicant of third country rather than for one of the privileged categories.

C. Duration of the procedure

25. Article 29(1) foresees that Member States should ensure that a decision to grant, to modify or to renew a permit was adopted and communicated to the applicant at the latest within 180 days of its receipt.

26. UNICE insists that such a timeframe is totally unacceptable. An employer cannot keep an unfilled vacancy for so long. Moreover, this provision would be in total contradiction with the aim of putting in place a more open EU immigration policy.

27. In UNICE's view, the total duration of the process from publication of the vacancy to the communication of the decision of the public authorities should not exceed 6 weeks (3 weeks waiting period for job applications plus 3 weeks decision period by the authorities)

D. Concerning the privileged access given to third country nationals who are citizens of countries with which accession negotiations have been started

28. UNICE welcomes the proposal according to which in granting admission to EU labour market citizens of the countries negotiating accession to EU are to be given priority. The free movement of persons is an integral part of the "acquis communautaire" and should be implemented and enforced by candidate countries and Member States alike as soon as possible after accession. Preparation for enlargement can be smoothed by regarding the future EU countries as a key source of labour supply.

29. However, article 6(2) states that the economic needs test if fulfilled if no acceptable job application from persons listed in article 6(1) or from third country nationals who are citizens of countries with which accession negotiations have been started has been received. UNICE does not understand why citizens of countries with which accession negotiations have been started are not included in Article 6(1). UNICE suggests that they should be added in the list of categories of people given priority by Member States authorities when assessing applications in Article 6(1).

E. Validity of the residence permit-worker

30. Article 7(1) foresees that the initial "residence permit - worker" granted shall be valid for a period of up to three years, to be determined in accordance with national legislation, and shall be renewable for periods of up to three years, to be determined in accordance with national legislation. It also proposes that the application for renewal of the residence permit-worker should be submitted preferably at least three months before the expiry date of the previous permit.

31. UNICE believes that the period of validity or of renewal of such permits should be determined by Member States without imposing an upper limit at EU level. Nevertheless, national provisions should ensure that the validity of the residence

permit-worker is consistent with the provisions of the proposed Directive concerning the status of the third country nationals who are long-term residents.

32. European employers also consider that the time requirement with regard to the application for renewal of the permit of three months before expiry is too long and should be replaced by a period of one month. This is a more realistic timeframe that in currently applied in most EU countries.

33. Furthermore, article 14 provides for a maximum period of validity for the residence permit-intra-corporate transferees of maximum five years. The provisions of article 7(1) and 14 should therefore be made compatible.

F. Mobility with respect to employer, job and workplace

34. Article 8 provides that a "residence permit - worker" should initially be restricted to the exercise of specific professional activities or fields of activities. It may also be restricted to the exercise of activities as an employed person in a specific region. After three years it shall not be subject to these restrictions.

35. UNICE accepts that Member States should have the possibility to restrict the residence permit-worker to specific activities for a certain period. However, restricting it to a specific region would be counterproductive in terms of labour market flexibility.

G. Rights conferred by the residence permit-worker

36. Article 11(1) foresees that during the period of its validity, a "residence permit – worker" shall entitle its holder, among other things, to enjoyment of equal treatment with citizens of the Union at least with regard to:
    i. working conditions, including conditions regarding dismissals and remuneration;
    ii. access to vocational training necessary to complement the activities authorised under the residence permit;
    iii. recognition of diplomas, certificates and other qualifications issued by a competent authority;
    iv. social security including healthcare;
    v. access to goods and services and the supply of goods and services made available to the public, including public housing;
    vi. freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations.

37. Member States may restrict the rights related to access to vocational training to third country nationals who have been staying or who have the right to stay in its territory for at least one year and those related to public housing to third country nationals who have been staying or who have the right to stay in its territory for at least three years.

38. UNICE would like to stress that provisions on working conditions and social security do not belong in a directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities and are already covered by EU and national legislation. They should therefore not be included in the proposal for a directive.

39. Moreover, imposing equal treatment for social security matters could be in contradiction with certain bilateral conventions which foresee that, in certain cases, a

third country national seconded to work in an EU country can remain affiliated to the social security system of their country of origin.

40. Article 11(3) states that after expiry of a "residence permit - worker" and following the return to a third country, former holders of a "residence permit - worker" shall have the possibility to request and obtain the payment of the contributions made by them and by their employers into public pension schemes during the period of validity of the "residence permit – worker" insofar as the following conditions are met:
    (a) no Member State pension is or will be payable, under national law or under bilateral or multilateral agreement to the applicant when residing in a third country;
    (b) the applicant is unable, under national law or under bilateral or multilateral agreement, to transfer pension rights to a scheme of the third country where the applicant resides;
    (c) the applicant formally waives all rights/claims acquired under the national pension scheme concerned;
    (d) the application is submitted from a third country.

41. According to UNICE, even though the principles stated in this provision are acceptable, such a provision would not belong to a directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, and is already covered by bilateral conventions. They should therefore not be included in the envisaged proposal for a directive.

H. Definitions

42. The Commission's proposal defines:
    - the activity as employed person as "any economic activity involving a subordinate relationship";
    - "residence permit - worker" means a permit or authorisation issued by the authorities of a Member State allowing a third-country national to enter and reside in its territory and to exercise activities as an employed person.

43. UNICE considers the definition of the employed person is too broad and ambiguous. The proposal should refer to the definitions of employed persons usually used in EU directives, which consists in referring to national definitions.

44. UNICE wonders whether the definition of "residence permit-worker" implies that the single document would also replace the entry visa in that Member State or whether third-country nationals would also need to apply for a visa.

I. Applicant legally present in a Member State

45. The proposal provides that if the applicant is already legally resident in the Member State concerned, applications can be directly submitted on the territory of the concerned Member State. In the explanatory memorandum, it is explained that "applicant legally present" means for instance a holder of a tourist visa or a job-seekers visa or a visa for applying for a work permit.

46. UNICE would like to stress that at present a job-seeker's visa or visa for applying for a work permit do not exist. Does this mean that such documents will be provided for in a different legislative initiative?

J. Documents required for the application for a residence permit-worker

47. The proposal foresees that the application would need to be accompanied:
    - by valid travel documents

- documents proving skills

48. By valid travel documents, the Commission seems to be referring to a passport. UNICE would like to ask that a clearer reference is used as the term could also be understood as covering transport tickets.

49. UNICE considers that the requirement regarding "documents proving skills" is too broad and could lead to excessive bureaucracy. A number of skills or competences acquired informally can simply not be proven in written documents.

K. Revoking of a "residence permit-worker" for reasons of unemployment

50. Article 10(3) stipulates that unemployment in itself would not constitute a sufficient reason for revoking a residence permit unless the period of unemployment exceeds the following duration:
    - 3 months within a 12-month period – for holders of residence permits-worker who have legally exercised activities as employed or self-employed person in the Member State for less than 2 years
    - 6 months within a 12-month period - for holders of residence permits-worker who have legally exercised activities as employed or self-employed person in the Member State for more than 2 years

51. UNICE believes that detailed provisions on unemployment as a reason for revoking the residence-permit should not be included in the proposed Directive and should be dealt with by Member States. Moreover, UNICE does not understand the reference to holders of residence permit - worker exercising self-employed activities as the permit allows the person to exercise employed activities only. Moreover, in a number of EU countries self-employed workers do not have the right to unemployment benefits.

L. More favourable provisions regarding specific categories of third country nationals

52. Article 3(4) foresees that, in the absence of more favourable provisions of Community law, Member States may maintain or introduce more favourable provisions regarding: researchers and academic specialists, priests and members of religious orders, sport professionals, artists, journalists, representatives of non-profit-making organisations.

53. UNICE believes that the proposed Directive cannot contain an exhaustive list of specific categories for which more favourable provisions can be provided. Therefore the article should read: "Member States may contain or introduce more favourable conditions regarding specific categories such as: researchers and academic specialists, priests and members of religious orders, sport professionals, artists, journalists, representatives of non-profit-making organisations".

M. Derogations in special cases

54. Transfrontier workers: Article 13 states that transfrontier workers may be granted a "permit-transfrontier worker". In order to provide a flexible frame, which covers all possible scenarios, this also covers third-country nationals who are intra-EU commuters. This provision – exceptionally - allows Member States to grant work permits without granting a right of residence.

55. Intra-corporate transferees: Article 14(2) foresees that the intra-corporate transferees should not be subject to an economic needs test. Article 2(h) defines the "intra-corporate transferees" as third-country nationals working within a legal person and being temporarily transferred into the territory of a Community Member State to either the principal place of business or an establishment of that legal person. The natural

person concerned must have worked for the legal person concerned for at least the year immediately preceding the transfer. Article 14(1) requires that the intra-corporate transferees must either belong to the "key personnel" (senior manager or executive position) or be a specialist who has uncommon knowledge.

UNICE considers that these provisions are too restrictive. The requirement that the transfer should be made to an establishment of the legal person is not considering the fact that many companies also transfer staff to work at client sites. The requirement that the person must have been employed for one year before being transferred should be reduced. The Netherlands has just dropped this requirement and the United Kingdom only requires 6 months experience. The proposal for a directive should be in line with these best practices.

The requirement that the applicant hold a senior position or uncommon knowledge limits the pool of talent from which businesses are able to draw from internally. Businesses should have the flexibility to choose the necessary professionals to deploy to best satisfy the business/client needs and maximise career development of their staff. Moreover, the same provisions should apply in the case the transfer is made for training or research purposes.

Furthermore, access to work by the spouses of intra-corporate transferees should be facilitated, as it is difficult convincing staff to take assignments of a longer duration if spouses are not allowed to seek employment in the receiving country.

56. Seasonal workers/trainees: The proposal foresees the possibility for Member States to ask applicants from these categories or their future employer to deposit security, which will be repayable at the return to a third country.

    Such a requirement is unacceptable. It would impose additional cost and therefore restrict the possibility to use trainees or seasonal workers from third-countries. Such a requirement does not exist today. Imposing it, would therefore not be compatible with the aim of having a more open policy for access to labour markets.

Conclusions

57. UNICE broadly welcomes the proposal for a directive and very much hopes that its comments will be taken into account so that the directive meets the following criteria:
    - be broad enough to take account of differences and developments in labour markets, business requirements and skills gaps across EU countries,
    - make provision for a flexible framework which can be easily adaptable to the changing economic and labour markets circumstances,
    - provide Member States with various broad options for granting admission, and with efficient tools enabling them to respond quickly to companies needs,
    - ensure rapid and transparent national procedures,
    - deal with conditions under which the admission to the labour market and residence and not with other issues which are already covered by EU and national legislation or bilateral conventions.

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