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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Accompanying the document

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on measures facilitating the exercise of rights conferred on workers in the context of
freedom of movement for workers

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(Text with EEA relevance)

1. INTRODUCTION

Freedom of movement for workers is one of the four freedoms on which the Single Market is based, along with the free movement of goods, services and capital. It is enshrined in Article 45 TFEU and has been specified into secondary law through Regulation 492/2011 (formerly Regulation 1612/68).

It means that EU citizens who move to another Member State for employment purposes have the right not to be discriminated against on the basis of their nationality as regards: access to employment, conditions of employment, access to social and tax advantages, membership of trade unions, access to training, access to housing, and access to education for children.

The present initiative is not intended to create new rights for the EU's migrant workers, but responds to the numerous concerns expressed by various parties on the need to ensure that the rights of European citizens are real and to remove obstacles they face when moving across borders. It fits into the Europe 2020 strategy and the 'Employment package' adopted by the Commission.

2. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

Studies conducted and reports drawn up by experts in the field of free movement of workers, such as the network of independent experts that supports the activities of DG Employment, Social Affairs and Inclusion, have been taken into consideration.

A public consultation was held from June to August 2011, in which citizens and organisations were invited to give their views on the main problems linked to the mobility of EU workers, on the current level of protection afforded and on the need for the EU to act in order to help workers enjoy their rights fully.

The issue was discussed within the Advisory Committee on free movement of workers, which is composed of representatives of Member States and of social partners at both national and European level.

3. PROBLEM DEFINITION

3.1. The state of play

The freedom of movement for workers that has been in place for more than 40 years is underpinned by important and strong rights. The Court of Justice has provided important guidance on the interpretation of the relevant provisions.

Infringement procedures are an important means of ensuring that the rules are applied. They lead to changes in non-conforming legislation and general practices. However, they will not solve specific cases for the individuals concerned and may not be launched in cases involving private entities.

Unlike what happens at EU level in other fields such as discrimination on grounds of race, religion, age or gender, EU migrant workers who suffer discrimination on the grounds of nationality have no further means than relying on the Commission's action and bringing a case before the national courts. The existing measures at EU level are therefore limited as regards effective exercise of the rights of individual workers.

Each Member State decides what kind of support and protection should be provided to EU migrant workers according to their own legal systems. Support and protection therefore differ between Member States. Reports from experts in the field suggest that in countries where nationality is explicitly included among the grounds of discrimination that are prohibited, protection of EU citizens is stronger.

There is a lot of scope for greater geographical mobility between EU Member States: according to the EU Labour Force Survey, in 2011 only 3.1 % of the working-age European population lived in an EU Member State other than their own.

3.2. The problems

While the rights relating to free movement of workers are strong, a number of indicators show that discrimination on the grounds of nationality takes place and that it is difficult for workers to exercise their rights in practice. The following problems have been identified:

3.2.1. Non-compliance of public authorities with EU law (non-conforming legislation or incorrect application) and the effect on EU migrant workers

The rules on free movement of workers have been in force for more than 40 years. In spite of this, problems due to non-compliance of national legislation and general practices persist in Member States and continue to be reported to the Commission. These problems can have severe negative consequences for EU citizens, as they may affect their job prospects, their working conditions or their access to social advantages, and disrupt their lives at both professional and personal levels. They also affect the integration of EU citizens in the labour market and in the society of the host country. While these problems may be addressed at EU level through infringement procedures, this will not have a direct effect on the individuals concerned.

3.2.2. Failure of employers and legal advisors to comply with EU law (unable or unwilling to apply EU law correctly) and the effect on EU migrant workers

Cases have been reported where public and private employers have failed to respect the EU rules, regardless of whether the legislation at national level is correct or not. Information collected by experts and by the Commission suggests that this problem is recurrent, although awareness of such problems depends very much on the level of publicity given to these cases. Problems due to action taken by private employers cannot be addressed at EU level through the infringement procedure. Therefore, citizens who suffer from discrimination may only rely

on the mechanisms and means available at the national level. Actions of employers can have severe consequences for the personal situation of the workers concerned, hindering their employment chances and/or affecting their working conditions.

3.2.3. EU migrant workers not having access to information or the means to ensure their rights

Respondents to various surveys have said that they do not know where to turn to when faced with problems concerning their EU rights. This indicates that there is no clear point of reference for EU citizens. Lack of clarity about the best place to obtain information about EU rights was also mentioned. It is also difficult for EU workers exercising their right to free movement, due to a number of factors (such as not knowing the procedures, not knowing the national systems, lack of linguistic abilities), to avail themselves of the means of protection available. This was confirmed by the results of the public consultation, where a majority of citizens stated that the level of protection afforded to workers would strongly influence their decision to go and work in another Member State. Reluctance to report discrimination is also an important factor.

3.3. Causes and drivers

Four main drivers have been identified: (1) unawareness of the rights of EU workers under EU law and unawareness of the means of redress available; (2) lack of understanding of EU law and lack of legal certainty; (3) insufficient support to enable EU migrant workers to exercise their rights; (4) protectionism and unwillingness to comply.

3.4. Who is affected and how

The problems identified affect EU citizens who move to another Member State for employment purposes, including jobseekers and citizens of a given Member State who have exercised their right to free movement and come back to their Member State of origin in order to work.

On average, 67.9% of the EU working-age citizens who live in another Member State are in employment and 9.1% are unemployed. So, theoretically, all of them may at some point have problems relating to the effective application of rights. Those citizens who intend to move in the future (17%) may also be affected.

The problems may concern all EU workers and all occupations and sectors of activity. Family members may also be affected, as they have certain rights under the EU provisions.

Employers and national authorities may be affected too, as better enforcement of migrant workers' rights might mean that they incur costs.

3.5. Baseline scenario and the need for intervention

In the current economic and social context, further limitations on the rights of EU migrant workers cannot be excluded. Specific actions identified across Europe and various surveys show that there is increasing intolerance towards EU migrant workers, which may translate into discriminatory actions.

Following the enlargements of 2004 and 2007, workers from other Member States are faced with new problems of application of EU law and this requires a more pedagogical approach in the field of free movement.

The present initiative can help encourage and facilitate mobility, as fighting discrimination on grounds of nationality will send a positive signal to those who wish to work in another Member State, and will mean that fewer people are discouraged from moving because of bad experiences or because they expect to find problems.

4. ANALYSIS OF SUBSIDIARITY

Article 46 TFEU establishes the Union's competence to issue directives or regulations setting out measures required to bring about freedom of movement for workers, as defined in Article 45 TFEU.

The present initiative will allow Member States to adopt appropriate implementing measures, thus respecting the principle of proportionality. Member States which already have detailed legal protection against discrimination on the grounds of nationality will not need to make major changes to their own systems.

Achievement of the objectives of this initiative would help consolidate the fundamental rights set out in the Charter of Fundamental Rights of the European Union.

5. POLICY OBJECTIVES

The present initiative ties in with the general objective of ensuring that EU citizens are treated equally. This is one of the core values of the European Union and a major part of EU citizenship. Ensuring that this goal is achieved will help the internal market to run more smoothly.

The following specific objectives have been identified:

- reducing discrimination of EU migrant workers on the grounds of nationality;
- narrowing the gap between the rights on paper and their exercise in practice, thus helping to achieve full and correct implementation of the existing legislation and allowing the internal market to run more smoothly.

In order to meet these policy objectives, operational objectives have been identified:

- increasing awareness among citizens, employers, public authorities and other stakeholders about EU migrant workers' rights;
- improving legal certainty;
- giving EU workers the appropriate tools of support when exercise their rights.

6. POLICY OPTIONS

The following options have been identified:

6.1. No further action at EU level (Baseline scenario)

6.2. Common guidance documents

This option would be focused on the adoption of common guidelines by Member States and the Commission in order to have a common approach to the application and interpretation of EU rules on free movement of workers. It would be complemented by interpretative documents adopted by the Commission.

6.3. Commission Recommendation to Member States.

This option would consist of the adoption of a general recommendation by the Commission addressed to Member States in order to encourage them to take action for:

- increasing awareness of EU migrant workers' rights;
- increasing the support given to EU migrant workers, by requesting that means of redress be provided, setting up supportive structures for EU migrant workers and

allowing associations and organisations to take legal action on behalf or in support of EU migrant workers.

6.4. Directive introducing support measures for EU migrant workers, in particular:

- a legal obligation to provide EU migrant workers with means of redress;
- the setting up of structures providing support to EU migrant workers. This would involve promotion of rights, assistance to EU migrant workers in enforcing their rights, conducting surveys, drawing up reports and adopting recommendations;
- ensuring that associations, organisations or legal entities with an interest in the promotion of the right to free movement of workers may engage in any administrative or judicial procedure on behalf or in support of EU migrant workers.

6.5. Directive introducing enhanced protection for EU migrant workers

In addition to the elements described under policy option 4, this option would also introduce:

- an obligation for employers to prevent discrimination within their undertakings;
- measures imposing sanctions or compensation;
- a legal provision aimed at protecting EU migrant workers against any adverse treatment as a result of making a complaint.

7. ANALYSIS OF IMPACTS

From an economic perspective, it has not been possible to identify any impacts other than those that will naturally stem from the expected social impacts and the actual costs of implementation. Reducing discrimination on the grounds of nationality in regard to employment might make intra-EU mobility more attractive. While the increase in mobility may not be substantial, as discrimination is only one of the factors that influence a person's decision to move, its effects on the functioning of the Single Market will be positive, as mobility can play a role in economic growth.

7.1. Option 1: Baseline scenario

Social impact

The identified problems and drivers would remain unaddressed. It would involve no significant change in national authorities' and employers' behaviour. There would be no substantial impacts on awareness of rights and legal certainty. Maintaining the status quo would furthermore mean that there would be no minimum consolidated support or EU-level protection of migrant workers. It would continue to affect negatively the individuals who move for employment purposes and would perpetuate the limited ability of EU migrant workers to participate fully in the labour market and society of the host Member State.

Economic impact

No implementation costs have been identified.

7.2. Option 2: Common guidance documents

Social impact

The adoption of guidance would entail a common interpretation of the current EU rules with a view to their practical implementation by national administrations. It would thus contribute to increasing legal certainty and reducing the implementation gaps. It might also result in fewer instances of discrimination.

The guidance would also help raise awareness among national authorities about the rights linked to free movement of workers but would depend on the publicity and dissemination given in each Member State.

The guidance would focus on questions of interpretation of EU law but would not contain any specific measure providing assistance and support to workers. Therefore, although it can induce workers to use their rights more fully because of greater legal certainty, it will not help them enforce those rights when problems arise.

Its overall social impact would therefore be positive but limited.

Economic impact

This option might involve some implementation costs linked to the dissemination and publication of the guidance, including translation costs. Costs will depend on the specific efforts made by Member States in this regard.

This option could reduce the level of misapplication of EU law by national administrations but it would not be relevant to a wider range of stakeholders and therefore it might have a limited impact on the number of complaints and court procedures.

No implementation costs have been identified for enterprises.

7.3. Option 3: Commission Recommendation to Member States

Impacts of this option might be potentially the same as in policy option 4, as the same issues will be addressed. The difference between the options and therefore their correspondent impacts lies in their binding or non-binding nature.

Social impact

The recommendation would give the issue a certain visibility which could improve the awareness of rights among citizens, relevant stakeholders and national authorities. It could increase involvement of the national authorities in reducing implementation gaps and help strengthen the support and help mechanisms available to EU migrant workers.

The recommendation would not impose any obligation on Member States. Taking into account the different perceptions and actions in the field of free movement of workers and their rights, there is a risk of increased diversity in the way problems are addressed in the Member States.

The social impact might therefore be positive but it will depend on the degree of implementation in each Member State, and increased diversity might reduce the advantages.

Economic impact

Impacts including costs will depend on the specific actions taken by Member States.

7.4. Option 4: Directive introducing support measures for EU migrant workers

Social impact

Linking means of redress specifically to matters of discrimination on the grounds of nationality would increase the level of legal certainty, as citizens would be sure that specific procedures are available to them no matter which Member State they decide to move to and work in.

Addressing nationality as a ground of discrimination through specialised bodies, without making protection against this kind of discrimination dependent on generous interpretations of the law applicable in other fields, would increase legal certainty.

The efforts of the supporting bodies (surveys, reports, recommendations) would help to increase awareness and to end discriminatory laws and practices. As they would offer EU migrant workers advice and assistance, they can also be expected to encourage such workers to assert their rights. Setting up similar bodies throughout the European Union would ensure that citizens can have access to support and information in every Member State. The fact that associations and organisations could take legal action would be another incentive for EU migrant workers to assert their rights.

The supporting bodies will also be in a position to assist enterprises and trade unions when they need advice on specific questions related to migrant workers' rights. Making provision for associations and organisations to take legal action would increase the number of stakeholders involved in the fight against discrimination on grounds of nationality.

Overall the social impact will be positive, as discrimination on the basis of nationality should be reduced.

Economic impact

The setting up of supporting bodies would involve implementation costs for national authorities. However, as it will be left to Member States to designate the bodies concerned, the actual costs will vary according to whether a new structure is created or whether the new tasks are assigned to already existing bodies. All 27 Member States currently have specific structures for dealing with discrimination on other grounds; therefore if they decide to confer on them the task of fighting discrimination on grounds of nationality, the implementation costs would be limited to extension of their role.

The measures proposed are expected to have a preventive effect and reduce the need to rely on court procedures to resolve disputes, as seems to be the case in countries where supporting bodies covering discrimination on the grounds of nationality already exist.

While no implementation costs have been identified for enterprises, this option would involve some costs for associations and organisations that will be allowed to take legal action, as they will have to bear the costs linked to the legal procedures.

7.5. Option 5: Directive introducing enhanced protection for EU migrant workers

The provisions that would be adopted under this policy option, in addition to those foreseen under option 4, would also impose some obligations on employers.

Social impact

Active measures to prevent discrimination would be directly applicable in the relevant context, namely at the workplace. That means there would be certainty that the information reaches its addressees. Sanctions and compensation to victims would also increase legal certainty, as a set of rights and obligations would be created.

The information obligation and/or active measures to prevent discrimination would make equal treatment a part of companies' human resources policy, thereby raising awareness of the applicable rights among national workers and entrepreneurs and also the sensitivity of the issue.

Measures for prevention of discrimination are by their nature intended to do away with discriminatory practices. The threat of sanctions may deter employers from acting in a discriminatory way.

Introducing provisions on victimisation would put individual workers in a stronger position and make them more assertive about their rights.

The provisions of this policy option would help reduce discrimination on the basis of nationality by a combined approach of incentivising workers to exercise their rights (option 4) and introducing prevention of discrimination.

While the elements envisaged would send an important message to society about fighting discrimination, it has not been possible to show whether they will in practice have a significant effect on the individuals concerned.

Economic impact

Implementation costs for national authorities are the same as under policy option 4. The number of court cases might change, but this is very uncertain; furthermore, short- and long-term effects might be completely different. Therefore, it was not possible to include this aspect in the analysis.

This policy option would involve compliance costs for employers, which would mainly consist of man-hour costs associated with taking active measures, e.g. for training facilities and activities. It is difficult to provide proper estimates of those costs, as they will vary according to the measures taken by employers. For the most part they can be expected to vary with the size of the enterprise, while a small fixed-cost component would be independent of the size of the company.

Implementation costs will also arise from the provisions on sanctions/compensation. However, establishment of the specific amount will be left to each Member State. The specific economic and financial impacts will therefore depend on each Member State.

8. COMPARISON OF OPTIONS

The options have been compared with regard to their effectiveness in achieving the specific objectives of the initiative, their efficiency, consistency with the general objectives of the EU and their impacts on stakeholders.

The preferred option is a combination of options 2 and 4. They are a bit less effective than policy option 5 but this approach is the most efficient. Together, these options provide a comprehensive solution to all the specific problems identified without involving excessive compliance costs. They are more consistent with the general objectives than option 5, which puts disproportionate costs on companies. They are also the most predictable options in terms of their effects.

9. MONITORING AND EVALUATION

Several indicators, both quantitative (e.g. the number of complaints) and qualitative (e.g. the reports from the network of experts), will be used for monitoring purposes, together with the reports, surveys and recommendations produced by the supporting bodies that will be set up according to this initiative.

Two years after the transposition deadline, an evaluation will be carried out by the Commission with the assistance of external experts. The evaluation will assess:

- awareness among citizens and stakeholders of the existence of the elements introduced through the Directive;
- the activities carried out by the supporting bodies, and the role of other organisations and associations;

- the types of discrimination most commonly dealt with and whether this has changed as compared to the status quo.

Overall, this evaluation should assess whether the newly introduced elements have led to positive changes and identify the difficulties faced so far.