



European Network Against Racism
Réseau européen contre le racisme
Europäisches Netz gegen Rassismus



Contributing to A Europe without Racism? The Proposal for a Directive on basic socio-economic rights of third country workers

ENAR Position and call for amendments to the 'Proposal for a 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' (taking into account also the proposal for an "EU Blue Card")

I. Introduction and Summary of Recommendations

It is a fundamental principle of human rights that they apply to 'Everyone... without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social group, property, birth or other status'.¹

In the European Union, **equal treatment of third country nationals** is both an obligation, under the general principle of respect for fundamental rights, and a political commitment. The Tampere Presidency conclusions in 1999 stated that: "The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States." The same commitment was reaffirmed implicitly in the **Common Basic Principles on Integration** adopted by the European Council in 2004 and the recent Council Conclusions on enhancing the Global Approach to Migration stated that:

"The Council reaffirms that the respect of human rights and fundamental freedoms of migrants, the Geneva Convention and due access to asylum procedures lie at the basis of the European Union's migration policy."²

Law, policies and practices related to migration must not undermine the vision of a Europe without racism. This danger arises from two realities. Firstly, discrimination against third country nationals affects many of Europe's ethnic and religious minorities. It is often difficult to distinguish between discrimination on grounds of race, ethnicity or religion, and discrimination on grounds of nationality. Secondly, when the debate on migration crosses the line into racism, when the tone and content of the dialogue leads to stereotyping and stigmatisation of migrants, perpetrators of racism and discrimination do not ask to see someone's passport or residence permit before acting. In this way 'legally resident' third country nationals and EU citizen ethnic and religious minorities become the targets of the racism and xenophobia that a negative debate on migration creates

ENAR believes that the Proposal for a 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 (hereafter 'draft Directive') has the potential to make a significant contribution to the achievement of a Europe free from Racism. The ability of the proposed Directive to achieve this, however, rests on the commitment of the European Institutions and the Member States to challenging racism and to respecting human dignity.

¹ Article 2 of the Universal Declaration of Human Rights

² Council Conclusions on enhancing the Global Approach to Migration 2878th GENERAL AFFAIRS Council meeting Luxembourg, 16 June 2008

Summary of recommendations

ENAR Welcomes:

- The explicit recognition of a 'rights gap' faced by third country nationals in EU Member States;
- The use of the principle of equal treatment to secure rights. This sends out a strong message of equality between third country nationals and EU citizens;
- The inclusion of a range of important rights that are essential for recognition of the equal dignity and worth of third country nationals;
- The inclusion of procedural safeguards regarding applications for a single permit;
- The specific inclusion of a clause on 'more favourable provisions', vital to ensuring that the draft Directive does not become a vehicle for the violation of Member States human rights commitments;
- The coverage of not only those third country nationals specifically granted entry for the purposes of employment, but also those who entered the Member State for other reasons, but have been granted access to employment.

ENAR calls for amendments and action on:

1. The Purpose and Scope of the Proposed Directive

Regarding the **scope** of the proposed Directive

- ENAR calls for the **deletion of Article 3 (2) (d), (e), (f) & (h)**

Regarding **respect for fundamental rights**, ENAR urges:

- European institutions to fully implement and where needed revise relevant Community legislation **to comply with the range of international human rights standards** relevant to third country nationals;
- The Community and its Member States to sign, ratify and implement the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.³

Regarding the need for **positive steps to be taken to ensure equal access to, and the effective enjoyment of, fundamental rights** by third country nationals, ENAR urges the EU to:

- Include equal treatment of TCNs in the common European policies on immigration and integration, modifying existing and proposed legislation;
- Ensure that transposition and implementation of Council Directive 2003/109/EC of 25 November 2003 concerning the status of TCNs who are long-term residents as well as the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, fully comply with the principle of non-discrimination.
- Launch a specific programme to support positive action for the promotion of equal treatment, building on past experience, but going beyond the consideration of migrants as workforce;
- Acknowledge the role of TCN's representatives and anti-racist organisations in guaranteeing that legislation and policy does not lead to unlawful discrimination against non-nationals, and provide for structured and permanent participation of NGOs in the EU institutional debate and decision making process on immigration and asylum.

2. Single Permit and Single Procedure

ENAR urges the European Commission, Council and Parliament to **ensure the following actions:**

Action 1: The inclusion of the following clause in the proposed Directive:

(New) Article 13 (a)

- 1. In giving effect to the provisions of this Directive Member States shall ensure that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation or nationality is prohibited.*
- 2. Member States Shall ensure that an effective remedy is put in place for any breach of Article 13(a) (1)*

³ For further details see ENAR General Policy Paper no 3, Third Country Nationals

Action 2: Clarification of the proposed Article 13 of the draft Directive to ensure that it is interpreted to include international standards related to the rights of TCNs including Council of Europe, ILO and UN standards.

Action 3: Abrogation of Article 3 (2) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Article 3 (2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Action 4: Deletion of the corresponding provision from the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation announced on the 2nd July 2008.

3. Equal Treatment

On the provisions guaranteeing respect for the right to Equal Treatment:

- ENAR reiterates the call for the European institutions to fully implement and where needed revise Community legislation to comply with the range of international human rights standards relevant to TCNs and for the Community and its Member States to sign, ratify and implement the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- ENAR urges the 'de-coupling' of the provisions related to the single permit and the right to equal treatment. The rights should not be dependent on the holding of a single permit, but should be available to all those whose right to work has been recognised.
- ENAR urges the inclusion of provisions guaranteeing access to rights. Consideration should be given to including provisions equivalent to those in Article 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the Race Equality Directive;
- ENAR calls for a stronger recognition of the vital role of NGOs and Trade Unions by enabling workers to make anonymous complaints through third parties, including migrant support NGOs, trade unions, labour inspectorates and other appropriate bodies, regarding discrimination, exploitative, abusive or otherwise illegal employment practices.⁴

On the provisions limiting the right to equal treatment:

- Language proficiency & Educational Qualifications

ENAR calls for the adoption of the following amendment:

Article 12 (2) (a) by requiring proof of a level of language proficiency necessary for the specific training proposed.

- Access to public housing

ENAR calls for the deletion of 12 (2) (c) that restricts rights in respect to public housing to cases where the third-country national has been staying or who has the right to stay in its territory for at least three years

- Working conditions; freedom of association and trade union membership

ENAR calls for the deletion of Article 12 (2) (d) authorising Member States to restrict the right to equal treatment regarding working conditions, freedom of association and affiliation and membership of an organisation representing workers or employers.

II. Detailed Position

1. An attempt at fairness to be welcomed

The Proposal for a 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 (hereafter 'draft Directive') is a welcome addition to the wide range of legislative proposals that have been or are in the process of being brought forward. Before this protection of the rights of third country nationals had been conspicuous by its absence. To a limited extent Directives such as

⁴ See also the ENAR, PICUM & SOLIDAR, Joint Position Employers' Sanctions Directive: Will migrant workers pay the price of their exploitation? P. 6

those on family reunification, the rights of long term residents and the rights of asylum seekers have contributed to a more coherent framework. However, these have been subject to many delays and problems in transposition and a strong enforcement of the standards is needed. While providing important rights for selected groups of third country nationals, the existing provisions do not provide for anything like a comprehensive or coherent approach that ensures respect for the rights of all third country nationals. This gap in protection, or 'rights gap' as it has been called by the European Commission, goes against the stated aim of the European Union and against the standards of fundamental rights.

Thus ENAR welcomes:

- The explicit recognition of a 'rights gap' faced by third country nationals in EU Member States and of the role and responsibility of the European Union in addressing this;
- The use of the principle of equal treatment to secure rights. This sends out a strong message of equality between third country nationals and EU citizens;
- The inclusion of a range of important rights that are essential for recognition of the equal dignity and worth of third country nationals. These include rights that have been identified by ENAR members as of vital importance, including the right to housing, to recognition of qualifications to equal treatment in the workplace and to freedom of association;
- The inclusion of procedural safeguards regarding applications for a single permit;
- The specific inclusion of a clause on 'more favourable provisions'. This clause is vital to ensuring that the adoption of a Directive aimed at securing the rights of third country nationals does not become a vehicle for the violation of international human rights standards to which Member States are bound;
- The extension of the scope to cover not only those third country nationals specifically granted entry for the purposes of employment, but also to those who entered the Member State for other reasons, but have been granted access to employment;

2. Purpose and Scope of the Proposed Directive

ENAR welcomes that the goal is clearly stated to be a common set of rights. The preamble makes it clear that the goal is "All third-country nationals who are lawfully residing and working in Member States should enjoy at least the same common set of rights in the form of equal treatment with the own nationals of their respective host Member State, irrespective of the initial purpose of or basis for admission" (Recital 10). This is an important recognition of the 'rights gap' that is confirmed by the analysis of the Impact Assessment.

Nevertheless, it is apparent that the stated aim of the proposed Directive is more limited than the commitment given at the Tampere Council in 1999:

"A more vigorous integration policy should aim at granting them (third country nationals who legally reside on the territory of EU Member States) rights and obligations comparable to those of EU citizens."⁵

While Tampere aimed to provide the same level of rights for Third country nationals as compared to EU citizens, the Directive is not so ambitious. It does not aim to provide the same rights to TCNs as EU citizens, but rather provides that equal treatment is granted in relation to a limited set of rights, common to TCNs, but not in relation to the body of rights enjoyed by EU citizens.

ENAR is concerned that the focus on the economic role of Third Country Nationals has obscured the goal of equal rights. The link with economic rather than human rights goals is explicit in the proposal. The purpose of granting rights is *"to recognize that such third-country nationals legally working in a Member States contribute to the European economy through their work and tax payments and to serve as a safeguard to reduce unfair competition between own nationals and third-country nationals resulting from possible exploitation of the latter."* (Recital 9)

⁵ Tampere Council Conclusion 1999

The consequences of this approach have been summed up by the UNESCO report on Europe and the International Convention on the Rights of Migrant Workers:

*"When such understandings of the role and function of rights are allowed to dominate, it is easy to see how the entitlements guaranteed by international human rights instruments come to be truncated, or, in the case of irregular migrants, almost entirely neglected. There is no guarantee that the logic of economics and that of human rights will lead to exactly the same protections and to exactly the same degree; indeed, where one is systematically subordinated to the other, such convergence seems unlikely."*⁶

ENAR is concerned that the current approach and justification for actions has led to precisely this outcome, with the rights considered important being those which are necessary to ensure efficient functioning as a worker, rather than those necessary for the dignity of a human being. In the proposal this is justified by an assertion that:

*"...international agreements ratified by all Member States (such as European Convention for the Protection of Human Right and Fundamental Freedoms) cover all the basic human rights. Looking at Member States national legislations one can state that the difference in treatment lies in the access to employment, partly in the field of education and vocational training and in the field of social security and access to public services."*⁷

This assertion does not take into account the need for such international instruments to inform the content of legislation, rather it takes the existence of the standards as a reason for excluding coverage of human rights more broadly and as such epitomises the lack of convergence feared by the authors of the above report.

This is most clearly seen in the scope of the proposed Directive. While ENAR welcomes the fact that the proposed Directive applies to a wider range of people than those who enter specifically for the purposes of employment, we are deeply concerned that many are left outside the scope.

For some this is because they already enjoy greater rights than those proposed in the draft Directive, for others exclusion from the scope will result in a denial of fundamental rights. This includes:

- Irregular or undocumented migrants;
- Seasonal Workers
- Applicants for International protection or temporary protection schemes
- Third Country Nationals whose expulsion has been suspended for reasons of fact or law.

The rights that are provided for in the proposed Directive are the minimum rights that are necessary for dignity at work. Denial of rights such as those to a healthy and safe working environment, to equality in working conditions and pay, to freedom of association and freedom to join a Trade Union only acts to re-enforce the already vulnerable position of many third country nationals.

While ENAR recognises the legal complexities of EU competence in this area and the subsequent challenge that would present in bringing forward a Directive that covers all third country nationals, including those who have an irregular status, this must be the ultimate goal if the aim of fair treatment for all third country nationals is to be realised.

In the meantime, it is a basic principle that when a Member State accepts that a person has the right to work, they must also accept that that person must be treated with dignity. In this context, ENAR urges the Commission, the Parliament and the Council to take action to address the deficit in the scope, to ensure that more broadly European Immigration and Asylum policy respects all international human rights instruments and

⁶ 'The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives', Euan MacDonald, Ryszard Cholewinski, UNESCO Migration Studies 1 (<http://unesdoc.unesco.org/images/0015/001525/152537E.pdf>)

⁷ Impact Assessment p.12

take positive steps to ensure equal access to, and the effective enjoyment of, fundamental rights by third country nationals. **We therefore urge the following actions:**

Amend the draft Directive:

Regarding the **scope** of the proposed Directive

- ENAR calls for the **deletion of Article 3 (2) (d), (e), (f) & (h)**

Complementary Actions:

Regarding **respect for fundamental rights**, ENAR urges:

- European institutions to fully implement and where needed revise relevant Community legislation to **comply with the range of international human rights standards** relevant to third country nationals;
- The Community and its Member States to sign, ratify and implement the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁸

Regarding the need for **positive steps to be taken to ensure equal access to, and the effective enjoyment of, fundamental rights** by third country nationals, ENAR urges the EU to:

- Include equal treatment of TCNs in the common European policies on immigration and integration, modifying existing and proposed legislation;
- Ensure that transposition and implementation of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents as well as the Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, are fully compliant with the principle of non-discrimination.
- Launch a specific programme to support positive action for the promotion of equal treatment, building on past experience, but going beyond the consideration of migrants as workforce;
- Acknowledge the role of TCN's representatives and anti-racist organisations in guaranteeing that legislation and policy does not lead to unlawful discrimination against non-nationals, and provide for structured and permanent participation of NGOs in the EU institutional debate and decision making process on immigration and asylum.

3. Single application procedure and Single permit (Articles 4 – 11)

As already stated, ENAR welcomes the broader application of the Directive to many of those whose right to work is recognised by Member States. The goal of a single permit would, however, be better achieved if at least all those whose right to work is recognised by Member States were to be eligible for the single permit, and therefore the purpose of this section of the Directive would be strengthened by the proposed deletion of Article 3 (2) (d), (e), (f) & (h).

ENAR also welcomes strongly the procedural safeguards put in place such as the need to give reasons for a decision rejecting the application for a single permit and the right to appeal. These are essential for a fair application of the rules. While we recognise that the criteria to be applied are to be governed by other instruments (such as the 'Blue Card' Directive) and by the competence of Member States, it is imperative that the EU, in providing for a framework within which this criteria is applied, ensures that certain fundamental principles of fairness underpin the application of such criteria.

⁸ For further details see ENAR General Policy Paper no 3, Third Country Nationals

The importance of non-discrimination in achieving the goals of the proposed Directive is recognised in the Preamble, Recital 19, which provides that:

“Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation in particular in accordance with Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.”

ENAR welcomes this specific recognition of the importance of the right to non-discrimination, and in particular welcomes the important recognition of the role of the existing anti-discrimination framework. We believe that such a recognition will assist greatly in enabling Member States to give effect to the provisions of the proposed Directive in a way that accords with the jurisprudence of the European Court of Justice regarding the fundamental principle of non-discrimination in EU law.

ENAR also strongly welcome the important protections for the right of Member States to maintain higher standards of protection and we hope that this will help to remove the myth expressed by the French Minister for Foreign Affairs in 2005 *“that the transfer of competence in the field of immigration effected by the Treaty of Amsterdam means that France would be acting unlawfully if it unilaterally ratified the Convention: that, since the famous judgment by the Court of Justice of the European Communities in the AETR case in 1971, once common Community rules on a certain issue have been established, Member States no longer have the power to undertake unilateral commitments with third countries in that field”*⁹

Nevertheless, we see important factors that could limit the effectiveness of such welcome provisions:

1. While the recognition of the right to non-discrimination in the Preamble is welcome, it is phrased as an aim, rather than a legal requirement.
2. The exclusion of nationality from the enumerated rights, and the use of a ‘closed’ list of grounds. The clause clearly draws on the EU Charter of Fundamental Rights, Article 21. This clause includes a non-exhaustive list of grounds (Article 21(1) and the prohibition of discrimination on grounds of nationality (Article 21(2));
3. The fact that inclusion in the Preamble limits the effectiveness of the right, and could lead some Member States to see this as an optional factor to consider. Inclusion in the body of the text would be a more effective method of achieving the aim of ensuring a non-discriminatory application of the provisions of the proposed Directive;
4. While the preamble recognises the important role of the standards set by the EU anti-discrimination framework, it is an unfortunate reality that as it stands the core of that Framework, namely the Race Equality Directive and the Framework Employment Directive, specifically provide an unacceptable derogation to the principle of non-discrimination, excluding from the scope of protection ‘provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States’, allowing ‘any difference of treatment’ arising from nationality and the legal status of third country nationals. This means that much of the proposed Directive is outside of the scope of non-discrimination, despite the fact that The EU has competence to act in these areas;
5. Finally the provision in Article 13 on more favourable provisions recognises the importance of a range of bilateral and multilateral agreements, it would benefit from a clearer statement that this includes International standards related to the rights of third country nationals, including Council of Europe, ILO and UN standards.

⁹ This position was asserted by the French Minister for Foreign Affairs in a response to a question in Parliament in November 2005. For further details see ‘The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives’, Euan MacDonald, Ryszard Cholewinski, UNESCO Migration Studies 1 (<http://unesdoc.unesco.org/images/0015/001525/152537E.pdf> page 54

ENAR urges the European Commission, Council and Parliament to ensure the following actions:

Amend the draft Directive:

Action 1: The inclusion of the following clause in the proposed Directive:

(New) Article 13 (a)

3. *In giving effect to the provisions of this Directive Member States shall ensure that any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, sexual orientation or nationality is prohibited.*
4. *Member States Shall ensure that an effective remedy is put in place for any breach of Article 13(a) (1)*

Action 2: Clarification of the proposed Article 13 of the draft Directive to ensure that it is interpreted to include international standards related to the rights of third country nationals including Council of Europe, ILO and UN standards.

Complementary Actions

Action 3: Abrogation of Article 3 (2) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Article 3 (2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

Action 4: Deletion of the corresponding provision from the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation announced on the 2nd July 2008.

4. Right to equal treatment (Article 12)

ENAR warmly welcomes this vital recognition of the right to equal treatment in a range of important areas. There is clear evidence of discrimination in these areas¹⁰ and ENAR has for many years raised concerns regarding discrimination against third country nationals in access to education, housing, healthcare, the treatment of workers and recognition of qualifications and we are pleased to see the EU using the competence granted in 1997 under the Amsterdam Treaty to address these concerns.

ENAR also warmly welcomes the clear consideration that has been given to international standards, with the rights proposed having a firm basis in international human rights law. ENAR also welcomes the parallels with the scope of the Race Equality Directive, as well as the inclusion of rights that are not specifically mentioned there, namely health and safety at work, tax benefits, recognition of qualifications and payment of an acquired pension when moving to a third country.

ENAR also welcomes the fact that the method for securing rights is equal treatment with nationals of the Member State. ENAR recognises that a more minimalist approach could have been pursued, the choice of equal treatment rather than minimum rights sends out a strong message of equality between third country nationals and EU citizens.

¹⁰ ENAR Shadow Reports 2005 & 2006

Nevertheless, ENAR is concerned that certain aspects of the current provisions serve to undermine these important steps forward:

1. As outlined above, the limitation in the scope of the proposed Directive, excluding significant numbers of third country nationals, including those who are often in the most vulnerable position, severely limits the effectiveness of the provisions on equal treatment;
2. The choice to limit the rights recognised in the proposed Directive to those that directly relate to employment demonstrates a lack of a thorough analysis of the rights gap. The broad assertion that *“international agreements ratified by all Member States (such as European Convention for the Protection of Human Right and Fundamental Freedoms) cover all the basic human rights”*¹¹ is fundamentally flawed in its reasoning, and undermined by the fact that many of the rights set out in the proposed Directive also draw on international human rights standards. It also pays insufficient attention to the reality that rights on paper do not always mean rights in practice. As the recent UNESCO report on the International Convention on the Rights of Migrant Workers and their Families and the EU/EEA highlights *“...there is...little doubt that vulnerable migrants do not receive the full benefits of the rights that they are ostensibly guaranteed under national law (whether or not this law has been adopted to implement an international or regional human rights instrument), in any of the countries under consideration here.”*¹²
3. There are important protections in the Race Equality Directive that are not enumerated here (most notably in relation to conditions for access to employment (Article 3(1)(a) RED), the broad understanding of social protection in the RED and equal treatment in ‘social advantages’);
4. A final concern is the lack of provisions aimed at enabling third country nationals to access their rights. The EU anti-discrimination framework has recognised the need for specific provisions to ensure access to rights, including provisions relating to defence of rights, shifting of the burden of proof, protection against victimisation, the importance of dissemination of information regarding rights and the central role of social dialogue and dialogue with NGOs. Furthermore, provision is needed to ensure that laws, regulations, administrative proceedings or similar provisions in collective agreements are consistent with the principle of equal treatment and where they are that they are abolished as well as provisions that ensure an effective remedy.
5. The vital role of NGOs and Trade unions in enabling access to rights must in particular be recognised.

▪ ENAR reiterates the call for the European institutions to fully implement and where needed revise relevant Community legislation to comply with the range of international human rights standards relevant to third country nationals and for the Community and its Member States to sign, ratify and implement the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

On the provisions guaranteeing respect for the right to Equal Treatment ENAR calls for the draft Directive to be amended to ensure:

- The ‘de-coupling’ of the provisions related to the single permit and the right to equal treatment. The rights should not be dependent on the holding of a single permit, but should be available to all those whose right to work has been recognised.
- The inclusion of provisions guaranteeing access to rights. Consideration should be given to including provisions equivalent to those in Article 7, 8, 9, 10, 11, 12, 13, 14 and 15 of the Race Equality Directive;
- A stronger recognition of the vital role of NGOs and Trade Unions by enabling workers to make anonymous complaints through third parties, including migrant support NGOs, trade unions, labour

¹¹ Impact Assessment, p. 12

¹² ‘The Migrant Workers Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives’, Euan MacDonald, Ryszard Cholewinski, UNESCO Migration Studies 1 (<http://unesdoc.unesco.org/images/0015/001525/152537E.pdf>) P.61

inspection and other appropriate bodies, regarding discrimination, exploitative, abusive or otherwise illegal employment practices.¹³

4.1 Restrictions on the Right to Equal Treatment

ENAR has warmly welcomed the vital recognition of the right to equal treatment in a range of important areas. While ENAR recognises that rights can, in certain instances, be limited, we are strongly of the view that the human rights standards provide the framework within which the balances entailed in such a limitation must be made. Blanket exceptions or provisions that enable Member States to make broad limitations on rights without regard to individual circumstances do not accord with this framework.

On the basis of this principle and the evidence from ENAR regarding discrimination faced by third country nationals, ENAR sees the restrictions proposed in the following areas as most problematic:

- Language proficiency & Educational qualifications
- access to public housing
- working conditions
- freedom of association and trade union membership

4.1.1 Language proficiency & Educational Qualifications

The ENAR Shadow Reports identify excessive language proficiency requirements as a significant barrier to equality in employment. Language requirements may constitute indirect race discrimination, in that they disproportionately impact on members of ethnic minorities. This does not mean that all language requirements are discrimination, but it does require that they are demonstrably necessary and proportionate to achieve a legitimate aim. Thus a requirement of fluency in the national language for an evening class in yoga is not likely to be justified, whereas for a degree in philosophy it probably would. The current text does not require this type of assessment, and could be in breach of the principle of non-discrimination as it allows for a broad language requirement and does not link this requirement specifically to the education or training in question.

Regarding the restriction on access to university, the right that is proposed is to equal treatment with nationals. If a Member State does not see it as necessary to put in place requirements for specific educational prerequisites for nationals to access university, it is hard to see the justification for placing such a requirement on third country nationals. Such a rule was challenged successfully when it was applied to EU citizens exercising their right to free movement, with the Court holding that “...*the differential treatment in question could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and were proportionate to the legitimate aim of the national provisions*”.

Amend the draft Directive:

ENAR urges that the following amendment replaces the current Article 12 (2):

“Article 12 (2) (a) by requiring proof of a level of language proficiency necessary for the specific training proposed.

Explanation: This would bring the exception in line with the provisions of the Race Equality Directive. The deletion of the second sentence can be justified on the basis that this is a disproportionate measure that can be achieved by non-discriminatory means and therefore the exception is redundant.

4.1.2 Access to public housing

Access to housing including social housing has been highlighted by the ENAR Shadow Reports as a significant problem. Many countries do not allow access to public housing for third country nationals, and many do not

¹³ See also the ENAR, PICUM & SOLIDAR, Joint Position Employers' Sanctions Directive: Will migrant workers pay the price of their exploitation? P. 6

allow access to homelessness facilities to third country nationals. The EU long-term residency Directive provides for a right of access to social housing after 5 years, on acquisition of long term resident status. Therefore this would be a limited improvement, shortening the period to 3 years. However, this is still a significant restriction that is not in line with the provisions of the EU Charter of fundamental rights, Article 34 (3) of which states:

"In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices."

The right to housing is also present in a wide range of human rights documents, including the International Covenant on Social, Economic and Cultural Rights, The European Social Charter (revised), the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child as well as numerous ILO Conventions.¹⁴

In addition, it has been held that in extreme circumstances denial of access to housing leading to destitution can lead to inhuman and degrading treatment, in violation of Article 3 of the European Convention on Human Rights.¹⁵

Where provisions of EC law, expressly or implicitly, authorise Member States to adopt or retain national legislation not respecting fundamental rights (including as recognised by the Charter of Fundamental Rights, the ECHR, the UN Covenant on Civil and Political Rights and the UN Convention on the Rights of the Child), the ECJ has held that those provisions can, themselves, violate fundamental rights.¹⁶

Amend the draft Directive:

ENAR calls for the deletion of Article 12 (2) (c)

4.1.3 Working conditions; freedom of association and trade union membership

The justification that is given for this restriction is that rights such as equal treatment regarding working conditions are only relevant for those that are in work. However, such a justification does not hold up against scrutiny. If the rights concerned are not relevant to those who are not in employment, then they will not be in a position to exercise those rights and the restriction is redundant. As an analogy, a person who has no contact with the Courts does not need to avail themselves of the right to a fair trial, but this does not mean that they lose the right. This is the case for the restrictions placed on the rights to equal treatment regarding working conditions.

The restrictions placed on freedom of association and affiliation and membership of an organisation representing workers or employers or of any professional organisation are seriously problematic. This would remove from a worker the right to join or retain membership of a Trade Union or other professional body, contrary to the EU Charter of Fundamental Rights and provisions of international human rights law¹⁷. Considering the vitally important role of NGOs and Trade Unions in ensuring support to the most vulnerable this is of particular concern.

A second concern is that the provision could also be used to restrict the right to join or be involved with an NGO. For many third country nationals the right to freedom of association and to access the support of NGOs is the

¹⁴ For a comprehensive overview of the right to housing see http://www.cohre.org/view_page.php?page_id=4

¹⁵ See the range of cases in the UK regarding the denial of support to asylum seekers

¹⁶ Case C-540/03, European Parliament v Council of the European Union, June 2006

¹⁷ E.x Article 23 (4) of the Universal Declaration of Human Rights

only support for victims of discrimination. NGOs such as Migrant community organisations and Migrant support centres provide essential support and play a central role in the integration of migrants. Such freedom of association cannot be curtailed.

As with the restriction on access to public housing, where this restriction would lead to a lack of respect for fundamental rights by Member States using the discretion that is authorised, the provision can itself violate those rights.

Amend the draft Directive:

ENAR calls for the **deletion of Article 12 (2) (d) authorising Member States to restrict the right to equal treatment regarding working conditions, freedom of association and affiliation and membership of an organisation representing workers or employers.**

5. Conclusion

As we said at the outset, ENAR believes that the Proposal for a 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 has the potential to make a significant contribution to the achievement of a Europe without racism, where each individual has an equal opportunity to participate in society. The ability of the proposed Directive in achieving this, however, rests on the commitment of the European Institutions and the Member States to challenging racism and to respecting human dignity.