**14.2.2011**

# ILO comments on the EU single permit directive and its discussions in the European Parliament and Council

## The social security and equal treatment/non-discrimination dimensions

Equal treatment and non-discrimination is a core principle enshrined in ILO international labour standards and international human rights law. Indeed, equal treatment in employment and occupation is recognized as a fundamental right and principle at work in accordance with the 1998 ILO Declaration on Fundamental Principles and Rights at Work, which means that all ILO Member States are obliged to adhere to this principle even if they have not ratified the specific conventions addressing this area. Equal treatment in the field of social security between nationals and non-nationals is laid down in ILO's flagship Convention on social security, the *Social Security (Minimum Standards) Convention, 1952 (No. 102)*, ratified by 21 EU Member States,[1] although export of contributory social security benefits may be subject to the existence of a bilateral or multilateral agreement providing for reciprocity (Article 68(2)). However, the *Equality of Treatment (Social Security) Convention, 1962 (No. 118)* goes further, treats these issues in more detail, and is therefore of central interest.

Convention No. 118 has been ratified by seven EU Member States[2] but also by 29 other countries. Each State party ratifying the Convention is obliged "to grant within its territory to the nationals of any other Member for which the Convention is in force equality of treatment under its legislation with its own nationals, both as regards coverage and as regards the right to benefits, in

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[1] Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom. Convention No 102 is also ratified by EU candidate countries Croatia, FYROM, Iceland and Turkey and by potential candidate countries Albania, Bosnia-Herzegovina, Montenegro and Serbia. It is also ratified by Norway and Switzerland. Remark: this list has been further completed since first version of ILO note of 11.02.2011.

[2] Denmark, Finland, France, Germany, Ireland, Italy and Sweden. The Netherlands ratified Convention No. 118 in 1964 but denounced it on 20 December 2004.

respect of every branch of social security for which it has accepted the obligations of the Convention" (Article 3(1)). Consequently, equal treatment with nationals is only accorded to migrants (and their survivors) on the basis of reciprocity. The provisions of the Convention apply to refugees or stateless persons without any condition of reciprocity. Article 5 of Convention No. 118 also requires that a State party provides for the payment of benefits to beneficiaries resident abroad, when eligibility for a benefit is established by a State party's national legislation. It should be noted that Article 5 only applies to invalidity benefits, old-age benefits, survivors' benefits and death grants, and employment injury pensions. Furthermore, the ILO Committee of Experts on the Application of Conventions and Recommendations has underlined that "the obligations under Article 5 in respect of any branch of social security for which a ratifying State has accepted the Convention are limited to its own nationals and the nationals of any other Member which has accepted the obligations of the Convention in respect of the branch or branches in question".[3] Importantly, while the payment of benefits to beneficiaries resident abroad may be implemented through inter alia multilateral or bilateral agreements (Article 8), such implementation may not be made conditional on the existence of such agreements. Only in case of non-contributory invalidity, old-age and survivors' benefits their payment to beneficiaries resident abroad may be made subject to the participation of the State parties concerned in schemes for the maintenance of rights.

Equality of treatment in social security is also guaranteed in the specific ILO instruments protecting migrant workers, in Article 6 of the *Migration for Employment Convention (Revised), 1949 (No. 97)* and Part II of the *Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)* – ratified by ten and five EU Member States respectively.[4] While equal treatment in these two conventions is not subject to any reciprocity, as the ILO Committee of Experts observed in 1999 in its General Survey on the migrant workers

[3] International Labour Conference, 63rd Session 1977, Report III (Part B), *General Survey of the Reports relating to the Equality of Treatment (Social Security) Convention, 1962 (No. 118)*, International Labour Office, Geneva, 1977, at p. 46, para. 88.

[4] Convention No. 97 has been ratified 49 States Parties, including ten EU Member States (Belgium, Cyprus, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain, United Kingdom) while Convention No. 143 has been ratified by 23 States Parties, including five EU Member States (Cyprus, Italy, Portugal, Slovenia, Sweden).

instruments, these provisions are "not designed to deal with the payment of benefits to beneficiaries residing abroad".[5]

From this perspective, the ILO welcomed the provision in the European Commission's original proposal for the single permit Directive,[6] applying the principle of equal treatment in social security in respect of third-country nationals when moving to a third country. In this specific context, application of the equal treatment principle would mean – in accordance with the position of the Commission – that EU Member States would be required to export the acquired pensions of third-country nationals who had been resident in their territory and when moving to a third country, if the Member States concerned also exported such pensions in respect of their own nationals. A similar principle was also accepted in Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment ("Blue Card" Directive), adopted in May 2009.[7]

In LIBE amendment 70, a Member State may make the application of equal treatment in respect of the payment abroad of acquired statutory pensions (in relation to old-age, invalidity and death) "conditional to the existence of bilateral agreements in which the reciprocal export of pensions is acknowledged and a technical cooperation established". In practice, the existence of such agreements will greatly facilitate access to acquired pensions abroad in case the migrant worker returns to his or her country of origin. Bearing in mind that most third countries of origin have no equivalent social security systems to those in EU Member States, only a few Member States have concluded or are likely to conclude bilateral agreements, for example, with

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[5] International Labour Conference, 87th Session 1999, Report III (Part B), *General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949, and Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975*, International Labour Office, Geneva, 1999, at p. 173, para. 434.

[6] European Commission, *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*, COM (2007) 638 final of 23 October 2007.

[7] See Article 14(1)(f): "EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card, as regards … without prejudice to existing bilateral agreements, payment of income-related acquired statutory pensions in respect of old age, at the rate applied by virtue of the law of the debtor Member State(s) when moving to a third country".

African countries. Migrant workers are contributing to the social security systems in EU Member States and therefore should obtain access to the benefits if these are also exported to third countries in respect of Member State nationals. The concept of a "Social Europe" and the EU support for the social dimension of globalization would be affected if third-country nationals are deprived of these rights, while the EU Member State national is eligible to receive the benefits in the same third country.

Of relevance also is *Migrant Workers Recommendation, 1975 (No. 151)*, which accompanies Convention No. 143 cited above, and which stipulates in paragraph 34 that a migrant worker who leaves the country of employment should be entitled, irrespective of the legality of his or her stay therein, *inter alia* to benefits which may be due in respect of any employment injury suffered, to compensation in lieu of any holiday entitlement acquired but not used and to reimbursement of any social security contributions which have not given and do not give rise to rights under national laws or regulations or international arrangements.

Finally, it is useful to recall at this juncture how equal treatment in the field of social security has been addressed by two important Council of Europe instruments to which all 27 EU Member States are also States Parties – the European Convention on Human Rights (ECHR), 1950, and its social counterpart, the European Social Charter, 1961 (and the Revised Charter, 1996). Under the ECHR, the European Court of Human Rights considers contributions to the social security system as "property", the enjoyment of which is guaranteed by Article 1 of Protocol No. 1 to the ECHR, and, moreover, in accordance with Article 14 of the ECHR, that discrimination based on nationality in this field is prohibited (see *Gaygusuz* v. *Austria*, judgment of 16 September 1996). The ECHR is applicable to all persons within the jurisdiction of a State party and therefore reciprocity is not an issue, as is the position in the European Social Charter (and Revised Charter). The Charter provides in Article 12(4) that States parties undertake to take steps to ensure "equal treatment with their own nationals and the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties". The obligation to ensure this objective, however, is by "the conclusion of appropriate bilateral or multilateral

agreements or by other means", although this obligation does not provide for making the payment of benefits conditional on the existence of such agreements as is also evident in the reference to "by other means".

Therefore, the ILO recommends that the European Commission's original clause on payment of acquired pensions abroad, which was deleted during the negotiations in the Council, is reinstated in order to guarantee equal treatment to third-country nationals in this important area. The ILO also recommends that the amendment is deleted. While ILO Convention No. 118 is based on the principle of reciprocity and the payment of certain social security benefits (i.e. old age benefits, invalidity benefits, survivors' benefits, death grants and employment injury pensions) may be implemented through bilateral or multilateral agreements, such implementation, however, may not be subject to the participation of the States parties concerned in schemes for the maintenance of social security rights.

Moreover, where third-country nationals may not have met the qualifying conditions for acquiring social security rights, and in the absence of applicable bilateral or multilateral social security agreements, ILO recommends that consideration is given to inserting an amendment ensuring reimbursement of those social security contributions which do not give rise to rights.

Finally, given that the ILO Conventions referred to in this commentary are pivotal to a proper understanding of the equal treatment principle as it applies to social security, it would be appropriate to make an explicit reference to them in Article 13 of the draft Directive, which underlines that the Directive "shall apply without prejudice to more favourable provisions of … [*inter alia*] … bilateral or multilateral agreements between one or more Member States and one or more third countries", or at the very least to refer to the ILO Conventions in the Directive's Preamble.