



IRISH CONGRESS OF TRADE UNIONS

Observations and Recommendations on the

Application of Transitional Measures on the
Accession of Bulgaria and Romania to the EU
on 1st January 2007

OCTOBER 2006

Overview

Drafting an appropriate labour migration policy for Ireland in the context of the enlargement of Europe to include Romania and Bulgaria on 1st January 2007 needs to take into account of a number of underlying developments. Unfortunately we are essentially caught up in an unfolding process and decisions made by Member States across the EU over the coming period will be crucial for Ireland. Their decisions to introduce, or not introduce, restrictions on free access to their labour markets for workers from Romania and Bulgaria will have the potential to create different labour migration dynamics for Ireland¹. This is particularly true in the case of the United Kingdom and careful consideration must be given to the consequences for Ireland, given our common travel area, if we were to adopt a different approach to the United Kingdom.

Predicting the scale of migration from Romania and Bulgaria is not possible. However we do know that there are strong push-pull factors at work, Romanian and Bulgarian living standards are lower than any of the EU 10 countries that entered in 2004. A simple comparison of minimum wages for April 2005 shows that the monthly minimum wage in Ireland was €1,064 while in Romania it was €219 a month and €32 a month in Bulgaria. We also know that there is a strong relationship between the number of workers with established contact in Ireland and the number we can expect to migrate. The increases recorded for Polish and Lithuanian nationals after May 2004 suggests that Romanians and Bulgarians can also be expected to migrate to Ireland.

There is no template that can guarantee a risk free path, there positives and negatives that flow both from decisions to introduce restrictions and from decisions to allow free access to Irelands labour market.

Congress' core concern is to ensure that the movement of workers from poorer to richer regions is beneficial for all concerned, that it does not give rise to the exploitation of vulnerable migrant workers nor undermine Ireland's labour market standards. It is clear that migration will not contribute to our economic and social strategy if it is driven by demand for labour at low levels of wages and conditions. We should not create the conditions that facilitate employers to bring workers from Romania and Bulgaria into Ireland on the basis of wages or working conditions that are below those acceptable to Irish or other workers from within the EEA area.

¹ The EU Accession Treaty permits Member States to continue to restrict the free movement of workers from Romania and Bulgaria. The experience of the most recent enlargement in 2004 was that the majority of Member States decided to introduce rules to limit access to their labour markets. Ireland, the United Kingdom and Sweden were the only countries not to introduce restrictions on access to labour markets. In mid 2006, Spain, Portugal, Greece and Finland lifted their restrictions. France, Belgium Luxembourg and Italy lifted their restrictions for specific sectors, where there were labour shortages, and Germany Austria and Denmark decided to continue their restrictions. At the time of writing only Slovakia had communicated their decision to the Commission, which is to allow free access to their labour market.

Congress believes that there is a case for Government to introduce a policy response which delays the free access of workers from Romania and Bulgaria, on the basis that we need some time to put the measures in place to manage any adverse impact on employment standards.

Congress would therefore support a decision by Government to introduce **temporary** transitional measures but only in the context of allowing sufficient time for the package of employment rights, compliance and enforcement measures, agreed as part of Towards 2016, to be put in place. Support is also dependant on the measures being made to apply to (i) employees (ii) self employed (iii) working holiday makers and (iv) working students coming from Romania and Bulgaria.

Establish the improved Employment Rights Compliance Framework agreed as part of Towards 2016.

Congress supports the application of temporary transitional measures to allow Ireland sufficient time to establish the major package of employment rights, compliance and enforcement measures that were agreed as part of Towards 2016.

It is import to state here that Congress believes that Ireland has largely benefited from immigration in recent years and that for the majority of migrant workers living and working in Ireland has been a positive experience. However this has not been the case for all migrant workers and Congress has consistently highlighted a growing pattern of discrimination, exploitation and under-paying of newly arrived migrant workers. In 2005, Congress affiliates brought forward evidence of how migrant workers were being forced to accept lower wages and worse working conditions, pay at levels below minimum wage and below REA\JLC rates , the non payment of overtime rates, excessive hours, no holiday pay, unfair dismissals, unlawful deductions, bullying, the non-issuing of pay-slips and forced self employment. A number of high profile cases demonstrated and gave expression to the concerns of workers about displacement, the emerging ‘race to the bottom’ on wages and employment standards and a culture of law breaking among certain employers.

Addressing workers’ concerns about the emerging negative impacts of migration was central to the negotiations on a new national agreement. Towards 2016 recognised that there were changed circumstances in the Irish labour market and that these had arisen, in part, from the decision to permit direct access by citizens of the new member states without an adequate system supporting legally binding labour standards. The outcome of the Agreement was a commitment to develop an improved employment rights compliance and enforcement framework.

The aim of the compliance framework is to secure the effective observance of Irish labour standards, including employment rights, health and safety, non-discrimination and equality rights. The measures committed to in Towards 2016, when implemented, will ensure against adverse labour market impacts which have the potential to arise from labour migration. Work on building the compliance framework has just begun and we are anxious that the policies, systems, structures and that institutional capacity would be fully developed and shown to be working effectively.

Congress acknowledges that some time is required to establish the major package of measures, including the passing of legislation and the establishment of the new statutory office (ODERC) dedicated to employment rights compliance and increasing the number of Labour Inspectors to 90². However the Transitional Measures should remain in place only until the compliance regime set out in Towards 2016 has been created and shown to be functioning. There should then be a gradual removal of the transitional arrangements on a sector-specific basis.

Transitional Measures Must Apply To Employed and Self Employed

Congress support for temporary transitional measures to be put in place in respect of ‘labour migration’ from Romania and Bulgaria depends on the restrictions applying to employees and to those proposing to enter the labour market as self employed persons. Recent experience, across the EU, shows that placing restrictions on the free movement of employees without any corresponding restrictions on the free movement of self employed persons can distort the labour market and operate to undermine employment standards. As workers eager to escape their situation, denied the opportunity to work in Ireland as an employee, will simply switch and take up work as a self employed contractor instead. These self-employed contractors are generally left outside the scope of statutory protections including the entitlement to be paid the minimum hourly wage³. The growth of ‘bogus’ self employment already exists as a problem in certain sectors, in particular the construction sector.

Requirement for Employment Permits for Employees

Transitional measures that require employees from Romania and Bulgaria to continue to require an employment permit should also provide for preference to be given to applications for employment permits for workers coming from Bulgaria and Romania.

Legislation already sets out the rules relating to the application of Transitional Measures, this is provided mainly in the Employment Permits Act 2006⁴.

The Employment Permits Act 2006 provides for a ‘*labour market*’ test before an employment permit can be provided. Congress is concerned to improve the effectiveness of the labour market test. At the moment, the test simply requires an employer to demonstrate that some effort has been made to recruit an EEA national. All that this requires an employer to do is advertise a job vacancy with FAS. FAS then advertise the job vacancy locally and nationally and circulate the job advertisement onto EURES, an EU wide job vacancy portal. If after four weeks, no suitable person has been recruited, FAS then issues a letter certifying

² The measures are set out in Towards 2016, chiefly in Part VII, Sections 11 to 26.

³ Where an REA/JLC is in place for an industry the Labour Court have found that it is capable of covering self employed workers in its scope.

⁴ The Act was signed by the President in June 2006 however the Minister has yet to provide for the commencement of any part of the Act.

the unavailability of workers, thus enabling the application for an employment permit to proceed. The employer is then in a position to recruit as many workers as they wish, and to employ them in any job, regardless of the skill level generally required.

This approach to identifying labour or skills gaps is inappropriate, it is out of place with a transparent and managed system of migration and insufficient to protect workers from exploitation. At a minimum the 'labour market' test needs to require that the job to be advertised at the 'going rate for the job' and with established conditions and skill levels. Otherwise the reason the job may not be filled is because it is under-cutting wages and the employment conditions are lower than are acceptable to Irish and other EEA workers.

Congress believes that all workers on employment permits, including for a limited period of time workers from Romania and Bulgaria, should be recruited only into sectors that have a genuine labour shortage. This requirement needs to be supported with better assessment of which sectors are actually suffering from labour market shortages. This requires much more than a single job vacancy related labour market test. What's needed are sector-specific strategies to manage migration that involve trade unions, employers and Government. This is in line with Towards 2016 which provides that there will be consultation with the social partners to determine 'included' and 'excluded' categories of jobs and staff eligible for work permits.

We are calling therefore calling for the establishment of an appropriate ongoing consultation mechanism with Congress which will identify sectors where it is appropriate to fill vacancies with employment permits. In addition fulfilling the 'labour market test' should not only require a letter from FAS but also from EURES stating clearly why no suitable employee was, or is likely to be, available from across the EU to fill the position.

Further the safeguards set out in the Employment Permits Act 2006 which guarantee certain rates of pay and protect the employee from particular abuses that can arise from the employment permit situation need to be put in place immediately, including the right to change to another employer.

Requirement for 'Self Employed Permit'

Congress is recommending that transitional measures be put in place to guard against a growth of forced or 'bogus' self employment. Without effective measures, disguised employment or 'bogus' self employment is likely to be used as a mechanism to avoid the restrictions on entering the labour force as an employee. The introduction of measures restricting the free movement of workers on one hand without any measures restricting the free movement of self employed would be a very undesirable situation. Transitional Measures need to guard against the inappropriate and disproportionate growth of self employment which can distort and interfere with the proper functioning of the labour market.

Ireland's laws and regulations, and their interpretation, should be compatible with the objectives of maintaining labour standards and with 'public policy' considerations such as the proper functioning of the labour market. Employment relationships that are disguised as self employment should not be facilitated, likewise the admission of a disproportionate

number of self employed workers into particular sectors may have a detrimental impact on employment and standards in that sector.

Currently, Romanian and Bulgarian nationals who wish to set up or carry on a business in Ireland need to apply for a '*Business Permission*'. The Business Permission guards against false self employment by requiring a minimum capital transfer to Ireland of €300,000 and the creation of at least two new jobs, for EEA nationals. Ideally these requirements would continue during the transitional period. However Congress understands that the EU Treaty provisions may not clearly support this exact mechanism to continue for **all** businesses. However measures that are substantially equivalent to these can be put in place for self employed workers.

Congress is recommending that the transitional measures applied will firstly establish that the worker is correctly categorized as either a self employed worker or an employee in advance of their entering the labour force in Ireland. Secondly that due regard is given to the labour market impact of increasing the number of self employed persons in the sector or industry before the Self Employed Permit is issued to the self employed worker.

Establishing if a worker is employed or self employed can be assisted by developing a legal presumption that an employment relationship exists, this is consistent with the ILO R198 Employment Relationship Recommendation, 2006⁵. Towards 2016 commits to a more effective implementation of the Code of Practice on the Correct Determination of the Status of Employed and Self Employed. This Code applies to all employees and self employed working in Ireland, it sets out tests to correctly categorise a worker as an employee or self employed. Romania and Bulgaria have different definitions and standards for determining employee and self employed status.

Where it has been verified that the worker is correctly categorized as a self employed worker then certain qualifying criteria should apply before a *Self Employed Permit* is issued. The criteria can include retaining the requirement for a capital transfer, proof of prior business/self employed experience for at least two years before the application for a business permit and the existence of contracts for a twelve month period. Congress believes that these requirements are consistent with the Commission's Guidance which allows for measures to be put in place for natural persons, that is self employed persons in accordance with the Treaty. Article 44 of the Treaty expressly provides that Member States can set out conditions that self employed workers would be required to satisfy when entering a Member State. Likewise the proposed Services Directive allows the 'member state of destination' to supervise service providers in its country.

Congress believes that greater monitoring and joined-up-decision making would be more likely to occur if granting permission to enter the labour market as a self employed person was a decision taken by Enterprise Trade and Employment in conjunction with Social Welfare and Revenue rather than by the Department of Justice as is currently the case. The requirement for a capital transfer and the demonstration of sustainable contracts for the first

⁵ Romania, Bulgaria and Ireland all voted in favour of adopting this Recommendation at the 2006 ILO Conference.

12 months will ensure an income to support a standard of living above the poverty line should can also be considered as ‘public policy’ measures.

Finally as previously stated Congress is of the view that a large and disproportionate increase in the number of workers who are self employed can have a negative effect on the proper functioning of the labour market. And restrictions, similar to those that apply in the case of employment permits, which require that a labour shortage is shown to exist before a permit is issued should also be put in place for be put in place for self employed workers. This is necessary to ensure that there is no adverse effect on the proper functioning of the labour market by a large increase in self employed or false self employed.

Improve Enforcement for Rights under the Posting of Workers Directive

The 2004 enlargement significantly increased the number of employers in the new member states interested in posting their workers to the EU. Imprecision, ‘loop holes’, and ‘grey areas’ have emerged while the absence of an accessible enforcement mechanism in circumstances where there is no employment relationship in the host state have been exposed as a real weakness.

Workers posted to work in Ireland from other EU Member States have the protection of Irish employment legislation in the same way as employees who have an Irish contract of employment⁶. However experience shows that the rights of posted workers are difficult to monitor and enforce. We urgently require the introduction of the legislation promised in Towards 2016 to provide that every employee must have an identifiable employer within the State who has legal responsibility for compliance with all aspects of the applicable employment rights. Effective enforcement urgently requires the development of this legislation which should be treated as a priority and brought forward immediately.

Another key area for concern for Congress is the extent to which an employee can rely on collective agreements established in Ireland. These issues are raised and awaiting decision in ‘VIKING’ and ‘Laval’.

Working Students and Working-Holiday Makers should have Employment Permit

Congress has previously highlighted examples of how the working student visa program can leave students vulnerable to abuse and exploitation. Towards 2016 provides that all working-students will be required to have an employment permit if they wish to work during their course of study. Congress recommends that if transition arrangements are put in place for employees then this requirement should similarly apply to working- students from Romania and Bulgaria. To avoid any ‘loopholes’, the requirement for an employment permit should also apply for Working Holiday Makers including those from Romania and Bulgaria.

⁶ The Protection of Employees (Part-Time Work) Act 2001, Section 20, gives certainly that all employment legislation which confers rights or entitlements on an employee applies to a posted worker in the same way that it applies to any other employee and that, a person, irrespective of nationality or place of residence, who works in the State under a contract of employment, has the same rights under Irish employment protection legislation as Irish employees.

Measures to Combat Irregular Working

The fight against irregular employment may require some monitoring of the overall numbers of people from Romania and Bulgaria who are exercising their right as EU Citizens to travel to Ireland. Recognition needs to be given to the fact that some people who enter as tourists may not leave and may choose instead to take up unauthorised employment or unauthorised self employment.

To meet such challenges, the measures negotiated by Congress as part of Towards 2016 need to be put in place as a matter of urgency. The main focus of actions is to combat irregular employment by reducing the number of employers willing to take a chance on employing workers who do not have permission to work in Ireland. The measures require better record keeping, regular inspection, increased penalties and the rigorous prosecution of employers who illegally employ migrant workers. International research shows that these types of actions, which focus on minimising demand among employers for irregular workers, are much more effective than actions aimed at minimising the supply of irregular workers through border controls.

Thorough enforcement should be supported by a humane approach to repatriation and Congress recommends that Ireland should conclude a 'return agreement' with Romania and Bulgaria which treats irregular workers with dignity and respect for their rights and for their family's rights.

Unauthorised migrant workers are at the margins of protection. The enforcement regime must recognise that employment rights and standards are being undermined by the employer who seeks to profit by exploiting the unauthorised migrant worker. It is therefore imperative that employment, health, safety and welfare and equality rights apply for all workers regardless of their status. The Hidden Economy Working Group should keep this situation under review.

Introduce Measures to Promote Integration

Finally, Congress would like to take this opportunity to highlight again the ongoing need for supported integration of migrant workers. Integration outcomes should recognise that immigration is fundamentally a human activity and the decision to admit migrant workers is closely associated to admitting family migrants. Access to information about employment rights, English classes, education and higher learning, health and housing are all relevant in ensuring that migrant workers and their families have the opportunity to live to their full potential. Programmes must be put into place to give information, including information about the right to join a union in Ireland, to promote integration, combat discrimination and xenophobia.

Summary of Recommendations

- There is a case for Ireland to introduce temporary Transitional Measures to restrict 'labour migration' from Romania and Bulgaria in the context of allowing sufficient time for the package of employment rights, compliance and enforcement measures agreed as part of Towards 2016 to be put in place.
- Congress support for restrictions on the free movement of employees is dependant on similar restrictions being made to apply to those proposing to enter the labour market as self employed persons.
- The 'labour market test' for employment permits should be improved and preference should be given to applications for employment permits for workers coming from Bulgaria and Romania.
- A worker should be correctly categorised as self employed or as an employee in advance of their entering the labour force in Ireland.
- Self employed workers should be required to have a Self Employed Permit and due regard must be given to the labour market impact of increasing the number of self employed persons in the sector or industry before the Permit is issued for the self employed worker.
- An appropriate ongoing consultation mechanism must be established which involves the social partners in identifying sectors where it is appropriate to fill vacancies with employment permits or self employed permits.
- Every employee must have an identifiable employer within the State who has legal responsibility for compliance with all aspects of the applicable employment rights.
- Working Students and Working-Holiday Makers should also be required to have an Employment Permit
- Guard against irregular employment by reducing the number of employers willing to take a chance on employing workers who do not have permission to work in Ireland by increased inspection and the rigorous prosecution of employers who illegally employ migrant workers.
- Put programmes in place to promote integration, combat discrimination and xenophobia.

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