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# The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights

Judy Fudge and Petra Herzfeld Olsson\*

## I. Introduction

On 26 February 2014, the European Parliament and the Council of the European Union adopted the Directive on the Conditions of Entry and Stay of Third-country Nationals for the Purpose of Seasonal Work (the Seasonal Workers Directive), which requires Member States to transpose the directive by 30 September 2016.<sup>1</sup> The Directive sets out rules for entry and stay for seasonal workers who are not EU citizens. It also establishes a common set of rights to which seasonal workers are entitled during their stay in the EU. The Directive seeks to respond to the needs of Member States for a source of labour to fill the low skill, seasonal, and, typically, precarious, jobs, that are not attractive to EU residents and citizens, while simultaneously minimizing the possibility of ‘economic and social exploitation’ of the third-country migrant workers by providing them with the set of rights, including the employment rights to which resident seasonal workers are entitled. At the same time, the Directive is designed to promote circular migration and to ensure that these low-skilled workers do not become permanent residents of the EU, while also stemming what is perceived to be a flood of irregular migrant workers into the EU.<sup>2</sup>

What makes the Directive distinctive from an international perspective is that it is a supranational regulation for low-skilled temporary migration that gestures towards a circular migration program. The Directive is a binding legal instrument that limits the discretion of member states to impose admission criteria and requirements of stay on third-country seasonal workers, although it leaves the actual numbers admitted within the jurisdiction of the Member State.<sup>3</sup> It is this constraint on national sovereignty over admission criteria and conditions of stay that is relatively rare in a binding international

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<sup>1</sup> Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375 28.3.2014. See Article 28 in the Directive.

<sup>2</sup> COM(2010)379, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purpose of seasonal employment, 2-3 and Council Press release, 17 February 2014, doc 6229/14, Council adopts directive on third-country seasonal workers, 1-2.

<sup>3</sup> There is no EU competence over this matter, Article 79.5 TFEU.

agreement.<sup>4</sup> From the standpoint of the EU, which is itself a sui generis supranational political and legal institution, what is remarkable about the Directive is the extent to which it combines immigration law, which regulates entry and stay in a territory, with labour law, which governs the rights of workers. We argue that these two distinguishing features of the Directive are clearly discernable in its substantive provisions and that these provisions exemplify the tension between immigration and labour regulation in a supranational context. Moreover, we claim that this tension, which is exacerbated by the different interests and expertise of the various EU institutions involved in the drafting and adoption of the Directive, tends to compromise the achievement of several of the EU's explicit objectives in adopting the Directive, namely, the establishment of a level playing field for the recruitment of seasonal migrant workers across the Member States, a truly circular managed migration program, and the protection of migrant workers from economic and social exploitation.

This paper is primarily concerned with evaluating the extent to which the Directive meets this final objective. We begin by providing a brief overview of the history of the Directive and discussing some consequences of this treaty basis. The successive incarnations of the Directive over the three and a half years that elapsed from the Commission's initial proposal to its adoption illustrates the extent to which various institutions emphasized different, and not always compatible, objectives, and how these objectives changed over time. This context helps us to explain the content of the Directive, which we examine in the subsequent section. We divide the provisions contained in the Directive into two general types: those pertaining directly to immigration (conditions for admission and stay) and those we characterize as the 'labour law' elements of the Directive (protections of migrant workers from economic and social exploitation). We also discuss hybrid provisions in which immigration controls are used to enforce migrant workers rights. Since our primary focus is on the 'labour protection' elements in the Directive, we compare it with other EU directives on labour migration and with relevant International Labour Organization (ILO) standards. In our analysis, we emphasize the distinctive EU-drafting style extensively utilized throughout the Directive, in which general mandatory provisions ('shall' clauses) are followed by permissive provisions ('may' clauses). This style allows the Member States a considerable margin of appreciation when it comes to transposing the Directive, and we suggest that this, now quite common, technique, which is attributable to, the increasingly fissiparous nature of the enlarged EU, accounts for the Directive's ambiguity. We conclude by summarising the main goals embodied in the adopted Directive and speculating on what the adoption of this Directive means for the future of the EU's immigration policy.

## II. The Institutional and Legal Context of the Seasonal Workers Directive

### 1. The Background and Aims of a Seasonal Workers Directive

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<sup>4</sup> The provisions on free movement on workers within the EU itself (Article 45 TFEU) is a unique aspect of a common market agreement, and for this reason there is a logic behind the adoption of a common immigration policy.

Issues pertaining to immigration were first identified as ‘matters of common interest’ through the Maastricht Treaty in 1993, and provisions providing for the adoption of acts within this field were included in the ‘third pillar’, Title IV in the Treaty on European Union, on cooperation on justice and home affairs. The Council of Ministers adopted a non-binding resolution on admission rules of third country nationals for the purposes of employment in 1994, and in 1997 the Commission proposed a Convention on rules on admission that was later dropped.<sup>5</sup> These tepid initiatives reflected the view that there was little need for third country nationals.<sup>6</sup> However, when competence over immigration was transferred to the EU through the Treaty of Amsterdam EU immigration instruments began to be proposed.

A new strategy to increase the competitiveness of the European Union was required in light of demographic change and labour and skill shortages. The Tampere European Council in 1999 emphasized the need for rapid decisions on ‘the approximation of national legislations on the conditions for admission and residence of third country nationals based on a shared assessment of the economic and demographic developments within the Union as well as the situation in the countries of origin’.<sup>7</sup> The main focus was to ensure that the European labour market functioned as efficiently as possible. However, another aim was to secure legal status for temporary workers who intended to return to their countries of origin, while at the same time providing a pathway leading eventually to a permanent status for those who wished to stay and who met certain criteria. The idea was that admitted workers should be provided with broadly the same rights and responsibilities as EU nationals in a progressive manner related to length of stay.<sup>8</sup>

These aspirations were part of an overall ambition to develop a common EU policy on asylum and migration.<sup>9</sup> Not surprisingly, therefore, the Commission’s first proposal to regulate labour migration in 2001<sup>10</sup> was characterized by uniform admission rules

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<sup>5</sup> Council Resolution of 20 June 1994 on limitations on admission of third-country nationals to the territory of the Member States for employment and COM(97)387 Proposal for a Council Act establishing the Convention on rules for the admission of third-country nationals to the Member States.

<sup>6</sup> See more on the content of these attempts in B Ryan, *The EU and Labour Migration: Regulating Admission or Treatment* in H Toner, E Guild and A Baldaccini (eds) *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy* (Oxford and Portland, Hart Publishing, 2007), 489-516, 496ff.

<sup>7</sup> SN 200/99, Presidency conclusions of the Tampere European Council 15&16 October 1999, para 20 and COM(2000)757 final, Communication on a community immigration policy.

<sup>8</sup> COM(2000)757 final (fn 7), 18 -19.

<sup>9</sup> Presidency Conclusions (fn 7) para 10.

<sup>10</sup> COM(2001)386, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities.

intended to replace national labour migration schemes.<sup>11</sup> Member States, however, did not share these far-reaching ambitions, and the Commission had to withdraw its proposal in the face of their criticism that it went too far in proposing harmonized admission criteria for labour migrants. The requirement for unanimity on the Council in order to adopt immigration admission provisions helps to explain the Commission's decision to retreat.<sup>12</sup>

Encouraged by the European Council in The Hague,<sup>13</sup> the Commission maintained its ambition to adopt a policy plan for economic migration, but this time it adopted a new strategy. After in-depth consultations with the Member States and other stakeholders, it presented a policy plan for legal migration in 2005, stressing that certain sectors were already experiencing substantial labour and skill shortages that could not be filled within the national labour markets and citing Eurostat projections of even worse shortages in the future.<sup>14</sup> The Commission also emphasized the possibility that the admission of third-country nationals in one Member State might affect the labour markets of other Member States.<sup>15</sup>

The 2005 package only addressed the conditions and the procedures of admission for few selected categories of economic immigrants.<sup>16</sup> One of these categories was seasonal workers, who were considered to be regularly needed in certain sectors, mainly agriculture, building, and tourism. The proposal was intended to provide Member States with a supply of labour while simultaneously granting a secure legal status and a regular work prospects for the immigrants protecting a particularly vulnerable category of workers, and contributing to the development of the countries of origin.<sup>17</sup> The Commission argued that even with high unemployment, few EU citizens and residents

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<sup>11</sup> E Guild, *Mechanisms of Exclusion: Labour Migration in the European Union* in J Apap (ed) *Justice and Home Affairs in the EU – Liberty and Security Issues after Enlargement* (Cheltenham, Edward Elgar, 2004) 211-224, 212.

<sup>12</sup> A Faure Atger, *Competing Interests in the Europeanization of Labour Migration Rules* in E Guild and S Mantu (eds) *Constructing and Imagining labour migration: perspectives of control from five continents* (Farnham, Ashgate, 2010) 157-174, 162.

<sup>13</sup> European Council conclusions in Haag, Annex I, § III 1.4. “Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the Lisbon strategy”.

<sup>14</sup> COM(2005)669 final, *Policy Plan on Legal Migration*, 4.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* 4-5. The sectors are highly skilled immigrants, seasonal workers, and intra-corporate transfers. Also a Framework directive including a single application procedure and a set of rights for labour migrants was proposed. These proposals have led to adopted directives (fn 45 and 89).

<sup>17</sup> *Ibid* 7 with reference to COM(2005)390 on *Migration and Development: Some concrete orientations*.

were willing to engage in seasonal activities and, thus, admitting this category of immigrant workers would rarely conflict with the goal of employing EU workers.<sup>18</sup>

In parallel to these discussions on harmonized rules for the admission of seasonal workers from third countries, the Commission was considering the links between migration and development. It examined the possibility of defining a general framework for the entrance and short-term stay of seasonal migrants.<sup>19</sup> In 2007, a communication on circular migration and mobility partnerships between the European Union and third countries was adopted, which identified mobility partnership agreements between the EU and specific third countries that would, for example, facilitate the access of these nationals to Member States' labour markets as the way forward.<sup>20</sup> Mobility partnerships were regarded as a way of fostering circular migration.<sup>21</sup> Multi-annual residence/work permits for seasonal migrants, allowing them to come back several years in a row to perform seasonal work, was the main measure to foster circularity.<sup>22</sup> Bilateral agreements were also encouraged.<sup>23</sup>

Before the Commission could actually propose a directive pertaining to the admission of seasonal workers from third countries it needed a legislative route that did not require (as under the Amsterdam Treaty) a unanimous decision by the Council. The entering into force of the Treaty of the Functioning on the European Union (TFEU) in late 2009 provided that the exercise of competence over immigration was through the ordinary legislative process where the Council adopts decisions by qualified majority and in agreement with the European Parliament. Without this change, it is doubtful that the Directive could have been adopted.<sup>24</sup>

In 2010, the Commission proposed a text for a directive on seasonal employment.<sup>25</sup> Its explanatory memorandum reiterated the need for seasonal work in the EU, for which a supply of such labour from within the EU was expected to become less and less

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<sup>18</sup> Ibid. The Commission had previously identified the need for seasonal workers in the 1994 resolution (principles i, iv and v) and in its proposals from both 1997 (art 9) and 2001 (art 2(f) and 12). See the official names of these documents in (fn 5 and 10).

<sup>19</sup> COM(2005)390 (fn 17), 7.

<sup>20</sup> COM(2007)248, Communication on circular migration and mobility partnerships between the European Union and third countries, 2 ff.

<sup>21</sup> COM(2007)248, 5 and 7. Circular migration is the temporary and typically repetitive movement of migrant workers between home and host countries.

<sup>22</sup> Ibid, 10.

<sup>23</sup> Ibid, 13.

<sup>24</sup> It is also worth mentioning that in 2008, the European Council adopted the European Pact on Immigration and Asylum and in 2009 reiterated the Commission and Council's commitment to implementing the Policy Plan on Legal Migration in The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115 of 4.5.2010.

<sup>25</sup> COM(2010)379 (fn 2).

available.<sup>26</sup> In the impact assessment the Commission's staff also emphasized the extent to which migrant workers were already employed in the agricultural sector in the Member States, noting that a large proportion were irregular migrants.<sup>27</sup> The directive would provide a route of lawful economic immigration for this group of seasonal workers and thus encourage legal, as opposed to irregular, migration.<sup>28</sup>

The impact assessment also stressed the importance of establishing a level playing field across the Member States. At least 20 Member States had specialized, and widely diverging, admission schemes for seasonal workers. This wide divergence was regarded as hindering the efficient allocation of seasonal workers since migrant workers would most likely be attracted to Member States with easier admission or renewal rules (or where detection of irregular status was less likely), instead of going to where their work was needed most.<sup>29</sup> The desire of Member States to maintain prevailing (low) wages in seasonal sectors did not make it into the Commission's proposal, although it was identified as a goal in the impact assessment.<sup>30</sup>

## 2. The Treaty Basis and its Influence on the Initial Framing of the Seasonal Workers Directive

The Seasonal Workers Directive is based on Article 79.2 a and b in the TFEU, which gives the EU competence to legislate with respect to the conditions of entry and residence and on the rights of third-country nationals residing legally in a Member State.<sup>31</sup> It was adopted by the ordinary legislative process (Articles 79, 2; 289 and 294 TFEU), which meant that the Council and the European Parliament had to agree on the outcome and that the Council decision was subject to the qualified majority. This legislative process gave the European Parliament a very prominent role, which it used to strengthen the labour protection provisions. Moreover, the fact that the qualified majority, and not consensus, was in play helped to a more harmonized directive.<sup>32</sup>

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<sup>26</sup> Ibid, 2-3.

<sup>27</sup> SEC (2010)887, Impact assessment accompanying the Proposal for a directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purpose of seasonal employment, Commission Staff Working document, 11.

<sup>28</sup> COM(2010)379 (fn 2), recital 6.

<sup>29</sup> SEC(2010)887 (fn 27), 10-11.

<sup>30</sup> Ibid, 12.

<sup>31</sup> However, the right of Member States to determine the volumes of admission of third-country nationals coming to seek work is preserved (Article 79.5). For a discussion on the choice of legal basis see, S Peers, E Guild, D Acosta Arcarazo, K Groenendijk, V Moreno-Lax (eds) *EU Immigration and Asylum Law (Text and Commentary): Second revised edition* (Leiden, Martinus Nijhoff Publishers, 2012) 177-178.

<sup>32</sup> Ibid, 177.

The legal basis under which the Directive was adopted situated it within immigration policy and this policy context influenced the specific entity in each of the EU institutions that had responsibility for negotiating the Directive. Within the Commission, the Directorate of Home affairs and Commissioner Malmström were responsible for the Directive.<sup>33</sup> The fact that the original proposal was elaborated within Commissioner Malmström's cabinet helps to explain why the initial provisions limiting Member States' control over their borders were so far reaching and the labour law provisions were so weak.

Although the Commission claimed that the initial proposal protected seasonal migrant workers from economic and social exploitation, in reality, the initial draft would not have achieved this goal. Not only was the absence of a firm commitment to equality for seasonal migrant workers criticized by the ILO, other EU institutional actors also supported a robust equal treatment approach for seasonal workers as a crucial step in protecting these workers from economic and social exploitation.<sup>34</sup> Moreover, it is likely that if the original proposal had been adopted it would have been in violation of basic human rights prohibition against of discrimination, such as the EU Charter of Fundamental Rights.<sup>35</sup>

The main thrust of the original proposal was to provide a labour supply for the internal market in order to foster economic growth.<sup>36</sup> The goal was to abolish obstacles to the EU's productivity, and the admission rules (Articles 5 and 11), rapid (maximum of 30 days) admission procedures (Article 13.1), and a facilitated re-admission procedure (Article 12) in the original proposal were designed to achieve it. Since these provisions would have had far-reaching implications for Member States' ability to control their borders, Member States considered them too intrusive. For the first time, the Commission faced significant direct opposition to one of its initiatives from national parliaments under the 'yellow card' procedure newly introduced by the Treaty of Lisbon (Article 6 of the amended Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality). The Commission can be compelled under this procedure to review its proposal if at least one-third of national parliaments state within eight weeks of the date of its transmission that they consider that the proposal does not comply with the principle of subsidiarity.<sup>37</sup> Despite missing the deadline for forcing a review, the Member States

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<sup>33</sup> [http://ec.europa.eu/dgs/home-affairs/what-we-do/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/index_en.htm)

<sup>34</sup> The ILO note is included in Council doc 9564/11, 2 May 2011, 4.

<sup>35</sup> Peers et al 2012 (fn 31) 181.

<sup>36</sup> Every year about 100,000 third-country nationals are admitted into EU Member States as seasonal migrant workers.

<sup>37</sup> Monar recounts that a number of national parliaments raised their concern that the proposed Directive violated the principle of subsidiarity by interfering with different national labour market needs and policies, and compromising the right of Member States (according to Article 7(5) TFEU) to determine volumes of admission of third country nationals for work purposes. However, as the Member States did not meet the deadline, the Commission could 'limit its response to a measured refutation of the parliaments' concerns and a vague hint at potential "further improvements" of the text'. J Monar



had sent a clear message to the Commission that the Directive was extremely controversial.

### III. Analysis of the Seasonal Workers Directive

#### 1. Immigration Controls

Although Member States are free under the Directive to determine the volume of admissions, if a Member State decides to admit seasonal workers, it is bound to adopt a procedure that is consistent with the Directive. The system is employer-driven, subject to the Member State's overarching authority to set the number of entrants and impose a labour market test (Article 8.3), and it is intended to facilitate a supply of seasonal workers to fill an unmet demand. As the following discussion illustrates, while the Commission was concerned to harmonize admission criteria and to create transparent and simple rules, the Parliament's chief objective was to add criteria for admitting seasonal workers and reasons for withdrawing employers' permission to employ them that were designed to protect the migrant workers from potential exploitation. Member States, on the other hand, wanted to avoid administrative burdens in the admissions process, as well as to retain control over the decision over which migrants would be allowed to enter their territory.

Member States and the Commission shared an interest in combating irregular migration – a theme that was also evident in the negotiations.<sup>38</sup> However, they differed over the appropriate means to achieve this end. The Commission, along with the European Parliament, wanted to promote circular migration since the entitlement to return the following year was seen as a carrot to encourage seasonal workers go back home. The European Parliament went even further, proposing that during a transitional period irregular migrants would be given the right to apply for a seasonal work permit from inside of a Member State.<sup>39</sup> But, Member States would not accept these incentives as the appropriate means for combating irregularity, preferring instead to use sticks.

#### The Scope of the Directive

The Directive only applies to third-country nationals who reside outside the territory of the Member States (Article 2.1). Two key concerns arose during the negotiation over the scope of the Directive. The European Parliament wanted to ensure that the sectors covered by the Directive were specified, and that any extension of the Directive to new

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'Justice and Home Affairs,' (2011) 49 *Journal of Common Market Studies* 145-164, 152.

<sup>38</sup> From the beginning, combating irregular migration has been an important part of a common EU immigration and asylum policy. It has been considered to be a necessary condition due to the lack of border control between the EU-member states, see for example R Cholewinski, *The EU acquis on Irregular Migration - Ten Years On in E Guild and P Minderhoud (eds) The First Decade of EU Migration and Asylum Law* (Leiden, Martinus Nijhoff Publishers, 2012)175.

<sup>39</sup> Council doc 15033/13, 25 October 2013, amendment 12, page 11.

sectors should depend upon the involvement of, and consultation with, the social partners.<sup>40</sup> The majority of the Member States wanted temporary work agencies and workers posted from third countries excluded from the Directive.<sup>41</sup>

The Directive gives Member States a great deal of flexibility to determine which sectors are seasonal, and only contemplates a limited role for the social partners. ‘An activity dependent on the passing of the seasons’ is defined as ‘an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly above those necessary for usually ongoing operations’ (Article 3 c). When transposing the Directive, Member States must list those sectors that are considered to be seasonal, and, if appropriate, the list should be drawn up in consultation with the social partners (Article 2.2). The preamble indicates that ‘activities dependent on the passing of the seasons are typically to be found in sectors such as agriculture and horticulture, in particular during the planting or harvesting period, or tourism, especially during the holiday period’ (recital 13). The Member States’ aversion to either formulating or limiting the kind of sectors to which seasonal workers could be recruited must be understood in light of their wish to maintain control over the inflow to their labour markets and their desire to organize their labour markets without any EU-based restrictions.

Member States were successful in ensuring that third-country based agencies or other third-country based service providers are excluded from the scope of the Directive.<sup>42</sup> By excluding specific kinds of working arrangements from the scope of the Directive, some Member States hoped to minimize the risk that the Directive would be abused by employers who were located in third countries, and beyond their direct supervision, to sponsor workers who were not really seasonal workers.

It is, however, possible for a Member State to allow employment agencies based in the Member State to avail themselves of the procedures adopted under the Directive. This practice is permitted under Recital 12 of the preamble, which was introduced after a few Member States objected to the explicit exclusion of employment agencies from the scope of the Directive on the ground both that this decision should be left to them and that workers who are employed through agencies should be protected under the Directive.<sup>43</sup>

The Directive explicitly excludes posting within the EU from its scope (Article 2.3.a). The European Parliament was unsuccessful in its attempt explicitly to prohibit (in Article 2) an employer who has a contract with a seasonal worker from posting that worker to

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<sup>40</sup> Council doc 6312/13, 12 February 2013, amendment 40.

<sup>41</sup> Council doc 5611/12, 23 January 2012, proposed articles 2.2. a and b.

<sup>42</sup> This is the effect of the requirement that the employment contract be concluded directly with an employer in the Member State where the permit is issued and the work should be carried out, which was the wording contained in the original version of the Directive (Article 3.b).

another Member State.<sup>44</sup> Recital 11 confirms that such a limitation was not intended and it is not likely that the legal basis of the Directive (Article 79) can be used to limit the mobility rights of service providers.

Is the Directive the Exclusive Means for Member States to Admit Seasonal Workers From Third Countries?

Does the Directive prevent Member States from using other procedures for admitting seasonal workers or is it the exclusive procedure? The answer to this question is critical for determining whether the Directive met the central objective of creating a level field for the recruitment of seasonal workers across the Member States, and it depends upon the type of seasonal workers immigration scheme under consideration. When discussing the linkage between migration and development, the Commission made it clear that the Directive was designed to complement, and not to replace, multilateral partnership agreements and bilateral agreements between the EU and/or one or more Member States, on the one hand, and third countries on the other. The only requirement is that the agreement 'adopt or retain more favourable provisions for third-country nationals' (Article 4). Member States can continue to give priority to migrant workers from specific third countries, and here we can see that development goals combined with Member States' desire for a reliable and efficient source of seasonal labour through partnership agreements compromised the aim of achieving a level playing field. However, the Directive prevents Member States from admitting seasonal workers through other temporary migration schemes.

#### Harmonizing Admission Rules

The Commission's primary objective was to establish harmonized admissions procedures. Common rules across the Member States would enable migrant seasonal workers to change destination easily from year to year in response to Member State demands. Simple and transparent rules would not only facilitate admission to EU territory, the Commission reasoned that seasonal migrant workers would choose to enter the EU territory through the legal route. In this way, harmonized admission rules served a dual purpose.

Although both goals are important with respect to any group of migrant workers, ensuring fair competition for labour supply is more compelling with regard to highly skilled workers, whereas stemming the flow of irregular migrants tends to have greater purchase with respect to low-skilled workers. For example, the goal of allocating migrant workers to Member States with the highest demand has led to a successful discussion of mobility within the EU as a necessary next step for highly skilled workers and intra-corporate transferees.<sup>45</sup> However, easing up the EU-internal border control in relation to

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<sup>44</sup> Council doc 6312/13 (fn 40), amendment 42.

<sup>45</sup> Article 18 in the directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.6.2009 and article 20-22 in the directive 2014/66/EU the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157/1, 27.5.2014. For an analysis of the importance of such mobility see Ryan (fn 6) 509.

low-skilled workers is not on the agenda. Seasonal workers will have to be satisfied with a right to enter, stay, and to free access to the territory in and of the Member State that issued the authorization (Article 22).

The Commission pushed for common admission criteria, and this objective was also voiced early in the negotiations by the Presidency, which emphasized that unless the Member States adopted an exhaustive list of criteria for admission, refusal, withdrawal, or non-refusal Member State discretion would undermine the objective of common criteria.<sup>46</sup>

Quite late in the negotiations, it became apparent that the admission rules had to take the Schengen acquis and the Visa code into account, which meant that different provisions would apply depending on whether or not a Member State applies the Schengen acquis in full and the length of the migrant's stay (three months being the critical cut off). Thus, the Directive includes six different routes to seasonal employment to a EU Member State. However, for those workers who are admitted for stays of longer than 90 days the Directive defines both the conditions for admission to and stay in the territory and the criteria and requirements for access to employment in the Member States (recitals 19-22). The following discussion will concentrate on the admission requirements as they pertain to stays in excess of 90 days despite the minor differences pertaining to stays less than 90 days.

Although the admission criteria are the same, Member States can choose what to call the authorization to work – a long stay visa that indicates it is for seasonal work, a seasonal work permit, and a seasonal work permit and a long stay visa – as well as how to structure it. However, the Directive requires Member States to select only one of the options (Article 12).

#### Admission Criteria

The admission system contemplated by the Directive is employer driven, subject to the Member State's right to impose limits on the numbers of migrants admitted. It is up to the Member State to decide whether the employee or the employer is required to submit the application (Article 12.3), although it is mandatory for the application to be accompanied by a valid work contract or a binding job offer (Article 6.1.a). Moreover, these documents must provide specified information, and here the European Parliament's ambition to safeguard the workers' rights had an impact. Although the Commission's original proposal required the contract to stipulate the remuneration and hours of work, the Parliament also ensured that the contract or offer includes the place and type of work, the duration of the employment, and the amount of any paid leave.<sup>47</sup> Furthermore, the Council added the requirement that these conditions conform to applicable laws, collective agreements, and/or practices (Article 6.2), which also enhances the equality

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<sup>46</sup> Council doc 10164/11, 17 May 2011, 3.

<sup>47</sup> Council doc 15033/13 (fn 39), amendment 53.

principle, which is the core of a rights-based protection approach to migrant workers schemes.<sup>48</sup>

These provisions should ensure that migrant workers know what to expect and should give them a way to prove the conditions of employment in the event of a dispute. However, it is unclear what legal effect these documents will have. In some jurisdictions, such as Sweden for example, a job offer entered into as part of the immigration process does not have legal effect, only the contract of employment does.<sup>49</sup> Unless these documents are legally enforceable, this requirement will not have much value as a form of protection.

The Directive also requires that the applicant demonstrate that the migrant is covered by health insurance (Article 6.1.b), has adequate accommodation (Article 6.1.c), and has sufficient resources without having recourse to social assistance (Article 6.3). The Member State is also required to verify that the third country national does not present a risk of illegal immigration (Article 6.5) and that he or she has valid travel document (Article 6.7). Article 6.5 states that ‘third-country nationals considered to pose a threat to public policy, public security or public health shall not be admitted.’ Even here some permissive ‘may’ provisions made their way into Directive, and they relate to the details of the travel document and proof of having the necessary skills for regulated professions (Article 6.6, 6.7).

Article 20, which is linked to the admission criteria under Article 6.1.c, is designed to ensure that employers do not exploit migrant workers through excessive housing charges or providing unacceptable accommodation. It is within the discretion of the Member State to determine whether workers are free to arrange their own accommodation or whether it is the employer’s responsibility. However, if the employer provides accommodation, paragraph 2 of Article 23 contains a number of safeguards (the rent must not be excessive and not be automatically deducted from the wages, a rental contract shall be provided, and the accommodation shall meet general health and safety standards).

Application fees relating to labour migration are controversial, and excessive fees are seen as an indication of exploitation.<sup>50</sup> Member States wanted the discretion to charge the application fees;<sup>51</sup> the European Parliament wanted employers to pay the fees if they were imposed.<sup>52</sup> The Council suggested a compromise, which was adopted in the

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<sup>48</sup> See for example ILO Multilateral Framework on Labour Migration (Geneva: International Labour Office, 2006) Guideline 9. 3.

<sup>49</sup> Members of the Swedish Parliament have unsuccessfully proposed to change this and make the offers binding, see [http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Motioner/Juridiskt-bindande-arbetsstills\\_H002Sf375/?text=true](http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Motioner/Juridiskt-bindande-arbetsstills_H002Sf375/?text=true)

<sup>50</sup> International Labour Organization, International labour migration: A rights-based approach (Geneva: International Labour Office, 2010) 78.

<sup>51</sup> Council doc 15033/12 (fn 39), 102f.

<sup>52</sup> Council doc 6651/12, 27 February 2013, 80.

Directive; ‘Member States may require the payment of fees for the handling of applications’ but that ‘the level of fees shall not be disproportionate or excessive’ (Article 19.1). The European Parliament’s concern about fees was also accommodated by providing that Member States may require employers to reimburse the workers for any application fees, traveling costs, and sickness insurance premiums (Article 19.2). This compromise, however, leaves it within the discretion of Member States to decide whether or not to impose these costs on employers.

During the negotiations, the Commission was largely successful in ensuring that the criteria were not too burdensome, and the additions that were made were done so at European Parliament’s initiative in order to protect migrant workers.

### Rejecting and Withdrawing an Application

The criteria for rejecting an application can be used to try to ensure that the employer will treat the worker decently and adhere to the standards and requirements set out in the Directive (Article 8). The European Parliament tried, largely unsuccessfully, to introduce criteria that would enhance the protection of the workers and protect them from unscrupulous employers. Although the Member States could have regarded these efforts as protecting their national workforce by limiting the opportunities to exploit migrant workers, the result suggests that most of the stakeholders wanted to avoid imposing detailed rules relating to the organization of national labour market and the administration of applications.

The provisions governing the rejection of applications in Article 8 contemplate three different types or tiers of criteria, which range from those to which Member States are required to adhere to those that they have discretion to impose. The first tier originated from the Commission’s proposal – an application shall be rejected if the admission criteria in Article 6 are not complied with or the relevant documents are fraudulently required. Under the second tier, the Member States shall, if appropriate, reject an application if the employer has been sanctioned for undeclared work or illegal employment,<sup>53</sup> the employer’s business is being or has been wound up under national insolvency laws or no economic activity is taking place, or the employer has either been sanctioned for or failed to fulfill its obligations under the Directive. In the third tier, Member States may reject an application if the employer has 1) failed to meet its legal obligations regarding social security, taxation, labour rights, working conditions or terms of employment as provided for in applicable law and/or collective agreement; 2) has, within the 12 months immediately preceding the date of the application, abolished a full-time position in order to create the vacancy that the employer is trying to fill through the

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<sup>53</sup> This provision and its counterpart relating to withdrawing an application are the only aspects of the Seasonal Workers Directive that overlap with the Directive 2009/52/EC providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. In effect, they impose an additional sanction, the denial of the privilege to hire third-country nationals as seasonal workers, on employers who have been sanctioned for employing undeclared workers.

Directive; or 3) the third-country national has not complied with the obligations arising from a previous decision on admission as a seasonal worker.

All three EU actors involved in the negotiation process appear to have agreed on the first tier of criteria for rejecting applications – the pure shall reasons for rejection. However, they parted company over the next two tiers of rejection criteria. The European Parliament wanted all the grounds for rejecting an application to be framed in shall clauses, whereas the Member States preferred to frame all of the other requirements, including the situation where an employer has abolished a full-time position in order to recruit a migrant worker, as discretionary ('may') clauses.<sup>54</sup> Member States wanted the discretion to protect their nationals, either by refusing applications where nationals had been terminated or by verifying whether the positions could not be filled by a national of the Member State, Union citizens or by third-country nationals already residing in the Member States (Article 8.3). However, they did not want to be required to reject applications in such situations. Thus, Member States retained the discretion to impose labour market tests.

The Commission wanted to close the door completely to those migrant workers who had previously overstayed. However, the European Parliament and Member States agreed to transform a migrant worker's violation of previous permits from a mandatory to a permissive reason for rejection.<sup>55</sup> The Parliament also succeeded in adding Article 8.5, which provides, with the exception of those grounds for rejecting an application that are mandatory upon Member States, that the interests of seasonal worker must be taken into account in any decision to reject an application.<sup>56</sup> It is important, however, to note that Member States are free to reject applications by third-country nationals who have violated previous permits.

The negotiations resulted in a set of criteria for rejecting applications that, at first sight, seem to require Member States to carry out a more thorough and time-consuming investigation than many wanted. However, the extent of the actual burdens imposed by the second tier of grounds for rejecting applications – which are framed in terms of 'shall, if appropriate' – is unclear. If it is within the sole authority of the Member State to determine whether it is appropriate to reject an application in a case where, for example, an employer has been sanctioned for employing undeclared workers, this is, in effect, a discretionary requirement. The Directive does not stipulate who has the authority to determine appropriateness in this context. Member States also have the choice to impose the additional requirements contemplated by the third tier of criteria, which are those expressed as may clauses. The possibility for Member States to consider all the criteria in rejecting an application, which would go a long way towards ensuring that workers are admitted to work under the conditions the Directive prescribes, was a counterweight to the Commission's goal of establishing a simple and transparent procedure that facilitates entry.

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<sup>54</sup> Council doc 6312/13 (fn 40), amendment 61.

<sup>55</sup> Council doc 15033/13 (fn 39), 64.

<sup>56</sup> *Ibid*, Agreement in trilogue.

The provisions in Article 9 governing the withdrawal of authorization for seasonal workers are constructed along the lines of the tiered approach to rejections, and they involve the same criteria. Member States also secured the discretion to withdraw an authorization on the ground of the employer's failure to fulfil obligations under the work contract.<sup>57</sup>

#### Time Limits for Processing Applications

In opposition to the Council, the Commission and the European Parliament wanted the Directive to provide for fast authorization procedures.<sup>58</sup> However, the Council prevailed since the Directive requires that a decision on the application for authorization for the purpose of seasonal work shall be taken as soon as possible, but not later than 90 days from the date when the application was submitted (Article 18).<sup>59</sup>

#### Minimum and Maximum Lengths of Stay

The Directive is the first directive to cover stays of a shorter duration than three months. Although the admission procedures for seasonal workers staying less than three months are a bit different from those provided for longer stays and, thus, compromises the goal of transparency, the workers admitted for shorter stays are covered by all of the protections provided for in the Directive.<sup>60</sup>

Over the opposition of the Commission and the European Parliament, the Member States were able to obtain a great deal of flexibility over the maximum duration of a seasonal workers stay.<sup>61</sup> The Commission argued that a strict limitation of six months per calendar year would contribute to ensuring that seasonal workers were admitted for genuinely seasonal, and not regular, work.<sup>62</sup> The Member States could not, however, agree on a common time limit due to the different lengths of their seasons.<sup>63</sup> Article 14 provides that the maximum period of stay for seasonal workers can vary from five to nine months in any twelve-month period. Once again the result is a less harmonized system.

#### Circular migration

The Commission's commitment to circular migration suffered during the negotiation process. Initially, it proposed a multi-seasonal permit option, which would have allowed for the issuance of three permits covering three seasons, arguing that this provision would not only promote the EU's development goals, but also that it would help to cultivate a stable and trained workforce for EU employers.<sup>64</sup> However, the problem was that the Commission's proposal affected the ability of Member States to control their borders and,

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<sup>57</sup> Ibid, 68.

<sup>58</sup> Council doc 6651/12 (fn 52), footnote 87.

<sup>59</sup> Council doc 15033/13 (fn 39), p 98 ff, amendment 86.

<sup>60</sup> A Lazarowicz, *A success story for the EU and seasonal workers' rights* without reinventing the wheel, EPC, 28 March 2014, 2.

<sup>61</sup> Council doc 15033/13 (fn 39), amendment 78.

<sup>62</sup> COM(2010)379 (fn 2), 10.

<sup>63</sup> Council doc 6312/12 (fn 40), 69.

<sup>64</sup> COM(2010)379 (fn 2), 3 and recital 17.



therefore, was not acceptable. The provisions that were ultimately adopted governing re-entry are weaker and they leave much more to the discretion of Member States. Although Article 16 requires Member States to facilitate the re-entry of migrant workers who have been admitted to that Member State at least once during the previous five years, the means of facilitating re-entry are completely within the discretion of the Member State. Article 16 lists four measures that Member States may adopt in order to facilitate the re-entry of seasonal workers. However, it is unclear what mechanisms Member States must put in place to facilitate circular migration since these measures are part of a non-exhaustive list ('may include one or more such measures') and they are not expressed as minimum requirements. What began as a commitment to promoting the circulation of third-country national seasonal workers (recital 17) became 'the possibility of facilitated admission procedures' in the adopted Directive (recital 34).

## 2. Protection from Social and Economic Exploitation

### Equal Treatment with Nationals

The Directive also provides for rights for third-country seasonal workers along with for immigration controls. The core of a rights-based approach to labour migration is the principle that migrants shall be entitled to equal treatment with nationals in the host state. The article on the right to equal treatment in the Directive changed considerably during the negotiations. The difference between the Commission's proposal and the adopted Article 23 is, perhaps, the clearest illustration of the Commission's misconception of what kind of minimum standard a EU directive that is supposed to provide for worker protection must contain.

Article 23 expressly embodies the equal treatment principle, providing that seasonal workers are to be treated equally to nationals at least with regard to nine enumerated categories of rights. The first paragraphs of Article 23 covers terms of employment, including the minimum working age, and working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements in the workplace. The Commission's original proposal did not provide for equal treatment on working conditions, and it was severely criticized in this respect by the ILO.<sup>65</sup> However, the Council and the European Parliament agreed on equal treatment regarding working conditions, and the Parliament was able to strengthen this provision.<sup>66</sup> An earlier reference to conditions in specific types of collective agreements, which the Commission copied from the Posted Workers Directive, was dropped.<sup>67</sup> Member States can decide the basis on which the conditions of the seasonal workers will be equalized with those of national workers.

In its second paragraph, Article 23 provides for equal treatment with regard to the right to strike and freedom of association. Although the Commission and the Council were in agreement on wording, the European Parliament pushed to include language that would have explicitly included the right to strike within the freedom of association. With a

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<sup>65</sup> ILO note (fn 34).

<sup>66</sup> Council doc 15033/13 (fn 39), amendment 94, 108.

<sup>67</sup> COM(2010)379 (fn 2), 22f, Article 16.

slight modification, the European Parliament was successful in obtaining the wording it wanted.

The majority of the equal treatment entitlements specified in Article 23 have to do with various forms of social entitlements. Article 23.1.d provides that seasonal migrant workers are entitled to those branches of social security defined in Article 3 of Regulation no 883/2004, which include sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family benefits. The Council demanded limitations on entitlement to social benefits, and as a result Member States have the discretion to compromise the equal treatment of migrant workers when it comes to accessing family and unemployment benefits (Article 23.2 i).<sup>68</sup> The equal treatment provisions in the Directive derogate from those in the two ILO migrant workers conventions since the latter include equal treatment of migrants and nationals specifically with respect to 'unemployment and family responsibilities' and more generally regarding 'social security'.<sup>69</sup> However, Article 23.1, 2<sup>nd</sup> paragraph specifically provides that migrant seasonal workers are entitled to receive statutory pensions based on the seasonal workers previous employment and acquired in accordance with the legislation set out in Article 3 of reg. 883/2004, when moving to a third country.

Seasonal workers are entitled to have the same access to goods and services and, with the exception of housing services, the supply of goods made available to the public (Article 23.1.e). In addition, migrant workers are, thanks to amendments proposed by the Parliament, entitled to equal treatment regarding education and vocational training; recognition of diplomas, certificates and other professional qualifications; and, in so far as the seasonal worker is deemed to be resident for tax purposes in the Member State concerned, tax benefits.<sup>70</sup> The Commission and the Council also wanted to be able to exclude employment services from this Article.<sup>71</sup> Instead, the Parliament was successful in ensuring that third country seasonal workers were granted equal access to any advisory services offered by employment services regarding seasonal work.

The European Parliament also managed to secure a provision on back payments to be made by the employers regarding outstanding remuneration to the third-country national.<sup>72</sup> Combined with the robust equal treatment approach, the Directive goes a long way to achieving the kind of rights-based approach to migration advocated by the ILO in its Multilateral Framework on Labour Migration.<sup>73</sup>

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<sup>68</sup> Council doc 15033/13 (fn 39), 113.

<sup>69</sup> ILO C 96, Migration for Employment Convention (Revised), 1949, Article 6(1)(a) (i) and C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Article 10, which refers to social security.

<sup>70</sup> Council doc 15033/13 (fn 39), 111-112, amendment 94.

<sup>71</sup> *Ibid*, 111.

<sup>72</sup> *Ibid*, 110, amendment 94.

<sup>73</sup> ILO, International labour migration: A rights-based approach(fn 50).

### A Multi-faceted Approach to Enforcement

The value of any rights depends, ultimately, on whether they can be enforced. Enforcement is a particular challenge when it comes to third-country migrant seasonal workers; they are sojourners in the host country, without political rights and lacking the status of citizens, and their migrant status is tied to an on-going employment relationship with the employer who sponsored them, making them particularly vulnerable to abuse. An enforcement mechanism must address the various dimensions of seasonal migrant workers' vulnerability if it is to be effective. Thus, a multi-faceted approach to enforcement is critical.

As a first step, it is essential to minimize the risks to which migrant workers who initiate complaints are exposed. Without the right to transfer employers, enforcement mechanisms that are linked to the withdrawal of the employer's authorisation to employ seasonal workers could also result in the worker's losing her or his authorisation to work. In such cases, the ability of seasonal workers to claim obligations to which they would have been entitled had the work authorisation not been withdrawn on account of the employer's violation is crucial.

Another enforcement-related problem that arises with respect to seasonal work, especially in the agricultural sector, is the use of labour supply chains.<sup>74</sup> Labour contractors often enter into arrangements with firms to supply them with a seasonal workforce. Although the seasonal worker's employment contract is with the labour supplier, the principal contractor often controls the work that is on offer. In situations in which the labour supplier fails to pay wages, violates employment standards, or fails to adhere to the terms and conditions of employment, it is important for the seasonal workers to have a right of recourse against the principal contractor.

No matter how many safeguards are provided to promote compliance, it is inevitable that complaints against employers who have failed to adhere to conditions provided for in the Directive will arise. Not only must effective complaint mechanisms be available to the seasonal migrant workers, these mechanisms should permit a third party like a trade union representative or a labour inspector to lodge complaints on behalf of seasonal workers. And, finally, external monitoring systems need to be put in place in order to ensure that the weakest party – the migrant seasonal worker – does not bear the entire burden of ensuring that employers meet their legal obligations under the Directive.

Throughout the negotiations, the European Parliament proposed a number of amendments aimed at achieving a multi-faceted enforcement structure, traces of which can also be found in the Directive. The highly contentious discussions over the impact of posted workers on the EU labour market made it obvious to the Parliament that enforcement mechanisms are absolutely essential if migrant workers are to enjoy the

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<sup>74</sup> J Allain, A Crane, G LeBaron and L Behbahani, *Forced Labour's Business Models and Supply Chains* (London, Joseph Rowntree Foundation November, 2013).

labour standards set out in a directive.<sup>75</sup> In particular, migrants whose presence in a host country is dependent on another party might decide not to claim their rights since claiming them might jeopardize their ability to stay and work in the host country. However, Member States wanted to maintain their flexibility and did not want to be tied to any particular enforcement mechanism.<sup>76</sup> In order to reach an agreement, the provisions relating to the enforcement of working conditions were split into mandatory and optional provisions.

#### *Workers' Freedom to Prolong their Stay and Change Employers*

Article 15 includes a number of provisions that give seasonal workers some flexibility over the length of their stay in a Member State and that loosen the closeness of their ties to their employers. The ability of migrant workers to change employers is regarded as a critical to whether or not they can actually enforce in practice the rights to which on paper they are entitled.<sup>77</sup> Although the provisions that were ultimately adopted were similar to that proposed by the Commission,<sup>78</sup> there was a deep conflict between the Council and European Parliament over whether or not seasonal workers should have the right to change employers. The Council did not want Member States to be required under any circumstances to permit migrant workers to change employers, whereas the European Parliament wanted migrant workers to have this right.<sup>79</sup>

In the end, there was a compromise. Member States are required to permit one extension with the same employer within the maximum period and they have the discretion to allow more than one extension with the same employer (Articles 15. 1 and 2). Member States are also required to allow seasonal workers to extend the stay once when changing employers (Article 15.3 and 4), and such applications can be submitted from within the Member State in question. The Member States, however, succeeded in obtaining a right to reject extension and renewal applications if the vacancy could be filled with other EU residents (Article 15.6).

#### *Monitoring and Inspections*

The European Parliament also succeeded in requiring Member States to ensure that mechanisms for monitoring, assessing, and inspecting whether or not employers are in compliance with the national instruments transposing the Directive.<sup>80</sup> Under Article 24, Member States must 'provide for measures to prevent possible abuses and to sanction infringements of this Directive', including monitoring, assessment, and, where

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<sup>75</sup> J Monar 'Justice and Home Affairs,' (2012) 50 *Journal of Common Market Studies* 116-131, 19.

<sup>76</sup> See for examples in the chart the amendment proposals nos. 61, 77, 85, 94, 96 and 97 on Articles 7, 12a on sanctions, 16 on back payments, 16a on monitoring and inspections, 17 on complaints mechanisms, Council doc 6312/13(fn 40).

<sup>77</sup> J Fudge, 'Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers' (2012) 34 (1) *Comparative Labor Law and Policy Journal* 101-37.

<sup>78</sup> COM(2010)379 (fn 2), Article 11.2.

<sup>79</sup> Council doc 15033/13 (fn 39), 84 ff, amendment 79.

<sup>80</sup> *Ibid*, 114 f and amendment 96.

appropriate, inspection in accordance with national law or administrative practice. Recital 49 specifically recommends using risk assessments, based on sectors and past record of infringement, in selecting which employers to inspect. The Article (24.2) also requires that Member States provide the officials who are responsible for inspections and, where provided for under national law for national workers, organizations representing workers' interests with access to the workplace and, with the worker's agreement, to the worker's accommodation.

#### Facilitation of Employee Complaints

The European Parliament also significantly strengthened the provisions relating to the facilitation of complaints.<sup>81</sup> The Commission's original proposal was only directed at third parties and their right to engage either on behalf of or in support of a seasonal worker in the administrative or civil proceedings provided for with the objective of implementing the Directive. In addition, two other provisions were added in order to facilitate complaints. Member States are required to ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers directly, through specified third parties,<sup>82</sup> or through a competent authority of the Member State when provided for by national law. Member States are also obligated to ensure that seasonal workers have the same access as other workers in a similar position to measures protecting against dismissal or other adverse treatment by the employer in retaliation for 'a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the directive' (Article 25.3).

#### Sanctions against Employers

The stakeholders had different views on sanctions against employers who violated the conditions imposed by the Directive. The Commission originally proposed that a violation of the work contract would in itself generate sanctions including the exclusion from applications for seasonal workers for one or more subsequent years.<sup>83</sup> While the Council agreed that Member States should be required to impose sanctions, it believed that Member States should have the discretion over the type of sanction to impose. By contrast, European Parliament wanted mandatory sanctions specified.<sup>84</sup> As a compromise, the sanctioning provisions are constructed as mix of obligatory and optional clauses.

According to Article 17.1, Member States are obliged to provide for sanctions against employers who have not fulfilled their obligations under this Directive, and these sanctions must be effective, proportionate, and dissuasive. For employers who are in serious breach of their obligations under the Directive these sanctions must include their exclusion from employing seasonal migrant workers.

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<sup>81</sup> Ibid, 116-117 and amendment 97.

<sup>82</sup> The third parties are those 'which have, in accordance with the criteria laid down by national law, a legitimate interest in ensuring compliance with this Directive' (Article 25 (1)).

<sup>83</sup> COM(2010)379 (fn 2), Article 12.2 (b)

<sup>84</sup> Council doc 6312/13 (fn 40), 62-63, 76-78, amendment 85.

The Article (17.2) goes beyond sanctioning the employer to require the employer to compensate migrant workers in situations in which the employer's work authorization is withdrawn for reasons that range from insolvency and employing undocumented worker (Article 9.2) to violating labour laws or working conditions (Article 9.3.b.). It is important to note that under the Directive,<sup>85</sup> Member States have the discretion to link the withdrawal of work authorisations to a range of employer behaviour. In cases in which the Member State provides for the withdrawal of a work authorisation because, for example, the employer has either not fulfilled its obligations under the work contract or has failed to meet its legal obligations regarding social security, taxation, or labour rights, the employer is liable for any 'outstanding' obligations which the employer would have had to respect if the authorization for the purpose of seasonal work had not been withdrawn. This compensation provision protects the legitimate expectations of seasonal migrants in those Member States that link the withdrawal of work authorizations to violations of labour law and working conditions. It is designed to ensure that migrant workers do not have to 'choose' not to complain so as not to jeopardise these expectations.

The only purely permissive clause in the sanctions provision relates to the liability in subcontracting chains (Article 17(3)), a provision that attracted little interest in the Council. In situations where the main contractor and intermediary subcontractors have not exercised due diligence with regard to a subcontractor's infringements of the Directive, the Member State may sanction the entities higher up the chain for the subcontractor's violation or make them liable for compensation or back pay owed by the subcontractor. Member States also have the discretion provide for more stringent liability rules under national law.

#### IV. Conclusion

Our analysis of the changes made to the text of the Directive from the original proposal to the version that was finally adopted illustrates the extent to which the Commission's initial, and almost exclusive, preoccupation with the immigration side of the seasonal workers' directive was modified by the European Parliament's more labour-oriented concern to ensure that migrant workers were protected from exploitation. The Commission's main goal was to achieve a common immigration scheme and a common level playing field for this sector. This ambition ran into conflict with Member States' concerns to avoid negative effects on their national labour force, to retain flexibility, and to avoid burdensome administrative requirements.

Although the Commission achieved common admission criteria and an exclusive admission route, subject to bilateral and multilateral agreements, for third-country seasonal workers in the Directive, which were central elements in its objective to create a

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<sup>85</sup> Article 9(2) provides that 'Member States shall, if appropriate, withdraw the authorisation', whereas Article 9(3) states that 'Member States may withdraw the authorisation...'

level field, its goal of promoting the circular migration of seasonal workers was severely compromised. So, too, were its attempts to achieve common grounds for rejecting an application and withdrawing a permit. To accommodate the different interests of the Member States and the European Parliament, the final provisions were drafted in a way that provided a great deal of flexibility to Member States, which allows them to implement very different admission structures. The Commission's objective of providing a fast-track procedure also failed, as the Member States would not commit to administering the immigration controls within a shorter timeframe. Member States also managed to secure a great deal of flexibility in determining which sectors to designate as seasonal as well over the duration of a seasonal worker's stay, and they are free to impose labour market tests. The Commission's compromises regarding common immigration rules are mainly attributable to the need to accommodate the Member States' concerns, although the European Parliament's objectives also contributed, albeit to a more limited extent, to this result.

Despite the Commission's claim that its goal was to establish a structure for avoiding the exploitation of third-country seasonal migrant workers, the substantive provisions of its original proposal were so severely flawed that they call into question the sincerity of this ambition. While the adoption of a rigorous equal rights approach would have helped to create a level playing field with respect to immigration controls, it was the other EU institutions, and not the Commission, that championed this approach. The tensions between the European Parliament's ambition to protect migrant workers and the Member States' aversion to burdensome commitments and to interference with their national labour markets resulted in compromise that permits a wide degree of diversity. Despite the compromises required to accommodate the different interests, the Directive that was adopted is much more likely to be effective than the original proposal in preventing labour and social exploitation.

The European Parliament was, often with the support of the Council, largely successful in ensuring that the Directive embodied an approach of treating migrant seasonal workers the same as national workers. However, the extent to which such an approach actually protects seasonal workers from exploitation depends upon two factors: the terms and conditions available to national workers in sectors designated as seasonal and the enforcement mechanisms available to them. With respect to the first, it is important to recall that Member States have found it necessary to recruit workers from third-countries because neither their national workers nor EU citizens have found seasonal work to be attractive. One of the limitations of an equal treatment approach is that if a Member State provides low standards for national workers in sectors that are designated seasonal, such as is often the case with the agricultural sector, all that migrants workers are entitled to is equally poor treatment. Regarding the second factor, while the European Parliament was successful in introducing a range of enforcement mechanisms into the Directive, some are discretionary rather than mandatory. Moreover, as is the case with the two ILO migrant workers conventions, there is nothing in the Directive that prevents a Member State from tying a migrant worker's legal status to be in its territory to an on-going employment relationship with the sponsoring employer, a linkage which makes the

migrant worker vulnerable to abuse.<sup>86</sup> The actual terms and conditions and legal rights to which seasonal migrant workers will be entitled, as well as how these conditions and rights will be enforced, remain within the purview of the Member States. However, unlike the Posted Workers Directive, the Seasonal Workers Directive allows the Member States more freedom, albeit within limits, to provide a greater protections and more robust standards than those set out in the Directive if they so choose.<sup>87</sup>

Over the past fifteen years, the EU has followed a sector-by-sector approach to legal migration. This tack has resulted in legal frameworks for high-skilled workers, seasonal workers, and intra corporate transferees, which regulate the admission of certain categories of persons, recognizes rights, and, at least for the seasonal workers and, to a limited extent, for the intra corporate transferees, sanctions for violations.<sup>88</sup> A Framework Directive for all other categories of migrant workers providing for a single permit, covering residence and work, as well as the rights to which migrants are entitled while working in the EU, has also been adopted.<sup>89</sup> However, these Directives fall well short of the Commission's goal of a common immigration policy for the EU.

The obstacles the Commission faces are clearly illustrated by the process that led to the adoption of the Directive on seasonal workers. However, this Directive differs in significant respects from the other immigration directives. The Seasonal Workers Directive could be seen as charting a new path in EU immigration policy by providing an exclusive route for admission with a robust equal treatment approach that allows a great deal of flexibility for Member States regarding enforcement. Yet, the even more recently adopted Directive on Intra-corporate Transferees indicates that this is a path that the EU is either unable or unwilling to follow since this Directive does not provide for equal treatment of third-country corporate transferees with national workers and it is weak on enforcement mechanisms. Nonetheless, it is possible to characterize the groups of migrants covered by the Seasonal Workers' Directive, on the one hand, and intra-corporate transferees, on the other, as so distinct that a common immigration framework is simply impossible.

A unique aspect of the negotiations over the Seasonal Workers Directive was the extent to which the European Parliament was unified in its ambition to strengthen the rights of seasonal workers. No such similar concern was evident with respect to the groups of migrant workers that were the subjects of the other immigration directives.

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<sup>86</sup> However, the requirement (Article 15.3) that Member States shall allow seasonal workers one extension of their stay to be employed by a different employer does mitigate the possibility of abuse. See also Recital 31,

<sup>87</sup> Articles 18, 19, 20, 23 and 25 are minimum provisions according to article 4.1 in the Directive.

<sup>88</sup> Directive 2014/66/EU (fn 45), sanctions article 9, rights article 18.

<sup>89</sup> Directive 2011/98/EU of the European Parliament and of the Council on a single application procedure for third country nationals to reside and work in a territory of a Member state and of a common set of rights for third country workers legally residing in a Member State, OJ L 343/1, 23.12.2011.



With the expiry of the Stockholm programme, the European Council will set new strategic guidelines for further development of the area of freedom, security, and justice. In its communication regarding the new programme, the Commission announced that the legal framework for a common migration policy is still to be completed,<sup>90</sup> and that it is time to consolidate existing measures within a more coherent EU common migration policy that takes into account the short-and long-term economic needs.<sup>91</sup> It believes that a common immigration framework is necessary for the economic recovery and that more people will want to come to Europe – some temporarily, such as tourists, students, and service providers, others on a more permanent basis to work or to seek protections.

Although the Commission emphasizes that all Member States must implement the existing EU rules on admission of migrants and on their rights in an effective and coherent way,<sup>92</sup> the flexible legislative style used in the Directive on Seasonal Workers may undermine this goal. Despite these compromises, this Directive has the potential to promote the protection of third-country migrant seasonal workers while they are working in the EU. It is now the responsibility of Member States to fulfill it.

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<sup>90</sup> COM(2014)154, An open and secure Europe; making it happen, 2.

<sup>91</sup> Ibid 3.

<sup>92</sup> Ibid 4.