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Migration and Sustainable Development in the EU: A Case Study of the Seasonal Workers Directive

Judy Fudge*

Most discussions of the EU's development agenda that emphasize the social dimension of globalisation in general or labour rights and standard in particular tend to focus on either trade agreements or aid. However, in 1999, the EU explicitly linked migration to its development objectives, and in 2011, the European Commission launched the Global Approach to Migration and Mobility (GAMM), which lists 'maximizing the development impact of migration and mobility' as one of its four pillars. A distinctive feature of the GAMM's approach is that migrants are placed at the centre and their human rights are to be mainstreamed throughout the migration cycle.

To what extent is the GAMM's commitment to migrants rights being put into practice? How does the GAMM's emphasis on migrant's rights impact upon development? Using the recently adopted Seasonal Workers Directive as my focus, I will attempt to address these questions. First, I will examine the extent to which the Directive protects migrant workers' human rights and ensures that they have access to meaningful labour standards. Second, I will explore the extent to which the Directive facilitates circular migration, which is seen as a key component of development-oriented migration. Third, I will consider the relationship between this Directive and Mobility Partnerships, which are the EU's key instruments for linking migration to development, when it comes to migrant workers rights and circular migration.

Keywords: Migration, Development, Seasonal workers, Circular migration, European Union

1 INTRODUCTION

Most discussions of the EU's development agenda that emphasize the social dimension of globalization in general or labour rights and standards in particular tend to focus on either trade agreements or aid.¹ In part, this emphasis was based on the assumption that migration and development were inimical; the idea was that once a country began to develop its citizens would no longer continue to migrate to more economically advanced countries. However, the relationship between development

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¹ For an important discussion of the need to consider the mobility of people in development discussions see A. Blackett, Development, the Movement of Persons and Labour Law: Reasonable Labour Market Access and its Decent Work Complement in The Role of Labour Standards in Development: From Theory to Sustainable Practice 143 (T. Novitz and D. Mangan eds, British Academy/OUP 2011).

and migration is more complex,² and in 1999, two years after it obtained competence over immigration matters under the Amsterdam Treaty, the EU explicitly linked migration to its development objectives.³ Since 2000 the so-called migration-development-nexus has become a popular concept, first, with international institutions concerned with the social side of development, such as the United Nations (UN) and International Labour Organization (ILO), and, then, amongst national and transnational policy makers. Properly managed circular migration programmes are seen as triple win solutions for low-income sending countries, high-income receiving countries, and for the migrants themselves.

In 2005, the EU published a Communication on Migration and Development that emphasized the need to make migration work for development, after which the Council adopted the Global Approach to Migration (GAM).⁴ The GAM introduced Mobility Partnerships, which are intended to facilitate remittances, engage diasporas, and promote circular migration, as the main tool for managed temporary migration with third countries. At the same time, the EU launched its legal migration strategy. However, the two strands ran on parallel tracks, which sometimes intertwined, but rarely intersected, until 2010 when the European Commission proposed a directive on seasonal migrant workers from countries outside of the EU, which it justified as, among other things, being development friendly and rights-based. The following year, the European Commission launched the Global Approach to Migration and Mobility (GAMM),⁵ which lists ‘maximizing the development impact of migration and mobility’ as one of its four pillars.⁶ A distinctive feature of the GAMM’s approach is that migrants are placed at the centre and their human rights are to be mainstreamed throughout the migration cycle.

The focus of this paper is on how low-skilled (as determined by the host country) migration from third countries fits into two of the GAMM four pillars⁷ – legal migration and maximizing the development impact of migration. I will examine the genealogy of the Seasonal Workers Directive, which was adopted on the 26 February 2014.⁸ My reasons for focusing on it are twofold: first, unlike Mobility Partnerships, which are soft instruments, the Directive is legally binding on all Member States, and, second, through its successive incarnations the Directive became more migrant-

² See discussion in see N. Reslow, Migration and Development? An Assessment of Recent EU Initiatives, 6 J. Cont. European Rsch, 3(2010), <http://www.jcer.net/index.php/jcer/article/view/197/189> (last accessed: 13 February 2015); M. Ruhs, The Price of Rights (Princeton U. Press 2013).

³ The Tampere European Council conclusions of 1999 (16/10/1999 - Nr: 200/1/99) called for ‘a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit.’

⁴ Migration and Development: Some Concrete Orientations (2005) COM 669; European Council 15-16 Dec 2005, Presidency Conclusions. See also European Council, European Commission and European Parliament, The European Consensus on Development, 2006, OJ (2006/C 46/01).

⁵ COM(2011) 743.

⁶ Ibid., 6.

⁷ Each of the four pillars is considered of equal importance. The other two are preventing irregular migration and trafficking in human beings and promoting international protection, and enhancing the external dimension of asylum policy; maximizing the development impact of migration and mobility. Ibid., 7. This genealogy is based on J. Fudge and P. Herzfeld-Olsson, The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights, 16 European J. Migration & L. 439 (2014).

⁸ 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.

centred and rights-based. My goal is to use the Seasonal Workers Directive to explore the reality, rather than simply the rhetoric, of the EU's commitment to rights-based and migrant-centred circular migration as part of its development strategy. In this way I hope to illuminate the linkages between the first and last pillars of the GAMM.

My analysis proceeds in three steps. I begin by situating the EU's embrace of the migration development nexus in two contexts: international institutions committed to promoting the social dimension of development and the EU's increased competence over migration. After establishing these contexts, I describe the evolution in the EU's approach to migration and development, which shifted from a tepid commitment to migration as a form of economic development, to the embrace of a more robust rhetoric that emphasizes a migrant-centred and rights-based approach that facilitates circular migration. This evolution is linked to the emergence of the EU's competence over immigration controls, which are those provisions having to do with the conditions of entry and requirements and entitlements of stay for third-country nationals. I examine whether, and if so, how the Seasonal Workers Directive's capacity to promote circular migration and to protect the rights of migrant workers shifted over the more than three years of negotiations that led to its adoption. I conclude by suggesting what the Seasonal Workers' Directive reveals about the EU's commitment to migration as a form of development with a social dimension.

2 CONTEXT FOR THE EU'S EMBRACE OF MIGRATION AS A DIMENSION OF DEVELOPMENT

2.1 The Migration/Development Nexus and the Central Role of Circular Migration

Despite the controversial assumptions regarding the relationship between migration and development,⁹ migration is no longer seen as a symptom of development failure but, instead, as making an important positive contribution to development.¹⁰ The prevailing wisdom in international institutions such as the United Nations and International Labour Organization, which are concerned with promoting the social dimension of development, is that managed migration in general and circular migration in particular can result in a triple win.¹¹ Circular migration is seen as good for sending countries, for receiving countries, and for migrants. It is broadly defined as:

migration experiences between an origin and destination involving more than one migration and return. Effectively, it involves migrants sharing work, family, and other aspects of their lives between two or more locations.¹²

⁹ Reslow, *supra* n. 2.

¹⁰ Migration and Development Policies and Practices: A Mapping Study of Eleven European Countries and the European Commission, Berne: Swiss Agency for Development and Cooperation, 194 (May 2013).

¹¹ Secretary-General Report on International Migration and Development, UN/GA A/60/871 of 18 May 2006, para. 77; J. Somavia, Statement of the Director-General of the International Labour office, 2006 ECOSOC High-Level Segment, Geneva, 5 July 2006. See also the discussion in K Eisele, *Reinforcing Migrants' Rights? The EU's Migration and Development Policy Under Review*, 5 *Global Justice: Theory, Practice Rhetoric*, 25-31, 36 (2012).

¹² G. Hugo, *What We Know About Circular Migration and Enhanced Mobility*, Policy Brief No. 7, Migration Policy Institute, 2 (September 2013).

Well-designed and properly managed circular migration programmes are now seen as leading to a virtuous circle of benefits.

Circular migration can give destination countries the flexibility to quickly overcome skills shortages while adapting to long-term labor market shifts. It can also serve to relieve labor surpluses in origin countries and provide the local economy with an influx of new skills and capital that migrants bring back with them. For the migrants, circular migration offers the opportunity to gain experience and earn higher wages while retaining valued connections in the home country.¹³

Of course, once properly managed circular migration is seen as pro-development the key issue becomes what does a ‘properly’ managed circular migration programme entail. Advocates of migrants’ rights have been suspicious of circular migration, fearing that such programmes are simply revamped and modernized versions of the old, and discredited, guest worker programmes.¹⁴ The question for them is whether or not circular migration schemes can be squared with an emphasis on migrants’ rights.

2.2 The EU’s Increasing Competence over Immigration

After migration and asylum became an EU competence under the Treaty of Amsterdam (1997), the Tampere European Council (1999) called for the establishment of a common EU migration and asylum policy. This call marked the end of the EU’s opposition to labour migration from third countries. A new immigration strategy was needed to increase competitiveness in the EU in light of demographic changes and labour skill shortages. The Tampere European Council emphasized the need for rapid decisions on ‘the approximation of national legislation 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’.¹⁵ The focus was on ensuring that the European labour market functioned as efficiently as possible. However, another aim of this policy direction 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 wish to stay and who meet certain criteria. The idea was that admitted workers should also be provided with broadly the same rights and responsibilities as EU nationals in a progressive manner related to length of stay.¹⁶

These aspirations regarding labour migration were part of an overall ambition to develop a common EU policy on asylum and migration.¹⁷ The Commission’s first

¹³ Ibid., 2. There is a more cynical view, one that acknowledges that since immigration cannot be stopped, especially to Europe with its long Eastern border and the Mediterranean coastline, it must be controlled.

¹⁴ S. Castles, *Guestworkers in Europe: A Resurrection?* 40 *Int’l Migration Rev.* 741-766 (2006); P. Wickramaskara, *Circular Migration: A Triple Win or a Dead End*, GURN Discussion Paper 15 (ILO 2011).

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

¹⁶ COM(2000)757; *Communication on a community immigration policy*, 18-19.

¹⁷ Presidency Conclusions (supra n. 15) para. 10.

proposal to regulate labour migration¹⁸ was characterized by uniform admission rules intended to replace national labour migration schemes.¹⁹ However, Member States did not share the desire for harmonized admission rules, and the requirement for unanimity on the Council for the adoption of legislation governing immigration admission provisions helps to explain the Commission's decision to retreat. Since Member States jealously guarded admission to their territory, the result was that very few instruments directly related to admission requirements were adopted.²⁰

With the coming into effect of the Lisbon Treaty in December 2009, the ordinary legislative procedure became the route for immigration legislation, which enhanced the ability of the EU institutions to adopt immigration legislation. But in order to adopt instruments that pertain to immigration controls, EU institutions must overcome their own divisions over immigration. The Parliament and Commission take a more liberal view than the Council, which has a more restrictive approach to immigration and traditionally prioritizes the management of irregular migration management and border control. For this reason, soft instruments such as Mobility Partnerships proliferate when it comes to promoting development through migration since hard instruments are difficult to agree upon.

A further complication for linking migration more tightly to development at the EU level is that the Directorate-General (DG) Home Affairs is responsible for new legislative proposals on immigration, whereas DG Development and Co-operation-Europeaid are responsible for development cooperation. The difficulty in coordinating different EU institutions in an area as politically contentious as immigration combines with the fact that development is distributed to different policy areas to undermine the coherence of approaches to migration that promote development.²¹

3 THE EVOLUTION OF THE EU'S APPROACH TO MIGRATION AND DEVELOPMENT

Although the first official reference to the development dimension of migration dates back to the conclusions of the 1999 Tampere European Council, it was not until 2005 that this linkage gained momentum.²² The EU's approach to the migration development nexus can be broken into two stages. The first begins with the Global Approach to Migration (GAM), which was adopted in 2005, and it focused mainly on the economic dimension of development.²³ The second dates to 2011, when the GAM was renamed the Global Approach to Migration and Mobility (GAMM), and it

¹⁸ 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.

¹⁹ E. Guild, *Mechanisms of Exclusion: Labour Migration in the European Union in Justice and Home Affairs in the EU – Liberty and Security Issues after Enlargement* 211-224, 212 (J. Apap ed, Edward Elgar 2004).

²⁰ Directives pertaining to the right to family reunification, the introduction of a long-term resident status, and the adoption of a single permit special admission regimes for highly-skilled non-EU nationals and third-country researchers were adopted. Eisele, *supra* n. 11, at 39

²¹ Reslow *supra* n. 2.

²² For a discussion of the earlier history, especially the Communications in 2002 and 2003, see Eisele *supra* n. 11, at 42-3

²³ Presidency Conclusions of the Brussels European Council of 15-16 December 2005; COM (2005) 621.

emphasizes the contribution that migration can make to the social dimension of development.²⁴ Although different in emphasis, both documents were provoked by humanitarian incidents that undermined the legitimacy of the EU's approach to migration.

In September 2005, the killing of six African migrants, who along with hundreds of their compatriots, were attempting to cross into the Spanish enclaves of Ceuta and Melilla in hope of reaching the EU's shores, provoked a major outcry within media and civil society. This tragedy reinforced the view that Europe was fortifying its borders against the citizens of its neighbouring states, many of which were former colonies. The outcry led to immediate action as the Heads of State and Government adopted a comprehensive approach, called the Global Approach to Migration, with the goal of managing migration flows in an effective manner and in genuine partnership with third countries.²⁵ Priority actions based on an integrated approach were to be focused on Africa and the Mediterranean. In 2006, a Commission Communication outlined a thematic programme for the cooperation with third countries in the areas of migration and asylum.²⁶ This approach was intended to respond to 'the need for integrating migration and asylum issues into the Community policies of cooperation and development,' to assist the Community better to match these responsibilities with its own interests in these fields, and to improve policy coherence.²⁷

By linking migration with development, the EU was also seeking to reduce undocumented migration. The belief was that the promotion of economic prosperity through 'closer trade cooperation, development assistance and conflict prevention' would reduce 'the underlying causes of migration flows.'²⁸ Circular migration was also seen as reinforcing the goal of stopping irregular migration; the assumption is that 'offering short- or medium-term employment contracts will forestall potential migrants from considering irregular ways of entering and residing in the territory of an EU Member State'.²⁹ Moreover, circular migration was also regarded as creating an incentive for sending states to shoulder more responsibility for halting the flow of irregular migration.

At the same time as the EU was developing an approach to migration that emphasized its connection with development, the Commission adopted a new strategy, one which targeted specific classes of immigrants, to further its ambition to adopt a policy plan for economic migration.³⁰ After in-depth consultations with the Member States and other stakeholders, in 2005 it presented a policy plan for legal migration, stressing that certain sectors were already experiencing substantial labour and skill shortages

²⁴ COM(2011) 743.

²⁵ European Commission, COM(2008) 611, 8.10.2008, 2; European Commission, COM(2008) 611, 8.10.2008

²⁶ Com(2006) 26.

²⁷ Ibid., 7.

²⁸ Eisele, supra n. 11, at 42. In a 2002 Communication on migration and development the Commission referred to the Conclusions of the Seville European Council, in which the European leaders unmistakably established a connection in this regard. COM(2002) 703, 3.12.2002.

²⁹ Eisele, supra n. 11, at 43.

³⁰ It was encouraged by the European Council in The Hague, see conclusions in 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'.

that could not be filled within the national labour markets and citing Eurostat projections of even worse shortages in the future.³¹ The Commission underlined the possibility that the admission of third-country nationals in one Member State might affect the labour markets of other Member States.³²

The 2005 package only addressed the conditions of, and the procedures of admission for, the entry and residence of four types of migrants: highly skilled workers; seasonal workers; intra-corporate transferees; and remunerated trainees.³³ Seasonal workers were considered to be regularly needed in certain sectors, mainly agriculture, building, and tourism. The goal of the proposal was to provide Member States with a supply of labour while at the same time granting secure legal status and regular work prospects to the immigrants concerned, and thereby protecting a particularly vulnerable category of workers, as well as contributing to the development of the countries of origin.³⁴ The Commission argued that even with high unemployment, few EU citizens and residents 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.³⁵ This discussion began to draw closer with the Commission's new approach to cultivating the links between migration and development since the proposed directive for seasonal workers envisaged repeat migration.³⁶ According to the Commission, such circular migration could contribute to the development of the country of origin.

In 2008, the European Council adopted the European Pact on Immigration and Asylum and in 2009 the Stockholm Programme reiterated the Commission and Council's commitment to implementing the Policy Plan on Legal Migration.³⁷ This was the context in which the Commission proposed a text for a directive on seasonal employment in 2010.³⁸

In the meantime, under the banner of GAM, in 2007, the EU launched the Mobility Partnerships, which emphasized circular migration with neighbouring countries. The Communication regarded mobility partnerships, which are political non-binding statements, as a way of fostering circular migration.³⁹ These Partnerships are entered into between the EU and individual third countries, and EU Member States participate on an opt-in basis. Although called 'partnerships', these agreements reflect highly unequal power relationships in which the EU sets the rules of the game and third

³¹ COM(2005) 669, 4.

³² Ibid.

³³ 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.

³⁴ Ibid., 7 and reference to COM(2005)390 on Migration and Development: Some concrete orientations.

³⁵ Ibid.

³⁶ 'The scheme will propose a residence/work permit allowing the third-country national to work for a certain number of months per year for 5-5 years.' Ibid., 7.

³⁷ The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115 of 4.5.2010.

³⁸ COM(2010) 379.

³⁹ COM(2007)248, 5 and 7. Circular migration is the temporary and typically repetitive movement of migrant workers between home and host countries.

countries abide by these rules.⁴⁰ They are intended to facilitate the access of these nationals to Member States' labour markets through admission quotas and more favourable treatment regarding the admission of certain categories of migrants.⁴¹ However, the Communication from the Commission on the Mobility Partnerships made it clear that the goal of these agreements were mixed. On the one hand, they were seen as a way of 'exploiting potential positive impacts of migration on development and responding to the needs of countries of origin in terms of skill transfers and of mitigating the impact of brain drain'.⁴² On the other, Partnership Agreements would be used 'to identify novel approaches to improve the management of legal movements of people between the EU and third countries ready to make significant efforts to fight illegal migration'.⁴³

In 2011, the Arab spring and events in the Southern Mediterranean revealed the need for a coherent and comprehensive migration policy for the EU.⁴⁴ That year, the Commission announced the EU's 'Global Approach to Migration and Mobility (GAMM),' 'which places mobility of third country nationals at its centre,' 'makes partnerships more sustainable and forward-looking' and emphasizes human rights as a theme that cuts across its four pillars.⁴⁵

The GAMM's four pillars – 1. legal migration and mobility, 2. irregular migration and trafficking in human beings, 3. international protection and asylum policy, and 4. maximizing the development impact of migration and mobility – are regarded as mutually supporting. According to the Commission:

If the EU is to engage more systematically in facilitating and managing migration and mobility, this latter aspect should be visible in the pillars on legal migration and on migration and development. Addressing trafficking in human beings is of key importance and should be a visible dimension of the pillar on irregular migration.⁴⁶

The need for a comprehensive approach to migration and mobility was seen as justifying the elevation of the profile of international protection and asylum to one of the GAMM's pillars. The GAMM was also embedded in the EU's foreign policy and a reporting mechanism to monitor implementation and ensure progress was established.⁴⁷

⁴⁰ A. Triandafylidou, *Circular Migration: Introductory Remarks in Circular Migration between Europe and its Neighbours: Choice or Necessity* 8 (A.Triandafylidou ed, Oxford U.Press, 2013).

⁴¹ COM(2007)248, 2 ff . See Eisele, *supra* n. 11, at 38.

⁴² On Circular migration and Mobility Partnerships between the European Union and Third Countries, Com(2007) 247, 2.

⁴³ *Ibid.* For a discussion of Mobility Partnership Agreements see N. Reslow, *The Role of Third Countries in EU Migration Policy: The Mobility Partnerships*, 14 *European J. Migration & L.* 393–415 (2012); T. Maroukis and A. Triandafyllidou, *Mobility Partnerships: A Convincing Tool for the EU's Global Approach to Migration? Policy Paper No. 76*, Notre Europe, (Jacques Delors Institute, 26 February 2013).

⁴⁴ Press release http://europa.eu/rapid/press-release_IP-11-1369_en.htm (last accessed: 13 February 2015).

⁴⁵ *Ibid.* and COM(2011) 743.

⁴⁶ COM(2011) 743, 6.

⁴⁷ The Communication outlines how the Global Approach should be jointly implemented by the European Commission and the European External Action Service (EEAS), including EU Delegations and Member States. It also provides for a Global Approach Report to be adopted every second year, starting in June 2013.

Significantly, the GAMM is expressly migrant-centred, and it emphasizes that ‘the human rights of migrants are a cross-cutting dimension’.⁴⁸ The Commission stressed that ‘respect for the Charter of Fundamental Rights of the EU is a key component of EU policies on migration’ and that ‘the impact on fundamental rights of initiatives taken in the context of the GAMM must be thoroughly assessed’.⁴⁹

Framework agreements were divided into two types, which depend upon the physical proximity of the third-country to the EU. Mobility Partnerships were limited to the EU’s immediate ‘neighbourhood’, with Tunisia, Morocco and Egypt identified as priorities⁵⁰ The Commission emphasized that under the GAMM mobility partnerships would focus on facilitating and organizing legal migration, effective and humane measures to address irregular migration, and concrete steps towards reinforcing the development outcomes of migration. For other countries, the Commission proposed to set up Common Agendas on Migration and Mobility, which ‘would constitute an advanced level of cooperation, based on a number of common recommendations, targets and commitments for dialogue and cooperation.’⁵¹

The GAMM also placed migration and mobility in the context of the Europe 2020 Strategy aim to contribute to the vitality and competitiveness of the EU, emphasizing evolving demographic and economic changes make migration and mobility a priority. The GAMM’s distinctive feature is the extent to which it stressed the urgency of the ‘need to improve the effectiveness of policies aiming at integration of migrants into the labour market.’⁵² The potential for a more demand-driven legal immigration policy combined with the portability of social and pension rights were identified as specific measures that would facilitate circular migration while simultaneously creating a disincentive for irregular work. Moreover, the GAMM specifically referred to the Directive on Seasonal Workers, emphasizing that the ‘proposal includes protection from exploitation and is of relevance for many partner countries, especially in agriculture and tourism.’⁵³ Here the explicit intersection of EU hard immigration law with its softer development agenda is evident.

In a subsequent communication about migration and development, the Commission acknowledged the importance of providing potential migrants with information about immigration procedures, their rights, and the economic and social conditions in the intended country.⁵⁴ This rights-based approach to temporary migration coincided with EU Member States’ traditional approach of granting migrants equal treatment under national laws and the EU’s robust anti-discrimination laws.⁵⁵ However, precisely what placing migrants’ rights at the centre of the GAMM entails in concrete terms is unclear. As yet, no EU Member State has ratified the UN Convention on the

⁴⁸ COM(2011) 743, 6.

⁴⁹ Ibid.

⁵⁰ As of mid-October 2014, seven Mobility Partnerships have been signed so far: with Cape Verde, the Republic of Moldova, Georgia, Armenia, Morocco, Azerbaijan and Tunisia.

⁵¹ Press release http://europa.eu/rapid/press-release_IP-11-1369_en.htm (last accessed: 13 February 2015).

⁵² Ibid.

⁵³ Ibid. 12.

⁵⁴ Maximizing the Development Impact of Migration 2013 Communication from the Commission COM(2013) 292, 7.

⁵⁵ Migration and Development Policies and Practices, supra note 10.

Protection of the Rights of Migrant Workers and their Families, and only a few have ratified either of the ILO's two migrant workers conventions.⁵⁶

Moreover, what the EU's commitment to circular migration in the GAMM actually entails is vague. According to Wickramaskara, 'despite the rhetoric on mobility and migration linkages, the fact remains that there are very limited opportunities for third country nationals, especially low skilled workers, to immigrate to EU Member States'.⁵⁷

4 SEASONAL WORKERS DIRECTIVE

Although the initial proposal for a seasonal workers directive was introduced before the GAMM was adopted, the negotiations overlapped with the new rights-based approach to migration and mobility. Thus, the adopted Directive provides an excellent opportunity to assess the EU's success in linking migration and development, promoting circular migration, and protecting migrant's rights.⁵⁸

The Directive sets out rules for the entry and stay for seasonal workers who are not EU citizens, although each Member State retains the right to determine the numbers of seasonal workers admitted to its territory.⁵⁹ 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, although recital 13 notes that agriculture, horticulture and tourism are likely to include seasonal activities.⁶⁰ It 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.⁶¹

⁵⁶ Italy, Germany, France, Belgium, The Netherlands, Portugal, and the United Kingdom have ratified ILO C 97, Migration for Employment Convention (Revised), 1949, and only Cyprus, Sweden, Italy, Slovenia and Portugal have ratified C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).

⁵⁷ Wickramaskara, *supra* n. 14, at 56, quoting European Social Watch, *Migrants in Europe as Development Actors: Between Hope and Vulnerability*, Social Watch, Eurostep, Brussels, 4.

⁵⁸ This analysis draws upon Fudge and Herzfeld Olsson, *supra* n. 7.

⁵⁹ There is no EU competence over this matter, Article 79.5 TFEU.

⁶⁰ '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).

⁶¹ COM(2010)379, 2-3 and Council Press release, 17 February 2014, doc 6229/14, Council adopts directive on third-country seasonal workers, 1-2. The Commission's explanatory memorandum reiterated the structural need for seasonal work in the EU, for which a supply of such labour from

4.1 Development and Circular Migration

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 so long as the bilateral or multilateral agreements are more favourable to the migrant workers than the terms set out in the Directive. Here the development goals combined with Member States’ desire for a reliable and efficient source of seasonal labour through partnership agreements. However, the Directive prevents Member States from admitting seasonal workers through other temporary migration schemes.

Despite this gesture to development, 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.⁶² But, the problem was that the Commission’s proposal affected the ability of Member States to control their borders and, therefore, was not acceptable.

In the end, the provisions that were 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, but 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. Thus, what began as a commitment to promoting the circulation of third-country national seasonal workers became ‘the possibility of facilitated admission’ (recital 34).

4.2 A Rights-Based Approach: Equal Treatment and Enforcement

within the EU was expected to become less and less available: COM(2010)379, 2-3. The agricultural sector in particular was earmarked as experiencing high job losses. Commission Staff Working document, 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, SEC (2010)887, 11. The explanatory memorandum also emphasized the extent to which migrant workers already conducted work in the agricultural sector in the Member States, noting that a large proportion were irregular migrants. 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. COM(2010)379, recital 6.

⁶² COM(2010)379, 3 and recital 17. In the Policy Plan for Legal Migration, COM(2005) 669, 7, the proposed seasonal workers directive contemplated a scheme which would propose a residence/work permit allowing the third-country national to work for a certain number of months per year for 4-5 years.

Although the social dimension of the Directive is not immediately obvious from its title, when it was initially proposed the Commission claimed that combatting the exploitation of third-country seasonal migrant workers and protecting their rights was a key objective.⁶³ But, the actual provisions in the initial proposal could not have achieved the goal of protecting seasonal migrant workers from economic and social exploitation. Not only was the initial version criticized by the ILO,⁶⁴ it is likely that if it 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.⁶⁵

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 Commission's original proposal did not provide for equal treatment on working conditions, and it was severely criticized in this respect by the ILO.⁶⁶ However, the Council and the European Parliament agreed on equal treatment regarding working conditions, and the Parliament was able to strengthen this provision.⁶⁷ 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. In its second paragraph, Article 23 provides for equal treatment with regard to the right to strike and freedom of association.

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).⁶⁸ Thus, 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'.⁶⁹ However, Article 23.1, 2nd paragraph specifically provides that migrant seasonal workers are entitled to receive statutory pensions based on the seasonal workers' previous employment and acquired in

⁶³ J. Hunt, Making the CAP Fit: Responding to the Exploitation of Migrant Agricultural Workers in the EU, 30 *The Int'l J. Comp. L. & Ind. Rel.*, 131-152, 142 (2014).

⁶⁴ The ILO note is included in Council doc 9564/11, 2 May 2011, 4.

⁶⁵ EU Immigration and Asylum Law (Text and Commentary): Second revised edition (S. Peers, E. Guild, D. Acosta Arcaz, K. Groenendijk and V. Moreno-Lax eds, Martinus Nijhoff Publishers 2012) 181.

⁶⁶ ILO, *supra* n. 64.

⁶⁷ Council doc 15033/13, amendment 94, 108.

⁶⁸ Council doc 15033/13, 113.

⁶⁹ ILO C 97, 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.

accordance with the legislation set out in Article 3 of reg. 883/2004, when moving to a third country. This is an important step towards portability, which is critical for development-friendly circular migration.

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.⁷⁰ Although the Commission and the Council also wanted to be able to exclude employment services from this Article, 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.⁷¹

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.⁷² 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.⁷³

Ultimately, the value of any rights depends 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.

The ability of migrant workers to change employers is regarded as a key factor in whether or not they can actually enforce in practice the rights to which they are entitled to on paper.⁷⁴ 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.⁷⁵ In the end, there was a compromise. 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

⁷⁰ Council doc 15033/13,111-112, amendment 94.

⁷¹ *Ibid.*, 111.

⁷² *Ibid.*, 110, amendment 94.

⁷³ ILO, *International Labour Migration: A Rights-Based Approach*, (ILO 2010), available at: http://oppenheimer.mcgill.ca/IMG/pdf/rights_based_approach.pdf (last accessed: 13 February 2015).

⁷⁴ J. Fudge, *Precarious Migrant Status and Precarious Employment: The Paradox of International Rights for Migrant Workers* 34 *Comp.Lab. L. & Pol. J.* 101-37 (2012).

⁷⁵ Council doc 15033/13, 84 ff, amendment 79.

closeness of their ties to their employers.⁷⁶

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.⁷⁷ In addition, it was able to significantly strengthen the provisions relating to the facilitation of complaints.⁷⁸

The only way the EU institutions were able to come to agreement on sanctions against employers who violated the conditions imposed by the Directive was by constructing these provisions as a mix of obligatory and optional clauses.⁷⁹ However, a critical provision for migrant workers is Article (17.2), which 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 workers to violating labour laws or working conditions. This provision minimizes the possibility that sanctions against employers will have the result of harming migrant seasonal workers.⁸⁰

5 CONCLUSION

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. In part the failure to attend to migrants' rights was due to the treaty basis selected for the Directive. While using the immigration base under Article 79 (TFEU) meant that the ordinary legislative process was available and thus a directive was more likely to be adopted, it also meant that the Directorate-General responsible for the directive was Home Affairs, one that was not familiar with workers rights.⁸¹ In fact, Home Affairs tends to be preoccupied with border control and security rather than the social dimensions of migration. However, during the negotiations the other EU institutions, especially the Parliament, with the assistance of the ILO, managed to obtain a Directive that was much more compatible with the migrant-centred and rights-based approach to migration articulated in the GAMM. The Directive that was ultimately adopted is much more likely to be effective than the

⁷⁶ 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).

⁷⁷ Ibid, 114 f and amendment 96.

⁷⁸ Ibid, 116-117 and amendment 97.

⁷⁹ Fudge and Herzfeld Olsson, *supra* n. 7.

⁸⁰ The requirement for back payments resembles the similar provision for the payment of back payments by employers to illegally employed third-country nationals, see Article 6 (1) (a) Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

⁸¹ The legal base was immigration under Article 79(2)(a) and (b) of the TFEU. Although there is a separate legal basis for 'conditions of employment third-country nationals legally residing in Union territory' unlike Article 79, it requires unanimity on the Council in order to adopt EU legislation. Moreover, treating provision pertaining to immigration permit Member States not to be bound by the measure, and the UK, Denmark and Ireland have all opted out. Hunt, *supra* n. 63, 141.

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 an equal treatment 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,⁸² all that migrants workers are entitled to is equally poor treatment. 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 ongoing employment relationship with the sponsoring employer, a linkage which makes the migrant worker vulnerable to abuse.⁸³ 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. The legislative style used in the Directive gives Member States a great deal of flexibility in designing admission and enforcement regimes. 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. But, even with these shortcomings, this Directive has the potential to promote the protection of third-country migrant seasonal workers while they are working in the EU.

However, by contrast with the extent to which migrants' rights were enhanced, the Commission's goal of promoting the circular migration of seasonal workers was severely compromised during the negotiations⁸⁴ Instead of providing for multi-seasonal permits, all the Directive requires Member States to do is to 'facilitate', in a manner entirely within their own discretion, the re-entry of migrant workers who have been admitted to the Member State at least once during the previous five years. The failure of Member States to commit to repeat entries by the same migrant undermines the possibility of truly circular migration, and makes it much more difficult for migrant workers to develop longer-term life projects. Such instability is likely to undermine the development potential of the Directive.

⁸² Hunt, *supra* n. 63.

⁸³ 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 3.

⁸⁴ It is also important to consider in this context the 'rights versus' numbers trade off raised by M. Ruhs, *supra* n. 2. Even if such a trade-off is normatively unpalatable (and framed in unnecessarily provocative language), if it is empirically the case that increasing the rights that migrant workers are granted in the host country results in fewer migrants being admitted, the relationship between the types of rights granted and the numbers of workers admitted is critical for scholars and policy makers concerned with the linkage between migration and development. It also raises the ethical question, if there is, in fact, such a trade off, of who should get a say in deciding what the tradeoff should be.

Moreover, the highly-publicised drowning of hundreds of migrants in the Mediterranean who were fleeing Libya has reinforced the European Union's commitment to strengthening border control. Both the Council, in its 23 April 2015 response to the tragedy, and the Commission, in its European Agenda on Migration, which was released 13 May 2015, emphasized the need to crackdown on migrant smugglers who are exploiting desperate migrants.⁸⁵ This emphasis will likely shift the priority of the Directorate-General of Migration and Home Affairs away from the development goals of migration towards policing borders. In fact, of the four pillars identified by Commission in its migration agenda, a new policy on legal migration was the last to be mentioned.⁸⁶ Maximizing the development goals for countries of origin was the final item identified in the Agenda. Once again, Mobility Partnerships took centre stage in the attempt to mainstream migration issues into key development sectors, although the Commission did note that it will 'make available at least EUR 30 million to support partners with capacity building on effective management of labour migration, focusing on migrant workers and tackling exploitation'.⁸⁷ However, it made no explicit reference to the Seasonal Workers Directive. The extent to which the Directive will establish a better floor for Mobility Partnerships and provide fast, effective, and protective procedures for admitting and regulating migrant workers will depend upon the political will of Member States since they have such a great deal of flexibility when it comes to how to transpose it.

The unwillingness of Member States to commit to truly circular migration programmes for workers who are considered low skilled is attributable to their desire to maintain control over entry to their territories. There are political, as well as economic, reasons why Member States do not want to dilute their sovereignty over immigration control. This unwillingness accounts for the lengthy period (thirty months) that Member States insisted upon for transposing the Directive.⁸⁸ By failing to commit to any real form of circular migration for seasonal workers who are clearly in demand in the EU, Member States have signaled that they prefer a disposable workforce to do Europe's dirty work, rather than providing an on-going commitment to seasonal migrants upon which sustainable development can be based.

⁸⁵ Special meeting of the European Council, 23 April 2015 – statement, <http://www.consilium.europa.eu/en/press/press-releases/2015/04/23-special-euco-statement/> (last accessed 24 May 2015); Communication from the Commission, A European Agenda on Migration, COM (2015) 240 final.

⁸⁶ COM (2015) 240 final, 16.

⁸⁷ Ibid.

⁸⁸ Member States must transpose the Directive by 30 September 2016.