EUROPEAN POLICY CENTRE

POLICY BRIEF

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A success story for the EU and seasonal workers' rights without reinventing the wheel

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BACKGROUND

The proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment was published by the European Commission (the Commission) in July 2010. With formal publication today in the Official Journal, it is time to assess what the final outcome of three and a half years of intra-EU negotiations has been.

Despite the economic crisis with resulting high unemployment, EU economies face vacancies across the skill spectrum. At the low end there is a structural need when it comes to seasonal work. This is due to the fact that the EU workforce generally sees seasonal work as unattractive. This need is sometimes plugged through the mobility of EU workers especially from newer Member States to older ones. Nevertheless, seasonal workers can be seen everywhere: mushroom picking in the Netherlands, ski resorts in Austria, coastal tourism in Spain or in the olive groves of Italy. Seasonal work is also key to Central and Eastern European Member States who often meet their needs with nationals of countries bordering the EU, e.g Ukrainians in Poland.

At the EU level the need for seasonal workers was acknowledged in the Commission's 2005 Policy Plan on Legal Migration. This plan resulted in a sectoral approach to labour migration policy and has seen the adoption of the Blue Card (Highly Skilled Workers Directive) in June 2009 and the EU Single Permit in December 2011. The remaining legislative proposals in this field are the Intra-Company Transfers (ICTs) Directive, awaiting the European Parliament's (the Parliament) approval in the plenary sitting in April, and the recast of the Students and Researchers Directive, which the Parliament adopted end of February at first reading. Before a year of change in EU institutions, there is a concerted push from all negotiating parties to adopt all these files before this Parliament's mandate is over. Such time pressures, allied to a general context of populism on migration issues in Europe, and hostility amongst some Member States towards EU legislation in this field, can run the risk of resulting in bad legislation.

Launched at the same time as the ICTs Directive – and often perceived as a package, and negotiated in parallel – the Seasonal Workers Directive initially appeared to be more troublesome, with the stigma of 'migrants stealing local jobs' haunting it. However, without the provisions for intra-EU mobility that have plagued the ICTs Directive, the Seasonal Workers Directive became less problematic despite the fact that seasonal workers are more numerous than intra-corporate transferees. It was also aided by a rapporteur, Claude Moraes MEP, who made the directive one of his priorities, as well as the Irish and Lithuanian Presidencies which found solutions and pushed the directive forward in the most crucial moments. Together with the Commission playing the role of an honest broker, they ensured a focus not only on the needs of the European labour market, but also saw an opportunity to bring added value to seasonal workers' rights, through equal treatment to EU nationals.

STATE OF PLAY

Definitions and scope

One of the most important elements to establish was who can apply for admission as a seasonal worker. It applies solely to migrant applicants from outside the EU territory (Article 2.1).

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The final text also provides clarity and flexibility on the list of sectors that are considered seasonal, stating (Article 2.2) that "Member States shall, where appropriate in consultation with social partners, list those sectors of employment which include activities that are dependent on the passing of seasons." Given the huge variety in Member States' economies', and the resulting different concepts of seasons, such matters are flexibly left to the authorities and social partners in a given area. Agriculture, horticulture and tourism are considered explicitly as sectors of seasonal work (Recital 13), and beyond that it is the decision of relevant actors whether other sectors are to be included.

In the early stages of negotiations this was a crucial issue, and resulted in some Member States' Parliaments (Austria, Czech Republic, the Netherlands, Poland among others) raising concerns that national specificities cannot be addressed and that seasonal work is sufficiently regulated at national level. These Parliaments raised subsidiarity alerts, which are an innovative tool for national parliaments in the Lisbon Treaty (enforcing Article 3b of TEU, the Protocol on the application of the principles of subsidiarity and proportionality is annexed to the TEU and TFEU). This lead to 12 subsidiarity votes, which although significant was not enough to raise the so-called "yellow card". It is for this reason that the Netherlands voted against the directive in the final vote. It is worth noting that the same amount of positive reasoned opinions were given from Finland, Germany, Italy, Latvia, Lithuania, Portugal and Spain, praising the uniform protection provided as well as common criteria for admission and conditions for residence.

Six authorisations: clarity through complexity?

Although these hurdles were overcome, the real difficulties lay ahead. Midway through the negotiations, an obstacle arose which went right to the core of how the Commission proposal was formulated. This was related to Schengen visas which are issued for stays of less than three months (short-stays) in the EU. Apart from cases of visa-exemption, such short-stay visas are always issued by Member States, in some cases in conjunction with a work permit. Therefore, any proposal needed to respect this, as it is a system that functions well and is a cornerstone of the Schengen *acquis* and the Visa Code. The Commission proposal did not cover short-stays, and instead obliged Member States not to issue any additional documents (Article 10). Given the short-term nature of seasonal work, not including short-stays would have limited the utility of the directive.

This resulted in this section of the Directive being entirely re-written in order to encompass all the possibilities for admission for seasonal work, and not provide for a one-size-fits-all solution. The final text now clearly lays out (Article 12) exactly how authorisations for seasonal employment will function both in terms of short and long stays, including the seasonal worker permit option in the latter category. It has also encompassed the options that include the issuing of work permits and long-term visas into the two categories, resulting in a total of six possible routes to seasonal employment.

Despite this, the final text does not add further complications to a system of short and long term visas in the Schengen area. The European Parliament accepted that there was no other feasible way of organising the directive, but in order to ensure there was consistency it demanded that each Member State had to choose one of these options (Article 12.1 and 12.2) to provide clarity for those applying to enter the EU as seasonal workers.

Given the aforementioned national differences, the maximum duration of stay has been set between five and nine months, changing from the rather arbitrary Commission proposal of six months. Such a maximum duration is necessary to ensure that work is actually seasonal. The lowering to five months was on account of the Netherlands, who will set their maximum at this amount in line with their current legislation, as anything longer than that would have resulted in eligibility for social benefits.

These efforts made to accommodate Member States and to respect the Schengen *acquis* have prevented a high level of harmonisation, because there are different conditions for entry depending on the length of stay and on each Member States' system of visas and work permits. However, it is the first directive on labour migration that covers people who come for less than three months.

Renewal and re-entry facilitated

The possibility for seasonal workers to extend their stay has been greatly enhanced in the final text. Within the maximum period of stay Member States must allow seasonal workers the ability to extend their contract with an employer, regardless of whether it is the same employer (Article 15). Furthermore, Member States may be allowed to do this more than once, as long as the maximum period is not exceeded. For example this could allow for someone working in a ski resort to then go pick fruit within a 5-9 month period.

Migrants who have been admitted for seasonal work and want to return to the EU for seasonal work in subsequent years will be able to do so (Article 16). Re-entry can be facilitated by exempting the seasonal worker from the requirement to submit a certain document, issuing several seasonal worker permits at a time, accelerating the application procedure, or

making it a priority during examination of applications. In the original Commission proposal a 'multi-seasonal worker' permit option was provided for, which would have allowed for the issuing of up to three seasonal work permits covering three subsequent seasons. This re-entry aspect of the directive is seen as a tool for promoting circular migration. As no limit is given in the final text, there is a risk of eternal seasonal permits, with no pathway to long-term residence status. This indeed would have been a progressive step, but given the current political and economic climate, such a move forward would have been very difficult to take.

Equal treatment on rights

Rights are often found watered down in the final texts of EU legislation, with employers trying to lower their labour costs seeing an opportunity in a cheap foreign workforce, and governments often concerned over encouraging more immigration. Notwithstanding the debatable foundation of these stances, no such dilution can be seen in the final text of this directive.

In fact equal treatment to nationals of the host Member State has been extended to include "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 at the workplace" (Article 23). This is a major step forward on rights, motivated in part by the exploitation some seasonal workers have experienced. It is a commendable move in terms of providing respect to seasonal workers through ensuring their protection, avoiding social dumping through undercutting of wages, and ensuring that real labour market gaps can be filled. This is the case on paper at least, and implementation will be crucial to ensure these predicted results become reality.

Building on the original Commission proposal are also the rights to strike and take industrial action, as well as to receive back payments from employers regarding any outstanding remuneration. Access to goods and services available to the public – except housing (both private and public) – access to advice services on seasonal work, educational and vocational training (which can be restricted to those directly linked to the employment activity), and tax benefits if deemed to be resident for tax purposes, are also rights gained under the final text.

Ensuring accommodation for seasonal workers has also been a key success of the final text. Member States "shall require evidence that the seasonal worker will benefit from accommodation that ensures an adequate standard of living according to national law and/or practice" (Article 20). The main problem Poland had with these provisions was that their arrangements (in particular with the Ukraine) provide for a fast-track way to access labour from their Eastern neighbours. Efficiency for Poland and ease for Ukrainian citizens were the advantages, but this comes at a cost of limited rights and obligations that would make the procedures lengthy and costly.

Concerns expressed by the Meijers Committee (a non-governmental body of immigration law experts) regarding the creation of a 2-tier system of rights for seasonal workers should be allayed by the final text. Short stay seasonal workers will enjoy exactly the same substantive rights as their long stay counterparts, and procedural rights are comparable to those set out in the Visa Code. Although the rights are below the level of protection granted by the ILO Convention No. 97 (Migrant workers), as this convention has been only ratified by five Member States it would have been unrealistic to propose those rights enshrined. The preamble of the directive does mention (recital 44) that it should be applied without prejudice to the 1961 European Social Charter, and where relevant, the 1977 European Convention on Legal Status of Migrant Workers. The final text also builds on the Single Permit Directive, by providing additional rights regarding unfair dismissal.

Good cooperation between the rapporteur and the EMPL Committee rapporteur from the same Socialist and Democrat party, as well as between the Commission and Member States such as France, Luxembourg and Portugal ensured that such high standards on equal treatment have been achieved.

No need to worry about the 'floods'

As always with legal migration legislation at EU level there is a safeguard of preference for EU citizens (Article 8.3), which should quell fears of migrants taking the jobs of unemployed EU citizens. Secondly, each Member State will regulate the amount of admission (Article 7), so any decision to admit more third-country nationals, whether seasonal workers or otherwise, will lie with the Member States. Thirdly, labour market tests will be allowed (Article 8.3), meaning that if a Member State feels someone in the existing labour force, whether an EU citizen or legally residing third-country national, could perform the task then they will be offered the position. In essence this is a second optional filter after the EU citizen preference principle, and adds resident legal migrants to the labour market test that Member States may conduct.

As for fears of providing a channel for irregular immigration, this should be assuaged by the fact that seasonal workers will need to show a work contract if provided for by national law or a binding job offer during their application

(Article 5.1a and Article 6.1a). This results in a demand-based approach that is employer-driven. Nevertheless, this will only concern those employers able to recruit from outside the EU through effective (private, public or of mixed nature) intermediating agencies.

Inspections and sanctions have also been provided for in this directive (Art. 24 and 17), but will need to be in force and implemented on the ground in order to be effective in preventing irregular employment. The European Parliament pushed for inspections and sanctions, further underlining the protection credentials of the final text.

Moreover, another ground for refusal was added during the negotiation process: "if the employer within the 12 months immediately preceding the date of the application has eliminated, by means of a null or unfair dismissal, the positions he is trying to fill through the new application" (Article 8.4b) The goal of this provision was to ensure the protection of jobs against the prospect that employers would act quickly to secure cheaper migrant seasonal workers. However, this may be tricky for immigration services to implement, as gaining knowledge of when an employer has fired former employees by means of null or unfair dismissal is difficult. This could also create legal uncertainty for seasonal workers who may have their work authorisation withdrawn.

PROSPECTS

The good, the bad, the ugly and the future

It is to the credit of all the negotiating parties that deadline pressures have not resulted in the dumbing down of rights or bad legislation. As the European Parliament rapporteur himself announced, "it says to good employers: carry on…and to bad ones: here are the minimum standards".

The final result shows that protection from exploitation and ensuring decent work is important for the EU. Seasonal workers are filling essential jobs all over Europe, and this directive will provide clear and decent procedures for migrants who are to be admitted for seasonal work.

Although high minimum standards are in place on rights, not a whole lot of harmonisation has been achieved, especially not with regards to the authorisations. Accommodating existing Member States' systems was the name of the game, so there was no reinventing the wheel.

This clear signal on rights is important at a time when national debates are rife with restricting migration and attacking the free movement of EU workers. Diluting the rights of EU citizens would be illogical when equal treatment on many rights is being accorded to many third-country nationals. These times of economic crisis, where populism has made labour migration an even more toxic issue in the public discourse, have often made the debate ugly.

With another piece of labour migration legislation adopted at EU level, and the ICTs Directive soon to follow, progress is being made. If the remaining legislation passed is of a high quality then implementation will be crucial, and will surely be one of the key components of the new strategic guidelines for the area of freedom security and justice to be adopted by the European Council in June.

Nevertheless, when assessing these strategic guidelines for the coming years, the EU must go beyond a sole focus on implementation. The EU needs a common migration policy fit for the 21st Century. The mobility of people all over the world is increasing, and the EU's demographic challenge and a changing global economy mean that getting the workforce needed will not be so easy. Internally there are also pressures on the horizon with enhanced coordination of economic policies in the Eurozone following the economic crisis. This will push the EU further towards a single European labour market, which will need to encompass a real common migration policy.

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