

The Past, the Present and the Future of the Seasonal Workers Directive

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This study aims at highlighting those legal and political issues that raised the most concerns during the negotiations of the Seasonal Workers Directive by giving an insight to the events behind the scenes. The research does not intend to describe every element of the Directive; instead it wants to reveal the specificities of the Seasonal Workers Directive. It therefore introduces the meaning of seasonal and circular migration from the aspect of the Directive; and also gives an insight of what challenges resulted from the fact that it is the first Directive on legal migration to cover short-term stay. The alignment of the provisions of the Directive with the Schengen acquis therefore is discussed in details.

Apart from solely legal issues the study also touched upon forms of how the Directive wishes to protect seasonal workers from exploitation and provide a stable legal basis with a tailor-made set of rights for them.

The frame used in the study for discussing these issue starts with the introduction of the plan and the adoption of the Directive, and ends with some thoughts on the challenges of implementation by two chosen Member States, namely Poland and Finland because of their unique national situations. Consequently, the study wishes to touch upon the past, present and the future of the Seasonal Workers Directive, as well.

Keywords: legal migration, seasonal workers, circular migration, equal treatment.

1. Introduction

“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.”¹

¹ Alex Lazarowicz, A success story for the EU and seasonal workers’ rights without reinventing the wheel, EPC Policy Brief, 28 March 2014, p. 1.
http://www.epc.eu/documents/uploads/pub_4309_eu_and_seasonal_workers__rights.pdf.

In spite of the fact that there is a clear need for admitting third-country nationals for seasonal work throughout Europe, the specificities of the already existing national schemes actually worked against an easy adoption of the Seasonal Workers Directive (2014/36/EU). The lack of willingness on behalf of many Member States to agree on harmonized rules at EU level was clearly reflected by the fact that 12 subsidiarity votes,² or better known as “yellow cards” against the Directive by national parliaments were submitted. Although it was not enough to stop the legislative procedure, but clearly contained a significant alert that the legislative procedure would not be an easy one.

It was only the continuation more difficult than the outset of the legislative procedure. This study aims at highlighting those legal and political issues that raised the most concerns during the negotiations by giving an insight to the events behind the scenes. The research does not intend to describe every element of the Directive, instead it wants to reveal the specificities of the Seasonal Workers Directive, such as what is meant by seasonal and circular migration, what challenges it meant to cover short-term stay, and how the Directive intends to protect seasonal workers. The frame used in the study for discussing these issue starts with the introduction of the plan and the adoption of the Directive, and ends with some thoughts on the challenges of implementation by two chosen Member States, namely Poland and Finland because of their unique national situations. Consequently, the study wishes to touch upon the past, present and the future of the Seasonal Workers Directive, as well.

2. The Birth of the Seasonal Workers Directive

2.1. The Background Framework Plan

The European Commission primarily aimed to approach the legislation of legal migration of third country nationals from an economic point of view. Accordingly, the Commission proposed 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 on 11 July 2001.³ No matter how noble the intention of the Commission was to create an EU-wide harmonised system for a very wide range of third-country migrants, i.e. to follow a horizontal approach in order to cover both the groups of employees and self-employed persons, the negotiation of the Directive revealed many problems. “The proposal, which closely followed the 1999 Tampere Programme’s milestones, was finally withdrawn because representatives of certain EU Member States expressed deep concern about the possibility of having ‘more Europe’ in these nationally sensitive fields.”⁴

Turning to other categories of migrants instead of workers and entrepreneurs, the proposals of the Commission, launched according to the instructions set out by the Tampere European Council, on sets of harmonized rules on third-country nationals coming for purposes such as family reunification, studies and research had been more successful as for the negotiations in the Council and resulted in a number of

² A new tool in the hands of the national parliaments introduced by 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.

³ 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 /COM/2001/0386 final – CNS 2001/0154/.

⁴ S. Carrera et al, Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020, CEPS Policy Brief No. 240, 5 April 2011, p. 3.

directives adopted between 2003 and 2005. Directive 2003/86/EC⁵ on family reunification adopted as the first legal migration directive harmonizes criteria for family reunification between third-country nationals and therefore embraces family reunification as a right of migrants. Directive 2003/109/EC⁶ creates a European regime for acquiring EU long-term residence status after five years of legal residence in a Member State. Directive 2004/114/EC⁷ focusing mainly on migrants coming for pursuing studies and Directive 2005/71/EC⁸ setting up a unique procedure for the admission of researchers reflect the EU's preference for knowledge-based migration.

The Hague Programme of November 2004, continuing the implementation of the initiatives of the 1999 Tampere Programme, stressed that legal migration plays an important role in strengthening the knowledge-based European economy, economic development and also contributes to the implementation of the Lisbon Strategy. In order to facilitate the adoption of a new draft Directive on economic migration, the European Commission initiated an extensive consultation with its 'Green Paper on an EU approach to managing economic migration'⁹ with Member States, other European institutions, international organizations and NGOs, and other interested parties as to what would be the best type of legislation at Community level in relation to the reception of economic migrants from third countries.

The primary objective of the consultation launched by the Green Paper was to find the most appropriate form of regulation in the Community on the reception of migrants for economic purposes from third countries, and to discover what would be the added value of the establishment of such a Community framework. The Hague Programme also referred to the Green Paper and the consultation, which would form the basis of a policy plan on legal migration including admission procedures capable of responding promptly to the changing labour market demand.

The result of this consultation was the continuation of the sectorial, or more precisely selective approach of laying down migration rules for certain chosen groups of migrants instead of covering a wider scope of third-country nationals by a harmonised set of criteria. "The main justification was that, by doing this, the common European policy would be in line with the political priorities and legal regimes applying in most EU Member States."¹⁰ The Political Plan on Legal Migration¹¹ was the way in which the Commission envisaged a framework directive – together with four further directives covering four specific groups of economic migrants. Carrera's view on the new Policy Plan clearly highlights the differences between the new perspective and the initial proposal of 2001: "The main result of the approach advocated by the "Policy Plan on Legal Migration" has been the emergence of a hierarchical, differentiated and obscure

⁵ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251, 3.10.2003, pp. 12–18.

⁶ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23.1.2004, pp. 44–53.

⁷ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service, OJ L 375, 23.12.2004, pp. 12–18.

⁸ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289, 3.11.2005, pp. 15–22.

⁹ COM (2004) 0811final: Green paper on an EU approach to managing economic migration.

¹⁰ Carrera, p. 4.

¹¹ Communication from the Commission on a policy plan on legal migration, COM (2005) 669 final.

European legal regime on labour immigration which accords different rights, standards and conditions for entry and stay to different groups and countries of origin of TCN.”¹²

The plan of five directives resulted in actually four proposals from the Commission among which the first to reach a maturity for adoption was Directive 2009/50/EC¹³ creating the so-called EU Blue Card. The framework directive (Directive 2011/98/EU¹⁴) not touching upon admission criteria, but definitely bringing major change in procedural rules as well as rights was only adopted two years later. Two more draft directives – the proposal for a Directive on intra-corporate transfers¹⁵ and the proposal for a Directive on seasonal workers¹⁶ - were proposed by the Commission in 2010. Their adoption had long been awaited as a result of the negotiations needed between the co-legislators Council and European Parliament under the ordinary legislative procedure that was extended to the field of legal migration by the Lisbon Treaty. Finally the Directive on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (Directive 2014/36/EU)¹⁷ and the Directive on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer (Directive 2014/66/EU)¹⁸ were both adopted in the first half of 2014.

2.2. The Adoption of the Directive

Directive 2014/36/EU of the European Parliament and of the Council on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (hereinafter referred to as Seasonal Workers Directive) was officially adopted on 26 February 2014 after three and a half years of negotiations. The legislative procedure contained elements that partly encouraged a fast rhythm of legislation, but all in all features hindering the quick adoption of the new legal act dominated the procedure.

The European Commission launched its proposal¹⁹ for a Directive on 3 July 2010 as an element of implementing the Policy Plan on Legal Migration set out in 2005. The Policy Plan acknowledged that “seasonal workers are regularly needed in certain sectors, mainly agriculture, building and tourism, where many immigrants work illegally under precarious conditions. (...) The aim is to provide the necessary

¹² Carrera, p. 3.

¹³ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155, 18.6.2009, pp. 17–29.

¹⁴ Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343, 23.12.2011, pp. 1–9.

¹⁵ Proposal for a directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer /COM/2010/0378 final - COD 2010/0209/.

¹⁶ 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 purposes of seasonal employment /COM/2010/0379 final - COD 2010/0210/.

¹⁷ 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, 28/03/2014, pp. 375–390.

¹⁸ Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, OJ L 157, 27.5.2014, pp. 1–22.

¹⁹ COM(2010) 379 final.

manpower in the Member States while at the same time granting a secure legal status and a regular work prospective to the immigrants concerned, thereby protecting a particularly weak category of workers and also contributing to the development of the countries of origin. Even in presence of high unemployment, this category of immigrant workers rarely conflict with EU workers as few EU citizens and residents are willing to engage in seasonal activities.”²⁰

According to the Impact Assessment annexed to the proposal of the Directive the national provisions in this field differ to a great extent as for the definition of seasonal employment, the time frame of seasonal work, the procedure rules of admission as well as the rights provided for seasonal workers. Accordingly, the main purpose of the proposal of the Directive is to introduce transparent provisions concerning the entry and stay of seasonal third-country national workers, furthermore making it easier for them to enter the territories of the EU for the purpose of seasonal employment and harmonizing the procedural rules of the Member States. In order to achieve these goals, primarily there is a need for introducing a common definition for seasonal employment, furthermore for creating a facilitated procedure for the admission of seasonal workers based on a common set of criteria. A further aim of the proposal was to help preventing the exploitation of seasonal workers and consequently it proposed to set out basic minimum rights to be provided for such workers.

As the proposal of this Directive was submitted together with the draft Directive on intra-corporate transferees (ICTs), the two proposed legal acts were handled in a package both by the Commission, and also, even more so, by the European Parliament regardless of the differences of the target groups of the two proposals. One of the major aims of the EP during the legislative procedure, namely not letting the facilitation of the entry and rights of low-skilled workers be neglected, is clearly shown by the fact that although the Council’s relevant Working Party²¹ developed a compromise proposal earlier in the case of the draft Directive on ICTs, the European Parliament quickened its steps concerning the Seasonal Workers Directive. Their tools of enhancing the adoption of the Council’s position concerning the proposal on Seasonal Workers Directive even included not showing real interest in starting informal trilogues in the ICT Directive as long as the Member States do not reach an agreement in the Council’s Working Party on a compromise proposal concerning seasonal workers.

While such political and inter-institutional games definitely put pressure on the Council, it was not only the wide range of existing national provisions slowing down the legislative procedure, but legal and conceptual deficiencies of the Commission’s proposal, as well. Such challenges of the adoption of the new legal act, elaborated more in the next Chapter, clearly had a major effect on the length of the legislative procedure.

3. The Unique Elements of the Seasonal Workers Directive

The Proposal of the Directive on seasonal workers was not only unique as it touched upon migration of low or unskilled workers for the first time and put not only the aim of raising the competitiveness of the EU in the centre, but the proposal aimed at fighting exploitation and also complied with the EU’s development policy by facilitating circular migration. In particular, its provisions were introduced in a

²⁰ Communication from the Commission on a policy plan on legal migration COM (2005) 669 final, p. 7.

²¹ Working Party on Integration, Migration and Expulsion, Formation Migration – Admission.

way to encourage the circulation of migrants staying only for a temporary period, and therefore the Directive is not expected to lead to brain drain²² in emerging or developing countries.

Therefore, while there have been several legal questions raised by both co-legislators during the more than three years of negotiations, such as for example the question of legal basis,²³ this study focuses only on issues that originate from the unique nature of the Seasonal Workers Directive.

3.1. Seasonal and Circular Migration

The definition of seasonal worker²⁴ includes carrying out an activity dependent on the passing of the seasons, which type of activity has also been defined in the Directive, meaning “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.”²⁵ Consequently the Directive itself does not contain a close list of seasonal work or seasonal activities, but takes into account the differences of Member States, in particular their climate and economy, and therefore obliges the Member States, when transposing the Directive, to consult with social partners, where appropriate, and list those sectors of employment which include activities that are dependent on the passing of the seasons. “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, in particular during the holiday period.”^{26,27}

²² Yet, it is a bit controversial to emphasize the nature of fighting brain drain in case of this Directive, as the target group of migrants is of low or non-skilled migrants.

²³ The legal basis proposed by the Commission for the proposed directive is Art. 79(2)(a) and (b) TFEU, which falls under Title V on the Area of Freedom, Security and Justice of Part Three of the TFEU, entitled Union Policies and Internal Actions. It has been raised during the negotiations that either it should be changed to or this legal basis should be applied parallel with Art.153(1) (a), (b) and (g) TFEU, which falls under Title X on Social Policy of Part Three of the TFEU, entitled Union Policies and Internal Actions. The reason for the additional legal basis is stated as being that the proposal for a directive does not regulate only issues of migration, but also questions of employment rights of the categories of workers concerned. The common official justification of such expressions of need was the fact that the proposal for the directive does not regulate only issues of migration, but also questions of employment rights of the categories of workers concerned. Yet, the purpose of such change was supposedly very different. Those arguing for the parallel use of the two legal bases, namely the Employment Committee of the EP, that the Area of Freedom, Security and Justice is subject to Protocol No 21 on the position of the United Kingdom and Ireland and Protocol No 22 on the position of Denmark. Under those protocols, Denmark never takes part in the adoption of measures and the United Kingdom and Ireland have a choice whether or not to participate. Further voices, mainly of certain Member States lobbied for the complete change of legal basis to Art. 153 of TFEU as in such issues of Social Policy the Council shall act unanimously, in accordance with a special legislative procedure, after consulting the European Parliament and the said Committees.

Contrary to all these voices para 42 of the decision on Case C-178/03 *Commission v European Parliament and Council* stated that if examination of the act "reveals that it pursues a twofold purpose or that it has a twofold component and if one of those is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component."

For further elaboration see the Opinion of the Committee on Legal Affairs of the EP on the Verification of the legal basis of the proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, 23.11.2011.

²⁴ See Art. 3(b) of Directive 2014/36/EU.

²⁵ Art. 3(c) of Directive 2014/36/EU.

²⁶ Preamble (13) of Directive 2014/36/EU.

“Taking into account certain aspects of circular migration as well as the employment prospects of third-country seasonal workers beyond a single season and the interests of Union employers in being able to rely on a more stable and already trained workforce, the possibility of facilitated admission procedures should be provided for in respect of bona fide third-country nationals who have been admitted as seasonal workers in a Member State at least once within the previous five years, and who have always respected all criteria and conditions provided under this Directive for entry and stay in the Member State concerned. Such procedures should not affect, or circumvent, the requirement that the employment be of a seasonal nature.”²⁸ It should be emphasized that the Directive intends to generate new migration flows of seasonal nature²⁹ as it only applies to third-country nationals residing outside the territory of the Member States.³⁰ Yet, in line with the aim of facilitating circular migration of those law-abiding seasonal workers is set out in Article 16 of the Directive.

There has been an extensive debate both within the EU Council’s competent Working Party as well as between the EP and the Council on how to determine the way of facilitation. The Commission’s proposal intended to provide for two, but compulsory ways of facilitation, according to which Member States should have either, upon application, issue up to three seasonal worker permits covering up to three subsequent seasons within one administrative act (‘multi-seasonal worker permit’), or provide a facilitated procedure for third-country nationals who were admitted to that Member State as seasonal workers and who apply to be admitted as such in a subsequent year.³¹ Even though the final text of the Directive offers more options for facilitation, such options are listed as a ‘may clause’, that is while there is a clear obligation for Member States to provide for a set of rules on facilitated entry, the content of these rules is not determined in a harmonized way at EU level, only the most preferred options are listed as follows, providing more flexibility for Member States: “(a) the grant of an exemption from the requirement to submit one or more of the documents referred to in Articles 5 or 6; (b) the issuing of several seasonal worker permits in a single administrative act; (c) an accelerated procedure leading to a decision on the application for a seasonal worker permit or a long stay visa; (d) priority in examining applications for admission as a seasonal worker, including taking into account previous admissions when deciding on applications with regard to the exhaustion of volumes of admission.”³²

As some of the Member States may already facilitate circular migration by bilateral or multilateral agreements with non-EU countries, it is important to emphasize that this Directive shall apply without prejudice to more favourable provisions of such agreements. Consequently such bilateral or multilateral agreements shall continue to apply as long as their provisions provide for more favourable rules for

²⁷ Such an approach is in line with the proposal of the Commission, as well. See Preamble (10) of COM(2010) 379 final.

²⁸ Preamble (34) of Directive 2014/36/EU.

²⁹ This purpose was although not that obvious for the LIBE Committee of the EP as in its draft report it suggested a new Paragraph under Art. 2: “For a transitional period of two years following its transposition by Member States, this Directive shall apply to third-country nationals present on the territory of a Member State who do not fulfil, or no longer fulfil, the conditions for stay or residence in that Member State and who apply for a seasonal worker permit in that Member State.” (See Amendment 18 of the Draft Report of the Committee on Civil Liberties, Justice and Home Affairs, 8.6.2011.) Therefore the EP tried to lobby for extending the scope of the Directive to those already residing illegally and therefore making the Directive a tool for the first harmonized way of legalizing stays of third-country nationals. This, however, still remains in the competence of each Member State.

³⁰ See Art. 2(1) of Directive 2014/36/EU.

³¹ See Art. 12(1) of COM(2010) 379 final.

³² Art. 16(1) of Directive 2014/36/EU.

seasonal workers, including their rights.³³ Therefore it is suggested for Member States having entered into bilateral or multilateral cooperation that they review their agreements in order to determine whether there are certain aspects of the agreement that need to be omitted in order to apply the Directive's provisions instead in order not to deprive a group of seasonal workers under the scope of the agreements, of their rights provided for by the Directive.

3.2. Covering Short-term Stays

The negotiations of the Directive were long-lasting due to the fact that it was the first set of EU rules on legal migration that concerns not only stays exceeding 90 days, but also stays not exceeding 90 days. Unfortunately the Commission's proposal was silent on how to proceed technically when the stays do not exceed three months as it only set out that "for stays exceeding three months, seasonal workers who fulfil the admission criteria as set out in Article 5 and for whom the competent authorities have taken a positive decision shall be issued with a seasonal worker permit."³⁴ Therefore the Commission only focused on pursuing single application procedure already set out in Directive 2009/50/EC and Directive 2011/98/EU, but did not investigate the issue substantially.

So what composed the substance of the problem? While Article 10 on the seasonal worker permit only concerns stays exceeding three months, the conditions for entry and stay set out in Article 5, the grounds for refusal in Article 6 and the reasons of withdrawal and non-renewal in Article 7 had been proposed by the Commission for all stays regardless of its length as long it is covered by the scope of the Directive. However, such provisions should have been aligned with³⁵ the *Schengen acquis* and in particular with the Visa Code³⁶ as there is already a closed system of EU rules concerning stays not exceeding 90 days within a 180-day period. As such provisions, being completely harmonized mainly by regulations at EU level, do not allow for a diversion unless expressly stated, the Seasonal Workers Directive would have been contradictory to the Visa Code containing a close list of entry and stay as well as grounds for refusal and withdrawal due to the lack of alignment of the proposed provisions with the already existing scheme for short-term stays.

Unfortunately, as such alignment had not been done by the Commission in its proposal it had to be solved mainly by the competent Working Party of the Council. There were several options outlined for solving the problem, so the issue needed a conceptual decision before proceeding further with the detailed rules. One and probably the most drastic option could have been to lower the expectations concerning the issues covered and omit rules on entry and stay while focus only on the rights of seasonal workers. Yet, it would have been far from the original aim of establishing a common system of admission for seasonal workers, furthermore it would have necessitated a completely different legal basis and legislative procedure as it would only concern social policy issues.

Further, less dramatic option was to only cover stays exceeding three months similarly to the already existing Directives on legal migration. However, as seasonal employment lasts typically for a shorter period and therefore most of the target group would not be covered and consequently the aim of the

³³ See Art. 4(1)b) of Directive 2014/36/EU.

³⁴ Art. 10 (1) of COM proposal.

³⁵ See Preamble (19) of Directive 2014/36/EU.

³⁶ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), OJ L 243, 15/09/2009, pp. 1–58.

Directive would not be reached. It has also occurred that the new Directive could repeat the provisions of the Visa Code for stays not exceeding 90 days, yet it would cause a legally problematic situation as the same rules would be set out in both a regulation and a directive and therefore the directly applicable nature of the provisions of the regulation could be questioned.

The solution expected to bring the most added value proved to be a complex one, but finally received the approval of both legislators. According to this, in case of seasonal workers coming for stays not exceeding 90 days, the admission criteria set out in the Directive only concerns the employment related provisions, and while as for other aspects the Visa Code shall continue to apply.³⁷ On the contrary for stays exceeding 90 days the Directive defines both immigration and employment conditions.³⁸

The complexity of the adopted rules does not only lie in the alignment of the *Schengen acquis* with the Directive's provision, but in providing flexibility due to the requests of Member States to be able to apply most of the elements of their already existing national systems on seasonal and temporary migration. Such requests included, among others, the length of the seasonal period to be determined within a given timeframe as well as being able to issue long-stay visas for the target group. Consequently, those fulfilling the conditions for admission may come for a period determined by each Member State individually between five and nine months in any 12-month period.³⁹ Member States are also free to continue issuing long-stay visas instead of seasonal worker permits for those staying for longer than 90 days, while for stays not exceeding 90 days, Schengen visas are to be issued by Member States applying the *Schengen acquis* in full.⁴⁰

“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.”⁴¹

3.3. The Protection of Seasonal Workers

The earlier results of EU harmonization of provisions managing legal migration focused on various issues, such as the appreciation of family as a value (Family Reunification Directive), the acknowledgment of successful integration of long-term migrants (Long-term Residence Directive) as well as the promotion of knowledge based migration (Students Directive and Researchers Directive). Yet, there is one thing in common: these aims all put values into the focus of legislation. On the contrary, the elements of the Political Plan on Legal Migration put interests into their focus, namely the facilitation of economic growth and competitiveness. However, one accompanying aim behind the idea of the Seasonal Workers Directive is still closer to values than interests as the Directive aims at protecting seasonal workers from being exploited and ensuring a stable legal status for them.

³⁷ See Preamble (20) and Art. 5 of Directive 2014/36/EU.

³⁸ See Preamble (21) and Art. 6 of Directive 2014/36/EU.

³⁹ See Art. 14(1) of Directive 2014/36/EU.

⁴⁰ See Art. 12 of Directive 2014/36/EU.

⁴¹ Lazarowicz, p. 2.

3.3.1. The Provisions on Accommodation

There are various elements of the proposal that could be contributed to the aim of protecting seasonal workers. One can even be found among the conditions of admission, namely the provisions on accommodation. Article 14 of the proposal suggested the application of the following rule: “Member States shall require employers of seasonal workers to provide evidence that the seasonal worker will benefit from accommodation that ensures an adequate standard of living.⁴² If seasonal workers are required to pay rent for such accommodation, its cost shall not be excessive in relation to their remuneration.” The problematic element of this proposal of the Commission was that employers would have had to provide evidence about the appropriate accommodation not only in case the employer would provide accommodation, but basically in all the cases. It has to be noted that practically in the majority of cases it is worker’s hostel or some other forms of accommodation arranged by the employer for the seasonal or temporary workers, but there may be exceptions, such as in the cases of those being accommodated by family or friends, or those renting their own places. Therefore it would be an unreasonable burden on the employers to bear the burden of proof even if they have nothing to do with the arrangements of accommodation.

In the meantime it was acknowledged that seasonal workers should be protected from having to live among poor conditions, therefore according to the compromise solution the following provision was approved by both legislators: “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, for the duration of his or her stay. The competent authority shall be informed of any change of accommodation of the seasonal worker.”⁴³ Furthermore where accommodation is arranged by or through the employer provisions concerning the rent, the rental contract as well as the health and safety standards have also been set out in the Directive.⁴⁴

3.3.2. The Equal Treatment Provisions of the Directive

The sectorial approach the EU does not only differentiate between certain groups of third-country national concerning criteria of admission, but concerning the areas of rights to which the principle of

⁴² The expression of providing “adequate standard of living” already appears in Art. 17(2) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) as well as in Article, yet with a different obligation of the state. While in case of asylum seekers it is the duty of the Member States to provide an accommodation that meets the condition of adequate standard of living, in case of seasonal workers the state authorities only need to check whether the employer provided it or not. To this effect the provision set out in Art. 7(1)(a) of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification stands closer to what the Seasonal Workers Directive envisions : “When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned.”

⁴³ Art. 20 (1) of Directive 2014/36/EU.

⁴⁴ Art. 20 (2) of Directive 2014/36/EU: (a) the seasonal worker may be required to pay a rent which shall not be excessive compared with his or her net remuneration and compared with the quality of the accommodation. The rent shall not be automatically deducted from the wage of the seasonal worker; (b) the employer shall provide the seasonal worker with a rental contract or equivalent document in which the rental conditions of the accommodation are clearly stated; (c) the employer shall ensure that the accommodation meets the general health and safety standards in force in the Member State concerned.

equal treatment is applied. It is based on the intention of attracting certain groups by laying down preferential rules on admission as well as providing a wide list of rights, while as for other groups of migrants the aim is to only keep them on the territory of the EU for a definite time. Such differentiation of migrants can not only raise ethical problems, but can cause further challenges when it comes to setting out specific legal provisions.

A very expressive example of the legal aspect of this issue has raised tensions in case of the Seasonal Workers Directive, as well. The provision of family allowances serves the primary purpose of strengthening families and encouraging their formation and extension as they are the basic foundations of a society. It is therefore a typical form of investing in the future of the state. Consequently the question justifiably arises, whether such support should be provided to families who are only temporary elements of the host society. If we agree that there are reasons justifying the lack of extending equal treatment to such right, another challenge is to define what constitutes temporary period and therefore where is the line between those claiming rightfully the reception of such benefits and those lawfully being excluded from the enjoyment of this right.

It is worth to examine the situation and specificities of seasonal workers in a more detailed way. The maximum time they are allowed to spend in an EU Member State is between five to nine months in a 12-month period at the end of which they are obliged to leave the territory of the EU. Furthermore the Seasonal Workers Directive does not provide for the right to family reunification either.⁴⁵ Based on all these features it is not typical for seasonal workers to reunite with their families on the territory of the EU, or even if they do so, they do not stay for a long period. Consequently there are powerful arguments in the hands of Member States why they are not ready to extend equal treatment clauses to the field of family allowances.

Based on such reasoning Article 23 of the Seasonal Workers Directive not only lists a number of areas concerning which seasonal workers shall receive equal treatment with the citizens of the host country, but also sets out certain optional restrictions, namely the exclusion of family benefits and unemployment benefits; the limitation of the application of equal treatment to education and vocational training which is directly linked to the specific employment activity and the exclusion of study and maintenance grants and loans or other grants and loans; and with respect to tax benefits the limitation of its application to cases where the registered or usual place of residence of the family members of the seasonal worker for whom he/she claims benefits, lies in the territory of the Member State concerned.

Nevertheless the access to certain rights remains a complex and sensitive question involving ethical, economic and legal aspects.⁴⁶ Based on human rights aspects the Council and the Member States are continuously accused of not extending the principle of equal treatment completely in case of third-country nationals. On the other hand Martin Ruhs using a realistic approach examines the economic aspects of rights; he even gave the title "*The Price of Rights*" to his book.⁴⁷ According to him rights not only have an internal value, as the human rights approach states, but they play an important role in shaping the effect

⁴⁵ It is in line with Art. 3(1) of the Council Directive 2003/86/EC on the right to family reunification: "This Directive shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of permanent residence, if the members of his or her family are third country nationals of whatever status."

⁴⁶ The *Kamberaj* case (C-571/10) showed that even in case of the long-time applied Directive 2003/109/EC questions can arise concerning in terms of what exact rights a limitation can be applied.

⁴⁷ Martin Ruhs, *The Price of Rights: Regulating International Labour Migration*, Princeton University Press, USA 2013.

of migration. Consequently the rights provided by the main host countries depend to a great extent on their effect on the society of the host country.⁴⁸ Ruhs therefore proposes a so-called *core rights approach* trying to find a viable option for following the rights-based approach, but in a way that it would not result in such an oppositional behaviour on behalf of the host society that providing a wide range of rights actually resulted in the complete undermining of immigration of third-country nationals.

3.3.3. The Possibility of Extension and Change of Employer

Article 11 (2) of the proposal sets out that within the maximum period of seasonal employment, and provided that the criteria of admission are still met, seasonal workers shall be allowed to extend their contract or to be employed as seasonal worker with a different employer. The Commission's explanation on these provisions reveal the fact that they are to serve the aim of the protection of seasonal workers: "Explicit provision is made that within the maximum duration of stay an extension of the contract or a change of employer for seasonal work is possible. This is important for the reason that seasonal workers who are tied to a single employer may face the risk of abuses. Also, the possibility to extend the stay within the specified period of time may reduce the risk of overstaying. Finally, extension allows higher earnings and remittances sent by third-country seasonal workers which, in turn, can contribute to the development of their countries of origin."

Member States have raised several negative comments on these suggestions both from a practical as well as from a legal point of view. Firstly, as labour market issues remain in the competence of Member States, they can apply labour market tests even in case of seasonal workers, and not only when admitting them first in the country, but also during the renewal procedure. As the maximum length of seasonal employment shall be determined between five to nine months by each Member State, if the seasonal worker is first admitted for a shorter period and wishes to extend their stay, or the seasonal worker intends to change employer, the length of the renewal procedure cannot guarantee that it will be worth starting such a procedure. The question of renewal also generates a legal problem due to the obligation of aligning the provisions with the *Schengen acquis*. More specifically, if the original intended period of stay was less than 90 days and a Schengen visa was issued for the purpose of seasonal employment, it is impossible to extend this visa for the purpose of continuing the seasonal work. Consequently the Directive had to play with the words in order not to overrule the *Schengen acquis* and therefore the adopted provisions mention the extension of stay instead of the extension of the visa. It therefore allows Member States to issue long-term visa or seasonal worker permit in case the stay with a Schengen visa for seasonal employment should be extended.⁴⁹

⁴⁸ Ruhs, p. 19.

⁴⁹ According to Art. 15 Member States shall allow seasonal workers one extension of their stay, where seasonal workers extend their contract with the same employer. Member States may decide, in accordance with their national law, to allow seasonal workers to extend their contract with the same employer and their stay more than once. Member States shall also allow seasonal workers one extension of their stay to be employed with a different employer. Member States may decide, in accordance with their national law, to allow seasonal workers to be employed by a different employer and to extend their stay more than once.

3.3.4. The Obligations of the Employers and the Member States

The Directive also sets out many obligations for employers as well as sanctions (Article 17) when they fail to comply with their obligations; furthermore it also obliges the Member States to have effective monitoring, assessment and inspections (Article 24). This can also be helped by the employees' complaints as Member States shall also ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers directly or through third parties (Article 25).

Nevertheless, there is a risk of going from one extreme to the other and create a set of rules that would be hard to comply with and therefore would rather discourage the employer from employing seasonal workers lawfully. As the rapporteur of the EP LIBE Committee, Claude Moraes put it: "Strict rules should be in place and enforced, but we also have to make sure that the Directive, as a whole, does not actively discourage employers from using it. We are well aware of the risk of rendering the Directive ineffective on implementation through either a lack of sanctions or sanctions which are misplaced or too burdensome. Finding the right balance is therefore an imperative for us."⁵⁰

4. The Predicted Problems of National Implementations

As a result of the continuous lobby of the Member States, the European Parliament finally agreed to allow 30 months for the transposition of the Directive; therefore Member States shall bring into force their national laws, regulations and administrative provisions necessary to comply with the Seasonal Workers Directive by 30 September 2016. Although it may seem to be an easy task to align the already existing national provisions on seasonal or temporary workers with the Directive, as many of the Member States already have specific rules for short-term employment, it may indeed imply just as numerous challenges for Member States as establishing a completely new scheme of admission, for example in the case of the EU Blue Card. It is due to the fact that "policy complexity, however, tends to delay transposition."⁵¹

4.1. The Simplified Procedure of Poland

In Poland a scheme called '*simplified procedure*' has been applied since 2006⁵² dedicated to short-term labour migrants of certain countries bordering Poland as well as further Eastern Partnership countries. Presently this scheme is applied for the citizens of Armenia, Belarus, Georgia, Moldova, Russia and the Ukraine. The scheme allows citizens of these countries to perform work in Poland for six months within the twelve consecutive months without work permit provided they are in possession of declaration of

⁵⁰ Claude Moraes & Anny Bhan, Debunking the myths of the EU Seasonal Workers Directive, ENAR, <http://www.enargywebzine.eu/spip.php?article286>.

⁵¹ Simon Hix & Bjorn Hoyland, *The Political System of the European Union*, Palgrave Macmillan, UK 2011, p. 33.

⁵² Ordinance of the Minister of Labour and Social Policy of 30 August 2006 on taking up employment by foreigners without the need to obtain a work permit (Dz. U. of 2006, No. 156, item 1116) allowing the nationals of the Russian Federation, Ukraine and Belarus to work without work permits in only one sector of economy, which suffered the most from the lack of workforce, i.e. in agriculture – they could work for a period of maximum 3 months in any consecutive 6 months.

employer registered in the local labour office.⁵³ The scheme is the most popular formula of employment of foreigners in Poland and is mainly applied in the sectors of agriculture and construction. According to the recommendation set out in the document “Migration policy of Poland – current state of play and further actions” adopted in 2012 the scheme should be further pursued and developed. During this development the implementation of the Seasonal Workers Directive will also affect the future shape of the simplified scheme.

“The simplified system makes it possible for the Polish employers to legally employ foreigners registered in a district labour office competent for the place of residence or seat of the declarant, free of charge and in most cases immediately. The registered statement is handed over to a foreigner and is the basis for applying for a visa. In addition to minimum formalities required, the advantages of the system include its flexibility and the fact that it is adequate to the demand.” This scheme already contains features appearing in the Seasonal Workers Directive, such as the possibility to re-enter and take up employment on the same conditions; and the possibility to change employers, which facilitates mobility while providing seasonal work. Indeed, “surveys conducted with seasonal workers have shown that according to the employees after the introduction of this solution their safety and working conditions improved which is related to the possibility of taking up employment with another employer and imposes competition between employers. The surveys have also shown that the scale of foreigners’ employment in the grey market was reduced.”⁵⁴ Similarly, an analysis⁵⁵ carried out by the Institute of Public Affairs concluded that the design of the simplified system works very well in the case of seasonal labour, and the foreigners employed under this procedure form the most numerous group of foreign legal workforce.⁵⁶

Yet, the future of the successful simplified procedure depends much on the concept that legislators will follow when transposing the Seasonal Workers Directive due to the fact that it was the sole decision of Poland to open the labour market originating from certain countries, no international agreement has been concluded for this reason. As according to the Directive it is only international agreements allowing for more favourable provisions concerning, among others, the admission criteria, the Polish government has therefore a choice to take. It either modifies its simplified procedure to align it with the provisions of the Seasonal Workers Directive or enters into bilateral or multilateral agreements with the source countries of this scheme. Fortunately, there is no stand-still clause in the Directive related to the introduction of more favourable provisions, therefore it could be a wise step from Poland to enter into agreements instead of erasing the simplicity of this scheme in which most of its added value lies.

4.2. The Situation of Berry Pickers in Finland

⁵³ The functioning of the simplified system is based on paragraphs 27 and 27a of the Ordinance of the Minister of Labour and Social Policy of 2 February 2009 amending the Ordinance on taking up employment by foreigners without the need to obtain a work permit. (Dz. U. No. 21, item 114).

⁵⁴ Temporary and circular migration in Poland: empirical evidence, current policy practice and future options Reference Years: 2004-2009 Prepared by: Polish National Contact Point to the European Migration Network, May 2011, p. 23.

⁵⁵ The report of the Institute of Public Affairs *Strategie przetrwania. Adaptacja ukraińskich migrantów zarobkowych do polskiej rzeczywistości instytucjonalnej* [Survival strategies. Adaptation of Ukrainian economic migrants to the Polish institutional reality], 2009.

⁵⁶ „2011 saw a 44% increase of such declarations, to almost 260,000. 92% of the declarations by Polish employers were for Ukrainians.” International Migration Outlook, OECD 2013, p. 284. <http://www.oecd.org/els/mig/POLAND.pdf>.

Every year, over 4,000 foreigners arrive in Finland to pick berries, the largest group by far, 3,500 persons in 2013, comes from Finland. The reason for Thai berry-pickers going to Finland is their productive work and the fact that the season of harvesting forest berries in Finland coincides with the unproductive farming period in Thailand. Contrary to the fact that Thai workers have been arriving to Finland in the past ten years, problems of various degrees still exist. Even the European Commission in its report⁵⁷ on Finland recommended the intervention of the authorities by ensuring that the occupational safety and health authorities monitor their situation.

“The process in which Thai pickers are brought to Finland to harvest forest berries has many stages, and in many parts, it is dubious by the Finnish standards. The manner in which a number of actors profit from the pickers has some questionable elements and the only one in the whole process with a significant personal risk is the picker.”⁵⁸ Such questionable elements lie in the ambiguity of the berry pickers’ actual position in the labour market, as they are neither regarded as working in an employment situation, nor as doing their activity in entrepreneurship.

Some companies use direct contracts with the pickers in which the pickers take the obligation of only selling berries to the company that invited them to Finland. Although it is usually the company or a coordinator arranging the flight tickets, accommodation and transport of the foreign berry pickers, no employment relationship is formally formed. Companies therefore do not feel responsible for providing safe working environment and further rights of employees, while pickers clearly depend on the company inviting them and paying for the berries they pick. In a more indirect situation the companies inviting the pickers to the country take part in arrangements where the coordinator recruiting the pickers deposits a security with an agricultural bank, which grants loans to a great share of the pickers while the security system allows the coordinator to pay back the loan.

A statement that is true for both relations between the company and the pickers is that “there is little difference between this practice and features that meet the criteria for human trafficking, however, any conflicts may result in this boundary being crossed.”⁵⁹ Therefore a solution must be found in order to change this unprotected situation of the berry pickers. One tool for this could be the implementation of the Seasonal Workers Directive as it requires an employment contract concluded with an employer established in the Member State where the work is carried out.

5. Conclusions

I agree with the statements of the so-called supranational politics approach, being also reflected by the negotiations on the Seasonal Workers Directive “that the rules governing decision-making in the EU shape policy outcomes, sometimes in the way governments can predict and at other times in ways they cannot predict easily. For example, if QMV is introduced in a particular policy area, the set of policies that can be adopted is increased significantly, and governments can find themselves unexpectedly on the losing side on a key issue. Similarly, extending the legislative powers of the European Parliament under

⁵⁷ CR(2013) 19.

⁵⁸ Merkkü Wallin, Proposals for solving problems associated with the conditions of foreign pickers of forest berries, Report summary, 28.2.2014, p. 2.

⁵⁹ Wallin, p. 5.

the co-decision/ordinary legislative procedure, gives new veto- and agenda-setting power to a majority in the European Parliament.”⁶⁰

The Council definitely had to experience this new power of the European Parliament and therefore enter into constructive debates with its new co-legislator in the field of legal migration. However, unfortunately the majority of the legislative procedure was occupied rather by doing the job the Commission would have had to do, namely aligning its proposal with the already existing EU rules on short-term migration.

Although it was clearly a challenging but exciting task for all the migration law experts having taken part in this legislative procedure to find all the elements of the legal framework into which this piece of legislation should be fitted in as well as to look for the most ideal solution, this has also prolonged the legislative procedure and therefore made the Member States miss the opportunity of a major harmonization. “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.”⁶¹

On the other hand, during the legislative procedure it became obvious that harmonization as for the authorization is secondary to the aim of establishing a firm legal status for seasonal workers throughout the EU, therefore while flexibility characterizes many provisions of the Directive, being the first directive on labour migration that covers low-skilled or unskilled workers who come for less than three months, it is clearly a major step forward. However, much depends on the effectiveness of transposition of the Seasonal Workers Directive into national laws that we still have to await for until the fall of 2016.

⁶⁰ Hix & Hoyland, p. 17.

⁶¹ Lazarowitz, p. 4.