

Note on the proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment

(1) The proposal is highly noncommittal

The proposal, as amended by the Council, contains few real obligations for Member States as they are free to continue issuing national residence permits for seasonal employment (recital 12a) and are under no obligation to issue an EU seasonal worker permit (Article 5a). Moreover, seasonal employment during the three months of visa free residence or seasonal employment covered by a travel visa (Article 5(6)) are excluded from the working of the directive, the same for applications for a permit for seasonal employment made within the Member State (Article 2(1)).

(2) Possible negative effects

The absence of binding provisions does not prevent Member States from using certain provisions of the directive to legitimately reduce the relevant standards in their national legislation. The directive will de facto function as 'the European standard'. This effect would be all the more serious, since the rights or protection provided in certain clauses of the amended proposal are clearly below the level of rights and protection granted to all lawfully employed workers, irrespective of their nationality, by the EU Charter of Fundamental Rights, ILO Convention No. 97 (Migrant Workers) and the International Covenant on Economic, Social and Cultural Rights.

(3) Lack of legal certainty

The formulation of several provisions in the proposal is hardly compatible with the requirements of the Union law principle of legal certainty. According to Article 5(1)(a) a valid work contract must be presented or a binding job offer determined by "administrative regulations or practice" but it is not explained what this administrative regulation or practice entails.

The Meijers Committee suggests to change this Article into the same wording as Article 5(1)(a) on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (Directive 2009/50/EC):

'.. a third-country national who applies to be admitted under the terms of this Directive or the employer shall:

- (a) present a valid work contract or, as provided in national law, a binding job offer for seasonal employment'.*

Moreover, it is noted that according to Article 16 (1)(a) working conditions laid down by "administrative provision" are relevant without the requirement that such provisions have been published.

The grounds for refusal, withdrawal or non-renewal of the permit if the employer has been sanctioned or has not observed national law with respect to legal obligations regarding social security, taxation and/or working conditions are not limited in time (see Article 6(3) and 7(3)). This comment also applies to Article 6(4) and Article 7(4). The consequence is that any sanction or non-observance during the lifetime of the worker or employer may be a ground for such decisions. Limiting the possibility to refuse, withdraw or not renew the permit in the situations mentioned above to violations of the employer or the worker in the last three to five years would provide more

legal certainty and avoids disproportional decisions. The drafters, apparently, disregarded the negative effect of such decisions on the employment rights of the workers concerned, even if they have fully complied with their obligations.

(4) Rights of seasonal workers below the level of ILO standards

The level of rights granted to seasonal workers in the proposed directive is in many respects below the level guaranteed in the binding standards of the International Labour Organisation. Ten EU Member States are bound by ILO Convention No.97: Belgium, Cyprus, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain and the UK.

For instance the rights mentioned in Article 16 of the proposal are more restricted than the rights granted to all lawfully employed workers (including seasonal workers) in Article 6 of ILO Convention No. 97 on Migration for Employment of 1949. The rights to *social security* provided for in Article 16(1)(c) and (d) are clearly below the level guaranteed by Article 6(1)(b) of ILO Convention No.97. Article 16(1)(d) and recital no. 22a in case of death of the worker do not explicitly forbid the payment of lower survivors' pensions to survivors residing in a third country than to survivors residing in a Member State. Payment of lower survivors' pensions to persons residing in a third country would amount to indirect discrimination, because survivors of national workers will only exceptionally reside in a third country and are, thus, rarely confronted with reduced benefits .

Moreover, Article 16 of the proposal does not contain provisions granting *equal treatment* with regard to *employment taxes, dues or contributions* payable in respect of the person employed and with regard to *legal proceedings* relating to the matters referred to in the directive, as provided for in Article 6(1)(c) and (d) of ILO Convention No. 97. Hence, equal treatment of the seasonal worker in a court case against his employer is not guaranteed by the directive.

The final words of Article 16(1)(b) of the amended proposal allow restriction of the *trade union rights* of the worker on the basis of national rules on public policy. Thus, participation in a strike could be ground for withdrawal of the permit and expulsion of the worker. This is below the trade union rights granted to EU workers since 1968, see the judgment of the Court of Justice of 28 October 1975 in the Rutili case.

Article 14 stipulates that the costs of *accommodation* provided by the employer "shall not be excessive in relation to their remuneration". It should be added that costs shall not be excessive in relation to the size and the quality of the accommodation. Further, the phrase "accommodation that ensures an adequate standard of living according to national legislation and/or practice" should be clarified so as to ensure that the standard is no less favourable than that accorded to nationals (as laid down in national legislation and/or practice). This corresponds with Article 6(1)(a)(III) ILO Convention No. 97 and Article 11 ICESCR.

Finally, in order to avoid another form of exploitation of seasonal workers by employers, the Meijers Committee proposes to add the following sentence in Article 16(1)(e):

"Provisions in the labour agreement obliging the seasonal worker to buy goods or services from the employer are null and void."

(5) The risk of an eternal 'seasonal worker permit'

The Commission in its proposal provided that the maximum stay of the seasonal worker should be six months in order to ensure “that third-country national workers admitted under this Directive are actually employed for work that is genuinely seasonal and not for regular work” (COM(2010)379, p. 10). The current provision states that the stay of the worker may last nine months (Article 11). Read together with the clause on facilitated admission of the worker in a subsequent year (Article 12) the provision creates the serious risk that the directive will be used to introduce a system that used to be in force in Switzerland in the 1950s and 1960s. Under that system Italian workers were employed for decades at Swiss farms with the precarious status of a seasonal worker without ever being able to acquire a more secure residence status. One major issue was the protracted separation of the seasonal workers from their families. Switzerland abolished that system by making Italian seasonal workers who completed five consecutive seasons of employment in Switzerland eligible for year-round employment permits with a right to family reunification. The Meijers Committee is concerned that the proposal allows for the re-introduction of such permanent schemes of seasonal employment in Member States. We suggest therefore to guarantee that the worker, after seven consecutive years of employment on the basis of a permit for seasonal work, is able to acquire an EU long-term residence status.

To this end the following provision should be added in Article 16:

“A seasonal worker who has lawfully worked for more than sixty months during at least seven consecutive years in a Member State, is no longer excluded from the personal scope of Directive 2003/109/EC and is considered to have complied with the residence requirement of Article 4(1) of that Directive.”

This addition would provide an essential guarantee against misuse of the seasonal work permit for permanent employment when the proposal extends the maximum stay of the seasonal worker from six to nine months. The nine months period for seasonal work is present in the Spanish legislation, but under Spanish law the possibility of misuse is limited since the seasonal worker is entitled to a normal residence permit after three years.

(6) Procedural safeguards

According to Article 13(2) the national authorities shall notify the applicant “within a reasonable period” that additional information is required. The fact that this period is not specified, will allow the competent authorities to turn the 60 days period for decision making mentioned in Article 13(1) into a soft rule.

The vague wording in Article 13(3) that “a legal challenge (...) in accordance with national law” should be open against any decision to refuse, withdraw or not renew a seasonal work permit, disregards that under Article 47 of the EU Charter of Fundamental Rights all applicants in such cases are entitled to “an effective remedy before a tribunal” that has to be “impartial and independent” and “established by law”. Therefore, Article 13(3) should be amended to bring it in line with the EU Charter, being primary Union law.