

## Seasonal Migration and how to Regulate it



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### Summary

The European Commission has recently issued a proposal for a Directive regulating the conditions of entry and residence of third-country nationals for the purposes of seasonal employment (COM (2010) 379 final). This Directive proposal is part of the Commission's strategy to regulate labour migration through a piecemeal approach; notably through regulating specific categories of migrant workers. This paper discusses what seasonal migration is and how it differs from circular, temporary, or shuttle migration. It argues that seasonal migration is a form of temporary migration that has a seasonal character and hence concerns employment sectors which are characterised by seasons of high and low employment, including thus not only agriculture but also tourism and catering but normally excluding construction or domestic work for instance. This paper reviews critically the Directive Proposal and argues that although it may be seen as a step forward in transparency and in bringing closer Member State provisions in the area of seasonal migration, it needs a boost as regards the protection of seasonal migrants' labour conditions and employment rights. In view of regulating seasonal labour migration at the EU level, the Directive should also consider whether seasonal labour migrants should be allowed to move also between Member States. On the other hand, the proposal is evaluated positively for a number of features such as: not tying the worker to her/his employer, allowing for the right to join trade unions, and proposing a simplified bureaucratic procedure for multiple entry visas.

### Seasonal Migration: A Moving Target

In the explanatory memorandum for its Proposal for a Directive on 'the conditions of entry and residence of third-country nationals for the purposes of seasonal employment' the European Commission notes:

"With its central focus on eradication of poverty and achievement of the millennium development goals, the [Directive] proposal also complies with the EU's development policy. In particular, its provisions on circular migration of seasonal workers between the EU and their countries."

Indeed it is this very statement that highlights the confusion that currently exists as to what qualifies as seasonal migration, how seasonal migration is different from temporary or what sociologists have called 'shuttle' migration. And again how this differs from what the European Commission has called 'circular' migration in its Communication on Circular migration and mobility partnerships between the European Union and third countries (COM (2007) 248 final) in May 2007.

It is the aim of this brief note to cast some light on what seasonal migration is or is not and to critically assess the pros and cons of the Commission's proposal for a directive regulating seasonal migration for employment purposes.

### Seasonal Migration: A Moving Target

In an ongoing EU-funded project (<http://metoikos.eui.eu>) we have identified a number of migratory movements that could qualify as seasonal or circular migration that cover short- and medium-term labour migration flows.

A preliminary typology includes:

- ◆ **Seasonal legal labour migration**, in agriculture mainly, regulated by bilateral agreements between specific Member States and specific countries of origin. Seasonal stays are not longer than six months and normally employment permits are for one sector and one employer.
- ◆ **Seasonal informal labour migration** (often also termed 'shuttle' migration because of the 'pendular' – frequent back and forth movement – of the migrant workers concerned). A number of employment sectors are concerned including construction, domestic work, tourism and catering. This type of seasonal migration is technically legal as regards the stay of the migrant (the migrant enters with a tourism visa which allows her/him to stay in the EU for 90 days) but it is irregular as regards his/her employment because his/her visa does not provide for the right to work.
- ◆ **Seasonal irregular migration**: the migrant enters without the necessary documents and finds employment in the informal labour market in seasonal jobs: agriculture or tourism.
- ◆ **Temporary irregular migration**: the migrant enters without appropriate documents and finds employment temporarily in construction (men), domestic work (women), care work (women). The migration is temporary because the stay is of a few months but it is not seasonal because the employment is not of a seasonal character.
- ◆ **Long term temporary irregular migration**: the migrant enters without the appropriate documents and stays for a period between 6 and 12 months. Hence s/he is technically considered as a temporary migrant but not necessarily as a seasonal or circular one.

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- ◆ **Circular legal labour migration**, usually of high skilled people or business persons. People may circulate between two countries holding a stay permit (of indefinite stay) or indeed a passport or ID card (e.g. co-ethnic migrants such as ethnic Greek Albanians in Greece) that allows them to do so. They tend to spend a few weeks or months in each country (origin and destination) either because of the nature of their employment (e.g. IT experts, economists) or because they are business persons doing trade or developing a business in-between the two countries. This is probably the category of repeated temporary movement that is closest to what has been described as circular migration in the European Commission's Communication of May 2007.

All the above movements qualify as temporary migration but they are not all seasonal. However, they show the range of situations that one can find on-the-ground and that the legislator should have in mind when seeking to regulate the entry and stay of third country nationals for the purposes of seasonal employment.

### Proposal for a Directive on Seasonal Migration

#### Why a Directive

This Directive is part of the overall approach of the Commission seeking to regulate those sectors of labour migration that are amenable to EU action and for which Member States show the will to adopt common measures. The reasons put forth for issuing the Directive proposal are

- a) the fact that seasonal labour migration policies of specific Member States may affect (and indeed distort) migration flows
- b) common EU rules will help in avoiding overstay and abuse of seasonal work permits
- c) common EU legislation will protect more effectively the labour rights of seasonal migrant workers
- d) and perhaps most importantly this directive expresses the wish of the Commission and the EU to use seasonal labour migration as a tool for fostering development in the countries of origin (since it will allow for migrants to move legally, it will not cause brain drain, and it will help migrants acquire both capital and skills in the country of destination). This last element is perhaps more wishful thinking than reality since we know that seasonal labourers in EU member states usually cover low skill low pay jobs, hence the accumulation of capitals and skills will be rather limited. But still as a principle it is true that seasonal migration (just like circular movements) at least does not cause brain loss to developing countries.

Indeed ad (17) of the introduction to the very directive, the European Commission notes:

'Circular migration of third country national seasonal workers should be promoted. In order for seasonal workers to have employment prospects in the EU for periods beyond a single season and for EU employers to be able to rely on a more stable and already trained workforce, the possibility of access to seasonal employment for several consecutive years should be

provided, either through a multi-seasonal worker permit or a facilitated procedure.'

In other words, the European Commission seems to be aware that circular migration as envisaged in its communication of 2007 and in the related mobility partnerships' scheme may not really take off and that maybe the seasonal labour migration path is more amenable for creating opportunities for further, non-seasonal, circular flows. However, this risks again adding to the confusion that we have noted above as regards to who is a circular or a seasonal migrant and which rules applies to whom – since reality on the ground tends to be grey, rather than black or white.

#### Who is covered

With a view of clarifying what is the field covered by the Directive, in the definitions provided it is noted that it concerns 'seasonal workers', i.e. people employed in a sector of activity dependent on the passing of the seasons, and it further clarifies that this sector of activity should be tied to ascertain time of the year (...) during which labour levels required are far above those necessary for usually ongoing operations.

#### What is the procedure

The Directive looks at seasonal labour migration as demand-driven and leaves complete flexibility to the Member States to decide about the volume of flows. It specifies that a valid work contract and a valid travel document are necessary as well as some insurance coverage (through work or through universal coverage) and accommodation (to be provided by the employer).

The simplified procedure introduces a time delay of 30 days for the processing of applications for seasonal migrant workers. It provides for the possibility that Member States do not require a market needs test (i.e. no need of verifying that the vacancy cannot be covered by native or third country nationals legally residing in the country).

In addition the Directive leaves complete flexibility to the MS to decide who should be doing the application (the employer or the third country national), which authority should receive and process the application, but they have to apply a single application procedure and should facilitate the obtaining of a visa by a worker whose application has been accepted.

The Directive also aims at facilitating re-entry as the MS shall either issue directly a permit valid for 3 consecutive seasons or facilitate the procedure for third country nationals who have already worked as seasonal workers and who apply again for a consecutive year.

In addition there are procedural safeguards introduced but without specific time limits as to notifying the applicant when her/his application is not complete and also informing her/him in writing about the reasons for rejecting her/his application and the means of redress available to her/him.

#### Rights

The Directive proposal specifies also the rights that seasonal migrant workers should enjoy. Apart from the obvious right to enter, stay and work in the specified activity, these include:

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- the freedom of association and membership to trade unions,
- guarantees that the remuneration, dismissal payment, health and safety conditions are those covered by relative collective agreements concerning the specific sector
- social security provisions as defined in national law covering the MS nationals
- payment of statutory pensions based on the worker's previous employment under the same conditions as nationals.

There are **two issues that are not appropriately covered** however by the Directive as regards the seasonal migrant workers' rights and their living and working conditions.

First, while Art. 14 specifies that the employer must provide evidence that the worker will benefit from adequate accommodation either for free or upon payment of rent which however should 'not be excessive in relation to their remuneration', there is no mechanism provided for ensuring the above. In practice, seasonal migrant workers are likely to face inadequate accommodation and/or excessive rent payments without any specific and tangible possibility to change this situation.

Second, article 16 on rights specifies what was mentioned above if collective agreements that are universally applied. In the absence of such a system the Directive Proposal stipulates that

'Member States may, if they so decide, base themselves on collective agreements which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and/or collective agreements which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout national territory'

This provision leaves practically the seasonal migrant workers largely without protection, a vulnerable part of the labour force that can be easily and comfortably exploited to bring production costs down or even to produce illicit competition towards native and other workers in the same sector.

The Directive should contain here a proposal that explicitly notes that existing collective agreements concerning seasonal workers should be extended to cover third country nationals employed with a seasonal work permit. This is the only way to effectively protect seasonal and native workers from a race to the bottom.

### Conclusions and Recommendations

The Directive proposal is a step forward as regards the simplification of the procedures governing seasonal migration, the creation of a common framework that is loose enough to fit the national labour market realities of the 27 MS while still guaranteeing some basic rights to seasonal workers. The Proposal gives emphasis to speedy processing of applications, strongly encourages that seasonal migrant workers are invited for more than one season and also seeks to regulate the employer-employee relationship as regards payment, housing, insurance and other rights while again not interfering at too high a level of detail with national specificities and national laws.

As such the Directive is a welcome initiative of the Commission.

However for these advantages to be truly realised in practice there are two sets of challenges that have to be taken into account. First some issues regarding the content of the directive, in particular, the inadequate protection as regards housing conditions; and the possibility to deviate from collective agreements and the conditions specified in those, need to be addressed, before the directive is finalised.

The second set of issues concerns **implementation** and overall the impact of the directive in regulating seasonal migration flows and encouraging both immigrant workers and employers to follow the legal channel rather than the irregular one.

Thus, one issue that several MS have raised during the first discussion in Parliament is whether there should be a document that accompanies the seasonal work permit which provides information on the sector of employment, the area of employment and the employer so that a labour inspector can easily check a seasonal labour migrant's compliance with the law. At the same time such a request seems to violate the principle of innocence: it is as if the authorities assume that the seasonal migrant worker is particularly susceptible to cheating the system.

In addition the request of such a document seems to invalidate the possibility of the migrant seasonal worker to change employer, sector or region within the MS where he works, despite the fact the Directive foresees that the seasonal worker may change employers. The possibility to change employers aims at avoiding pitfalls of the past and of other seasonal migration programmes in which the migrant was at the mercy of the employer as s/he was tied to the specific employer, who could thus easily violate the initial agreement and ask for more tasks, a different job to be performed, or indeed lower the salary.

A different strategy for dealing however with the problem of overstaying and 'disappearing' after the end of the season would be to ask employers to provide for a list of their seasonal migrant workers and their contact details so that **checks should start with employers not with employees**. Indeed such a provision would be in line with the spirit of the system which provides (article 7) that a permit may not be issued or renewed if the holder has not respected the provisions of the permit as regards her/his stay and work at the MS.

Nonetheless, the issue of overstaying and informal work is a pressing concern as regards seasonal labour migration.

Actually in relation to such concerns Spain has for instance enacted a seasonal workers programme with Morocco for the picking up of strawberries in the region of Huelva in southern Spain in which a positive discrimination is applied for Moroccan women (instead of men) with a preference for married women with children (because they are much less likely than men or single women to violate the conditions of their seasonal employment and remain illegally in Spain). While one can see the practicality of such a programme, which is actually seen as a success story, one wonders how this fits with the anti-discrimination legislation in the EU. Since being a woman and indeed a married woman is

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not a necessary feature for being employed as a seasonal agricultural worker picking up strawberries.

As regards the actual implementation of the rights foreseen in the Directive proposal, the Directive should perhaps be accompanied by supporting measures such as language learning courses to be provided by the employer in cooperation with an NGO or a trade union. One wonders how the seasonal migrants will be able to actualise their right to association if, as it often happens, have no or very little knowledge of the language of their destination country. Indeed, in an ongoing research on Irregular Migrant Domestic Workers, commissioned by the Fundamental Rights Agency, one of the issues that arises as regards seeking recourse when one is exploited or abused is the problem of language. Seasonal migrant workers may be aware of their rights but they may not be able either to join a trade union or defend their rights if they do not have at least a basic knowledge of the language of the MS in which they work. Thus, the Directive Proposal could include a clause that MS shall institute such language courses in cooperation with the employers (the cost of the courses could be partly absorbed by the employers).

The European Federation of Food Agriculture and Tourism Trade Unions (EFFAT) in their position document of 22 September 2010 argue, among other issues, that the right to family life should also be guaranteed for seasonal migrant workers, I believe that such a right is not part of a temporary, even if repeated, stay of a migrant workers in a destination country as the seasonal character of the work and of the related permit does not foresee a longer stay. It is true though that often seasonal or temporary migrants become long term ones. It should therefore be explicitly provided (in line with the actual spirit of this directive as expressed in the explanatory note that precedes it) that such a change of

plans goes hand in hand with a change of permit and hence of migration status and related rights, including thus the right to family life.

This directive proposal is not going to make a huge difference as regards the needs for seasonal migrant workers and the overall management of flows but it certainly is **a step in the right direction**: towards creating a common set of conditions and rights, a standardised procedure and by seeking to increase transparency.

The Directive ties well with the piecemeal approach to labour migration that the European Commission has adopted during the past five years and is indeed in line with the view that national labour markets are too different to be regulated by a common framework for labour migration. Nonetheless, seasonal work shares many common features across Member States such as (a) the sectors concerned, (b) the continuous need for seasonal migrant workers, (c) the problem of overstaying, (d) and the interdependence of MS as regards matters of migration management, which leave scope for such a directive.

It is possible that a common set of rights (provided they are appropriately defined and implemented), a transparent and speedy procedure and an effective mechanism for checking overstay and abuse will encourage both employers and third country nationals to follow the legal channels (perhaps with different motivation each of them) and avoid irregular entry and informal work.

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### Further Readings:

- European Commission (2010) Proposal for a directive of the European Parliament and the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM (2010) 379 final, Brussels, 13 July 2010.
- Triandafyllidou, A. (2009) Attempting the Impossible? The Prospects and Limits of Mobility Partnerships and Circular Migration, ELIAMEP Thesis 1/2009, available at: <http://www.eliamep.gr/en/european-integration/publications-european-integration/eliamep-thesis-12009-attempting-the-impossible-the-prospects-and-limits-of-mobility-partnerships-and-circular-migration/> last accessed on 14 October 2010.
- European Federation of Food, Agriculture and Tourism Trade Unions (EFFAT) (2010) Position of the EFFAT Agricultural Sector on the proposal for a directive on seasonal workers, 22 September 2010, available at: [http://www.effat.eu/files/1285855577\\_doc\\_2010%20-%2009%20-%2022%20Position%20Seasonal%20Work%20Dir%20EN.pdf](http://www.effat.eu/files/1285855577_doc_2010%20-%2009%20-%2022%20Position%20Seasonal%20Work%20Dir%20EN.pdf), last accessed on 15 October 2010.

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