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Free movement, labour market regulation and multilevel governance in the enlarged EU/EEA – a Nordic and comparative perspective

Giving to those who have and taking from those who have not – the development of an EU policy on workers from third countries

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1 Introduction

Worldwide migration flows have been growing considerably over the past decades.¹ Among the estimated 214 million international migrants in 2010, 90 per cent were migrant workers and their families.² Foreign-born workers comprise about 10 per cent of labour forces in Western European countries. Migration is to a large extent driven by globalisation and the dynamics of capitalist development itself. Mobility of capital, goods and services; and rapid evolutions in technology and the organisation of work require that labour and skills are available where new investments are being made. At the same time, disparities in income, wealth, human rights and security are push factors towards migration.³

Promoting a forward-looking and comprehensive labour migration policy that can respond in a flexible way to the priorities and needs of European labour markets is thus one of the envisaged roads to increased European competitiveness and economic vitality set out in the EU Strategy 2020 and the Stockholm Programme.⁴ A new labour market scenario has developed in Europe due to, inter alia, demographic trends and skill shortages, notwithstanding the high levels of unemployment.⁵

Until 1999, the EU starting point was that regulating labour migration from third countries was a strictly national business.⁶ However, the EU touched upon the autonomy of Member States in this regard on issues related to the EU and the WTO/GATS regimes on freedom to provide services.⁷

Since 1999, the EU has been taken steps in order to harmonise the *conditions for admission* by third country nationals to the EU labour market and the *rights guaranteed*

¹ COM(2005)669 p 1 referring to ILO Report 2004, World Bank Report 2005, EU Economy 2005 review.

² ILO, International labour migration: A rights-based approach, Geneva 2010 p 1-2.

³ ILO p 13, 18 et seq

⁴ Communication from the Commission Europe 2020 A strategy for smart, sustainable and inclusive growth, COM(2010)2020 final, Brussels 3.3.2010, p 18. The Stockholm programme, adopted by the European Council of 10 and 11 December 2009, see also COM(2010)378 Proposal for a directive on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, p 2

⁵ G. Menz and A Caviedes, Introduction in G Menz and A Caviedes (eds), *Labour Migration in Europe* Palgrave Macmillan, 2010, p 2.

⁶ For an overview of the activities up to that date see B. Ryan, *The European Union and Labour Migration: Regulating Admission or Treatment, in Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*. Hart Publishing, UK, 2007, pp. 489-516, ca pp 500-

⁷ On the EU competence in this regard before the entering into force of the Lisbon treaty see P Hallström & C Hjälmroth, *EU:s WTO-förhandlingar om tillträde till tjänstemarknaden för lågutbildade*, Europarättslig Tidskrift nr 1 2007 , p 37-53, pp 41.

while being here. Besides demographic change and skill shortages, these initiatives have been motivated to some extent by trade related considerations. The Commission underlined early on that these initiatives would further facilitate the trade in services already which had already been committed to under the General Agreement on Trade in Services (GATS) adopted within the World Trade Organisation (WTO) and add real meaning to the commitments that the EC and its Member States had undertaken in that context.⁸

As will be seen, it has been more difficult to gain the necessary consensus on this issue than the Commission had anticipated. The Member States are reluctant to adhere to harmonised rules in this area. Even though it is clear that many Member States need workers from third countries, they are not ready to abandon their right to control the inflow of people into their countries,⁹ particularly in regard to workers whose contributions to the welfare systems are insecure.¹⁰ Some governments have general problems in gaining public support for labour migration due to high structural unemployment, hostile public opinion and social and political problems emanating from past migration waves connected to modestly successful attempts at their integration.¹¹ On the other hand, international economic forces push states towards greater openness.¹² BUSINESSEUROPE has, for example, been one of the warmest supporters of EU activity in this area, promoting demand driven and flexible procedures.¹³

The Member States' fear of burdensome commitments in relation to workers from third countries is not unproblematic. It risks generating an EU system which de-humanises workers from third countries - a system more directed towards economic units than human beings.¹⁴ This strategy can lead to a situation where the more a migrant can contribute economically to the host state, the more rights he or she will be guaranteed. Strong segments of the third country workforce will accordingly be given a generous set of rights, while the weaker segments, such as seasonal workers, may be given practically nothing. A struggle between different stakeholders is presently taking place at EU level. We have not seen the final result

⁸ COM(2001)386 p 3 and 4 see also COM(2010)378 p 7.

⁹ S. Carrera and M Formisano, *An EU Approach to Labour Migration What is the Added Value and the Way Ahead*, CEPS Working Document, No 232/October 2005, p 2-3; K Tamas, A European migration policy based on partnerships, in J.O Karlsson and L. Pelling eds., *Moving beyond demographics – Perspectives for a Common European Migration Policy* 2011, p 34,

¹⁰ H. Kolb *Immigration, Immigration, and the Quality of Membership: On the political Economy of Highly Skilled Immigration Politics*, in G. Menz and A Caviedes eds *Labour Migration in Europe*, 2010, p 76-100, p 83.

¹¹ Menz Caviedas p 18.

¹² Kolb, p 78.

¹³ See for example BusinessEurope Position paper on an agenda for new skills and jobs, 16 February 2011, p.17; position paper on the ICT proposal, 23 November, 2010, position paper on seasonal work, 13 October 2010, Go for Growth, February 2010, position paper on the highly skilled and the single permit, 31 January 2008.

¹⁴ See for example S. Carrera, *Building a Common Policy on Labour Migration Towards a Comprehensive and Global Approach in the EU?* CEPS Working Document No. 256/February 2007, p 2.

of this struggle yet and, for those favouring a stronger non-discriminatory rights-based approach, the indications so far are perhaps more promising today than they were a year ago.

This working paper will focus on labour migrants from third countries and the proposed and adopted EU commitments/legislation regulating their entrance to EU labour markets and their rights when working there.¹⁵ This overview is intended to contribute to the overall picture of the challenges facing national labour market systems. The focus of the study is to evaluate the level of rights provided to workers from third countries

The working paper is structured in the following way. First a starting point for the analysis is presented. Secondly the political turnabout and the first legal attempt to regulate is discussed. In section 4 an analysis and presentation of the adopted and proposed legal framework is found. Next a short description of the GATS commitments on Mode 4, movement of persons, is included in order to better be able to evaluate the proposals on the intra corporate transferees. The paper ends with a few concluding remarks.

2 Starting points for analysis

Demographic change and skill shortages have been the main driving forces behind the development of an EU-policy on workers from third countries. It is challenging to argue for a common legal framework for attracting third country nationals to the EU while unemployment in the Member States is extremely high and the integration of the already present immigrants from third countries has been far from successful in many places. Giving away control of who to let into the nation state is, however, not tempting to any state at any time. The WTO Members' commitments in Mode 4 of the GATS are the only binding international obligation in place to limit sovereignty over the admission of foreigners.¹⁶ On a regional basis, the Schengen commitments are far-reaching but not free from attacks.¹⁷

The issue of how to cope with demographic change and skill shortages is also complex and debated. The role of third country nationals is part of this debate. Anderson and Ruhs remind us of the fundamental economic starting point that when considering staff shortages it is necessary to recognise that employer demand and labour supply are interrelated and mutually conditioning. They argue that many

¹⁵ It is however also worth mentioning that other rules of course can have an important significance for the willingness to come and work in the EU. Hatzopoulos has for example pointed at the importance of the services directive in this regard and the directive on professional qualifications (2005/36)V. Hatzopoulos, *Labour Immigration in the EU Through the Back Door? The Free Provision of Services as a Facilitator of Migration Flows*, in G. Menz and A. Caviedes (eds), *Labour Migration in Europe*, , Palgrave Macmillan, 2010, p 150-182, p 160 ff.

¹⁶ M. Panizzon, *Trade and Labour Migration – GATS Mode 4 and Migration Agreements*, Dialogue on Globalisation, No 47/January 2010, p 10.

¹⁷

employers could, in principle, pursue a number of responses to staff shortages, including for example, raising wages and improving employment conditions, investing more in training local workers, and adopting labour-saving production processes and technology. But as long as migrant workers are available, the incentives for taking these steps are not particularly strong.¹⁸ The activities of the State also play a crucial role in this discussion.¹⁹ The identification of shortages, therefore, must be based on a complex analysis.²⁰

Demographic change is perhaps less complex to establish. According to Eurostat the “the share of population of working age [...] in the total population is expected to decrease strongly from 67.2% in 2004 to 56.7% in 20150, a fall of 52 million[...].²¹ Migration from third countries can be one of many ways to sustain the welfare systems and safeguard economic development.²²

On a global scale, the driving forces behind labour migration are, as indicated in the introduction, much more complex than driving forces behind the new EU strategy.. Migration also plays a role in development and elsewhere it is discussed how labour migration can contribute to such development. Those conclusions are not always compatible with intentions to safeguard the EU national workforce and avoid unfair competition. Demands for equal treatment in relation to nationals with regard to pay and working conditions has been viewed as protectionist and motivated “to curb adjustment costs of globalisation to the domestic work force”.²³

In parallel to the emerging EU legal framework on workers from third countries is an existing regime on movement of workers from third countries connected to the freedom to provide services within the WTO/GATS. The commitments made by the former EC and its Member States within the GATS are very limited and the Doha-negotiations do not seem to alter that fact.²⁴ The emerging legal EU framework on economic migration is, however, drafted so as to be fully compatible with these limited commitments and to further facilitate the trade in services.²⁵

¹⁸ M. Ruhs and B Anderson, *Migrant Workers: Who needs them? A framework for the Analyses of Staff Shortages, Immigration , and Public Policy* in Anderson and Ruhs eds, *Who needs migrant Workers: Labour Shortages, immigration, and public policy* , Oxford University Press, 2011, p 25.

¹⁹ Ibid p 25-27

²⁰ M.Ruhs, *Who needs migrant workers? The potential role of an independant expert commission in future labour immigration policy*, in Karlsson&Pelling eds *Moving Beyond Demographics*,, 2011, p 61.

²¹ COM(2005)669 p 4.

²² J Ekberg, *Kan invandrare bidra till att förverkliga målen i Lissabonstrategin?* Europaperspektiv, Santérus, 2006.

²³ Panizzon, p 18.

²⁴ Panizzon, p 20 et seq.

²⁵ COM(2001)386 p 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, explanatory memorandum, COM(2010)378 p 14, preamble recite 10 in the draft directive on intra-corporate transferees.

In this paper, I will analyse parts of the emerging EU legal framework on workers from third countries from an equal rights perspective. Guaranteeing third country nationals robust equal treatment with nationals with regard to working conditions and pay will be a crucial condition for avoiding social dumping and exploitation. This condition is the starting point set up by the Council and the Commission when initiating the regulatory work and also the starting point envisaged by global actors as the ILO.²⁶ Workers from third countries are not supposed to replace EU-workers but to fill shortages – i.e. to do work that the EU-workers cannot or are not willing to do. Through this perspective the tensions between the differing driving forces and the interplay between the economic, social, and political dynamics in shaping this legal framework will be illustrated.

Being guaranteed formal equality with nationals with regard to working conditions and pay is a necessary first step for a rights-based approach. Real equality is, however, dependant on a number of other conditions. Being a migrant worker with no permanent status or citizenship in the country where the work is performed implies an inherent vulnerability. As the ILO puts it: “The more tenuous the worker’s migration status, the more barriers there are to seeking redress for unfavourable treatment”.²⁷ Anderson, Fudge, Kallenberg and Vosko have considered different aspects relevant to the status and level of precariousness of the migrant worker.²⁸ Their research gives us tools to analyse the EU legal framework on workers from third countries. My analysis draws heavily on the work done by Fudge. This paper addresses the overall question: Is a robust rights-based legal framework taking form that includes the necessary components to avoid social dumping and exploitation?

In order to conduct this analysis, we will look into three sets of conditions organised under the following headings set by Fudge: *Admission conditions*, *Employment relations* and *Institutional security*.²⁹ These sets of rights are interrelated and can strengthen or weaken each other. Under the heading *Admission conditions* the following questions are considered: Is the permit connected to a certain employer, sector or branch? For how long a period can a permit be issued? Is it possible to keep the permit during a period of unemployment. The more room for manoeuvre included in the permit for the worker, the easier it will be to safeguard his or her employment-related rights. If the worker can leave an abusive employer and search for new employment, there is a greater likelihood that the worker will not accept exploiting conditions below the guaranteed standard. The heading *Employment relations* deals with issues such as: Can a permanent employment be entered into?

²⁶ Presidency Conclusions, Tampere European Council, 15-16 October 1999, Bulletin EU, p 18, COM(2000)757 On a community immigration policy p 15, ILO Multilateral framework on labour migration, 2005, Guideline 9.3.

²⁷ ILO 2010, p 77.

²⁸ J Fudge, , *The precarious migrant status and precarious employment: the Paradox of International Rights for Migrant Workers*, (Metropolis British Columbia: Centre of Excellence for Research on Immigration and Diversity, Working Paper Nr 11-15 2011) Leah. F. Vosko, *Managing the Margins*, Oxford University Press, 2010, B. Anderson, *Migrations, immigration controls and the fashioning of precarious workers*. *Work, Employment and Society* 24, p 300-317.

²⁹ Fudge, 2011, p 14-15

Which level of employment and working conditions is protected (wages, working time, occupational health and safety, trade union rights)? Trade union rights have a very important role in upholding and safeguarding the other employment-related rights. The rights mentioned are fundamental conditions. But others, such as recognition of professional qualifications and rights to education and vocational training, are crucial for safeguarding the migrant worker's access to employment on equal terms with national workers.³⁰ Access to education and vocational training can help the migrant to improve his or her labour market position.³¹ *Institutional security* includes aspects of social citizenship such as social protection, including unemployment benefits, and routes to more secure migrant status and family reunification.

In the following discussion, we will examine which level of protection is provided for in the EU legal framework. We will also focus on the issue of sanctions and monitoring procedures. Safeguarding those aspects in an effective way is fundamental for making the guaranteed rights real.³²

The analysis will be limited to the directives adopted and proposed thus far relating to workers from third countries and which are based upon the 2005 Policy Plan on Legal Migration adopted by the Commission.³³ The commitments regarding movement of workers in the General Agreement on Trade in Services adopted within the World Trade Organisation (WTO) will also be considered. Parts of the legal framework proposed in the 2005 policy plan are meant to facilitate the realisation of the commitments in GATS. It is important to clarify the scope of those commitments in order to evaluate some of the decisions that have been made when proposing a level playing field, in particular through the directive on intra-corporate transferees.

3 The first round

3.1 The political turnabout

At the Special European Council on Asylum and Immigration in Tampere in 1999, thirty years of zero-vision on labour migration from third countries was abandoned.³⁴ The European Council acknowledged the need for approximation of national legislations on the conditions for admission and residence of third country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin.³⁵

³⁰ ILO 2010, p 171, ILO Multilateral Framework on Labour Migration guideline 12.6.

³¹ Ibid ILO Guideline 14.3.

³² ILO 2010, p 104, 173

³³ COM(2005)669 Policy Plan on Legal Migration

³⁴ COM(2000)757 p 3.

³⁵ Presidency Conclusions, Tampere European Council, 15-16 October 1999, Bulletin EU, p 20.

The EU should ensure that these workers are treated fairly and are granted rights and obligations comparable to those of EU citizens.³⁶ The need for more efficient management of migration flows at every stage was, however, also stressed.³⁷

The main reasons given for this turnabout were demographic change and skill shortages at both skilled and unskilled levels.³⁸ A number of Member States had at that point begun to actively recruit third country nationals from outside the Union. The Commission formulated the challenge in the following way:

“ In this situation a choice must be made between maintaining the view that the Union can continue to resist migratory pressures and accepting that immigration will continue and should be properly regulated, and working together to try to maximize its positive effects on the Union, for the migrants themselves and for the countries of origin”.³⁹

Even though the Tampere Conclusions clearly stated the the ambition to develop a legislative framework, in the follow up communication the Commission did not hide the fact that the Member States had strongly divergent views on admission and integration of third country nationals;⁴⁰ something it hoped to overcome in an open debate by, in particular, focusing attention on the connection of this issue to the EU economic reforms taking place at that time within the framework of the European Economic Strategy.

The Commission also emphasised that bringing the issue of labour migration into the discussion on the development of economic and social policy for the EU would provide an opportunity to reinforce policies designed to combat irregular work and the economic exploitation of migrants which were fuelling unfair competition in the Union.⁴¹

“A corollary of an economic immigration policy must be a greater effort in ensuring compliance with existing labour legislation by employers for third country nationals. Equality with respect to wages and working conditions is not only in the interest of migrants, but of society itself which then both benefits fully from the contribution migrants make to economic and social life”.⁴²

At the time of writing, the EU has proposed substantial parts of a legal action program on labour migration. Directives have been adopted and two are currently being negotiated. The divergent views of the Member States on this topic have been more or less difficult to overcome. The Commission has tried to capture the need for this endeavour through the concepts of *managed migration* and *equality of treatment*.

³⁶ Presidency Conclusions, Tampere European Council, 15-16 October 1999, Bulletin EU, p 18 .

³⁷ Tampere Conclusions p 22-23.

³⁸ COM(2000)757 pp 2, 6, 24 et seq.

³⁹ COM(2000)757 p 3.

⁴⁰ Ibid.

⁴¹ Ibid p 14.

⁴² COM (2000)757 p.15.

Managed migration aims to direct the inflow of labour migrants towards areas where clear shortages have appeared. This management is based on different forms of economic need tests. The starting point is that the national workforce can or will not do the work being considered. The responsibility for establishing these shortages is shared between the state authorities and single employers. The permit must be connected to the expected length of the shortage and expire when there is no more shortage. At that point, the third country worker will lose the right to stay in the Member State.

The concept of managed migration is in itself rather problematic – it is not possible, as the ILO puts it, to turn migration on and off like a water tap.⁴³ We are dealing with human beings and the concept of managed migration seems old fashioned and belonging to an era of pre-globalisation.⁴⁴

The tension between equal treatment and the management of migration flows has increased during the legislative process resulting in a waiving of the strict application of the equal treatment principle.⁴⁵

Before discussing the content of the legal framework, the legal basis for this exercise is considered.

3.2 The legal basis

The introduction of Title IV to part III of the EC treaty, as a result of the Treaty of Amsterdam in 1997, aimed to create of an area of freedom, security and justice and thereby transferred asylum and immigration matters to European Community law. Legal migration was dealt with in article 63.3 and 4 TEC. Until the Lisbon Treaty into force, the Council unanimously acted on a proposal from the Commission (or during the first five years after the entering into force of the Treaty of Amsterdam at the initiative of the Member States) after consulting the European Parliament (art 67 TEC). This competence has now been included in the ordinary legislative procedure i.e. the former co-decision procedure, where the Council with qualified majority co-decide with the European Parliament.

The relevant provision in the Treaty on the Functioning of the European Union reads:

Article 79

⁴³ ILO 2010, pp 144.

⁴⁴ Newland, 2005, p 15 (in ILO 2010)

⁴⁵ Cholewinski and Macdonald, however, argue that a robust version of the equal treatment principle was never envisaged in the EU context. Something they think is confirmed by the Tampere conclusions and its qualified rhetoric of equality Macdonald and Cholewinski, *The ICRMW and the European Union*, in de Guchteneire, Pécoud and Cholewinski eds, *Migration and Human Rights – The United Nations Convention on Migrant Workers' Rights*, Cambridge University Press, 2009, p 377.

Draft- Third country nationals

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures in the following areas:
 - (a) the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
 - (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
 - (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
 - (d) combating trafficking in persons, in particular women and children.
-
5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed

Article 79 (art 63 in former TEC for the highly skilled) is the legal basis used for the Proposals discussed in this section. The Proposals concern migration issues related to Article 79.2 a and b. Voices have, however, been raised demanding a referral to Article 154 TFEU as well and thus a requirement to include consultations with the social partners.⁴⁶ This has not, as yet, led to any results.

3.3 The first attempts to regulate

In a follow up communication to the Tampere conclusions, the Commission formulated the bases for a legal framework for admission of economic migrants into the EU.⁴⁷

- The framework should address the *needs of the market place* particularly for the very highly skilled, or for lesser or unskilled workers or for seasonal labour
- The admission policies must enable the EU to *respond quickly and efficiently to labour market requirements...*
- There is a need for *greater mobility between Member States* for incoming migrants because of the complex and rapidly changing nature of labour market requirements
- Persons admitted should enjoy broadly *the same rights and responsibilities* as EU nationals but these may be incremental and *related to the length of stay* provided for in their entry conditions.
- The aim should be to give a *secure legal status* for temporary workers who intend to return to their countries of origin, while at the same time

⁴⁶ ETUC, EMPL-rapporteur in ICT, EESC opinion on seasonal work, SOC/392, p 3.3, and on intra-corporate transferees SOC/393 p 1.3

⁴⁷ COM(2000)757, 11.11.2000 On a community immigration policy

Draft- Third country nationals

providing a pathway *leading eventually to a permanent status* for those who wish to stay and who meet certain criteria.

- The responsibility for deciding on the need for different categories of migrant labour must remain with the Member States.⁴⁸
(emphasis added)

From the beginning it was clear that the decision on the number of people that would be allowed into any given country should remain a national decision:

“Given the difficulties of assessing economic need it would not be the intention to set detailed European targets. The responsibility for deciding on the need for different categories of migrant labour must remain with the Member States”.⁴⁹

The Commission’s first attempt to propose a directive regulating the entry and residence conditions for all third-country nationals engaged in paid and self-employed activities was presented in 2001. The Proposal included a broad horizontal approach. The starting point was that the same principles should apply to all third country workers permitted entry to an EU country, irrespective of whether they were highly-, medium-, or low skilled, or were intra-corporate transferees or seasonal workers. The distinctions between different types of labour migrants were limited to a minimum. The Proposal failed, however, due to the deep criticism it generated from some Member States. In particular, the general/horizontal admission conditions in the Proposal were controversial. Many Member States felt uneasy abandoning their sovereign right to decide who to let into the country.⁵⁰ The Commission was unable to convince the Member States that there were sound reasons for overcoming the diversity of their approaches in the interests of achieving an EU standard.⁵¹ The Proposal was withdrawn in 2006.

⁵²

However, the attempt to regulate the conditions for long-term residents, which was negotiated in parallel to the above Proposal, was easier, as were the negotiations on some other proposals. A directive on long-term residents was adopted in 2003.⁵³ It includes criteria for obtaining long-term residence status and the rights provided when holding that status. A third country national is entitled to this status after spending five years legally residing in a Member State. The long-term residence directive provides for a comprehensive set of rights and also for an indefinite stay.

⁴⁸ Ibid pp 15-18.

⁴⁹ COM (2000)757 p 16.

⁵⁰ COM(2001)386, (drawn back in COM(2005)462) The different positions among the Member States are reflected in Council documents 7557/02 and 13954/03. See also B Ryan, 2007, pp 15- 18. Macdonald and Cholewinski, 2009 p 371; Carrera&Formisano, 2005, p 2-3 K Tamas, A European migration policy based on partnerships, 2011, p 34, COM(2004)811 p 1.

⁵¹ B Ryan 2007 p 18.

⁵² The support for regulating the self-employed has until now not been strong enough for including them in the forthcoming legislative proposals. They will therefore not be considered further in this chapter.

⁵³ Council Directive 2003/103/EC of 25 November 2003 concerning the Status of Third Country Nationals who are Long-Term Residents, OJ L16/44 23.1.2004.

Equal treatment is, inter alia, assured regarding conditions of employment and working conditions, including conditions regarding dismissal and remuneration.⁵⁴ The important Directive on the Right to Family Reunification (2003/86/EC) was adopted in the same year, 2003.⁵⁵ It includes the right for a residence permit holder to bring parts of their family to the Member State. This right is reserved for a holder of a residence permit issued for a period of validity of one year or more and who has reasonable prospects of obtaining the right to permanent residence.

A directive on a specific procedure for admitting third country nationals for the purposes of scientific research was adopted in 2005. It stipulates the conditions of admission of third country researchers to the Member States for the purpose of carrying out a research project under hosting agreements with research organisations approved for that purpose by the Member State.⁵⁶ Another directive on conditions of admission for third country nationals for the purpose of e.g. studies (2004/114/EC) was adopted in 2004.⁵⁷

4 The second round

The EU did not give up on the idea to develop common regulations on labour migration. In 2004, the European Council adopted the Hague Programme where the Commission was invited to present a policy plan on legal migration, including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market.⁵⁸

This time, the Commission wanted to proceed thoroughly. Through a Green paper,⁵⁹ an in-depth discussion on the most appropriate form of Community regulations for admitting economic migrants and on the added value of adopting such a common framework was initiated. This discussion resulted in the 2005 policy plan on legal migration.⁶⁰

A large number of Member States were not in favour of a horizontal approach regarding admission conditions and the Commission realised that proposing a

⁵⁴ For an analysis of the content of the directive see i a, K. Groenendijk, *The Long-Term Residents Directive, Denizenship and Integration* in A. Baldaccini, E. Guild and H. Toner (eds) *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing, 2007, pp 429-450.

⁵⁵ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L251/12 3.10.2003.

⁵⁶ 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 L289/15 3.11.2005.

⁵⁷ 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 L375/12 23.12.2005

⁵⁸ European Council 4-5 November 2004, European Council Conclusions, Annex I, § III I.4

⁵⁹ COM(2004)811 final

⁶⁰ COM(2005)669 final Commission communication on a policy plan on legal migration p5.

sectoral approach was more realistic.⁶¹ The consultations revealed a need for EU common rules regulating the conditions of admission for some key categories of economic immigrants, most notably highly qualified workers and seasonal workers.⁶²

However, in the 2005 Policy Plan, the Commission still seemed to think that they had support for a horizontal instrument, including a common framework of *rights* for all third country nationals in legal employment who were already admitted to a Member State, but who were not yet entitled to long-term residence status. The development however showed that that was not the case. This horizontal instrument also proposed simplified application procedures for immigrants and employers by means of a single application for a joint work/residence permit.⁶³

Altogether, the 2005 Policy Plan on Legal Migration included proposals for five directives.⁶⁴

- A general Framework Directive on a single permit for work and residence and rights for workers
- Four sector directives on
 - highly skilled workers
 - seasonal workers
 - intra-corporate transferees (ICTs)
 - remunerated trainees

In 2007, as planned, two Directive Proposals from the plan were presented: The General Framework Proposal; and the Proposal on Highly Skilled Workers. These directives were adopted in December 2011 and in May 2009 respectively. In 2010, two sectoral Directive Proposals on Seasonal Workers and Intra-Corporate Transferees were presented. These are currently being negotiated. The content of each of these directives and proposals will now be analysed, starting with the Framework Directive.

4.1 The horizontal approach – finally completed

In 2007, the Commission presented a horizontal Directive Proposal on simplified application procedures and a common set of rights for third country workers - the Single Permit Directive.⁶⁵ After lengthy negotiations, a directive (2011/98) 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 was finally adopted (hereafter called the framework directive). The obstacles during the negotiating

⁶¹ COM(2010)378 p 5.

⁶² *ibid* 6-8.

⁶³ *Ibid* p 6.

⁶⁴ *Ibid* p 6-8.

⁶⁵ Proposal for a council directive 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 COM(2007)638, Brussels 23.10.2007

process were connected to issues regarding the legal basis, competence conflicts between the LIBE and EMPL committees in the European Parliament (EP) and conflicts between the Commission and the Council on administrative requirements for transposition procedures.⁶⁶ After the Lisbon Treaty entered into force, this subject area was included in the ordinary legislative procedure. This means that the Council co-decided on this Proposal by qualified majority, together with the European Parliament.⁶⁷

The 2007 Proposal was as far as the Commission dared to go with regard to horizontal provisions. The Proposal included regulations to facilitate the application procedure for third country national workers and a new set of rights for the third country workers legally residing in the Member States. This Proposal was considered to be consistent with and supportive of the objectives of the Lisbon strategy, particularly in respect of making the EU a more attractive place to work.⁶⁸

In the 2005 Policy Plan on Legal Migration, the Commission had already explained that guaranteeing a common framework of rights to all third country nationals in legal employment based on equal treatment with nationals would not only be fair toward those contributing by means of their work and tax payments to our economies, but would also help to establish a level playing field within the EU.⁶⁹ This argument was developed in the 2007 Proposal: Equal treatment could also help in reducing unfair competition emanating from the existing rights gap, thus serving as a safeguard for EU citizens by protecting them from cheap labour at the same time as protecting migrants from exploitation.⁷⁰ This arguments is now included in the preamble, recite 19, in the adopted directive.

4.1.1 Personal scope

In reality, however, the Commission had already abandoned parts of the horizontal approach with regard to equal treatment. Exceptions from the personal scope of the Proposal were included. Third country nationals posted in accordance with Directive (96/71) were excluded from the scope as they were not considered to be part of the labour market of the Member State to which they were posted. Intra-corporate transferees⁷¹, contractual service suppliers and graduate trainees under the European Community's GATS commitments were also excluded following the same principle.⁷² Seasonal workers were also excluded - a decision justified by the specificities and temporary nature of their status.⁷³

⁶⁶ Y Pascouau&S McLoughlin, *EU Single Permit Directive: A small step forward in EU migration policy*, EPC Policy Brief, 24 January 2012, pp 1-2.

⁶⁷ Commission communication on Consequences of the entry into force of the Treaty of Lisbon for ongoing institutional decision-making procedures, COM(2009)665

⁶⁸ COM(2007)638 p 4.

⁶⁹ COM(2005)669 p 6.

⁷⁰ COM(2007)638 Explanatory memorandum p 3.

⁷¹ See definition in section 4.3.2

⁷² On these commitments see section 5

⁷³ COM(2007)638 p 9 and article 3.

Draft- Third country nationals

The different political groups in the European Parliament were highly divided with regard to the parts of the Proposal relating to personal scope and rights. EMPL argued for a real horizontal instrument which would exclude no group such as temporary workers from its scope of application.⁷⁴ The LIBE rapporteur argued that including seasonal workers and workers posted within their undertaking would require the amendment of the entire original Commission Proposal and would further postpone its adoption.⁷⁵

In the first reading of the European Parliament, the LIBE won the principal battle against the EMPL on the personal scope of the directive. In the EP-position, seasonal workers, intra-corporate transferees, as well as *all* posted workers were excluded from the scope, including *all* workers posted from a third country.⁷⁶ Groups connected to the GATS commitments were no longer singled out. They are most likely covered by the more general wording of the exclusion of posted workers. Other groups such as long-term residents and refugees already covered by more far-reaching sets of rights in other directives were also excluded.

It is important to note that the ILO's regional office published notes on the Proposal based on International Labour Standards, in good time before important decisions were made during the negotiations on the different directives discussed here. In one of those notes, the ILO states that it would prefer to see the establishment of a horizontal framework – which would be more in line with the approach taken by relevant International Labour Standards, including that underpinning the specific instruments protecting migrant workers.⁷⁷

ETUC also declared its discontent with the exclusion of certain groups from the coverage of the directive. Joël Decaillon, ETUC's Deputy General explained their position in the following way:

*“We now have a draft directive which ignores the principle of equal treatment, adds to the number of exemptions and will result in a wide variety of workers' statutes. This in turn will increase social dumping, the lack of job security, the instability and the vulnerability of groups of workers in Europe and will lead to further competition which is the exact opposite of the spirit in which the immigration package was initially intended”.*⁷⁸

These comments did not influence the final decision. In the adopted directive, posted workers, intra-corporate transferees and seasonal workers, alongside other

⁷⁴ A7-0265/2010 EMPL explanatory statement p 40

⁷⁵ A7-0265/2010 LIBE explanatory statement p 37.

⁷⁶ P7_TA-PROV(2011)0115, article 3.2.b-d and recite 12 and the EP press release found at

<http://www.europarl.europa.eu/en/pressroom/content/20110323IPR16161/html/Equal-treatment-for-foreign-workers-under-new-EU-single-permit>, last visit 25 May 2011.

⁷⁷ ILO Note based on International Labour Standards with reference to relevant regional standards – Proposal for a Directive of the European Parliament and the Council on the conditions of entry and residence of third country nationals for the purpose of seasonal employment, COM(2010)379.

⁷⁸ Stated in a meeting with the European Parliament in December 2010 at: <http://www.etuc.org/a/8101>. See also the ETUC resolution on Equal treatment and non-discrimination for migrant workers, Brussels 1-2 December 2010 at <http://www.etuc.org/a/7954>.

groups such as refugees and long-term residents who are in general already provided with stronger protection, are excluded from the scope.⁷⁹ In so doing, the EU is developing a regime providing different level-playing fields for different third country workers. The extent of this rights-gap will, of course, be determined by the content of the sectoral directives.

4.1.2 Admission conditions

The 2007 Proposal and the subsequently adopted Directive introduces a single application procedure along with a single residence/work permit (art 1 and 4). The Commission stated that the combined permit would create useful synergies and enable Member States to better manage and control the presence of third country nationals on their territories for employment purposes.⁸⁰ The single permit would significantly simplify the administrative requirements for third country workers and employers throughout the EU. Moreover, due to its reinforced control function, it complemented the Commission's then recent proposal on sanctions against employers of illegally staying third country nationals.⁸¹

A decision regarding an application for a single permit must be given as soon as possible and, in any event, within four months from the date of the application (art 5.2). Decisions regarding the permit will be open to challenge before the courts in the Member State concerned (art 8.2).

All decisions relating to the *admission conditions* of the permit are left to the Member States. Thus we do not know if the permit will be connected to a single employer or to a branch or if it will be possible to keep the permit during unemployment while looking for a new job. Neither do we know for how long a permit may be valid, nor whether it can be renewed. It is likely that the Member States will simply continue to apply the conditions that are already in place for the groups covered by the Framework Directive. The conditions will, therefore, completely depend on any given Member State's choices and will probably continue to differ widely between Member States, as well as between groups within the Member States.⁸² This important part, the admission conditions, when evaluating the robustness of the equality principle in the directive is therefore unknown.

4.1.3 Employment relations

According to the directive (art 12.1 a-d) third country workers shall enjoy equal treatment with nationals with regard to:

1. working conditions, including pay and dismissal as well as health and safety in the workplace

⁷⁹ 2011/98 art 3.2(c)

⁸⁰ COM(2007)638 p 2.

⁸¹ Ibid p 3. That directive was adopted in 2009, 2009/52/EC.

⁸² For an overview on the range of differences see eg. M Ruhs, *Openness, Skills and Rights: An empirical analysis of labour immigration programmes in 46 high- and middle-income countries*, Centre on Migration, Policy and Society, Working paper No 88, University of Oxford, 2011. In this overview 18 of the EU Member States are included.

2. freedom of association and affiliation and membership of an organisation representing workers or employers or of any organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security
3. education and vocational training
4. recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures

The original Commission Proposal included quite wide possibilities for the member states to restrict these rights. Some restriction possibilities were related to higher education. Others opened the way for restricting equal treatment with regard to working conditions and in relation to freedom of association for those not in employment. The employment based restriction possibilities went too far. It would be rather inappropriate if the EU opened the way for restrictions relating to the freedom of association that would contradict its protection as a fundamental right.⁸³ The EP also deleted this possibility in its first position, along with those relating to working conditions. New restriction possibilities were, however, added during the negotiations, in terms of the possibility to impose certain time frames and the possibility to restrict the right to education and vocational training for those in employment or those previously employed.⁸⁴

At the time of the EP decision, the Council had come quite far in its negotiations on the text and the position was clear to the EP. The Council's proposals were also in line with the EP on these topics.⁸⁵

The EMPL, however, attempted to extend the scope for equality of treatment by amending the part on "working conditions, including pay and dismissal as well as health and safety at the workplace" by adding "working time and leave and disciplinary procedures, taking into account general collective agreements in force".⁸⁶ Substantial parts of that Proposal ended up in a recite in the final EP position⁸⁷ and then made it all the way into the preamble of the adopted directive (recite 22) which reads: "Working conditions as referred to in this Directive should cover at least pay and dismissal, health and safety at the workplace, working time and leave taking into account collective agreements in force."

In the adopted directive, there is no room for restricting the equality principle with regard to working conditions, trade union rights or recognition of professional qualifications. The rights to education and vocational training can, however, be limited in a number of ways, such as excluding study and maintenance loans to those who are in employment and excluding those who have been admitted as students according to the directive (2004/114, art 12.2 (a)).

⁸³ It is not acceptable to nationally impose more far-reaching restrictions on the right to freedom of association on foreigners than those imposed on nationals.

⁸⁴ P7_TA-PROV(2011)0115 art 12.2.a and c and e

⁸⁵ Council doc 6492/10 MIGR 22 SOC 114 CODEC 114 art

⁸⁶ EMPL opinion, amendment 8,

⁸⁷ P7_TA-PROV(2011)0115 recite 14a

To conclude, in terms of *employment relations* there is a relatively strong protection in the directive. It is not, however, entirely clear how far the concept of “working conditions” reaches. Recite 22 gives us strong arguments for including working time and leave provisions in the concept. The general reference in recite 22 to applicable collective agreements indicates a new and more far-reaching approach than, for example, the one included in the posting of workers directive (96/71, art 3.8). The possible restriction related to education and vocational training, however limits the overall picture a bit. Any possibility of connecting rights to employment reduces the likelihood of the worker reacting to exploitation if such action could result in loss of work.

4.1.4 Institutional security

A number of social and economic rights are included in the general article 12.1 (e-g) on equal treatment in the directive. Third country workers shall enjoy equal treatment with nationals with regard to

1. branches of social security, as defined in Regulation (EC) No 883/2004
2. tax benefits, in so far as the worker is deemed to be resident for tax purposes in the Member State concerned
3. access to goods and services and the supply of goods and services made available to the public, including procedures for obtaining housing as provided by national law
4. advice services afforded by employment offices.

A right to bring acquired old age, invalidity or death, statutory pensions, for survivors and for workers when moving to a third country is also provided for (art 12.4)

The branches of social security included in regulation 883/2004 are

- (a) sickness benefits
- (b) maternity and equivalent paternity benefits
- (c) invalidity benefits
- (d) old-age benefits
- (e) survivors' benefits
- (f) benefits in respect of accidents at work and occupational diseases
- (g) death grants
- (h) unemployment benefits
- (i) pre-retirement benefits
- (j) family benefits.

The restriction possibilities in the original Commission Proposal were relatively far-reaching and included, for example, the possibility of restricting the right to public housing to those who had the right to stay in the territory for at least three years. Restricting payment of acquired pensions, tax benefits and social security rights, with the exception of unemployment benefits, to those in employment was also included in the Proposal.

Before the plenary vote in the EP, the ILO, as previously mentioned, prepared a note informing the EP and Council about the ILO provisions in this area. The ILO underlined that equal treatment in the field of social security between nationals and

non-nationals is laid down in ILO's flagship convention on social security, the Social Security (Minimum Standards) Convention, 1952 (No. 102), ratified by 21 EU Member States.⁸⁸

The restriction possibilities were limited in the adopted directive due to joint efforts by the EP⁸⁹ and some Member States, but they can still have substantial effects.⁹⁰ It is, for example, possible to restrict social security rights, except for those in employment or for those who have been employed for a minimum period of six months and who are registered as unemployed (art 12.2 (b)) This seems to indicate that a worker could be left quite unprotected during the first six months of his or her stay if he or she becomes unemployed during that period. It would, for example, be possible to deny the third country worker sick benefits or family benefits during that period. According to the same paragraph, it is also possible to restrict the right to family benefits to, for example, third country workers who have not been authorised to work longer than six months. Access to goods and services including access to housing can also be restricted, except to those in employment (art 12.2(d)). In countries taking advantage of these restrictions, it can, for example, be difficult for a third country worker to leave an abusive employer and look for another job during the first six months of the stay.

The possibility for a permit holder to bring his or her family is of crucial importance in terms of the likelihood of a worker applying for a permit in that particular Member State. The directive includes no rules that deviate from the family reunification directive. This means that it can take more than a year before the family can join the worker. Neither are there any rules in the directive referring to possible means of gaining permanent residence. These issues are left to the Member States to decide.

In general, the level of the social rights dimension of *institutional security* in the directive is relatively high, in particular for those workers who are in employment. The possibility to restrict social rights and the absence of rules facilitating family reunification or permanent stay give the Member States significant room for manoeuvre with regard to the general level of protection. The situation can differ significantly between the Member States and also depends on eagerness of the Member States to use the restriction possibilities.

4.1.5 Effective enforcement

The directive does not contain any specific enforcement provisions. The EMPL committee tried to include such provisions but did not gain the necessary support

⁸⁸ 14.2.2011 ILO comments on the EU single permit directive and its discussions in the European Parliament and Council – The social security and equal treatment/non-discrimination dimensions.

⁸⁹ European Parliament, Common rights and single work and residence permit for non-EU workers, press release 13.12.2011

⁹⁰ Y. Pascouau and S MaLoughlin, *EU Single Permit Directive: a small step forward in EU migration policy*, 2012, p 3,

from either the EP or the Member States.⁹¹ The general obligation in article 4 .3 TEU, which stipulates that Member States must take all appropriate measures to ensure fulfilment of e.g. the obligations resulting from the acts of the institutions of the Union ,do of course apply. This means that, in general, enforcement rules must guarantee real and effective judicial protection.⁹² The more specific requirements in this regard are, however, flexible and not always completely clear.⁹³

4.1.6 More favourable provisions

The Member States are free to adopt or maintain provisions that are more favourable to the persons to whom they apply (art 13.2).

The directive also applies without prejudice to more favourable provisions of Community (Union) legislation, including bilateral and multilateral agreements between the Community, or the Community and its Member States, on the one hand, and one or more third countries on the other. The same should apply with regard to bilateral or multilateral agreements between one or more Member States and one or more third countries. The effect of this provision will be discussed in the conclusions.

4.2 The highly skilled workers

As envisaged in the 2005 policy plan, the Member States supported starting negotiations on admission criteria for some specific sectors. Even though it was clear that only some Member States were likely to attract highly skilled workers,⁹⁴ it seems that this group gained the broadest support from most actors.⁹⁵ Highly skilled workers are seldom perceived as a threat to the cohesion of national society.⁹⁶

The Commission is also of the opinion that the vast majority of Member States need these workers.⁹⁷ Attracting highly skilled immigrants is seen as part of the Lisbon strategy to become the most competitive and dynamic knowledge-based economy in the world.⁹⁸ It was therefore no accident that the first sector-related directive to be proposed was on the conditions of entry and residence for third country nationals for the purposes of highly qualified employment.⁹⁹

⁹¹ A7-0265/2010 LIBE report amendment 71 and 72.

⁹² Case 14/83 von Colson (1984) ECR 1891, para 23.

⁹³ See more on this topic in J Malmberg (ed) *Effective Enforcement of EC Labour Law*, Iustus Förlag, 2003, pp 33

⁹⁴ COM(2005)669 p 6.

⁹⁵ E. Guild, *EU Policy on Labour Migration A First look at the Commission's Blue Card Initiative*, CEPS Policy Brief, No. 145 November 2007 p 1, (hereafter Guild 2007 Blue).

⁹⁶ Lucie Cerna, *The EU Blue card: A bridge too far?* Paper prepared for the Fifth Pan-European Conference on EU Politics, Porto Portugal (23-26)June 2010) p 6.

⁹⁷ *Ibid* p 7.

⁹⁸ See confirmed by ia recite p 3 in the adopted directive on highly qualified employment, 2009/50/EC.

⁹⁹ COM(2007)637 final.

In spite of this, Cerna has pointed out that the degree of support varied according to the self-interest of Member States, i.e whether they perceived any benefit in increased EU legislation. The main support was from the countries lacking a specific national policy on highly qualified migrants. This Proposal could help them to shift the balance between their migrant groups.¹⁰⁰

The motivation for adopting a common legal framework for highly qualified workers was based on the following reasons:

- the continuous growth of employment in high education sectors compared to other sectors of the EU economy.
- the increasing EU requirement for a highly qualified workforce to sustain its economy.
- the lack of the ability of the EU to attract highly qualified professionals in the context of strong international competition.¹⁰¹
- the fact that the EU's relative attractiveness in relation to the USA and Canada, was suffering, given that highly qualified migrants
 - had to face 27 different admission systems,
 - had restricted possibilities in terms of moving easily from one country to another for work,
 - were subject to time-consuming and cumbersome procedures, which made non-EU countries granting more favourable conditions for entry and stay a more attractive option.¹⁰²

The aim was not only to improve the EU's ability to attract but also to *retain* third country highly qualified workers. In order to effectively and promptly respond to fluctuating demands for highly qualified immigrant labour – and to offset present and upcoming skill shortages – the Proposal also aimed to develop a level playing field at EU level to facilitate and harmonise the admission of this category of workers and to promote their *efficient allocation and re-allocation* in the EU labour market.¹⁰³ The generous attitude towards this workforce, as illustrated by the desire to create routes to long-term status and free movement rights, is exceptional and an indication of this sector's crucial anticipated positive economic input to the EU. These proposals were, however, intensely discussed during the negotiations, which resulted in new compromises.¹⁰⁴

4.2.1 Personal scope

So who would qualify for this attractive status? In order to perform a "highly qualified employment" a person must, as a general rule, have higher professional qualifications, defined as a post-secondary higher education of at least three years in duration (Art 2). The definition of highly qualified employment was intensely discussed during the negotiations. There was a concern that this favourable status would be misused. In the Commission Proposal, workers with at least three years

¹⁰⁰ Cerna pp 22-24.

¹⁰¹ COM(2007)637 final explanatory memorandum p 3.

¹⁰² *ibid*

¹⁰³ *Ibid* explanatory memorandum p 2.

¹⁰⁴ Cerna p 26 .

of relevant professional experience could also qualify for this status.¹⁰⁵ This was something that some Member States could not accept.¹⁰⁶ The compromise reached was that the Member States could themselves decide whether they wanted to extend this status to persons with at least five years of professional experience at a level comparable to higher education qualifications.

Certain categories are excluded from the application of the directive. Most important from our perspective is the fact that seasonal workers and posted workers according to Directive 96/71 are excluded from the scope, along with persons who enter a Member state under commitments contained in an international agreement facilitating the entry and temporary stay of certain categories of trade and investment-related natural persons (Art 3). The two first categories were added by the Council and were not included in the original Proposal from the Commission.¹⁰⁷

4.2.2 Admission conditions

The criteria for admission were and are, in principle, the same in the Commission's Proposal and in the adopted Directive. An important condition in the adopted directive is the obligation to present a valid work contract or a binding job offer for highly qualified employment of at least one year, specifying a certain wage level, and to provide documents attesting to the required qualifications (Art 5). The specification of a relative minimum wage was justified in terms of ensuring that the wage criteria would be rendered worthless by setting a national level that would be too low for a national or EU highly qualified worker to accept.¹⁰⁸ The specification of a relative minimum wage was something that was strongly opposed by BUSINESSEUROPE.¹⁰⁹

According to the adopted directive articles 5.3 - 5.5, the gross annual salary resulting from the monthly or annual salary specified in the work contract or job offer must not be inferior to a relevant salary threshold defined and published for that purpose by the Member States, which is required to be at least 1.5 times the average gross annual salary in the Member State concerned. In this regard, the Member State may require that all conditions in the applicable laws, collective agreements or practices in the relevant occupational branches for qualified employment are met. For employment in professions in particular need of third country national workers, the salary threshold can be at least 1.2 times the average gross annual salary in the Member State concerned.

The Commission proposed a possibility to derogate from the wage obligations for workers of less than 30 years of age. This possibility was excluded in the adopted

¹⁰⁵ COM(2007)637 article 2b.

¹⁰⁶ See for example Council document 5255/08 MIGR 1 SOC 19, Brussels 18 January 2008, footnote 6.

¹⁰⁷ COM(2007)637 , art 3.

¹⁰⁸ COM(2007)637 pp 9-10 and Art 5 and 6 pp 21-22.

¹⁰⁹ At http://www.cebre.cz/dokums_raw/businessseurope.pdf.

text.¹¹⁰ Retaining this provision could have been advantageous for recent third country graduates who wished to stay in a Member State after their studies.¹¹¹ The lower wage requirement can, however, have a particular effect on that age category. In general, there is a clear deficiency in the 2005 legal policy plan in that there is no provision for any intermediate steps between the directive on admission for the purposes of studies (Dir 2004/114/EC)¹¹² and the labour migration framework. This situation may be remedied if a revision of the study-directive is initiated.¹¹³

One of the most important elements of the procedural requirements stipulated in order to effectively and promptly respond to fluctuating demands for highly qualified immigrant labour and to offset present and upcoming skill shortages was to introduce a fast-track procedure. In the Commission's original Proposal, the procedure should take no longer than 30 days or, in exceptional cases, 60 days. It was clear that the Member States were not ready to speed up their procedures to that degree. The adopted text states the decision must be taken as soon as possible and at the latest within 90 days (Art 11.1). Of course, this inability to set a common procedural time frame threatens the aim of minimising internal competition for high skilled workers among the Member States.

An application can be turned down if the applicant does not meet the conditions; if a required vacancy test is not conducted; or if the volumes determined by the authorities are already filled (Art 8). Some other grounds for refusal are also applicable.

The EU Blue card

If the authorities decide to approve the application, the applicant will be issued with an EU Blue Card (Art 7). The idea was to invent something that would sound as attractive as the US Green Card. However, the wording cannot take away the fact that the two cards generate quite different statuses.¹¹⁴

The Commission proposed that the validity of the EU Blue Card should be for two years, with the possibility of renewal for another two years. Should the work contract cover a period of less than two years, the EU Blue Card would be issued for the duration of the work contract plus three months.¹¹⁵ In the adopted directive, the Member States were granted the right to decide on a standard period of between one and four years for the validity of the EU Blue Card. If the work contract covers a shorter period, the EU Blue Card will be issued for that period plus three months (Art 7.2).

¹¹⁰ COM(2007)637 p 10 and 21, dir 2009/50 art 5.

¹¹¹ Guild 2007 Blue p 5.

¹¹² Directive 2004/114/EC 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. 0012-0018

¹¹³ Commission Communication, Delivering an area of freedom, security and justice for Europe's citizens: Action plan implementing the Stockholm Programme, COM(2010)171 final, Brussels, 20.4.2010 p 48-52.

¹¹⁴ Guild, 2007 Blue , p 4.

¹¹⁵ COM(2007)637 art 8.

Labour market access

During the two first years, the EU Blue Card holder is limited to the employment fulfilling the criteria for admission. A change of employer must be subject to prior authorisation by the authorities, a process which can take up to three months (Art 12.1-2). Importantly, the EU Blue Card holder can keep the permit during unemployment, for a period of up to three months (Art 13). Thus, in principle, the third country worker may be obliged to find a new job before leaving the original one. While the right to keep the permit during unemployment is, of course, important, the Member States may withdraw the permit if the worker does not have sufficient resources to maintain himself and his family without having recourse to the social assistance system (Art 9.3(b)). After the first two years, the Member States may, but are not required to, grant the persons concerned equal treatment with nationals with regard to access to highly skilled employment (Art 12.1).

Right to movement

Perhaps the most remarkable element of the Proposal was that it included a right for the permit holder to move to another EU Member State after two years in order to take up highly qualified employment. The Proposal was in line with the Commission's ambitions to build flexibility into the system. The Commission underlines the importance of being able to allocate and re-allocate this category of workers within the EU labour market.¹¹⁶ The Proposal was controversial as it touched upon the sovereignty of borders. The negotiations resulted in a right for EU Blue Card holders to move to another Member State after 18 months for the purpose of highly qualified employment, so that the worker could apply for a new EU Blue Card in that other Member State. The application must be made within one month (Art 18). The provisions on community preference, however, continue to apply (Art 12.1 and 5). In the original Commission Proposal, a right to move to another EU Member State would arise after two years *without* having to apply for a new Blue Card. This change in the adopted directive is lessening the effect of the external free movement provision and, as with many other adaptations, will limit the fulfilment of its purpose.¹¹⁷

The possibility for the Member States to decide on the volumes of admission has been criticised for weakening the free movement-related rights in the directive. It would, however, have been difficult to overcome this obstacle, not least because of the, at that time, only proposed but later adopted Article 79.5 TFEU.¹¹⁸ Article 79 is, according to Article 79.5, not supposed to affect the Member States' right to decide on how many third-country nationals to admit into the country.

The right to movement between the Member States confers an important advantage for the EU Blue Card holder. It will, according to Article 16, be possible to accumulate periods in the different Member States, if certain requirements are met, in order to obtain long-term resident status along with all the rights conferred by the Long-Term Residence Directive (2003/109). The EU Blue Card holder is

¹¹⁶ Ibid p 2 and 7.

¹¹⁷ See comments on this in Cerna, 2010 p 26-27.

¹¹⁸ Guild 2007 Blue p 6-7.

also allowed to bring his or her family to the new Member State if they were already residing in the first Member State (Art 19).

One of the main advantages put forward by the Commission with this Proposal was that it would replace 27 admission procedures with one, thereby not only making it more attractive to migrants to apply for admission to any EU Member State but also eliminating competition between the EU Member States.¹¹⁹ The flexibility in the provisions on admission limits these effects, but was obviously necessary in order to gain consensus. Importantly, *the admission criteria* gives the worker, an opportunity theoretically at least, to leave an exploitative employer during the first two years. The possibility to change employer with regard to highly qualified employment can be unlimited after two years, should the Member State so decide. After 18 months, the worker is allowed to look for another job in another Member State – a right much more limited than originally proposed by the Commission, but hopefully of some value, at least, to the workers.

4.2.3 Employment relations

The highly qualified third country employees shall, according to Article 14 of the Directive, enjoy equal treatment with nationals to the same extent as in the Framework Directive. This means with regard to:

1. Working conditions, including pay and dismissal, as well as health and safety requirements at the workplace
2. Freedom of association and affiliation and membership of an organisation representing workers or employers or of any other organisation whose members are engaged in a specific occupation, including the benefits conferred by such organisations, without prejudice to the national provisions on public policy and public security
3. Education and vocational training
4. Recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures

It is possible to restrict equal treatment as regards study and maintenance grants and loans, or other grants and loans relating to secondary and higher education and vocational training. The rights to equal treatment with regard to education can also be restricted to those whose registered or usual place of residence lies within the territory.

As in the Framework Directive, it is only possible to restrict the equal treatment rights connected to employment relations with regard to education and vocational training. However, the restriction possibilities are more limited in this directive. The *employment relations* dimension of the Directive thus provides quite strong protection.

4.2.4 Institutional security

Equal treatment with nationals with regard to social rights is guaranteed by the following:

¹¹⁹ COM(2007) 637 p 7.

- 1 Provisions in national law regarding the branches of social security as defined in Regulation (EEC) No 1408/71. The special provisions in the Annex to Regulation (EC) No 859/2003 shall apply accordingly
- 2 Without prejudice to existing bilateral agreements, payment of income-related acquired statutory pensions in respect of old age, at the rate applied by virtue of the law of the debtor Member State(s) when moving to a third country
- 3 Access to goods and services and the supply of goods and services made available to the public, including procedures for obtaining housing, as well as information and counselling services afforded by employment offices

In principle, these rights correspond to those in the Framework Directive. There is, however, no provision related to a right to tax benefits. In the Commission Proposal, both the right to social assistance and tax benefits were included.¹²⁰ It is unclear why they were removed in the adopted directive. But, as highly qualified workers are not excluded from the personal scope of the Framework Directive, they should be implied with the rights provisions in that directive, in situations where these are more favourable. The only possibility to restrict the rights included in this directive is limited to procedures for obtaining housing (Art 16.2)

The possibility for family members to join the Blue Cards holder in a Member State is, of course, of crucial importance in terms of the likelihood of the worker applying for a permit in that particular Member State. The starting point, according to Article 15, is the application of the Family Reunification Directive (2003/86). There are, however, very important favourable derogations made from that directive. The right to family reunification is, for example, not dependent on the requirement for the EU Blue Card holder to have reasonable prospects of obtaining the right of permanent residence and to have a minimum period of residence. The decision to grant a residence permit for family members must also be taken more quickly, within six months at the latest, compared to the nine months stipulated in the 2003 directive; and no time limits apply in respect of access to the labour market.

Furthermore, the level of *institutional security* is relatively strong in this directive. The restriction possibilities are left to a minimum. The right to family reunification is facilitated. There are no restrictions on the number of permits issued and accordingly no obstacles in qualifying for a more secure status, as a long-term resident, if the Member States so provide. The worker can even aggregate permits issued in different Member States when qualifying for long-term residence status.

4.2.5 More favourable provisions

The Commission's Proposal on highly qualified employment envisaged, in principle, a minimum directive allowing for extensive possibilities for adopting more favourable provisions. The provisions were limited only in terms of the criteria regarding entry to the first Member State, necessary so as not to undermine the scope of the directive.¹²¹ In the adopted directive, this starting position changed

¹²⁰ COM(2007)637 Art 15.1 f and h.

¹²¹ COM(2007)637 Art 4, explanatory memorandum p 9.

and more favourable provisions were accepted only in relation to a limited number of provisions; Article 5(3) in application of Article 18 and Articles 11, 12(1), second sentence, 12(2), 13, 14, 15 and 16(4).¹²² Importantly, this directive will not affect those Member States with existing successful national schemes relating to highly qualified employees. (Article 3.4)

4.3 The ongoing battle regarding the 2010 Proposals

In July 2010, the Commission adopted two sector-related Proposals on Seasonal Employment and Intra-Corporate Transferees (ICT). These are directed towards two very different types of workers – one includes some of the most vulnerable workers in the labour market and the other includes workers with a relatively strong position in the labour market. In general, according to the Directive Proposals, they are, supposed to be treated very differently. But in at least one aspect there are worrying similarities –both categories are denied a general right to equal treatment with nationals in respect of working conditions, including pay. The reasons for this choice differ. Both Proposals have been heavily criticised, especially the Proposal on seasonal workers. But the grounds for criticism are different. The vulnerable seasonal workers are not provided with the necessary protection. The ICTs, on the other hand, are a strong group more closely related to highly skilled workers and are, correspondingly, treated generously in many ways. The decision to treat them as posted workers with regard to working conditions, including pay, is however quite problematic and will be further discussed later. But first, we will briefly consider the Proposals on seasonal employment.

4.3.1 Seasonal workers

The Directive Proposal on seasonal employment aims to contribute to the implementation of the EU 2020 Strategy and to the effective management of migration flows for the specific category of seasonal temporary migration. According to the Commission, it sets out fair and transparent rules for entry and residence, at the same time providing for incentives and safeguards to prevent a temporary stay from becoming permanent.¹²³ This aim can be contrasted with the ambition to retain highly skilled workers.¹²⁴

The Commission points out that EU economies are facing a situation where labour from within the EU is expected to become less and less available to meet their demands for seasonal workers. At the same time, there is a more permanent need for unskilled labour within the EU. It is expected to be increasingly difficult to fill these gaps in seasonal labour supply with EU national workers, primarily due to the fact that these workers consider such work unattractive.¹²⁵ It is further pointed out that there is significant evidence that certain third country seasonal workers face exploitation and sub-standard working conditions, which may threaten their health

¹²² Dir 2009/50/EC Art 4.

¹²³ COM(2010)379 explanatory memorandum p 2.

¹²⁴ COM(2007)637 p 2.

¹²⁵ COM(2010)379 p 2-3.

and safety. The Commission also underlines that certain sectors in which seasonal work is performed are those most prone to employing third country nationals who are staying illegally.¹²⁶ One unanswered question is, of course, what this Proposal does for helping these illegal migrants.

According to the Commission, the Proposal is also consistent with, and supportive of, the objectives of the Commission Communication on Promoting Decent Work for All (COM(2006)249). Setting up swift and flexible admission procedures and securing a legal status for seasonal workers can act as a safeguard against exploitation and also protects EU citizens who are seasonal workers from unfair competition.¹²⁷

The Commission points out that in respect of the employment-related rights of third country seasonal workers, the Proposal complies with the requirement that all EU policies should ensure a high level of human health protection.¹²⁸ This remark is rather odd and the question of how this Proposal takes the human health protection aspect into account is unanswered.

The Proposal emphasises the importance of circular migration and aims to facilitate reliable inflows on remittances and transfer of skills and investment, so that seasonal workers are able to come to a Member State, go back to their countries and then come again to the Member State. As this type of migration is temporary, the Directive is not expected to lead to 'brain drain' in emerging or developing countries.¹²⁹ It is rather interesting to note that the positive effects of circular migration and negative effects of 'brain drain' are taken into consideration in this Proposal, which deals with low skilled seasonal workers, while they are totally absent in the Proposals relating to highly skilled workers.

4.3.1.1 Personal scope

A seasonal worker is, according to the Directive Proposal, a third country national who retains a legal domicile in a third country but resides temporarily for the purposes of employment in the territory of a Member State, in a sector of activity dependent on the passing of the seasons, under one or more fixed-term work contracts concluded directly between the third country national and the employer established in a Member State (Art 3 b). An activity dependent on the passing of the seasons means an activity that is tied to a certain time of the year by an event or pattern during which labour levels are required that are far above those necessary for usual ongoing operations (Art 3c). According to the preamble in the Proposal, such activities are typically to be found in sectors such as agriculture, during the planting or harvesting period, or tourism, during the holiday period (recital 10).

The European Parliament has not yet adopted a final report on this Proposal. A draft report and a draft opinion have, however, been presented by the rapporteurs of LIBE and EMPL; and the Committee on Women's Rights and Gender equality

¹²⁶ Ibid p 3.

¹²⁷ Ibid p 3.

¹²⁸ Ibid p 4

¹²⁹ Ibid p 3.

has adopted an opinion. The LIBE rapporteur is proposing a range of very important and far-reaching amendments. It seems that he is intending to ensure that the limitations of the personal scope, accepted by LIBE in the EP-report on the horizontal Framework Proposal, will not result in the provision of less strong protection for seasonal workers than that provided under framework directive.

In both the EP Committee drafts, it is proposed to specify the relevant economic sectors in the articles and only include other sectors with the agreement of the social partners.¹³⁰ Such a specification would limit the risk of abuse of these permits for work which is not intended to be covered by the directive.

The proposed directive is not intended to be applied to third country nationals who are carrying out activities on behalf of undertakings established in another Member State, in the framework of a provision of services within the meaning of Article 56 of the TFEU including those posted by undertakings established in a Member State in the framework of a provision of service in accordance with the Posting Directive (96/71(Art 2.2)). This could be interpreted to mean that seasonal workers being posted from third countries should be covered by the directive. In this regard, the scope corresponds with the Directive on highly qualified employment.

The EMPL rapporteur, however, proposed to delete Art 2.2. Given that it has not yet been clearly established whether and in what way the Posting Directive also applies to third-country nationals, the rapporteur found it inappropriate to exclude third country workers posted by undertakings established in an EU Member State from the scope of this directive.¹³¹ EMPL did not get support from the LIBE rapporteur on this point. It is, though, quite likely that the more general exclusion used in the Framework Directive, which also excludes posted workers from third countries, will be used.¹³² There is no reason to treat the two groups differently in this regard. It is, however, worth noting that the seasonal worker is supposed to conclude a contract directly with an employer established in a Member State (Art 3b). This could indirectly lead to the same result.

Many seasonal workers operating in the EU labour market today lack the necessary permits. Stakeholders have therefore proposed to include a possibility in the directive for these workers to apply for a seasonal work permit and thereby legalise their stay. One proposal is to allow third country nationals residing illegally a transitional period of two years from the entering into force of the directive during which to apply for a seasonal work permit.¹³³ It might be very difficult to get the necessary approval for this proposal, but it certainly reflects the reality.¹³⁴ It is not

¹³⁰ EMPL amendment 15 PE464.974v01-00, LIBE amendment 20 PE464.960v2-00.

¹³¹ EMPL amendment 14.

¹³² This is the wording used in the text presented by the Presidency to the Council working group on 1 February 2012, Art 2.2 (Council document 5613/12, MIGR 8 Soc 41 CODEC 171, Brussels 1 February 2012)

¹³³ LIBE amendment 17 and 18

¹³⁴ This possibility is not envisaged in the February text presented for negotiations in the Council. Council document 5613/12, MIGR 8 Soc 41 CODEC 171, Brussels 1 February 2012.

likely that seasonal workers with an irregular status have the means to return to a third country and apply for a seasonal work permit.

4.3.1.2 Admission conditions

An application for a seasonal worker permit must, according to the proposal, contain a valid work contract or, as provided for in national law, a binding job offer to work as a seasonal worker. The contract or work offer must specify the rate of pay and the working hours per week or month and, where applicable, other relevant working conditions (5a). There are different reasons, according to the Commission, for specifying these two conditions. The rate of pay is required in order to verify that the proposed remuneration is comparable to that paid to nationals for the equivalent activity in the Member State concerned. The purpose is, therefore, twofold – to avoid conferring an unfair advantage to the employer and to avoid exploitative working conditions for the seasonal worker.

The first reason put forward for requiring information on the working hours – to ensure that employers only request third country seasonal workers in situations of real economic need - makes the last part of the text “ when applicable, other relevant working conditions” reasonable. The other working conditions might not have anything to do with this calculation. Information about working hours is also likely to be connected to the requirement that the seasonal worker must have sufficient resources during his or her stay to maintain him- or herself without having recourse to the social assistance system of the Member State concerned (Art 5.2). But, in the explanatory memorandum, the Commission continues to mention other reasons as a guarantee of a certain, fixed level of remuneration for the seasonal workers, and, when applicable, other relevant working conditions such as insurances.¹³⁵ If the specification is to serve as a guarantee, it seems very strange that only wage and working time levels have to be mentioned. The working conditions must, of course, include many other aspects of the employment. This formulation gives the odd impression that only a very limited set of working conditions is necessary to ensure for seasonal workers. Hopefully, this is not the intention. A third reason for this specification mentioned by the Commission is that it will enable efficient control by the competent authorities before admission. This important aspect makes it even more critical that a broader set of working conditions are included in the document; a starting point shared by the EMPL and LIBE rapporteurs. According to their proposals, all essential aspects of the contract or employment relationship as laid down in the Directive regarding information on employment conditions (91/533) must be specified in the contract or job offer.¹³⁶

Evidence of having accommodation that ensures an adequate standard of living is also required. If rent is paid for such accommodation, the amount must not be excessive in relation to the remuneration (Art 5 1 d and Art 14). In general, the requirement to prove an adequate standard of living for the seasonal worker has been welcomed by the EP committees. The LIBE and EMPL rapporteurs are, however, proposing an amendment to Article 14, which includes a description of

¹³⁵ COM(2010)379 p 9.

¹³⁶ LIBE Draft Report, PE464.960, 8.6.2011, amendment 25, EMPL Draft Opinion, PE464.974v01-00, 27.5.2011, amendment 20.

what is to be included in an adequate accommodation. The amendment is founded on the definition of adequate housing stipulated by the UN Committee on Economic, Social and Cultural Rights.¹³⁷ The two rapporteurs also propose that any rent paid for the accommodation must be fixed for the duration of the stay.¹³⁸

The grounds for refusal of the permits are similar to those in the Blue Card Directive. If the conditions are fulfilled, the application can still be rejected if no vacancy test can be verified or if the quota is filled (Art 6.2 and 4). The Member States can, however, decide whether or not they want to apply a vacancy test.

A successful application will result in a seasonal worker permit. A decision on the application must, according to the proposal, be given within 30 days (Art 13). In order to allow sufficient time to process the application and to conduct the necessary checks, the LIBE rapporteur proposes to extend this period to 60 days.¹³⁹ The permit, however, only applies to stays exceeding three months. The seasonal worker is granted residence for a maximum of six months in any calendar year. It is clearly stated that these workers must return to a third country as soon as the permit expires. But it is proposed that the seasonal worker be given the right to change employer within this 6 month period and also that the period be extended if the permit is originally granted for a shorter period than 6 months, provided that the admission criteria are met (Art 11). The Commission justifies this last part of the provision on the grounds of avoiding abuses. Seasonal workers tied to a single employer may face a risk of abuse. The possibility of extending the period may reduce the risk of staying longer than is legally permitted and allow higher earnings and remittances sent by third country seasonal workers which, in turn, may contribute to the development of their countries of origin.¹⁴⁰ The seasonal worker does not, however, have a right to stay in the territory if unemployed - a right which an amendment by LIBE is proposing to include.¹⁴¹ Without such a right, the right to change employer is of a more limited value.

According to the Proposal, the Member State must facilitate the re-entry of the seasonal worker. Two options are given: Either issue three seasonal worker permits covering up to three subsequent seasons within one administrative act; or provide a facilitated procedure for the seasonal worker when applying for admission as a seasonal worker in a subsequent year. The rationale behind the multi-seasonal permits is that they are appropriate for sectors where the labour market needs to remain stable over a period of time.¹⁴² The purpose of this provision is to promote circular migration of seasonal workers, with the justification that such migration will potentially benefit the country of origin, the EU host country and the seasonal workers themselves.

¹³⁷ EMPL amendment 23, LIBE amendment 53

¹³⁸ EMPL amendment 24 LIBE amendment 54

¹³⁹ LIBE amendment 51

¹⁴⁰ COM(2010)379 explanatory memorandum, p 10

¹⁴¹ LIBE amendment 45

¹⁴² Ibid p 10.

Parts of this Proposal have gained support from, for example, the ILO, but its success is also dependant on a set of protective measures.¹⁴³

This whole Proposal is based on a fear of conferring possibilities that will enable these vulnerable workers to stay in an EU Member State for a longer period. This perspective has been heavily criticized. The LIBE rapporteur is, for example, proposing that the Member States themselves determine the conditions under which seasonal workers may apply for a longer-term residence permit.¹⁴⁴ Taking advantage of a person's labour year after year without giving him or her a chance to establish residency in that Member State is far from decent. The right to apply for longer work permits in accordance with national rules would, of course, be open to this category of workers, as for any other. But it is questionable whether that is enough. It also seems that the Council Working Group is now more amenable to considering such possibilities.¹⁴⁵

To conclude, the short period of validity of a permit is a clear weakness connected to the *admission conditions* in the Proposal. It is difficult for the worker to exercise any of the given rights during this short period. And as will be seen, the short validity can also make it difficult to exercise many of the social rights. The right to change employer is, however, a strength but is weakened by the absence of any right to keep the permit when unemployed and by other restrictions discussed later on.

4.3.1.3 Employment relations

As regards working conditions, the 2010 proposals have not used the equal treatment principle as a starting point.

In the Seasonal Employment Proposal, seasonal workers shall be entitled to working conditions, including pay and dismissal, as well as health and safety requirements in the workplace, applicable to seasonal work, as laid down by law, regulation or administrative provision and/or universally applicable collective agreements in the Member State to which they have been admitted. In those Member States where collective agreements are not declared universally applicable, the Member States can 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 employer's and labour organisations at national level and which are applied throughout national territory (Art 16.1).

The fact that seasonal workers have not been granted equal treatment has been criticised by the trade union movement¹⁴⁶, the ILO¹⁴⁷ and the EP rapporteurs and

¹⁴³ International labour migration – A rights-based approach, International Labour Office Geneva, 2010 p 168 et seq.

¹⁴⁴ LIBE amendment 49

¹⁴⁵ Article 11.1 (Council document 5613/12, MIGR 8 Soc 41 CODEC 171, Brussels 1 February 2012).

¹⁴⁶ ETUC Resolution on equal treatment and non discrimination for migrant workers, adopted at the Executive Committee on 1-2 December 2010.

EECS.¹⁴⁸ The Commission does not give any understandable explanation for this choice. In the explanatory memorandum, they simply state that this part of the Article defines the working conditions, including pay, dismissal and health and safety requirements in the workplace applicable to seasonal workers in order to ensure legal certainty. The preamble (recital 20) refers to the especially vulnerable situation of third country national seasonal workers and the temporary nature of their assignment. This implies a need to define clearly the working conditions applicable to such workers in order to ensure legal certainty and to refer such conditions to generally binding instruments that provide effective protection of the rights of third country seasonal workers, such as law or universally applicable collective agreements.

It is, however, difficult to interpret this Article as placing any obligation on the Member States to include such rights for seasonal workers in binding instruments. The ILO expresses concern about the lack of reference in this Article to equal treatment with nationals. They point out that such provision is included in the Blue Card directive and in the now adopted Framework Directive, as well as in the ILO Convention Nos 97 and 143 on Migrant Workers. Equal treatment in employment and occupation is one of the ILO fundamental principles and rights and is the subject of a core ILO legally binding instrument, the Discrimination (Employment and Occupation) Convention, 1958 (No.111), which addresses non-discrimination with respect to, *inter alia*, conditions of employment.¹⁴⁹ The ILO, however, also note that unjustified distinctions on the basis of nationality have been found to be discriminatory in the jurisprudence of the European Court of Human Rights, under the European Convention on Human Rights, 1950.¹⁵⁰

The ILO also expresses concern over the reference to universally applicable collective agreements, which it thinks should be avoided and substituted by reference to collective agreements that bind the employer and can therefore be locally negotiated. ILO Convention No 98 on Collective Bargaining, ratified by all Member States, also covers collective bargaining at workplace level by an individual employer. There are, therefore, no grounds whatsoever to support the limitation of equal treatment for seasonal workers to collective agreements that have been declared universally applicable.¹⁵¹

The EMPL rapporteur covers this issue extensively in the draft opinion. According to their proposal, seasonal workers should be entitled to equal treatment with nationals with regard to working conditions, including pay and dismissal, working hours, holidays and disciplinary provisions, as well as health and safety

¹⁴⁷ ILO Note based on International Labour Standards with reference to relevant regional standards – 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).

¹⁴⁸ ILO note and ETUC, LIBE p 44, EMPL amendment 26, EESC Opinion p 4.13.

¹⁴⁹ Nationality is not an included ground for discrimination. The supervisory bodies have however repeatedly affirmed that migrant workers are protected by the instrument, ILO 2010 p 124

¹⁵⁰ ILO Note pp 2-3.

¹⁵¹ ILO Note p 3.

requirements in the workplace. In addition to legal, administrative and regulatory provisions, collective agreements and contracts, concluded at any level, in accordance with the host Member State's law and practices, by the most representative employers' and labour organizations, shall be taken into account under the same terms as for nationals of the host Member State.¹⁵²

The provisions proposed here are more extensive than those provided in the Blue Card Directive. A similar wording is however included in the preamble of the Framework Directive. This may influence the likelihood of success in achieving a wider definition of working conditions. But the end result is still unclear.

Nevertheless, there appears to be strong support for providing equal treatment regarding working conditions. It would be extremely worrying if the Directive were adopted without a clear formal equal treatment provision. Fortunately it seems that the EP will not let this principle go. The extended reference to collective agreements *at all levels* is also of tremendous importance. The argument from ILO in respect of Fundamental ILO standards is not insignificant here. Its value will once again be tested in an EU context. The Council Working Group seems to agree with the criticism on these points. The text presented by the Presidency on 1 February 2012, provides for equal treatment and includes no reference to a limited number of collective agreements.¹⁵³

A general point, not discussed so far in relation to any of the Proposals, is the lack of reference to conditions of employment. The Long-Term Residence Directive provides for equal treatment regarding conditions of employment *and* working conditions, including conditions regarding dismissal and remuneration. The question is whether anything important is excluded by this omission of employment conditions in the proposals or whether it is, or is supposed to be, the same issues dealt with in the directives but only formulated in different ways. Employment conditions can include, for example, criteria for temporary work. Are such rules supposed to be excluded from the provisions for migrant workers who do not yet benefit from long-term residence status or should they be included?

The right to freedom of association was already guaranteed on an equal basis with nationals in the Commission proposal. The EMPL rapporteur is, however, proposing to clarify the content by adding "including the right to negotiate and conclude collective agreements and the right to strike and take industrial action, in accordance with the host Member State's national law and practices which comply with Union law".¹⁵⁴ As no such clarifications were included in the Framework -or Blue Card directives, it is very unclear if they will be accepted here.

It is not, however, proposed to grant seasonal workers any rights connected to education and vocational training or recognition of diplomas, certificates and other professional qualifications. The EMPL rapporteur proposes to include these rights

¹⁵² EMPL amendment 26

¹⁵³ Article 16.1(a) Council document 5613/12, MIGR 8 Soc 41 CODEC 171, Brussels 1 February 2012

¹⁵⁴ EMPL amendment 26.

in the general provision on equal treatment.¹⁵⁵ But these have still not been added to the text being discussed by the Council Working Group. Even if seasonal workers are, in general, considered to be low skilled workers, it is important that those qualifications achieved should be recognised. For example, work in the tourist branch can generate the need for specific qualifications. The decision to exclude education and vocational training from the equal treatment principle could also be discussed. Should seasonal workers be excluded from personal and professional development? In the advice given to host countries on how to govern labour migration, the ILO stresses recognition of qualifications and access to education.¹⁵⁶

It is clear that, with the exception of trade union related rights, the level of protection with regard to *employment relations* is much weaker in this proposal than in the adopted Directives. It appears that an already highly vulnerable group is not being given the necessary means either to develop and change status or to be treated decently. Consequently, there is a great risk that this EU directive will legalise the establishment of a sector with second class workers. Hopefully, this will not be the case and it is likely that at least some of these deficiencies will be removed before the adoption of the Directive.

4.3.1.4 Institutional security

The provision on equality of treatment with nationals includes the following social rights, which, to a certain extent, correspond with those provided for in the adopted Directives:

1. Rights conferred under national laws regarding the branches of social security as defined in Article 3 or Council Regulation (EC) No 883/04;
2. Payment of statutory pensions based on the worker's previous employment under the same conditions as nationals of the Member states concerned when they move to a third country;
3. Access to goods and services and the supply of goods and services made available to the public, except public housing and counselling services afforded by employment services (Art 16.2).

The ILO point to the fact that ensuring equal treatment for seasonal workers generally may require special adjustments to be made, for example, in terms of the qualifying period, the waiting period and duration of payment of unemployment benefits. Provision for such special adjustments has also been laid down in Article 24(4) of ILO Convention No. 102. Similar adjustments, therefore, can also be foreseen for migrant seasonal workers, not only in respect of unemployment benefits but also other benefits such as old age pension.¹⁵⁷

Seasonal workers are comparable to the workers covered by the adopted Directives provided with fewer rights: They are not guaranteed equal treatment with regard to tax benefits or social assistance.

¹⁵⁵ EMPL amendment 27 and 28

¹⁵⁶ ILO 2010, p 164, p 171.

¹⁵⁷ ILO Note p 5.

In the Commission proposal, no restrictions possibilities except for those included in point 3 are envisaged. It is, however, extraordinary that seasonal workers are excluded from public housing and counselling by employment services. How will they find new employment if they are subject to abuse? The 1 February text from the Presidency to the Council Working Group adds a further restriction possibility. The Member States should be allowed to exclude family benefits to seasonal workers.¹⁵⁸

Seasonal workers do not have any special rights with regard to family members. The most vulnerable workers are thus not allowed to bring their families if they are going to work for a 6 month season non even if they can support them independently during that time. This issue is has not being considered by the EP committees. Neither is there any provision for a route to a more secure migrant status. On the contrary, the aim of the Proposal is to ensure that these workers return home as soon as their permits expire, as will be further explored in the section on effective enforcement.

It is obvious that the level of *institutional security* is much lower in this Directive Proposal than in the adopted Directives. The possibility to restrict access to employment services and public housing may also limit the ability to exercise the right to change employer as stipulated in the *admission criteria*. The political support for strengthening these provisions is, worryingly, weaker than the support for strengthening the *employment relations* provisions and could potentially lead to further entrenching the vulnerable status of this group.

4.3.1.5 Effective enforcement

In the Seasonal Workers Proposal, in contrast to the adopted Directives, two sanctions are included. The sanctions are directed towards the seasonal worker and the employer, respectively. A *third country national* who has not complied with the obligations arising from the admission decision during a previous stay as a seasonal worker, in particular in relation to the requirement to return to the third country upon expiry of the permit, shall be excluded from admission as a seasonal worker for one or more subsequent years (Art 12.2.a). An *employer* who has not fulfilled the obligations arising out of the work contract shall be subject to effective, proportionate and dissuasive sanctions. Such employers shall be excluded from applications for seasonal workers for one or more subsequent years (Art 12.2.b). According to the explanatory memorandum, the exclusion must last at least one year. LIBE is proposing additional grounds for refusal connected to the employer. For example, where the employer, in previous years, failed to meet its legal obligations regarding working conditions or labour rights as provided for in national law.¹⁵⁹ Something similar to this proposal was included in the text which was negotiated by the Council Working Group in February.¹⁶⁰

¹⁵⁸ Council document 5613/12, MIGR 8 Soc 41 CODEC 171, Brussels 1 February 2012.

¹⁵⁹ LIBE amendment 31

¹⁶⁰ article 6.3.b. Council document 5613/12, MIGR 8 Soc 41 CODEC 171, Brussels 1 February 2012.

There are many different factors that cause seasonal workers to be vulnerable. One of the most important is the short period of their stay and the drastic implications of a loss of employment. The EP rapporteurs have proposed relatively far-reaching amendments in this regard. It is proposed that monitoring mechanisms are put in place and that adequate inspections are carried out to ensure that the provisions in the Directive are fully respected during the duration of the stay, with particular regard to rights, working conditions and accommodation,¹⁶¹

It can, however, be difficult for a seasonal worker, who is only permitted to stay in the country for a short time, to take legal action against the employer for not fulfilling the obligations arising out of the work contract. A complaints mechanisms needs to be put in place in order to make enforcement more effective,. The Seasonal Work Proposal therefore includes a provision according to which the Member States shall enable third parties, who have a legitimate interest in ensuring compliance with the Directive, to engage either on behalf of or in support of a seasonal worker, with his/her approval, in any proceedings provided that the objective is to implement the directive (Art17). The possibility to engage third parties in the process is justified by evidence which suggests that seasonal workers are often either unaware of the existence of such mechanisms, or are hesitant to use them on their own behalf, as they are afraid of the consequences in terms of future employment possibilities. A comparable provision is laid down in Article 9(2) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.¹⁶²

The EP rapporteurs are proposing to strengthen this provision further by the inclusion of a provision protecting seasonal workers against dismissal or other adverse treatment by the employer in reaction to a complaint or to any legal proceedings aimed at compliance with this Directive.¹⁶³ Such a provision would be an important step forward.

4.3.1.6 More favourable provisions

The Directive shall, according to the Proposal, apply without prejudice to the more favourable provisions of

- Union law, including bilateral and multilateral agreements concluded between the Union or between the Union and its Member States, on the one hand, and one or more third countries on the other
- Bilateral or multilateral agreements concluded between one or more Member States and one or more third countries
- The Member States are also entitled to adopt or retain more favourable provisions in relation to articles 13-17 in the Directive ie. the provisions on procedural safeguards, accommodation, movement related rights on the basis of the permit, rights on working conditions etc, and complaints mechanisms.

¹⁶¹ EMPL amendment 31, LIBE amendment 58

¹⁶² COM(2010)389 p 12.

¹⁶³ LIBE amendment 59 and 60 EMPL 32 and 33.

4.3.2 Intra-corporate transferees

In parallel to the Seasonal Workers Directive, the Commission presented a Proposal on Intra-Corporate Transferees (ICT). An intra-corporate transferee is a manager, specialist or trainee, temporarily seconded, from an undertaking established in a third country, to an entity belonging to the undertaking or group of undertakings inside the EU. Measures to attract highly qualified third country nationals, such as key staff of transnational corporations, are part of the broader framework set out in the EU 2020 Strategy.¹⁶⁴

Today, many multinationals wishing to transfer their personnel have, according to the Commission, encountered inflexibility and limitations compounded with wide differences between Member States in terms of conditions of admission and restrictions of family rights.¹⁶⁵ The treatment granted to intra-corporate transferees at the EU level, combined with the conditions and procedures regulating such movements, have an impact on the attractiveness of the EU as a whole and influence the decisions of multinational companies to conduct business or invest in a certain area.¹⁶⁶

The proposed Directive is specifically aimed at responding effectively and promptly to demand for managerial and qualified employees for branches and subsidiaries of multinational companies, by setting up transparent and harmonised conditions of admission of this category of workers; by creating more attractive conditions of temporary stay for intra-corporate transferees and their families; and by promoting efficient allocation and re-allocation of transferees between EU entities.

This Proposal is also intended to contribute to fulfilling the EU's international trade commitments, including specific rules on intra-corporate transferees.¹⁶⁷ Neither the EU-25 Commitments under the General Agreement on Trade in Services (GATS) nor the Economic Partnership Agreements are intended to cover exhaustively the conditions of entry, stay and work.¹⁶⁸ The large differences between Member States in terms of entry procedures and temporary residency rights could hamper uniform application of the international commitments to which the EU and its Member States have agreed in the WTO negotiations.¹⁶⁹

The proposal was welcomed by the two EP rapporteurs working on the file - the EMPL and LIBE rapporteurs. EMPL, however, have an important objection which will be discussed shortly.

4.3.2.1 Personal scope

Third country nationals posted by undertakings established in a Member State, within the framework of a provision of services in accordance with Article 56 of the Treaty and Directive 96/71/EC on the posting of workers are, inter alia, excluded from the scope of the proposed Directive (Article 2).

¹⁶⁴ COM(2010)378 p 4.

¹⁶⁵ Ibid p 3.

¹⁶⁶ Ibid p 7.

¹⁶⁷ Ibid p 2.

¹⁶⁸ Ibid p 3.

¹⁶⁹ Ibid p 7.

The Directive is aimed at highly skilled workers. Only managers, specialists or graduate trainees can be granted an intra-corporate transferee permit (Art 5 1 c, d and 11). The proposal has been criticised for being too vague, particularly with regard to the definitions of *specialist* and *manager*. This could leave the Directive open to abuse. The situation must be avoided where de facto a wide range of employees, could be able to work for up to three years in a subsidiary in a Member State.¹⁷⁰ The definitions should, according to the critics, also be aligned with the corresponding GATS definitions.¹⁷¹

4.3.2.2 Admission conditions

According to the Directive Proposal, in order for a permit to be granted, there must be proof, that the different entities between which the transfer shall take place belong to the same undertaking or group of undertakings; that the worker has been employed by the company for at least 12 months prior to the transfer, if national legislation so requires; and that the employee shall take up the required position, has the necessary qualifications and already has or has applied for sickness insurance (Art 5). The worker must also be provided with a remuneration at the same level as posted workers during the transfer (Art 5.2). The application can be rejected if the quota is filled. No vacancy test is, however, required.

It is proposed that the Member States determine whether the application is to be made by the third country national or by the host entity ie. the entity to which the third country national is transferred (Art 10) The application shall be submitted in a single application procedure. Simplified procedures may be available for up to a maximum of three years for groups of undertakings, recognised as such by Member States.¹⁷² The decision on the application must normally be taken within 30 days. For complex applications, the deadline may be extended for a maximum of a further 60 days.¹⁷³

An intra-corporate transferee permit is proposed to be valid for at least one year or less (if the duration of the transfer is shorter) and that it may be extended to a maximum of three years for managers and specialists and one year for graduate trainees.¹⁷⁴

It is proposed that the intra corporate transferee (ICT) be able to move between the Member States. The Proposal includes a right to perform the employment activity covered by the permit in any other entity belonging to the group of undertakings listed in a document that must be included in the application (Art 16). It also includes a right to carry out the assignments at the sites of clients of the entities belonging to the group of undertakings listed in the same document.¹⁷⁵ The

¹⁷⁰ EESC SOC /393 p 1.5 and 1.8, 4.15, EMPL p 3, amendment 10-14, PE464.975v02-00, 30.5.2011.

¹⁷¹ EESC p 5.1

¹⁷² Art 10

¹⁷³ Art 12

¹⁷⁴ Art 11

¹⁷⁵ Art 13

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duration of the transfer to the other Member State or Member States may, however, not exceed twelve months.¹⁷⁶ The free movement aspect of the permit is considered to be very important by both the LIBE and EMPL rapporteurs.¹⁷⁷

“This modus operandi will give rise to new and stronger collaborative and sharing mechanisms between Member States, which, as a result, will develop greater levels of mutual trust”.¹⁷⁸

It has, however, been underlined that, in order to avoid wage dumping, it is important that the transferee is paid the minimum salary applicable in the State where he or she is actually working.¹⁷⁹ The draft Directive suggests that the conditions applicable in the country issuing the permit should apply.

The admission conditions include no flexibility for the worker. The permit is dependent on the company. If the company decides to dismiss the worker, the permit will be withdrawn and there is no possibility for the worker to apply for another permit. The provisions related to movement are also in the hands of the employer. Consequently, the intra-corporate transferee is bound to his or her employer and the admission criteria have no value for the worker per se.

4.3.2.3 Employment relations

But what kind of status do the ICTs have? Are they a subset of third country posted worker or are they exercising free movement of labour. The starting point in the Commission proposal is clear. Intra-corporate transferees shall be entitled to the terms and conditions of employment applicable to posted workers in a similar situation, as laid down by law, regulation or administrative provision and/or universally applicable collective agreements in the Member State to which they have been admitted pursuant to this Directive.

Where collective agreements are not declared to be of universal application, 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 majority of representative employers' and labour organisations at national level and which are applied throughout national territory.¹⁸⁰ The formula from Art 3.8 in the Posting Directive (96/71) is obviously used here.

As indicated earlier, the two EP rapporteurs do not seem to be completely in agreement on this topic. The opinion of the EMPL rapporteur is clear: She “fundamentally disagrees with the Commission on what rules should be applied to

¹⁷⁶ Art 16.1 a.

¹⁷⁷ EMPL Draft Opinion, PE464.975v02-00 p 4, LIBE Draft Report PE464.961v01-00 p 21-22.

¹⁷⁸ LIBE p 22.

¹⁷⁹ See for example EESC SOC/393, p 5.12

¹⁸⁰ Art 14.1

the Intra-Corporate Transferees”¹⁸¹ and she specifies a number of arguments for this position:

- 1) It is not clear whether and to what extent the Posting Directive(96/71) applies to third country nationals;
- 2) In a situation where the Posting Directive is currently being reviewed, one may question the sense of referring to a piece of legislation which does currently not serve its original purpose any longer; and
- 3) While the Posting of Workers Directive is meant to ensure the free movement of services, the objective of the ICT Directive is to ensure the free movement of labour.

The Directive should, according to the EMPL rapporteur, follow the principle that third country nationals ought to be treated equally with Union citizens. The equal treatment principle should apply in relation to the nationals in the Member State where the ICT is currently working.¹⁸² The EMPL rapporteur is also clear about what kind of collective agreements should be taken as a reference point. She rejects th this part of the Proposal and puts forward a definition of collective agreement as “any kinds of collective agreements, concluded at any level, including at company level, in accordance with national legislation and practices of the host Member State, by the most representative social partners”.¹⁸³ The adopted EMPL opinion supports this position,¹⁸⁴which is also supported by the European Economic and Social Committee.¹⁸⁵ The LIBE is quiet on this topic. The level of Working conditions protected is technically the responsibility of the EMPL, although this did not prevent LIBE touching upon these issues with regard to the seasonal workers.

In some other areas, such as freedom of association and recognition of diplomas, certificates and other professional qualifications, the ICTs are guaranteed equal treatment (Art 14.2 a-b). Due to the temporary nature of their stay, equal treatment with regard to education and vocational training, were however considered irrelevant by the Commission.¹⁸⁶

The issue of whether there are justifiable grounds for treating the intra-corporate transferees as posted workers needs further discussion. In the following section the GATS provisions on similar working groups are presented in order to give a reference point. The conclusion from that overview is that there is no reason in the GATS for using the Posting of Workers Directive as a starting point. The Directive is adopted in order to safeguard the special requirements connected to the treaty’s regulation of freedom to provide services. The corresponding right to provide services according to GATS is constructed in a different way. Besides, the scope of this Directive is much wider than both the Posted Workers Directive and the GATS commitments, as it is not limited to transfers connected to services. Any

¹⁸¹ EMPL p 3.

¹⁸² Ibid and amendments 4 and 21

¹⁸³ EMPL amendments 16, 18, 19, 21.

¹⁸⁴ EMPL Opinion PE464.975v04-00, 12.12.2011, p 3 and, inter alia, amendments 37,

¹⁸⁵ EESC Opinion, SOC/393 p 1.5.

¹⁸⁶ COM(2010)378 p 11.

company can use this right to move workers, irrespective of whether it is producing toys or providing IT services. The Commission has anticipated that around 16,000 workers would be covered by the scope of this Directive. There is, however, no evidence that the figure cannot be much higher. It would be unfortunate if the equal treatment principle were set aside for a group, without any real arguments in favour of such a decision.

One question to be dealt with is, however, if Article 1.4 in the Posting of Workers Directive (96/71) has any role to play in relation to the ICTs. According to Article 1.4, undertakings established in a non-Member State must not be given more favourable treatment than undertakings established in a Member State. More favourable treatment should be understood as a level of protection below the minimum level provided for in the Directive. Nothing in this provision seems to include any limits for providing a more burdensome treatment i.e. providing the workers with stronger protection.

It is clear that the level of *employment relations* protected in this proposal is low. No equal treatment is guaranteed for working conditions. The workers are neither entitled to any rights connected to education nor to vocational training. They can stay in the EU for up to three years and it would be strange if they were to be deprived of a right to development during this time.

4.3.2.4 Institutional security

Equal treatment with regard to social rights is proposed to be provided for in the following way:

1. Without prejudice to existing bilateral agreements, national laws regarding the branches of social security as defined in Article 3 or Council Regulation (EC) No. 883/04. In the event of mobility between Member States and without prejudice to existing bilateral agreements, Council Regulation No. 859/2003 shall apply.
2. Without prejudice to Regulation No. 859/2003 and to existing bilateral agreements, payment of statutory pensions based on the worker's previous employment when moving to a third country.
3. Access to goods and services and the supply of goods and services made available to the public, except public housing and counselling services afforded by employment services (Art 14.2 c-e).

Due to the temporary nature of their stay, equal treatment with regard to public housing and counselling services from employment services were considered irrelevant by the Commission.¹⁸⁷

The proposal contains derogations from the Family Reunification Directive (2003/86) considered necessary in order to set up an attractive scheme for intra-corporate transferees. It provides for immediate family reunification in the first State of residence.¹⁸⁸

¹⁸⁷ COM(2010)378 p 11.

¹⁸⁸ Art 15 and Ibid p 11

The *institutional security* provided for in the proposal is formally stronger than the corresponding level for the seasonal workers due to the generous family reunification rights. The rest of the provisions, in general, correspond to the level in the Proposal on Seasonal Workers. But as there is no possibility for the ICT to change employer, the social rights will have no effect in a transitory situation.

4.3.2.5 Effective enforcement

There is no general enforcement provision included in the draft. This means that the general EU-law principles on effective enforcement will apply. There is, however, a provision in the draft clarifying that the Member States may hold the host entity responsible and provide for penalties for failure to comply with the conditions of admission. Those penalties shall be effective, proportionate and dissuasive (Art 8)

4.3.2.6 More favourable provisions

Beside the general provision which is included in all these drafts and directives on union law and different bilateral and multilateral agreements, the draft gives rather limited room for the Member States to adopt or retain more favourable provisions. That possibility is provided for in relation to Articles 3(i) on the definition of family members, 12 on procedural safeguards, 14 on rights and 15 on family reunification.

5 The right to post workers according to GATS

In this last section before the concluding remarks, some points in the WTO General Agreement on Trade in Services (GATS) will be presented. The reason for this is to illustrate that the GATS does not seem to include any obstacles to providing a robust equal treatment principle in the EU legal framework on workers from third countries. This is particularly relevant when discussing the EU draft Directive on Intra-Corporate Transferees.

The international trade in services is regulated by the WTO General Agreement on Trade in Services, GATS, which was adopted in 1995.

According to GATS a service can be supplied in four different modes (Article I.2. GATS);

- 1 - cross border supply,
- 2 - consumption abroad,
- 3 - commercial presence and
- 4 - presence of natural persons

GATS is based on a positive listing approach.¹⁸⁹ This means that a Member, in general, must make specific commitments which indicate to what extent the Member will be bound by the specific provisions in the treaty.

¹⁸⁹ M Panizzon, *Trade and Labour Migration – Gats Mode 4 and Migration Agreements*, Occasional Papers No 47/January 2010, Friedrich Ebert Stiftung, Geneva, p 12.

GATS divides services into 12 broadly defined sectors. These, in turn, are divided into a number of subsectors.¹⁹⁰ Each Member State can choose to commit itself to a limited number of sectors and subsectors and *to a limited extent*. In relation to a sector in which a Member State has made commitments, foreign service providers in that sector must, to the extent of the commitment, be granted access to that particular market (Art XVI GATS). Once a service is allowed access to a certain market, it must be treated no less favourably than national service providers (Art XVII GATS). Discriminatory treatment is considered to undermine market access for foreign competitors by distorting competition.¹⁹¹ The Member States, however, retain flexibility and can decide to limit, qualify and condition equal market access.

Also important is the most-favoured-nation (MFN) treatment obligation in Article II GATS, which is fundamental and general and applies to all commitments made. It basically means that any market access or national treatment offered to one Member should immediately be granted to all other WTO Members as well. Only if an original WTO Member scheduled an exemption from the MFN obligation in 1994, can that Member deviate from the MFN principle.¹⁹²

Mode 4 on the presence of natural persons is the mode for provision of services which will be discussed in this paper. Mode 4 covers natural persons who are service suppliers of a Member and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service (Art 1 Annex on movement of natural persons supplying services under the Agreement, hereafter referred to as ‘Annex’) The first group covers self-employed workers who are remunerated directly by the customers.¹⁹³ This discussion will be limited to the second group which covers workers employed and remunerated by the service supplier. It is, however, not necessary for the service supplier to have established a commercial presence in the territory where the service is delivered. Because of Mode 4’s connection to migration and domestic labour market policies it has been described as an “almost revolutionary approach” to place Mode 4 in the multilateral framework of the WTO.¹⁹⁴ It is, therefore, not so surprising that its scope is quite limited. The Annex states that the Agreement shall not apply to measures affecting natural persons seeking *access to the employment market* of a Member, nor shall it apply to measures regarding citizenship, residence or *employment on a permanent basis* (art. 2 Annex). The exclusion of those seeking access to the employment market of a Member State in our case simply means that the worker must already be employed by a service provider in another country to be covered by the provisions. There is

¹⁹⁰ Business services, communication services, construction, distribution, education, environmental services, financial services, health and social security, tourism and travel, recreational and cultural services, transport, other, World Trade Organisation doc. MTN.GNS/W/120, 10 July 1991.

¹⁹¹ S Tans, *The unwanted service provider: implementation of WTO and EU liberalisation of service mobility in the Dutch legal order*, Refugee Survey Quarterly, pp 1-29, 2011, pp 3-4.

¹⁹² Panizzon p 14

¹⁹³ Bast, Annex on movement of natural persons supplying services under the agreement, in WTO-trade in services R. Wolfrum, P-T. Stoll (eds), Max Planck Commentaries on World Trade Law; 6, 2008, p 579.

¹⁹⁴ Bast, , 2008, p 575.

no provision for unemployed persons to seek employment, for example, in an establishment set up through Mode 3 on commercial presence.¹⁹⁵ The regime is oriented towards foreign employment as foreign employment forms part of trade in services under GATS, while domestic employment, which is qualified as “labour migration”, is not.¹⁹⁶

Moreover, the persons covered by Mode 4 shall only stay in the other Members’ territory on a temporary basis. The GATS itself does not provide any information on how to define permanent stay. The decision has to be made on a case-by-case basis. The Members can limit the commitments on Mode 4 to specific categories of persons (Art 3 Annex). The categories of persons covered are mainly highly qualified, intra-corporate transferees and business visitors.¹⁹⁷ Others are contract service suppliers and other high-level management officials/specialists. The commitments made in relation to the different categories of persons can include time limits for periods of stay. These range from three months to five years. But a majority of commitments do not even include a maximum time limit.¹⁹⁸

The EU commitments with regard to Mode 4 are, in general, very limited and oriented towards highly skilled workers.¹⁹⁹ The potential of the application of Mode 4 is therefore far from being realised. The ILO has raised concerns about Mode 4 permitting differential treatment of workers, leading to discrimination.²⁰⁰ A main reason for taking up such limited commitments for Mode 4 seems to be fears over social dumping and competition with the national work force.²⁰¹ It has been suggested that the GATS’ scheduling structure is inadequately prepared for managing the risks associated with increased cross-border movement of persons, in particular unskilled labour; also, the binding of market access commitments on a Most-Favoured-Nation clause does not allow for flexibility, nor the possibility of control.²⁰²

The EU Member States, however, have used the flexibility provided with regard to market access in order to protect their domestic workforce from unfair competition.²⁰³ Conditions such as quotas and economic needs tests are frequent.²⁰⁴

The EU has ensured wage parity and equal working conditions for GATS migrants.²⁰⁵ A footnote to the consolidated schedule presented in 2006 reads “All

¹⁹⁵ Bast p 586.

¹⁹⁶ Panizzon p 27.

¹⁹⁷ World Trade Report 2004 Exploring the linkage between the domestic policy environment and international trade, p 46.

¹⁹⁸ WTO Report 2004 p 55.

¹⁹⁹ Tans, 2011 p 23.and 26.

²⁰⁰ International Labour Office, International labour migration, A rights-based approach, Geneva 2010, p 56.

²⁰¹ Tans 2011 p 27.

²⁰² Panizzon, p 9.

²⁰³ Panizzon p 14.

²⁰⁴ WTO report 2004 p 55.

²⁰⁵ Tans 2011, p 28.

other requirements of Community and Member States' law and regulations regarding entry, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements".²⁰⁶

This condition gives the EU Member States the right to condition the entry of Mode 4 service suppliers by safeguards connected to the application of national laws and collective agreements on wage and working conditions.

One question to be dealt with here is whether Article 1.4 in the Posting of Workers Directive (96/71) has any role to play in relation to the GATS commitments. According to Article 1.4, undertakings established in a non-Member State must not be given more favourable treatment than undertakings established in a Member State. More favourable treatment should be understood as a level of protection below the minimum level provided for in the Directive. It seems, however, that this provision is directed towards service providers operating in the EU Member States outside the GATS commitments or any other agreements concluded by the EU. Recite 20 in the preamble of the Directive states that the Directive should not affect the agreements concluded by the Community with third countries. As international agreements ratified by the Community take precedence over EC-legislation²⁰⁷ Article 1.4 does not seem to be applicable within the GATS context.

To sum up: The commitments related to GATS generate a very limited flow of workers.²⁰⁸ The stay is not permanent and the possible length of the stay differs between the EU Member States and between the different categories of workers. One starting point, however, is that the Mode 4 workers shall, according to the EU-25 commitments, be provided with the same level of working conditions, pay and social security protection as the national workforce. The scheme is connected to a specific employer and there is no provision for a permanent stay. After a certain period of stay, it should be possible for the worker to apply for a long-term residence permit. No specific rules on family reunification are included. The EU Directive on Family Reunification could apply. A few things can, however, be noted: Mode 4 is not about free movement of workers but about free movement of services - it does not generate any independent status for the worker-; the presence on other Members' territory is totally dependant on the workers' contract of employment with the service provider; The length of stay is also decided on a national basis.²⁰⁹

²⁰⁶ WTO, Council for Trade in Services, EU Consolidated GATS Schedule, footnote 17.

²⁰⁷ S Peers, EU Migration Law and Association Agreements, In B Martenczuk and S van Thiel (eds), *Justice, Liberty, Security-New Challenges for EU External Relations* (Brussels University Press 2008, p 59.

²⁰⁸ See inter alia Tans p 13. He points out that Gats Mode 4 type of work permit has never been granted in the Netherlands.

²⁰⁹ The EU has also concluded agreements with third countries which include provisions of services. In the majority of those agreements the EU has accepted the entry, residence and work of employees of agreement countries in subsidiaries and

6 Concluding remarks

Third country workers have been operating on the EU labour market for quite some time. Until recently, the admission criteria and working conditions for this workforce have been dealt with mainly on a national basis. Since 1999, this starting point has no longer been evident. The EU is trying to adopt common rules in this area in order to make the EU labour market more attractive for third country nationals and create a level playing field for everyone.

It is clear that the presence of the workforce from third countries in the EU Member States has effects on the national labour markets. Some Member States host large numbers of irregular migrants. They are present in a part of the labour market open to exploitation and corresponding abuse. Many Member States are, in parallel, opening up their labour markets for third country nationals in order to overcome skill shortages. When the EU is now trying to create a common, level playing field the ambition is to facilitate the application processes in order to make it both more attractive and also, in many ways, at all possible to apply for legal residence in a EU Member State. The positive effect of this exercise is, however, dependent on whether it will be supported by a robust rights-based approach. The overall question in this paper is whether the adopted and proposed legal framework fulfills that requirement.

The starting point for initiating this regulatory regime was that EU needs workers from third-countries. It may otherwise be difficult to maintain existing levels of economic productivity, to sustain pensions and social security systems and to find the caregivers required to meet the needs of an ageing population.²¹⁰ A common EU playing field would maximise the positive effects for all involved. This overview has illustrated how an initial strong equality principle with regard to working conditions and pay for the workers from third countries, proposed by the Commission in 2001, has been replaced by a segmented and fragmented legal framework treating workers differently. The Member States fear over losing control over their borders in combination with a fear of establishing a legal framework which would lead to opposite effects than those anticipated in terms of national unemployment and burdens on the welfare systems seem to have driven this development. Each proposal discussed has led to different results with regard to where the vertex is established.

We can conclude that this overview has revealed a number of different level playing fields concerning the rights guaranteed to workers from third countries admitted to work in the EU:

- 1) The very limited commitments made within the GATS system, where the EU Member States have safeguarded their right to enforce national

branches based in the EU where the employees meet the criteria of key personnel without time limits. For an overview from 2007 on the different agreements, see Elspeth Guild, *European Union and Third Party Service Trades: Four Essays on EU services*, in Quaker United Nations Office, April 2007, p 11 ff and p 24

²¹⁰ Migration in an interconnected world: New directions for action, Report of the global commission on international migration, 2005p 6.

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provisions on pay, working conditions and social security rights. The robustness of the system is difficult to evaluate as many dimensions are up to the individual Member State to decide.

- 2) The highly qualified workers who are provided with the most robust equality of treatment principle. They are at least in theory given some means to safeguard decent working conditions through a change of employer and the level of *employment conditions* and *institutional security* is relatively high.
- 3) The workers covered by the Framework Directive are provided with a fairly strong, formal equal treatment principle. Some parts of the rights discussed under the heading *institutional security* however weakens the protection in particular during the first six months of the stay. As the *admission conditions* are totally dependent on the decisions in the different Member States, it is difficult to evaluate the robustness of the equality principle. The robustness will vary depending on the choices made by the Member States.
- 4) It is proposed that intra-corporate transferees are provided with a less extensive set of *employment-related rights* than those workers covered by the adopted directives. They are also deprived of rights to education and vocational training. Their strong connection through the *admission conditions* to the employer weakens their chances of enforcing the rights provided. The level of *institutional security* provided for seems rather adequate. It does, however, not help the worker to enforce their rights because of the close connection to the employer.
- 5) It is not proposed that the seasonal workers be provided with working conditions equal to those of nationals. However, it seems that the negotiations will result in providing equality in this regard. Important parts of the *employment relation*, such as the right to education and vocational training and recognition of diplomas, are, however, not provided for. The short stay permitted according to the *admission conditions* is a severe obstacle in safeguarding the eventual equality principle. The right to change employer is helpful but of limited value if no right to keep the permit in unemployment is safeguarded and the employment services are closed for seasonal workers. The *institutional security*, at first glance, looks quite good. In reality, the Member State's conditions for obtaining the particular social security-related rights can leave the seasonal workers totally unprotected. The level of protection is also weakened by the facts that no right to family reunification is provided for and that no route towards a more secure status is envisaged.

It is clear that the different groups regulated will be provided with quite different levels of protection.

A common feature in the sectoral draft and adopted directives is that it is the employers who have major control of this process, as all application processes are demand driven. The worker needs a concrete job offer in order to receive the necessary permit. The governments keep part of the control through quotas and demands for vacancy tests. There must be a real economic need connected to admittance.

The highly qualified workers, however, are those closest to a robust equality principle. But despite that there are still weaknesses in their set of rights it has been argued that the Directive has justified a questionable disparity in the treatment of those workers and others, something that has raised concerns about potential discrimination.²¹¹ It is, of course, problematic if an EU regime for third country workers is being created that does not establish a legal framework robust enough to combat exploitation and social dumping. A heavy responsibility hereby rests on the Member States to complement the requirements of the directives with provisions safeguarding robust equality. The directives are, to varying degrees, minimum directives and, to a certain extent, weaknesses in the EU legal framework may be overcome by national measures. The absence of effective monitoring and enforcement requirements is an important example.

Still, a basic requirement ought to be that the third country nationals are guaranteed the same employment and working conditions as the national workforce. This overview has shown that this is not an evident starting point. Some third country national groups are excluded from the legal framework, based on equality of treatment with the national workforce - a starting point that has generated a lot of criticism and lacks a rational basis.

One of these excluded groups, the ICTs, is not supposed to be admitted to the EU labour market on a permanent basis and should therefore not, according to the Commission's proposal, be guaranteed more favourable rights than those provided to EU nationals operating on a temporary basis in another EU Member State's labour market.

One interesting thing, however, is that almost none of the third country nationals can be said to be operating in the EU labour market on a permanent basis. They are all supposed to return to a third country after a certain time, even if some forces want at least the highly skilled to remain. Their right to operate freely in the EU Member States' labour markets, while admitted to work there, is also very restricted.

It is quite strange that an ICT working in an EU Member State for three years should only be guaranteed those core rights provided for in the Posting Directive, while other labour migrants admitted for a shorter period should be guaranteed equal treatment. Giving the Posting Directive such far-reaching implications also seems inadequate. Exporting the already questioned advantages provided to service providers within the EU to all multinational firms regardless of their character, risks contributing to an increase in the part of the labour market not open to competition on the same terms as the rest.

Seasonal workers are also excluded from the equality of treatment principle. The argument for this decision is unclear. The vulnerability of this workforce makes it even more important that they are guaranteed equality of treatment, complemented

²¹¹ S. Carrera, A. Faure Atger, E Guild and D Kostakopoulou, *Labour Immigration Policy in the EU: A Renewed Agenda for Europe 2020*, CEPS Policy Brief, 2011, p 4.

by effective enforcement mechanisms. Demands for effective monitoring mechanisms and sanctions, including protective elements, have also been raised. The Commission's original proposal is characterised by a utility perspective quite different from what we normally mean when we talk about social Europe. Steps in the right direction will, however, not remedy the weak protection offered to seasonal workers in general in many Member States. The ETUC have argued that establishing robust national protection with regard to working conditions and pay for seasonal workers ensuring equal treatment between seasonal workers, locals and migrants would be a more accurate step.²¹²

The deficit with regard to effective enforcement mechanisms is something which characterises this whole package. The Member States seem to have a quite ambiguous attitude to this issue - on the one hand they are afraid that the third country nationals will out-compete the national labour force; on the other hand, they are not willing to ensure that they are competing on equal terms.

Another important element for safeguarding competition on equal terms is to make it realistic for the workers themselves to take steps to act when they are exploited or simply not paid what they are supposed to be paid. Employment protection, as well as the opportunity to obtain another job, is therefore crucial. The rules on labour market access and periods of admitted unemployment are important as a counterweight for the risks with demand driven labour migration.

In conclusion, we have an emerging legal framework which might facilitate the application procedures for third country workers. If the draft directives are not to be supplemented by a robust rights-based approach, it will be up to each Member State to decide on adopting such rights and effective enforcement mechanisms. Workers forced to compete on a low wage basis will be admitted to some countries and those who are not, to others. This could result in segmenting a segregated EU labour market and a detrimental development. The risk of this happening depends in how the relevant legal structures are organized in each Member State.

²¹² ETUC Resolution on equal treatment and non discrimination for migrant workers. Adopted at the Executive Committee on 1-2 December 2010.