The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights

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I. Introduction

On 26 February 2014, the European Parliament and the Council of the European Union adopted the Directive on the Conditions of Entry and Stay of Third-country Nationals for the Purpose of Seasonal Work (the Seasonal Workers Directive), which requires Member States to transpose the directive by 30 September 2016. The Directive sets out rules for the entry and stay for seasonal workers who are not EU citizens, although each Member State retains the right to determine the numbers of seasonal workers admitted to its territory. It also establishes a common set of rights to which seasonal workers are entitled during their stay in the EU. Thus, the Directive seeks to respond to the needs of Member States for a source of labour to fill the low skill, seasonal, and, typically, precarious, jobs, that are not attractive to EU residents and citizens, while simultaneously minimizing the possibility of avoiding the ‘economic and social exploitation’ of the third-country migrant workers by providing them with the set of rights, including the employment rights to which resident seasonal workers are entitled. At the same time, the Directive is designed to promote circular migration and to ensure that these low-skilled workers do not become permanent residents of the EU, while also stemming what is perceived to be a flood of irregular migrant workers into the EU. 23

What makes the Directive distinctive from an international perspective is that it is a supranational regulation for low-skilled temporary migration that gestures towards a circular migration program. The Directive is a binding legal instrument that limits the discretion of member states to impose admission criteria and requirements of stay on third-country seasonal workers, although it leaves the actual numbers admitted within the jurisdiction of the Member State. 4 It is this constraint on national sovereignty over admission criteria and conditions of stay that is relatively rare in a binding international

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4 There is no EU competence over this matter, Article 79.5 TFEU.
agreement. From the standpoint of the EU, which is itself a sui generis supranational political and legal institution, what is remarkable about the Directive is the extent to which it combines immigration law, which regulates entry and stay in a territory, with labour law, which governs the rights of workers. In this paper, we argue that these two distinguishing features of the Directive are clearly discernable in its substantive provisions and that these provisions exemplify the tension between immigration and labour regulation in a supranational context. Moreover, we claim that this tension, which is exacerbated by the different interests and expertise of the various EU institutions involved in the drafting and adoption of the Directive, tends to compromise the achievement of several of the EU’s explicit objectives in adopting the Directive, namely, the establishment of a level playing field for the recruitment of seasonal migrant workers across the Member States, a truly circular managed migration program, and the protection of migrant workers from economic and social exploitation.

Our paper begins by providing a brief overview of the history of the Directive, focusing on the stated objectives of the various EU institutions and Member States involved in its adoption. The successive incarnations of the Directive over the three and a half years that elapsed from the Commission’s initial proposal to its adoption illustrates the extent to which different institutions emphasized different, and not always compatible, objectives, and how these objectives changed over time. After the furnishing this context, we proceed to examine the content of the Directive. In doing so, we divide the provisions contained in the Directive into two general types: those pertaining directly to immigration (conditions for admission and stay) and those we characterize as the ‘labour law’ elements of the Directive (protections of migrant workers from economic and social exploitation). We also discuss hybrid provisions in which immigration controls are used to enforce migrant workers rights. Our goal is to identify and to evaluate the extent to which the different stated goals of the Directive are embodied within its express provisions. In our analysis, we emphasize a distinctive drafting style or technique utilized throughout the Directive, in which general mandatory provisions (‘shall’ clauses) are followed by permissive provisions (‘may’ clauses). This style allows the Members States a considerable flexibility or margin of appreciation when it comes to transposing the Directive, and we suggest that this technique is not only attributable to the Treaty basis of the Directive, which determined the legislative process and key institutional actors involved in it, but the increasingly fissiparous nature of the enlarged EU itself. We conclude by summarising the main goals embodied in the adopted Directive and speculating on what the adoption of this Directive means for the future of the EU’s immigration policy.

II. The Institutional and Legal Context of the Seasonal Workers Directive

1. The Background and Aims of a Seasonal Workers Directive

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5 The provisions on free movement on workers within the EU itself (Article 45 TFEU) is a unique aspect of a common market agreement, and for this reason there is a logic behind the adoption of a common immigration policy.
In 1999, the EU dropped its position opposing labour migration from third countries. Demographic change combined with labour and skill shortages required a new strategy in order to increase the competitiveness of the European Union. The Tampere European Council emphasized the need for rapid decisions on ‘the 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’. The focus was on ensuring that the European labour market functioned as efficiently as possible. However, another aim of this policy direction was to secure legal status for temporary workers who intended to return to their countries of origin, while at the same time providing a pathway leading eventually to a permanent status for those who wish to stay and who meet certain criteria. Admitted workers should also be provided with broadly the same rights and responsibilities as EU nationals in a progressive manner related to length of stay.

These aspirations regarding labour migration were part of an overall ambition to develop a common EU policy on asylum and migration. Not surprisingly, therefore, the Commission’s first proposal to regulate labour migration was characterized by uniform admission rules intended to replace national labour migration schemes.

However, Member States did not share these far-reaching ambitions, and the Commission had to draw back its proposal in the face of their criticism that this proposal went way too far in proposing harmonized admission criteria for labour migrants. The fact that at that time unanimity on the Council was required in order to adopt immigration admission provisions helps to explain the Commission’s decision to retreat. Ryan suggests that the Commission was unable to convince the Member States that common admission rules were necessary to overcome national diversity because, at that time, the connection between their labour markets was not sufficiently strong.

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8 Presidency Conclusions (fn 6) para 10.
11 A Faure Atger, Competing Interests in the Europeanization of Labour Migration Rules in E Guild and S Mantu (eds) Constructing and Imagining labour migration: perspectives of control from five continents (Farnham Ashgate, 2010)157-174, 162.
However, encouraged by the European Council in The Hague, the Commission continued with its ambition to adopt a policy plan for economic migration, but this time it adopted a new strategy. After in-depth consultations with the Member States and other stakeholders, it presented a policy plan for legal migration in 2005, stressing that certain sectors were already experiencing substantial labour and skill shortages that could not be filled within the national labour markets and citing Eurostat projections of even worse shortages in the future. The Commission underlined the possibility that the admission of third-country nationals in one Member State may affect the labour markets of other Member States.

The 2005 package only addressed the conditions and the procedures of admission for few selected categories of economic immigrants, adopting a sector-specific approach. One of those categories was the seasonal workers, who were considered to be regularly needed in certain sectors, mainly agriculture, building, and tourism. The goal of the proposal was to provide Member States with a supply of labour while at the same time granting a secure legal status and a regular work prospects to the immigrants concerned, and thereby protecting a particularly vulnerable category of workers, as well as to contribute to the development of the countries of origin. The Commission argued that even with high unemployment, few EU citizens and residents were willing to engage in seasonal activities and, thus, admitting this category of immigrant workers would rarely conflict with the goal of employing EU workers.

Despite the encouragement of the European Council at The Hague for harmonized admission rules for third-country migrants and the hard work of the Commission to convince Member States that such rules were in their self interest, when it came to concrete proposals the Member States were not enthusiastic. The fierce struggle by the EU to obtain some competence over immigration in the Treaty of Amsterdam continued to run up against the refusal of Member States to cede control over its prerogatives.

In parallel to these discussions on harmonized rules for the admission of seasonal workers from third countries, the Commission was considering the links between migration and development. In this context, it examined the possibility of defining a

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13 European Council conclusions in Haag, Annex I, § III 1.4. “Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the Lisbon strategy”.


15 Ibid.

16 Ibid 4 – 5. The sectors are highly skilled immigrants, seasonal workers, and intra-corporate transfers. Also a Framework directive including a single application procedure and a set of rights for labour migrants was proposed. These proposals have led to adopted directives.


18 Ibid.

19 Guild 2004 (fn 10) 211.
general framework for the entrance and short-term stay of seasonal migrants within the common area. Thus, a directive on seasonal employment was only one method of attracting a much-needed workforce to the EU.

In 2007, a communication on circular migration and mobility partnerships between the European Union and third countries was adopted, which stated that the way forward was for the EU to conclude mobility partnership agreements with specific third countries that would, for example, facilitate the access of these nationals to Member States’ labour markets. Admission quotas reserved for the nationals of third countries that entered into Partnership Agreements were among the measures mentioned, as was their more favourable treatment when it came to the admission of certain categories of migrants. The Communication regarded mobility partnerships as a way of fostering circular of migration. The introduction in a directive of a multi-annual residence/work permit for seasonal migrants, allowing them to come back several years in a row to perform seasonal work, was the main measure to foster circularity. Bilateral agreements were also encouraged.

Before the Commission could actually propose a directive pertaining to the admission of seasonal workers from third countries it needed another legislative route than the one envisaged in the Amsterdam Treaty since the competence over immigration required a unanimous decision by the Council. The entering into force of the Treaty of the Functioning on the European Union (TFEU) in late 2009 provided this change so that the exercise of this competence was via the ordinary legislative process where the Council adopts decisions by qualified majority and in agreement with the European Parliament. Without this change, it is doubtful that the Directive could have been adopted. Not surprisingly, several Member States were very reluctant to adopt legislation imposing common immigration criteria. By contrast, the strong support of the European Parliament for a common immigration policy, and especially, one that is very protective of workers’ rights, is remarkable.

Moreover, as we shall discuss in the next subsection, the Treaty not only established how competence over immigration is divided between the EU and Member States, and the legislative route the Directive took, but also the key institutional actors involved in its negotiation.

In 2008, the European Council adopted the European Pact on Immigration and Asylum and in 2009 the Stockholm Programme reiterated the Commission and Council’s

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22 COM(2007)248, 5 and 7. Circulat migration is the temporary and typically repetitive movement of migrant workers between home and host countries.
23 Ibid, 10.
commitment to implementing the Policy Plan on Legal Migration.\textsuperscript{25} This was the context in which the Commission proposed a text for a directive on seasonal employment in 2010.\textsuperscript{26}

The Commission’s explanatory memorandum reiterated the structural need for seasonal work in the EU, for which a supply of such labour from within the EU was expected to become less and less available.\textsuperscript{27} The agricultural sector in particular was earmarked as experiencing high job losses.\textsuperscript{28} The explanatory memorandum also emphasized the extent to which migrant workers already conducted work in the agricultural sector in the Member States, noting that a large proportion were irregular migrants. The directive would provide a route of lawful economic immigration for this group of seasonal workers and thus encourage legal, as opposed to irregular, migration.\textsuperscript{29}

However, some rationales for the directive, especially those that expressed the desire of Member States to avoid permanent settlement by low-skilled workers and maintain prevailing (low) wages in seasonal sectors, that did not make it into the Commission’s proposal were identified in the impact assessment.\textsuperscript{30}

The impact assessment also stressed the importance of establishing a level playing field across the Member States. At least 20 Member States had specialized, and widely diverging, admission schemes for seasonal workers. Such wide divergence was regarded as hindering the efficient allocation of seasonal workers since migrant workers would most likely be attracted to Member States with easier admission or renewal rules (or where detection of irregular status was less likely), instead of going to where their work was needed most.\textsuperscript{31}

2. The Treaty Basis

Article 79.1 of the Treaty of the Functioning of the European Union (TFEU) provides that the European 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. However, the

\textsuperscript{25} The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115 of 4.5.2010.
\textsuperscript{26} COM(2010)379.
\textsuperscript{27} COM(2010)379, 2-3.
\textsuperscript{31} Ibid, 8 and 12.
The right of Member States to determine the volumes of admission of third-country nationals coming to seek work is preserved (Article 79.5).

These provisions are part of the title in the Treaty on the Functioning of the European Union (TFEU) on an Area of Freedom, Security and Justice. Competence over the adoption of legislation pertaining to conditions of employment for workers from third countries is also granted in the title on Social Policy through Article 153.1.g. TFEU. A key difference between the legislative processes under the two titles is that the social partners do not play a treaty-based role in the legislative process under the Area of Freedom, Security and Justice title. By contrast, before the Commission can submit a new legislative proposal based on the Social title, it must consult with the social partners (Article 154.2-3 TFEU).32

The Seasonal Workers Directive is based on Article 79.2 a and b in the TFEU, which gives the EU competence to legislative with respect to the conditions of entry and residence and on the rights of third-country nationals residing legally in a Member State. It was adopted by the ordinary legislative process (Articles 79, 2; 289 and 294 TFEU), which meant that the Council and the European Parliament had to agree on the outcome and that the Council decision was subject to the qualified majority. The Employment Committee in the European Parliament proposed to add article 153 to the legal basis.33 If the Social title had been used as the basis for the Directive, the Council would have only been required to consult with the European Parliament, although its decisions would have been subject to the requirement of unanimity. However, the Social title would have provided only a limited legal basis for the Directive, which would not have included the provisions regulating the admission of third country nationals. There were also other obstacles that prevented the addition of article 153 to the legal basis.34

The ordinary legislative process that was used for the Directive gives the European Parliament a very strong role. As we will show, those provisions in the Directive that can be characterized as ensuring minimum conditions of employment increased during the lengthy legislative process at the behest of the Parliament. Moreover, the fact that the qualified majority was in play facilitated the achievement of a more harmonized directive than the requirement of unanimity would have permitted.35

3. The Negotiations Over the Seasonal Workers Directive

32 Moreover, under the Social title, the social partners can also take over the initiative and negotiate an agreement on the matter (Articles 154.4 and 155 TFEU).
33 Committee on Legal Affairs, Verification of the legal basis of the proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, 23.11.2011, PE473.853.
34 Ibid, 5f.
This legal basis under which the Directive was adopted situated it within immigration, and not the labour law, policy and this policy context influenced which specific entity in each of the EU institutions that had responsibility for negotiating the Directive. Within the Commission, the Directorate of Home affairs and Commissioner Malmström were responsible for the Directive.\(^{36}\) In the Council, the first level of the negotiations took place in the Working Party on Immigration, Migration and Expulsion related to the Justice and Home Affairs Council. The final decision by the Council to adopt the text was actually taken by the Council of Agriculture but under the heading Justice and Home Affairs.\(^{37}\) In the European Parliament, the committee on Civil Liberties Justice and Home Affairs (LIBE) was responsible for preparing the Parliamentary Report. However, the Committee on Employment and Social Affairs, which is responsible for labour law issues, influenced the Parliament’s final proposal.\(^{38}\)

The fact that the original proposal was elaborated within Commissioner Malmström’s cabinet helps to explain why the initial provisions limiting Member States’ control over their borders were so far reaching and the labour law provisions were so weak. In fact, the original proposal did not contain any requirement that migrants be entitled to be treated as equals with national workers with regard to working conditions.\(^{39}\) The ILO criticized the initial proposal for this reason.\(^{40}\) Moreover, if adopted, the original proposal would have likely been in violation of basic human rights prohibition against of discrimination, for example the EU Charter of Fundamental Rights.\(^{41}\) Early on in the negotiations, the Member States, strongly backed by the European Parliament, made it clear that they supported an amendment providing seasonal migrant workers with equal treatment with nationals when it came to terms and conditions of work.

The main thrust of the original proposal was to provide a labour supply for the internal market in order to foster economic growth. Every year about 100,000 third-country nations are admitted into EU Member States as migrant workers. The goal was to abolish obstacles to the EU’s productivity and the provisions in the proposed Directive that were designed to achieve it were harmonized admission rules (Articles 5 and 11) and rapid (maximum of 30 days) admission procedures (Article 13.1), and a facilitated re-admission procedure (Article 12). These provisions had far reaching implications for the Member States’ control of their borders and it soon became clear that the Member States considered the proposals to go too far. For the first time, the Commission faced significant direct opposition to one of its initiatives from national parliaments under the ‘yellow card’ procedure newly introduced by the Treaty of Lisbon (Article 6 of the

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\(^{36}\) http://ec.europa.eu/dgs/home-affairs/what-we-do/index_en.htm


\(^{38}\) Compare the texts in the Report by the LIBE-rapporteur Claude Moraes A7-0428/2013 and the text which was the result of the EP-orientation vote which was part of the trilogue see column two in doc 15033/13, 25 October 2013.


\(^{40}\) The ILO note is included in Council doc 9564/11, 2 May 2011, 4.

\(^{41}\) Guild et al 2012 (fn 35) 181.
amended Protocol 2 on the Application of the Principles of Subsidiarity and Proportionality). This procedure can force the Commission to review its proposal if at least one-third of national parliaments state within eight weeks of the date of transmission of the legislative proposal that they consider that the proposal does not comply with the principle of subsidiarity. Despite missing the deadline for forcing a review, the Member States had sent a clear message to the Commission that the Directive was extremely controversial. However, throughout the negotiations the Member States and the Commission continued to struggle over important aspects of the admission processes.

The Member States and the Commission shared an interest in combating irregular migration – a theme that was also evident in the negotiations. However, they differed over the appropriate means to achieve this end. The Commission, along with the European Parliament, wanted to promote circular migration since the entitlement to return the following year was seen as a carrot to encourage seasonal workers go back home. The European Parliament went even further, proposing that during a transitional period irregular migrants would be given the right to apply for a seasonal work permit from inside of a Member State. But, Member States would not accept these incentives as the appropriate means for combating irregularity, preferring instead to use whips.

Member States also feared that employers who were located in third countries, beyond their direct supervision, might abuse the Directive by sponsoring workers who were not really seasonal workers. Although Member States maintained control of the number of migrants who would be admitted under the Directive, they would be required to adopt specific and, for many Member States, facilitated procedures for admitting seasonal workers. By excluding specific kinds of working arrangements from the scope of the Directive, some Member States hoped to minimize the risk that the Directive would be abused.

42 Monar recounts that a number of national parliaments, including Austrian, British, Czech, Danish, Dutch and Polish chambers, raised their concern that the proposed Directive violated the principle of subsidiarity by interfering with different national labour market needs and policies, and compromising the right of Member States (according to Article 7(5) TFEU) to determine volumes of admission of third country nationals for work purposes. However, as the Member States did not meet the deadline, the Commission could ‘limit its response to a measured refutation of the parliaments’ concerns and a vague hint at potential “further improvements” of the text’. J Monar ‘Justice and Home Affairs,’ (2011) 49 Journal of Common Market Studies 145-164, 152.

43 See, for example, Council doc 6651/12, 27 February 2012, 31 on article 13 footnote 87.

44 From the beginning, combating irregular migration has been an important part of a common EU immigration and asylum policy. It has been considered to be a necessary condition due to the lack of border control between the EU-member states, see for example R Cholewinski, The EU acquis on Irregular Migration- Ten Years On in E Guild and P Minderhoud (eds) The First Decade of EU Migration and Asylum Law (Martinus Nijhoff Publishers Leiden, 2012)175.

The Member States’ aversion to either formulating or limiting the kind of sectors to which seasonal workers could be recruited must be understood in light of their goal of maintaining the greatest degree of control over the scope of the seasonal workers schemes. Their wish to maintain control over the inflow to their labour markets was accompanied by their desire to organize their labour markets without any EU-based restrictions. The highly contentious discussions over the impact of posted workers on the EU labour market made it obvious, at least, to the European Parliament that enforcement mechanism are absolutely essential if migrant workers are to enjoy the labour standards set out in a directive. In particular, migrants whose presence in a host country is dependent on another party – as is the case with posted workers who depend on the service-provider and third country nationals who depend on an employer in the host country – may not claim their rights since claiming them may jeopardize their ability to stay and work in the host country. This was a key concern of the European Parliament; however, Member States wanted to maintain their flexibility and did not want to be tied to any particular enforcement mechanism. In order to reach an agreement, the provisions relating to the enforcement of working conditions were split into mandatory and optional provisions.

III. Analysis of the Seasonal Workers Directive

In this section we examine the key provisions of the Directive that was ultimately adopted with the goal of identifying the trade-offs that were made during the negotiations by the different EU institutions and the Members States. The analysis is divided into two parts, the first in which we appraise those provisions that primarily concern immigration control, which are the conditions of entry and stay pertaining to migrants, and the second, where we discuss those elements that are primarily directed at ensuring that the migrants enjoy labour and social protection. In each section we identify those hybrid provisions where immigration controls are used to enforce migrant workers’ rights.

1. Immigration Controls

It is important to recall that Member States are free under the Directive to determine the volume of admissions. However, if a Member State decides to admit seasonal workers, it is bound to adopt a procedure that is consistent with the Directive. Since the Directive is designed to facilitate the supply of seasonal workers to fill an unmet demand, the system is employer-driven, subject to the Member State’s overarching authority to set the number of entrants and impose a labour market test (Article 8.3). As our discussion of the elements of the Directive will illustrate, while the Commission was concerned to

47 See for examples in the chart the amendment proposals nos. 61, 77, 85, 94, 96 and 97 on Articles 7, 12a on sanctions, 16 on back payments, 16a on monitoring and inspections, 17 on complaints mechanisms, Council doc 6312/13, 12 February 2013.
48 Article 7. This is a consequence of the fact that the EU has no competence on the issue of volumes (Article 79.5 TFEU).
harmonize admission criteria and to create transparent and simple rules, the Parliament’s chief objective was to add criteria for admitting seasonal workers and reasons for withdrawing employers’ permission to employ them that were designed to protect the migrant workers from potential exploitation. Member States, on the other hand, wanted to avoid administrative burdens in the admissions process, as well as to retain control over the decision over which migrants would be allowed to enter their territory.

**The Scope of the Directive**

Two key concerns arose during the negotiation over the scope of the Directive. The European Parliament wanted to ensure that the sectors covered by the Directive were specified, and that any extension of the Directive to new sectors should depend upon the involvement of, and consultation with, the social partners.\(^49\) The majority of the Member States wanted temporary work agencies and workers posted from third countries excluded from the Directive.\(^50\)

The Directive only applies to third-country nationals who reside outside the territory of the Member States (Article 2.1). Seasonal workers are required to retain their principal place of residence in a third country and to ‘temporarily carry out an activity dependent on the passing of the seasons, under one or more fixed-term contracts concluded directly between the third-country national and the employer established in the particular Member State’ (Article 3.b). An activity dependent on the passing of the seasons is defined as ‘an activity that is tied to a certain time of the year by a recurring event or pattern of events linked to seasonal conditions during which required labour levels are significantly above those necessary for usually ongoing operations’ (Article 3.c). When transposing the Directive, Member States must list those sectors that are considered to be seasonal, and, if appropriate, the list should be drawn up in consultation with the social partners (Article 2.2). The preamble indicates that ‘activities dependent on the passing of the seasons are typically to be found in sectors such as agriculture and horticulture, in particular during the planting or harvesting period, or tourism, especially during the holiday period’ (recital 13).

The Parliament was only partially successful in achieving its goal as the Directive gives Member States a great deal of flexibility to determine which sectors are seasonal, and only contemplates a limited role for the social partners. By contrast, the Member States were successful in ensuring that third-country based agencies or other third-country based service providers are excluded from the scope of the Directive.\(^51\)

However, the situation with respect to posting seasonal workers from one Member State to another is, perhaps, less clear. The Directive explicitly excludes posting within the EU.

\(^{49}\) Council doc 6312/13, 12 February 2013, amendment 40.
\(^{50}\) Council doc 5611/12, 23 January 2012, proposed articles 2.2. a and b.
\(^{51}\) This is the effect of the requirement that the employment contract be concluded directly with an employer in the Member State where the permit is issued and the work should be carried out, which was the wording contained in the original version of the Directive.
from its scope (Article 2.3.a), and a critical question is whether this exclusion prohibits an employer who has a contract with a seasonal worker from posting that seasonal worker to another Member State. The European Parliament unsuccessfully tried to include such an explicit prohibition in Article 2. One problem with interpreting the Directive to include such prohibition is that it would mean that employers employing seasonal migrants would be restricted from providing services in another country. Since the starting point for other service providers is that legally residing third country workers can be posted, the right under Article 56 of the TFEU of employers to provide services would be limited. Recital 11 confirms that such a limitation was not intended and it is not likely that the legal basis of the Directive (Article 79) can be used to limit the mobility rights of service providers.

Although employment agencies based in third countries cannot hire out seasonal workers to the EU using permits based on this Directive, it is possible for a Member State to allow employment agencies based in the Member State to avail themselves of the procedures adopted under the Directive. This practice is permitted under Recital 12 of the preamble, which was introduced after a few Member States objected to the explicit exclusion of employment agencies from the scope of the Directive on the ground both that this decision should be left to them and that workers who are employed through agencies should be protected under the Directive.

Is the Directive the Exclusive Means for Member States to Admit Seasonal Workers From Third Countries?
Does the Directive prevent Member States from using other procedures for admitting seasonal workers or is it the exclusive procedure? The answer to this question is critical for determining whether the Directive met the central objective of creating a level field for the recruitment of seasonal workers across the Member States, and it depends upon the type of seasonal workers immigration scheme under consideration. When discussing the linkage between migration and development, the Commission made it clear that the Directive was designed to complement, and not to replace, multilateral partnership agreements and bilateral agreements between the EU and/or one or more Member States, on the one hand, and third countries on the other. The only requirement is that the agreement ‘adopt or retain more favourable provisions for third-country nationals’ (Article 4). Member States can continue to give priority to migrant workers from specific third countries, and here we can see that development goals compromised the aim of achieving a level playing field.

However, the Directive prevents Member States from admitting seasonal workers through other temporary migration schemes. Three factors help to explain why the Commission succeeded with this ambition in relation to the seasonal workers in contrast

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52 Council doc 6312/13, 12 February 2013, amendment 42.
54 Council doc 5611/12, 23 January 2012, proposed Article 2(b).
to the result in the Blue-Card Directive, where it was unable to ensure that highly skilled workers exclusive access to the EU was via the Blue-Card Directive.\textsuperscript{55} Because the Blue Card Directive was adopted before the Lisbon Treaty entered into force, it required a unanimous decision in the Council, unlike the Seasonal Workers Directive, which only needed a qualified majority.\textsuperscript{56} Another, perhaps more compelling, reason why the Commission succeeded in making the Seasonal Workers Directive the exclusive route, outside of partnership and bilateral agreements, for admitting seasonal workers is that the competition amongst Member States for low-skilled workers is not as fierce as it is for their highly skilled counterparts. And finally, as our discussion will illustrate, the Directive gives Member States a great deal of discretion in implementing many of its provisions, a discretion which a Member State can use to makes its seasonal workers’ immigration regime more attractive than that of other Member States.

\textit{Harmonizing Admission Rules}

The Commission’s primary objective was to establish harmonized admissions procedures that are designed to facilitate the entrance of seasonal workers to the European labour market. Common rules across the Member States would enable migrant seasonal workers to change destination easily from year to year in response to Member State demands. Moreover, if the rules are simple and transparent, which would facilitate admission, the Commission reasoned that seasonal migrant workers would not only choose to work in EU Member States, but that they would enter the EU territory through the legal route. In this way, harmonized rules to facilitate admission served a dual purpose.

Although both goals are important with respect to any group of migrant workers, ensuring fair competition for labour supply is more compelling with regard to highly skilled workers, whereas stemming the flow of irregular migrants tends to have greater purchase with respect to low-skilled workers. For example, the goal of allocating migrant workers to Member States with the highest demand has led to a discussion, in the context of highly skilled workers and intra-corporate transferees.\textsuperscript{57} of mobility within the EU as a necessary next step.\textsuperscript{58} However, easing up the EU-internal border control in relation to low-skilled workers was never on the agenda, which is not surprising in light of the reluctance of some Member States to accept even harmonized admission rules with exhaustive lists of admission criteria.\textsuperscript{59} Seasonal workers will have to be satisfied with a right to enter, stay and to free access to the territory in and of the Member State that issued the authorization (Article 22).

\textsuperscript{55} Art 3.4 in Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.


\textsuperscript{57} Art 18 in the directive 2009/50/EC and article 23 in the directive 2014/XX/EU the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer.

\textsuperscript{58} But – the limited use of EU intra mobility by EU workers could contradict this, see a reasoning in this, Ryan 2007 (fn 14), \textit{XX}.

\textsuperscript{59} Council doc 10164/11, 17 May 2011, 2.
The Commission pushed for common admission criteria, and this objective was also voiced early in the negotiations by the Presidency, which emphasized that unless the Member States adopted an exhaustive list of criteria for admission, refusal, withdrawal, or non-refusal Member State discretion would undermine the objective of common criteria. When faced with Member State support for permissive ‘may’ clauses over mandatory ‘shall’ clauses with respect to admission criteria, the Presidency reminded the Member States of the need for a transparent and simple admission procedure and criteria that would not entail any disproportionate burden on the migrant worker.  

Quite late in the negotiations, it became apparent that the admission rules had to take the Schengen acquis and the Visa code into account, which meant that different provisions would apply depending on whether or not a Member State applies the Schengen acquis in full and the length of the migrant’s stay (three months being the critical cut off). Thus, the Directive includes six different routes to seasonal employment in a EU Member State. However, for those workers who are admitted for stays of longer than 90 days the Directive defines both the conditions for admission to and stay in the territory and the criteria and requirements for access to employment in the Member States (recitals 19-22) Rather than reviewing the differences in admission criteria imposed by the Directive on stays under three months and stays exceeding three months, we will concentrate on the admission requirements as they pertain to stays in excess of 90 days.

Although the admission criteria are the same, Member States have the flexibility to choose what to call the authorization to work – a long stay visa, indicating that it is for seasonal work; a seasonal work permit; and a seasonal work permit and a long stay visa. – as well as how to structure it. However, in order to provide a clear and transparent admission system for seasonal workers, the Directive requires Member States to select only one of the options (Article 12).

Admission Criteria
The admission system contemplated by the Directive is employer driven, subject to the Member State’s right to impose limits on the numbers of migrants admitted. Some Member States did not want the Directive to impose an obligation on them to take a positive decision during the admission procedure, even if the third-country national would fulfill all the criteria.  But these arguments did not achieve the necessary support.

It is up to the Member State to decide whether the employee or the employer is required to submit the application (Article12.3), although it is mandatory for the application to be accompanied by a valid work contract or a binding job offer (Article 6.1.a). Moreover, these documents must provide specified information, and it is here that the European Parliament’s ambition to safeguard the workers’ rights had an impact. Although the Commission’s original proposal required the contract to stipulate the remuneration and hours of work, the Parliament also ensured that the contract or offer includes the place

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60 Council doc 10164/11, 17 May 2011, 3.
61 Ibid, 2.
and type of work, the duration of the employment, and the amount of any paid leave.62 Furthermore, the Council added the requirement that these conditions conform to applicable laws, collective agreements and/or practices (Article 6.2).

These provisions ensure that migrant workers know what to expect and gives them a way to prove the conditions of employment in the event of a dispute. However, it is unclear what legal effect these documents will have. In some jurisdictions, such as Sweden for example, a job offer entered into as part of the immigration process does not have legal effect, only the contract of employment does.63 Unless these documents are legally enforceable, this requirement will not have much value as a form of protection. However, the reference to national law and collective agreements also boosts the equality principle, which is the core of a rights-based protection approach to migrant workers schemes.64

The Directive also requires that the applicant demonstrate that the migrant is covered by health insurance (Article 6.1.b), has adequate accommodation (Article 6.1.c), and has sufficient resources without having recourse to the social assistance system (Article 6.3). The Member State is also required to verify that the third country national does not present a risk of illegal immigration (Article 6.5) and that he or she has valid travel document (Article 6.7). Article 6.5 states that ‘third-country nationals considered to pose a threat to public policy, public security or public health hall not be admitted. Even here some permissive ‘may’ provisions made their way into Directive, and they relate to the details of the travel document and proof of having the necessary skills for regulated professions (Article 6.6, 6.7).

Article 20, which is linked to the admission criteria under Article 6.1.c, is designed to ensure that employers do not exploit migrant workers through excessive housing charges or providing unacceptable accommodation. It provides that ‘Member State shall require evidence that the seasonal worker will benefit from accommodation that ensures an adequate standard of living according to national law/and or practice for the duration of the stay’. It is within the discretion of the Member State to determine whether workers are free to arrange their own accommodation or whether it is the employer’s responsibility. However, if the employer provides accommodation, paragraph 2 of Article 23 provides for a number of safeguards (the rent must not be excessive and not be automatically deducted from the wages, a rental contract shall be provided, and the

62 The EP fell short of its objective of requiring employers to provide migrant workers with the same information they are required to provide employees under Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, Council doc 15033/13, 25 October 2014, amendment 53.
63 Members of the Swedish Parliament have unsuccessfully proposed to change this and make the offers binding, see http://www.riksdagen.se/sv/Dokument-Lagar/Forslag/Motioner/Juridiskt-bindande-arbetstill_H002Sf375/?text=true
64 See for example ILO Multilateral Framework on Labour Migration, 2005, Guideline 9. 3.
accommodation shall meet general health and safety standards). The issue of who should be responsible for accommodation was discussed within the Council and at a certain point during the negotiations it proposed, with support from the Commission, that the employer should be responsible for accommodation.65

Application fees relating to labour migration are controversial, and excessive fees are seen as an indication of exploitation.66 A new provision on fees was included after a proposal from the Council. Member States wanted the discretion to charge the application fees.67 If fees were to be imposed, the European Parliament wanted employers to pay them.68 The Council suggested a compromise, which was adopted in the Directive; Article 19.1 states that ‘Member States may require the payment of fees for the handing of applications in accordance with this Directive. The level of fees shall not be disproportionate or excessive.’ The European Parliament’s concern about fees was also accommodated in the Article by providing that Member States may require employers to reimburse the workers for any application fees. Article 19.2 also includes the option for Member States to require employers of seasonal workers to pay for traveling costs for the seasonal worker and the cost of sickness insurance.

During the negotiations, the Commission was largely successful in ensuring that the criteria were not too burdensome, and the additions that were made where done so at European Parliament’s initiative in order to protect migrant workers.

Rejecting an Application
The criteria for rejecting an application can be used to try to ensure that the employer will treat the worker decently and adhere to the standards and requirements set out in the Directive (Article 8). The European Parliament tried, largely unsuccessfully, to introduce criteria that would enhance the protection of the workers and protect them from unscrupulous employers. Although the Members States could have regarded these efforts as protecting their national workforce by limiting the opportunities to exploit migrant workers, the result suggests that most of the stakeholders wanted to avoid imposing detailed rules relating to the organization of national labour market and the administration of the applications.

The provisions governing the rejection of applications in Article 8 contemplate three different types or tiers of criteria, which range from those to which Members States are required to adhere to those that they have discretion to impose. The first tier originated from the Commission’s proposal - an application shall be rejected if the admission criteria in Article 6 are not complied with or the relevant documents are fraudulently required. Under the second tier, the Member States shall, if appropriate, reject an application if the employer has been sanctioned for undeclared work or illegal

65 Council doc 6651/12, 27 February 2013, Article 14, footnote 91.
67 Council doc 15033/12, 25 October 2013, 102f.
68 Council doc 6651/12, 27 February 2013, 80.
employment, the employer’s business is being or has been wound up under national insolvency laws or no economic activity is taking place, or the employer has either been sanctioned for or failed to fulfill its obligations under the Directive. In the third tier, Member States may reject an application if the employer has 1) failed to meet its legal obligations regarding social security, taxation, labour rights, working conditions or terms of employment as provided for in applicable law and/or collective agreement; 2) has, within the 12 months immediately preceding the date of the application, abolished a full-time position in order to create the vacancy that the employer is trying to fill through the Directive; or 3) the third-country national has not complied with the obligations arising from a previous decision on admission as a seasonal worker.

All three EU actors involved in the negotiation process appear to have agreed on the first tier of criteria for rejecting applications—the pure shall reasons for rejection. However, they parted company over the next two tiers of rejection criteria. The European Parliament wanted all the grounds for rejecting an application to be framed in shall clauses, the Member States preferred to frame all of the other requirements, including the situation where an employer has abolished a full-time position in order to recruit a migrant worker, as discretionary (‘may’) clauses. Member States wanted the discretion to protect their nationals, either by refusing applications where nationals had been terminated or by verifying whether the positions could not be filled by a national of the Member State, Union citizens or by third country nationals already residing in the Member States (Article 8.3). However, they did not want to be required to reject applications in such situations. Thus, Member States retained the discretion to impose labour market tests.

The Commission wanted to close the door completely to those migrant workers who had previously overstayed. However, the European Parliament and Member States agreed to transform a migrant worker’s violation of previous permits from a mandatory to a permissive reason for rejection. The Parliament also succeeded in adding Article 8.5, which provides, with the exception of those grounds for rejecting an application that are mandatory upon Member States, that the interests of seasonal worker must be taken into account in any decision to reject an application. It is important, however, to note that Member States are free to reject applications by third-country national who have violated previous permits, and it will be interesting to see how many adopt such criteria.

The negotiations resulted in a set of criteria for rejecting applications that required Member States to carry out a more thorough and time-consuming investigation than many wanted. The burden imposed on the administrative authorities through the operation of the shall clauses is quite heavy, and Member States can choose to impose the additional requirements contemplated by the may clauses. The possibility for Member States to consider all the criteria in rejecting an application, which would go a long way towards ensuring that workers are admitted to work under the conditions the Directive...
prescribes, was a counterweight to the Commission’s goal of establishing a simply and transparent procedure that facilitates entry.

**Time Limits**
The Commission and the European Parliament both wanted, in opposition to the Council, the Directive to provide for fast authorization procedures. The Council prevailed since the Directive requires that a decision on the application for authorization for the purpose of seasonal work shall be taken as soon as possible but not later than 90 days from the date when the application was submitted (Article 18).\(^{72}\) The Commission argued that the 90-day deadline was excessive given that it concerns workers who only enter Member States for a short period and that the documentation to be processed is less extensive than in the other Directives pertaining to legal migration.\(^{73}\)

**Withdrawal**
The provisions in Article 9 governing the withdrawal of authorization for seasonal workers are constructed along the lines of the tiered approached to rejections, and they involve the same criteria. A provision allowing Member States to withdraw an authorization on the ground of the employer’s failure to fulfilled obligations under the work contract was added at the request of Member States.\(^{74}\)

**Minimum and Maximum Lengths of Stay**
The Directive covers both stays longer and shorter than three months. Owing to the need to accommodate the Schengen *acquis* and Visa code, the admission procedures for seasonal workers staying less than three months are complicated. However, it is, important that these workers are covered by all of the protections provided for in the Directive. Moreover, this is the first directive that covers stays of a shorter duration than three months.\(^{75}\)

Over the opposition of the European Parliament, the Member States were able to obtain a great deal of flexibility over the maximum duration of a seasonal workers stay.\(^{76}\) Article 15 provides that the maximum period of stay for seasonal workers can vary from five to nine months in any twelve-month period. Unlike the case with highly skilled workers, flexibility for season workers is necessary given that what counts as a season in the agricultural sector is, for example, much longer in southern Italy than that in Finland.

**Circular migration**
The Commission’s commitment to circular migration suffered during the negotiation process. Initially, it proposed a multi-seasonal permit option, which would have allowed for the issuance of three permits covering three seasons. The Commission argued that this provision would not only promote the EU’s development goals, but also that EU

\(^{72}\) Council doc 15033/13, 25 October 2013, p 98 ff, amendment 86.

\(^{73}\) Council doc 6651/12, 27 February 2012, footnote 87.


\(^{75}\) A Lazarowicz, *A success story for the EU and seasonal workers’ rights without reinventing the wheel*, EPC, 28 March 2014, 2.

\(^{76}\) Council doc 15033/13, 25 October 2013, amendment 78.
employers should be able to rely on a more stable and already trained workforce. However, in contrast to the rights connected to bilateral agreements with third countries, the proposed provisions on circular migration affected the Member States’ control of their borders and, therefore, were not acceptable. As a result, the provisions governing re-entry that were adopted are not only much weaker; they leave much more to the discretion of Member States, a discretion that both the Commission and European Parliament had attempted to limit. Article 16 requires Member States to facilitate the re-entry of migrant workers who has been admitted to that Member State at least once during the previous five years. However, the means of facilitating re-entry are completely within the discretion of the Member State. Article 16 lists four measures that Member States may adopt in order to facilitate the re-entry of seasonal workers. But, since these measures are part of a non-exhaustive list (‘may include one or more such measures’) and they are not expressed as minimum requirements, it is unclear what mechanisms Member States must put in place to facilitate circular migration.

The dilution of the Directive’s promotion of circular migration is also illustrated by the change in the wording of the recital connected to this provision from the proposed to the adopted directive. What began as a commitment to promoting the circulation of third-country national seasonal workers (recital 17) became ‘the possibility of facilitated admission procedures’ in the adopted directive (recital 34).

2. Protection from Social and Economic Exploitation

As much as the Directive provides immigration controls, it also provides for rights for third-country seasonal workers. The Directive follows a rights-based approach to managed migration and adopts an equal-treatment approach. However, as we shall discuss, it fall short of the ILO’s two migrant workers conventions by compromising the commitment to equal treatment with respect to some aspects of social security. However, since very few Member States have ratified either of the two ILO migrant workers conventions it is not surprising that Member States insisted on exempting certain types of social security from the equality principle. Moreover, Recital 44 specifically states that ‘this Directive should apply without prejudice to the rights and principles contained in the European Social Charter... and, where relevant the European Convention on the Legal Status of Migrant Workers ....’ In addition to protecting the migrant workers, this approach also provides a level-playing field for Member States when it comes to recruitment. However, one of the limitations of an equal treatment approach is that if a Member State provides low standards for national workers in sectors that are designated seasonal, such as is often the case with the agricultural sector, all that migrant workers are entitled to is equally poor treatment. Thus, from a labour law perspective, the possibility that the Directive will provide decent standards for migrant workers continues to depend, to a large extent, upon the standards that a Member States provides to its

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78 A Lazarowicz, (fn 75) 3. ILO Convention 96, Migration for Employment Convention (Revised), 1949 and C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143).
national workers. Of course, labour standard pertaining to wages and freedom of association, for example, are outside the competence of the EU.

**Equal Treatment with Nationals**

The core of a rights-based approach to labour migration is the principle that migrants shall be entitled to equal treatment with nationals in the host state. The article on rights to equal treatment changed considerably during the negotiations. The difference between the Commission’s proposal and the adopted Article 23 is, perhaps, the clearest illustration of the Commission’s misconception of what kind of minimum standard an EU directive that is supposed to provide for worker protection must contain.

Article 23 expressly embodies the equal treatment principle, providing that seasonal workers are to be treated equally to nations at least with regard to nine enumerated categories of rights. The first paragraphs of Article 23 covers terms of employment, including the minimum working age, and working conditions, including pay and dismissal, working hours, leave and holidays, as well as health and safety requirements in the workplace. The Commission’s original proposal did not provide for equal treatment on working conditions, and it was severely criticized in this respect by the ILO. However, the Council and the European Parliament agreed on equal treatment regarding working conditions, and the latter was able to strengthen this provision. An earlier reference to conditions in specific types of collective agreements, which the Commission copied form the Posted Workers Directive, was dropped. It is now up to Member States to decide the basis on which the conditions of the seasonal workers will be equalized with those of national workers.

In its second paragraph, Article 23 provides for equal treatment with regard to the right to strike and freedom of association. Although the Commission and the Council were in agreement on wording, the European Parliament pushed to include language referring to the right to strike and the right to negotiate and conclude collective agreements. With a minor exception, the European Parliament was successful in obtaining the wording it wanted. It proposed that the right to strike and collective bargaining to be mentioned as part of the freedom of association; however, the language adopted divides them into two rights, the right to strike and take industrial action and the freedom of association and affiliation and membership of an organization representing workers, including the rights and benefits conferred by such organizations, inter alia the right to negotiate and conclude collective agreements. A number of Member States seem to have considered it to be important to avoid a formulation that could strengthen the view that the right to strike is an intrinsic part of the freedom of association, and the fact that the right to strike is only protected to the extent that it is protected in the host state’s national law and practice did not alleviate this concern.

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79 Council doc with ILO note (fn 40).
The majority of the equal treatment entitlements specified in Article 23 have to do with various forms of social entitlements. Article 23.1.d provide that seasonal migrant workers are entitled to those branches of social security defined in Article 3 of Regulation no 883/2004, which include sickness benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, survivors' benefits, benefits in respect of accidents at work and occupational diseases, death grants, unemployment benefits, pre-retirement benefits and family benefits. The Council demanded limitations on entitlement to social benefits, and as a result Member States have the discretion to restrict the equal treatment of migrant workers with regard to family benefits and unemployment benefits (Article 23.2 i). It is here that the equal treatment provisions in the Directive derogate from those provided in the two ILO migrant workers conventions, since the latter include equal treatment of migrants and national specifically with respect to ‘unemployment and family responsibilities’ and more generally regarding ‘social security’. However, Article 23.1, 2nd paragraph specifically provides that migrant seasonal workers are entitled to receive statutory pensions based on the seasonal workers previous employment and acquired in accordance with the legislation set out in Article 3 of reg. 883/2004, when moving to a third country.

Seasonal workers are entitled to have the same access to goods and services and, with the exception of housing services, the supply of goods made available to the public (Article 23.1.e). The Commission and the Council also wanted, in opposition to the European Parliament and without success, to be able to exclude employment services from this Article. Instead a new provision was included according to which equal treatment shall be granted to advice services on seasonal work afforded by employment services. Seasonal workers can obviously not use these services to look for another kind of job.

The European Parliament also managed to secure a provision on back payments to be made by the employers regarding outstanding remuneration to the third-country national. In addition, they obtained equal treatment for migrant workers regarding education and vocational training; recognition of diplomas, certificates and other professional qualifications and tax benefits; and, in so far as the seasonal worker is deemed to be resident for tax purposes in the Member State concerned, tax benefits.

A Multi-faceted Approach to Enforcement
The value of any rights depends, ultimately, on whether they can be enforced. Enforcement is a particular challenge when it comes to third-country migrant seasonal workers; they are sojourners in the host country, without political rights and lacking the status of citizens, and their migrant status is tied to an on-going employment relationship

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83 ILO C 96, Migration for Employment Convention (Revised), 1949, Article 6(1)(a ) (i) and C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), Article 10, which refers to social security.
84 Council doc 15033/13, 25 October 2013, 111.
85 Ibid, 110, amendment 94.
86 Ibid, 111-112, amendment 94.
with the employer who sponsored them, making them particularly vulnerable to abuse. An enforcement mechanism must address the various dimensions of seasonal migrant workers’ vulnerability if it is to be effective. Thus, a multi-faceted approach to enforcement is critical.

As a first step, it is essential to minimize the risks to which migrant workers who initiate complaints are exposed. Without the right to transfer employers, enforcement mechanism that are linked to the withdrawal of the employer’s authorisation to employ seasonal workers could also result in the worker’s losing her or his authorisation to work. The problem with enforcement mechanisms that link employer compliance with the authorization to employ seasonal migrant workers is that they place a heavy burden on seasonal workers who are unable to find a new employer. In such cases, the ability of seasonal workers to claim obligations to which they would have been entitled had the work authorisation not been withdrawn on account of the employer’s violation is crucial.

Another enforcement-related problem that arises with respect to seasonal work, especially in the agricultural sector, is the use of labour supply chains. Labour contractors often enter into arrangements with firms to supply them with a seasonal workforce. Although the seasonal worker’s employment contract is with the labour supplier, the principal contractor often controls the work that is on offer. In situations in which the labour supplier fails to pay wages, violates employment standards, or fails to adhere to the terms and conditions of employment, it is important for the seasonal workers to have a right of recourse against the principal contractor.

No matter how many safeguards are provided to promote compliance, it is inevitable that complaints against employers who have failed to adhere to conditions provided for in the Directive will arise. Not only must effective complaint mechanisms be available to the seasonal migrant workers, these mechanisms should permit a third party like a trade union representative or a labour inspector to lodge complaints on behalf of seasonal workers. And, finally, external monitoring systems need to be put in place in order to ensure that the weakest party – the migrant seasonal worker – does not bear the entire burden of ensuring that employers meet their legal obligations under the Directive.

Throughout the negotiations, the European Parliament proposed a number of amendments aimed at achieving a multi-faceted enforcement structure, traces of which can also be found in the Directive. However, since many of the elements of the enforcement mechanism provided in the Directive are framed in the recurring pattern of obligatory provisions combined with optional clauses, the strength of any particular enforcement regime is within a Member State’s discretion.

Workers’ Freedom to Prolong their Stay and Change Employers

The Directive includes a number of provisions in Article 15 that give the seasonal worker some flexibility about the length of their stay in a Member State and that loosen the closeness of the tie to the employer. The ability of migrant workers to change employers

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is regarded as a critical to whether or not they can actually enforce in practice the rights
to which on paper they are entitled.\textsuperscript{88} Although the provisions that were ultimately
adopted were similar to that proposed by the Commission,\textsuperscript{89} there was a deep conflict
between the Council and European Parliament over whether or not seasonal workers
should have the right to change employers. The Council did not want Member States to
be required under any circumstances to permit migrant workers to change employers,
whereas the European Parliament wanted migrant workers to have this right.\textsuperscript{90}

In the end, there was a compromise. Member States are required to permit one extension
with the same employer within the maximum period and they have the discretion to allow
more than one extension with the same employer (Articles 15. 1 and 2). Member States
are also required to allow seasonal workers who are entitled to extend their stay to change
employers (Article 15.3 and 4). The Member State also has the discretion to decide that
such applications can be submitted from within the Member State in question. They also
succeeded in obtaining a right to reject extension and renewal applications if the vacancy
could be filled with other EU residents (Article 15.6).

\textit{Monitoring and Inspections}
The European Parliament also succeeded in including a provision requiring that Member
States ensure mechanisms for monitoring, assessing, and inspecting whether or not
employers were complying with the national instruments transposing the Directive.\textsuperscript{91}
Under Article 24, Member States are required to ‘provide for measures to prevent
possible abuses and to sanction infringements of this Directive’. The measure must
include monitoring, assessment and, where appropriate, inspection in accordance with
national law or administrative practice. Recital 49 specifically recommends using risk
assessments, based on sectors and past record of infringement, in selecting which
employers should be inspected.

The Article (24.2) also requires that Member States provide the officials who are
responsible for inspections and, where provided for under national law for national
workers, organizations representing workers’ interests with access to the workplace and,
with the agreement of the worker, to the accommodation.

\textit{Facilitation of Employee Complaints}
The European Parliament also significantly strengthened the provisions relating to the
facilitation of complaints.\textsuperscript{92} The Commission’s original proposal was only directed at
third parties and their right to engage either on behalf of or in support of a seasonal
worker in administrative or civil proceedings provided for with the objective of
implementing the Directive. In addition, to incorporating this proposal into the Directive

\textsuperscript{88} J Fudge, ‘Precarious Migrant Status and Precarious Employment: The Paradox of
International Rights for Migrant Workers’ (2012) 34 (1) \textit{Comparative Labor Law
and Policy Journal} 101-37.
\textsuperscript{89} COM(2010)379, Article 11.2.
\textsuperscript{90} Council doc 15033/13, 25 October 2013, 84 ff, amendment 79.
\textsuperscript{91} Ibid, 114 f and amendment 96.
\textsuperscript{92} Ibid, 116-117 and amendment 97.
(in Article 25.2), two other provisions were added in order to facilitate complaints. Member States are required to ensure that there are effective mechanisms through which seasonal workers may lodge complaints against their employers directly, through specified third parties⁹³ or through a competent authority of the Member State when provided for by national law. Member States are also obligated to ensure that seasonal workers have the same access as other workers in a similar position to measures protecting against dismissal or other adverse treatment by the employer in retaliation for ‘a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the directive’ (Article 25.3).

**Sanctions against Employers**

The stakeholders had different views on sanctions against employers who violated the conditions imposed by the Directive. The Commission originally proposed that a violation of the work contract would in itself generate sanctions including the exclusion from applications for seasonal workers for one or more subsequent years.⁹⁴ While the Council agreed that Member States should be required to impose sanctions, it believed that it should be within the Member State’s discretion as to the type of sanction to impose. By contrast, European Parliament wanted mandatory sanctions specified.⁹⁵ As a compromise, the sanctioning provisions are constructed as mix of obligatory and optional clauses.

According to Article 17.1, Member States are obliged to provide for sanctions against employers who have not fulfilled their obligations under this Directive, and these sanctions must be effective, proportionate and dissuasive. For employers who are in serious breach of their obligations under the Directive these sanctions must include their exclusion from employing seasonal migrant workers.

The Article (17.2) goes beyond sanctioning the employer to require the employer to compensate for migrant workers in situations in which the employer’s work authorization is withdrawn for reasons that range from insolvency and employing undocumented worker (Article 9.2) to violating labour laws or working conditions (Article 9.3.b.). It is important to note that under the Directive,⁹⁶ Member States have the discretion to link the withdrawal of work authorisations to a range of employer behaviour. In cases in which the Member State provides for the withdrawal of a work authorisation because, for example, the employer has either not fulfilled its obligations under the work contract or has failed to meet its legal obligations regarding social security, taxation, or labour rights, the employer is liable for any ‘outstanding’ obligations which the employer would have had to respect if the authorization for the purpose of seasonal work had not been

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⁹³ The third parties are those ‘which have, in accordance with the criteria laid down by national law, a legitimate interest in ensuring compliance with this Directive’ (Article 25 (1).  
⁹⁴ COM(2010)379 Article 12.2 (b)  
⁹⁵ Council doc 6312/13, 12 February 2013, 62-63, 76-78, amendment 85.  
⁹⁶ Article 9(2) provides that ‘Member States shall, if appropriate, withdraw the authorisation’, whereas Article 9(3) states that ‘Member States may withdraw the authorisation...’
withdrawn. This compensation provision protects the legitimate expectations of seasonal migrants in Member States that choose to link the withdrawal of work authorizations to violations of labour law and working conditions. It is designed to ensure that migrant workers do not have to ‘choose’ not to complain so as not to jeopardise these expectations.

The only purely permissive clause in the sanctions provision relates to the liability in subcontracting chains (Article 17(3)), a provision that attracted little interest in the Council. In situations where the main contractor and intermediary subcontractors have not exercised due diligence with regard to a subcontractor’s infringements of the Directive, the Member State may sanction the entities higher up the chain for the subcontractor’s violation or make them liable for compensation or back pay owed by the subcontractor. Member States also have the discretion provide for more stringent liability rules under national law.

IV. Conclusion

Our analysis of the changes made to the text of the Directive from the original proposal to the version that was finally adopted illustrates the extent to which the Commission’s initial, and almost exclusive, preoccupation with the immigration side of the seasonal workers’ directive was modified by the European Parliament’s more labour-oriented concern to ensure that migrant workers were protected from exploitation. The Commission’s main goal was to achieve a common immigration scheme and a common level playing field for this sector. This ambition ran into conflict with Member States’ concerns to avoid negative effects on their national labour force, to retain flexibility, and to avoid burdensome administrative requirements.

Although the Commission achieved common admission criteria and an exclusive route, subject to bilateral and multilateral agreements, for third-country seasonal workers in the Directive, which were central elements in its objective of a creating a level field, its goal of promoting the circular migration of seasonal workers was severely compromised. So, too, were its attempts to achieve common grounds for rejecting an application and withdrawing a permit. To accommodate the different interests of the Member States and the European Parliament the final provisions were drafted in a way that provided a great deal of flexibility to Member States, which allows them to implement very different admission structures. The Commission’s goal to provide a fast-track procedure also failed, as the Member State could not commit to administering the immigration controls in a shorter time. Member States also managed to secure a great deal of flexibility in determining which sectors to designate as seasonal as well over the duration of a seasonal worker’s stay, and they are free to impose labour market tests. The Commission’s compromises regarding common immigration rules are mainly attributable to the need to accommodate the Member States’ concerns, although the European Parliament’s objectives also contributed, albeit to a more limited extent, to this result.
Despite the Commission’s claim that its goal was to establish a structure for avoiding the exploitation of third-country seasonal migrant workers, the substantive provisions of its original proposal were so severely flawed that they call into question the sincerity of this ambition. While the adoption of a rigorous equal rights approach would have helped to level the playing field with respect to immigration controls, it was the other EU institutions, and not the Commission, that championed this approach. However, the tensions between the European Parliament’s ambition to protect migrant workers and the Member States’ aversion to burdensome commitments and to interference with their national labour markets resulted in an uneven playing field. Despite the compromises required to accommodate the different interests, the final outcome is much more likely to be effective than the original proposal in preventing labour and social exploitation.

The European Parliament was, often with the support of the Council, largely successful in ensuring that the Directive embodied an approach according to which seasonal migrant workers would be treated equally to national workers. However, the extent to which such an approach actually protects seasonal workers from exploitation depends upon two factors: the terms and conditions available to national workers in sectors designated as seasonal and the enforcement mechanisms available to them. With respect to the first, it is important to recall that Member States have found it necessary to recruit workers from third-countries because neither their national workers nor EU citizens have found seasonal work to be attractive. Regarding the second factor, while the European Parliament was successful in introducing a range of enforcement mechanisms into the Directive, many are discretionary rather than mandatory. Moreover, as is the case with the two ILO migrant workers conventions, there is nothing in the Directive that prevents a Member State from tying a migrant worker’s legal status to be in its territory to an ongoing employment relationship with the sponsoring employer, a linkage which makes the migrant worker vulnerable to abuse.\(^{97}\) Thus, the actual terms and conditions and legal rights to which seasonal migrant workers will be entitled, as well as how these conditions and rights will be enforced, remain within the purview of the Member States. However, unlike the Posted Workers Directive, the Seasonal Workers Directive allows the Member States more freedom, albeit within limits, to provide a greater protections and more robust standards that those set out in the Directive if they so choose.\(^{98}\)

Over the past fifteen years, the EU has followed a sector-by-sector approach to legal migration. This tack has resulted in common legal frameworks for high-skilled workers, seasonal workers, and intra corporate transferees, which regulate the admission of certain categories of persons, recognizes rights, and, at least for the seasonal workers and to a

\(^{97}\) However, the requirement (Article 15.3) that Member States shall allow seasonal workers one extension of their stay to be employed by a different employer does mitigate the possibility of abuse.

\(^{98}\) Articles 18, 19, 20, 23 and 25 are minimum provisions according to article 4.1 in the Directive.
certain extent for the intra corporate transferees, sanctions violation.99 A Framework Directive for all other categories of migrant workers providing for a single permit, covering residence and work, as well as the rights to which migrants are entitled while working in the EU, has also been adopted.100 However, despite the claim that over the first decade of this century Member States have transferred to the EU most law-making competences concerning one of the central functions of the nation state, namely the admission and expulsion of non-citizens,101 these Directives fall well short of the Commission’s goal of a common immigration policy for the EU.

The obstacles the Commission faces are clearly illustrated by the process that led to the adoption of the Directive on seasonal workers. However, this Directive differs in significant respects from the other immigration directives. The Seasonal Workers Directive could be seen as charting a new path in EU immigration policy by providing an exclusive route for admission with a robust equal treatment approach that allows a great deal of flexibility for Member States regarding enforcement. Yet, the even more recently adopted Directive on Intra-corporate Transferees indicates that this is a path that the EU is either unable or unwilling to follow since it does not provide for equal treatment of third-country corporate transferees with national workers and it is weak on enforcement mechanisms. Nonetheless, it is possible to characterize the groups of migrants covered by the Seasonal Workers’ Directive, on the one hand, and intra-corporate transferees, on the other, as so distinct that a common immigration framework is simply impossible.

A unique aspect of the negotiations over the Seasonal Workers Directive was the extent to which the European Parliament was unified in its ambition to strengthen the rights of seasonal workers. No such similar concern was evident with respect to the groups of migrant workers that were the subjects of the other immigration directives. Perhaps the Parliament felt that it was incumbent upon it to promote the rights of what is typically a very vulnerable group of workers, a concern that is not as pressing with respect to the often highly skilled intra-corporate transferees.

In light of the expiry of the Stockholm programme, in June 2014 the European Council will set the strategic guidelines for further development of the area of freedom, security and justice. In its communication regarding the new programme, the Commission stated that the legal framework for a common migration policy is still to be completed102 and

99 DIRECTIVE 2014/…/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer, sanctions article 9, rights article 18.
that it is time to consolidate existing measures within a more coherent EU common migration policy that takes into account the short-and long-term economic needs. The Commission recognizes that more people will want to come to Europe – some temporarily, such as tourists, students, and service providers, others on a more permanent basis to work or to seek protections. Moreover, the Commission believes that a common immigration framework is necessary for the economic recovery.

It remains to be seen if the Member States are ready to follow the ambitions stated by the Commission, although it is doubtful that they are ready to go further than what was articulated in the 2005 Policy plan. The Commission emphasizes that all Member States must implement the existing EU rules on admission of migrants and on their rights in an effective and coherent way. However, the flexible legislative style used in the Directive on Seasonal Workers does not greatly contribute to the achievement of this goal. However, this feature of the Directive was a trade-off since many Member States either did not want EU-level rules governing seasonal migrant workers or they wanted a great deal of flexibility over how to implement the rules. Despite these compromises, the Directive on Seasonal Workers has the potential to promote the protection of third-country migrant seasonal workers while they are working in the EU. It is now the responsibility of Member States to fulfill it.

103 Ibid 3.
104 Ibid 4.