

Brussels, 21 JAN. 2011

Dear President,

The Commission would like to thank the Austrian Bundesrat for its opinion on the Commission proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment {COM(2010)379}. It has particularly taken note of the views expressed therein as regards the proposal's compliance with the principle of subsidiarity.

The good functioning of the European Union requires active participation of all concerned stakeholders, including national Parliaments, and thus, the Commission welcomes the fact that national Parliaments are assuming their new role and responsibilities conferred to them by the Lisbon Treaty.

The Commission appreciates the interest in the above-mentioned proposal shown by a large number of national Parliaments and notes that a wide range of different opinions have been expressed by the different chambers, both as regards subsidiarity and the substance of the proposal.

The first exchange of views in the Council has shown that there is a general support for the proposal, underlining the importance of European added-value and also the need to show flexibility and to take into account national specificities. Some Member States flagged more problematic issues regarding the seasonal workers Directive by raising subsidiarity concerns and matters relating to equal treatment with EU nationals regarding social security.

In the European Parliament, the proposal has received a strong support so far by most of the parties.

The thresholds referred to in Protocol 2 of the Treaty have not been met within the deadline of 8 weeks. Notwithstanding, the Commission of course carefully considered, in the context of its political dialogue with national Parliaments, all opinions it received from 17 chambers and took note of the different remarks expressed therein.

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In the annex to this letter you will find a set of responses to the main points raised by national Parliaments in their opinions submitted to the Commission and related to the issue of subsidiarity. Where individual Chambers raised more specific points concerning the substance of the proposal, the Commission responds to them separately. As usual, all replies will be published on the Commission's Europa website.

The Commission hopes that these clarifications address in a satisfactory manner the concerns expressed by the Austrian Bundesrat.

I am looking forward to further develop our political dialogue.

**COMMISSION REPLY TO OPINIONS CONCERNING SUBSIDIARITY RECEIVED
FROM NATIONAL PARLIAMENTS ON THE PROPOSAL FOR A DIRECTIVE ON
THE CONDITIONS OF ENTRY AND RESIDENCE OF THIRD-COUNTRY
NATIONALS FOR THE PURPOSES OF SEASONAL EMPLOYMENT
(COM(2010)379)**

I. Policy context

Before moving to specific issues that have been raised it is necessary to place the proposal in a broader context of the European Union's efforts to create a comprehensive immigration policy.

Since the 1999 Tampere European Council, the European Union has sought to develop, on the basis of the new powers conferred to it by the Treaty of Amsterdam, a comprehensive immigration policy addressing the phenomenon in all its dimensions, that is, legal and irregular immigration, visa and border policy, cooperation with the countries of origin of immigrants and fair treatment of third country nationals.

In 2001, the Commission adopted a proposal for a *Directive dealing with the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities*.¹ Whilst the other European Institutions gave positive opinions,² discussion in Council was limited to a first reading of the text and the proposal was officially withdrawn in 2006.³

The 2005 *Hague Programme* reaffirmed the importance of legal migration for the advancement of economic development in the European Union and asked the Commission 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'.⁴ The 2005 Commission Communication *A Policy Plan on Legal Migration*⁵ provided for the adoption of five legislative proposals on labour immigration, including on the conditions of entry and residence of seasonal workers. The 2009 *European Pact on Immigration and Asylum*⁶ expressed the commitment of the European Union and its Member States to conduct a fair, effective and consistent policy for dealing with the challenges and opportunities of migration. Finally, the 2009 *Stockholm Programme* – endorsed by all Member States at the level of Heads of State and Government via the European Council - reiterated the Commission and Council's commitment to implementing the Policy Plan on Legal Migration, which calls for the development of a forward-looking and comprehensive migration policy, based on solidarity and responsibility. *The Action Plan implementing the Stockholm Programme* provided for the adoption of the proposal on seasonal workers in 2010.⁷

¹ COM(2001)386.

² Opinions of the: European Parliament of 12.2.2003 (A5-0010/2003); Economic and Social Committee of 16.1.2002 (SOC/084, CES 28/2002); Committee of the Regions of 13.3.2002 (CdR 386/2001).

³ It has to be recalled in this context that legal immigration was subject to unanimity in the Council and consultation of the European Parliament.

⁴ COM(2005) 184 final.

⁵ COM(2005)669.

⁶ ASIM 72, 13440/08.

⁷ COM(2010) 171 final.

II. General observations concerning the proposal

A. Migratory flows

The Commission would like to restate its opinion that a common European Union scheme on seasonal workers would help to ensure that the proposed minimum harmonisation results in legal frameworks across the European Union that are comparable. As a consequence, Member States are equally attractive and, therefore, migratory flows throughout the European Union are not distorted due to possible variations of rules among the Member States.

The Commission acknowledges that, in accordance with Article 79(5) of the Treaty on the Functioning of the European Union, it is for the Member States to determine the numbers of economic migrants admitted into their respective territories. Nevertheless, this principle in no way annuls the validity of the argument about distortion of migratory flows. Indeed, quotas have to be viewed as only one element impacting upon migratory flows. Another, equally important aspect is the attractiveness of the national schemes. As stated above, the creation of a common European Union framework is expected to ensure that migratory flows are not distorted due to variations in attractiveness of the proposed schemes.

B. Schengen rules

The Commission reiterates its assessment that the Schengen area without internal borders requires common minimum rules in order to reduce the risk of overstaying and irregular entries that may be caused by lax and diverse rules on the admission of seasonal workers.

C. Protection of workers/prevention of social dumping

The introduction of common European Union standards is vital to ensure that across the European Union third-country seasonal workers enjoy socio-economic rights which are as close as possible to those granted to Union citizens and which are legally enforceable. This is crucial to prevent exploitation and sub-standard working conditions and abuses, which have unfortunately been taking place in the European Union. It is also a way to guarantee that third-country seasonal workers do not unfairly compete with Union citizens.

Furthermore, it should be noted that the proposal sets out minimum standards in this regard. Pursuant to Article 4 (2) on more favourable provisions, Member States are free to adopt or retain more favourable provisions regarding seasonal workers' rights.

D. Differences among labour markets

The Commission agrees with the observation that the demand for third-country seasonal workers varies among European Union Member States. This is clearly stated in the Impact Assessment.⁸ The proposal takes account of this and other differences among labour markets of the Member States and puts forward a number of provisions which should allow Member States to accommodate their national specificities. Most notably, as laid down in Article 79(5) of the Treaty on the Functioning of the European Union and reiterated in Article 6(3) of the proposal, it is for the Member States to determine the numbers of third-country seasonal workers they admit. Pursuant to Article 6(2) and recital 14, Member States are also free to

⁸ *Commission Staff Working Document, Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purpose of seasonal employment*, SEC(2010) 887, 9-10.

apply a labour market test and determine sectors of the economy that come within the definition of seasonal work as it is defined in Article 3(c) of the proposal.

E. Cooperation with third-countries and circular migration

The Commission reiterates its opinion that harmonised rules on migration will facilitate the European Union's cooperation with third countries. There is undeniable link between migration and development.⁹ A common European Union legal regime on third-country seasonal workers has been long awaited by some third-countries and it is viewed as an important element of the European Union migration policy with a potential significant impact on the development policy.¹⁰ Therefore, the future benefits of the proposal in the area of development cooperation should not be underestimated.

In response to doubts concerning the concept of circular migration expressed by some national Parliaments, the Commission would like to reiterate that promoting legal migration and mobility, circular migration not only supports the socio-economic development of countries of origin and destination, but it is also likely to prevent irregular migration by opening channels of legal migration.¹¹ Further, it is often argued that circular migration can contribute to the so-called "triple win" outcomes, namely the country of destination can meet the needs of its labour market; third-country migrants upon return to their countries of origin bring expertise, knowledge and funding back home which, in turn, benefits their countries of origin.¹²

III. Specific provisions

A. Legal basis (introductory provisions and Article 1)

The proposal primarily concerns conditions of entry and residence and rights of third-country nationals residing legally in a Member State. Consequently, the appropriate legal basis is Article 79(2)(a) and (b) of the Treaty on the Functioning of the European Union.

Moreover, it is worth adding that Article 63(3) and (4) of the Treaty establishing the European Community, the predecessor of Article 79(2)(a) and (b), was used as a legal basis for the adoption of the other legislative instruments in the area of legal migration.¹³

B. Obligation to specify the rate of pay and the working hours per week (Article 5)

Article 5(1)(a) lists, among the documentary evidence necessary for admission, a work contract or a binding job offer specifying the rate of pay and the working hours. The Commission considers it essential to ensure that third-country nationals receive adequate

⁹ *Council Conclusions on Policy Coherence for Development (PCD)*, 2974th External Relations Council meeting Brussels, 17 November 2009.

¹⁰ See for example, discussions carried out in the context of the EU-Africa Partnership on Migration, Mobility and Employment.

¹¹ *Commission Staff Working Document, Policy Coherence for Development Work Programme 2010- 2013 accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A twelve-point EU action plan in support of the Millennium Development Goals*, SEC(2010) 421 final, 26.

¹² See for example dialogue in the context of the EU-ACP dialogue on migration and development

¹³ See for example, Directive 2003/109/EC of 25 November 2003 *concerning the status of third-country nationals who are long-term residents* or 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*.

remuneration and work a reasonable number of hours. This is important not only in order to prevent possible abuses of third-country nationals but also to ensure, as indicated in Article 5(2), that seasonal workers will have adequate resources during their stay in order to maintain themselves without having recourse to social assistance system of the host Member State.

C. Union preference (Article 6(2))

The Commission would like to stress that the proposal respects the principle of Union preference, as expressed in the provisions of the Acts of Accession of 2003 and 2005. Recital 7 of the proposal provides that the Directive 'should be applied without prejudice to the principle of EU preference as regards access to Member States' labour market as expressed in the relevant provisions of Acts of Accession'. This is also confirmed by Article 7(2) concerning grounds of refusal, which states that Member States may verify whether the vacancy concerned could not be filled by their nationals, other EU nationals or by third-country nationals lawfully residing in the Member State and already forming part of their labour market.

D. Document authorising residence and work for stays shorter than 3 months (Art. 10)

The Commission would like to clarify that the proposal does not ban Member States from issuing work permits for stays shorter than or to equal three months. Whereas it is true that the proposal introduces obligations to issue seasonal worker residence permits for stays longer than three months, this duty does not amount to prohibiting Member States from issuing permits for shorter stays. The matter is left for Member States to decide.

E. Duration of stay (Article 11 (1))

In respect of the duration of stay, the Commission carefully considered possible options. It verified the existing legislative frameworks in the Member States and found out that although in most of Member States the time limit is between three and six months, there are also Member States where the stay is longer and lasts up to 12 months.¹⁴ Therefore, bearing in mind that one of the purposes of the directive is to help employers to meet their needs in terms of seasonal workforce whilst ensuring that year-long jobs are not filled with seasonal workers from third-countries, the Commission proposed six months time limit.

F. Possibility to change the employer (Article 11(2))

The possibility for third-country seasonal workers to change employer is another important mechanism ensuring the protection of this vulnerable group of workers. It is vital that seasonal workers are not tied to their employers. However, it has to be underlined that the change of the employer and the conclusion of a new contract are only allowed within the specified maximum period of six months.

G. Multi-seasonal permit (Article 12)

Multi-seasonal permits are considered a useful tool to ensure that third-country seasonal workers will have employment prospects in the Member State beyond a single season – this system is expected to help prevent overstaying. It also means that employers are able to rely

¹⁴ *Impact Assessment*, above n 9, 10-11.

on a more stable and already trained workforce.¹⁵ Yet, it has to be stressed that a certain room for manoeuvre has been left to the Member States. Namely, it is for each Member State to choose whether it prefers to issue a multi-annual permit or to provide a facilitated procedure for third-country nationals who apply to be admitted in subsequent years.

H. Accommodation (Article 14(1))

The obligation to provide evidence of accommodation is another important element of the proposal ensuring that the migrant workers will not be abused. Nonetheless, it has to be stressed that the provision in question does not impose excessive burden on the employers for the reason that accommodation can be provided either by the employer or by a third party and seasonal workers may be required to pay a rent.

I. Social security (Article 16(2) and recital 22)

In respect of the concerns that third-country seasonal workers could be granted more extensive rights than Union citizens in the area of social welfare, it has to be stressed that the proposal precludes this possibility. Indeed, Recital 22 provides that 'third-country national seasonal workers should be granted equal treatment in respect of those branches of social security listed in Article 3 of Regulation (EC) No 883/04 on the coordination of social security systems. This Directive should not confer more rights than those already provided in existing EU legislation in the field of social security for third-country nationals who have cross-border interests between Member States. Furthermore, this Directive should not grant rights in relation to situations which lie outside the scope of that EU legislation such as, for example, to family members residing in a third country. This is without prejudice to the non discriminatory application by Member States of national legislation providing for *de minimis* rules on contributions to pension systems'.

IV. Other comments

A. Possibility of working in another Member State

In respect of the duration of stay the proposal is clear; a third-country seasonal worker should be allowed to reside in a Member State for a maximum period of six months in any calendar year, after which he or she should return to a third country (Article 11 in conjunction with Article 3(b) of the proposal). In other words, the six-month period is set per Member State and not for the European Union as a whole. It follows that the proposal does not intend to exclude the possibility of a third-country national seeking seasonal work in a second Member State as such a scheme would be unnecessary restrictive on both potential employers and employees and, importantly, would create an additional burden on Member States.

B. Irregular employment/stay

In respect of objections expressed that the proposal does not adequately address irregular employment and/or irregular stay, it has to be reiterated that the proposal needs to be viewed in the context of a broader migration policy framework. These aspects are regulated by other

¹⁵ *Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions, Migration and Development: Some concrete orientations*, Brussels, 1.9.2005 COM(2005) 390 final, 7.

European Union instruments, most notably Directive 2009/52/EC *providing minimum standards on sanctions and measures against employers of illegally staying third-country nationals* and Directive 2008/115/EC *on common standards and procedures in Member States for returning illegally staying third-country nationals*.

However, the proposal nevertheless addresses indirectly the issues of irregular employment and/or stay. By opening channels of legal migration and putting in place a mechanism that gives third-country nationals the prospect to lawfully return in the following season, the proposal may prove as efficient as measures of a punitive character in dealing with the challenge of irregular migration. Indeed, it is important to create more legal job opportunities for third-country migrants while, at the same time, enabling them to continue to return periodically to their countries and thus maintain ties with their families and local communities.

C. Additional costs

While the introduction of the proposed legal framework might create some additional administrative and financial burdens in certain Member States (see the detailed analyse in the IA pp 40-43), the benefits of the introduced scheme are expected to outweigh possible costs.

D. No proper analysis of the subsidiarity issue

The explanatory memorandum to the proposal for the Directive includes a section on the subsidiarity principle on pages 6 and 7.¹⁶ Further, the Impact Assessment accompanying the proposal and Annexes define the problem, describe objectives, analyse the possible policy options and elaborate on the modalities of the proposed legal framework, including the assessment of expected costs.¹⁷ The Commission believes that the issue of subsidiarity has been properly examined and that the proposal passes the subsidiarity test.

V. Concluding remarks

To conclude, the Commission is of the opinion that the proposal for a *Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment* is an important legislative initiative.

The Commission did its utmost to present a balanced proposal taking into account various, at times divergent, interests of stakeholders. The Commission is convinced that the European Parliament and the Council both have important contributions to make which could result in a further improvement of the text. It trusts that following examination by the co-legislators, common rules will be established in this area.

¹⁶ See also *Impact Assessment*, above n 9, 15-16.

¹⁷ *Ibid*, 33-43.