

The Seasonal Workers Directive: '... but some are more equal than others'

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Abstract

The Seasonal Workers Directive, harmonising Member States' laws regarding the entry, residence and certain labour rights of seasonal workers, entered into force in 2014 and should be implemented by Member States (except for the UK, Ireland and Denmark) by 30 September 2016. According to Article 23 of the Directive, in principle, third-country nationals coming to a Member State as seasonal workers are entitled to equal treatment with nationals of the host Member State. However, what does 'equal treatment' mean when there are almost no nationals doing seasonal work for comparison? Also, the Directive allows Member States to diverge from the principle with regard to family and unemployment benefits and education and vocational training. Furthermore, the Directive does not provide for family reunification, even though seasonal workers are allowed to work for periods of up to nine months per year in the host Member State. Considering the limitations to the principle of equal treatment, and the broad measure of discretion given to the Member States in the implementation of the Directive, can the Directive really improve the precarious position of seasonal workers? What is to be expected of the effectiveness of the Directive? Could the Directive also be attractive for application by countries (inside the EU or outside) that are not bound by the Directive? This article will try to answer these questions by critically analysing the Directive, setting it in historical perspective and comparing it other EU legal instruments on labour migration, focusing particularly on the content of a select number of rights. The article furthermore discusses the issue of gender equality in the (effects of the) EU regulation of labour migration. It finally also addresses the question of the attractiveness of the Directive for adoption by States that are not bound by it, in particular Switzerland, where the seasonal worker has remained a hot topic after officially having 'disappeared' from the radar in 2002.

Keywords

EU migration, labour migration, seasonal workers, migrant workers, equal treatment

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Political and historical backdrop of the seasonal workers directive

With the focus of current migration policy being predominantly on finding a solution for what is perceived as the refugee crisis, a solution that is sought with a view to keeping refugees out or sending them back to where they came from, it is easy to forget about recent legal instruments of the EU that revolve around the possibility of allowing unskilled or low-skilled workers first access to the labour markets of the Member States of the European Union. However, the Seasonal Workers Directive does exactly that: it regulates the conditions under which unskilled or low-skilled third-country nationals are allowed to enter the territory of, and take up seasonal work in, those EU Member States that are bound by the Directive (all Member States except Ireland, the UK and Denmark).¹ What drove the Commission to propose such a Directive, at a time when unemployment rates in the EU² were thought to be ‘soaring’?³ And how did the Commission manage to have it adopted by the Council and the Parliament, bearing this in mind?

In order to answer these questions, it is necessary to look at the historical backdrop of the Directive. Already back in 2001, the Commission made it clear that it thought it best to harmonise the conditions of entry and residence of labour migrants.⁴ The Member States, however, were not keen on sharing labour migration control, and as the Council at that time still would have had to adopt the proposal with *unanimity*,⁵ the proposal was withdrawn.⁶ The Commission consequently abandoned its all-inclusive approach to EU labour migration regulation, and decided to put forward the original proposal in pieces. The proposals for Directives, harmonising the regulation of entry and stay of those categories of labour migrants that were favored by the Member States (highly qualified workers, researchers and students) because of their perceived high value to the labour market and the economy of the host Member States, led the way both in terms of sequence and in terms of rights.⁷ In March 2004, a Directive regulating the entry and stay of researchers was

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1. According to Articles 1 and 2 of Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and the TFEU, Ireland and the UK are not bound by EU acts that are based on Title V of Part Three of the TFEU, unless they wish to opt in during the legislative process or to accept the measure after it has been adopted. The Seasonal Workers Directive is based on Article 79 TFEU, and thus falls within the scope of Protocol No. 21. Ireland and the UK have not made use of the possibility to opt in with regard to the Seasonal Workers Directive. Denmark has also negotiated a reservation; according to Protocol No. 22 on the position of Denmark annexed to the TEU and to the TFEU, Denmark is not bound by any measure or Court decision based on Title V of Part Three of the TFEU. Denmark does not have the possibility to opt in. See also Preamble of Directive 2014/36/EU on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers (‘Seasonal Workers Directive’), OJ L 94/375, under 54 and 55.
 2. The Commission came up with the proposal in 2010, when the EU unemployment rate was just under 10%, and steadily growing; see for graphics Eurostat under http://ec.europa.eu/eurostat/statistics-explained/images/0/0a/Unemployed_persons%2C_in_millions%2C_seasonally_adjusted%2C_EU-28_and_EA-19%2C_January_2000_-_March_2016_.png
 3. Schwarzer, ‘What Economic Policy for the Euro Area after the Financial Crisis? The Path Towards a New Franco-German Compromise’, in *State of the Union 2010* – Schuman report on Europe, Chopin and Foucher (eds.), Springer, 2010, p. 60.
 4. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001)386, OJ 2001 C 332 E/248.
 5. Fudge and Herzfeld Olsson, *The EU Seasonal Workers Directive: When Immigration Controls Meet Labour Rights*, *European Journal of Migration and Law* 16(2014), p. 443.
 6. Withdrawal of Commission proposals following screening for their general relevance, their impact on competitiveness and other aspects, OJ 2006 C 64/3.
 7. ‘Guild, Equivocal Claims? Ambivalent Controls? Labour Migration regimes in the European Union’, in Guild and Mantu (eds.), *Constructing and Imagining labour migration: perspectives of control from five continents*, p. 216.

proposed by the Commission, and quickly adopted in 2005.⁸ In October 2007, the Commission proposed two more Directives, one on the admission of ‘highly qualified’ labour migrants, and the other on the establishment of a single residence and work permit for third-country nationals. The ‘Blue Card’ Directive⁹ regulating admission for the purposes of highly qualified employment, aimed at making the EU more attractive to highly skilled workers that can contribute to the sustenance of the EU’s competitiveness and economic growth,¹⁰ was adopted by the Council early 2009. In contrast, the ‘Single Permit’ Directive¹¹ – applicable to *all* third-country workers and providing in principle for equal treatment with domestic workers – was adopted almost three years after that.

Significantly, it was only after the coming into force of the Lisbon Treaty in 2010 that proposals were made for legislation regarding the entry and stay of unskilled third-country national workers for the sake of seasonal labour, together with a proposal for the regulation of intra-corporate transfer of workers. The 2010 proposal for the Seasonal Workers Directive clearly has as its focal point the management of the migration of an unskilled labour force, even though it mentions the protection of the migrant workers against exploitation and consistency with the EU’s development policy as policy objectives that are served by the Directive.¹² The impact assessment on which the proposal is based argues that the economies of the EU Member States need around 100,000 third-country national temporary/seasonal workers per year, and the proposed Directive contained provisions aimed at promoting circular migration¹³ so as to provide the Member States’ economies with an indispensable workforce while preventing the seasonal workers from becoming long-term residents¹⁴ by allowing them to stay for a period of up to six months per calendar year, without being permitted to bring their family members with them. On the other hand, the proposal provided for strong guarantees for seasonal workers who left before the expiry of their residence and work permit that they would be allowed to return the next calendar year, by leaving the Member States

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8. Directive 2005/71/EC on a specific procedure for admitting third-country nationals for the purposes of scientific research, see also Peers and Rogers (eds.), *EU Immigration and Asylum Law* (2006), p. 661. This Directive will be merged with an earlier Directive on the entry and stay of Students (Directive 2004/114/EC). The new Directive will regulate the conditions of entry and residence of third-country nationals for the purposes of research, study, training, voluntary service, pupil exchange schemes or educational projects and *au pairing*; and is expected to be adopted in 2016 or 2017.
 9. Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ 2009 L 155 (‘Blue Card Directive’).
 10. Recitals 3 and 4 in the preamble of the Blue Card Directive.
 11. Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ 2011 L 343.
 12. The Commission, in its Explanatory Memorandum to 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 purposes of seasonal employment, COM(2010) 379, under (1) Context of the Proposal - Grounds for and objectives of the proposal, mentions as the sole objective of the Directive the provision of fair and transparent rules for entry and residence, and safeguards to prevent a temporary stay from becoming permanent.
 13. As such, the Directive was meant to complement and not replace the bilateral or multilateral agreements between Member States and third countries, implementing the Mobility Partnerships with which the EU sought to promote circular migration under the 2005 Global Approach to Migration GAM. The Mobility Partnerships have remained an ineffective tool in migration, development and human rights policy, see Carrera and Hernandez I Sagrera, *Mobility Partnerships. ‘Insecurity Partnerships’ for policy coherence and migrant workers human rights in the EU*, in Kunz, Lavenex and Panizzon (Eds.), *Multilayered Migration Governance. The promise of partnership*, pp. 97-115.
 14. Fudge and Herzfeld Olsson (fn. 5), p. 446.

the choice between issuing multi-seasonal permits covering up to three seasons or applying a facilitated procedure when such a third-country national applied in a subsequent year.¹⁵

The proposal met with resistance on a number of levels and for a wide range of reasons. The narrow scope of the Directive, having no regard for the precarious employment position of the seasonal worker and excluding seasonal workers that would come for less than three months,¹⁶ was criticised by NGOs such as the ILO,¹⁷ PICUM and SOLIDAR,¹⁸ by the European Parliament, and academics. The national parliaments of several Member States voiced their concern that the principle of subsidiarity would be infringed by the Directive.¹⁹ The Ministers in the Council found that the Directive would affect their ability to control their borders, and thus infringed their prerogative to determine volumes of third-country nationals admitted to their territory, as protected by Article 79(5) TFEU. What ensued was a long negotiation period of three and a half years, in which the proposal underwent fundamental changes (some of which are examined below), until the EU institutions hurriedly reached an agreement at the end of March 2014 just before the EP elections in May 2014.²⁰ Thus, the Directive on Seasonal Workers came to fruition nine years after the Commission had announced its plans to propose legislation regarding the entry and stay of unskilled third-country national workers.²¹ And even then, the Member States were not in a hurry to transpose the Directive in their national legal orders: the deadline for implementation runs in September 2016.

The text of the Directive as adopted in 2014 has changed dramatically when compared to the 2010 proposal. To name but a few changes: Seasonal workers are allowed to stay in the Member State for periods of up to nine months per calendar year, and provisions aimed at stimulating 'circular' migration were toned down to afford the Member States more discretionary power to decide how to implement them. These particularities of the Directive that are discussed at some length elsewhere in literature,²² fall outside the scope of the present paper which concentrates on the human rights and labour law regime created by the Seasonal Workers Directive.

Scope and non-peremptory character of the Directive

As already mentioned above, the delay in the adoption of legislation on the entry and stay of unskilled third-country workers, as opposed to the relative speed with which legislation pertaining

15. Article 12 of the proposed Directive, COM(2010) 379.

16. The provision covering admission in the original proposal (Article 10) was only applicable for stays exceeding three months, whereas the provisions covering admission and renewal covered all seasonal workers, which resulted in confusion.

17. ILO, Technical comments on the Proposal for an EU Directive on seasonal employment of migrant workers, 21 November 2011.

18. Joint NGO statement, EU Seasonal Migrant Workers Directive: Full Respect of Equal Treatment Necessary, 20 April 2011; also AEDH (European Association for the Defense of Human Rights), Foreign workers in the EU: moving towards multiple standards, founded on unequal treatment?, November 2011.

19. COSAC, Annex to the Sixteenth Bi-annual Report on Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny: Replies of National Parliaments and the European Parliament, October 2011, listing Austria (pp. 16 and 17), Czech Republic (pp. 39 and 44), Finland (p. 59), Lithuania (p. 130), the Netherlands (p. 149), Portugal (p. 171) and the UK (pp. 217 and 220) as those Member States whose parliaments objected to the proposal for this reason.

20. Lazarowicz, 'A success story for the EU and seasonal Workers rights without reinventing the wheel', European Policy Centre Policy Brief, 28 March 2014, p. 2.

21. Commission, Policy Plan on Legal Migration, COM(2005)669 final.

22. For a clear overview of the transformation of the Directive, see Fudge and Herzfeld Olsson (fn.5).

to immigration and employment of highly skilled was adopted by the European legislator,²³ may be seen as an indication of the type of third-country national that is regarded as welcome by the EU and its Member States and the type that is not. This suggestion becomes even stronger when comparing the content of some of the rights granted to the various categories of third-country national workers. To illustrate the disparity, the regime of the Seasonal Workers Directive will be contrasted below with the rights of highly skilled migrant workers that fall within the scope of the Blue Card Directive. Still, in order to understand the impact of the rights granted to seasonal workers under the Seasonal Workers Directive, it is important to clarify to whom they are applicable. Therefore it is necessary to reflect on the personal scope and the peremptory effect of the Directives, before continuing to examine the rights granted by the Directives.

Regarding the differences in scope, the Seasonal Workers Directive is applicable to third-country nationals residing *outside*²⁴ the EU at the time of application for a visa, who wish to temporarily reside in an EU Member State to take up seasonal employment in that Member State – with seasonal work being defined in the Directive 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.²⁵ For the applicability of the Directive it is therefore not the person of the seasonal worker that is decisive, but the sector the Member States' governments decide that they will allow them to work in. From the Commission's Impact Assessment, it is, furthermore, clear that it is aimed in particular at the horticultural and agricultural sectors. The Directive therefore does not apply to the low skilled or unskilled labour force active in sectors that are not affected by recurring events or patterns of events linked to seasonal conditions, such as the healthcare sector. Contrarily, in principle the scope of the Blue Card Directive extends to potential migrant workers residing outside the territory of the Member State of the EU to which they apply, or those legally resident in the territory of that Member State.²⁶ Furthermore, the applicability of the Blue Card Directive depends on the hard skills of the person involved, as only applicants that have evidence of higher education qualifications (or, if the Member State allows for such a derogation, comparable professional experience of at least five years).²⁷

With regard to the peremptory effect of the Directives, the regimes of the two Directives show great differences as well. Halfway through the negotiation process of the Blue Card Directive, Germany insisted on inserting a clause into the Directive that would allow the Member States to issue residence permits other than an EU Blue Card for the purpose of employment. Despite Commission opposition, as such a clause would risk the creation of a standard procedure on residence and work permits for highly skilled migrant workers throughout the EU, Article 3 of the Blue Card Directive now allows Member States to maintain or introduce national admission

23. Despite the fact that the Blue Card Directive was adopted before the Lisbon Treaty came into effect, which meant that the Council had to adopt it with unanimity. See also Eisele, 'Assessing the "Attractiveness" of the EU's Blue Card Directive for "Highly Qualified" Immigrants', CEPS paper in Liberty and Security in Europe, No. 60/October 2012, p. 4.

24. The Directive will therefore not offer a solution for the illegal seasonal workers that are already employed in Member States of the EU, though the European Parliament and several NGO's lobbied to have them included as well; EP Committee on Civil Liberties, Justice and Home Affairs, 'Draft report on 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 purposes of seasonal employment', 2010/0210(COD), p. 16.

25. Article 2(1) second indent, and Article 3(a) and (b) of the Seasonal Workers Directive.

26. Though Member States are at present still allowed to provide otherwise, and require applicants to reside outside their territory at the time of application.

27. Article 2(g) of the Blue Card Directive.

schemes for highly skilled migrant workers.²⁸ The limited impact of the Directive therefore does not necessarily mean that highly skilled migrant workers do not migrate to the EU Member states, as some Member States prefer to rely on the relevant domestic scheme that existed before it had to implement the Blue Card Directive.²⁹ The same tolerance does not exist with regard to seasonal (low-skilled) migrant workers, as the Seasonal Workers Directive does not permit Member States to admit seasonal workers through other temporary migration schemes than that based on the Directive.³⁰ Whereas Article 4 of the Directive does provide that more favorable provisions of EU law,³¹ and multi or bilateral agreements between Member States and third countries, will not be affected by the Directive, the effect of this provision is expected to be rather limited.³² Therefore, it is safe to say that the Seasonal Workers Directive will replace existing national legislation on the admissibility, residence and employability of seasonal workers. This strengthens the impression that the EU would like to centralise the control of the migration of ‘unwanted’ low-skilled migrant workers – whose numbers should be kept at a minimum – whereas it reserves only a complementary role for the EU regulation of the migration of the coveted highly skilled migrant workers.

The catalogue of rights of seasonal workers according to the Directive

Without claiming to be complete in its assessment, this paper analyses the differences in the legal regimes applicable to the entry and stay in EU Member States of seasonal and highly skilled workers by contrasting the substance of the rights granted under the Seasonal Workers Directive and the Blue Card Directive. It does so primarily by focusing on the difference in the content of the principle of equal treatment with Member State nationals, the right to change employers, and the right to family reunification.

Equal treatment

In the original version of the proposal for the Blue Card Directive,³³ the scope of the right to equal treatment with nationals of the Member State was fairly broad, excluding only study grants and procedures for obtaining public housing for Blue Card holders staying for less than three years, and

28. The existence of different regulatory systems regarding the entry, residence and employability of highly skilled migrant workers, is regarded by the Commission as one of the main reasons for the limited impact of the Directive in its 2009 version; Commission Inception Impact Assessment, Review of 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 (“EU Blue Card” Directive), 16/07/2015, pp. 6, 7 and 13.

29. The Netherlands is an example of such a Member State. According to their own numbers, the legislation implementing the Blue Card Directive was only used once in 2012-2013, whereas 5,514 permits were issued based on the national legislation for the immigration of highly skilled workers; see Communication from the Commission to the Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (‘EU Blue Card’), COM(2014) 287, pp. 4 and 11.

30. Fudge and Herzfeld Olsson, (fn.5), p. 450.

31. Association agreements with third countries often offer the citizens of these countries preferential treatment; the EEC-Turkey association agreement with its additional protocol, and the EU-Switzerland association agreement, are but two examples of legal instruments that contain more favourable provisions than the Seasonal Workers Directive.

32. The practical use made of Mobility Partnerships is rather limited; see Carrera, Cassarino, El Wuadim, Lahlou and Den Hertog, ‘EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?’ CEPS Papers in Liberty and Security in Europe, No. 87, 2016, p. 13.

33. COM/2007/0637 final.

social assistance to Blue Card holders that had been granted long-term residence status.³⁴ During the negotiation process, the scope of the right to equal treatment changed only slightly, and at the stage of adoption included working conditions, freedom of association, education and vocational training, recognition of diplomas, access to social security, payment of income-related pensions on moving to a third country, access to public goods and services, and free access to the national territory.³⁵ Access to education and vocational training may be made subject to specific prerequisites in accordance with national law, and may only be given to Blue Card holders and their family members if their registered place of residence lies within the territory of the Member State from whom it is requested. Furthermore, equal treatment with regard to grants and loans regarding secondary and higher education and vocational training, and procedures for obtaining public housing, may be restricted by national law.³⁶

Unlike the proposal for the Blue Card Directive, the Commission's proposal for a Seasonal Workers Directive did not provide for the principle of equal treatment – even though one of the Directive's proclaimed objectives was the protection of the third-country national seasonal worker against exploitation.³⁷ The Directive merely guaranteed '*working conditions, including pay and dismissal as well as health and safety requirements at the workplace, applicable to seasonal work, as laid down by law, regulation or administrative provision and/or universally applicable collective agreements in the Members State to which they have been admitted according to the Directive*'.³⁸ This was one of the aspects of the proposal that received criticism. The ILO focuses, in particular, on the difference in treatment between the seasonal workers and the migrant workers falling within the scope of the Blue Card Directive, and further, on the Seasonal Workers Directive's shortcomings in respect of ILO norms that have been signed by the EU Member States with regard to the equal treatment of migrant workers in employment and occupation.³⁹ Mainly through activism on the part of the European Parliament, the Directive now provides for equal treatment at least with regard to nine specific categories of rights listed in Article 23. These categories are terms of employment and working conditions, the right to strike and take industrial action, the right to back payment of outstanding remuneration, the right to branches of social security as per Article 3 of Regulation 883/2004 (thus, among others, sickness benefits, maternity benefits, invalidity benefits, survivors' benefits and family benefits), access to public goods and services, advice services on seasonal work offered by employment offices, education and vocational training, recognition of professional qualifications, and tax benefits.

The possibility for Member States to exclude study and maintenance grants and loans, and procedures for obtaining houses strengthens the impression that on the surface of things, the right to equal treatment provided for by the Seasonal Workers Directive does look rather similar to its

34. Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment {SEC(2007) 1382} {SEC(2007) 1403} /* COM(2007) 637 final, Article 15.

35. Article 14(1) of the Blue Card Directive.

36. Article 14(2) of the Blue Card Directive; see also Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 May 2008, document number: 8249/08, p. 30, footnote 95; Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 19 June 2008, document number: 9666/08, pp. 21, 22 and 23.

37. Fudge, *Migration and Sustainable Development in the EU: A Case Study of the Seasonal Workers Directive*, pp. 343-344.

38. Article 16 of the Proposal, COM(2010) 379.

39. ILO Note based on International Labour Standards with reference to relevant regional standards, available through the ILO's website: www.ilo.org.

Blue Card Directive counterpart. However, Member States are given a wider discretionary power under the Seasonal Workers Directive to decide on the exact scope of equal treatment, as the Directives leaves it to the Member States to determine whether they want to exclude access to family benefits and unemployment benefits, to limit access to education and vocational training to that which is directly linked to the specific employment activity, and to limit tax benefits to cases where the registered place of residence of the family members of the seasonal worker for whom he or she claims benefits lies in the territory of the Member State concerned.⁴⁰ Considering that the Directive does not provide for family reunification, on which the paper will focus below, limiting tax benefits to cases where the registered place of residence of the family members lies within the territory of the concerned Member States is virtually eliminating these tax benefits. Furthermore, limiting access to education and vocational training to that which is directly linked to the specific employment activity would counteract one of the other objectives underlying the Directive: that of development. The proposal for the Seasonal Workers Directive was launched within the context of the 2009 Stockholm Programme, which highlighted the importance of optimising the link between migration and development.⁴¹ On many occasions, the Commission has highlighted the contribution circular migration, and circular migrants, can make to the development of the source country ('triple win').⁴² But what better contribution to development can be made than through education? It is difficult to find a reason why Member States would not want to allow seasonal workers to acquire valuable skills during their stay in that Member States, besides the motive that seasonal workers should not be able to attend whatever education and vocational training they would like as this would help them to climb the skills ladder – and possibly return to the EU with a different residence title. The scope of the right to equal treatment under the Seasonal Workers Directive is therefore considerably more limited than that under the Blue Card Directive.⁴³

Finally, the *raison d'être* of the Seasonal Workers Directive is the Member States' need for labour force from third countries to do seasonal work, as it is extremely difficult to find national workers in the Member States willing to do this type of work.⁴⁴ Therefore, the guarantee of equal treatment is *per se* problematic in the seasonal work sector: if there are no national workers with whom a comparison can be made, then what will be the practical content of the right to equal treatment of seasonal workers? It is true that EU citizens from some eastern and southern Member States travel to other Member States to do seasonal work there, and through their presence the third-country national seasonal Workers right to equal treatment may be given real substance; however, this 'indirect' equalisation will not take place in Member States that are not attractive as hosts for EU citizen seasonal workers, and where the labour force in the seasonal work sector will almost entirely consist of third-country nationals. Furthermore, whereas it may be easier for EU citizen seasonal workers to enforce their right to equal treatment – even only by quitting a job in which this right is infringed upon by the employer, and finding a job with another, more compliant,

40. Article 23(2) of the Seasonal Workers Directive.

41. Seasonal Workers Directive, Preamble under (6).

42. See, for example, the website of DG home affairs: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/legal-migration/work/index_en.htm

43. Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration', in Costello and Freedman, *Migrants at Work: Immigration and Vulnerability in Labour Law*.

44. Brickenstein, 'Social Protection of Foreign Seasonal Workers: from State to Best Practice', *Comparative Migration Studies* (2015), 3:2, p. 1.

employer -, this is not the case for the third-country national seasonal worker; the comparison below of the right to change employer illustrates this point in more detail.

Changes in employer

According to the Commission, Article 12 of the Blue Card Directive in particular aimed at making the European market attractive to highly skilled workers.⁴⁵ The Article provides, in a nutshell, that as long as the person stays within the same kind of position, and as long as the change is notified to the authorities, he or she should be able to change roles within an enterprise or change enterprise.

For seasonal workers, Article 15 of the Seasonal Workers Directive provides that Member States should allow them to change employer once (within the period they have been given the permit for, or extending their stay) – unless the vacancy can be filled with other EU residents.⁴⁶ The right to change employers is important for seasonal workers whose working conditions are known to be tough – if these working conditions do not satisfy those of the Directive the easiest way to enforce the Directive's rights would be for the seasonal worker to change employer.⁴⁷ If a permit is linked to the one employer, the seasonal worker is made dependent on that employer, and the seasonal worker will think twice before even complaining.⁴⁸ To balance the discretion the Member States have in allowing the seasonal worker a change of employer, the Directive has a provision on the facilitation of complaints against an employer not fulfilling his duties under the Directive, while at the same time offering protection to the complaining seasonal worker.⁴⁹ On top of that, the Directive obliges the Member States to provide for effective sanctions against the employer, while ensuring that the employer will be kept liable to pay compensation to the seasonal worker in case the employer's seasonal work authorisation is withdrawn by the authorities.⁵⁰ While such a provision may seem to reduce the vulnerability of the seasonal worker, similar provisions present in the Employers' Sanctions Directive have either not been transposed by the Member States into their national laws, or have remained ineffective.⁵¹ It is therefore not likely that the sanctions provision in the Seasonal Workers Directive will have much more of a dissuasive effect. The right to change employer is therefore essential for the seasonal worker as he will continue to have to fend for himself.

Family reunification

In order to make it more attractive to highly skilled people to come to the EU to take up employment, and to integrate into the society of the host Member State, the Blue Card Directive contains provisions on family reunification that are more favorable than the Family Reunification

45. Council of the European Union, Outcome of Proceedings – Working Party on Migration and Expulsion, 8 April 2008, document number: 7642/08, p. 3, footnote 5.

46. Article 15(6) of the Seasonal Workers Directive.

47. Fudge and Herzfeld Olsson, pp. 460-461.

48. Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration', in Costello and Freedland, *Migrants at Work*, p. 113.

49. Article 25 of the Seasonal Workers Directive.

50. Article 17 read in conjunction with Article 9 (2) and 9(3) (b), (c) and (d) of the Seasonal Workers Directive.

51. Guild, 'What are the Member States doing regarding sanctions on employers of irregularly staying third country nationals?' <http://eulawanalysis.blogspot.ch/2014/06/what-are-member-states-doing-regarding.html>

Directive,⁵² whereas the Family Reunification Directive also applies to Blue Card holders as minimum standard rules.⁵³ To name but a few examples: Blue Card holders do not have to wait for up to two or three years to be reunited with their families and they do not have to prove a reasonable prospect of obtaining permanent residence, and family members of Blue Card holders do not have to fulfil integration requirements (such as the passing of a language test) before admission to the territory of a Member State.⁵⁴ Thus, the Blue Card holder has been granted rights that are not quite the same, but similar to, the rights of EU citizens moving between Member States.

Seasonal workers, on the other hand, are not able to bring their families with them, even though they can stay in a Member State for as long as nine months per calendar year.⁵⁵ As the aim of the Seasonal Workers Directive is to stimulate circular migration, the seasonal workers are not encouraged to integrate - or put more strongly: they are kept from integrating - into the society of the host Member State. Despite ILO Recommendations to allow seasonal workers to bring their families with them,⁵⁶ regardless of experiences with guest-worker regimes in the past,⁵⁷ and notwithstanding the right to family life as recognised by the European Union and its Member States, the Directive does not contain a provision on family reunification. It is not clear why the EU assumes that the Directive will not lead to the same tragic results as the temporary work programmes before it, where spouses and children preferred to reunite illegally instead of remaining apart for nine months of the year.

Intra-EU mobility

One of the elements in the original proposal for the Blue Card Directive that were aimed at making the EU more attractive to highly skilled workers was the introduction of the right of secondary mobility.⁵⁸ Thus, the proposal provided for priority in the local labour market whenever Blue Card holders would move to another Member State after having acquired long-term resident status.⁵⁹ However, during the negotiations some of these elements lost their shine somewhat. Though the Blue Card Holder is allowed to change jobs and move to another Member State according to the adopted Directive, he cannot do so immediately after having being granted the Card by the Member State of first arrival. The Blue Card Holder cannot move to another Member State within the first 18 months⁶⁰ of entry; furthermore, the two-year waiting period for equal treatment in employment may start afresh after moving to the second Member State.⁶¹ For these reasons, the

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

53. Article 4(2)(b) of the Blue Card Directive.

54. Article 15(2) and 15(3) of the Blue Card Directive.

55. Costello, *The Human Rights of Migrants in European Law*, p. 131.

56. ILO, *Conditions of work and life of migrant and seasonal workers employed in hotels, restaurants and similar establishments*, 1974, p. 46.

57. Castles, 'The Guest-Worker in Western Europe – An Obituary', *The International Migration Review*, Vol. 20, No. 4 (Winter 1986), p. 761.

58. Barnard, *EU Employment Law*, p. 186.

59. European Commission, explanatory memorandum to the proposal for the Blue Card Directive, {SEC(2007) 1382}{SEC(2007) 1403}, under 130.

60. This period will be reduced to 12 months if the Commission's proposal for the Recast Blue Card Directive is adopted.

61. Peers, Guild, Acosta Arcazaro, Groenendijk and Moreno-Lax (eds.), *EU Immigration and Asylum Law (Text and Commentary): Second Revised Edition*, Vol. 2: *EU Immigration Law*, p. 63, referring to Kocharov, 'What Intra-Community mobility for third-country workers?' (2008) 33 *ELRev.* 913 at p. 920-921.

mobility provisions in the Blue Card Directive have received criticism. The Directive treats the internal market as 25 separate states for the sake of the free movement of workers.⁶² It seems that the Member States' fear of the permanent settlement of third-country nationals and the wish to control admission has won out, even over their wish to become an attractive destination for highly skilled third-country national workers.⁶³ Notwithstanding the limitations, however, the principle remains that the Directive grants the Blue Card holder the right to move from one Member State to another. If the proposed Recast Blue Card Directive is adopted, this right will be reinforced as it will reduce the period in which the Blue Card Holder has to stay in the first Member State to 12 months.

The Seasonal Workers Directive does not provide for intra-EU mobility for those third-country nationals that have entered an EU Member State benefiting from its provisions. *A fortiori*, as analysed above, the seasonal worker only has a limited right to change employer within the *same* Member State. The absence of a provision on intra-EU mobility in the proposal for the Seasonal Workers Directive was actually one of the aspects of the Directive that made it less problematic.⁶⁴ Without intra-EU mobility, the unskilled seasonal worker remains the sole responsibility of the Member State that originally admitted him or her, and there would be no danger of the seasonal worker, once admitted, moving to another Member State that would not have admitted him or her in the first place – based on a different assessment of the conditions for admission, or based on the availability of labour force within the Member State.

The Member States, in their wish to remain in control of the admission of unskilled workers to their territory and labour market, disregard calls from think tanks⁶⁵ and civil society organisations like the European Trade Union Confederation, which argue that EU legislation should remove obstacles to intra-EU mobility of all third-country nationals residing regularly in a Member State, including those without long-term resident status, for the duration of their legal residence in the EU.⁶⁶ The failure to create a real European labour market ignores an untapped potential labour force of third-country nationals already legally residing in the EU, whereas intra-EU mobility would improve the functioning of the labour market and meet labour market needs throughout the EU. The internal mobility, resulting from the creation of a single area of migration within the EU, will allow migrants to go where labour shortages exist – even if those shortages are seasonal. This would also enable the seasonal worker to find seasonal employment in the EU for the maximum amount of time per year (at present, nine months per year). As the season in some sectors of the labour market can be very short, as short as two months for the harvest of asparagus, for example, the income earned during one season will not be enough for the seasonal worker and his family to live on for the rest of the year. In other 'seasonal' sectors the season may run for as long as ten

62. Guild, 'The EU's Internal Market and the Fragmentary Nature of EU Labour Migration', in Costello and Freedland, *Migrants at Work*, p. 113.

63. Peers, Guild, Acosta Arcarazo, Groenendijk and Moreno-Lax (fn.61), p. 324.

64. Lazarowicz, A success story for the EU and seasonal Workers rights without reinventing the wheel, European Policy Center, Policy Brief 28 March 2014.

65. Martin, Di Bartolomeo, De Bruycker, Renaudiere, Salamonska and Venturini, Exploring New Avenues for Legislation for Labour Migration to the European Union, study for the European Parliament Policy Department C: Citizens' Rights and Constitutional Affairs, Migration Policy Center, Robert Schuman Centre for Advanced Studies, European University Institute, p. 37 and

66. Mavrodi, Common EU Policies on Authorised Immigration: Past, Present and Future, LSE IDEAS, Strategic Update 15.2, May 2015, p. 12.

consecutive months.⁶⁷ Providing for intra-EU mobility for seasonal workers, therefore, would both serve the objective of sustaining the EU's development policy as it would allow the seasonal workers to earn an income that would be sufficient for a whole year, and at the same time, it would provide employers in the different seasonal sectors with the required workforce. It is, however, obvious that the introduction of intra-EU mobility for unskilled workers conflicts with the Member States' wish to control first admissions of this type of labour migrant to their territory, as argued throughout this article. A solution could be to allow Member States initially to make entry and access to the labour market conditional upon a labour market test – as is presently the case for Member States that host a seasonal worker who has requested an extension of a valid seasonal work permit in the same Member States; and also to secondary Member States to which a Blue Card Holder wants to move after having resided and worked in the first Member State for 18 months.⁶⁸

Gender-related aspects of the Seasonal Workers and Blue Card Directives

One feature that the Seasonal Workers Directive and the Blue Card Directive do have in common is the collateral negative effect both instruments have on the migration of women. Since neither instrument mentions gender, they seem gender neutral at a first glance. However, the different effects of migration policies on men and women have been studied before, especially within the framework of research on the migration of highly skilled workers.⁶⁹ Evidence has been produced that generally, skilled women migrate more than men.⁷⁰ Surprisingly, more recent research has nevertheless revealed that women form a minority of the migrant workers admitted through highly skilled migration schemes. Available data shows that in some of the 'old' EU Member States only a quarter of the permits issued to highly skilled migrant workers are obtained by women.⁷¹ A reason for this discrepancy might be found in the criteria for admission as laid down by the Blue Card Directive and similar national legislation of the Member States. One of the criteria for admission according to the Blue Card Directive is the gross annual salary, which must be at least 1.5 times the average gross annual salary in the Member State concerned.⁷² Despite efforts, policies and promises to change this situation, the gender wage gap is still a fact in all of the EU Member States.⁷³ For this reason alone, the conclusion can be drawn that highly skilled female

67. Medland, Misconceiving 'Seasons' in Global Food Systems: The Case of the EU Seasonal Workers Directive, Colloquium Paper No. 25, paper presented at the Global governance/politics, climate justice & agrarian/social justice colloquium.

68. The practical implementation of labour market tests by Member States within the scope of the EU Directives on labour migration requires further research; Martin, Di Bartolomeo, De Bruycker, Renaudiere, Salamonska and Venturini, *Exploring New Avenues for Legislation for Labour Migration to the European Union* (fn. 64), p. 40.

69. Docquier, Lowell and Marfouk, *A Gendered Assessment of Highly Skilled Emigration*, World Bank, 2008; also Fincher, Foster and Wilmot, *Gender Equity and Australian Immigration Policy*, Australian Government Publishing Service, 1994.

70. Cerna and Czaika, 'European Policies to Attract Talent: The Crisis and Highly Skilled Migration Policy Changes', in Triandafyllidou and Isaakyan (eds.), *High Skill Migration and Recession: Gendered Perspectives*, pp. 36-38.

71. Kofman, 'Towards a Gendered Evaluation of (Highly) Skilled Immigration Policies in Europe', *International Migration* Vol. 52(3)2014, p. 122.

72. Article 5(3) of the Blue Card Directive.

73. <https://www.oecd.org/gender/data/genderwagegap.htm>

potential migrant workers are less likely to fulfill the admission criteria of the Blue Card Directive or similar national legislation of the EU Member States than their male peers.

As already examined above, the Seasonal Workers Directive has a different set of conditions for admission, and the total wages of the potential seasonal migrant worker is not one of them. It is another aspect of this Directive that is inherently disadvantageous for women, namely the fact that seasonal workers are not allowed to bring their families with them. As discussed above, the Directive does not provide for family reunification – whether the seasonal worker is a man or a woman. Whereas the Directive is not directly discriminatory, when one considers that in most societies – and especially in the societies of countries that source unskilled seasonal workers – women have maintained primary responsibility for the direct care of children,⁷⁴ it is obvious that it will be mainly men that are able and willing to leave their families behind for periods of up to nine months per calendar year to go and take up seasonal work in one of the Member States of the EU. From this very cursory examination of the gender-related aspects of the Directives the conclusion can be drawn that also gender equality and equal opportunities in the labour market thus seem to be principles that are solely applicable to the EU's own citizens and not so much to third-country nationals.

Likelihood of adoption of the Directive by (Member) States not bound by it: Switzerland

As mentioned before, the Directive is not binding on three EU Member States (the UK, Ireland and Denmark). It also does not need to have an effect on the legal order in Switzerland, despite the Directive's links with the Schengen acquis and Switzerland's association with the Schengen area.⁷⁵ On a case-to-case basis, Switzerland nevertheless may choose to transpose parts of EU legislation, as it has done before.⁷⁶ If Switzerland feels that the transposition of the EU legislation is beneficial for the competitiveness of the Swiss economy, it could select and transpose any part of EU legislation that it wants – without being bound by later amendments and the CJEU's interpretation of the transposed legal act.⁷⁷ The question is, whether the Seasonal Workers Directive is a candidate for transposition into Swiss law. Considering the above remarks with regard to the rights

74. OECD, *Closing the Gender Gap: Act Now*, pp. 199 ff ('Who Cares?'); also Patton, *Conceptualising Women's Working Lives: Moving the Boundaries of Discourse*, pp. 5 and 6.

75. Switzerland entered into an agreement with the EU on the association with the implementation, application and development of the Schengen acquis (Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis, OJ 2011 L160/3). As a result of this association, Switzerland is under the obligation to align its legislation with so-called 'Schengen relevant legislation'. Whether EU legislation is Schengen relevant is decided on by the EU Council, based on political considerations; see Wichmann, "'More InThan Out': Switzerland's Association With Schengen/Dublin Cooperation", (2009) *Swiss Political Science Review* 15(4), pp. 666-667.

76. The process of voluntary transposition is called '*autonomer Nachvollzug*' in Switzerland. For example, the Swiss Competition Law (*Kartellgesetz*, KG) is an example of Swiss law being an almost one-to-one copy of EU law, despite the fact that Switzerland is not bound by it. The '*autonomer Nachvollzug*' takes place also in other policy areas such as immigration law; see Good, *Die Schengen-Assoziierung der Schweiz*, pp. 42-43, and Church, 'Thoughts on "Switzerland in Europe"', as seen from foggy northern islands', in Cottier and Liechti-McKee (eds.), pp. 175-176.

77. Maiani, *Legal Europeanization as Legal Transformation: Some Insights from Swiss "Outer Europe"*, EUI Working Papers, MWP 2008/32.

the Directive grants to seasonal workers, and the expected success in reaching the various policy objectives of the Directive, the future of the Seasonal Workers Directive in Switzerland looks rather bleak. I would go so far as to say that in the particular case of the regulation of entry and stay of seasonal workers, it might even be the EU that could learn from the Swiss – even if the Swiss experience with the regulation of seasonal Workers immigration is a negative one.

The first Swiss federal law regulating the entry and stay of foreigners was the 1934 Law on Sojourn and Residence of Foreigners (*'Bundesgesetz ueber Aufenthalt und Niederlassung der Auslaender'*, ANAG) provided for short-term residence permits for seasonal workers in Article 5 of the Law. These so-called 'A' permits allowed the migrant workers to stay in Switzerland for a period of up to nine months per calendar year, without giving them the option of taking their families with them and without the possibility to change employer.⁷⁸ The aim was to create a circular migration pattern (*'Rotationsprinzip'*). A bilateral agreement with Italy led to the introduction of the provision that seasonal workers that had worked in Switzerland for the full nine months per year for five consecutive years (45 months in total) would be entitled to a 'B' permit allowing them to stay in Switzerland for a whole year, with an additional right to family reunification. In 1972 this was brought down to 36 months.⁷⁹ Simultaneously, however, the Swiss population increasingly saw immigration as a serious problem, which resulted in popular votes demanding the imposition of strict quotas on the number of migrants and the tightening of conditions under which permits could be granted. One of these conditions was that the potential employer of the migrant worker should prove that the vacancy could not be filled by a Swiss employee.⁸⁰ Remarkably, this obligation led to an increase in the costs of hiring foreign personnel and in longer procedures and uncertainty for the potential migrant workers, which again led to proportionally *more* low-skilled migrant workers coming to Switzerland. Potential highly skilled migrant workers considered their position on the labour market in Switzerland as uncertain and Switzerland thus became a less attractive destination for highly skilled workers as a result of the restrictive immigration policy. This result was obviously the opposite of what the policy makers had had in mind.

On top of the effect of the migration of unskilled workers on the economy, the policy also had unforeseen social repercussions. Many of the foreigners staying under an 'A' permit were allowed to work for 10 or 11 months per year, and again, many of them therefore brought their families along with them. The children of seasonal workers, who were not supposed to be there in the first place, were unable to attend school or any other public facility.⁸¹ Even though the Swiss government had been made aware of the issue in the early 1970s by the Council of Europe,⁸² the problem of the 'lost generation' could only be solved in the 1990s when individual cantons, and later the Swiss federation, ended the exclusion from school of children who did not have the right of residence.

78. The limited rights of seasonal workers were first regulated in a decision of the Swiss Federal Council of 1 March 1963 (*Bundesratsbeschluss ueber die Beschränkung der Zulassung ausländischer Arbeitskräfte vom 1. März 1963 (AS 1963 190)*), which was replaced in 1986 by Articles 16-19 BVO (*Verordnung ueber die Begrenzung der Zahl der Ausländer*).

79. Abberger, Abrahamsen, Bolli, Dibiasi, Egger, Frick, Graff, Haelg, Iselin, Sarferz, Schlaepfer, Siegenthaler, Simmons-Suer, Sturm und Tarlea, *Der bilaterale Weg – eine oekonomische Bestandsaufnahme; Aktualisierung der Studie 'Auswirkung der bilateralen Abkommen auf die Schweizer Wirtschaft'*, p. 98.

80. OECD, *Jobs for Immigrants (Vol. 3): Labour Market Integration in Austria, Norway, and Switzerland*, p. 224.

81. Power, *Migrant Workers in Western Europe and the United States*, p. 34; also Ziegler, *Switzerland: the awful truth*, pp. 121-122.

82. Council of Europe, Consultative Assembly, *Documents de Séance 1973*, Vol. 5, p. 105.

An attempt at turning the tide was made in the middle of the recession in 1991, when the ‘three circles’ system was introduced. If the Swiss labour market needed more workers than available domestically, EEA Member State citizens could be hired (the ‘first circle’), also as seasonal workers. Non-EEA Member State citizens could no longer be hired as seasonal workers. Highly skilled citizens of the United States, Canada, Australia and New Zealand (the ‘second circle’) could still be hired, but only if no suitable candidate could be found in Switzerland or the EEA. Highly skilled citizens of all other countries (the ‘third circle’) could henceforth only emigrate if the first and second circles did not provide the employer with the necessary labour force. The new Swiss migration policy had the effect the policy makers desired: as of the mid 1990s, new labour migrants entering the Swiss labour market were largely highly skilled, and regarded as assets to the Swiss economy.⁸³

As a result of the coming into force of the Bilateral Agreement on the Free Movement of People between the EU and Switzerland in 2002 and the additional protocol in 2004, the Swiss legislation on migration needed to be reformed. With the 2005 Law on Foreigners the legislator had the chance to show what kind of migration policy it had in mind for the coming decades. First and foremost, Switzerland wanted to maintain the policy of attracting highly skilled migrant workers, whereas principally it no longer welcomed low-skilled seasonal workers into its territory. Therefore the Law on Foreigners provides explicitly only for the immigration of ‘managers, specialists and other qualified Workers’,⁸⁴ whereas the seasonal work permit does not feature at all in the law.⁸⁵ The exception to this rule is that if there is a difficult recruitment situation in the labour market, specific branches of economic significance may still hire foreigners that do not fulfill these conditions – including seasonal workers.⁸⁶ The difference is that because of the Bilateral Agreement, through which EU citizens are able to obtain a residence permit with considerable ease if they have a valid work contract, most of the migrant workers – short and long-term - now come from EU Member States.⁸⁷ For unskilled third-country migrant workers, it has become virtually impossible to legally enter the Swiss labour market. The Swiss Nationalist Party (SVP) has lobbied repeatedly for its return with mixed results;⁸⁸ the fate of the seasonal worker is therefore still unclear at the moment. A session of the Parliament on the implementation of a referendum vote on the subject of the limitation of migration, planned to take place shortly, is expected to shed more light on this issue. Considering the experiences Switzerland had in the past with the regulation of the immigration of seasonal workers, it is questionable that they will look at the EU Directive for guidance on this matter.

83. Christoffersen, Beyeler, Eichenberger, Nannestad and Paldam, *The Good Society: A Comparative Study of Denmark and Switzerland*, p. 237.

84. Article 23(1) of the Swiss Federal Law on Foreigners (*Auslaendergesetz*), which came into force in 2005.

85. Elliker, *Demokratie in Grenzen: Zur diskursiven Strukturierung gesellschaftlicher Zuhoerigkeit*, pp. 17 and 18.

86. Swiss State Secretariat for Migration (SEM), *Begleitbericht zum Entwurf fuer ein Bundesgesetz fuer Auslaenderinnen und Auslaender*, June 2000, p. 17.

87. 66% of the foreigners living in Switzerland are EU/EFTA citizens; *La population de la Suisse 2013, Confédération Suisse, Office fédéral de la statistique OFS, Neuchâtel 2014*.

88. As part of referendums in 2004 and 2014, the SVP has launched campaigns to force the federal government to introduce measures to limit immigration to Switzerland – also the immigration of EU citizens – and to reintroduce the ‘seasonal workers permit’ into the Swiss Law on Foreigners. The initiative failed in 2004, but partly succeeded in 2014, with 50.4% of the population voting for it. The Swiss national government has until February 2017 to implement the outcome of the referendum.

The end that justifies the means?

As some of the weaknesses of the Directive were debated in politics and academia before the final text of the Directive was adopted in 2014, one may think that the EU legislator settled for this text despite its weaknesses, as the Directive would still be able to attain its main policy objective - migration management. However, apart from the fact that the willful inequality between categories of third-country citizens based on their perceived value to the economy as conceptualised by EU legislation most likely infringes the fundamental rights of equality and non-discrimination which are at the heart of the EU integration model and protected by Articles 20 and 21 of the EU's own Charter of Fundamental Rights,⁸⁹ it may also very well negatively affect the economies of individual Member States. Whereas it is true that the economies of some Member States need highly skilled workers, and that for these Member States EU legislation allowing them to provide a broad range of rights to these workers may be important, the economies and societies of other Member States have a clear need for low-skilled workers. Member States with higher wages and better work conditions in the agricultural sector will be able to attract low-skilled and/or seasonal workers from other Member States, but that also means that the Member States that 'source' seasonal workers for Member States with higher wages and better conditions for seasonal workers will, in turn, look to third countries for a seasonal labour force. If EU legislation makes it more difficult to attract low-skilled workers from third countries, the already fragile economies of Member States that are a source for seasonal/low-skilled work force for Member States with higher wages will suffer serious damages. Either they will not be able to come by the necessary work force, or whole sectors will become dependent on illegal seasonal migrants – as was the case in Spain previously.

The Directive therefore may only slightly contribute to the attainment of the policy objective of migration management. Its possible accomplishments in this respect can, nonetheless, not be considered as an end that justifies the means. Or perhaps the end that justifies the means should not be sought in the direction of the attainment of policy objectives. It might also be that the Commission considers the adoption of a text on seasonal workers in itself an achievement, one that brings the possibility of the adoption of a legal instrument on migration of third-country citizens, similar to the 2001 proposal for a 'horizontal' Directive on the conditions of entry and residence of economically active third-country nationals,⁹⁰ one step nearer.

Conclusion

This paper examined the Seasonal Workers Directive and the rights it seeks to grant to the low-skilled or unskilled migrant labour force coming to work temporarily in EU Member States. It did so by comparing the regime of the Directive with that of the Blue Card Directive which regulates the entry and stay of highly skilled migrant workers. The comparison revealed that the Seasonal Workers Directive, despite the changes made in the text of the Directive during the negotiation process, is still predominantly a migration management tool. And what is more, it is a product of a

89. Peers, Guild, Acosta Arcarazo, Groenendijk and Moreno-Lax (fn.61), p. 181; also Besharov and Lopez (eds.), *Adjusting to a World in Motion: Trends in Global Migration and Migration Policy*, p. 171. See also the Opinion of the European Economic and Social Committee on the Green Paper on an EU approach to managing economic migration, CESE 694/2005 - SOC/199 (COM(2004) 811 final), Rapporteur: Mr. Pariza Castaños (Spain), 9 June 2005; also S. Carrera and M. Formisano, *An EU Approach to Labour Migration – What is the Added Value and the Way Ahead?*, CEPS Working Document No. 232, Centre for European Policy Studies, Brussels, p. 11.

90. See fn. 4.

migration policy that is directed at attracting highly skilled migrants by granting them ample rights, whereas low-skilled migrants – who are already in a weaker position in many regards – are given fewer rights as they are furthermore perceived as ‘unwanted’. In case of the seasonal workers, the EU still tries to import labour, not people.⁹¹

The promises of fair treatment and protection against exploitation, with which the proposal for the Directive was launched by the Commission, can hardly be realised by the Directive as it only came into force in 2014 – and by the widely varying ways in which the Member States are allowed to implement it. The limited personal and substantial scope of the Directive will not be sufficient to address the rights gap between the different groups of third-country national migrant workers in the EU, let alone the rights gap between third-country nationals and EU citizens. Furthermore, and this is an aspect of the Directive that has not been dealt with in academia or politics before, the Directive is less attractive to female than to male third-country citizens because of the fact that the Directive does not allow for family reunification. That being said, the introduction of the principle of equal treatment is a leap forward, and gives reason for optimism. One can thus hope that the Directive will be subject to revision soon after the expiry of the deadline for implementation by the Member States, and that such a revision will see the rights gap closed – or at least bridged – and that this has been the plan of the Commission all along.

The paper has also shown that it is not only the European Union that realises the need for a low-skilled or unskilled labour force has not disappeared over recent decades. Switzerland has also been struggling to come up with a suitable migration regime that can accommodate the need for skilled and unskilled migrant workers. However, considering Switzerland’s history with seasonal workers, it is unlikely that the Swiss will choose to follow the EU’s regulative modal.

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91. Castles, ‘Back to the Future? Can Europe meet its Labour Needs through Temporary Migration?’ International Migration Institute, University of Oxford, 2006: Working Paper No. 1, p. 3, referring to Castles and Kosack, *Immigrant Workers and Class Structure in Western Europe*, London: Oxford University Press.