5 The Seasonal Workers Directive

Another Vicious Circle?

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Abstract
This contribution analyses the regime of the Seasonal Workers Directive (SWD) in order to determine whether it grants adequate safeguards to seasonal workers. Zoeteweij defends the argument, however, that the Directive itself and the (state of) implementation by the EU Member States only confirms the legal subordination of unskilled or low-skilled labour migrants on the European labour market, and that the observed reluctance on the side of the Member States with regard to the transposition of the Directive serves to underpin this argument. The focus of the contribution is on the progress in the implementation of the Directive; special attention is given to the implementation in Italy and Spain. Finally, the contribution concludes by taking stock of the changes in the legal position of seasonal workers, and by formulating a prognosis of what can be expected of the Directive.

Keywords: seasonal workers directive, implementation, subordination low-skilled workers, seasonal workers rights

1 Introduction

The Seasonal Workers Directive, providing minimum standards on the conditions of entry and stay of third-country nationals (TCN) for the purpose of employment as seasonal workers, should have been implemented by the Member States bound by it until September 2016. Implementation of the Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ 2014 L94/375.
Directive's standards is to ensure decent working and living conditions for seasonal workers by setting out fair and transparent rules for admission and stay, and by defining the rights of seasonal workers in order to ensure decent working conditions. This contribution analyses the regime as per the Directive in order to determine whether it indeed grants adequate safeguards to seasonal workers. This contribution defends the argument, however, that the Directive itself and the (state of) implementation by the EU Member States only confirms the legal subordination of unskilled or low-skilled labour migrants on the European labour market, and that the observed reluctance on the side of the Member States with regard to the transposition of the Directive serves to underpin this argument.

The argument in this contribution is built up as follows. It will briefly discuss the historical background of the Directive, which is followed by an analysis of some of the rights that are provided for – or rights that are lacking – in the Directive. The focus of the contribution subsequently shifts to the progress in the implementation of the Directive; special attention is given to the implementation in Italy and Spain as the agricultural sector in these two Member States depends to a large extent on seasonal workers. Finally, the contribution concludes by taking stock of the changes in the legal position of seasonal workers, and by formulating a prognosis of what can be expected of the Directive now that the deadline for its implementation has expired.

2 Background

The aim of the EU’s migration policy is to ensure the efficient management of migration flows and the fair treatment of TCNs legally residing in the Member States. The first proposal for a Directive on the conditions of entry and stay of TCNs for the purpose of paid employment and self-employed economic activities was presented by the Commission in 2001. This proposed Directive would have established a general regime treating all labour migrants equally. However, due to a lack of support for the proposal in the

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2 Seasonal Workers Directive, Preamble, under 7.
3 Article 79 of the Treaty on the Functioning of the European Union, TFEU.
Council, the Commission withdrew the proposal in 2005. Consequently, the Commission decided it would approach the issue of TCN workforce sector by sector, proposing Directives that would introduce different regimes for each and every category of TCN workers in the EU.

It was not until 2010, after Directives on the entry and stay (and employment) of students, trainees, volunteers, researchers, and highly qualified workers had been adopted with unanimity in the Council, and after the adoption of legislative measures with regard to migration was made easier due to the Lisbon Treaty of 2009, that the Commission proposed the introduction of legislation harmonising Member States’ legislation on unskilled migration. Even then, the proposal was the subject of long and difficult negotiations in the Council of Ministers and the European Parliament, as its discussion took place during a period of economic crisis in some of the Member States, and an increased scepticism to migration in almost all. The adoption of the Directive in 2014 in itself may therefore already be regarded as an accomplishment.

Be that as it may, it is through the substance and effective implementation of the Directive that its effect on the improvement of the working and living conditions for seasonal workers should be assessed. Therefore, the following paragraphs will critically analyse the potential improvement brought about by the Directive with regard to the situation of seasonal workers on the labour markets of the Member States of the EU.

3 Rights and Temporariness: Which Way Does the Scale Tip?

The Directive, in its version as adopted in February 2014, regulates a number of issues related to the entry and stay of unskilled or low-skilled TCN migrant workers to carry out an activity dependent on the passing of the seasons.

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9 Preamble to the Seasonal Workers Directive, under 7.
In a nutshell, the Directive seeks to cater to the Member States’ fluctuating but persistent demand for low-skilled migrant labour force, without giving the labour migrants falling within its scope the prospective of integration and long-term residence in the host Member State. The solution to this equation is thus sought in the promotion of temporary and circular migration. The Directive can therefore be regarded as the schoolbook example of migration law that transforms people into economic inputs who depart when their labour is no longer necessary. This is understandable and even laudable from an economic point of view. Some even argue that it is also in the interest of (potential) unskilled labour migrants that the catalogue of rights granted to them stays at a minimum as an increase in their rights could come at the price of a more restrictive admission policy of the hosting countries. Advocates of this view put forward that, as long as certain basic rights are granted, a number of specific rights of migrant workers can be temporarily restricted in order to give more unskilled workers the chance to migrate legally to higher-income countries. It is apparently in this spirit that the Seasonal Workers Directive was drafted. As is often the case with legislation that serves economic purposes, it takes less heed of the possible negative effects of the legislation on the persons involved, effects that, in the case of the Directive, are reinforced by the uncertainty of temporary employment and short-term residence. Compared to the original 2010 draft proposal for the Directive, the text of the Directive that resulted from the intervention of the Parliament and international actors such as the ILO does provide the seasonal worker with a more comprehensive catalogue of rights. However, are the substance and the weight of these rights enough to guarantee labour migrants decent work, in line with the aims of the Directive as listed in its preamble? That question is the starting point of the following analysis of the Directive. In order to be able to focus on the rights regime in as much detail as possible, this contribution will focus on

14 During the UN General Assembly in 2015, decent work and the four pillars of the ILO’s Decent Work Agenda – promoting jobs and enterprise, guaranteeing rights at work, extending social protection, and promoting social dialogue (with gender as a crosscutting theme) – became integral elements of the new 2030 Agenda for Sustainable Development.
the substantial provisions in the directive rather than those on admission, procedure, and authorisation. Therefore, the following aspects are addressed: equal treatment, family rights, dependency on employer, and enforceability.

**Equal Treatment**

The Directive’s central provision determining the rights of the seasonal worker as migrant and as employee can be found in Article 23. This article provides that, in principle, the seasonal worker is entitled to equal treatment with nationals of the host Member State. The European Parliament’s introduction of this provision at a later stage in the legislative procedure, and the extension of the scope of this article to cover terms of employment and the right to strike, can indeed be regarded as an accomplishment.\(^\text{15}\)

The article allows Member States to make exceptions from the principle of equal treatment. Exceptions may be made with regard to social security benefits,\(^\text{16}\) such as sickness benefits, maternity benefits, benefits in respect of accidents at work, unemployment benefits, and family benefits.\(^\text{17}\) It is, however, questionable whether Member States implementing laws creating unequal treatment with regard to social security is in line with EU and international law in this regard. The ECtHR has repeatedly ruled that difference of treatment with regard to social security, based exclusively on the ground of nationality, is only possible if justified by very weighty reasons.\(^\text{18}\) Relevant ILO Conventions further limit Member States’ discretion, even though these Conventions are presently only binding on a very small number of them.\(^\text{19}\) The content of the right to equal treatment under the Seasonal Workers Directive therefore certainly does not guarantee that their treatment will be equivalent to the treatment of nationals – or, for that matter, to the treatment of other, more ‘economically valuable’.\(^\text{20}\) TCN

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15 A. Lazarowicz (28 March 2014), *A success story for the EU and seasonal workers’ rights without reinventing the wheel*, EPC Policy Brief, p. 3.
16 Seasonal Workers Directive, Article 23(1)(d).
17 The complete list of social security benefits with regard to which Member States may make an exception to the principle of equal treatment can be found in Article 3 of Regulation 883/2004 on the coordination of social security systems.
18 ECtHR, Gaygusuz v. Austria, Application no. 17371/90, para. 42; also ECtHR, Andrejeva v. Latvia, Application no. 55707/00, para. 87.
19 ILO Convention No. 118 on Equality of Treatment (Social Security).
20 Though, legally speaking, it is not possible to establish the value of a person and compare it to the value of another person, economically speaking, the value of a person as a production factor can be determined by looking at the supply and demand for this particular person as a production factor. As the EU aggregate of the demand for third-country national seasonal
labour migrants that fall under the regime of the Single Permit Directive or the Blue Card Directive.

Family Rights

When taking a closer look at the legal regime established by the Seasonal Workers Directive, and especially when comparing this regime with other EU acts regulating labour migration into the EU, the lack of the right to family reunification stands out immediately. This aspect of the Seasonal Workers Directive especially bears resemblance to guest worker programmes, implemented throughout Europe in the 1960s and 1970s, which left a bitter aftertaste for all parties involved. Not only did the families involved suffer from prolonged periods in which their family life was disrupted, but the States hosting the guest workers were also faced with the unanticipated effect of an increased irregular (or at least undesired) migration. With the adoption of the Seasonal Workers Directive, the EU may have entered into the same vicious circle. Considering that the aim of the Directive is to foster a circular movement of labour force, it does not offer the prospect of integration and settlement in the host Member State to the labour migrant—even though the Directive allows Member States to implement schemes that foresee a more stable residence for third-country nationals that fall within the scope of the Directive. It does not come as a surprise that the Directive does not provide for family reunification. Furthermore, as seasonal workers are excluded from the scope of the Long Term Residents

workers is much lower than the global supply for seasonal workers, the value of the seasonal worker is considerably lower than the economic value of a highly skilled blue card holder.

21 K. Groenendijk (2014), ‘Which Way Forward with Migration and Employment in the EU?’, in S. Carrera, E. Guild, and K. Eisele (eds.), Rethinking the Attractiveness of EU Labour Immigration Policies, Comparative perspectives on the EU, the US, Canada and beyond, CEPS, pp. 95 and 96. Where he compares the content of the right to equal treatment under the Seasonal Workers Directive to that as provided by Article 12 of 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 (‘Single Permit Directive’).


23 Preamble of the Seasonal Workers Directive, under 46.

24 Though opinions may vary with regard to whether family members joining the guest worker migrated irregularly or regularly, it is a fact that their presence alongside the guest worker was not intended; see, for the Dutch example, Bonjour (2009), Grens en Gezin, Aksant, pp. 51 ff.

25 See Article 14(1) of the Seasonal Workers Directive; also see under paragraph IV ‘implementation’ the example of the implementation of the Directive in Italy.
Directive, they do not have another legal venue to obtain this right as long as their stay in the EU is regulated by the Seasonal Workers Directive. At the same time, however, the Directive provides that Member States may allow seasonal workers to stay and work on their territories for periods of up to nine months per calendar year, and, if the implementing national legislation so provides, subsequent return for periods up to nine months per calendar year for the purpose of seasonal work. Thus, third-country nationals whose economic situation in their country of usual residence is dire enough to apply for seasonal work in countries far away, and who want to stay and work for as long as possible in order to earn back the money invested in finding employment and travelling to the EU before being able to make remittances, are thus forced into illegality, or into illegally bringing their families along.

The Protection Gap and Dependency on the Employer

Apart from the substantive rights regime of the Directive, there are other aspects that corroborate the disadvantageous position of the seasonal worker on the EU labour market. As the obligation to facilitate reentry of a


Article 14(i) of the Seasonal Workers Directive enables Member States to issue a residence permit under national or Union law for purposes other than seasonal work.

Article 16 of the Seasonal Workers Directive.

This is especially the case for those migrants that have to travel long distances to the host Member State; they usually incur higher initiation costs than those coming from neighbouring countries, and for migrants that have made other costs related to the application for a work and residence permit, and therefore also take longer to generate a net financial gain that is high enough to make the whole exercise worthwhile. Ruhs, The potential of temporary migration programmes in future international migration policy, A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (GCIM.org), p. 13. Also, International migration and development, Report of the UN Secretary General (A/71/296), op cit., para. 113. Since the EU’s Seasonal Workers Directive makes the third-country national applicant to a large extent dependent on the employer, this increases the danger of employers being tempted to sell visas and work permits, as is known to have been a widespread problem under a number of temporary migration programmes before. There is no reason why this would be different under the current scheme as devised by the Directive.

seasonal worker only applies to Member States that have already admitted this person as seasonal worker before, the seasonal worker’s freedom to choose seasonal employment in other parts of the EU labour market is curtailed. In the current version of the Directive, in case a seasonal worker employed in one Member State would like to take up seasonal employment in another Member State, the worker will have to start the whole application procedure from scratch, without being able to rely on the facilitated reentry. In line with the principle of mutual recognition characterising the EU legal order, the Directive could have provided for the establishment of a database of seasonal workers that have already entered, stayed, and left one of the Member States of the European Union, entitling them to facilitated entry in another Member State on the same conditions that would have applied if they would have requested reentry in the Member State that had previously hosted them. As it is now, the principle of mutual recognition and, as a result, the EU market perspective is missing in the Seasonal Workers Directive.

During their stay in a Member State, seasonal workers’ freedom to move between employers is limited. Additionally, considering the length (or, rather, the shortness) of the stay of the seasonal worker in the host Member State, and the fact that proof of accommodation is one of the requirements for admission as a seasonal worker for stays exceeding 90 days, the seasonal worker will most likely be dependent on the employer for accommodation too. Though Article 20 of the Directive provides for minimum standards with regard to accommodation arranged by the employer, terms used in this Article such as ‘excessive rent’ and ‘equivalent document’ leave the Member States and the employers broad discretion.

The dependency of the seasonal worker on the employer also has its consequences for the enforceability of the Directive’s standards, which is also one of the concerns voiced in the European Parliament. Dependence results in a low incentive on the side of the worker to complain in case of the employer’s noncompliance with the standards of the Directive, let alone to file a lawsuit against the employer. For it is only natural that employees who are dependent on their employers for residence as well

31 Seasonal Workers Directive, Article 16.
32 Article 15(6) of the Seasonal Workers Directive allows Member States to refuse an extension of the stay for the purpose of seasonal work when the vacancy in question could be filled by nationals of the Member State concerned or by other Union citizens, or by third-country nationals lawfully residing in the Member State.
33 Article 6(1)(c) of the Seasonal Workers Directive.
as work permits will think twice before ventilating any discontent with the working conditions, as this could lead to (the employer threatening with) a severing of the employment relationship.\(^{35}\) For this reason, the Directive obliges Member States to establish mechanisms that enable seasonal workers to lodge complaints through relevant third parties that have a legitimate interest in ensuring compliance with the Directive, such as Unions; these third parties should be authorised to act on behalf of or in support of seasonal workers.\(^{36}\) It is therefore up to the worker to lodge a complaint, after which the third party can come into action. However, the fact that seasonal workers are usually recruited from countries with less protective labour standards already leads the assumption that they will be prepared, or even willing, to work under conditions that are below the legal standards in the host country. This so-called ‘dual frame of reference’ of migrant workers describes situations in which the conditions in the host country are evaluated on the basis of the conditions and legal framework existing in the home country of the migrant worker. The conditions in the home country often being perceived as (far) worse than those in the host country, the migrant workers are sometimes relatively satisfied with the conditions they find in the host country, even if these are below the legal standards.\(^{37}\) Generalising, one could therefore say that (temporary) seasonal workers are less likely to raise issues about wages and other conditions relating to their employment,\(^{38}\) and that the effective protection of seasonal workers under the Directive depends mostly on Member State monitoring, assessment, and inspections.\(^{39}\) In light of the surplus of seasonal workers in relation to the aggregated EU demand, a surplus that will continue to exist despite unequal treatment or even exploitation of seasonal workers, the costs that the effective implementation of such protection measures bring along with them make it highly improbable that Member States will be in a hurry to comply with these particular provisions of the Directive. This would not be a first, as the Member States’ lack of gusto for an effective implementation of Union legislation protecting vulnerable migrants seems


\(^{36}\) Seasonal Workers Directive, Article 25.


\(^{39}\) These issues are regulated in Article 24 of the Seasonal Workers Directive.
to be a recurrent, and worrying, pattern. The following section reviews the progress that Member States have made with regard to the implementation of the Directive.

4 Implementation by Member States

As mentioned above, the deadline for the implementation of the Seasonal Workers Directive expired in September 2016. Without implementation in national legislation, the Directive will remain a paper tiger as it does not provide the seasonal worker with directly enforceable rights. Many of the rights and norms need to be given shape and teeth by implementation in national legislation. For this reason, no definitive conclusions can yet be drawn with regard to the implications of the Seasonal Workers Directive in practice. What is more, assessment of an effective transposition of the Directive depends, as it always does in similar situations, on Member States' reporting and outsourced studies the implementation of which requires more time than just one year. So far, the European Commission’s European Migration Network (EMN) reported that only five Member State have introduced amendments to the national law on the entry and stay of TCN migrant workers to ensure alignment with the provisions of the Seasonal Workers Directive. These Member States are Cyprus, Czech Republic, Estonia, Italy, and Luxembourg. The same report noticed that Spain and France have retained legislation that was already deemed by these Member States to be in line with the Directive. With regard to three other Member States, the report noticed that advanced plans to implement the Directive were in place, but that, as yet, the legislation in these Member States was not aligned with the Directive. We can therefore conclude that implementation of the Directive in the remaining fifteen Member States that are bound by it is not even underway yet or at a preliminary stage.

41 The research leading to this contribution was carried out in the summer of 2017.
42 See also E. Collett (March 2015), ‘The Development of EU policy on immigration and asylum – rethinking coordination and leadership’, Migration Policy Institute Policy Brief Series, 8 p. 8.
44 Denmark, Ireland, and the UK are not bound by the Directive, according to its Preamble under 54 and 55.
Though studies of Member States’ compliance with EU law show that, on the whole, the statistics on transposition of Directives by Member States have improved over the last decades, there are still considerable differences between the compliance rates pertaining to the legislation in the various EU policy areas, with noncompliance ranging from no implementation or late implementation of a directive to incorrect implementation of a directive. The Commission proudly claims that, with regard to so-called ‘Single Market Directives’, noncompliance has fallen from almost 7% in 1997 to below 1% at present in most of the Member States. A possible explanation given by the Commission for this high compliance rate is a strong political commitment in the Member States, as observed by the Commission. Considering the contentious character of legislation regulating the entry and stay of TCNs, the persisting lack of timely implementation of Directives related to migration demonstrated again by the fifteen Member States that do not yet have (communicated) plans to implement the Seasonal Workers Directive should not come as a surprise. Even for those Member States that have reported an alignment of their national law with the Seasonal Workers Directive, it remains questionable whether this particular section of the national law is complied with in practice. In the following, two case studies illustrate how ostensible implementation does not have to equal compliance with the standards of the Directive. As data with regard to the transposition of the Directive are only available with regard to a small number of Member States, the choice for the discussion of implementing measures is very limited. Italy and Spain are selected as case studies because they are two of the few Member States that have reported alignment of the national law with the Directive, and because exploitation of migrant workers in the agricultural sector is reported to be notorious in these countries.
Case Studies of Implementation

Italy
To start with Italy, the Italian legislator adopted a new Decree just a month after the expiration of the deadline for implementation of the Seasonal Workers Directive, transposing the Directive into national law. Decree n. 203 of 29 October 2016 entered into force on 24 November 2016 and was clarified by a circular letter issued by the Ministry of Labour and Immigration in December 2016. According to the Decree and the circular letter, seasonal workers in the agricultural and tourism sectors can benefit from its provisions, which enable the seasonal worker, among other things, to switch from a seasonal workers permit to a regular employment resident permit, and foresees the issuance of permits that allow the seasonal workers to return to Italy for seasonal work in consecutive years, without requiring the seasonal worker to return to the same employer. It also prohibits the automatic deduction of the costs for accommodation, if provided by the employer, from the wages of the seasonal worker, and even provides for a cap on costs for the accommodation of the seasonal worker. The Decree therefore seems to provide for standards that are above the relevant minimum requirements in the Directive. Unfortunately, however, enforcement of similar protective measures has previously failed dramatically in Italy. Instances of (institutionalised) labour exploitation are often known to the authorities, but these authorities either lack the will or the power to intervene. It is not seen as a priority for the policy or public institutions, and the adoption of more protective measures alone, without stepping up enforcement, will not improve the position of the migrant workers in Italy.

50 Art. 1(11) of the Decree.
51 Art. 1(3) of the Decree.
52 European Union Agency for Fundamental Rights, Severe labour exploitation: workers moving within or into the European Union – States’ obligations and victims’ rights, p. 54.
53 Amnesty International, Exploited labour Migrant workers in Italy’s agricultural sector, pp. 32 and 33.
**Spain**

With regard to the transposition of the Directive, as mentioned above, Spain reported that national legislation in place was deemed to be in line with the Directive’s standards. Issues of compliance could be raised, not only with regard to the adoption of adequate national legislation implementing the Seasonal Workers Directive, and with regard to the enforcement of such measures, but also with regard to more favourable provisions of bilateral or multilateral agreements to be adopted by or already in place between one or more member States and one or more third countries. Such agreements are, according to Article 4 of the Directive, not affected by the provisions of the Directive. When taking a closer look at the relevant Spanish national legislation, it seems that it provides for favourable labour migration arrangements that could benefit from Article 4 of the Directive. These arrangements for the recruitment and employment of seasonal workers from Morocco in Spain date back more than just a few years. Only one aspect of this legislation will be mentioned here: the Spanish-Moroccan arrangements. These arrangements are known to have allowed for guest worker programmes that featured as one of the recruitment conditions the sex of the guest worker (in this case female), or parenthood of minor children: Women applying for participation in the programme were required to produce documents indicating the ages of their children. The compatibility of such arrangements for the recruitment and employment of seasonal workers with the Directive and with EU law on gender equality is therefore questionable.

Article 4 (2) of the Directive provides that, despite the Directive being applicable without prejudice to more favourable provisions of Union law or unilateral or bilateral treaties between the EU and/or its Member States on the one side, and a third country on the other side, Member States still have the right to adopt or retain more favourable provisions for third-country nationals to whom it applies in respect of Articles 18, 19, 20, 23, and 25. The Article, read against the background of this one Spanish example, serves to

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56 Articles 2 and 3(3) of the TEU; Articles 8 and 10 of TFEU; Articles 21 and 23 of the Charter of Fundamental Rights of the European Union; Gender Equality Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, 2006 OJ L204/23.

57 Article 4(1) of the Seasonal Workers Directive.
show that, in order to assess the compatibility of Member States’ legislation transposing the Directive into national law with the Directive and other relevant EU law, analysing implementation of legislation alone will not suffice. Next to that, all bilateral and multilateral arrangements covering the entry, stay, and employment of third-country nationals for the purpose of seasonal employment in an EU Member State should be scrutinised on a rolling basis – a herculean task indeed, especially considering the Member States’ perceived lack of interest in this particular piece of legislation. Yet, it is the only way in which the EU can show that it takes the protection of vulnerable temporary labour migrants on the EU labour market seriously, lest it wants the Seasonal Workers Directive to share the same fate as the Employers Sanctions Directive, discussed by Berntsen and De Lange in this volume.

5 Analysis and Conclusions

This relatively short analysis of several aspects of the EU’s Seasonal Workers Directive allows for preliminary conclusions to be drawn with regard to the potential of the Directive to ameliorate the position of TCN seasonal workers on the labour market of the EU Member States bound by the Directive.

Equal Treatment, but Not Quite

The Seasonal Workers Directive, as one of the EU’s legislative measures regulating labour migration into the EU Member States, provides minimum standards with regard to the entry, stay, and employment of TCNs for the purpose of seasonal employment in the EU. That it is intended to be mostly a migration management tool is clear from the narrow legal basis of the Directive in Article 79(2) of the TFEU – whereas considering the impact of the Directive and the other labour migration directives on the labour market alone, broadening this legal basis by including the EU’s social policy would not only have increased the legitimacy of the Directive, but would have also guaranteed the involvement of social partners as provided by Article 154 TFEU. Such an involvement could have resulted in a regime that provides

58 Preliminary, as concrete results of the adoption, implementation, and application of the Directive are not yet available.

for a better and more effective protection for labour migrants than the minimum standards of measures like the Seasonal Workers Directive. By choosing instead to base the Directive solely on EU competences with regard to the regulation of migration of TCNs further undermines the EU’s social and migration management policies, and contributes to the stigmatisation of the seasonal worker as a potential irregular whose situation needs regulation instead of a migrant worker who is entitled to decent work. As things stand now, despite the introduction of Article 23 to the Directive, it is clear that the rights and obligations pertaining to the status of seasonal worker under the Seasonal Workers Directive create a legal regime that is not on a par with that related to EU citizen workers, or indeed to other TCN workers on the EU labour market.60 This inequality does not only negatively affect TCN seasonal workers, but will also have a negative effect on the local labour force in the long run.61

This inequality, created by the cardinal wish of the legislator to benefit from temporary workers without giving too many benefits in return, and thus by obstructing the integration of seasonal workers and compelling seasonal workers to leave when their work is done, make the Directive prone to attract criticism and legal scrutiny. Taking into account that, according to Article 15(3) of the Charter of Fundamental Rights of the EU, ‘Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union’, and that, furthermore, Article 21 of the same Charter prohibits ‘Any discrimination based on any ground’ within the scope of application of the Treaties, the Directive in its current form might not have survived the scrutiny of the Court of Justice, if an action for annulment would have been brought before it. In the present situation, the Court can only be called on to assess the validity or interpretation of the Directive through a Member State court’s request for a preliminary ruling. This could be the case when, based

60 C. Costello and M. Freedland, Migrants at work: Immigration and Vulnerability in Labour Law. The same authors come to a somewhat more nuanced conclusion in their contribution entitled Seasonal Workers and Intra-corporate transferees in EU Law, in which they compare the regime of the Seasonal Workers Directive to that of the Intra-corporate Transferee Directive; see J. Howe, R. Owens, et al. (Eds.), (fn. 9), p. 63.

61 A. Goldman, ‘Assessing Employment Policies from an Organic Perspective: the Needed Transition from Job Security and Job Welfare to Personal Security and Welfare’, in R. Blanpain and M. Weiss (Eds.), Changing Industrial Relations & Modernisation of Labour Law, Liber Amicorum in Honour of Professor Marco Biagi, p. 168. Where Goldman finds that migrant workers’ enforceable minimum working conditions and rights in the host country protect not only the migrants but also prevent a race to the bottom for domestic workers who are competing for the same work opportunities.
on Member States’ implementation measures of the Directive, questions are raised regarding the validity or interpretation of the Directive.

As regards the transposition of the Directive, however, this contribution also shows that most of the Member States have yet to report their (proposed) implementation measures, or their preexisting national legislation that (supposedly) complies with the Directive. This leads to the conclusion that implementing legislation is not in place in most of the Member States bound by the Directive, despite the fact that the deadline for implementation already expired in September 2016. Adopting national legislation regulating the entry, stay, and working conditions of unskilled or low-skilled labour migrants does not seem to be a priority for the national legislator.

Implementation and Enforcement: Law that Remains in the Books

The implementation and enforcement of the Directive leads to a number of issues.62 First of all, Directives are typically not directly effective and their enforcement depends on (correct) transposition into national law.63 The previous paragraphs have shown that correct implementation of the Seasonal Workers Directives is presently problematic. Second, in case of incorrect or incomplete implementation by the Member States, the provisions of these Directives are enforceable only in the vertical relation of the individual TCN against the state, and not against another individual such as the employer. Even against the state, the TCN’s case is weak, as the directives’ provisions are often unclear and leave substantial leeway to the Member States as already mentioned before. In such cases, knowledgeable judges or active legal counsellors could improve the position of the seasonal workers by filing a request for a preliminary ruling. Finally, even correct transposition of the Directive, which will also entail the State ensuring that effective mechanisms through which seasonal workers may lodge complaints against their employers are put in place,64 does not solve the problem of the precariousness and dependency of the situation that a circular migrant with no particularly coveted set of skills is in with regard to the effective enforcement of his or her rights.65

64 Article 25 of the Seasonal Workers Directive.
For the time being, therefore, one can only conclude that it is highly improbable that the adoption of the Directive in 2014 has contributed to a substantive improvement of the position of the TCN seasonal workers in the EU Member States. Once more, or perhaps now more than ever, seasonal workers depend on the vigilance and activism of unions, legal counsellors, and the judiciary to enjoy the protection they need, the decent work they are entitled to, and the rights they deserve as persons on equal footing with their EU and TCN peers.

Bibliography


The right to decent work, and the obligations to ensure decent working conditions, are recognised by the EU in the preamble of the Seasonal Workers Directive under 7, and by other relevant international organisations such as the ILO; see, e.g., Promoting Decent Work for Migrant Workers, ILO, February 2015.
ECtHR, Andrejeva v. Latvia, Application no. 55707/00, para. 87.
ECtHR, Gaygusuz v. Austria, Application no. 17371/90, para. 42.
Falkner, G. et al. (2005), Complying with Europe: EU Harmonisation and Soft Law in the Member States, Cambridge, Cambridge University Press.


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