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

ILO Note based on International Labour Standards with reference to relevant regional standards

The European Union recognizes the contribution of labour migration to increased competitiveness and economic vitality of the Union – as expressed by the Stockholm Programme[1] – and the need to elaborate common procedures for the admission and residence of migrant workers from third countries, and to address protection gaps. Rather than elaborate a single directive addressing the labour migration of third-country nationals to the EU (i.e. a "horizontal" framework), in its 2005 *Policy Plan on Legal Migration* the European Commission proposed, after consultation, a "sectoral" approach expressing the preference of Member States to regulate in turn a number of migrant worker categories.[2] The proposed Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment is part of the set of legislative proposals currently under discussion to achieve these goals.

While the ILO would prefer to see the establishment of a horizontal framework – which would be more in line with the approach taken by relevant International Labour Standards,[3] including the specific instruments protecting migrant workers – nevertheless it welcomes the Commission's initiatives to simplify administrative admission procedures and reduce the "rights' gaps" between third-countries nationals and EU citizens. The specific purpose of this technical note is to underline the importance of a robust application in the proposed Directive of the key principle of equality of treatment in regard to working conditions and social security, in the light of relevant International Labour Standards and with reference to other applicable regional human rights instruments. The note also considers the adoption of additional measures that may go beyond the application of the equality principle to ensure fair and dignified treatment of seasonal migrant workers.

Relevant international legal instruments applicable to seasonal workers

International Labour Standards are in principle applicable to all workers irrespective of their nationality, length of employment and residence in a country, and immigration status, unless specified otherwise. The ILO Committee of Experts on the Application of Conventions and Recommendations has also

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[1] The Stockholm Programme – An open and secure Europe serving and protecting the citizens, OJ 2010 C 115/1, at para. 6.1.3.

[2] COM(2005) 669 final of 21 December 2005, at pp. 5-8.

[3] Unfortunately, the Commission's impact assessment elaborated as background to the proposed seasonal workers Directive (SEC(2010) 887 of 13 July 2010) does not include any reference to International Labour Standards. All EU Member States have ratified the core labour standards conventions and many of the other ILO conventions classified by ILO as up to date. A number of EU Member States have ratified the specific ILO conventions dealing with migrant workers (see note 5 below).

underlined that the four specific instruments concerning the protection of migrant workers apply generally to all categories of workers, including short-term and seasonal workers:

> [N]o distinction can be made, within the provisions of the instruments, between migrants for permanent settlement and migrants who do not intend to stay for any significant length of time in the host country, such as *seasonal workers*.[4]

These ILO instruments comprise two legally binding Conventions and two accompanying Recommendations: Migration for Employment Convention (Revised), 1949 (No. 97); Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143); Migration for Employment Recommendation (Revised), 1949 (No. 86); and Migrant Workers Recommendation, 1975 (No. 151).[5]

Working conditions, equal treatment and applicable collective agreements

In Article 16 of the proposed Directive specifically addressing the issue of "rights", the first paragraph, guarantees to seasonal workers

> 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.

There are two concerns with this provision. First, there is no reference to equal treatment with nationals of the host Member States as regards working conditions in contrast to Article 16(2) which provides for equal treatment with nationals in a number of areas, including freedom of association and social security. On the other hand, equal treatment with nationals as regards working conditions is afforded to highly qualified third-country nationals under the Blue Card Directive and in the proposed Directive on the single permit applicable to most other lawfully resident third-country nationals in employment.[6] ILO Conventions No. 97 and No. 143 espouse the equal treatment principle between migrant workers and nationals in respect of working conditions, and employment and occupation.[7] Equal treatment in employment and occupation is also one of the ILO fundamental principles and rights at work, and the subject of a core ILO legally binding instrument, namely the Discrimination (Employment and

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[4] International Labour Conference, 87th Session, 1999, Report III (Part B), *General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97) and Recommendation (Revised) (No. 86), 1949, and Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975*, International Labour Office, Geneva, at p. 43, para. 107. Emphasis added.

[5] Convention No. 97 has been ratified by 49 States Parties, including ten EU Member States (Belgium, Cyprus, France, Germany, Italy, Netherlands, Portugal, Slovenia, Spain, United Kingdom), while Convention No. 143 has been ratified by 23 States Parties, including five EU Member States (Cyprus, Italy, Portugal, Slovenia, Sweden).

[6] See respectively Council 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, OJ 2009, L 155/17, Art. 14(1)(a) and COM(2007) 638 final of 23 October 2007, draft Art. 12(1)(a) ("working conditions, including pay and dismissal, as well as health and safety [requirements] at the workplace").

[7] See respectively Convention No. 97, Article 6(1)(a)(i) and Convention No. 143, Article 10.

Occupation) Convention, 1958 (No. 111) which addresses non-discrimination with respect to inter alia conditions of employment.[8] It has also been ratified by all 27 EU Member States. While Convention No. 111 does not explicitly refer to "nationality" as a ground of discrimination in Article 1(1)(a) – although States parties have the option of expanding the list of prohibited criteria of discrimination by virtue of Article 1(1)(b) after consultation with employer and worker organizations amongst others – the ILO Committee of Experts has observed that it has to be considered in the light of the non-discrimination provisions that contain a non-exhaustive list of prohibited criteria in other international human rights instruments.[9] Many European countries, including EU Member States, have also made an explicit reference to nationality discrimination in their human rights and/or equality legislation.[10] Moreover, unjustified distinctions on the basis of nationality have been found to be discriminatory in the jurisprudence of the European Court of Human Rights under the European Convention on Human Rights, 1950.[11]

The second concern with Article 16(1) is the reference to *universally applicable* collective agreements, which should be avoided and substituted by reference to collective agreements that bind the employer and can therefore be locally negotiated. The Right to Organise and Collective Bargaining Convention, 1949 (No. 98) has been ratified by all EU Member States and is applicable to all workers and employers of both the private sector and the public sector other than those engaged in the administration of the State. It also covers collective bargaining at workplace level by an individual employer.[12] There is therefore no ground whatsoever to limit the equal treatment for seasonal workers to collective agreements that have been declared universally applicable.

Seasonal work and social security

Both Convention No. 97 (in Article 6(1)(b)) and Convention No. 143 (in Article 10) provide that equality of treatment must also cover social security. Moreover, the ILO Committee of Experts has underlined that "the principle of equality of treatment in terms of social security cannot be interpreted … as providing a legal basis permitting the automatic exclusion of a category of migrant workers from

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[8] According to Article 1(3) of Convention No. 111, "employment and occupation" are defined to "include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment", which also encompass remuneration.

[9] International Labour Conference, 82nd Session, 1994, *Equality in Employment and Occupation*, Special Survey of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Office, Geneva, at para. 244.

[10] For example, discrimination based on nationality is prohibited by law in Belgium, Bulgaria, Czech Republic, Ireland, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain, and the United Kingdom. See *Global Report 2011 on Discrimination*, International Labour Office, Geneva (forthcoming).

[11] See the section on "Seasonal work and social security" below.

[12] ILO, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, International Labour Office, Geneva, Fifth (revised) ed., 2006, at paras. 880, 885, 886, 988-991.

qualifying for social security benefits",[13] and thus must also be applied with regard to seasonal migrant workers.

The principle of equal treatment in the field of social security between nationals and non-nationals is also laid down in ILO's flagship Convention on social security, the Social Security (Minimum Standards) Convention, 1952 (No. 102)[14] and is elaborated in the Equality of Treatment (Social Security) Convention, 1962 (No. 118), which is specifically concerned with the equality of treatment of national and non-national workers in social security.[15] Each State party ratifying Convention No. 118 is obliged "to grant within its territory to the nationals of any other Member for which the Convention is in force equality of treatment under its legislation with its own nationals, both as regards coverage and as regards the right to benefits, in respect of every branch of social security for which it has accepted the obligations of the Convention" (Article 3(1)). Consequently, equal treatment with nationals is only accorded to migrant workers (and their family members) on the basis of reciprocity, although provisions of the Convention apply to refugees or stateless persons without any condition of reciprocity. As with the migrant workers instruments, the Committee of Experts has underlined that social security coverage in Convention No. 118 has "not been defined by categories or sectors of workers" but by the branches of social security covered by national legislation and accepted by a ratifying State.[16]

Furthermore, the *Guidelines on Special Protective Measures for Migrants in Time-bound Activities*, proposed by the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration (1997), recommended specifically in respect of such migrant workers:

> Seasonal workers, project-tied workers engaged by employers from outside their home countries, special-purpose workers and students and trainees in gainful employment should, as a minimum, enjoy the same benefits as nationals in respect of:
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> (a) occupational accidents and diseases, medical care, loss of facilities and survivors' entitlements as a result of employment injury;
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> (b) medical care with a view to improving or restoring migrants' health and their ability to work and to attend to the needs of such family members as are authorized to live with them in that country;

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[13] *General Survey 1999*, op cit., at para. 431.

[14] Article 68(1). Convention No. 102 has been ratified by 47 States parties, including 22 EU Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom.

[15] Convention No. 118 has been ratified by 37 States parties, including seven EU Member States: Denmark, Finland, France, Germany, Ireland, Italy and Sweden. The Netherlands ratified Convention No. 118 in 1964 but denounced it on 20 December 2004.

[16] International Labour Conference, 63rd Session, 1977, Report III (Part B), *General Survey of the Reports relating to the Equality of Treatment (Social Security) Convention, 1962 (No. 118)*, International Labour Office, Geneva, at p. 11, para. 44.

(c) sickness, i.e. where migrants have to stop work because of illness or disease and the stoppage entails a reduction or suspension of earnings that qualifies for compensation;

(d) invalidity resulting in the partial or total loss of earning capacity; and

(e) maternity benefits and family allowances.[17]

The ILO Committee of Experts has recently underscored that ensuring equal treatment for seasonal workers generally may well require special adjustments to be made, for example in terms of the qualifying period, the waiting period and duration of payment of unemployment benefit.[18] Provision for such special adjustments has also been laid down in Article 24(4) of Convention No. 102.[19] Similar adjustments therefore could also be foreseen for migrant seasonal workers, not only in respect of unemployment benefit but also other benefits such as old-age pension.

Importantly, in the European context, Article 14 of the European Convention on Human Rights (ECHR),[20] while not explicitly referring to nationality as a ground of discrimination, has been interpreted by the European Court of Human Rights as also prohibiting discrimination based on nationality, including in the realm of social security which the Court views as a property right protected by Article 1 of the First Protocol to the ECHR, 1952. The Court has ruled that denial of social security benefits to migrants, solely because of their foreign nationality, is unlawful under Article 1 of the First Protocol read together with Article 14, and added that "very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention".[21] Moreover, in the light of a recent judgment of the Court, it is difficult to see the circumstances under which State authorities would be able to justify denial of a pension to persons who have contributed to a social security scheme for a considerable period of time.[22]

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[17] ILO, "Protecting the most vulnerable of today's workers", Discussion Paper, Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration, Geneva, International Labour Office, 1997, at para. 90.

[18] International Labour Conference, 100th Session, 2011, *General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization*, Report III (Part 1B), International Labour Office, Geneva, at para. 318.

[19] Article 24(4) of Convention No. 102 stipulates that "in the case of seasonal workers the duration of the benefit and the waiting period may be adapted to their conditions of employment".

[20] Article 14 has no independent status as such and has to be read in accordance with other provisions in the ECHR. However, a stand-alone non-discrimination clause has also been introduced in Protocol No. 12 to the ECHR, 2000 (Article 1), which has been ratified by 18 Council of Europe Member States, including seven EU Member States (Cyprus, Finland, Luxembourg, the Netherlands, Romania, Slovenia and Spain).

[21] *Gaygusuz* v. *Austria*, Eur. Ct HR, judgment of 19 September 1996, at para. 42; *Koua Poirrez* v. *France*, Eur. Ct HR, judgment of 30 September 2003, at para. 46; *Andrejeva* v. *Latvia*, Eur. Ct HR, judgment of 18 February 2009, at para. 87. In these judgments, Article 1 of the First Protocol to the ECHR, concerned with the protection of property was interpreted as encompassing access to social security benefits for the non-nationals concerned.

[22] *Klein* v. *Austria*, Eur. Ct HR, judgment of 3 March 2011, at paras. 54-57.

Beyond the application of the equality principle: the role of bilateral agreements

Given that many third-country national seasonal workers only work in EU Member States for a limited period of time, it is recognized, as noted above, that a robust application of the equality principle is needed to safeguard their rights to working conditions and social security, and that other measures may also be required to ensure that they are treated fairly and with dignity. Article 4 of the proposed Directive stipulates that it is to apply without prejudice to more favourable provisions of EU law, "including bilateral and multilateral agreements" concluded between the EU or between the EU and its Member States and third countries, or bilateral agreements concluded between one or more Member States and third countries.

The ILO supports the application of bilateral agreements in the field of labour migration that conform to International Labour Standards. Indeed, ILO Convention No. 97, in Article 10, explicitly refers to the possibility of ILO Members concluding bilateral agreements with regard to regulating matters of common concern arising in connection with the application of the Convention – which may also include equal treatment – and Annex I to Recommendation No. 86 contains a model bilateral agreement on temporary and permanent migration for employment, which has been used by a number of governments. Convention No. 143 also stipulates that it does not prevent Members from concluding multilateral or bilateral agreements with a view to resolving problems arising from the Convention's application (Article 15). The ILO further encourages the conclusion of bilateral social security agreements which guarantee the maintenance of migrant workers' social security rights and rights in course of acquisition, as regulated in the ILO Maintenance of Social Security Rights Convention, 1982 (No. 157). Moreover, the accompanying Maintenance of Social Security Rights Recommendation, 1983 (No. 167) provides in its Annex I model provisions for the conclusion of bilateral social security agreements and in Annex II a model agreement for the co-ordination of such agreements.

EU Member States could therefore be encouraged to negotiate bilateral labour agreements with third countries to regulate many aspects of seasonal employment, including travel, accommodation, equal treatment with respect to working and living conditions, social security, responsible government agencies, etc. Because it is likely that in the future more seasonal workers will come from third countries, as recognized also in the Commission's explanatory note justifying the draft Directive,[23] such agreements can play an important role in addressing many of the abuses in the labour migration process, including those that may occur in the country of origin at the hands of unscrupulous private employment/recruitment agencies, a matter not regulated by the proposed Directive as it currently stands.

[23] COM(2010) 379 final of 13 July 2010, at pp. 2-3.