Opinion of the European Economic and Social Committee 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'

COM(2010) 379 final — 2010/0210 (COD)

(2011/C 218/18)

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On 29 September 2010, the Council of the European Union decided to consult the European Economic and Social Committee, under Article 304 of the Treaty on the Functioning of the European Union, 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

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The Section for Employment, Social Affairs and Citizenship, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 24 March 2011.

At its 471st plenary session, held on 4 and 5 May 2011 (meeting of 4 May), the European Economic and Social Committee adopted the following opinion by 165 votes to 3, with 9 abstentions.

1. **Conclusions and recommendations**

1.1 The Committee welcomes the proposed directive, which is part of European efforts to develop a broad-based approach to legal migration. The proposed directive can help meet increased demand for seasonal labour that cannot be covered by national workers. The proposal also makes a key contribution to combating illegal immigration.

1.2 The Committee is particularly pleased about the simplified and accelerated admission procedures as seasonal work is, by its very nature, time-limited and businesses face staffing shortages during these particular periods.

1.3 The Committee is also happy that it is left up to the Member States to decide whether to carry out a labour market test. In that connection, the Committee would recommend involving the social partners in any measures relating to the admission of third-country nationals as seasonal workers.

1.4 The Committee would call on the Council, the Commission and the European Parliament to review the provision on the maximum duration of stay, as a period of six months in any calendar year fails to meet the needs of businesses in, for instance, two-season countries. The Committee therefore suggests that, where justified, it should be possible for national exceptions from the maximum duration of stay to be made in close consultation with the social partners. It is important to ensure that this does not become a way of circumventing the seasonal nature of the employment contract and the attendant system of checks and balances.

1.5 The Committee calls for the directive to contain clear rules on which economic sectors may comprise activities dependent on the passing of the seasons. It should be possible to make exceptions at national level in close consultation with the social partners.

1.6 The Committee would point out that seasonal workers are given temporary access to the labour market of the Member State concerned. In line with the *lex loci laboris* principle (the law of the place of work), they must therefore, under employment law, be granted equal treatment with nationals of the host Member State, regardless of whether the rights concerned accrue from legislation, generally applicable collective agreements or regional collective agreements. However, equal treatment in social security matters should be conditional on appropriate bilateral agreements being in place.

2. **Introduction and gist of the proposal for a directive**

2.1 The Commission communication *A Policy Plan on Legal Migration* [1] provided for the adoption of a total of five legislative proposals on labour immigration between 2007 and 2009, including a proposal for a directive on the conditions of entry and residence of seasonal workers. The Stockholm Programme adopted by the Council on 10/11 December 2009 reiterated the Commission and Council's commitment to implementing the Policy Plan on Legal Migration.

2.2 The Commission submitted its proposal [2] on 13 July 2010, citing as justification the fact that ever fewer EU citizens are available to meet Member States' need for seasonal work. Despite growing demand for highly skilled workers in the EU, traditional sectors will, for structural reasons, continue to need increasing numbers of low-skilled workers. The Commission also points to evidence that certain third-country seasonal workers face exploitation and sub-standard working conditions which may threaten their health and safety.

2.3 The preparatory consultations for the proposed directive revealed the need for common EU rules regulating the conditions of admission for some key categories of

[1] COM(2005) 669 final.
[2] COM(2010) 379 final.

economic immigrants, most notably highly qualified workers subject to intra-corporate transfers and seasonal workers. The conditions for admission should be as simple, unbureaucratic and flexible as possible.

2.4 The Commission proposal establishes a simplified procedure for the admission of third-country seasonal workers, based on common definitions and common criteria. Under certain conditions, seasonal workers would receive a joint residence and work permit entitling them to stay for a period of six months in any calendar year. Member States may grant seasonal workers multi-seasonal permits for up to three years or provide a facilitated procedure for re-entry in subsequent years. The working conditions for seasonal workers are clearly set out, so that, in respect of certain rights, seasonal workers are entitled to equal treatment with nationals of the host Member State.

3. **General considerations**

3.1 As the Commission impact assessment shows, the extent of seasonal work carried out by third-country nationals varies considerably across the EU: in 2008, Hungary admitted 919 seasonal workers, France 3 860, Sweden 7 552 and Spain as many as 24 838. In many Member States, seasonal workers take up low-skilled jobs in sectors such as agriculture (60 % of the seasonal labour force in Italy, 20 % in Greece) and tourism (in Spain 13 % of all work permits issued in 2003 were for the hotel and catering sector). Certain regions of Austria rely on seasonal workers – hence the quota of 8 000 for the 2008/2009 winter season.

3.2 A number of Committee opinions have already addressed the issue of uniform admission conditions for third-country nationals. During the consultation process for the green paper on economic migration ([3]), the Committee advocated specific rules for seasonal workers and the mandatory production of a work contract.

3.3 The Commission has chosen Article 79(2)(a) and (b) as the legal basis. The Committee wonders whether consideration could also have been given to additionally basing the proposed directive on Article 153, as it also regulates terms and conditions of employment. In this case, the social partners should also have been consulted. However, the Committee is aware that, under settled ECJ case law, a proposal for a directive that pursues two aims, one of which can be considered to be the main or overarching one, should take the legal basis required by that main or overarching aim.

3.4 An EU-wide procedure for seasonal residence and work permits for third-country nationals would do much to match seasonal peaks in demand for employment with available supply. Businesses need and will continue to need both low- and higher-skilled workers. Despite the rise in unemployment as a result of the crisis, it is, in some countries, sectors and professions, impossible to find enough EU staff to meet seasonal demand.

3.5 The Committee recalls that European employees, regardless of whether they are working as mobile workers or seasonal workers in a country other than their own, are subject to both European and the relevant national law. The directive relating to seasonal workers from third countries must not lead to the creation of a special category of worker. The employment law of the country in which the work is done must apply in full.

3.6 The Committee agrees that an EU-wide procedure can also help secure legal employment for seasonal workers and prevent the exploitation that exists in a number of regions. Account must thereby also be taken of the sanctions directive (2009/52/EC) ([4]), which obliges employers to ensure that their employees hold a valid residence permit and provides for sanctions in the case of non-compliance. Any illegal continued residence by third-country seasonal workers on expiry of their residence permits is prohibited by Directive 2008/115 (the Return Directive) which provides for a fair and transparent procedure for ending the residence of illegally staying third-country nationals, with preference given to voluntary rather than forced return.

3.7 Seven national parliaments ([5]) have conducted more in-depth subsidiarity and proportionality checks on the proposed directive, with some criticism, among other things, of the duration of residency entitlement and the issue of accommodation.

3.8 In order to take account of the national parliaments' concerns about compliance with the subsidiarity principle, the Committee recommends that the duration of the residency permit be dealt with at national level so as to reflect national conditions. In this way, Member States requiring more seasonal workers in both winter and summer would be able to retain their current arrangements.

4. **Specific comments**

4.1 The Committee notes that the definitions of 'seasonal worker' and 'activity dependent on the passing of the seasons' are wide in scope, leaving it up to the Member States to decide which specific sectors are to be considered season-dependent. This is not wholly consistent with recital 10, which clearly states that activities dependent on the passing of the seasons are typically to be found in sectors such as agriculture, during the planting or harvesting period, or tourism, during the holiday period. The directive should therefore contain clear rules defining which specific sectors may comprise activities dependent on the passing of the seasons. It should be possible to make exceptions at national level in close consultation with the social partners.

([3]) OJ C 286/20, 17.11.2005.

([4]) Directive 2009/52/EC, OJ L 168/2009, p. 24, 30.6.2009.

([5]) http://www.ipex.eu/ipex/cms/home/Documents/dossier_COD20100210.

4.2 The definition of an 'activity dependent on the passing of the seasons' as an activity requiring labour levels that are **far above** those necessary for usually ongoing operations is open to interpretation and thus generates legal uncertainty. The Committee feels that the text should speak of a '**significantly** higher' or 'higher' demand for labour. Whether such '(significantly) higher' demand for labour actually obtains in practice should be a matter for the appropriate authority to decide, in conjunction with the national social partners.

4.3 The Committee expressly welcomes the provision whereby the combined seasonal worker permit is issued only on production of a valid temporary work contract or a binding job offer specifying the rate of pay and the working hours. This enables the authority responsible for issuing the residence permit to examine the contractual basis for employment of third-country nationals. It also ensures compliance with national employment rules.

4.4 An application for admittance may be rejected, among other things, if the employer has been sanctioned for 'undeclared work and/or illegal employment'. The Committee deplores undeclared work in the strongest of terms, but notes that such grounds for rejection could be interpreted in such a way that even minor infringements would result in applications being permanently refused. In the interests of legal certainty and along similar lines to the sanctions directive, it should be made clear that such grounds for rejection may be invoked only for a certain period, which must be proportionate to the severity of the infringement, after the sanction is imposed.

4.5 The Committee is pleased that Member States may, if they wish, continue to carry out a labour market test. The Committee is also pleased that volumes of admissions may be used as grounds to reject applications. That said, the social partners of the countries concerned and the public employment agencies must be involved both in labour market tests and in establishing admission quotas. Quotas should be fixed in such a way that this does not greatly prolong the procedure for individual permits.

4.6 The Committee feels that the provision of Article 11, under which seasonal workers are allowed to reside for a maximum of six months in any calendar year, is too inflexible and might well contravene the subsidiarity principle: to enable businesses in two-season Member States to take on seasonal workers on both occasions, Member States should be able to provide for exceptions to the maximum duration of seasonal workers' residence and work permits within a specific timeframe. This should happen in consultation with the national social partners. It is important to ensure that this does not become a way of circumventing the seasonal nature of the employment contract and the attendant system of checks and balances.

4.7 Taking the calendar year as a base is impractical and fails to take account of tourist areas with both a winter and a summer season. This provision would force employers and/or employees to submit a new application during the ongoing employment period.

4.8 The Committee also feels that Article 11(2), which states that 'within the period referred to under paragraph 1 (…), seasonal workers shall be allowed to extend their contract or to be employed as seasonal worker with a different employer', is unclear and raises questions such as whether 'the period referred to under paragraph 1' means the calendar year or the six months that are also mentioned. Does this mean, for instance, that a seasonal worker can extend his or her residence permit to eleven months per calendar year?

4.9 The Committee calls for the provision allowing workers to change employer to be made subject to certain conditions and to compliance with the relevant national law: seasonal workers are generally employed to meet the employment requirements of one specific employer. This is also reflected in the duration of the residence permit. In any case, any change in employer should be reported to the competent authority so that checks can be carried out.

4.10 In principle, the Committee endorses the provision facilitating re-entry, as this will enable employers to re-employ seasonal workers with whom they have had good dealings in the past. Under the proposal, employers who have not fulfilled their obligations resulting from the work contract and have been subjected to sanctions as a result are barred from applying for seasonal workers. To avoid a situation where even the most minor misdemeanours preclude the hiring of seasonal workers, the key issue should be whether the sanctions involved were imposed for the infringement of **fundamental provisions of employment law**.

4.11 Under the heading *Procedural safeguards*, the directive stipulates that Member States must adopt a decision on the application and notify the applicant accordingly within 30 days. The Committee in principle welcomes a fixed deadline for decision-making but notes that the relevant authority must in all cases have due opportunity to check the submitted information within the set timeframe.

4.12 Under Article 14, employers are required to furnish evidence that the seasonal worker will benefit from accommodation that ensures an adequate standard of living. That raises the question of whether this also obliges employers to provide that accommodation. If that interpretation is correct, the Committee feels such a provision would be impractical. However, should an employer provide accommodation, this should at all events be open to inspection by the competent authority.

4.13 The Committee would point out that seasonal workers are given temporary access to the labour market of the Member State concerned. In line with the *lex loci laboris* principle (the law of the place of work), they must therefore, under employment law, be granted equal treatment with nationals of the host Member State, regardless of whether the rights concerned accrue from legislation, generally applicable collective agreements or regional collective agreements. The Committee therefore feels that the reference to, and definition of, generally applicable collective agreements in the second paragraph of Article 16(1) should be dropped.

4.14 The provision whereby seasonal workers are entitled to equal treatment with nationals of the host Member State in respect of certain branches of social security should, as a matter of principle and at least in the areas of pensions, early retirement benefits, survivors' pensions, unemployment benefits and family benefits, be conditional on appropriate bilateral agreements being in place. That said, any requirement to pay contributions into the relevant national system should also give this category of persons entitlement to receive the corresponding benefits.

4.15 In addition, the Member States should be encouraged to provide their supervisory authorities (e.g. labour inspectorates) with the resources and training they need to perform their duties with due regard for fundamental rights.

4.16 In addition to the appropriate authorities, the national social partners are key players on their own national labour market. They should therefore be intimately involved in any decisions relating to the sectors in which season-dependent work is allowed, labour market checks and the monitoring of compliance with the provisions of the work contract.

Brussels, 4 May 2011

The President
of the European Economic and Social Committee
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