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EU Seasonal Migrant Workers' Directive: Full Respect of Equal Treatment Necessary

Joint NGO Statement¹, 20 April 2011

NGO Recommendations to MEPs

In view of the EP LIBE Committee's Hearing on Legal Migration, a coalition of NGOs active on migration (see logos above) have the following recommendations for MEPs on the European Commission's proposed directive on "conditions of entry and residence of third-country nationals for the purposes of seasonal employment".

The directive should:

- Establish the necessary conditions for the effective access of seasonal workers to the full respect of equal treatment regarding, in particular, work conditions, social rights and access to legal redress.
- Define exactly what is meant by "seasonal work" to prevent social dumping between national and third-country workers in the EU.
- Include in the scope of the directive those third-country nationals who already reside in an EU member state and who do not have access to the labour market.
- Offer decent working conditions and comprehensive social protection measures which are vital to guarantee a standard of rights which is common to all workers, including seasonal workers.
- View seasonal migrant workers not merely as economic units but as human beings; make provisions that allow for family unity and/or reunification and for a possibility to change status into a more permanent one.
- Retain reference to the employers' obligation to provide accommodation but the definition of 'adequate housing' must be qualified.
- Reinforce complaints mechanisms and strengthen rules on labour inspections to monitor the conditions under which third-country nationals are recruited and employed.

¹ In January 2011, a number of European civil society organisations came together to discuss the directive and to unify their concerns in this joint position, which has been developed following various consultations among European NGOs, local organisations from their networks and policy makers.

1. Objectives – creating standards and tackling exploitation?

The objectives of the directive, as laid out in the explanatory memorandum of the proposal, are to answer to a permanent need for low and unskilled labour in sectors employing seasonal workers, to create a common entry system for seasonal workers across the Schengen area, and to address the exploitation and sub-standard working conditions in the seasonal work sector for third-country nationals.

Considering the exploitation taking place in this sector, we do recognise the need to define clear standards in seasonal work and we also take note of the will of the legislator to reduce exploitation as stated among the objectives of the proposed directive. We nevertheless feel the current proposal does not live up to this objective, which is further weakened by the political choice to define different sets of rights for different groups of third-country workers. We therefore feel the directive, in its current formulation, does not offer sustainable solutions for reducing exploitation and improving working conditions within the sector.

We urge the European legislator to establish the necessary conditions for the effective access of seasonal workers to the full respect of equal treatment regarding, in particular, work conditions, social rights and access to legal redress.

2. Scope of the directive

It is regrettable that at this stage there is no comprehensive framework directive in place that regulates residence and work permits and creates a common set of rights for all third-country nationals. Additional legislation on labour migration should only be considered for very specific areas of work in order to complement the provisions of the framework directive - as in the case of seasonal work - and it should never weaken the rights recognised by the abovementioned comprehensive framework directive.

Specific legislation or provisions on seasonal work are necessary to take into account the specific circumstances related to seasonal work as a form of temporary employment linked to specific activities and periods of the year, as well as to address the less favourable treatment of seasonal workers than permanent workers in terms of legal entitlements (e.g. dismissal protection), benefits offered by employers (e.g. pension entitlements) and other employment conditions (e.g. health and safety, training).

This legislation should complement the rights obtained from the framework directive (single permit for third-country nationals) with specific provisions and ensure both that the demand for migrant workers in the EU is met and, above all, that seasonal workers coming to Europe enjoy the same rights as EU citizens. As the proposal stands, it does not live up to these principles.

The seasonal workers' directive only applies to third-country nationals residing outside the EU. The directive thus overlooks the situation currently existing in the sector, in which there is a strong presence of third-country seasonal workers in an irregular migration status employed under very precarious conditions. Because the directive applies to a narrow group of seasonal workers, the attempts to reduce exploitation and improve working conditions in the seasonal work sector lack commitment and ambition.

The proposed directive should depart from the realities that currently exist by taking into account the present situation in the formulation of its objectives and provisions. Those third-country nationals who already reside in an EU member state and who have no access to the labour market should not be excluded.

As well, there is no guarantee that workers who have been hired under this new directive will return to their countries of origin after the maximum stay of six months, assuming more work is available for them in Europe. By creating such a migration scheme with rigid return dates and without any option for a change of status, the directive may risk increasing the number of migrants who overstay their residence and work permit and become exposed to exploitation and destitution.

3. Definition of seasonal work

Article 3.c of the directive refers to employment in a sector or “activity dependent on the passing of the seasons.” It remains unclear which sectors and activities can be categorised under seasonal work and if the directive refers to natural seasons or any period of greater employment needs.

The vagueness of the definition could lead to situations in which a non-European workforce is increasingly exploited, holding very few rights, and would increase social dumping between national and third-country workers in the EU.

4. Conditions of admission, procedures and complaints mechanism

Article 5.a of the directive stipulates that a valid work contract or binding job offer to work as a seasonal worker is a prerequisite for admission. It is unclear, as the proposal stands, who will be responsible for acting as liaison between the employer and prospective seasonal workers in third countries. Agencies established both in the EU or in third countries will play a crucial role in information dissemination and in recruitment procedures for seasonal workers. Consequently, they have considerable power over the procedure from the very beginning.

Without specifying the role of intermediaries who will be responsible for inviting the seasonal workers, the directive could risk opening channels for the exploitative use of such an intermediary role, including the facilitation of human trafficking.

As labour force intermediation is an activity that exceeds the national and European framework, the introduction of a licensing system for providers of recruitment and placement services at European level should be taken into account. This would help to ensure transparency and accountability of these companies' activities. Employers should be obliged to recruit through licensed agencies or individual applications. In that respect, it will be vital that regularly updated information on all procedural requirements, rights and obligations is made publicly available. The applicants should receive this information in a language known and spoken by them before signing the contract as well as during the employment in case of any changes in their work situation. They should also have access to information, and advice services provided by public employment agencies during the entire duration of their stay in order to be able to change employer without the risk of being abused by possibly dishonest private intermediaries.

EU member states must assume the duty to actively inform seasonal workers about (labour) rights, complaint mechanisms and compensation procedures.

While Article 12.2.b of the proposed directive guarantees sanctions for employers who have not fulfilled their obligations arising out of the work contract, it does not provide for an effective complaints mechanism that would avoid victimisation. By complaining against their employers, seasonal workers could risk losing their job with no compensation and jeopardise their possibilities of returning for another season. Procedural guarantees, such as back wages and victimisation prevention, should be included in the directive in order to support workers in

enforcing their rights and seeking redress. Sanctioned employers and recruiters should not be allowed to hire third-country seasonal workers for at least two years and should pay compensation for the damage (loss of income) occurred to the worker.

As well as reinforcing complaints mechanisms, rules on labour -inspections must be strengthened, so that labour inspectors are able to monitor the conditions under which third-country nationals are recruited and employed. The provisions regarding admission and renewal procedures should therefore include control measures regarding the work contract, working conditions, accommodation and possible previous condemnations for infringements of regulations related to work. The decision period should be long enough to permit such controls.

5. Equal treatment, non-discrimination and decent work

Equality of treatment and non-discrimination represent crucial provisions as enshrined in the EU Charter of Fundamental Rights. Therefore, provisions of the directive related to rights and equal treatment should refer to all rules and collective agreements applicable, regardless of whether this applicability is universal or not, and possibilities of reducing equal treatment should be as limited as possible. Equality of treatment encompasses provisions regarding social security and protection, access to health and care services and the portability of benefits such as pension and tax benefits. It will be vital to ensure that working conditions, such as pay, working time and leave, are part of the work contract.

We are concerned that the lack of clarification and the obscure phrasing of Article 16.2.b of the directive could prevent seasonal workers from upholding their rights regarding social security. Our concerns also lie in the financing of social rights, such as accommodation and health insurance, which remain unclear in the proposed directive. One of the admission requirements (art 5.c) is that the worker has health insurance for “periods in which no such insurance coverage and corresponding entitlement to benefits are provided” in connection with the work contract. Nonetheless, it is not specified who must pay for such costs. In countries where national health insurance would not extend to seasonal workers, private insurance may be unaffordable for many. Access to affordable and quality health and care services must be provided for all seasonal workers for the whole duration of the stay.

Decent work and social security are core values for a social Europe; existing achievements in this area have to be defended for EU nationals and all migrants – documented and undocumented alike. Offering decent working conditions and comprehensive social protection measures are thus vital to guarantee a standard of rights which is common to all workers, including seasonal workers.

This is true for working conditions, the application of collective agreements, freedom of association as well as for the right to bargain as an instrument guaranteeing equal treatment of workers in terms of professional development, wages, security and a system of rights and protections. It also helps to prevent discrimination and enhances social inclusion, including the recognition of qualifications, literacy training and intercultural dialogue.

6. Integration measures and the right to family life

The proposed directive foresees a circular migration system whereby seasonal migrants have a possibility to access seasonal employment in the same EU member state for up to three consecutive years and thus spend considerable periods of time in the EU. Nevertheless, no integration measures (such as language courses) or the right to family life are provided for these workers. While some workers come with the intention to do seasonal

work, others may consider this as one of their only possibilities of earning a living and are highly dependent, while again others may see this as a first step to settle permanently in Europe.

Seasonal workers under this scheme should have the possibility to acquire a more permanent status without having to leave the EU.

The need for integration measures and for family reunification is equally pressing for third country nationals coming to the EU as seasonal workers as well as through other legal migration schemes. Intra-corporate transferees², for example, are guaranteed the right to family reunification even for postings of short duration. The denial of integration measures for seasonal workers is in contradiction with the objectives of the EU Integration Agenda, and differentiated treatment regarding the right to family life risks discriminating between third country nationals on grounds of the type of work and period employed.

Seasonal migrant workers should not be seen as economic units but as human beings, and therefore provisions for family unity and/or reunification, especially in cases of multi-seasonal work permits or the change of their status, must be foreseen.

7. Accommodation

Article 14 of the directive stipulates that employers are to provide evidence that the seasonal worker will have accommodation ensuring an “adequate standard of living.” We welcome this notion of accommodation in the proposal, as seasonal workers face special challenges to obtain a lease for the short period employed and are more likely to be confronted with unsanitary and inhumane living conditions.

The definition of adequate housing must be qualified by referring to guarantees provided under Article 11 of the International Covenant on Economic, Social and Cultural Rights as contained in the General Comment 4 by the UN Committee on Economic, Social and Cultural Rights.³

The directive does not stipulate if the workers must stay in the accommodation provided by the employer or if they are able to choose where to live, for example, if they have a possibility of reducing their costs by living with family or relatives.

We find important to retain the reference to the employers’ obligation to provide accommodation but it should also leave the choice to the seasonal worker to accept or decline the provided accommodation. The directive should also provide the maximum ratio between salary and accommodation costs.

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² As foreseen by the proposal for a directive on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0378:FIN:EN:PDF>

³ <http://www.unhcr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e?Opendocument>